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SERVICE DATE – LATE RELEASE NOVEMBER 4, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 752

ASSOCIATION OF AMERICAN RAILROADS—PETITION FOR RULEMAKING

Decided: November 4, 2019

AGENCY: Surface Transportation Board.

ACTION: Solicitation of information.

SUMMARY: The Surface Transportation Board (STB or Board) seeks information on whether and how particular cost-benefit analysis approaches might be more formally integrated into its rulemaking process.

DATES: Comments addressing the information requests described below will be due by January 17, 2020. Replies will be due by March 6, 2020.

ADDRESSES: Comments and replies may be filed with the Board either via e-filing or in writing addressed to: Surface Transportation Board, Attn: Docket No. EP 752, 395 E Street, S.W., Washington, DC 20423-0001. Comments and replies will be posted to the Board's website at www.stb.gov.

FOR FURTHER INFORMATION CONTACT: Sarah Fancher at (202) 245-0355. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: On March 14, 2019, the Association of American Railroads (AAR) filed a petition to institute a rulemaking to adopt procedural rules that would require a cost-benefit analysis in certain Board rulemaking proceedings and would set certain data requirements. In response to the petition, the Board received filings from the Competitive Enterprise Institute, the Western Coal Traffic League, the Joint Shippers,¹ the National Grain and

¹ The Joint Shippers consist of the Agricultural Retailers Association, American Chemistry Council, 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, Private Railcar Food and Beverage Association, The Chlorine Institute, The Fertilizer Institute, and the Vinyl Institute.

Feed Association, the American Forest & Paper Association, and the American Fuel & Petrochemical Manufacturers.

On July 10, 2019, the Board issued a decision waiving the provision at 49 C.F.R. § 1110.2(d), which requires the Board to rule on a petition for a rulemaking within 120 days of the filing of the petition. In that decision, the Board deferred action to allow the Board to further consider the issues raised in the petition.² The Board continues to consider the practices at other agencies, including other independent agencies that do not have cost-benefit analysis procedural rules,³ and the Board now finds that it would be helpful to solicit 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, the Board seeks the following information:

1. *Methods.* The Board requests information on specific methods—not just general criteria and processes in best practices guides, which the Board has reviewed—that would assist in the qualitative or quantitative analysis of a final rule by the Board. Commenters may wish to draw upon academic literature, other economic regulatory agencies' analyses, or other sources to demonstrate how the Board might identify, and to the extent practicable quantify, specific benefits, costs, and transfer payments. The Board seeks specific methods directly applicable to regulatory issues within the Board's jurisdiction, including the economic regulation of freight railroads. To the extent that commenters reference studies, analyses, or other sources covering other types of regulation or industries, the Board requests that commenters describe in detail the application of the methods to the economic regulation of railroads. Such methods should account for the differences between rules that establish the processes under which administrative litigation takes place and other types of rules that prescribe a particular action or technology without such processes.
2. *Data.* The Board seeks suggestions regarding specific data that the Board collects or could collect to assist with cost-benefit analysis. Commenters may wish to describe potential uses of the Board's established data collections, such as the Waybill Sample or

² AAR filed a petition for reconsideration of the Board's July 10 decision. Because the 120-day deadline waived in the Board's decision passed on July 12, 2019, the petition to reconsider the waiver is moot. Further, with respect to the additional Board action AAR requests in its reconsideration petition, that request is also moot because, in this decision, the Board is soliciting additional information as specified, *infra*, so that it can give further consideration to the AAR petition to institute a rulemaking, just as the Board indicated it would do in its July 10 decision. The Board expects the responses to this solicitation will be helpful to its consideration of the issues, and at this time, the Board is not denying or granting the AAR petition to institute a rulemaking.

³ Neither the Board's authorizing legislation nor the Administrative Procedure Act requires the Board to conduct formal cost-benefit analysis. See Village of Barrington, Ill. v. STB, 636 F.3d 650, 670-71 (D.C. Cir. 2011); see also BNSF Ry. v. STB, 526 F.3d 770, 776 (D.C. Cir. 2008).

the reports submitted by Class I carriers, or potential changes to those collections, that would help facilitate or inform cost-benefit analysis. Commenters may also wish to describe new or additional data that the Board might start to collect and analyze, and suggest procedures for doing so, to assist in cost-benefit analysis.

3. *Application.* The Board seeks a detailed description of how cost-benefit analysis would apply to a hypothetical rulemaking, using the methods and data sources identified in response to items 1 and 2 above. Specifically, the Board suggests that commenters consider a hypothetical proposed rule to modify the revenue-variable cost (R/VC) percentage used for purposes of market dominance from 180% to 165%. For purposes of this hypothetical, commenters should assume the Board has the authority to modify 49 U.S.C. § 10707(d)(1)(A) and should not address the statutory constraint in their comments.⁴ To the extent practicable, the comments should provide a detailed example of how the Board would conduct a cost-benefit analysis of this hypothetical proposed rule utilizing appropriate methods and data sources.
4. *Threshold.* The Board requests information on the threshold for determining the rulemaking proceedings to which any cost-benefit analysis procedures should apply. Commenters may wish to identify qualitatively or quantitatively a category or categories of rules.

Again, the Board expects to take responses to this solicitation into consideration in connection with its decision on AAR's petition to institute a rulemaking, which the Board is not denying or granting at this time. The requested information will be helpful to the Board's continued consideration of the issues raised in AAR's petition to institute a rulemaking. This decision is consistent with AAR's suggestion that the Board move forward with a "transparent process that allows for relevant input from all interested stakeholders" and to "open the issue for public comment." (Pet. for Recons. 2-3.)

Comments addressing the information requests described above will be due by January 17, 2020. Replies will be due by March 6, 2020.

It is ordered:

1. Comments as described above are due by January 17, 2020.
2. Replies are due by March 6, 2020.
3. AAR's petition for reconsideration of the July 10 decision is denied as moot.
4. This decision is effective on its date of service.

⁴ By suggesting this hypothetical proposed rule, the Board does not intend to convey any view on the statutory R/VC percentage, which the Board lacks authority to modify. The hypothetical was selected to provide commenters a common example with which to apply their views and suggestions on methods and data sources.

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