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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. EP 752

PETITION FOR RULEMAKING

Comments of American Fuel & Petrochemical Manufacturers

I. INTRODUCTION

The American Fuel & Petrochemical Manufacturers (“AFPM”) is pleased to provide comments on the Surface Transportation Board’s (“STB” or “Board”) decision and request for information related to docket Ex Parte No. 752 published on November 4, 2019.¹

On March 14, 2019, the Association of American Railroads (“AAR”) petitioned the STB, pursuant to 5 U.S.C. § 553, to amend 49 C.F.R. Part 1110 to require the Board to perform a cost-benefit analysis (“CBA”) in all rulemaking proceedings except those described in § 1110.3(a), to consider the cumulative impacts of such proposed rules, and to rely upon the most reliable and up-to-date data that is reasonably obtainable in such analyses. On July 8, 2019, the STB deferred action on the petition and cited that, “[a]dditional time is required for the Board to consider whether and how particular cost-benefit analysis approaches or data requirements might be more formally integrated into its rulemaking process.”² On November 4, 2019, the Board issued a request for information on whether and how particular cost-benefit analysis approaches might be more formally integrated into its rulemaking process. As expanded upon below, AFPM continues to oppose AAR’s petition for rulemaking, but provides input on the Board’s request.

II. AFPM INTEREST IN THE PROCEEDING

AFPM is a national trade association whose members comprise nearly 90 percent of U.S. refining and virtually all U.S. petrochemical manufacturing capacity. AFPM members produce the fuels that drive the U.S. economy and the chemical building blocks integral to millions of products that make modern life possible. To produce these essential goods, AFPM members depend on all modes of transportation, including rail, to move their products and have made

¹ See Surface Transportation Board Decision, Docket No. EP 752, Association of American Railroads Petition for Rulemaking, Service Date November 4, 2019.

² See Surface Transportation Board Decision, Docket No. EP 752, Association of American Railroads Petition for Rulemaking, Service Date July 10, 2019.



significant infrastructure investments to support and improve the efficiency of the transportation system. Rail transportation is vital to our members, as well as to manufacturers and customers downstream who depend on our products. Approximately 3.7 million carloads of our members' feedstocks and products — crude oil, natural gas liquids, refined products, plastics, and synthetic resins — were delivered by rail in the U.S. in 2018.³ To that end, AFPM supports policies that promote free and open energy markets that benefit the U.S. economy.

Refineries and petrochemical manufacturers across the country rely on a healthy rail network as an essential part of their supply chains. Over 75% of refiners and petrochemical manufacturers are served by a single railroad (e.g., captive) and are negatively impacted by excessive freight rail rates, escalating and poorly communicated demurrage and accessorial fees, and lack of competitive rail service. The Board's recent proposals and hearings, including those on revenue adequacy and demurrage, are positive steps towards alleviating some of the problems in the freight rail industry; however, this petition will not advance those efforts and could indeed stymie much of the Board's progress on reforms. AFPM supports informed, risk-based, and cost-justified approaches to developing, reviewing, and revising regulations related to transportation, but this petition is not the right approach. AFPM is committed to working with STB to find the right approach on this issue.

III. COMMENTS ON COST-BENEFIT ANALYSIS REQUIREMENTS

In their petition, AAR stated that “agencies like the Board should ensure that they are incorporating meaningful cost-benefit analysis into their rulemakings.”⁴ To that end, AAR proposed that the Board adopt three requirements:

- 1) Consider the costs and benefits of new rules when it proposes and adopts such rules;
- 2) Consider the cumulative impact of regulations; and
- 3) Base its decisions on up-to-date and reliable data.

AAR's action is merely an attempt to delay or slow the Board's considerable progress on a number of important initiatives. AFPM believes that the Board is already well-suited in its role as economic regulator and the Board need not undertake a rulemaking to institute CBA to appropriately consider the cost and benefits of its action. AFPM has consistently advocated for transparent regulations that are data driven and include CBA. It is highly unusual for us to oppose a position that would generate more data and more analysis to confirm that the benefits of a regulatory initiative outweigh its costs. That said, in this case AAR does not seek to inform the regulatory process. STB already has the data needed to conduct a robust cost benefit analysis as

³ Rail Traffic Data - Association of American Railroads. (2019). Retrieved from <https://www.aar.org/data-center/rail-traffic-data/>.

