

July 6, 2023

306807

Ms. Cynthia Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings
July 6, 2023
Part of
Public Record

Re: *Railroad Revenue Adequacy*, EP 722

Dear Ms. Brown:

On May 5, 2023, the Western Coal Traffic League (“WCTL”) filed a petition before the U.S. Court of Appeals for the D.C. Circuit, seeking a writ of mandamus directing the Board to either publish a Notice of Proposed Rulemaking in Docket No. EP 722 or serve a final decision in EP 722 within 90 days of the Court’s issuance of its writ, explaining why the Board is discontinuing the proceeding.¹ If the Board takes further action in this proceeding, AAR supports closing EP 722. If the Board wishes to proceed with regulatory action, principles of good government are best served by the Board first taking up AAR’s petition for the use of cost-benefit analysis (EP 752).

There are a few reasons why closing the EP 722 proceeding is the appropriate action. First, the presumption in WCTL’s mandamus petition that the Board is required to take some additional affirmative action in EP 722 is incorrect. A writ of mandamus is an “extraordinary writ” that is “reserved only for the most transparent violations of a clear duty to act.”² The Board has no duty to act in this matter. EP 722 is “a pre-rule informational and hearing docket,” with the Board specifically noting that “no rulemaking has been initiated.”³ (By contrast, some of the Class I railroads subsequently submitted a petition for rulemaking relating to revenue adequacy, which remains pending.⁴) Informational dockets provide an opportunity for the public to comment generally on issues or questions raised by the Board, but are not intended to result in a decision on any particular controversy. As the Board has previously

¹ See Pet. for Writ of Mandamus, *In re WCTL*, No. 23-1126, at 4 (D.C. Cir.).

² *In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000); see *In re Nat’l Nurses United*, 47 F.4th 746, 752 (D.C. Cir. 2022) (“The duty must be incontrovertible and not a matter within the agency’s discretion.”); *Thomas v. Holder*, 750 F.3d 899, 904 (D.C. Cir. 2014).

³ *Railroad Revenue Adequacy*, Docket No. EP 722 (STB served March 28, 2018); see also *Joint Petition for Rulemaking—Annual Revenue Adequacy Determinations*, Docket No. EP 766, at 3 n.7 (STB served Dec. 30, 2020) (describing Docket No. EP 722 as an “informational docket[] related to revenue adequacy”).

⁴ See Petition for Rulemaking, *Joint Petition for Rulemaking—Annual Revenue Adequacy Determinations*, Docket No. EP 766 (filed Sep. 1, 2020).

explained, informational proceedings are “automatically discontinued” after the record closes.⁵ Therefore, the Board does not need to take any further action to bring EP 722 to finality. However, if the Board were to take some additional action in EP 722, the only outcome supported by the record is to close the docket, as AAR has previously stated.⁶

Second, the Board is not authorized to use a carrier’s revenue adequacy as a basis to restrain rates.⁷ Instead, the statute directs the Board to “make an adequate and continuing effort to *assist* those carriers in attaining revenue levels prescribed under this paragraph.”⁸ Rather than warranting a limit on railroad revenues, revenue adequacy is a statutory goal of the Railroad Revitalization and Regulatory Reform Act of 1976 Act, which the Board is directed to promote.⁹ Put another way, railroad revenue adequacy is a congressional goal that must be viewed by the Board as a floor, not as a ceiling.¹⁰ Well-recognized and well-established economic principles reject the use of a measure of firm-wide earnings to regulate individual rates.¹¹ The Board should therefore decline to take any action in EP 722 or in any other docket that would use a carrier’s systemwide revenue adequacy as a basis to constrain rates.

Third, the Board’s annual revenue adequacy determination substantially overstates railroad return on investment because of its treatment of deferred taxes and the use of book value of assets. Using such a defective calculation as a basis for rate regulation is improper and unfair.¹² With respect to asset valuation, the agency has even recognized that replacement

⁵ *Review of the Surface Transportation Board’s General Costing System*, Docket No. EP 431 (Sub-No. 3), et al., at 3 (STB served Jan. 19, 2010).

⁶ *See* Reply of the AAR to the Petition by WCTL, *Railroad Revenue Adequacy*, Docket No. EP 722, at 2-3 (filed Sept. 13, 2022) (“2022 Comments”).

⁷ *See, e.g.*, Comments of AAR, *Railroad Revenue Adequacy*, EP 722, at 20-42 (Sept. 5, 2014) (“2014 Comments”); Comments of AAR, *Hearing on Revenue Adequacy*, EP 761, et al., at 20-35 (Nov. 26, 2019) (“2019 Comments”); Supp. Comments of AAR, *Hearing on Revenue Adequacy*, EP 761, et al., at 3-21 (Feb. 13, 2020) (“2020 Supp. Comments”) Comments of AAR, *Joint Petition for Rulemaking—Annual Revenue Adequacy Determinations*, EP 766, at 19-23 (May 17, 2021) (“EP 766 Comments”).

⁸ 49 U.S.C. § 10704(a)(2) (emphasis added).

⁹ *See Railroad Revitalization and Regulatory Reform Act of 1976*, Pub. L. No. 94-210, 90 Stat. 31 (1976); 2014 Comments at 21-23.

