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SERVICE DATE – MAY 21, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 724 (Sub-No. 5)

PETITION FOR RULEMAKING TO AMEND 49 C.F.R. PART 1250

Decided: May 14, 2020

AGENCY: Surface Transportation Board.

ACTION: Final Rule.

SUMMARY: The Surface Transportation Board (STB or Board) is adopting a final rule amending its railroad performance data reporting regulations to include chemical and plastics traffic as a distinct reporting category for the “cars-held” metric.

DATES: This rule is effective on July 20, 2020.

FOR FURTHER INFORMATION CONTACT: Amy Ziehm at (202) 245-0391. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: The Board’s railroad performance data reporting regulations at 49 C.F.R. part 1250, which became effective on March 21, 2017, require all Class I carriers and the Chicago Transportation Coordination Office (CTCO), through its Class I members, to report certain service performance metrics on a weekly, semiannual, and occasional basis.

On December 6, 2018, the American Chemistry Council (ACC) filed a petition for rulemaking¹ to amend those data reporting regulations to: (1) include chemical and plastics (Standard Transportation Commodity Code (STCC) 28, except fertilizer)² traffic as a distinct reporting category for the cars-held metric at 49 C.F.R. § 1250.2(a)(6); (2) amend 49 C.F.R. § 1250.3(a) to clarify that yard dwell must be reported for each yard subject to average daily car

¹ On December 12, 2018, ACC filed an errata to its petition.

² STCC 28 is designated for “chemicals or allied products” and referred to generally by ACC as “chemical and plastics.” ACC excluded the fertilizer reporting category of STCC 28 from its request because fertilizer is already included in the Board’s data reporting regulations under § 1250.2(a)(6). (See Pet. 6.)

volume reporting;³ and (3) extend the same types of terminal reporting requirements that are applicable to the Chicago gateway (as clarified by comments filed by ACC on May 6, 2019) to the New Orleans, East St. Louis, and Memphis gateways (together, the Mississippi Gateways). (Pet. 1, 5; ACC Comments 1, 12-13, May 6, 2019.)

On January 28, 2019, the Association of American Railroads (AAR) filed a reply in opposition to ACC's petition. By decision served on April 5, 2019, the Board opened a rulemaking proceeding and directed ACC and AAR to provide additional information regarding ACC's proposed amendments to the regulations.⁴ Pursuant to that decision, ACC and AAR each filed comments on May 6, 2019, and AAR filed reply comments on May 20, 2019.

After considering the petition for rulemaking and the comments received, the Board granted ACC's petition in part and proposed amending its regulations to include chemical and plastics (STCC 28, except fertilizer) traffic as a distinct reporting category for the cars-held metric at § 1250.2(a)(6). Pet. for Rulemaking to Amend 49 C.F.R. Part 1250 (NPRM), EP 724 (Sub-No. 5) (STB served Sept. 30, 2019).⁵ The Board denied ACC's petition with regard to its other requested amendments.

In response to the NPRM, the Board received comments from ACC, AAR, the American Fuel & Petrochemical Manufacturers (AFPM), BNSF Railway Company (BNSF), and Canadian National Railway Company (CN). After consideration of the comments received, the Board will adopt as the final rule the NPRM proposal, with one modification. Specifically, the final rule modifies the proposed rule to clarify that the term "chemical or allied products" encompasses all STCC 28 commodities not otherwise reported under ethanol or fertilizer.

BACKGROUND

In 2014, the Board initiated a rulemaking proceeding to establish new regulations requiring all Class I railroads and the CTCO, through its Class I members, to report certain service performance metrics on a weekly basis. See U.S. Rail Serv. Issues—Performance Data Reporting (2014 NPRM), EP 724 (Sub-No. 4) (STB served Dec. 30, 2014).⁶ The primary purpose of that rulemaking proceeding was to develop a set of performance data that would allow the agency to monitor current service conditions in the industry and improve the Board's ability to identify and help resolve future regional or national service disruptions more quickly,

³ ACC initially sought to extend the weekly average terminal dwell time reporting requirement at 49 C.F.R. § 1250.2(a)(2) to include all Class I, terminal, and switching carriers at the Chicago gateway. However, in its comments filed on May 6, 2019, ACC withdrew this part of its initial request and instead sought the amendment described here.

⁴ Pet. for Rulemaking; R.R. Performance Data Reporting (84 Fed. Reg. 14,907) (Apr. 12, 2019).

