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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 752

ASSOCIATION OF AMERICAN RAILROADS—PETITION FOR RULEMAKING

Digest:[1] In light of changes to regulatory review processes, other priority initiatives, and pending complaint and licensing proceedings, the Board denies a petition for rulemaking asking the Board to adopt rules that would set additional data requirements and require the Board to undertake certain cost-benefit analyses in most of its rulemaking proceedings.

Decided: November 24, 2026

On March 14, 2019, the Association of American Railroads (AAR) filed a petition to institute a rulemaking to adopt rules that would require the Board to undertake a cost-benefit analysis in most of its rulemaking proceedings and would set certain data requirements. In a decision served on July 10, 2019, the Board waived the 120-day deadline under 49 C.F.R. § 1110.2(d) for addressing rulemaking petitions, Ass'n of Am. R.Rs.—Pet. for Rulemaking, EP 752 (STB served July 10, 2019), and, in a decision served on November 4, 2019, the Board solicited additional information to assist its evaluation of AAR's proposed rules, Ass'n of Am. R.Rs.—Pet. for Rulemaking (Nov. 2019 Decision), EP 752 (STB served Nov. 4, 2019).[2]

After considering the petition and the comments received, the Board will deny the petition for the reasons explained below.

BACKGROUND

AAR asks the Board to amend its regulations at 49 C.F.R. part 1110 to require that the Board: (1) include in most notices of proposed rulemaking a cost-benefit analysis of the proposed rule and reasonable alternatives prepared by the Board's Office of Economics; (2) update that analysis and consider the costs and benefits of the proposed rule (including the cumulative impact) before adopting it; and (3) rely on "the most reliable and up-to-date data that is reasonably obtainable." (Pet. 2, 15-16, 21-22.) AAR proposed that the cost-benefit

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] AAR filed a petition for reconsideration of the Board's July 10, 2019 waiver decision, which the Board denied as moot. See Nov. 2019 Decision, EP 752, slip op. at 2 n.2.

requirements would apply in rulemakings other than those described in 49 C.F.R. § 1110.3(a), which references interpretive rules, general statements of policy, and rules relating to organization, procedure, or practice. (Id. at 22.)[3]

According to AAR, cost-benefit analysis facilitates sound agency decision-making through an evaluation of whether the rules will achieve positive outcomes and at what cost. (Id. at 2.) AAR also asserts that an effective cost-benefit analysis requires consideration of the cumulative impact of regulations. (Id. at 10.) AAR argues that cost-benefit analysis can be misleading if an agency focuses only on the impact of individual rules, as opposed to the overall, cumulative impact of regulation on the economy or an industry. (Id.) Finally, AAR contends that agencies should rely on sound economic data that reflects market realities when proposing or adopting new rules. (Id. at 13-15.) For an agency like the Board, AAR argues this data would include information the Board already collects and analyzes, as well as studies by independent third parties, information that parties provide the Board before and during rulemaking proceedings, and, when needed, additional information the Board solicits that major stakeholders (e.g., shippers and railroads) maintain in the ordinary course of business. (Id. at 14.)

In support of its petition, AAR cites, among other things, Executive Order (E.O.) 12866. AAR notes that E.O. 12866 "requires executive agencies to assess the economic costs and benefits of significant proposed regulations, consider regulatory alternatives, and 'select those approaches that maximize net benefits . . . unless a statute requires another regulatory approach.'" (Id. at 6 (quoting Exec. Order No. 12866, § 1(a), 58 Fed. Reg. 51,735 (Oct. 4, 1993)).) AAR also states that E.O. 12866 "requires agencies to 'tak[e] into account, among other things and to the extent practicable, the costs of cumulative regulations,'" and provides that "[e]ach agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation." (Pet. 12-14 (citing Exec. Order No. 12866, § 1(b)(7), (11)).) AAR also cites guidance from the Office of Management and Budget (OMB) concerning regulatory analysis. (See Pet. 13-14 (citing OMB Circular A-4 (Sept. 17, 2003)).[4])

Replies and Comments Received

The Board received replies to AAR's petition. The following current and now-former United States Representatives filed a joint letter in this proceeding: Sam Graves, Lloyd Smucker, Doug LaMalfa, Russ Fulcher, Ken Buck, Ron Estes, Roger Williams, Paul Cook, Jodey Arrington, Mike Gallagher, Ron Wright, Van Taylor, Will Hurd, Michael Burgess, John Carter, John Ratcliffe, Cathy McMorris Rodgers, Andy Biggs, Ann Wagner, Tom McClintock, Kevin Brady, Kevin Hern, Jason Smith, Greg Gianforte, Mark Amodei, Adrian Smith, Greg Pence, Carol Miller, Ross Spano, Dan Newhouse, Jenniffer Gonzalez-Colon, John Rutherford, John

[3] AAR's proposal related to the Board using the most reliable and up-to-date data would apply to any Board rulemaking proceeding. (See Pet. 3, 22.)

