

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

RAILROAD COST RECOVERY PROCEDURES
– PRODUCTIVITY ADJUSTMENT

REPLY OF THE ASSOCIATION
OF AMERICAN RAILROADS

247448

ENTERED
Office of Proceedings
April 10, 2019
Part of
Public Record

The Association of American Railroads (“AAR”) hereby replies in opposition to the request for access to unmasked revenue data from the Carload Waybill Sample (“CWS”) made by the Western Coal Traffic League (“WCTL”) on March 21, 2019 in the above-captioned docket.

BACKGROUND

The Board publishes a Rail Cost Adjustment Factor (“RCAF”) in two forms: a factor adjusted for productivity and one unadjusted.¹ To allow for a productivity-adjusted RCAF, the Board calculates an annual rate of railroad productivity change by dividing an index of railroad outputs (“Output Index”) by an index of railroad costs and expenses (“Input Index”).² The methodology for calculating the productivity adjustment was developed in the 1980s by a consultant to the agency based on a shipper proposal.³

¹ See 49 U.S.C. § 10708.

² *Railroad Cost Recovery Procedures – Productivity Adjustment*, 5 I.C.C.2d 434, 437 (1989).

³ *Id.* at 435 & n. 4.

The Input Index compares the change in constant dollar-adjusted railroad freight expenses, fixed charges and contingent interest from railroad Annual Reports (“R-1”). The Input Index is transparent and can be reproduced by stakeholders each year. The Board develops the Output Index from the CWS by assigning each movement in the costed CWS to one of 189 “segments.” The Board has explained that segmentation is based on three mileage blocks, seven car types, three weight brackets, and three shipment sizes. That is, each movement in the costed CWS is sorted into one of 189 categories based on those variables. The Output Index is a composite of the year-to-year change in revenue ton-miles for each of the 189 segments weighted by each segment’s base-year share of total revenues.

Because the CWS contains confidential information and the Board does not make public its break points for the categories, railroad and shipper stakeholders cannot verify the Output Index and have not been able to do so since it was adopted in 1989.⁴ From the outset, AAR objected to the use of revenues in the CWS as a weighting factor in the Output Index, both conceptually and due to flaws in the CWS dataset.⁵ When the ICC revisited some implementation issues associated with the productivity adjustment in the early 1990s, the ICC declared that it would rely on the CWS for the Output Index and stated that it would not consider further comments on the issue.⁶

⁴ The Board released work papers in 2017 underlying a linking factor used to account for a change in methodology associated with how mileages were assigned to shipments. The work papers that the Board made available did not reveal any information about the segmentation process. In seeking “the Board’s analyses” of CWS data in this proceeding, WCTL is presumably asking for release of the segmentation formula.

⁵ See 5 I.C.C.2d at 461.

⁶ *Productivity Adjustment – Implementation*, Notice of Proposed Policy Determination, 56 Fed Reg. 6680 (Feb. 19, 1991).

The Board issued a decision in this proceeding on March 11, 2019, calculating the RCAF productivity adjustment for 2019. WCTL filed comments confirming the Board's calculation of the Input Index and stating that it is "unaware of any information that directly undermines the accuracy of the Board's calculation of the output index value."⁷ Nevertheless, WCTL asks that it and its economic consultant, L.E. Peabody & Associates, Inc. ("Peabody"), be given access to the entire unmasked CWS and "the Board's analyses of that data" for the last six years, spanning from 2012 to 2017.⁸ As explained below, the Board should deny the request because the potential harm of the release of such a large amount of confidential shipper and railroad data outweighs any possible benefit here.

ARGUMENT

The potential harm to railroads and shippers in the release of confidential rate information contained in the CWS is significant and well known to the Board. Both railroads and shippers can suffer competitive harms if confidential contract rates are disclosed and shippers could be particularly disadvantaged if their contract rates and information about their transportation practices and costs became known to their competitors or their competitors' representatives.⁹ Exposing these confidential rates could put many rail shippers at a disadvantage relative to their competitors in violation of 49 U.S.C. § 11904.

⁷ WCTL comments at 1-2.

⁸ *Id.* at 2.

⁹ See *CSX Corp. and CSX Transp. Inc., Norfolk S. Corp. and Norfolk S. Ry. Co.—Control and Operating Leases/Agreements—Conrail, Inc. and Consol. Rail Corp.*, STB Fin. Docket No. 33388, at 3 (STB served Oct. 3, 1997) ("*Conrail*").

