

BEFORE THE
SURFACE TRANSPORTATION BOARD

In the Matter of:

RAILROAD COST RECOVERY
PROCEDURES - PRODUCTIVITY
ADJUSTMENT

227682
Ex Parte No. 290 (Sub-No. 4)

QUARTERLY RAIL COST
ADJUSTMENT FACTOR

227685
Ex Parte No. 290 (Sub-No. 5) (2010-2)

REPLY COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE

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Dated: August 24, 2010

ENTERED
Office of Proceedings
AUG 24 2010
Part of
Public Record

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REPLY COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE

In response to the Notice and later decision that the Surface Transportation Board (“STB” or “Board”) served in the above-captioned proceedings on June 11, 2010, and July 20, 2010, respectively, the Western Coal Traffic League (“WCTL”) submits the following Reply Comments that respond to the comments submitted by the Association of American Railroads (“AAR”) on July 12, 2010.

The AAR asks the Board to restate the past RCAF-A and RCAF-5 values to reflect the Board’s updated calculation of 2007 productivity on the grounds that: (a) the Board’s calculation of productivity and publication of the RCAF-A and RCAF-5 reflect a “purely ministerial function” that has no role in the Board’s regulatory functions; (b) such restatement is “clearly supported by agency precedent;” and (c) the AAR either “is unaware of any detrimental reliance” or believes that such reliance should be ignored because it would involve contracts or rate reasonableness proceedings. AAR at 3, 4.

As explained below, the AAR's assertions are incorrect and even contradictory, especially given the positions that the AAR has maintained (and the Board has adopted) in rejecting the requests of WCTL and other shippers for restatement in the past. If the Board decides to restate here, it should also restate elsewhere.

I. CALCULATION OF PRODUCTIVITY AND PUBLICATION OF THE RCAF-A AND RCAF-5 ARE NOT MERELY MINISTERIAL

First, the calculation of productivity and the publication of the productivity-adjusted RCAF values cannot be dismissed as being merely ministerial. Instead, they reflect a statutory function assigned to the Board by Congress in the ICC Termination Act of 1995. Congress concluded that the Board should continue the function previously fulfilled by the predecessor Interstate Commerce Commission ("ICC" or "Commission"), and there is no basis on which to conclude that the function warrants only second-class status. Indeed, as a result of its decision in STB Ex Parte No. 657 (Sub-No. 1), *Major Issues in Rail Rate Cases* (STB served Oct. 30, 2006), the Board now uses RCAF-A to adjust the operating expenses of stand-alone railroads. The productivity calculation thus plays an important role in the Board's scheme for regulating railroad rates and is not merely ministerial.

Furthermore, even before *Major Issues*, the Board concluded that the concerns associated with restating productivity-adjustment values were sufficiently important to prevent restatement to correct clear errors. In particular, the Board concluded in *Productivity Adjustment-Implementation*, 1 S.T.B. 739 (1996), that it should adopt the RCAF-5, rather than correct or restate past RCAF-A values, to adjust for the

distortion inherent in giving unequal weight to productivity changes in different years. Moreover, the AAR opposed both correction of the RCAF-A and adoption of the RCAF-5 in that proceeding, even though the RCAF-A, under the AAR's current reasoning, served no official regulatory function at the time.

The AAR's claim, that the productivity adjustment and the associated RCAF values are purely ministerial and serve no purpose that warrants consideration of anything more than technical matters, cannot be reconciled with either the Board's prior decisions or the AAR's prior positions.