⁴ See Petition for Rulemaking Before the Surface Transportation Board, Ex Parte No. 752, Association of American Railroads petition for Rulemaking, pg. 5.



part of its rulemaking activity, and AAR's petition amounts to nothing more than imposing additional, superfluous, requirements that delay the regulatory process. STB already collects data in the form of waybills, Annual R-1 Reports, quarterly demurrage and accessorial revenues, fuel surcharges, and wage data. In addition, STB encourages stakeholders to submit relevant data to the dockets related to their rulemakings and hearings. The STB then performs economic analyses to produce Commodity Revenue Stratification Reports, Revenue Shortfall Allocation Method ("RSAM") calculations, rail cost adjustment factors, cost of capital figures, among others. If AAR's petition were to result in a more informed regulatory decision rather than just adding delay to decisions AAR is reluctant to support, we likely would take a different view of their petition.

While AFPM does not support the AAR petition, should any CBA policy be adopted it should be applied prospectively and must consider the resources available to STB.⁵ The *Federal Register* notice does not indicate an intent to revisit existing rules to reanalyze their economic consequences; however, AAR's petition seeks the quantification of the cumulative impacts of regulations. We note that a blanket review of existing STB rules would be incredibly resource intensive and interfere with STB's ongoing regulatory reforms. In the November 2019 request for information, the Board specifically asks for input on several areas, including methods, data, application, and threshold. AFPM responds to each of these below.

Methods of Analysis

The Board requests information on specific methods, not just general criteria and processes in best practices guides, that would assist in the qualitative or quantitative analysis of a final rule by the Board. AFPM does not support AAR's request to initiate a rulemaking to implement CBA for STB actions. AFPM believes STB has the authority and ability to consider cost and benefits appropriately without codifying such requirements and methods in rulemaking. AFPM also notes that historically, independent regulatory agencies have been exempted from requirements for CBA and centralized review.⁶

⁵ See Petition for Leave to Submit Reply and Reply Ex Parte Docket No. 752, Petition for Rulemaking, American Fuel & Petrochemical Manufacturers, April 16, 2019.

⁶ When President Clinton issued Executive Order 12866 in 1993, he chose to exempt the independent regulatory agencies from the order's CBA requirements. Similarly, President Obama continued to exempt independent regulatory agencies from CBA requirements with EO 13563, although his Office of Information and Regulatory Affairs ("OIRA") Administrator encouraged those agencies to "give consideration to all [EO 13563's] provisions" in a memorandum issued soon after the executive order.⁶ In July 2011, President Obama issued EO 13579, "Regulation and Independent Regulatory Agencies."⁶ That executive order encouraged independent regulatory agencies to comply with some of the principles in EO 13563 that were directed to Cabinet departments and independent agencies (e.g., public participation, integration and innovation, flexible approaches, and science). However, in a separate memorandum issued the same day as the executive order, the President said he was taking these actions with "full respect for the independence of your agencies."⁶ EO 13579 did not directly apply the cost-



Generally, the nature of the rules being promulgated by independent regulatory agencies, including the STB, may make it difficult to conduct rigorous, quantitative, cost-benefit analysis. This is evidenced in the Board's decision in Ex Parte 711, when it discusses the National Industrial Transportation League's petition for reciprocal switching:⁷

Under the proposal, the availability of reciprocal switching would not be presumed based on one-size-fits-all criteria, but instead would be based on factual determinations derived from the evidence provided by the parties. Pursuant to the [Rail Transportation Policy] RTP, we believe this approach would be fairer than both the current regulations as well as the NITL proposal in EP 711.

Adding additional requirements to perform a lengthy and costly analysis of the Reciprocal Switching rule is duplicative and wasteful. These circumstances are representative of an industry that serves many different segments of the nation's economy including fuel and petrochemical markets, automobile manufacturing, pulp and paper products, and construction materials, to name but a few. CBAs attempting to quantify the broad behavioral responses of firms to economic regulations across multiple segments of the economy are subject to great uncertainty.