⁵ Pet. for Rulemaking; R.R. Performance Data Reporting (84 Fed. Reg. 53,375) (Oct. 7, 2019).

⁶ For background on the service problems that led to the Board initiating the 2014 proceeding, see 2014 NPRM, EP 724 (Sub-No. 4), slip op. at 2-3.

should they occur. Id. at 3. The Board adopted its final rule on November 30, 2016, U.S. Rail Service Issues—Performance Data Reporting, EP 724 (Sub-No. 4) (STB served Nov. 30, 2016), and the rule became effective on March 21, 2017.⁷

Proposed Rule

As noted above, ACC petitioned the Board to institute a rulemaking proceeding to, among other things, revise § 1250.2(a)(6) to include chemical and plastics (STCC 28, except fertilizer) traffic as a distinct reporting category for the cars-held metric. ACC stated that STCC 28 traffic accounts for the highest number of manifest carloads, compared to all other two-digit STCC groups, and plays a key role in the national economy. (Pet 1.) According to ACC, STCC 28 traffic is especially vulnerable to rail service problems because it cannot readily shift to alternative rail carriers or to other modes. (Id. at 7.)

ACC asserted that separately reporting cars-held data for STCC 28 traffic would enable shippers to identify regional issues affecting that traffic. (ACC Comments 6, May 6, 2019.) ACC argued that the cars-held metric is an important indicator of rail system fluidity and that, for STCC 28 traffic, a fluid rail system is especially important in the Gulf Coast, where a substantial portion of this traffic is concentrated. (Id.) ACC also asserted that the current data reporting masks the severity of service events having a disproportionate impact on STCC 28 traffic. (Id. at 6-7.) ACC argued that additional reporting would enhance shippers' ability to internally manage service issues and might lead to substantial cost savings. (Id. at 9.)

AAR opposed adopting additional commodity-specific reporting, arguing that a narrow focus on subsets of rail traffic could remove important context from the full picture of a globalized supply chain, that commodity-specific reporting is particularly susceptible to such distortion, and that granular reports are therefore of limited benefit. (AAR Reply 2-4, Jan. 28, 2019.) According to AAR, additional reporting of STCC 28 traffic as a line item in the “cars-held for more than 48 hours” report would require each Class I carrier to alter the coding necessary to pull the data prescribed by the Board. (AAR Comments 9-10, May 6, 2019.) AAR objected to “[c]ontinuous changes to the Board’s reporting rules,” arguing that such changes would “impose ongoing costs to railroads that would need to make programming changes to their systems to enable compliance.” (AAR Reply 3, Jan. 28, 2019; AAR Comments 9, May 6, 2019.) AAR also noted that ACC had the opportunity to make this request in the past and failed to do so. (AAR Comments 9, May 6, 2019.)

After considering ACC’s petition and the responsive comments filed, the Board concluded that including STCC 28 traffic as a distinct reporting category for the cars-held metric at § 1250.2(a)(6) would be reasonable, warranted, and consistent with the rail transportation policy (RTP) of 49 U.S.C. § 10101, and proposed a rule requiring such reporting. NPRM, EP 724 (Sub-No. 5), slip op. at 6.

⁷ By decision served on March 13, 2017, the Board issued a technical correction to the final rule to add one fertilizer STCC to the 14 fertilizer STCCs initially included. U.S. Rail Serv. Issues—Performance Data Reporting, EP 724 (Sub-No. 4) (STB served Mar. 13, 2017).

In response to the NPRM, both BNSF and CN comment they are not opposed to reporting chemical and plastics traffic as a distinct reporting category but note that there are two commodity groups within STCC 28 that are already reported in separate cars-held categories in § 1250.2(a)(6)—fertilizer and ethanol. (CN Comments 1; BNSF Reply Comments 2.) CN states that the Board should make clear that the “chemicals or allied products” category will not include these other commodities in STCC 28 that are already reported in existing categories of the cars-held metric to avoid a double count. (CN Comments 1.) CN explains that it plans to use the list of seven-digit STCCs from Railinc Corporation (Railinc) for STCC 28 traffic (except fertilizer and ethanol).⁸ (Id. at 2-3.) Similarly, BNSF states that it intends to comply by reporting on chemicals and plastics as the STCC 28 categories that are not otherwise captured by the historic and ongoing reporting for fertilizer and ethanol. (BNSF Reply Comments 2.) In light of the potential overlap between “chemical or allied products” and ethanol and fertilizer, the Board will modify its proposed rule to clarify that the term “chemical or allied products” encompasses all STCC 28 commodities not otherwise reported under ethanol or fertilizer.

