

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 752

PETITION FOR RULEMAKING

REPLY OF JOINT SHIPPERS

By their attorneys:

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The “Joint Shippers” hereby reply 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”) 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. For the reasons set forth below, the Petition should be denied.

INTRODUCTION AND SUMMARY

As a general matter, the Joint Shippers support the use of CBAs in appropriate rulemaking proceedings. The Joint Shippers believe that regulatory impact assessments are a key component of the Federal regulatory process. The impact, or cost-benefit, assessments 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. For the Board, such assessments can be particularly useful to understand the broader impacts of railroad market power over captive shippers upon our nation's economy, including impacts on service and deadweight losses resulting from non-competitive rates.

AAR's Petition, however, places the cart before the horse. The Board first must address important questions regarding its ability to conduct meaningful and independent analyses. The Board is a small agency that currently lacks the resources to conduct meaningful CBA on the complex economic regulatory subjects within its jurisdiction. The AAR is keenly aware of this fact and is engaged in a thinly-veiled attempt to exploit it by using this Petition to delay pending rulemaking proceedings to which AAR is opposed. Therefore, although the Joint Shippers support the greater use of CBA in Board rulemaking proceedings, the Board should not delay pending proceedings while it considers how to conduct CBA and acquires the necessary resources to do so.

Although CBA can be valuable a tool in the rulemaking process, there is not a one-size-fits-all approach for all types of rulemakings. The CBA process is a means to an end, not an end in itself. Some types of rulemakings are more amenable to CBAs than others. Statutory mandates also must take precedence over CBA results. That does not mean that a CBA has no place at all in Board rulemakings, but rather that such analyses should be applied with flexibility. The Board must consider these matters in determining how to implement a CBA requirement for rulemaking proceedings before it actually adopts such a requirement through a binding rule.

ARGUMENT

A. **The Board Should Develop CBA Standards and Procedures Initially Through A Policy Statement Or Memoranda, Before It Considers A Rule Requiring CBA.**

The AAR Petition asks the Board to require CBA in rulemaking proceedings through the adoption of specific proposed rules that would be codified in the Code of Federal Regulations. It is premature, however, for the Board to adopt CBA by rulemaking before it has developed procedures and obtained the resources that are necessary to conduct meaningful analyses. Otherwise, the Board will have legally obligated itself to requirements that it presently cannot satisfy. Therefore, the Board should establish CBA standards and procedures initially through a policy statement or internal memorandum – the approach of nearly all agencies undertaking similar rulemakings.

By petitioning the Board to adopt a CBA requirement by regulation and apply it to nearly all types of substantive rulemakings,¹ AAR is asking the Board to go down a path that no other independent agency has followed and that even the executive branch agencies do not uniformly follow. No other agency, either executive branch or independent, appears to have adopted rules comparable to those that AAR has proposed.² Rather, they have waded into the CBA process through policy statements or internal memoranda, typically as part of general rulemaking guidelines. The Joint Shippers urge the Board initially to consider a CBA requirement through these more typical means before it considers adopting a CBA requirement by rule.

¹ The only excluded proceedings are those in 49 C.F.R. § 1110.3(a), which encompasses “[i]nterpretive rules, general statements of policy, and rules relating to organization, procedure, or practice....”

² The Joint Shippers have identified only one agency that even has codified a portion of its CBA requirement in the CFR, namely, the Federal Communications Commission through the Order attached as Exhibit D to the AAR Petition. The FCC rule identifies cost-benefit analysis for rulemaking proceedings as a function of the newly-created Office of Economics and Analytics.

The AAR's proposed rules also go beyond what other agencies have done in another significant respect. Most agencies only perform a CBA for rulemakings that will have an annual effect on the economy of at least \$100 million. AAR would have the Board perform a CBA on all rulemakings regardless of their annual economic effect. Given the difficulty of performing CBAs on economic regulations and the substantial resource requirements to do so, any CBA policy adopted by the Board should exclude CBAs for rulemakings below the \$100 million impact threshold that other agencies have adopted.

