

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
June 4, 2024
Part of
Public Record

RAILROAD COST OF CAPITAL — 2023	)))))	STB Docket No. EP 558 (Sub-No. 27)
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**REBUTTAL COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS
AND ITS MEMBER RAILROADS**

By a decision served on February 20, 2024, the Surface Transportation Board (“STB” or “Board”) instituted this proceeding to determine the railroad industry’s cost of capital for the year 2023. The Association of American Railroads (“AAR”) submitted the statement of the railroads on April 23, 2024. The only other party to submit comments was the Western Coal Traffic League (“WCTL”), which filed its reply on May 14, 2024.

Argument

AAR reiterates that it followed the Board’s instructions to use the methodology in Railroad Cost of Capital – 2022, and WCTL does not dispute that. Indeed, WCTL admits that it found “no significant errors in AAR’s mathematical calculations implementing the Board’s established cost of capital methodology.”¹ There being no errors in AAR’s calculations, nor any claims that the AAR failed to follow the cost-of-capital calculation methodology set forth in Railroad Cost of Capital – 2022, the Board should determine that the railroads’ cost of capital for 2023 is 9.87 percent.

¹ Reply Statement of Western Coal Traffic League (“WCTL”), R.R. Cost of Cap.—2023, EP 558 (Sub-No. 27) (served May 14, 2024), at 1.

I. THE BOARD SHOULD DENY WCTL’S COLLATERAL ATTACKS ON THE BOARD’S METHODOLOGY, AS IT HAS CONSISTENTLY.

While it could not provide substantive concerns with the calculation, WCTL relies on its previous arguments in this docket—which amount to nothing more than complaints about the STB’s methodology for calculating the railroad cost of capital, such as data concerns and results-based issues with the measures. These complaints and concerns have been denied as procedurally deficient and have been repeatedly rejected by the Board in the past.² Indeed, several recent Board proceedings on the cost of capital specifically rejected WCTL’s claims regarding the insufficiency of the Multi-Stage Discounted Cash Flow Model (“MSDCF”) and WCTL’s stated desire to move to a Capital Asset Pricing Model (“CAPM”)–only approach.³ The Board has thoroughly explained:

The Board has explicitly rejected . . . WCTL’s requests to either move to a CAPM-only approach or to change the Morningstar/Ibbotson MSDCF regarding cashflows and growth rates, in prior decisions. WCTL’s other suggestion, that Morningstar/Ibbotson MSDCF’s “variability” is a reason to abandon it, has been implicitly rejected in the Board’s decisions finding that Morningstar/Ibbotson MSDCF and CAPM each have their own strengths and weaknesses that, when averaged together, lead to a more robust result.⁴

Similarly, last year, the Board rejected WCTL’s methodological concerns, noting that:

WCTL . . . reiterates its critiques of the MSDCF and provides arguments in support of the CAPM-only approach and its calculation of the cost of equity. The Board, however, has

² See, e.g., Pet. of the W. Coal Traffic League to Inst. a Rulemaking Proceeding to Abolish the Use of the Multi Stage Discounted Cash Flow Model in Determining the R.R. Indus.’s Cost of Equity Capital, EP 664 (Sub-No. 2), slip op. at 1-2 (STB served Sept. 28, 2018); Pet. of the W. Coal Traffic League, EP 664 (Sub-No. 2), slip op. at 2 (STB served Aug. 14, 2017); Pet. of the W. Coal Traffic League, EP 664 (Sub-No. 2), slip op. at 2, 5, 9, 11-13 (STB served Apr. 28, 2017); Pet. of the W. Coal Traffic League, EP 664 (Sub-No. 2), slip op. at 11, 14, 17-18, 20 (STB served Oct. 31, 2016); Use of a Multi-Stage Discounted Cash Flow Model, EP 664 (Sub-No. 1), slip op. at 11-13 (STB served Jan. 28, 2009).

³ See, e.g., R.R. Cost of Cap.—2022, EP 558 (Sub-No. 26), at 3 (STB served Oct. 3, 2023); R.R. Cost of Cap.—2021, EP 558 (Sub-No. 25), at 3 (STB served Aug. 2, 2022); R.R. Cost of Cap.—2020, EP 558 (Sub-No. 24), at 3 (STB served Aug. 6, 2021); see also Revisions to the Board’s Methodology for Determining the Railroad Industry’s Cost of Capital (“Revisions”), EP 664 (Sub-No. 4), at 5 (STB served June 23, 2020).

