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Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

Re: Ex Parte No. 752, *Association of American Railroads – Petition for Rulemaking*

Dear Ms. Brown:

Hereby transmitted is a Reply by The Western Coal Traffic League to The American Association of Railroads' Petition for Rulemaking for filing with the Board in the above referenced matter.

Sincerely yours,

Timothy A. Roth
An Attorney for The
Western Coal Traffic League

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 752

PETITION FOR RULEMAKING

REPLY OF THE WESTERN COAL TRAFFIC LEAGUE

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Dated: April 3, 2019

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REPLY BY THE WESTERN COAL TRAFFIC LEAGUE TO THE ASSOCIATION OF AMERICAN RAILROADS' PETITION FOR RULEMAKING

The Western Coal Traffic League ("WCTL") hereby replies in opposition to a petition for rulemaking (the "Petition") filed by The Association of American Railroads ("AAR") on March 14, 2019, in the above-captioned docket. WCTL respectfully requests that the Board deny the Petition.

INTRODUCTION

AAR asks the Board to open a proceeding and issue three rules related to the Surface Transportation Board's ("STB" or "Board") rulemaking procedures. Specifically, AAR proposes that the Board establish new procedural rules requiring that: (1) when the Board issues a notice of proposed rulemaking it will include a cost-benefit analysis ("CBA") of the proposed rule and reasonable regulatory alternatives, and that if the Board adopts a final rule it will update its CBA and consider costs and benefits; (2) the Board specifically consider the cumulative impact of a proposed rule in light of existing regulatory burdens; and (3) the Board use reliable data that reflects market realities, including up-to-date data regarding the financial conditions in the railroad industry, when it decides whether to propose or adopt a new rule.[1]

[1] Petition at 16.

AAR claims that its proposed rules "will not unfairly advantage any particular stakeholder" and that "there is no basis for concluding the reforms offered here will create an undue burden or otherwise slow down the Board's regulatory proceedings."[2] AAR's claims, however, are without merit. By adopting and incorporating CBA into its rulemaking procedures, the Board will certainly cause undue burden to parties and to itself, and in a manner that will harm both shippers and consumers. For the reasons stated herein, the Board should exercise its authority to deny the Petition in the above-captioned docket.

The adoption of AAR's proposed rules will create an undue burden on the Board and slow down the Board's pending and future regulatory proceedings. Indeed, AAR's proposed rules will require the Board to undertake extra procedural steps—conducting CBA at various points throughout the regulatory process—resulting in considerable regulatory delay. Moreover, AAR's proposed rules will force the Board to incur additional costs and divert critical agency resources away from other proceedings and pertinent Board matters, so that the Board can conduct CBAs for its proposed rules, their reasonable alternatives, and eventual final rules, in every rulemaking.

Finally, AAR's proposed rules are wholly unnecessary for the Board to conduct reasoned rulemaking. In fact, the Board's current regulatory process, when active, already conducts "conceptual CBA" that ensures that its policies are reasoned and capable of passing review under the Administrative Procedure Act's ("APA") arbitrary and capricious standard. Formal CBA, on the other hand, is neither a precondition to reasoned rulemaking nor a guarantee of a more reasoned rulemaking than APA notice-and-comment rulemaking. Moreover, independent

[2] *Id.* at 18.

agencies, like the Board, have been largely unsuccessful in conducting CBA in practice. Given the foregoing, the Board should deny the Petition.

ARGUMENT

I. AAR's Proposed Rules Will Delay Resolution of Pending Rulemakings and Lengthen the Regulatory Process in the Future

Conducting CBA for all proposed rules, their reasonable alternatives, and final rules, as proposed by AAR, will be a time-intensive endeavor. Despite AAR's claims that CBA will not "otherwise slow down the Board's regulatory proceedings," it is well-established that adding an additional procedural step to an agency's regulatory process, *i.e.*, conducting CBA in addition to APA notice-and-comment rulemaking procedures, lengthens that process.[3] Indeed, adding CBA to the Board's rulemaking procedures will delay the resolution of pending rulemakings and lengthen the regulatory process for future ones.