If the Board decides to adopt a CBA policy, the Joint Shippers commend to the Board the memoranda approach taken by the Securities and Exchange Commission ("SEC") which is attached to the AAR Petition as Exhibit C. The SEC is one of the few independent agencies that has opted to employ CBA in its rulemaking proceedings. Notably, however, the SEC has not codified CBA as a requirement in its rules. Instead, over the course of a 17-page memorandum, the SEC has developed detailed guidance on the economic analyses it will conduct in rulemakings. Although the SEC guidance generally follows the approach in OMB Circular A-4,³ which provides guidance for the conduct of CBAs by executive branch agencies, the SEC addresses that approach within the context of its specific statutory mission. For example, the SEC Memorandum provides guidance on the identification of benefits and costs that are most pertinent to the financial services industry and discusses the difficulties with reliably estimating those factors and how to handle those situations.⁴ The Board would benefit from taking a similar approach.

³ OMB Circular A-4 (Sept. 17, 2003), available at <https://tinyurl.com/yaork9v2>.

⁴ Petition, Ex. C, pp. 10-14.

Notably, the Department of Transportation (“DOT”) has not codified a CBA requirement in any of its rules, nor have any of the agencies under DOT’s umbrella. Rather, DOT has implemented CBA through issuance of a policy statement.⁵ CBA is but one element of the DOT Order which also specifies policies that govern the development and issuance of DOT regulations, the division of responsibilities across DOT offices, detailed procedures for all stages in the rulemaking process, and policies regarding public contacts at each stage of the process. This DOT Order is commendable for its holistic approach to incorporating CBA into the rulemaking process.

B. The Board Must Conduct A CBA Consistent With Its Implementing Statute.

Any CBA requirement that the Board adopts, whether by rule, policy statement or memorandum, must carefully consider the policies and mandates of the ICC Termination Act (“ICCTA”) and implement CBA in a holistic manner that is consistent with them. Conventional CBA procedures and outcomes are not always consistent with statutory policies and mandates. Not all statutory policies and mandates are intended to improve economic efficiency or remedy market failures; some are designed to ensure fairness, reduce risks to a level that policymakers have decided is desirable even when below the economically efficient level, or promote some other policy objective.⁶ In the case of the ICCTA, the common carrier obligation and the multiple and sometimes competing rail transportation policies highlight the most prominent statutory mandates that may not always be consistent with CBA results.⁷

⁵ *Policies and Procedures for Rulemakings* (“DOT Order”), DOT Order 2100.6 (Dec. 20, 2018) (attached to AAR Petition as Exhibit A).

⁶ Jerry Ellig, *Why and How Independent Agencies Should Conduct Regulatory Impact Analysis*, 29 Cornell J. L. & Pol’y 1, 17 (2018).

⁷ See 49 U.S.C. §§ 10101 (rail transportation policies) and 11101 (common carrier obligation).

Docket No. EP 711 (Sub-No. 1), *Reciprocal Switching* (served July 27, 2016), illustrates the need to accommodate multiple statutory mandates in a rulemaking proceeding. The Board's proposals in that rulemaking implement the statutory standards for reciprocal switching at 49 U.S.C. § 11102(c)(1) and the national rail transportation policies at § 10101(1, 2, 4, 5, 7 & 12), which seek to rely upon competition to the maximum extent practicable. Through those statutory provisions, Congress has determined that switching should be granted when "practicable and in the public interest" or "necessary to provide competitive rail service." The Board has proposed to implement the "public interest" standard by conducting a form of CBA upon each specific request for switching, thereby obviating the need for a CBA on the rule itself (*see* proposed § 1145.2(a)(1)(iii)). The Board has proposed to implement the "necessary to provide competitive rail service" standard by determining whether the incumbent carrier possesses market dominance which constitutes a finding that there are no effective competitive alternatives to a rail carrier (*see* proposed § 1145.2(a)(2)(ii)). That same market dominance standard also is a statutory prerequisite for rate regulation. *See* 49 U.S.C. § 10707(a). Thus, these two standards for reciprocal switching reflect policy judgments that Congress has made through the statute as to when competitive rail service is necessary, which lessens the role and significance of a CBA.

