

**BEFORE THE
SURFACE TRANSPORTATION BOARD****ENTERED**
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Ex Parte No. 752

PETITION FOR RULEMAKING

REPLY OF THE AMERICAN FOREST & PAPER ASSOCIATION

The American Forest & Paper Association ("AF&PA")¹ hereby replies to the Petition For Rulemaking filed by the Association of American Railroads ("AAR") in the above-captioned docket on March 14, 2019 (the "Petition"). AAR has petitioned the Surface Transportation Board ("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") for "any rule," other than those described in § 1110.3(a), to consider the cumulative impacts of any such proposed rule, and to rely upon the most reliable and up-to-date data that is reasonably obtainable in such analyses.

¹ AF&PA serves to advance a sustainable U.S. pulp, paper, packaging, tissue, and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA's member companies make products essential for everyday life from renewable and recyclable resources. The forest products industry accounts for approximately 4 percent of the total U.S. manufacturing GDP, manufactures over \$200 billion in products annually, and employs approximately 950,000 men and women. The industry meets a payroll of approximately \$50 billion annually and is among the top 10 manufacturing sector employers in 45 states.

INTRODUCTION AND SUMMARY

AF&PA generally strongly supports the use of CBA to inform appropriate economically significant regulatory decisions, but unfortunately, the AAR proposal is a thinly veiled attempt to delay specific pending rulemakings, particularly the Commodity Exemption Rulemaking (Docket No. EP 704 (Sub. No. 1)) and the Reciprocal Switching Rulemaking (Docket No. EP 711 (Sub. No. 1)), which already have been proposed by the Board and which the AAR Petition targets.² AF&PA's member companies must compete in a fiercely competitive global market and need dependable and efficient rail transportation services in their daily operations. We urge the Board not to delay the critical relief that finalization of these rules can provide due to AAR's proposal, which should not apply to these pending proposed rules even under the very precedent that AAR cites to support its Petition. Fundamental economic logic and fairness supports final Board action to remedy the undue concentration of market power that the railroads exploit in today's highly concentrated railroad market, which, to the detriment of U.S. manufacturers and others, has resulted in higher prices and poorer frequency and quality of service than a competitive free market would provide. If the Board would like to discuss how economic analysis can help support its regulatory decisions to enhance societal well-being, AF&PA would be happy to productively engage with the Board.

ARGUMENT

A. The Board Should Not Delay Pending Rulemakings

No matter how the Board decides to address AAR's Petition, the Board should not allow it to delay the pending rulemakings. Even if the Board were to adopt the

² See Petition, pp. 1, 11, 16-18.

precedent that AAR relies on, the pending rulemakings would be excluded. As Exhibit A to its Petition, AAR attaches the Department of Transportation's new *Policies and Procedures for Rulemaking*, DOT Order 2100.6 (Dec. 20, 2018) ("DOT Order"). DOT has been conducting CBA for over 38 years pursuant to Executive orders,³ and the DOT Order is not a dramatic departure from longstanding practice. Even so, in its applicability section, the DOT Order expressly excludes "***Any rulemakings in which a notice of proposed rulemaking was issued before the effective date of this Order and which was still in progress on that date.***" (DOT Order, Section 2(c)(1)) (emphasis added). Likewise, in Circular A-4, which merely updated the longstanding guidelines of the White House Office of Management and Budget (OMB) for cost-benefit analysis by executive agencies, OMB included an effective date that excluded pending proposed rulemakings.⁴ In considering AAR's petition, the Board should apply the same principle reflected in the DOT Order.

As AAR well knows, the Board is a small agency with limited resources, and performing rigorous CBA requires significant resources, data, expertise and time. If the Board would like to consider going down this path, it first needs the proper resources, data, expertise and time to do so, which requires an adjustment period. That should not be an excuse to delay or undermine the pending rulemakings and the critical relief they can provide to U.S. manufacturers and other shippers. This is consistent with the

³ In 1981, President Reagan issued Executive Order 12291, which among other things, required executive agencies to conduct CBA for "major" rules costing \$100 million or more annually. In 1993, President Clinton replaced E.O. 12291 with E.O. 12866, which continued this requirement for "economically significant" regulations with an annual effect of \$100 million or more and is still in effect.

