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March 20, 2020

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: EP 752, Association of American Railroads' Reply Comments

Dear Ms. Brown:

Enclosed for filing in the above-referenced proceeding is the Association of American Railroads' ("AAR's") reply to comments filed in response to the Board's November 4, 2019 Solicitation of Information.

Thank you for your assistance in this matter.

Respectfully,

/s/ Cynthia E. Richman

Cynthia E. Richman

Counsel for the Association of American Railroads

Enclosure

BEFORE THE SURFACE TRANSPORTATION BOARD

Ex Parte No. 752

REPLY COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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March 20, 2020

INTRODUCTION

Virtually all of the comments the Board has received—including comments from an academic expert on regulation, a leading shipper’s group, a small business association, and dozens of members of Congress—agree that cost-benefit analysis is a well-established and important tool that will help the Board do its job more effectively. Cost-benefit analysis helps agencies articulate the purpose of regulation and weigh potential outcomes, is a widely accepted feature of modern administrative law, and would help ensure that the Board’s rulemakings fulfill its statutory objectives. *See* AAR Response to Solicitation of Information, EP 752 (STB served Jan. 31, 2020) (“AAR Comments”); AAR Petition for Rulemaking, EP 752 (STB served Mar. 14, 2019). The messages from the commenters are loud and clear—cost-benefit analysis is an irreplaceable part of sound federal policymaking. The Board should incorporate cost-benefit analysis to help ensure that it “manage[s] the costs associated with [its] imposition of private expenditures required to comply with [its] regulations.” Exec. Order 13,771 § 1, 82 Fed. Reg. 9,339, 9,339 (Feb. 3, 2017).

AAR submits this reply to respond to the issues that remain despite the consensus among commenters. First, a few shippers’ groups incorrectly state that cost-benefit analysis is expensive and that it may exceed the Board’s capabilities. As AAR has explained, the Board is already well-positioned to incorporate cost-benefit analysis into its rulemakings, and doing so will make the Board’s efforts more efficient and effective.

Second, the American Fuel & Petrochemical Manufacturers (“AFPM”) proposes that the Board should consider “cost-effectiveness analysis” as an alternative to cost-benefit analysis, and the American Chemistry Council (“ACC”) proposes that the Board should use ACC’s “prototype benchmarking model” to assess market failures in the freight-rail industry. Both proposals are flawed. Although cost-effectiveness analysis can be a useful tool, it is not an adequate substitute

for a comprehensive analysis of a rule's potential costs and benefits. And ACC's proposal is not responsive to the Board's solicitation. The "[p]rototype benchmarking model" is not a relevant framework and ACC's comments simply rehash positions it has taken in other proceedings. In any event, AAR has already shown that the model is fundamentally flawed.

Third, some commenters suggest that the Board should adopt a strict numerical threshold for cost-benefit analysis. The Board should reject this overly simplistic approach, as it is inconsistent with the best practices of executive agencies as well as Congress's flexible definition of "major rules" in the Congressional Review Act.

Finally, two shippers' groups argue that the Board should deny AAR's petition because of AAR's objections to unrelated pending proceedings at the Board. But disputes about the Board's other pending proposals are no reason to distract the Board from the importance of cost-benefit analysis to sound agency decisionmaking, the widespread agreement that the Board's rulemakings would benefit from cost-benefit analysis, or the clear consensus about the general methods the Board should employ when it proposes and adopts new rules.

The Board should grant AAR's petition.