[4] On January 31, 2025, E.O. 14192, Unleashing Prosperity Through Deregulation, instructed the Director of OMB to revoke OMB Circular A-4 of November 9, 2023 and reinstate the prior version of Circular A-4, issued on September 17, 2003. See Exec. Order No. 14192, § 6(b), 90 Fed. Reg. 9065 (Feb. 6, 2025).

Curtis, Paul Gosar, Garret Graves, Randy Weber, Dan Crenshaw, Kay Granger, Billy Long, Brian Babin, Mark Meadows, Lance Gooden, Michael Waltz, Tim Burchett, Mark Walker, Denver Riggleman, Doug Lamborn, Drew Ferguson, David P. Roe, Mark Green, H. Morgan Griffith, and Trey Hollingsworth (Congressional Delegation). United States Representative Ken Calvert also filed a letter. The following individuals and entities submitted filings: Jerry Ellig (Ellig), the Competitive Enterprise Institute (CEI), the American Forest & Paper Association (AF&PA), the National Grain and Feed Association (NGFA), the Western Coal Traffic League (WCTL), and the American Fuel & Petrochemical Manufacturers (AFPM). A joint comment was filed by the Agricultural Retailers Association, American Chemistry Council (ACC), American Malting Barley Association, Corn Refiners Association, Freight Rail Customer Alliance, Industrial Minerals Association–North America, Institute of Scrap Recycling Industries, Louisiana Chemical Association, National Association of Chemical Distributors, National Industrial Transportation League (NITL), Private Railcar Food and Beverage Association, the Chlorine Institute, the Fertilizer Institute, and the Vinyl Institute (collectively, Joint Shippers).

While many parties express general support for, or do not oppose, incorporating a cost-benefit analysis process into the Board's rulemaking proceedings, (see AF&PA Reply 2; AFPM Reply 1, Apr. 16, 2019; Calvert Letter 1; CEI Reply 2; Congressional Delegation Letter 1-2; Joint Shippers Reply 3, Apr. 4, 2019), several parties argue that the Board should do so through non-formal means, such as an internal memorandum or policy statement, rather than through the adoption of a formal regulation, (see AFPM Reply 3-4, Apr. 16, 2019; Joint Shippers Reply 4-6, Apr. 4, 2019; NGFA Reply 1-2). Some parties, including those amenable to the Board incorporating cost-benefit analysis through non-formal means, ask the Board to deny the petition. (See AFPM Reply 1, Apr. 16, 2019; Joint Shippers Reply 1, 17, Apr. 4, 2019; NGFA Reply 1-3; WCTL Reply 1-3, 10.) Some parties note that AAR would have the Board perform a cost-benefit analysis on all covered rulemakings regardless of their annual economic effect. (See AF&PA Reply 4-5; Joint Shippers Reply 5, Apr. 4, 2019.) Several parties note that conducting cost-benefit analyses would require significant resources and urge the Board to ensure that it has the resources and data to conduct truly independent analyses and the flexibility and capability to address the challenges of conducting a meaningful cost-benefit analysis on economic regulations. (See AF&PA Reply 3; Joint Shippers Reply 8-10, Apr. 4, 2019; NGFA Reply 2; WCTL Reply 4-6.)

In the November 2019 Decision, the Board solicited additional information to assist the Board's evaluation of whether and how particular cost-benefit analysis approaches might be more formally integrated into its rulemaking process. Specifically, the Board sought information on: (1) specific methods that would assist in the qualitative or quantitative analysis of a final rule by the Board; (2) specific data that the Board collects or could collect to assist with cost-benefit analysis; (3) a detailed description of how cost-benefit analysis would apply to a hypothetical rulemaking to modify the revenue-variable cost percentage used for purposes of market dominance from 180% to 165%; and (4) the threshold for determining the rulemaking proceedings to which any cost-benefit analysis procedures should apply. Nov. 2019 Decision, EP 752, slip op. at 2-3. Comments in response to the November 2019 Decision were filed by AAR, Ellig, AFPM, ACC, the National Coal Transportation Association (NCTA), and the Small

Business & Entrepreneurship Council (SBE Council). AAR and Ellig filed replies to those comments.

