

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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October 17, 2013  
Part of

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QUARTERLY RAIL COST	)	EP 290 (Sub-No. 5) (2013-4)
ADJUSTMENT FACTOR	)	
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Public Record

**PETITION OF THE WESTERN COAL TRAFFIC LEAGUE  
FOR RECONSIDERATION**

WESTERN COAL TRAFFIC LEAGUE

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Dated: October 17, 2013

Its Attorneys

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Pursuant to 49 C.F.R. § 1115.3, the Western Coal Traffic League (“WCTL”)<sup>1</sup> hereby petitions the Surface Transportation Board (“STB” or “Board”) for reconsideration of the Board’s decision in *Quarterly Rail Cost Adjustment Factor*, EP 290 (Sub-No. 5) (2013-4) (STB served Sept. 20, 2013) (“*RCAF 4Q13*”).

In its decision, the Board stated that “[i]nterested parties may submit a petition for reconsideration to propose alternative approaches for addressing the need to correct for restated data while awaiting further modifications.” *RCAF 4Q13* at 2 n.3. WCTL is such an interested party and submits that (a) the RCAF values should have been restated even while awaiting further corrections, and (b) the Association of American Railroads (“AAR”) should not, and need not, have acted unilaterally.

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<sup>1</sup> WCTL is a voluntary association whose regular membership consists entirely of shippers of coal mined west of the Mississippi River that is transported by rail. WCTL members currently ship and receive in excess of 175 million tons of coal by rail each year. WCTL’s members are: Ameren Energy Fuels and Services, Arizona Electric Power Cooperative, Inc., CLECO Corporation, Austin Energy (City of Austin, Texas), CPS Energy, Entergy Services, Inc., Kansas City Power & Light Company, Lower Colorado River Authority, MidAmerican Energy Company, Minnesota Power, Nebraska Public Power District, Omaha Public Power District, Texas Municipal Power Agency, Western Fuels Association, Inc., and Wisconsin Public Service Corporation.

The restatement issue arises from corrected R-1 reports that UP filed in July 2013 to address its interest expense for 2010-2012. *Id.* at 2. UP's corrected R-1 data still does not appear to have been posted on the Board's website. Nonetheless, the improperly calculated interest component appears to involve the sort of technical error arising from incorrect data that should result in restated RCAF values, based on the restatement standard that the Board has recently utilized.<sup>2</sup>

The AAR explained in its 4Q13 RCAF forecast filing that it did not attempt to undertake any restatement in the 4Q13 RCAF stemming from the improperly calculated interest rate out of concern that the corrected 2010-2012 R-1 reports that BNSF will be filing to remove the acquisition markup pursuant to *W. Coal Traffic League -- Pet. for Declaratory Order*, FD 35506 (STB served July 25, 2013) ("*Declaratory Order*"), will or may present a need for further restatement involving the depreciation component.<sup>3</sup> The AAR appears to have reasoned that restating historical RCAF values in one quarter, only to have to restate those same historical values again in the next quarter, would be burdensome and/or disruptive.

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<sup>2</sup> *Railroad Cost Recovery Procedures--Productivity Adjustment*, EP 290 (Sub-No. 4) (STB served Jan. 20, 2012) (restating RCAF-A and RCAF-5 values for 2009 and 2010, at AAR's request, and over WCTL's objections, to correct errors in the 2007 and 2008 RCAF productivity output index resulting from Board's use of masked revenue data and exclusion of certain waybill records).

<sup>3</sup> "We plan to examine the changes to all indexes caused by the STB-ordered revisions and the interest expense revisions after we have processed all revisions from both railroads." AAR Status Report, *Rail Cost Adjustment Factor*, EP 290 (Sub-No. 5), (2013-4) (filed Sept. 5, 2013) at 1.

The AAR's approach to its quandary has some basis. Nonetheless, the better approach would have been for the AAR to submit calculations showing the restated RCAF resulting from the corrected UP interest values for 2010-2012, even if there may be further restatement in the next quarterly forecast for the acquisition markup. Uncertainty attaches to future events -- at the very least, there is the potential for delay -- and a feasible correction for known error should not be deferred for the sake of an additional future correction for error that is not yet knowable. The "infeasible perfect [should not] oust the feasible good." *Commonwealth of Pa. v. ICC*, 535 F.2d 91, 96 (D.C. Cir. 1976), *quoted in Simplified Standards for Rail Rate Cases*, EP 646 (Sub-No. 1) (STB served July 28, 2006) at 28.

The greater concern is that the AAR acted unilaterally. UP submitted its corrected R-1 reports addressing the embedded cost of debt capital data for 2010-2012 to the Board in July 2013, and the Board served its *Declaratory Order* addressing the BNSF acquisition premium on July 25, 2013. The AAR thus had over a month to seek restatement guidance from the Board or to notify the public of its intentions and allow opportunity for comment. The AAR also could have prepared its 4Q13 RCAF submission on an alternative basis: one version without any restatement (what the AAR actually filed), and another version reflecting restatement for the corrected interest component. Parties would then have had a meaningful opportunity for comment (as well as notice of the significance of the correction), and the Board could then have chosen between the two. Instead, the AAR acted on its own, foreclosing any opportunity for consideration or adoption of alternatives.

Accordingly, where a partial restatement is feasible, it should not be delayed, and the RCAFs should be restated here, just as they were in *Railroad Cost Recovery Procedures -- Productivity Adjustment*, EP 290 (Sub-No. 4) (STB served Jan. 20, 2012). Moreover, the AAR should be directed, wherever possible, to avoid acting unilaterally and instead to seek additional guidance from the Board and provide prompt notice to the public when restatement and similar issues arise.

Respectfully submitted,

WESTERN COAL TRAFFIC LEAGUE

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Dated: October 17, 2013

Its Attorneys

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 2013, I have caused copies of the foregoing Petition to be served via first class mail, postage prepaid, upon the parties of record to this case.

/s/ Robert D. Rosenberg