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November 6, 2013

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

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ENTERED
Office of Proceedings
November 6, 2013
Part of
Public Record

Re: STB Docket No. EP 290 (Sub-No. 5) (2013-4), *Quarterly Rail Cost Adjustment Factor*

Dear Ms. Brown:

On October 17, 2013, the Western Coal Traffic League filed a petition for reconsideration of the Board's decision served in the above captioned proceeding on September 20, 2013. Please find attached the Association of American Railroads' reply comments for filing.

Respectfully submitted,

Timothy J. Strafford
Counsel for the Association of
American Railroads

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 290 (Sub-No. 5) (2013-4)

QUARTERLY RAIL COST
ADJUSTMENT FACTOR

REPLY OF THE
ASSOCIATION OF AMERICAN RAILROADS

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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QUARTERLY RAIL COST)	STB Docket No. EP 290
ADJUSTMENT FACTOR)	(Sub-No. 5)(2013-4)
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REPLY OF THE ASSOCIATION OF AMERICAN RAILROADS

By a decision served on September 29, 2013, the Surface Transportation Board (“Board”) adopted the calculations submitted by the Association of American Railroads (“AAR”) and established the values for the Rail Cost Adjustment Factor (“RCAF”) for the fourth quarter of 2013 (“4Q2013 RCAF decision”). On October 17, 2013, the Western Coal Traffic League (“WCTL”) filed a petition for reconsideration of that decision. For the reasons discussed below, the petition should be denied.

Background

Each quarter, the AAR is required to submit a projection of railroad costs by calculating the all-inclusive index of railroad input prices and the Rail Cost Adjustment Factor (RCAF).

Railroad Cost Recovery Procedures, 1 I.C.C.2d 207 (1984). The Board’s rules require that the AAR,

shall calculate and file with the Board by the fifth day of December, March, June and September of each year its forecast for the next calendar quarter of the all-inclusive index of railroad costs and calculate and file the RCAF unadjusted for changes in railroad productivity as prescribed in *Railroad Cost Recovery Procedures*, 1 I.C.C.2d 207 (1984), and any subsequent amendments thereto. In

addition, the AAR shall calculate the productivity-adjusted RCAF as prescribed in *Railroad Cost Recovery Procedures*, 5 I.C.C.2d 434 (1989), and any subsequent amendments thereto. The AAR shall submit workpapers detailing its calculations.

49 CFR § 1135.1. In compliance with this rule and the agency decisions cited therein, the AAR calculates both an index adjusted for productivity (RCAF-A) and one that is unadjusted (RCAF-U). *Rail Cost Recovery Procedures - Productivity Adjustment*, 5 I.C.C.2d 434 (1989), *aff'd sub nom. Edison Electric Institute v. ICC*, 969 F.2d 1221 (D.C. Cir. 1992).¹ The Board's procedures mandate that the weights for each major cost component of the all-inclusive cost index, on which the RCAF is based, be updated annually in order to reflect the changing mix of index components. The procedures also require the wages and supplement rates used in the labor index to be rebenchmarked in the fourth quarter of each year. *See Railroad Cost Recovery Procedures*, 364 I.C.C. 841 (1981).

When the AAR filed the fourth quarter 2013 calculations, it had recently received Union Pacific Railroad's revised interest expense data that had been submitted to the Board, but had not yet been posted to the Board's website. The revisions involved Schedules 210 and 510 in Annual Report Form R-1 for the years 2010, 2011, and 2012. At that time, the AAR did not yet have revised BNSF R-1 data required by *Western Coal Traffic League—Petition for Declaratory Order*, FD 35506 (STB served July 25, 2013) to be filed with the Board October 23, 2013. As a result, the AAR could not know the correct value of the weights constructed from 2010, 2011, and 2012 data. The AAR submitted calculations for the fourth quarter of 2013 using revised 2012 UP data to calculate the new weights (and Interest Index) beginning with the fourth quarter of 2013, but the impact on weights and the Interest Index, or the appropriateness of using

¹ In addition, the AAR includes, but does not endorse, the RCAF-5, another productivity adjusted cost index. *See Productivity Adjustment – Implementation*, EP 290 (Sub-No.7)(served October 3, 1996).

previous calculations, for earlier quarters had not yet been assessed. The AAR informed the Board that if, as a result of revised R-1 submissions, weights needed to be revised, the AAR planned to use the forecast error adjustment in the second quarter of 2014 submission (which uses fourth quarter 2013 data) to remedy differences for the fourth quarter of 2013.