This situation is not unique to the Board. Other agencies also have statutory mandates which they have reconciled with CBA through detailed guidelines for conducting rulemaking proceedings. For example, the Commodity Futures Trading Commission has adopted rulemaking guidelines that expressly acknowledge "[q]uantitative benefits need not always be

greater than costs because there may be a statutory mandate or policy rationale behind the rule.”⁸

The Board should include a similar qualification for any CBA procedures that it may adopt and it should expressly identify statutory policies and mandates that may not be consistent with CBA outcomes.

C. The Board Must Consider Resource Needs And Other Factors That May Limit Its Ability To Conduct A Meaningful And Independent CBA.

The Board should not incorporate CBA into rulemaking proceedings without first ensuring it has the resources and data to conduct truly independent analyses, and the flexibility and capability to address the challenges of conducting a meaningful CBA on economic regulations.

1. Adequate resources and independent data sources are critical to conducting an independent and meaningful CBA.

A recent Congressional Research Service report cautioned that:

Presidential and congressional requirements for [CBA] should also recognize that data availability may be an implementation issue, and that additional resources may be necessary for the agencies conducting these analyses. In some cases, the data that agencies need to estimate the costs and benefits of their rules may not exist, or may only be available from regulated entities. Although there is no “typical” [CBA] (just as there is no “typical” rule), the cost of conducting many individual regulatory analyses has been in the hundreds of thousands of dollars. If more agencies were required to prepare more detailed analyses for more rules, it is likely that

⁸ Office of the Inspector General, U.S. Commodity Futures Trading Commission, “A Review of Cost-Benefit Analyses Performed by the Commodity Futures Trading Commission in Connection with Rulemakings Undertaken Pursuant to the Dodd-Frank Act,” June 13, 2011, Ex. 2, pp. 6-7, available at http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oig_investigation_061311.pdf.

the agencies would make the argument that they would be unable to do so without additional resources.⁹

Performing CBAs properly will impose more demands upon the Board's limited personnel and financial resources. A 1997 study by the Congressional Budget Office concluded that the median cost of 85 CBAs conducted between 1990 and 1996 was \$270,000, but some of the analyses cost more than \$1 million.¹⁰ We are now over two decades beyond that study period which suggests much higher costs today.¹¹

The Joint Shippers agree with the AAR that complete, relevant, reliable, and up-to-date data is critical to conduct a meaningful CBA. The Board, however, must not make itself dependent upon data and analyses presented by stakeholders in response to a rulemaking proceeding. A key CBA purpose is to act as an information tool capable of providing an objective assessment of a rule's potential effects. Such independent assessments contrast with advocacy of policies by groups that may "exaggerate or minimize risks, costs, or likely outcomes of a certain regulation."¹² Over-reliance upon the participants in a rulemaking proceeding to provide quality data and analysis for a CBA jeopardizes that independence and objectivity.

⁹ Maeve P. Carey, Cong. Research Serv., R41974, *Cost-Benefit and Other Analysis Requirements in the Rulemaking Process* 30 (Dec. 9, 2014) (footnotes omitted) (attached as Ex. 2).

¹⁰ Congressional Budget Office, *Regulatory Impact Analysis: Costs at Selected Agencies and Implications for the Legislative Process*, March 1997, available at <http://www.cbo.gov/ftpdocs/40xx/doc4015/1997doc04-Entire.pdf>.

¹¹ For example, the NITL spent six figures just on economic consultants to perform the financial impact analysis requested by the Board in Ex Parte No. 711, *Petition for Rulemaking To Adopt Revised Competitive Switching Rules*, slip op. (served July 25, 2012), which was narrower in scope than a full CBA.