AFPM believes that if the Board considers adopting a CBA policy, it should give special credence to the method taken by the Securities and Exchange Commission ("SEC") or consider the guidance provided in EO 12866 and subsequent amendments. While the SEC uses the Office of Management and Budget's ("OMB") Circular A-4 as a framework for conducting CBAs, the SEC takes a nuanced approach to tailor analyses to the financial sector.⁸ Former SEC Chairman Mary Schapiro noted in Congressional testimony that, "although the SEC (as an independent regulatory agency) is not subject to the rulemaking requirements of Executive Orders 12866 and 13563 and Office of Management and Budget Circular A-4, the SEC had recently released its Current Guidance that 'draws upon principles set forth in OMB Circular A-4 and Executive Orders 12866 and 13563.'"⁹

In its 2012 guidance, the SEC asserted that robust economic analysis should have at least four basic features:

benefit principles in EO 12866 and 13563 to independent regulatory agencies, nor did it require these regulators to conduct CBA before issuing their rules.

⁷ See Surface Transportation Board Decision, Petition for Rulemaking to Adopt Revised Competitive Switching Rules, Docket No. EP 711 (Sub-No. 1), Reciprocal Switching, Service Date July 27, 2016. <https://dcms-external.s3.amazonaws.com/MPD/62491/11DFF4D3703B81A885257FFD00475D63/44871.pdf>.

⁸ White House Office of Management and Budget, Circular A-4 (Accessed January 17, 2020), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>.

⁹ "Use of the Current Guidance on Economic Analysis in SEC Rulemakings," U.S. Securities and Exchange Commission Office of Inspector General, Office of Audits. <https://www.sec.gov/files/518.pdf>.



1. a statement of the need for the proposed action;
2. the definition of a baseline against which to measure the likely economic consequences of the proposed regulation;
3. the identification of alternative regulatory approaches; and
4. an evaluation of the benefits and costs—both quantitative and qualitative—of the proposed action and the main alternatives identified by the analysis.¹⁰

AFPM generally supports these elements as key considerations to a robust analysis and they have proven to be effective as they are used widely across government. Importantly; however, the SEC guidance noted that it is general and “allow[s] for flexibility in the context of any particular rulemaking.”¹¹ Moreover, most regulatory agencies conduct CBA per the guidelines in Executive Order (“EO”) 12866 and the subsequent EOs amending EO 12866, as well as OMB’s Circular A-4, and have not initiated a formal rulemaking related to CBA.¹² EO 12866 and Circular A-4 also instruct covered agencies to conduct cost-effectiveness analysis (“CEA”). CEAs involve qualitative discussion of costs and benefits, as opposed to CBA, which typically requires monetized estimates of both costs and benefits. In these analyses, an outcome is identified as necessary or sufficiently important to the advancement of social welfare, such as preventing cancer cases, preserving wetlands, or reducing the likelihood of financial crises. A set of alternative regulations, ranging from stringent to lenient, is then analyzed to determine how well each alternative achieves the objective outcome and at what cost. This comparison is useful for identifying the most effective form of regulation, and much less burdensome than full-scale CBA.

It should be noted that substantial additional resources and personnel were required at SEC to meet the requirements of the new guidance as would likely be the case should STB implement similar procedures.¹³ Further, in the SEC’s FY 2014 Congressional Budget Justification, it states that the majority of these expansions in resources were allocated to recruit and hire additional

¹⁰ See Current Guidance on Economic Analysis in SEC Rulemakings, Memorandum March 16, 2012, https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.

¹¹ *Id.* at 2.

¹³ In terms of resources, an analysis of the net costs as a percentage of total SEC program costs reveals that the economics division has experienced more growth in net costs than any other reported division or office in the SEC. Net costs of the department within the SEC responsible for economic analyses grew from \$20 million to \$43 million over FY 2011 to FY 2014. SEC, Fiscal Year 2012 Agency Financial Report 65 (2012), available at <http://www.sec.gov/about/secpar/secafr2012.pdf>; SEC, Fiscal Year 2013 Agency Financial Report 65 (2013), available at <http://www.sec.gov/about/secpar/secafr2013.pdf>; SEC, Fiscal Year 2014 Agency Financial Report 75 (2014), available at <http://www.sec.gov/about/secpar/secafr2014.pdf>.



financial economists in support of economic analysis.¹⁴ The STB must be cognizant of the increased resources that will be required if it pursues this rulemaking, especially since its FY2020 budget request of \$37.1 million is the same level that the Board requested in FY2019 and supports a full-time equivalent of just 142 employees.¹⁵

A reasoned and systematic examination of likely consequences of a regulation is a useful practice to ensure good and avoid bad regulation. However, calibrating requirements to reach this outcome is difficult. Excessively stringent requirements, like this petition seeks, could block good regulation from being implemented, because the time and resources required to perform the analysis could make the cost to regulators prohibitively high. The calibration is complicated by the difficulties and uncertainties involved in performing CBA. In such cases, CEA should be employed by the Board.