In a decision served in this proceeding on September 20, 2013, the Board adopted the AAR's RCAF figures for fourth quarter of 2013. The Board recognized a need to publish RCAF values in a timely fashion and directed the 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. 4Q2013 RCAF decision at 2.

Discussion

WCTL has not satisfied the standards of 49 CFR § 1115.3 for reconsideration, nor has it complied with the Board's direction that parties seeking reconsideration should "propose alternative approaches for addressing the need to correct for restated data while awaiting further modifications." 4Q2013 RCAF decision at 2 & n. 3. WCTL has not demonstrated any error in the Board's decision and has not demonstrated any material effect of utilizing the forecast error adjustment to process the revised UP and BNSF R-1 data. Indeed, WCTL acknowledges that AAR's approach to revised data submissions "has some basis," WCTL petition at 3, and recognizes that AAR reasoned that accounting for revisions in one quarter, only to immediately redo that work would be burdensome and disruptive. *Id.* at 2. WCTL offers no practical alternative other than suggesting that the AAR should prepare alternative versions of its evidence to allow WCTL to pick and choose its preferred outcome.

Rather than attempting to demonstrate that the Board's decision somehow constitutes material error or proposing a workable alternative, WCTL cites *Railroad Cost Recovery*

Procedures—Productivity Adjustment, EP 270 (Sub-No. 4)(STB served Jan. 20, 2012) as support for seeking an order requiring AAR to restate historical RCAF values. As WCTL well knows, the Board’s practice has been to not restate historical RCAF values, except for timely raised computational errors. *Id.* Instead, the Board relies on the forecast error adjustment to account for revised index input data on a going forward basis. *See, e.g., Quarterly Rail Cost Adjustment Factor*, EP 290 (Sub-No. 5) (2012-3) (STB served June 20, 2012) (using the forecast error adjustment to account for revised data); *Railroad Cost Recovery Procedures*, 3 I.C.C.2d 60, 74 (1986) (adopting forecast error correction prospectively, not restating past values). The AAR’s stated intention to utilize the forecast error adjustment with complete revised data is consistent with this precedent.

In addition to seeking restatement of historical RCAF values, WCTL briefly complains that the AAR should not have “acted unilaterally” and should have instead sought additional guidance from the Board or provided some form of public notice beyond its filing. WCTL petition at 3. Such suggestions are inconsistent with the Board’s rules that require the AAR to file RCAF data on a specific date. Moreover, such an approach is not practical. Seeking written guidance from the Board would likely turn the quarterly RCAF proceeding into a protracted rulemaking-style proceeding. The Board has experience attempting to perform mechanical mathematical functions in the face of extraneous challenges and arguments in the annual cost-of-capital proceeding. There is no need for the Board to engage in such a process four times a year to establish the RCAF. Such a practice would introduce more regulatory lag into the Board’s processes. Instead, the AAR filed its evidence in a timely manner consistent with the Board’s rules, transparently disclosed its intention to utilize the forecast error adjustment to include the revised R-1 data, and the Board issued public direction as to how the AAR should best comply

with its obligations.

Conclusion

Based on the foregoing, the Board should deny WCTL's petition for reconsideration.

Respectfully submitted,



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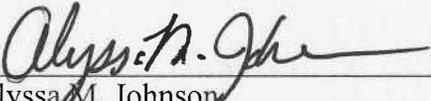
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November 6, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November 2013, I served by first class mail, postage prepaid, a copy of the forgoing on the following:

Robert D. Rosenberg
Slover & Loftus
1224 Seventeenth St, NW
Washington, DC 20036-3003


Alyssa M. Johnson