ARGUMENT

A. The Advantages Of Cost-Benefit Analysis Are Undisputed

The comments received by the Board reveal broad support for cost-benefit analysis and widespread agreement about how the Board can incorporate cost-benefit analysis into its rulemakings. For example, ACC "supports the use of cost-benefit analysis" because such analysis "can enhance the transparency of the regulatory process, create a consistent framework for data collection and the identification of data gaps and uncertainties, allow for a useful comparison of alternative approaches, and establish a basis for the measurement of net benefits." ACC Comment Letter, EP 752, at 1 (STB served Jan. 31, 2020) ("ACC Comments"). Likewise,

the National Coal Transportation Association (“NCTA”) also “supports the use of [cost-benefit analysis] in appropriate rulemaking proceedings that are useful to the Board.” NCTA Comment Letter, EP 752, at 3 (STB served Jan. 31, 2020) (“NCTA Comments”). And AFPM “understands the desire to consider costs and benefits of regulations.” AFPM Comment Letter, EP 752, at 9 (STB served Jan. 31, 2020) (“AFPM Comments”).

Commenters also agree that “[t]he framework for benefit-cost analysis most commonly employed by federal agencies is based on the analytical principles and requirements articulated in President Clinton’s Executive Order 12866 (which has been reaffirmed by every president since) and OMB Circular A-4.” Comment Letter of Professor Jerry Ellig, EP 752, at 3 (STB served Jan. 31, 2020) (footnotes omitted). AFPM states that “robust economic analysis should have at least four basic features,” including: (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.” AFPM Comments at 4–5; *see also id.* at 8 (discussing “the principles of [OMB] Circular A-4”). ACC also believes the Board should: (1) “Assess the problem the agency is trying to solve”; (2) “Identify alternative solutions”; and (3) “Define and estimate the benefits and costs of each alternative.” ACC Comments at 2; *see also id.* (discussing the methods outlined in Executive Order 12,866 and OMB Circular A-4).

In short, there is broad agreement that cost-benefit analysis is an important tool for sound policymaking and that the basic structure of cost-benefit analysis is well-settled. Although differences remain over secondary points, as discussed below, this widely accepted view

illustrates that the only question should be how, not whether, the Board should incorporate cost-benefit analysis into its rulemakings.

B. The Board Is Fully Capable Of Implementing Cost-Benefit Analysis

Two commenters argue that the Board should be cautious about implementing cost-benefit analysis because it is a small agency with limited funds. *See* NCTA Comments at 3; AFPM Comments at 6. But the Board is more than capable of incorporating cost-benefit analysis into its rulemakings already, and indeed doing so will ultimately make the Board’s proceedings more efficient in the long run, in addition to improving the effectiveness of the rules it adopts. And cost-benefit analysis is a flexible framework that can be tailored to the size and sophistication of the problem at issue.

As the experience of other agencies has shown, cost-benefit analysis need not impose prohibitive costs on the Board. AAR Comments at 6; Verified Statement of David Zorn, PhD, *in* AAR Comments, at 3, 5–7, 41. The Board already has an Office of Economics with economists who can draw on the extensive experience and guidance of fellow agencies and the Office of Management and Budget (“OMB”). *See* AAR Comments at 9 (discussing *Memorandum of Understanding Between OIRA and the CFTC* (May 9, 2012), <https://tinyurl.com/ydhqegw5>). Further, the Board already has access to many types of data collected on an ongoing basis. This data is likely to prove useful in analyzing the costs and benefits of its rulemakings and reducing the time and effort necessary for analyzing proposed rules. *See* AAR Comments at 16 (providing a non-exhaustive list of data sources, including carload waybill data, uniform rail costing system data, annual R-1 reports and submitted financial data, rail service data, and Freight Analysis Framework data); *see also* Verified Statement of David Zorn, PhD, *in* AAR Comments, at 20–21 (same).

And any investment that the Board does make in cost-benefit analysis would be worthwhile. Cost-benefit analysis will help ensure that rules are proposed and adopted with the critical information Board members need to make sound policy. Failure to consider costs and benefits, on the other hand, places the Board outside of the mainstream of best practices at federal agencies and opens the door to unnecessary and wasteful litigation, which undermines the Board's goals. See Matthew J. Warren, *Judicial Review of Surface Transportation Board Decisions: An Empirical Analysis*, 45 Transp. L.J. 1, 22–23 (2018); see also Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 Duke L.J. 1593, 1607 n.62 (2019) (explaining that “independent agencies['] . . . rules must withstand judicial review,” which “will continue to push them to conduct and rely on CBA in decisionmaking”).

