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Surface Transportation Board
395 E Street, SW
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RE: Petition for Leave to Submit Reply and Reply Ex Parte Docket No. 752, Petition for Rulemaking

On March 14, 2019 the Association of American Railroads submitted Petition for Rulemaking in the above referenced docket. The American Fuel & Petrochemicals Manufacturers (“AFPM”) was engaged with a coalition to submit reply; however, at a late date, it was determined there were material differences between the coalition’s reply and AFPM’s core principles. Given the importance of this issue, AFPM respectfully requests leave to late file reply in this proceeding.

The American Fuel & Petrochemical Manufacturers (“AFPM”) hereby reply to the Petition for Rulemaking (“petition”) filed by the Association of American Railroads (“AAR”) in docket Ex Parte No. 752 on March 14, 2019. AAR has petitioned the Surface Transportation Board (“STB” or “Board”), 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. As explained below, AFPM generally supports cost benefit analyses as an integral part of agency decision-making; however, we oppose AAR’s petition for rulemaking.

I. Introduction

AFPM is a national trade association representing virtually all U.S. refining and petrochemical manufacturing capacity. Our members produce the gasoline, diesel, and jet fuel that drive the modern economy, as well as the chemical building blocks that are used to make the 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 significant infrastructure investments to support and improve the efficiency of the transportation system. AFPM supports informed, risk-based, and cost-justified approaches to developing, reviewing, and revising regulations related to transportation, and is committed to working with STB on this issue.

II. The petition is an attempt to delay or slow the Board’s progress

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.



AFPM supports many of the arguments made within the Joint Shippers'¹ reply to AAR's petition. Like the Joint Shippers, AFPM urges the Board not to adopt AAR's petition until the Board can assess its ability to conduct timely, independent analyses. Moreover, the Board should not delay any pending rulemakings including Reciprocal Switching, EP 711 (Sub-No. 1) or Expanding Access to Rate Relief; EP 665 (Sub-No. 2) while considering AAR's petition.

The Board should be commended for its accomplishments in 2018 given its full-time equivalent employee level of 118² and its continued implementation of the Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110 mandates. The Office of Economics ("OE"), that AAR believes can produce detailed and lengthy CBA already provides economic, cost, financial, and engineering analyses for the Board. OE also makes available to the public a variety of statistical and financial analyses of the railroad industry. The office manages the Board-prescribed Uniform System of Accounts and cost accounting systems. OE also audits Class I carriers to ensure their compliance with these systems and uses the data provided by carriers to develop and disseminate the Uniform Rail Costing System. OE also provides the Carload Waybill Sample to parties who meet the rules for release of waybill data codified at 49 C.F.R § 1244.9. The OE staff includes dedicated economists, accountants, financial analysts, engineers, transportation industry analysts and computer programmers, but not nearly enough personnel to conduct robust and timely CBA that goes beyond the good work STB is presently accomplishing.

AFPM is pleased with the progress made in seating two new members this year to build a quorum at STB. A fully staffed STB is essential to achieving freight rail policy reforms that will streamline overly burdensome regulatory procedures and promote greater competition in the rail sector. Unfortunately, the AAR petition is merely an attempt to delay and slow the Board's momentum by implementing onerous and often duplicative CBA requirements. The Board already monitors the financial condition of railroads as part of its oversight of the rail industry. The agency prescribes a uniform accounting system³ for railroads to use for regulatory purposes. The Board requires Class I railroads to submit quarterly and annual reports containing financial and operating statistics, including employment and traffic data.⁴

III. The Board is uniquely suited in its role as economic regulator

AFPM supports the Joint Shippers' argument that the Board must conduct CBA analyses that are consistent with its implementing statute. Not all statutory mandates are aimed at improving economic efficiency or remedying market failures; some are geared towards ensuring fairness or the promotion of

¹ See Joint Shippers Reply to Petition for Rulemaking, Docket No. EP 752.

² Performance and Accountability Report Fiscal Year 2018, Surface Transportation Board, <https://www.stb.gov/stb/docs/PAR/STBFY2018PAR.pdf>.

³ 49 U.S.C. §§ 11141-43, 11161-64, 1200-1201.

⁴ 49 U.S.C. §§ 11145, 1241-1246, 1248.



other policy objectives. For example, the common carrier obligation does not lend itself to being quantified in a CBA. Another salient example is the Board's recent proposal in Reciprocal Switching, EP 711 (Sub-No. 1) that relies on the two "prongs" for prescription of reciprocal switching. Statute sets out two prongs by which the Board can order reciprocal switching: where reciprocal switching is practicable and in the public interest, or where reciprocal switching is necessary to provide competitive rail service.⁵ Indeed, in its Notice of Proposed Rulemaking in reciprocal switching, the Board explains why CBA would be difficult given that the criteria cannot be applied on a one-size-fits-all basis:

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 RTP, we believe this approach would be fairer than both the current regulations as well as the NITL proposal in EP 711. Specifically, as discussed below, a particularized analysis is warranted.⁶

Adding additional requirements to perform a lengthy and costly analysis of the Reciprocal Switching rule is duplicative and wasteful.