In response to the Board's first information request, AAR suggests that the Board could use existing regulatory guidance, such as OMB Circular A-4, and the experience of other agencies as a template for its cost-benefit analysis framework. (See AAR Comment 8-16, Jan. 31, 2020.) As to the second information request, AAR notes that the Board already has access to extensive data collections that would likely prove essential in cost-benefit analyses at the Board, 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. (Id. at 16.) However, concerning the possibility of general, ongoing data collection solely to support future cost-benefit analyses in rulemaking proceedings, AAR argues that the costs of doing so would likely outweigh the benefits, as the data relevant to a cost-benefit analysis of one proposal is often irrelevant to analyses of others. (Id.)

Turning to the Board's hypothetical, which was explained in the third information request, AAR provides a sample cost-benefit analysis but argues that the hypothetical suffers from a threshold problem—specifically, that the Board did not identify the hypothetical problem that the proposal is intended to solve. (Id. at 17-20.) Finally, as to the fourth information request, AAR reiterates that all Board rulemakings could benefit from incorporation of a cost-benefit analysis. (Id. at 20.) However, AAR states that if the Board prefers to adopt a threshold, AAR suggests that the Board adopt one similar to those applicable under E.O. 12866, which applies to "significant regulatory actions,"[5] or under the Congressional Review Act (CRA), 5 U.S.C. §§ 801-08, which defines "major rules."[6] (AAR Comment 21, Jan. 31, 2020.) According to AAR, adopting a threshold along these lines would avoid unnecessarily burdensome analyses of minor rules. (Id. at 22.)

In response to the November 2019 Decision, Ellig provides input on how cost-benefit analysis could be applied to the Board's hypothetical rulemaking. (Ellig Comment 2-9, Jan. 21,

[5] E.O. 12866 defines "significant regulatory action" as any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the executive order. Exec. Order No. 12866, § 3(f).

[6] The CRA defines "major rule" as any rule that the Administrator of the Office of Information and Regulatory Affairs (OIRA) of OMB finds has resulted in or is likely to result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. 5 U.S.C. § 804(2).

2020.) ACC, AFPM, and NCTA also comment on the November 2019 Decision, stating general support for cost-benefit analysis but expressing concern about the potential impacts of AAR's proposal. (See, e.g., ACC Comment 1; AFPM Comment 2, 7, Jan. 31, 2020; NCTA Comment 2-3.) AFPM and NCTA ask the Board to deny the petition. (See AFPM Comment 1, 9, Jan. 31, 2020; NCTA Comment 3.) SBE Council discusses small businesses in relation to the freight rail system, the impact of regulations on small businesses, and SBE Council's support for cost-benefit analysis of regulations by the Board. (See SBE Council Comment 2-5.)[7] Ellig's reply provides further clarification about the application of cost-benefit analysis to Board proceedings. (See Ellig Reply 1-12, Mar. 18, 2020.) In its reply, AAR argues that the advantages of cost-benefit analysis are undisputed and responds to comments on the November 2019 Decision. (See AAR Reply 2-8, Mar. 20, 2020.)

DISCUSSION AND CONCLUSIONS

The Board appreciates AAR's interest in codifying cost-benefit analysis into the Board's rulemaking process and the thoughtful stakeholder comments filed in this proceeding. After considering the petition and the comments received, the Board will deny AAR's petition but will continue assessing regulatory effects consistent with applicable law and executive orders.

The Board notes that since AAR's petition was filed, there have been changes to the E.O. 12866 process, which provides for OIRA review and cost-benefit assessments of regulatory actions deemed "significant" by OMB. In 2019, when AAR filed the petition, the regulatory review procedures under E.O. 12866 did not apply to the Board. However, on February 18, 2025, E.O. 14215, Ensuring Accountability for All Agencies, amended the definition of "agency" in E.O. 12866 to include certain independent regulatory agencies, including the Board. See Exec. Order No. 14215, § 3(a), 90 Fed. Reg. 10,447 (Feb. 24, 2025). Although AAR's proposal differs in scope and legal effect from E.O. 12866, the Board can pursue analytical improvements under the existing framework. The Board is not persuaded that the incremental benefits of codification, even with AAR's suggested threshold, justify diverting resources from other priorities.