¹² Perkins and Carey, p. 2. (Exhibit 1).

Data availability is of particular concern with respect to the Board's rules. Other than the costed waybill sample ("CWS") and Uniform Rail Costing System ("URCS"), there appear to be few independent data sources on the rail industry. Most relevant data appears to be in the exclusive possession of the railroads themselves. Is the Board willing to require, and the rail industry willing to provide, the level of data necessary to perform a truly independent and objective CBA in appropriate circumstances? Will the Board make that data, including the confidential CWS, available to non-rail stakeholders to review and critique the Board's CBAs when relevant? These are important questions that need to be answered before the Board adopts any form of CBA requirement.

2. CBA is particularly difficult to perform on economic regulations and poses substantial pitfalls that the Board needs flexibility to avoid.

CBA has a role in many types of rulemaking proceedings. The vast majority of federal regulations for which a CBA is conducted, however, pertain to environment, safety and health. A much smaller universe of federal regulation entails economic regulation of an entire industry comparable to the Board's regulation of the rail industry. The former has costs and benefits that are far more amenable to quantification and monetization in a CBA than the latter. For example, the cost of implementing a safety requirement or installing anti-pollution equipment is typically known or readily susceptible to estimation and so are the benefits of doing so. In contrast, behavioral responses to economic regulations are subject to much greater uncertainty and are less susceptible to quantification and monetization. Such difficulties may explain why neither of the two independent agencies with missions most comparable to the Board's, the Federal Energy Regulatory Commission ("FERC") and the Federal Maritime Commission ("FMC"), have adopted CBA requirements for their rulemaking proceedings.

As a threshold matter, when it comes to conducting a CBA on economic regulations, the Board must be careful not to confuse costs and benefits with wealth transfers. For example, rate regulations that reduce the rate a railroad may charge may be perceived as a benefit to the shipper and a cost to the railroad, but in fact constitute a wealth transfer. CBA is a tool used to measure the *net* economic effects, with wealth transfers being a secondary concern.¹³ Reciprocal switching is an example that implicates both concepts. Rate reductions from greater competition are wealth transfers, whereas the economic efficiency benefits of competition to society through the reduction of economic deadweight loss would be the proper focus of a CBA. The net economic effects of regulation require a determination of the most economically efficient outcome for society as a whole, not for the rail industry or its customers.

The Board also must ensure that it has the ability to quantify and monetize the costs and benefits of economic regulations that it is likely to encounter in its rulemaking proceedings with the data available to it. The impacts of economic regulation are substantially dependent upon behavioral responses. Unlike other sectors, the objects of economic regulation are not goods or equipment, but the activities of individuals and firms and their interactions in interrelated markets for intangible goods and services.¹⁴ For example, the effects of changes in rail economic regulations administered by the Board depend upon the behavior and reactions of railroads and their customers in response to those changes, which are hard to accurately predict.¹⁵

Compounding this difficulty is the fact that the shippers which benefit from rail regulations represent scores of different industries which may respond to, or be affected by, the

¹³ David W. Perkins and Maeve P. Carey, Cong. Research Serv., R44813, *Cost-Benefit Analysis and Financial Regulator Rulemaking* 14 (April 12, 2017) (attached hereto as Ex.1).

¹⁴ *Id.*, p. 13.

¹⁵ *Id.*

same regulations quite differently. This complicates evaluation and measurement of the causal channels through which regulatory changes impact the broader economy.¹⁶ For example, how would the Board quantify and monetize the impact of a proposed standard for regulating rail rates or granting reciprocal switching across so many different industries or even among differently-situated shippers within each industry, especially given that the Board has no special knowledge or expertise in those industries.