As explained in the NPRM, pursuant to the RTP, in regulating the railroad industry, it is the policy of the United States Government to, among other things, minimize the need for regulatory control, 49 U.S.C. § 10101(2), promote a safe and efficient rail transportation system, 49 U.S.C. § 10101(3), ensure the development of a sound rail transportation system to meet the needs of the public, 49 U.S.C. § 10101(4), and encourage efficient management of railroads, 49 U.S.C. § 10101(9). NPRM, EP 724 (Sub-No. 5), slip op. at 6. The final rule will promote the RTP by allowing the agency, as well as shippers and other stakeholders, to more quickly identify and respond to service issues related to these important commodities. Reporting of chemicals and plastics as a stand-alone category of cars holding for 48 hours or longer would, in addition to allowing the Board and shippers to monitor the fluidity of these commodities vital to essential goods and services, have the potential to help shippers address such issues privately with railroads, make operational adjustments, and improve their business planning, including through the management of their rail car fleets. These private solutions, without further involvement by the Board, could reduce the need for litigation and could lower overall costs of the provision of these commodities.

Other Issues

As noted above, in issuing the NPRM, the Board concluded that ACC had not provided adequate justification for its proposal to extend to the Mississippi Gateways the terminal reporting requirements currently applicable to Chicago, and therefore denied ACC’s request to include that proposal in the NPRM. NPRM, EP 724 (Sub-No. 5), slip op. at 8.

⁸ CN explains that its current algorithm for reporting ethanol and fertilizer commodities for the cars-held metric is coded at the seven-digit STCC level and requests that the Board confirm that a rail carrier may use the list of seven-digit STCCs from Railinc in effect when the Board’s proposed rule becomes effective to comply with the Board’s proposal that a rail carrier separately report the category of “chemicals or allied products” in the cars-held metric under § 1250.2(a)(6). (CN Comments 2-3.) The Board has thus far not prescribed the methodology by which rail carriers derive their data and will not do so here. See 49 C.F.R. § 1250.1(c).

In commenting on the NPRM, ACC asks that the Board remain open to requiring reporting of Mississippi Gateway data if warranted by events, arguing that the data would enable shippers whose cross-country traffic moves through the Mississippi Gateways to detect gateway congestion, identify uncongested gateways, and pursue routing through them. (ACC Comments 6-7, Dec. 6, 2019.) AFPM urges the Board to reconsider this decision and “keep an open mind” about including the Mississippi Gateways in the reporting requirements. (AFPM Comments 5.) AFPM states that the Mississippi Gateways are “vital chokepoints” in the national freight rail system and that increased petrochemical production could exacerbate the existing rail network capacity problems that AFPM’s members in the Gulf Coast are already experiencing. (Id. at 5-6.)

In response, AAR comments that ACC failed to demonstrate that its requested reporting would have public benefits tied to the Board’s regulatory authority that would justify the expense and burden that reporting would place on carriers. (AAR Reply Comments 2, Jan. 6, 2020.) AAR further comments that AFPM, in urging the Board to reconsider its decision, has failed to address the Board’s standards for reconsideration.⁹ (Id.)

The Board will not expand the scope of this rule to include additional terminal reporting requirements for the reasons it explained in the NPRM. While AFPM disagrees with the Board’s decision not to propose including Mississippi Gateways in the reporting requirements, it has not provided additional justification that undermines the Board’s reasoning in the NPRM.

To the extent that ACC urges the Board to remain open to reconsidering this issue should future events warrant additional gateway reporting, the Board confirms that it would, as in all actions, consider substantially changed circumstances as a potential ground for reconsideration pursuant to 49 U.S.C. § 1322(c).

FINAL RULE

For the reasons discussed above, the Board is adopting a final rule, as set forth in the Appendix, to amend its regulations to include chemicals or allied products (all STCC 28 commodities not otherwise reported under ethanol or fertilizer) traffic as a distinct reporting category for the “cars-held” metric at § 1250.2(a)(6).¹⁰

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. §§ 601-612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may

⁹ BNSF and CN both state support for AAR’s reply comments on the issue of the Mississippi Gateways. (BNSF Reply Comments 2; CN Reply Comments 1.)