In addition, the Board has been dedicating significant resources to other priority initiatives that are centered on making the agency's regulatory framework more efficient and effective. These include proceedings such as Policy Statement on Jurisdiction & Preemption Under the ICC Termination Act, Docket No. EP 791; Permitting Reform—Environmental Review Process, Docket No. EP 779; Review of Replies to Replies, Docket No. EP 790; Changes to Appeal Standards, Docket No. EP 792; and a number of other deregulatory initiatives. The Board is also considering revisions to the definition of "small entities" for the purpose of Regulatory Flexibility Act (RFA) analyses. Furthermore, the Board notes that significant resources have been allocated to the agency's pending complaint and licensing proceedings.

[7] SBE Council's comment does not contain page numbers. The page numbers cited in this decision refer to the PDF page numbers of the filing.

In Policy Statement on Jurisdiction & Preemption Under the ICC Termination Act, the Board recently issued a comprehensive policy statement related to the scope of its jurisdiction over transportation by rail carriers and federal preemption under the ICC Termination Act of 1995. See Pol'y Statement on Jurisdiction & Preemption Under the ICC Termination Act, EP 791 (STB served Nov. 9, 2026). The policy statement aims to further the Board's goals of transparency and collaboration and to provide greater certainty to Board stakeholders for capital and operational planning, reduce unnecessary litigation and regulatory costs, and promote investment and growth. See id. at 2.

In Permitting Reform—Environmental Review Process, the Board has proposed a comprehensive permitting reform that would streamline reviews and decrease infrastructure expenses, while ensuring informed decision-making and facilitating public participation. The Board's proposal in that docket is intended to conform the Board's regulations to current practices and changes in the law, among them, the Council on Environmental Quality's rescission of its regulations implementing the National Environmental Policy Act (NEPA), the 2023 and 2025 amendments to NEPA, and changes to other relevant statutes, executive orders, and case law relating to the implementation of NEPA, including recent U.S. Supreme Court precedent.

The Board is also focused on proceedings to update its regulations to incorporate certain practitioner suggestions from a series of listening sessions led by Vice Chairman Schultz in 2025. See Press Release, STB, STB Gathers More than 100 Ideas from Practitioners to Streamline Board Processes, (June 10, 2025), https://www.stb.gov/news-communications/latest-news/pr-25-22/. For instance, in Review of Replies to Replies, the Board has sought public comment on whether to modify its regulations related to replies to replies. In Changes to Appeal Standards, the Board is considering proposing modifications to the standards of review applicable to appeals to the entire Board of decisions issued pursuant to delegated authority.

In addition to those priority initiatives, the Board also sees a potential opportunity to augment its analytical approach via targeted regulatory changes. For example, the Board is considering proposing to revise its definition of "small entities" for the purpose of RFA analyses.[8] For rail carriers, the Board currently defines "small entities" for RFA purposes to mean Class III rail carriers under 49 C.F.R. § 1201.1-1. See Small Entity Size Standards Under the Regul. Flexibility Act, EP 719, slip op. at 3 (STB served June 30, 2016) (with Board Member Begeman dissenting).[9] The revision under consideration would add Class II carriers to that

[8] The RFA requires agencies to consider the impact of their regulations on small entities, analyze effective alternatives that minimize the impact to small entities, and make their analyses available for public comment. For purposes of defining "small entities" under the RFA, an agency may apply the Small Business Administration's (SBA) size standards for "small business" under the Small Business Act, or it may establish another definition appropriate to its activities after consultation with SBA and opportunity for public comment. 5 U.S.C. § 601(3), (6).

[9] The Board's decision in Docket No. EP 719 adopted a definition of "small business" for purposes of RFA analyses. The RFA defines "small entity" as having the same meaning as

definition. If proposed and ultimately adopted, this change would broaden the Board's RFA analysis to also consider the economic impact of proposed regulations on Class II carriers.

The Board agrees with AAR concerning the importance of the agency's reliance on sound economic data reflective of market realities and notes that it already collects certain data that can assist it in analyzing the impacts of its proposed rules. (See AAR Comment 16-17, Jan. 31, 2020.) The Board is also currently engaged in a broad data modernization initiative and will continue to pursue enhancements, such as focusing, automating, and augmenting its data collection, as appropriate. The Board can address proceeding-specific data needs through targeted requests, consistent with E.O. 12866, (see Exec. Order No. 12866, § 1(b)(7)), without adopting an additional rule.

Therefore, for the reasons discussed in this decision, the Board will deny AAR's petition. The decision does not preclude nonbinding guidance or further improvements to the Board's economic analyses in the future.

It is ordered:

1. AAR's petition to institute a rulemaking is denied, as explained above.

2. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Kloster, and Schultz.

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the terms "small business," "small organization," and "small government jurisdiction." 5 U.S.C. § 601(6).