¹⁰ *See* 2014 Comments at 1; *see* 2022 Comments at 3-4 (noting that “the Transportation Research Board explained earnings regulation ‘can incentivize excessive capital-to-labor ratios and lessen the motivation for asset replacement and the pursuit of innovation,’ which ‘would be at odds with the deregulatory thrust of the Staggers Rail Act reforms . . . [and constitutes a] misguided view that a single yes/no indicator of railroad profitability can be used to regulate rates.’”) (internal citation omitted).

¹¹ *See* 2022 Comments at 3-4 (“The threat of enhanced rate regulation once a firm reaches a return on investment equal to its cost of capital would drive that firm to avoid efficiency enhancements or slow innovations, so as to not trigger regulation. These perverse incentives would lead to diminished investment and distorted commercial actions. The impact will be to gradually reduce the robustness of the rail network over time and precipitate a decline in the quality of rail service.”) (internal citations omitted).

¹² *See id.* at 4-5.

cost is preferred to book value, but has not adopted it because of practical challenges.¹³ Because railroad assets are longer-lived than most industries, the use of book value creates a larger differential for railroads than other industries.¹⁴ The Board also excludes deferred taxes from the investment base. Not including deferred taxes assumes investors do not expect a return on assets financed through deferred taxes, which is simply not the case.¹⁵ If the Board takes action related to revenue adequacy, it should be to correct these errors in separate proceedings.¹⁶

Should the Board wish to take regulatory action, then there is a more immediate and pertinent matter pending before the Board that should be addressed upfront—specifically, EP 752, *Cost-Benefit Analysis*. Conducting a cost-benefit analysis prior to instituting regulation is a well-established and fundamental principle of good government.¹⁷ Accordingly, the commenters in EP 752 expressed near-universal support for employing a cost-benefit analysis.¹⁸

Cost-benefit analysis is a vital tool that can help the Board fulfill its statutory mandates to “minimize the need for Federal regulatory control over the rail transportation system,” “foster sound economic conditions in transportation,” and “ensure effective competition and coordination between rail carriers and other modes.”¹⁹ More specifically, cost-benefit analysis

¹³ See *Standards for Railroad Revenue Adequacy*, 364 I.C.C. 803, 818 (1981); see *Standards for Railroad Revenue Adequacy*, 3 I.C.C.2d 261 (1986) (“While current cost accounting is theoretically preferable to original cost valuation, it cannot be practically implemented in a manner that we can be confident would produce accurate and reliable results.”). Indeed, WCTL would have the Board disregard the fact that a railroad is not earning the industry cost of capital even on a book value basis and declare a railroad revenue adequate if the proposed alternative measures “show[] a railroad’s financial position to be strong.” Joint Opening Comments of the Western Coal Traffic League, et al., *Railroad Revenue Adequacy*, EP 722, at 22 (filed Sept. 5, 2014) (“WCTL Opening Comments”).

¹⁴ See 2014 Comments, Verified Statement of Roger Brinner at 18-26.

¹⁵ See 2019 Comments at 39-40.

¹⁶ The issue of deferred taxes is currently before the Board in Docket No. EP 766.

¹⁷ See *Petition, AAR -- Petition for Rulemaking*, EP 752, at 15-16 (filed Mar. 14, 2019) (“AAR Petition”). More than 40 years ago, then-President Reagan issued Executive Order 12291, requiring executive agencies to perform a cost-benefit analysis for all major rules. This executive order was subsequently replaced by President Clinton’s Executive Order 12866 in 1993, and each subsequent president has reaffirmed that 1993 order. Most recently, on April 11, 2023, President Biden issued Executive Order 14094, which supplements and confirms the principles established in Executive Order 12866.

¹⁸ See AAR Reply Comments, *AAR -- Petition for Rulemaking*, EP 752, at 1 (filed March 20, 2020) (“Virtually all of the comments the Board . . . 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.”); see also, e.g., American Chemistry Council (“ACC”) Comment Letter, *AAR -- Petition for Rulemaking*, EP 752, at 1 (STB served Jan. 31, 2020) (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.”); National Coal Transportation Association (“NCTA”) Comment Letter, *AAR -- Petition for Rulemaking*, EP 752, at 3 (STB served Jan. 31, 2020) (NCTA “supports the use of [cost-benefit analysis] in appropriate rulemaking proceedings that are useful to the Board.”).

¹⁹ 49 U.S.C. § 10101(2), (5); see also AAR Petition at 1.

would arm the Board with the information it needs to make appropriate decisions about where, when, and how to regulate—including in a separate rulemaking concerning revenue adequacy or any of the other rulemakings pending before or contemplated by the Board.

For the foregoing reasons, there is no need for the Board to take any further action in EP 722. However, if the Board chooses to take further action, it should close the EP 722 proceeding and instead focus its efforts on EP 752, which will assist the Board in all its rulemaking proceedings.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be "JFM", is positioned above the typed name and address.

J. Frederick Miller Jr. (*admitted in MD*)
Association of American Railroads
425 Third Street, SW
Washington, D.C. 20024
(202) 639-2100

*Counsel for the Association
of American Railroads*