AFPM and its members are subject to environmental, health, and safety regulations. Federal regulators including the Environmental Protection Agency, the Department of Labor, and the Department of Homeland Security, and others perform CBAs in their rulemaking processes. However, those federal agencies are not the economic regulators of an industry. Shippers responses to economic regulations, like those from STB, are typically difficult to quantify through a CBA. Moreover, the railroads serve 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. CBA that attempt to quantify the broad behavioral responses of firms to economic regulations across multiple segments of the economy are subject to great uncertainty.

IV. The Board does not need to initiate a rulemaking to implement CBA analysis

AFPM is generally in favor of rulemaking over policy or guidance to effect change because regulatory actions tend to be more permanent, resilient and legally defensible than policies or guidance documents. We are in favor of regulatory approaches that provide a clear understanding and certainty of the methodology that will be used. However, a regulation is not needed for the board to implement cost benefit analysis in their internal rulemaking processes. In fact, most regulatory agencies conduct CBA

⁵ See 49 U.S.C. § 11102 (c)

⁶ See Docket No. [Docket No. EP 711; Docket No. EP 711 (Sub-No. 1), "Petition for Rulemaking To Adopt Revised Competitive Switching Rules; Reciprocal Switching," 81 Fed. Reg. 149, proposed August 3, 2016, <https://www.regulations.gov/document?D=STB-2016-0120-0001>.



per the guidelines in Executive Order (“EO”) 12866 and the subsequent EOs amending EO 12866 and have not initiated a formal rulemaking related to CBA.⁷

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. The SEC Memorandum, attached to the AAR’s petition as Exhibit C, provides guidance on the identification of benefits and costs that are most pertinent to the financial sector and identifies difficulties with reliability estimating those factors and how to handle those situations. AFPM emphasizes the unique role the Board plays in the economic regulations of the nation’s freight rail network, a system complex and nuanced like the nation’s financial industry and encourages the Board to investigate a streamlined CBA analysis system.

V. Any CBA policy should be forward looking

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.

Here too, Reciprocal Switching, EP 711 (Sub-No. 1) provides an example of unnecessary retroactive review. In 2008, the Board commissioned Christensen and Associates, Inc. to perform an independent study to examine competitive access issues, and in 2009, that firm issued a report analyzing a variety of proposals that might enhance competition.⁸ The report indicated that reciprocal switching likely would result in potential gains with respect to the economies of density and only few effects with respect to other economic measures; would “most likely” result in competitive responses by rail carriers; and would “most likely” produce shipper gains. Reciprocal switching, the Christensen Competition Report concluded, would have a “lower potential of leading to adverse changes to industry structure, costs, and operations, and additionally have greater likelihood [] of resolving shipper concerns via competitive market responses.” Following the report’s delivery, on July 30, 2009, the Board announced that Christensen Associates would begin updating its November 2008 study by incorporating the latest available economic data available at the time and by making technical corrections to the original report.⁹ The STB already

⁷ See https://www.reginfo.gov/public/jsp/Utilities/EO_Redirect.myjsp

⁸ Laurits R. Christensen Associates, Inc. A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals That Might Enhance Competition (rev. 2009), <http://Irca.com/projects/railroadstudy>.

⁹ Surface Transportation Board FY 2009 Annual Report, pg. 37, <https://www.stb.gov/stb/docs/AnnualReports/Annual%20Report%20-%202009.pdf>.



engages in retrospective review, there is no need to codify it in rulemaking. Indeed, in 2009 again, the Board's OE issued its own *Study of Railroad Rates: 1985-2007* summarizing OE's latest findings on trends in freight railroad rates and updating OE's measurement of its rail-rate index through 2007.¹⁰

Any changes to STB's rulemaking process should be forward-looking to ensure that the new rules are workable and accessible.

VI. The AAR should institute CBA

While AAR's internal processes are not subject to STB regulations, we would be remiss not to address the lack of CBA within AAR's own Tank Car Committee ("TCC"). While the AAR's Safety & Operations Department Committee Handbook, which governs the operation of AAR Committees, includes requirements for committees to conduct CBA, the TCC is the only committee explicitly excluded from such requirements. The TCC enacts tank car standards through their Interchange Standards and is controlled through the railroad members who maintain a supermajority position within the committee. However, tank cars are owned and leased by rail shippers, not the carriers. The only committee that does not require economic justification for decisions is the one in which the railroads carry no cost burden. The AAR should consider implementing the same CBA requirement for all of their committees consistent with their petition.

VII. Conclusion

AFPM supports STB's recent efforts to streamline their processes as evidenced by their Rate Case Reform Task Force ("RRTF") constituted in April 2017. While we applaud the efforts the Board has taken to maximize efficiency, we are concerned that STB has placed further rulemakings on the back burner. Several rulemakings including Expanding Access to Rate Relief, EP 665 (Sub-No. 2) and Reciprocal Switching, EP 711 (Sub-No. 1) have already been years in the making, with no timetable for review. Many of the rulemakings pending before the board would balance AAR's disproportionate voice and influence. 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

¹⁰ Ibid.



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