⁴ See Revisions, at 5 (citations omitted).

rejected similar arguments WCTL has raised in the past. See, e.g., Pet. of the W. Coal Traffic League to Inst. a Rulemaking Proceeding to Abolish the Use of the Multi Stage Discounted Cash Flow Model in Determining the R.R. Indus.'s Cost of Equity Cap., EP 664 (Sub-No. 2), slip op. at 1-2 (STB served Sept. 28, 2018) (rejecting WCTL's arguments against the use of the MSDCF in the agency's estimation of the railroad industry's cost of capital); Pet. of the W. Coal Traffic League, EP 664 (Sub-No. 2), slip op. at 2, 5, 9, 11-13 (STB served Apr. 28, 2017) (rejecting WCTL's arguments supporting a CAPM-only approach and WCTL's position that the Board must incorporate a market-risk premium of five percent or lower); Pet. of the W. Coal Traffic League, EP 664 (Sub-No. 2), slip op. at 11, 14, 17-18, 20 (STB served Oct. 31, 2016) (explaining that a methodology that uses multiple models is more robust than a methodology that utilizes only one model).⁵

As has been the case for numerous years, the Board should recognize the deficiency of WCTL's complaints about the methodology and reject WCTL's arguments.

II. WCTL'S FILING IS NOT A PROPER PETITION FOR RULEMAKING

Last year, WCTL attempted to convert its reply into a petition for rulemaking, asking that its "comments be construed as a petition for the STB to institute rulemaking to the extent necessary to have its concerns considered and addressed."⁶ The Board denied WCTL's request to accept its comments as a petition, "saying, as it has said repeatedly for over a decade, that any party wishing to challenge the cost-of-capital methodology should bring a case in the rulemaking docket expressly reserved for that purpose rather than in the docket reserved solely for cost-of-capital calculations under the existing methodology."⁷

However, after last year's denial, WCTL has shifted its approach slightly. Now, instead of explicitly asking that the Board construe its comments as a rulemaking, WCTL states that it

⁵ R.R. Cost of Cap.—2022, EP 558 (Sub-No. 26), at 3 (STB served Oct. 3, 2023), at 2-3.

⁶ See, e.g., Reply Statement of WCTL, R.R. Cost of Cap.—2022, EP 558 (Sub-No. 26) (served May 2, 2023), at 4.

⁷ STB's Mot. For Summ. Denial of the Pet. for Rev., at 2, WCTL v. STB, No. 23-1272 (D.C. Cir. Nov. 16, 2023). WCTL subsequently appealed that decision, and the D.C. Circuit granted summary denial in favor of the STB. Order, at 1, WCTL v. STB, No. 23-1272 (D.C. Cir. Feb. 21, 2024).

“recognizes that the Board may be under no immediate legal obligation to consider [the] matters [WCTL raises] in this particular proceeding,” but goes on to note that “[t]he deviation between the cost of capital values adduced under the Board’s methodology and those utilized by investors, the railroads, and the Board itself in other contexts is more than worthy of a *Board-initiated* rulemaking proceeding.”⁸ The Board should not entertain this creative request for a rulemaking, which continues to ignore the Board’s prior instructions on how to properly bring a case in the rulemaking docket.

As AAR has noted in the past, WCTL is a frequent filer before the Board, with knowledge of the Board’s processes and procedures. WCTL has petitioned for a rulemaking change in the past, and, furthermore, WCTL recently filed a writ of mandamus against the Board in the very same procedural docket where it previously petitioned the Board for a change to the cost of capital methodology.⁹ These are not the actions of an unwitting, inexperienced party. Rather, WCTL has received explicit instructions from the Board, including last year, as to the appropriate actions to take.¹⁰ WCTL cannot claim ignorance, nor should it be rewarded for attempting to circumvent the Board’s consistent advice to file in the appropriate docket—no

⁸ Reply Statement of WCTL, R.R. Cost of Cap.—2023, EP 558 (Sub-No. 27) (served May 14, 2024), at 9 (emphasis added).

⁹ See Notice of Court Action, *Pet. of the W. Coal Traffic League to Inst. a Rulemaking Proceeding to Abolish the Use of the Multi Stage Discounted Cash Flow Model in Determining the R.R. Indus.’s Cost of Equity Capital*, EP 664 (Sub-No. 2)(STB Served May 12, 2023).

¹⁰ See Cost of Capital – 2022, at 3 (“The Board reaffirms that this proceeding is not the proper forum by which a party may seek to institute a rulemaking for proposed changes to the Board’s cost-of-capital methodology. As the Board has stated, ‘requests to [change our methodology] must be brought (*in the form of a petition for rulemaking*) in a 664 proceeding, not in the annual 558 proceeding, in which we calculate the cost of capital for a particular year.’”) (internal citations omitted).

matter how creatively WCTL packages its request. WCTL should, therefore, follow the Board's procedures for a petition for rulemaking, not slip it into a reply in this docket.¹¹

Conclusion

The Board should reject WCTL's attacks on the cost of capital methodology. Moreover, AAR opposes WCTL's procedural workaround to having to file a separate petition for rulemaking. To the extent the Board is willing to entertain such a petition, AAR requests the Board deny it for the same reasons it has before. As has been the case in prior years, WCTL concedes that AAR correctly calculated the cost of capital. Therefore, the Board should determine that the railroads' cost of capital for 2023 is 9.87 percent.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "K. Kirmayer", is positioned above the typed name.

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June 4, 2024

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 2024, I caused to be served by electronic mail a copy of the foregoing on the following:

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Amber L. McDonald