The Securities and Exchanges Commission's ("SEC") attempts at issuing rules under the Dodd Frank Act following *Business Roundtable*, for example, illustrate how adopting CBA slows an agency's regulatory process. In that case, the U.S. Court of Appeals for the D.C. Circuit vacated an SEC rule, finding SEC's action arbitrary and capricious under the APA, on

[3] *See* Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 89 (2018) ("If agencies must satisfy more procedural requirements, it should take them longer to act—that is, unless they opt to divert resources from other projects. Either way, the agency's burden is increased, so one would expect less total administrative action, greater delays for the action that does get through, or both."), available at http://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/02%20Nielson_ART_Final.pdf; *see also* Paul N. Singarella & Marc T. Compopiano, *The Role of Economics in Environmental Health and Safety Regulation After Entergy*, 35 ENVIRONS. ENVTL. L. & POL'Y J. 101, 106, 107 (2011) (requirement to consider costs and benefits "could create an unnecessary procedural burden where there is little risk of an unreasonable or inefficient regulatory outcome" and "overly formal cost-benefit analyses … could be viewed as too restrictive or time-consuming"), available at https://www.lw.com/thoughtLeadership/role-of-economics-in-enviromental-regs-after-entergy.

the basis that the SEC failed to "determine as best it can the economic implications of the rule."[4] In other words, the SEC failed to adequately conduct CBA. Following the case, the SEC's attempts at issuing rules under the Dodd Frank Act, with an eye focused towards conducting adequate CBA, took on an abnormally sluggish pace.[5] The inclusion of CBA into the Board's regulatory process also threatens to place unnecessary strains on the Board to meet statutory and/or judicial deadlines, and any other requirements that are pertinent to the Board's function.[6]

II. AAR's Proposed Rules Will Increase Agency Costs on the Board

In the Petition, AAR claims that "there is no basis for concluding the reforms offered here will create an undue burden … [on] the Board's regulatory proceedings."[7] AAR fails, however, to consider the undue burden that will be imposed on the Board in the form of extra costs that it will incur, and agency resources that it will have to devote, to conduct CBA. As University of Chicago Law School Professor Eric A. Posner has exclaimed, "[d]etermining costs and benefits can be expensive!"[8]

CBA can be a cost-intensive undertaking for an agency for a couple reasons. First, CBA drives up agency costs simply by requiring an agency to undertake an additional procedural task

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[4] *Business Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011).

[5] Jesse Hamilton, *Dodd-Frank Rules Slow at SEC After Cost Challenge*, Bloomberg (Mar. 6, 2012), available at https://www.bloomberg.com/news/2012-03-06/dodd-frank-rules-slow-at-sec-after-court-cost-benefit-challenge.html.

[6] *See* Congressional Research Service, *Independent Regulatory Agencies, Cost-Benefit Analysis, and Presidential Review of Regulations*, at 17 (Nov. 16, 2012), available at https://www.everycrsreport.com/files/20121116_R42821_f13ce4444471435dc5f00a6918929150267f077f.pdf.

[7] Petition at 18.

[8] Eric A. Posner, *Cost-Benefit Analysis in U.S. Regulation*, at 5, available at https://www.law.uchicago.edu/files/file/e.posner-cost-benefit_analysis_in_u_s_regulation.pptx.

that it would not have otherwise been required to in APA notice-and-comment rulemaking.[9] Under AAR's proposed rules, the Board is responsible for incurring costs and devoting agency resources to conduct CBA for proposed rules and their reasonable alternatives, and to the extent practicable, consider the cumulative impact of a proposed rule in light of existing regulatory burdens.[10] AAR's proposed rules also require the Board to prepare an updated CBA of the proposed rule and its reasonable alternatives before the final rule is adopted.[11] Second, AAR's proposed rules do not establish how expansively the Board is supposed to define "costs" and "benefits." Given the expansive reach of the rail industry on society and the economy, including the hundreds of different industries that rely on rail, or are in some other manner touched by it, the Board is required, under AAR's proposed rules, to accomplish a Herculean task in reasonably and effectively computing all of the direct and indirect "costs" and "benefits" associated with any given rule.

