

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 290 (Sub-No. 5) (2013-4)

QUARTERLY RAIL COST ADJUSTMENT FACTOR

Digest:¹ The rail cost adjustment factor (RCAF) is an index formulated to represent changes in railroad costs incurred by the nation's largest railroads over a specified period of time. The statute requires the Surface Transportation Board (Board) to publish the RCAF on at least a quarterly basis. Each quarter, the Association of American Railroads (AAR) computes three types of RCAF figures and submits those figures to the Board for approval. This decision reopens the relevant 2011, 2012, and 2013 RCAF decisions and directs AAR to restate and submit those RCAFs using the applicable revised financial data submitted to the Board by BNSF Railway Company and Union Pacific Railroad Company.

Decided: November 27, 2013

BACKGROUND

In a decision served July 25, 2013,² the Board held that BNSF Railway Company (BNSF) was not permitted to mark up its railroad assets as a result of its acquisition by Berkshire Hathaway, Inc. (Berkshire) during the years 2010, 2011, and 2012, due to Berkshire's unauthorized control of BNSF during those years. The Board then directed BNSF to refile its R-1 Annual Reports for 2010, 2011, and 2012 within 60 days of the decision's August 24, 2013 effective date (by October 23, 2013). In July 2013, Union Pacific Railroad Company (UP) submitted to the Board its own revised R-1 Schedules 210 and 510 for the years 2010, 2011, and 2012, to correct certain errors regarding the interest calculation. BNSF has now certified its revised R-1 Annual Reports for 2010, 2011, and 2012, and the Board has audited the certified schedules.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Western Coal Traffic League—Petition for Declaratory Order (BNSF-Berkshire), FD 35506, slip op. at 2 (STB served July 25, 2013).

On September 5, 2013, AAR filed its fourth quarter 2013 RCAF calculations. In that filing, AAR explained that it used only the corrected UP data from 2012 to calculate the new weights and interest index therein because BNSF's data were not yet available, and that it planned to examine the changes to all indices once it had processed all revisions from both BNSF and UP.

On September 20, 2013, the Board issued a decision (September 20 Decision) approving AAR's fourth quarter 2013 calculations despite the omission of UP's revised 2010 and 2011 data, noting that publishing the RCAF figures in a timely fashion is important to a number of interested parties. However, the Board stated that, in the future, AAR should use all available data to generate the most accurate calculation at any given time, and it directed AAR to make the adjustment for the UP 2010, 2011, and 2012 interest expense restatement, to the extent not already made, in its next quarterly submission. The Board also invited interested parties to submit a petition for reconsideration to propose alternative approaches for addressing the need to correct the RCAF figures with restated data while awaiting further modifications.

On October 17, 2013, the Western Coal Traffic League (WCTL) filed a petition for reconsideration, arguing that AAR should have restated the RCAF values using the revised UP data even while awaiting further corrections, and that AAR should not have acted unilaterally in choosing not to do so. WCTL argues that AAR should have submitted calculations showing the restated RCAF resulting from UP's interest expense revisions for the years 2010-2012, even if there may be further restatement in the next quarterly forecast to account for the removal of the acquisition markup from BNSF's R-1 reports, as directed by the Board in BNSF-Berkshire. WCTL further argues that AAR should have sought the Board's guidance after receiving UP's corrected R-1 reports instead of choosing its own course of action, or that it should have filed two versions of its calculations: one without any restatement (such as AAR's September 5, 2013 filing), and another version reflecting restatement for the corrected interest component.

On November 6, 2013, AAR filed a reply to WCTL's petition for reconsideration, arguing that WCTL did not propose an alternative approach as requested by the Board in the September 20 Decision. AAR further argues that it was not wrong in acting "unilaterally," as seeking guidance from the Board or public input within the framework of filing quarterly submissions would have been impractical. AAR reiterates its intention to review the revised UP data in conjunction with the revised BNSF R-1 reports. In the event weights need to be revised, AAR argues that it would use the forecast error adjustment instead of restating the RCAFs because the Board's practice has been not to restate historical RCAF values except in the event of certain timely raised errors.

DISCUSSION AND CONCLUSIONS

To the extent it seeks a finding that AAR acted improperly by not using the corrected UP R-1 data in its earlier RCAF computation, we will deny WCTL's petition for reconsideration of the September 20 Decision. We will, however, grant in part WCTL's petition to the extent it requests that AAR restate the relevant RCAFs for 2011, 2012, and 2013 to take into account BNSF's certified revised R-1 Annual Reports, together with UP's interest expense revisions for

those years.³ We will reopen the relevant RCAF decisions for 2011, 2012, and 2013 in order for AAR to use BNSF's and UP's revised R-1 reports for the years 2010-2012 when restating the RCAFs for prior periods.⁴

In the BNSF-Berkshire decision, the Board ordered BNSF to file revised R-1 reports and thus put all interested parties on notice that the 2011, 2012, and 2013 RCAFs would thereafter need to be adjusted at a later time. In fact, parties were effectively on notice from September 28, 2011, the date of the notice initiating that proceeding, that BNSF's R-1 reports could be subject to recalculation or revision. Moreover, given the significance of the Berkshire acquisition premium, the current circumstances satisfy the balancing test between the interests of finality and repose and the interest of accuracy that comes with updating data from prior periods. See Railroad Cost Recovery Procedures—Productivity Adjustment, EP 290 (Sub-No. 4), slip op. at 3 (STB served Jan. 20, 2012). Here, there have been no allegations of detrimental reliance, and more significantly, parties have been on notice from at least September 28, 2011, that BNSF's R-1 reports were not final. Thus, the restatement of the RCAFs will advance the interest of correcting decisions without adversely affecting the interest of the finality of decisions.

In its September 5, 2013 quarterly RCAF filing, AAR used only UP's 2012 revisions, and stated that it planned to examine the changes to all indexes once it had processed all revisions from both BNSF and UP. In the September 20 Decision, the Board advised AAR that this was not the preferred approach and directed AAR to use all the data available to it at the time it submits its quarterly calculations. However, given that AAR needs to restate the relevant RCAF figures to address the BNSF restatement, we will direct it to restate the relevant RCAFs considering UP's restatement as well. We direct AAR to use BNSF's and UP's revised R-1 reports for the years 2010-2012 when recalculating the affected RCAFs (including the productivity adjustment) in its next quarterly submission.

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

It is ordered:

1. WCTL's petition for reconsideration is denied in part and granted in part to the extent discussed above.

³ Because railroad annual financial reports are not filed until the following year, the data reported in the R-1 reports do not begin to affect the computation of the RCAF until the following year. For example, changes in the R-1 reports for 2010 would begin to affect the computation of the RCAF in the fourth quarter of 2011. It would not change the 2010 RCAF. Therefore, there is no need for us to consider here a restatement of the 2010 RCAF figures.

⁴ The Board's BNSF-Berskhire decision, along with the submission of BNSF's revised R-1 Annual Reports, constitutes changed circumstances and thus satisfies the reopening standard under 49 U.S.C. § 722(c).

2. AAR is directed to restate the 2011, 2012, and 2013 RCAF's using BNSF's and UP's revised R-1 reports in its next quarterly submission.

3. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.