The Office of Management and Budget (“OMB”) acknowledges that, “[w]hen important benefits and costs cannot be expressed in monetary units, BCA [benefit-cost analysis] is less useful, and it can even be misleading, because the calculation of net benefits in such cases does not provide a full evaluation of all relevant benefits and costs.”¹⁷ In such circumstances, the recommended CBA procedures depend upon the same exercise of professional judgment in which the Board already engages.¹⁸ The resulting risk is that “CBAs involving such a high degree of uncertainty and contestable assumptions..., [i]nstead of providing an authoritative rationale for a regulation..., would provide an opportunity for parties aiming to protect their own interests—not social welfare—to challenge certain beneficial regulations by offering competing but similarly subjective CBAs.”¹⁹

The Board must ensure that it has the capability and resources to surmount the foregoing challenges before adopting a regulatory requirement to perform CBA as part of its rulemaking proceedings.

¹⁶ *Id.*

¹⁷ OMB Circular A-4, at 10 (Sept. 17, 2003), <https://tinyurl.com/yaork9v2>.

¹⁸ *Id.* at 10, 27.

¹⁹ Perkins and Carey, p. 14 (Exhibit 1).

D. The Board Should Not Delay Pending Rulemaking Proceedings.

However the Board elects to proceed in response to AAR's Petition, it should not delay pending rulemaking proceedings. Despite AAR's inferences to the contrary, CBA cannot be implemented at the drop of a hat. That is particularly true for a small agency like the Board with substantial resource constraints and no prior experience conducting CBA. It could take years for the Board to develop the capacity to perform meaningful CBA on complex economic regulations. Rather, the Board should follow DOT's example and exclude pending rulemaking proceedings should it decide to adopt a CBA requirement, so as not to delay important regulatory reforms.²⁰

The motives underlying AAR's petition are a relevant factor for the Board to consider. AAR is engaged in an undisguised attempt to erect additional hurdles to regulatory reform initiatives that have reached advance stages in the rulemaking process, after having languished before the Board for many years. Indeed, the Petition makes Docket Nos. EP 711 (Sub-No. 1), and EP 704 (Sub-No. 1), in particular, examples for conducting a CBA. Delaying these proceedings, however, would do more harm than good.

The Board already has done more in EP 711 to identify costs than in any other recent rulemaking proceeding. In response to the NITL petition for rulemaking in EP 711, the Board requested analyses from commenters on the financial impact of reciprocal switching on the rail industry and granted access to the confidential waybill sample to perform that analysis.²¹ Although the NITL provided the requested analysis, AAR did not fully respond to the Board's request on the grounds that "it is not possible to predict the level of rail rates or the precise

²⁰ DOT Order, p. 1

²¹ See note 11, *supra*.

amount of lost revenues....”²² Yet AAR now would require the Board to do precisely what it has claimed is not possible.²³ It appears that AAR may hope that the difficulty of performing a CBA in EP 711 will preclude the Board from taking any action at all. But as discussed in Part B above, reciprocal switching rules implicate statutory mandates that the Board must carefully consider when deciding whether and how to perform a conventional CBA. The Board’s proposed rules account for CBA in evaluating individual switching requests consistent with those statutory mandates.

Similarly, the Board’s EP 704 (Sub-No. 1) proceeding is derived from the exemption revocation statute and would potentially restore STB oversight over rail transportation of several different commodities.²⁴ This statutory provision expressly requires the Board to determine if such restoration is consistent with the National Rail Transportation policy, including “to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the [shipping] public”²⁵ and “to foster sound economic conditions in transportation and to

²² “Opening Comments of the Association of American Railroads,” STB Ex Parte No. 711, p. 15 (filed March 1, 2013).

²³ In yet another ironic example involving the AAR, there is an ongoing battle over recent decisions of the AAR Tank Car Committee, which enacts standards for tank cars. In those decisions, the railroad members with majority control over the Committee’s decisions have exploited the AAR Interchange Rules to impose costly requirements in excess of those contained in DOT regulations. Because railroads do not own or otherwise supply tank cars to their customers, additional tank car requirements cost the railroads nothing – but they reap most of the benefits. The majority is incentivized to make decisions for its own benefit while disregarding the costs imposed on other stakeholders. To avoid such inequitable outcomes, the minority, non-railroad, Committee members have entreated AAR to perform CBAs before adding new requirements. AAR has consistently refused.