II. NO PRECEDENT SUPPORTS THE AAR'S REQUESTED RESTATEMENT

The AAR's second claim is that restatement is "clearly supported by agency precedent." AAR at 3. However, when the AAR actually addresses precedent, the only RCAF-related decisions it references are those in which the Board (or, more technically, the predecessor Commission) refused shipper requests to restate past values. *See* AAR at 9-10, discussing *Railroad Cost Recovery Procedures--Productivity Adjustment*, 1989 WL 239385 (I.C.C. 1989) (served Sept. 19, 1989) (ICC declines to retroactively restate 3Q89 RCAF-A to reflect 1987 productivity data); *Ex Parte* No. 290 (Sub-No. 2), *Railroad Cost Recovery Procedures*, 3 I.C.C.2d 60 (1986) (ICC adopts forecast error correction prospectively and holddown or "banking" procedure, but does not restate past values); and *Ex Parte* No. 290 (Sub-No. 2), *Railroad Cost Recovery Procedures* (ICC decided June 8, 1984) (ICC adjusts future RCAF value to correct for error in past RCAF value, reflecting AAR opposition to mandatory refund for past

values). The AAR simply fails to present any instance where past RCAF values were restated or, for that matter, where the AAR previously supported such restatement. The 1986 decision cited by the AAR is especially significant because the Board rejected restatement for a technical error.

The AAR at 10 does note other examples where the Board or the ICC corrected past decisions. However, the AAR ignores the fact these decisions did not involve rulemaking proceedings, but instead involved the Board's or ICC's adjudication of a dispute directly between two parties as to such matters as the amount of compensation for an offer of financial assistance in an abandonment or a coal rate case. Accordingly, from the inception of the proceedings, the parties were direct litigants that were on notice as to the matter to be resolved, and the agency was attempting to determine accurately the level of compensation that one party would provide another. Those decisions provide no support for the action that the AAR is seeking here.¹

III. THE AAR EVADES OR DISTORTS DETRIMENTAL RELIANCE ISSUES

The AAR's position on the detrimental reliance issue, for which the Board specifically requested comment, is "that it is unaware of any detrimental reliance ... that would compel the Board to refrain" from its requested restatement. AAR at 4, 11. It is thus unclear if (a) the AAR believes that there is no detrimental reliance at all, or (b)

¹ WCTL notes that the Board has nonetheless taken general reliance interests into account in individual rate cases, *e.g.*, in rejecting shipper efforts to apply the Board's CAPM cost of equity methodology "retroactively," as in STB Docket No. 41191, *AEP Texas North Co. v. BNSF Ry.* (STB served May 15, 2009), noted by AAR at 12 n.18.

there is detrimental reliance, but the AAR believes that it should be ignored. In either event, the AAR's position is not well-founded.

The AAR first cites various cases involving other agencies or other matters where "detrimental reliance" did not prevent correction of errors. Be that as it may, the fact remains that the Board and its predecessor have viewed detrimental reliance as a factor preventing restatement of RCAF values when previously sought by WCTL and other shippers and opposed by the AAR. The AAR's comments ignore the Board's established position and thus fail to begin to provide the explanation required for a change in that position. An agency may not "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books," *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009), and must "justify departing from its own prior interpretation" of a statute. *Goldstein v. SEC*, 451 F.3d 873, 883 (D.C. Cir. 2006).

The AAR next asserts that any reliance on the former values would occur only in the context of individual contracts or rate cases, that detrimental reliance in contracts is voluntary and is thus irrelevant for the Board's purposes, and that any reliance in rate cases can be addressed by a request for reopening in that rate case. Again, the AAR's claims cannot be resolved with its position or the Board's action in adopting the RCAF-5 in *Productivity Adjustment-Implementation*. In that case, the RCAF-A was relevant only for contracts, yet the Board held that detrimental reliance prevented restatement of past RCAF-A values and that the proper approach was to establish the separate RCAF-5. Here, the AAR seeks restatement of past values for both

the RCAF-A and the RCAF-5. The AAR's contention that a party with a rate case affected by restatement can seek reopening to override the restatement also does not wash. Indeed, the Board now intends that the RCAF-A values will be used in rate cases, which constitutes "official" utilization of the RCAF-A.