⁴ See U.S. Office of Management and Budget, Circular A-4 (Sept. 4, 2003), at p. 48 (excluding regulatory analyses for draft proposed rules submitted to OMB before January 1, 2004), available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>

Board's duty to provide "fair and expeditious regulatory decisions when regulation is required."⁵

AAR's one-size-fits-all proposal is an obvious attempt to obstruct the Board from providing needed relief to shippers. It is telling that AAR's Petition would impose its proposed CBA requirement on literally "*any rule*," other than interpretive rules, general statements of policy, and rules relating to agency organization, procedure or practice, which are covered by 49 C.F.R. § 1110.3(a).⁶ Not only does the Petition fail to exclude pending rulemakings, it also would apply to any substantive rule, including legislative rules that are not "economically significant" or not even "significant."⁷ As AAR knows, performing CBA requires substantial resources, expertise and time. Accordingly, under the Executive orders that have required CBA by executive agencies for over 38 years, CBA is only required for a small subset of regulations which are "economically significant," generally having an annual effect on the economy of \$100 million or more. See Executive Order 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993), §§ 3(f)(1), 6(a)(3)(C). Moreover, in Circular A-4, OMB made clear that "transfers" are not counted as either costs or benefits and thus do not trigger the CBA requirement:

"Transfer payments are monetary payments from one group to another that do not affect total resources available to society. . . . The net reduction in the total surplus (consumer plus producer) is a real cost to society, but the transfer from buyers to sellers resulting from a higher price is not a real cost since the net reduction automatically accounts for the transfer from buyers to sellers. . . . ***You should not include transfers in the estimates of the benefits and costs of a regulation.*** Instead, address them in a separate discussion of the

⁵ See 49 U.S.C. § 10101(2).

⁶ Petition, p. 22 (proposed §§ 1110.6(a), (b); 1110.9; 1110.3(c)(2); 1110.10) (emphasis added).

⁷ See Executive Order 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993), §§ 3(f)(1), 6(a)(3)(C) (requiring CBA for "economically significant" regulations); §§ 3(f)(2)-(4), 6(a)(3)(B) (requiring only an informal "assessment" of potential costs and benefits for "significant" regulations).

regulation's distributional effects. Examples of transfer payments include the following:

- Scarcity rents and ***monopoly profits***
- Insurance payments
- Indirect taxes and subsidies"⁸

To the extent that the pending rulemakings would help to remedy the unfair transfers from manufacturers and other shippers to the railroads, those transfers would not normally be addressed in a CBA, but rather in a separate distributional analysis.⁹ Under traditional practice, if a CBA were required, the focus of the CBA would be centered on the reduction of the deadweight loss created by the undue market power exercised by the railroads, which is a net social cost.¹⁰

Finally, AAR's request for the Board to analyze the cumulative impact of "any"¹¹ legislative rule without any limitations, transition period, or resources is a further invitation for gridlock. Analyzing the cumulative regulatory impacts for every proposed legislative rule is outside of standard practice and is not required by OMB Circular A-4. When viewed in context, AAR's bald assertion that "there is no basis for concluding the reforms offered here will create an undue burden or otherwise slow down the Board's regulatory proceedings"¹² simply lacks credibility.

B. Fundamental Economic Logic and Fairness Supports Prompt Board Finalization of the Pending Rulemakings

Fundamental economic logic and fairness supports prompt final Board action to remedy the undue concentration of market power that the railroads exploit in today's

⁸ See U.S. Office of Management and Budget, Circular A-4 (Sept. 17, 2003), at p. 38 (emphasis added).

⁹ See *id.*

¹⁰ See *id.*

¹¹ See Petition, p. 22 (proposed §§ 1110.6(a), (b); 1110.3(c)(2)) (emphasis added).