²⁴ 49 U.S.C. § 10502(d).

²⁵ 49 U.S.C. § 10101(4).

ensure effective competition and coordination between rail carriers”²⁶ Thus, in the context of the pending EP 704 (Sub No. 1) proceeding, the Board already must evaluate certain economic and public interest impacts, such as whether the regulatory benefits achieved when the existing exemptions were first granted continue to exist today based on substantial changes to both the statute and the rail industry that have occurred since the exemptions were granted decades ago.

AAR also ignores the unique circumstances associated with exemption revocations that make its proposed rules impractical to apply. Specifically, revocation of a class exemption under the statute would restore STB oversight and allow those impacted industries to obtain direct access to all of the Board’s regulatory procedures. It is not limited to a single regulation or proposal. Once the Board determines that exemption revocation is justified based on the evidence before it, there are no alternatives to STB oversight that Congress contemplated. Additionally, measuring the cumulative impacts of exemption revocation would require a highly speculative and extremely burdensome exercise for a small agency such as the Board to reasonably predict which STB procedures likely would be used, and the extent of such use, by each of the impacted industries. Accordingly, the Board should not accommodate AAR’s attempt to create new roadblocks that are designed to further delay the outcome of the EP 704 (Sub No. 1) proceeding.

It is especially troubling that AAR’s petition for CBA’s comes at a time when pending proceedings threaten to reform a *status quo* that has benefited the rail industry enormously, often at the societal cost of less competition and economically inaccessible regulatory remedies. That *status quo* includes regulations that were not subjected to a CBA and may not be justified if they

²⁶ 49 U.S.C. § 10101(5).

were today. The stand-alone cost (“SAC”) methodology, which is the rail industry’s self-proclaimed “gold standard” for rate regulation, is the most prominent example. Does anyone other than the rail industry contend that a SAC case, which requires years and costs millions to litigate, has benefits that outweigh those costs? AAR’s Petition is an attempt to entrench a *status quo* that would be of dubious value if the same CBA requirements had applied to them.

Therefore, if the Board implements CBA, it should not delay pending rulemaking proceedings, particularly EP 711 (Sub-No. 1) and EP 704 (Sub-No. 1), which would enhance rail competition and create greater balance in the rail regulatory regime. Those proceedings are at advanced stages and already have been subjected to extensive expert scrutiny of potential impacts and, in the case of reciprocal switching, extensive financial impact analysis. The utility of delaying those proceedings, most likely for several more years, pending the development of CBA guidelines, the acquisition of sufficient resources, and actually conducting CBAs and subjecting them to public comment is dubious, whereas the harm in such a lengthy delay is unquestionable. The Board has ample information to apply its expert judgment to complete pending rulemakings without further delay.

CONCLUSION

The Joint Shippers support the use of CBA in the Board’s rulemaking proceedings. But the Board should take a cautious and deliberate approach to implementing CBA. The Board should not implement CBA unless and until it concludes it has the resources and data sources to conduct meaningful, independent and truly objective analyses. The Board also must consider the role and significance of a CBA for economic regulations and reconcile that role to its statutory mandates. To foster these objectives, before requiring CBA by rule as AAR proposes, the Board initially should develop CBA standards and procedures through a policy statement or memorandum, which is the same path followed by nearly all other agencies which already

perform CBA in their rulemaking proceedings. Because this will require a substantial amount of time and effort to complete, the Board must not delay long-pending rulemaking proceedings for the implementation of CBA. Many of the Joint Shippers have first-hand experience with CBA in rulemaking proceedings before other agencies and offer their experience to assist the Board in developing CBA procedures consistent with the Board's mandates.

Respectfully submitted,

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