Another consideration for the STB if they were to implement policy or procedures related to CBA would be to develop some threshold criteria that would dictate the level of analysis required. Similar to the OMB's use of a significance determination, STB could conduct a preliminary assessment of impacts, the results of which would be used to determine the level of further analysis needed. This could alleviate some of the concerns related to resource availability discussed above. Again, such a policy could, and should, be implemented outside of a formal rulemaking process.

AFPM emphasizes the unique role the Board plays in the economic regulations of the nation's freight rail network, a system as complex and nuanced as the nation's financial industry and encourages the Board to investigate a streamlined CEA analysis system.

Supporting Data

The Board seeks suggestions regarding specific data that the Board collects or could collect to assist with cost-benefit analysis. AFPM is encouraged by STB efforts to attain better and more comprehensive waybill data and believes this improvement will also assist in the analysis of STB proposals.¹⁶ That said, AFPM cautions STB to avoid overanalyzing regulatory proposals to the point where the Board is hindered from moving forward with a decision. In the Rate Reform Task Force Report, STB staff notes that Stand-Alone Cost ("SAC") cases have become unworkable due to, "the ever-growing ability of commercial organizations (like railroads) to capture and analyze large data sets suggests that the complexity that already bedevils this process

¹⁴ See SEC, FY2015 Congressional Budget Justification, FY2015 Annual Performance Plan, and FY 2012 Annual Performance Report (2014), available at <https://www.sec.gov/about/reports/secfy15congbudgjust.pdf>.

¹⁵ See Surface Transportation Board, Budget Request, Fiscal Year 2020, <https://prod.stb.gov/wp-content/uploads/STB-FY-2020-Budget-508-compliant.pdf>.

¹⁶ See Docket No. EP 385 (Sub-No. 8)



will only grow in the future ... a radical simplification of the SAC test ... seems appropriate.”¹⁷ Adjudicating individual rate cases has become so prohibitively expensive and time consuming to become an unworkable process.

AFPM cautions STB in pursuing a CBA policy that casts such a wide net to incorporate all available large data sets to “bedevil” the rulemaking process. If it pursues a CBA policy, the STB must set rational boundaries around the scope of its own economic analyses, boundaries within which data analysis and economic theory can inform, but not dictate, policy outcomes. Further as each policy and potential rulemaking may necessitate differing sets of data it would be difficult, if not impossible, to predict and preemptively collect specific data sets. As other agencies do, STB could request information and data from stakeholders relevant to their proposals as part of the policy development. That said, it is reasonable to expect waybill samples to be frequently used and therefore, as previously mentioned, this data set seems relevant in almost all cases.

As previously mentioned, AFPM believes that the data required to perform a satisfactory CBA is already within the STB’s toolkit in the form of the waybill, and other data collection activities. Among other things, a waybill currently contains the following data: (1) the originating and terminating freight stations; (2) the railroads participating in the movement; (3) the points of all railroad interchanges; (4) the number and type of cars; (5) the car initial and number; (6) the movement weight in hundredweight; (7) the commodity; and (8) the freight revenue. Moreover, the Board recently released a proposal to increase the rate at which the Board samples waybill data and AFPM believes the increased sampling rates proposed provide sufficient data to perform any CBA.

As previously mentioned, characteristics of the freight rail industry and regulation can make CBAs in this area especially uncertain and contestable, and economic regulation effects depend on human and market reactions. Moreover, requisite CBAs that are uncertain and contestable are more likely to disguise agency discretion as objective fact and provide the opportunity for interested parties to challenge socially beneficial regulation with their own subjective, self-interested analyses. AFPM remains concerned that AAR’s petition is nothing more than a thinly veiled attempt to delay or derail pending rulemakings designed to equalize the negotiating ability of shippers and railroads. STB should recognize this misdirection and deny AAR’s petition.