It is also apparent that the AAR made no effort to ascertain that the RCAF-A is used to adjust the maximum gateway rates for transportation provided by AAR member Canadian National Railway, operating as British Columbia Railway Company (BC Rail), for interconnections with fellow AAR members BNSF, Canadian National, and Union Pacific, pursuant to the Consent Agreement with the Competition Bureau of Canada. Information about this arrangement, discussed in WCTL's Opening Comments, is publicly available and would have come to the AAR's attention if it had made any sort of inquiry among its members. In any event, the arrangement shows that the RCAF-A values are relied upon, and restatement of the RCAF-A values will likely cause disruption in rates that were already paid for transportation, including transportation to or from the United States involving products made or consumed in the United States.²

² On August 9, 2010, Canadian Forest Ltd. ("Canfor") submitted a letter dated August 6, 2010, explaining that it expected that the AAR's requested restatement "would have a minimal impact on the historical rate levels," that the restatement thus appears to be "inconsequential," and that the RCAF calculations "should therefore remain at the originally reported levels," although "[i]f a quantifiable benefit could be brought forward then Canfor might be persuaded to reconsider this position. Canfor is presumably a shipper, and its comments suggest that it might not recognize that the restatement sought by the AAR would result in a rate increase, rather than a rate decrease. Assuming that Canfor recognizes that the AAR is seeking an increase in the RCAF-A and RCAF-5 values, Canfor's position appears to be that the disruption caused by the restatement would not be justified by the minor impact on rate levels. In that regard, WCTL notes

Additionally, AAR's dual claims that (a) restatement is desirable, but (b) will not undermine any detrimental reliance present a contradiction. If no use were made of the RCAF-A values, there would be no reason for restating the RCAF-A (and RCAF-5) values, as restatement would be a meaningless gesture without any practical consequence. Accordingly, restatement matters only if there are rates (contract, prescribed, or otherwise) that will be altered as a consequence. However, if the rates are altered, then it will upset the expectations of those that relied on the values as originally published and entail the disruption associated with corrective billings and payments. As discussed *infra*, there may still be a reason to restate the values -- generally, and not just in this one instance that happens to favor the interests of the AAR and its member railroads -- but it is disingenuous for the AAR to seek restatement while suggesting that the action is of no consequence and that there has been no reliance on the published values.

IV. CONCLUSION

Restatement cannot be undertaken on the grounds presented by the AAR, as any restatement on the grounds presented by the AAR would fail the arbitrary and capricious test. The Board's function in calculating productivity and publishing the RCAF-A and RCAF-5 is not purely ministerial. Indeed, the Board has previously refused to restate RCAF productivity-adjusted values that would have been even more "purely

that the AAR has made no effort to quantify the impact on the rate levels of its members, and the AAR does not even demonstrate that there would be any impact. If there is no impact, then there is nothing useful to be gained by restatement, as the Board already purported to correct the values on an ongoing basis.

ministerial” because of concerns about detrimental reliance and settled expectations. Nor is there any basis to the AAR’s claim that precedent supports restatement of past RCAF values. The decisions cited by the AAR involve instances where the Board or its predecessor refused to restate, even for technical errors, and reveal no instances where the Board actually restated RCAF values. The AAR’s claims concerning detrimental reliance are also misguided in that reliance prevented restatement previously, the degree of reliance has been increased (through *Major Issues* and the Consent Agreement regarding the gateway rates for BC Rail), and the fact that the restatement sought by the AAR would be meaningless unless it actually altered actual rates.

In short, the restatement sought by the AAR cannot be reconciled with the Board’s past actions and the AAR’s past, and even current, statements.

However, WCTL is not opposed to restatement *per se*. Instead, if the Board wishes to restate its past RCAF-A and RCAF-5 values to make them more accurate, the Board should do so -- not for only the values involving the 2007 productivity adjustment, but also in the other instances previously sought by WCTL and other shippers. Furthermore, the Board should restate other values, including the cost of equity and the cost of capital, as well, as WCTL explained in its Opening Comments. There is no basis for restatement in just this one instance sought by the AAR.

Respectfully submitted,

WESTERN COAL TRAFFIC LEAGUE

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