¹⁰ As noted above, the Board is modifying its proposed rule to clarify that the term “chemical or allied products” encompasses all STCC 28 commodities not otherwise reported under ethanol or fertilizer.

minimize a regulation's impact; and (3) make the analysis available for public comment. §§ 601-604. In its final rule, the agency must either include a final regulatory flexibility analysis, § 604(a), or certify that the proposed rule would not have a "significant impact on a substantial number of small entities," § 605(b). The "impact" must be a direct impact on small entities "whose conduct is circumscribed or mandated" by the proposed rule. White Eagle Coop. v. Conner, 553 F.3d 467, 480 (7th Cir. 2009).

In the NPRM, the Board certified that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.¹¹ The Board explained that the proposed change to its regulations was intended to improve the quality of the service data reported by Class I carriers and would not mandate or circumscribe the conduct of small entities. The final rule adopted here is limited to Class I carriers, so the same basis for the Board's certification of the proposed rule in the NPRM applies to the final rule. Therefore, the Board certifies under 5 U.S.C. § 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

Paperwork Reduction Act

In this proceeding, the Board is modifying an existing collection of information that is currently approved by the Office of Management at Budget (OMB) through June 30, 2020, under the collection of the United States Rail Service Issues-Performance Data Reporting (OMB Control No. 2140-0033). In the NPRM, the Board sought comments pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3521, and OMB regulations, 5 C.F.R. § 1320.8(d)(3), regarding: (1) whether the collection of information, as modified in the proposed rule and further described in Appendix A to the NPRM,¹² is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of

¹¹ For the purpose of RFA analysis for rail carriers subject to the Board's jurisdiction, the Board defines a "small business" as only including those rail carriers classified as Class III rail carriers under 49 C.F.R. § 1201.1-1. See Small Entity Size Standards Under the Regulatory Flexibility Act, EP 719 (STB served June 30, 2016) (with Board Member Begeman dissenting). Class III carriers have annual operating revenues of \$20 million or less in 1991 dollars, or \$39,194,876 or less when adjusted for inflation using 2018 data. Class II carriers have annual operating revenues of less than \$250 million in 1991 dollars, or \$489,935,956 when adjusted for inflation using 2018 data. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds in decisions and on its website. 49 C.F.R. § 1201.1-1; Indexing the Annual Operating Revenues of R.Rs., EP 748 (STB served June 14, 2019).

¹² As discussed above, the Board made a minor change to the final rule, clarifying the term "chemical or allied products." The change, however, does not impact the Board's analysis of the collection.

information technology, when appropriate. No comments were received pertaining to the collection of this information under the PRA.

This modification to an existing collection will be submitted to OMB for review as required under the PRA, 44 U.S.C. § 3507(d), and 5 C.F.R. § 1320.11.

Congressional Review Act

Pursuant to the Congressional Review Act, 5 U.S.C. §§ 801-808, the Office of Information and Regulatory Affairs has designated this rule as a non-major rule, as defined by 5 U.S.C. §804(2).

List of subjects:

49 C.F.R. Part 1250

Administrative practice and procedure, Railroads, Reporting and recordkeeping requirements.

It is ordered:

1. The Board adopts the final rule set forth in the Appendix to this decision. Notice of the final rule will be published in the Federal Register.
2. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.
3. This decision is effective on July 20, 2020.

By the Board, Board Members Begeman, Fuchs, and Oberman.

Appendix

For the reasons set forth in the preamble, the Surface Transportation Board amends part 1250 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1250—RAILROAD PERFORMANCE DATA REPORTING

1. The authority citation for part 1250 continues to read as follows:

Authority: 49 U.S.C. 1321 and 11145.

2. Amend § 1250.2 by revising the first sentence of paragraph (a)(6) to read as follows:

§ 1250.2 Railroad Performance Data Elements

(a) * * *

(6) The weekly average of loaded and empty cars, operating in normal movement and billed to an origin or destination, which have not moved in 48 hours or more, sorted by service type (intermodal, grain, coal, crude oil, automotive, ethanol, fertilizer (the following Standard Transportation Commodity Codes (STCCs): 2812534, 2818142, 2818146, 2818170, 2818426, 2819173, 2819454, 2819815, 2871235, 2871236, 2871238, 2871244, 2871313, 2871315, and 2871451), chemicals or allied products (all STCC 28 not otherwise reported under ethanol or fertilizer), and all other). * * *