In the same way that regulatory delay impacts the Board's ability to effectively regulate, so too do increased agency costs. High agency costs associated with CBA requirements can have a chilling effect on agencies' willingness to open new rulemakings.[12] Indeed, agencies will forgo rulemaking altogether simply if, in so doing, the agency will have to absorb high costs.[13] In such cases, agencies are incentivized to instead use less participatory regulatory vehicles like

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[9] *See* CRS Report, *supra* note 6, at 15 (adopting CBA generally burdens agencies).

[10] Petition at 22.

[11] *Id.*

[12] Nielson, *supra* note 3, at 88 ("[I]n today's world, it takes too much time and too many resources for agencies to act—particularly for notice-and-comment rulemaking" in part because agencies "may also have to engage in cost-benefit analysis.").

[13] *Id.*

guidance documents to effect new policies.[14] Relatedly, studies have also shown that because costs tend to be easier to monetize than benefits, costs can be overestimated, which in effect nudges agencies towards not regulating.[15] In short, increased agency costs associated with CBA can create such a daunting and administratively unfeasible task for the Board that it could impede its ability to effectively regulate when regulation is needed in order to protect shipper and consumer interests.

III. The Board's Current Regulatory Practices are Adequate Under the APA and CBA Does Not Guarantee Better Rulemaking

While AAR acknowledges that CBA does not apply to independent agencies like the Board, AAR makes repeated reference in the Petition to CBA being a necessary component to reasoned policymaking.[16] To be clear, the Board is not required to conduct CBA for its rules to pass review under the APA's arbitrary and capricious standard. Moreover, WCTL is unaware of any case where a court has found a Board rule promulgated under its normal APA notice-and-comment rulemaking practices to be arbitrary and capricious under the APA for failure to adequately assess costs and/or benefits.

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[14] *See* Thomas McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1386 (1992), available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3189&context=dlj; *see also* Jason Webb Yackee & Susan Yackee, *Testing the Ossification Thesis: An Empirical Explanation of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 1414 (2012) (CBA can be so costly and time consuming that it can cause a diversion of resources that could "prevent agencies from developing desired regulations, or create important incentives to avoid undertaking certain regulatory efforts in order to avoid oversight imposed cost"), available at http://www.gwlr.org/wp-content/uploads/2012/07/80_5_3_Yackee.pdf.

[15] *See* Dennis Kelleher, Stephen Hall & Katelynn Bradley, *Setting the Record Straight on Cost-Benefit Analysis and Financial Reform at the SEC*, Better Markets, Inc. (July 30, 2012), available at https://bettermarkets.com/sites/default/files/Setting%20The%20Record%20Straight.pdf.

[16] Petition at 2, 6, 9-10, 19, 20-21.

Nevertheless, the Board already conducts a sort of "conceptual CBA" as part of its regulatory process. "Conceptual CBA" describes "a disciplined framework for specifying baselines and alternatives," which ensures that both costs and benefits are considered, and that also encourages agencies to rely on "'evidence' compared to 'quantified guesstimated' analysis."[17] In other words, "conceptual CBA" is an evidence-focused CBA, preferable to agencies that regulate in areas where quantification and monetization of costs and benefits are too difficult or costly. The Board's effective application of "conceptual CBA" is readily apparent in some of its decisions. For example, in *Ex Parte Communications in Informal Rulemaking* Proceedings, EP 739, slip op. at 7-8 (STB served Sept. 28, 2017), the Board balanced benefits and concerns in determining whether to allow ex parte communications in information rulemaking proceedings. In the same docket, the Board later concluded that "[h]aving reviewed the comments, the Board continues to believe that the benefits of not requiring disclosure for ex parte communications prior to the issuance of an NPRM outweigh the potential harms."[18] Also, in *On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, EP 726, slip op. at 4 (STB served May 15, 2015), the Board weighed the potential industry impact in the form of litigation costs in future cases from acting by adjudication against the avoidance of re-litigation costs and conservation of party and agency resources by acting by rulemaking.

Furthermore, it remains an open question whether CBA is even a reliable technique capable of improving agencies' regulatory decisionmaking. For instance, George Washington

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[17] John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L. J. 882, 893 (2015), available at https://www.yalelawjournal.org/pdf/a.882.Coates.1011_owe353wf.pdf.