If the Board does ultimately determine it would benefit from additional resources, AAR would fully support such a request. AAR understands that the Board's most recent budget request seeks additional funding to support, among other things, “added research and analytical capabilities to continue to enhance the Board's evidence-based decision-making.” Surface Transportation Board, *Budget Request: Fiscal Year 2021*, at 5, <https://tinyurl.com/rp5srux>. The President's most recent budget also includes additional funding for the Board, noting that the “request also seeks resources to develop the STB's research and analytical capabilities to enhance the Board's evidence-based decision-making.” OMB, *President's Budget FY 2021, Appendix*, at 1333, <https://tinyurl.com/ujhr683>. And leveraging additional resources would not necessarily require an expansion of the Board's staff; the Board could consider other solutions, such as arrangements with other agencies to utilize their economists on a reimbursable basis.

C. Cost-Effectiveness Analysis Is An Inadequate Substitute

AFPM argues that one way to reduce costs would be to adopt “cost-effectiveness analysis” because it is “less burdensome than full-scale [cost-benefit analysis].” AFPM

Comments at 5. A cost-effectiveness analysis estimates the costs of alternative ways to achieve the same “primary outcome,” and can be a helpful tool “to identify options that achieve the most effective use of the resources available without requiring monetization of all of [the] relevant benefits or costs.” OMB Circular A-4 at 10–12 (Sept. 17, 2003). A cost-effectiveness analysis does not always require actual monetization of costs and benefits for a qualitative review.

AAR agrees that the Board should utilize all of the tools that OMB and other agencies have developed to analyze proposed rules, and that where quantification is impracticable the Board should consider costs and benefits qualitatively. AAR Comments at 12. Relatively simple rules should require only relatively simple analyses, and in appropriate circumstances the cost-effectiveness framework might be the best way for the Board to proceed.

That cost-effectiveness analysis might be a useful tool in some rulemakings, however, does not negate the need for a more comprehensive cost-benefit analysis in other rulemakings. As AAR has explained—and as OMB and other agencies agree—agencies should strive to quantify and monetize the specific costs and benefits of proposed and final rules whenever possible. *See* AAR Comments at 11–12; Circular A-4 at 9–10, 26, 45; SEC, *Memo: Current Guidance on Economic Analysis in SEC Rulemakings*, at 9–10, 12–13 (Mar. 16, 2012), <https://tinyurl.com/y74qfq76>. It is critical that the Board has the information it needs to make well-informed decisions when deciding whether to adopt rules that have significant impacts on railroads, shippers, and the broader economy. AFPM’s proposal that the Board should consider cost-effectiveness analysis *instead of* cost-benefit analysis would deny the Board this vital information.

Moreover, adopting cost-effectiveness analysis as a less-expensive substitute for cost-benefit analysis is inconsistent with OMB’s guidance on how these two methods should relate to

one another. “A major rulemaking should be supported by *both* types of analysis wherever possible.” Circular A-4 at 9 (emphasis added). And, contrary to AFPM’s assumption that cost-effectiveness analysis is inherently simpler or avoids the need to monetize or quantify costs, agencies should attempt to quantify “benefits, costs and effectiveness” in *all* of their economic analyses, including cost-effectiveness analyses. *Id.* at 9–10. Only “[i]n unusual cases” where quantification is impossible should an agency’s analysis include only “a qualitative discussion of the issues and evidence.” *Id.* at 10. And “[w]here regulation may yield several different beneficial outcomes, a cost-effectiveness comparison becomes more difficult to interpret because there is more than one measure of effectiveness to incorporate in the analysis.” *Id.* at 12.