Application of Analysis

The Board seeks a detailed description of how cost-benefit analysis would apply to a hypothetical rulemaking, using the methods and data sources identified in response to items 1 and 2 above. Specifically, the Board suggests that commenters consider a hypothetical proposed

¹⁷ Rate Reform Task Force, Report to the Surface Transportation Board, April 25, 2019, https://www.stb.gov/stb/rail/Rate_Reform_Task_Force_Report.pdf.



rule to modify the revenue-variable cost (R/VC) percentage used for purposes of market dominance from 180% to 165%.

While AFPM is not in the position to perform a hypothetical CBA, it notes that not all statutory mandates are aimed at improving economic efficiency or remedying market failures; some are geared towards ensuring fairness or the promotion of other policy objectives. Common carrier obligations serve an important function that continues to be integral to the government's oversight of the national rail network, yet do not lend themselves to CBA. Railroads continue to have duties to shippers and the public, and they may not refuse to carry commodities, unless the proper agency of the federal government has relieved them of that obligation.

However, we reiterate that a rule is not needed to perform a CBA. That said, should STB consider a policy that addresses costs and benefits it should operate in the following manner, consistent with Circular A-4:

1. Baseline scenario: Assess current environment and the problem the Board is attempting to resolve and identify any market failures, so it knows whether action is even necessary. This would utilize existing data such as the waybill sample and derivative reports (i.e. Commodity Revenue Stratification Reports). In the example
2. Identify alternatives: Establish rationally bound alternatives.
3. Evaluation of costs and benefits: Perform high-level quantitative and qualitative evaluation of the proposed action and preferred alternative.¹⁸
4. Should this initial analysis breach a STB defined threshold, this CEA could trigger a more thorough CBA to be performed to build on the initial analysis in line with the principles of Circular A-4.

Moreover, STB should limit retrospective analysis to rules that have significant economic impacts and should focus their efforts on rules for which there is reason to believe that the prospective estimates of benefits or costs may differ significantly from those realized. Retrospective analysis can lead to rule modifications that increase net societal benefits. However, retrospective analysis itself is costly, and if every open rule were subject to such analysis, the costs of the enterprise could exceed the benefits. Agencies should limit retrospective analysis to rules that have significant economic impacts and should focus their efforts on rules for which there is reason to believe that the prospective estimates of benefits or costs may differ significantly from those realized.

Threshold

¹⁸ The Board's market dominance determination already mirrors this process if the quantitative 180% R/VC threshold is exceeded, then the qualitative determination proceeds.



The Board requests information on the threshold for determining the rulemaking proceedings to which any cost-benefit analysis procedures should apply.

AFPM believes that if the Board were to adopt a CBA policy or rule, it should follow established Office of Management and Budget established practice and adopt a \$100,000,000 “economically significant” threshold for review. Under § 3(f)(1) of Executive Order 12866, a regulatory action is considered “economically significant” if it is likely to result in a rule that may have: “an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.”¹⁹ However, as stated previously, the Board does not need to initiate a rulemaking to implement CBA analysis.

IV. CONCLUSION

AFPM understands the desire to consider costs and benefits of regulations. Given STB’s unique position and resources we suggest the Board investigate the more streamlined CEA. However, if the Board adopts a CBA policy, it should be done through guidance and not formal rulemaking. There are plentiful examples of federal agencies that have established models (i.e. SEC) that the Board can emulate if it so desires. Moreover, these existing models rely on the basic tenets of Circular A-4 to include defining the problem, identifying rational alternatives, and establishing reasonable thresholds. This CBA guidance should be prospective in nature and avoid unduly burdensome and costly retrospective analyses.

AFPM supports STB’s recent efforts to streamline their processes as evidenced by their Rate Case Reform Task Force (“RRTF”) and various ongoing rulemakings. However, this petition is a thinly veiled attempt to stunt that effort, and AFPM strongly opposes AAR’s call for rulemaking. We encourage STB to promptly move forward with these regulations and recognize AAR’s petition as a backdoor effort to make STB’s process more complex and burdensome, delaying or postponing the rebalancing of economic power.

Sincerely,

Rob Benedict
Senior Director, Transportation & Infrastructure

¹⁹ See 58 Fed Reg. 51735, Ex. Ord. No. 12866, Regulatory Planning and Review, September 30, 1993.