Here, WCTL's consultant, Peabody, advertises its participation in contract negotiations for its clients.¹⁰ The use of protective orders and assurances by requestors that the CWS data will only be used for limited, appropriate purposes are not adequate protection. Even assuming absolute good faith by the requestors, once the shipper-specific and movement-specific revenue information is seen, it cannot be excised from memory for other purposes.¹¹ Access to the CWS and masking factors would inevitably influence rate negotiations and other competitive contexts in which the requestors are involved. Six years of unmasked revenue data for each Class I carrier to a participant in rate negotiations could significantly impact future negotiations.¹²

WCTL's stated justification for access to this large amount of confidential rate information is to allow WCTL to replicate the Board's Output Index calculation for the latest five-year period. But WCTL has offered no reason to suspect there is any problem with this particular calculation or offered any insight into potential harms to it or its members if there were an error in the calculation. The productivity-adjusted RCAF (RCAF-A) is of limited regulatory and commercial utility and is largely a relic of the regulatory past. Section 203 of the Staggers Rail Act of 1980 created a zone of rate flexibility ("ZORF") relating to railroad rates in effect during specified periods beginning October 1, 1980. Under provisions of then 49 U.S.C. §§ 10707a and 10709, these inflation-adjusted base levels could not be challenged as unreasonable. The purpose of the section 203 inflationary cost index was "to provide a

¹⁰ See <http://lepeabody.com/OurServices/NegStrategies>.

¹¹ See *Conrail* at 3 ("[T]here would be no effective way to 'unring the bell' once disclosure is made").

¹² See, e.g., *Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004, 1054-1055 (1996) ("We agree with AAR that pre-complaint access to the confidential Waybill Sample is not only unnecessary, but would be an inappropriate use of the Waybill Sample for a non-regulatory purpose if we were to foster its use in rate negotiations between shippers and carriers.").

mechanism for recovering inflation-based costs”¹³ Thus, the RCAF established a system of challenge-free, inflation-adjusted base rates, enabling a railroad to increase its rates without having to defend its action any further than to note that it was simply keeping pace with inflation. Though the Board’s decisions in this proceeding still sometime refer to the agency’s “cost recovery procedures,” section 10707a was excised from the statute nearly 25 years ago by the ICC Termination Act of 1995, though the requirement to calculate an RCAF persisted. The RCAF is now simply a forecast index of the prices railroads pay for various inputs.

The release of unmasked CWS data here would open the door to widespread disclosure of the most sensitive rate and traffic information. Any party that wished to gain ongoing access to unmasked CWS data could do so in the future by simply requesting access in the productivity adjustment proceeding each year. Moreover, the productivity adjustment is not the only Board calculation that relies on CWS data and therefore cannot be verified by stakeholders without access to the unmasked CWS. In *Simplified Standards for Rail Rate Cases*, the Board revised the method by which it calculates the $R/VC_{>180}$ and RSAM benchmarks.¹⁴ Since that decision, the $R/VC_{>180}$ benchmark has been calculated using the CWS by dividing the total revenues earned by the carrier on traffic that moves pursuant to a rate that generates revenue in excess of 180% of its URCS variable cost by the carrier’s total variable costs for that traffic.¹⁵ Similarly, the Revenue Shortfall Allocation Method (“RSAM”) benchmark is calculated by adding the carrier’s revenue shortfall (or subtracting the overage) shown in the Board’s annual revenue

¹³ *Western Coal Traffic League v. United States*, 677 F.2d, 915, 925 (D.C. Cir 1982).

¹⁴ *Simplified Standards for Rail Rate Cases*, EP 646 (Sub-No. 1) (STB served Sept. 6, 2007).

¹⁵ *Id.* at 20.

adequacy determination, adjusted for taxes, to the numerator of the $R/VC_{>180}$ benchmark.¹⁶ Due to reliance on CWS data, stakeholders cannot verify the Board's annual R/VC_{180} or RSAM calculations.

In considering requests for pre-complaint access to unmasked CWS data in that proceeding, the Board noted that “[i]t has been the Board’s practice not to release unmasked contract revenue information to practitioners and consultants” but created an exception to this policy for Three-Benchmark complaints.¹⁷ However, the Board stated that “the potential for abuse from release of this confidential data prior to the filing of a complaint far outweighs the benefits that might come from it . . .” and “having this information prior to filing a complaint is not vital.”¹⁸ Similarly here, WCTL has not demonstrated that the release of six years of unmasked revenues to allow WCTL to check the Board’s calculations is vital in this proceeding.

* * *

In sum, WCTL has not raised any legitimate questions regarding the Board’s calculations in this proceeding. A grant of access to six years’ worth of competitive traffic information would create competitive harm and be a step towards wide-scale disclosure. The productivity adjustment is of limited regulatory and commercial utility and its tail should not wag the dog of widespread confidential unmasked rate disclosure. Should WCTL or its members need to verify the productivity adjustment in the context of a particular adjudicatory proceeding, access to the data could be granted at that time. If the Board is concerned with the transparency of its

¹⁶ *Simplified Standards for Rail Rate Cases—Taxes in Revenue Shortfall Allocation Method*, EP 646 (Sub-No. 2), slip op. at 2-3 (STB served May 11, 2009).

¹⁷ *Simplified Standards for Rail Rate Cases*, EP 646 (Sub-No. 1) (STB served Sept. 6, 2007).

¹⁸ *Simplified Standards for Rail Rate Cases*, EP 646 (Sub-No. 1) (STB served Mar. 19, 2008).

productivity adjustment, the agency should begin a rulemaking proceeding to consider the use of publicly-available data to construct the Output Index, not release unmasked CWS data. As such, WCTL's request should be denied.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read 'K. Kirmayer', with a long horizontal flourish extending to the right.

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April 10, 2019