D. The Board Should Not Adopt ACC’s “Prototype” Benchmarking Model

Next, ACC argues that the Board should use ACC’s “prototype benchmarking model” that purportedly would “yield[] information that could be useful in Board analysis.” ACC Comments at 3. This proposal is not responsive to the Board’s solicitation. Rather, it simply regurgitates ACC’s comments in response to the Board’s Final Offer Rate Review (EP 755) and Railroad Revenue Adequacy (EP 761) proposals. *See* ACC Comment Letter, EP 755, at 3, 19–25 (STB served Nov. 12, 2019) (“ACC Rate Review Comments”); ACC Written Testimony, EP 761, at 11–15, 18–29 (STB served Nov. 16, 2019). ACC’s proposal goes well beyond the scope of this proceeding by suggesting that the Board approve, in advance, the use of a methodology that ACC itself has previously recognized would require notice and comment rulemaking. ACC Rate Review Comments at 24. And AAR has already addressed the many substantive problems with ACC’s approach in the appropriate forums. *See, e.g.*, Verified Statement of Joseph P. Kalt, PhD & David Reishus, PhD, *in* AAR Supplemental Comments, EP 761 (filed Feb. 13, 2020); AAR Reply Comments, EP 755 (STB served Jan. 10, 2020); AAR Testimony, EP 761 (STB served Dec. 10, 2019).

E. The Board Should Not Employ An Overly Simplistic Numerical Threshold

The Board should not rely solely on a dollar figure to assess which of its rules are important enough to require that Board members have the most comprehensive and useful information when they make their decisions. As AAR explained in its opening comments, if the Board adopts a threshold for cost-benefit analysis, then it should follow the approach of Executive Order 12,866 and the Congressional Review Act. AAR Comments at 20–22. ACC and AFPM erroneously suggest that under the approach of Executive Order 12,866, the threshold should include *only* regulations that have an annual effect on the economy of at least \$100 million. *See, e.g.*, ACC Comments at 6–7; AFPM Comments at 9. But this would disregard the several other categories of rules that Executive Order 12,866 and the Congressional Review Act include, and for which the Board might also determine that cost-benefit analysis is necessary. Accordingly, any threshold should also include proposed rules that have a material effect on the economy, raise novel legal or policy issues, are inconsistent with actions by other agencies, *or* have an effect on the economy of \$100 million or more. AAR Comments at 22.

F. Disputes Regarding Other Pending Proceedings Are No Reason To Delay The Board’s Use Of Cost-Benefit Analysis

Finally, NCTA and AFPM assert that AAR’s petition on the ground is an attempt “to delay . . . pending rulemaking proceedings.” NCTA Comments at 3; *see also* AFPM Comments at 9 (asserting that AAR’s “petition is a thinly veiled attempt to stunt” “various ongoing rulemakings”). AAR initiated this proceeding—and continues to provide detailed analysis and commentary on it—to assist the Board in incorporating sound regulatory policy in *all* of its rulemakings, regardless of which stakeholders those rulemakings may ultimately benefit. Disputes about a few pending proceedings should not distract the Board from the importance of incorporating cost-benefit analysis into its rulemaking procedures more generally.

CONCLUSION

Federal agencies, academics, and presidents from both political parties have long recognized the importance of cost-benefit analysis in agency decisionmaking. Just a few weeks ago, more than twenty U.S. Senators wrote the President to express their view that the Office of Information and Regulatory Affairs “should review the significant regulatory actions of independent agencies” to ensure that they “rigorously assess the costs and benefits of their significant regulatory actions.” Letter from Sen. James Lankford et al. (Mar. 5, 2020), <https://tinyurl.com/usyoz5k>. And in this proceeding, railroads and shippers alike agree that cost-benefit analysis is an important tool that can help the Board do its job more effectively.

For all of these reasons, and those explained in AAR’s petition and opening comments in response to the Board’s solicitation of information, the Board should incorporate cost-benefit analysis into its rulemaking procedures.

Dated: March 20, 2020 Respectfully submitted,

/s/ Cynthia E. Richman

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