¹² Petition, p. 18.

highly concentrated railroad market. The railroad's exercise of this undue market power has harmed U.S. manufacturers, workers, consumers and others by leading to higher prices and poorer frequency and quality of service than a competitive free market would provide. Accordingly, AF&PA has actively participated in the Commodity Exemption proceeding (EP 704 (Sub. No. 1)) and has submitted voluminous comments and evidence supporting revocation of the class exemptions for forest and paper products, and the boxcar exemption as applied to rail movement of these same products.¹³

As has been clearly demonstrated in EP 704 (Sub. No. 1), the existing class exemptions for forest and paper products were based on a rail transportation marketplace and regulatory structure that no longer exist, and they are no longer necessary or justifiable. The exemptions for forest and paper products were initially approved in a series of decisions in the late 1980's and early 1990's before major rail mergers that drastically consolidated the railroad market. Over the last 30 years, consolidation in the rail industry has fundamentally altered the prevailing landscape, allowing the railroads to exert market power over shipments of forest and paper products as shown in EP 704 (Sub. No. 1). Revoking the exemptions for forest and paper products would eliminate outdated regulations and ensure that rail shipments of forest and paper products are treated the same as other nonexempt commodities within the Board's jurisdiction. It would allow affected industries recourse to all of the Board's regulatory procedures and is not limited to one rule.

¹³ See AF&PA's Opening Comments (filed July 26, 2016), Reply Comments (filed August 26, 2016), and Supplemental Comments (filed October 3, 2016) in Ex Parte No. 704 (Sub. No. 1).

As AAR is well aware, requiring the Board at this late stage and with no additional resources to perform a detailed analysis of the cumulative impacts of exemption revocation would be an extremely burdensome, time-consuming and speculative exercise for a small agency to predict which Board procedures would be used, and the extent of use, by each impacted industry. Fundamental economic logic and distributional fairness leads to the conclusion that the deadweight loss created by the unfair exercise of market power by the railroads should be significantly reduced, and EP 704 (Sub. No. 1) should be timely finalized. This is consistent with the Board's duties to "ensure the development and continuation of a sound rail transportation system with effective competition . . . ,"¹⁴ "to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers . . . ,"¹⁵ and to make "fair and expeditious decisions when regulation is required."¹⁶

In the same vein, the Board should replace outdated and burdensome rules related to reciprocal switching and rate reasonableness as soon as practical. This includes timely finalizing the reciprocal switching proposal being considering in EP 711 (Sub. No. 1). Expanding reciprocal switching arrangements would allow rail customers to rely on marketplace competition, rather than Board intervention, to address rail rate and service issues. The Board also should adopt an alternative rate reasonableness standard and process that would enable rail customers to avoid the extremely complex, expensive and time-consuming regulatory process involved in large Stand Alone Cost (SAC) cases and the SAC standard that is unworkable for shippers of carload traffic,

¹⁴ 49 U.S.C. § 10101(4).

¹⁵ 49 U.S.C. § 10101(5).

¹⁶ 49 U.S.C. § 10101(2).

both of which undermine the competitiveness of U.S. manufacturers and other rail-dependent industries.

Both the EP 704 and EP 711 rulemakings are at an advanced stage and have included expert analysis to justify their adoption, and in the case of reciprocal switching, an extensive financial impact analysis of the broader NITL proposal is already part of the record.¹⁷ As the DOT Order, standard practice, and basic logic and fairness would dictate, it does not make sense to delay these rulemakings to develop CBA standards, acquire sufficient resources and staff, conduct rigorous CBAs, and subject them to public comment. The Board has more than sufficient information to exercise its expert judgment and timely finalize the pending rulemakings. Delaying the pending rulemakings would harm U.S. manufacturers and others and undermine, not enhance, societal well-being.

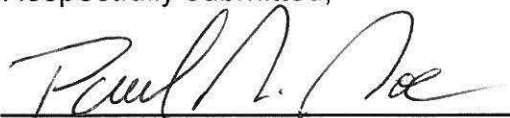
CONCLUSION

AF&PA urges the Board to not delay the long-pending rulemaking proceedings for the implementation of CBA as detailed in the AAR petition, which goes far beyond current practice and is an invitation for gridlock. The use of CBA should pass a net benefits test. The Board would not be in the position to fully implement rigorous CBA until it has the resources, staff, data sources, and time to conduct objective and rigorous analyses if appropriate. If the Board would like to discuss how economic analysis can help support its regulatory decisions to enhance societal well-being, AF&PA would be happy to engage with the Board. AF&PA thanks the Board for its willingness to critically

¹⁷ See NITL financial impact analysis in Ex Parte No. 711, *Petition for Rulemaking To Adopt Revised Competitive Switching Rules*, slip op. (served July 25, 2012).

examine its existing rules and practices.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul R. Noe", written over a horizontal line.

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