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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex. Parte No. 752

Petition for Reconsideration

Reply of Joint Shippers

By their attorneys:

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Dated: August 14, 2019

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Reply of Joint Shippers

The American Chemistry Council, The Fertilizer Institute, and the National Industrial Transportation League (collectively, Joint Shippers) hereby reply in opposition to the Petition for Reconsideration filed by the Association of American Railroads (“AAR”) in the above-captioned docket on July 25, 2019 (“Petition”). In addition, the National Grain and Feed Association concurs with and fully supports this reply. AAR seeks reconsideration of the Board’s decision in this docket, served on July 10, 2019, which waives the provision at 49 C.F.R. § 1110.2(d) and defers action on AAR’s March 14, 2019 petition for rulemaking to require a cost-benefit analysis in certain future agency rulemakings (“July 10 Decision”).

A petition for reconsideration will be granted only upon a showing of “new evidence or changed circumstances” or “material error.” 49 C.F.R. § 1115.3(b). AAR’s Petition makes no reference to either of these requirements.

AAR’s Petition cites a guidance memorandum issued by the Office of Management and Budget (M-19-14, April 11, 2019) (“OMB Guidance”) after AAR filed its March 14 petition. (Pet. at 1.) However, the OMB Guidance does not constitute “changed circumstances” for the Board. The document “*reinforces* the obligations of Federal agencies” under the Congressional Review Act (CRA). OMB Guidance 1. The Board is required to comply with the CRA, just as it

was before the OMB Guidance was published. Furthermore, nothing in the OMB Guidance, CRA, the Administrative Procedure Act, nor the Board’s statutory mandates requires the Board to adopt formal procedures for cost-benefit analysis through legislative rule or other mechanism.¹ The Board can fully comply with its obligations without opening the rulemaking proceeding called for in AAR’s petition.

Despite claiming that the Board would be in “good company” by adopting AAR’s proposed reforms, AAR identified only one federal agency—the Federal Communications Commission—that has adopted a legislative rule regarding cost-benefit analyses. Moreover, the FCC’s rule merely identifies cost-benefit analysis as a function of its Office of Economics, without providing any of the details about the analysis process that AAR has requested the Board adopt by legislative rule in its March 14 petition.² None of the other agencies that the AAR identifies as having adopted cost-benefit-analysis procedures have found it necessary to do so via a legislative rule.

The Board is right to defer AAR’s March 14 petition while it “consider[s] whether and how particular cost-benefit-analysis approaches or data requirements might be more formally integrated into its rulemaking process” and “evaluate[s] best practices of other agencies for conducting such analyses” July 10 Decision at 2. The OMB memorandum does nothing to undermine that determination.

A fundamental principle of federal regulation is to enact regulation only when required by law, necessary to interpret the law, or necessary by compelling need. Exec. Order No. 12866,

¹ Moreover, the CRA, which is the subject of the OMB Guidance, does not require cost-benefit analyses. It requires agencies to submit certain rules to Congress with “a complete copy of the cost-benefit analysis of the rule, *if any*.” 5 U.S.C. § 801(a)(1)(B)(i) (emphasis added).

² See 47 C.F.R. § 0.21(c) (stating that a duty of the Office of Economics is to “[p]repare[] a rigorous, economically-grounded cost-benefit analysis for every rulemaking deemed to have an annual effect on the economy of \$100 million or more”).

58 Fed. Reg. (Sept. 30, 1993) *reprinted in* 5 U.S.C. § 601 note. AAR has failed to introduce new evidence or changed circumstances to show that a new regulation prescribing cost-benefit-analysis procedures is required or necessary. Nor has AAR alleged material error in the July 10 Decision. For these reasons, the Board should deny AAR's petition for reconsideration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Moreno', with a long horizontal flourish extending to the right.

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Certificate of Service

I certify that on August 14, 2019, I served copies of this document upon the following parties of record in this proceeding, by e-mail or regular mail.



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