[18] *Ex Parte Communications in Informal Rulemaking Proceedings*, EP 739, slip op. at 8 (STB served Feb. 28, 2018).

University Law Professor Robert L. Glicksman testified before the House Judiciary Committee's Subcommittee on Courts, Commercial, and Administrative Law that:

> Cost-benefit analysis is itself a flawed technique for distinguishing between useful and counterproductive regulations … the existing regulatory process already allows those affected by regulation to identify flaws in agency regulatory proposals and affords both regulated entities and agencies opportunities to fix problems such as overly costly or unfair regulation.[19]

Detailed case studies attempting to apply CBA to certain financial regulations also support similar conclusions:

> [P]recise, reliable, quantified CBA remains unfeasible. Quantified CBA of such rules can be no more than guesstimated, and is not a true alternative to expert judgment—it is simply judgment in (numerical) disguise. As a result, for the near future, at least, judicial review of quantified CBA of financial regulation is not likely to generate benefits that exceed its costs.[20]

Rather, "more serious attention should be given to how to improve the capacities of [] agencies to improve the reliability and precision of CBA in practice."[21] Recent analyses also demonstrate that independent agencies, in general, are unsuccessful at conducting CBA, and far less competent in its administration than their executive agency brethren. For instance, of the 101 major rules promulgated by independent agencies from 2008-2013, only *one* included a "complete cost-benefit analysis."[22] Comparatively, executive agencies issued fifty-four major

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[19] Testimony of Robert L. Glicksman, U.S. Congress, House Committee on the Judiciary, Subcommittee on Courts, Commercial, and Administrative Law, *Raising the Agency's Grades—Protecting the Economy, Assuring Regulatory Quality and Improving Assessments of Regulatory Need*, 112th Cong., 1st sess., March 29, 2011, pp. 2-3, available at http://judiciary.house.gov/hearings/pdf/Glicksman03292011.pdf.

[20] Coates IV, *supra* note 17, at 1011.

[21] *Id.*

[22] Richard L. Revesz, *Cost-Benefit Analysis and the Structure of the Administrative State: The Case of Financial Services Regulation*, 34 YALE L.J. 545, 560-61 (2016), available at file:///C:/Users/troth/Downloads/SSRN-id2733713.pdf.

rules in Fiscal Year 2013 alone.[23] Of those rules, thirty were "budgetary transfer rules" nearly all of which were "quantified and monetized."[24] Of the remaining twenty-four, seven fully quantified costs and benefits, two included solely benefits, and eleven included solely costs.[25] Only four went entirely without quantification.[26] The reason for this disparity is believed to be because executive agencies, and not independent agencies, benefit from the critical function that the Office of Information and Regulatory Affairs ("OIRA"), a subagency of the Office of Management and Budget ("OMB"), plays in overseeing CBA pursuant to Executive Orders 12866 and 13564.[27] Because independent agencies do not fall under OIRA's purview, independent agencies do not benefit from OIRA's expertise and are isolated from methodological advances adopted by executive agencies.[28]

In short, the regulatory benefits to be achieved as a result of engaging in a "time-consuming, expensive (and perhaps ultimately indeterminate) process of formal economic cost-benefit analysis are simply not worth the cost."[29] Therefore, in the interests of shippers, consumers, and its own regulatory process, the Board should not adopt AAR's proposed rules.

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[23] *Id.* at 561.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *See id.* at 561-575 (illustrating how OIRA oversight has improved CBA conducted by the Nuclear Regulatory Commission, the Commodity Futures and Trading Commission, and the SEC).

[29] Amy Sinden, *The Economics of Endangered Species: Why Less is More in the Economic Analysis of Critical Habitat Designations*, 28 HARV. ENVTL. L. REV. 129, 212 (2004), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=459426.

CONCLUSION

For the foregoing reasons, the Board should deny the Petition filed by AAR.

Respectfully submitted,

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Dated: April 3, 2019

CERTIFICATE OF SERVICE

I certify that on this 3rd day of April, 2019, I served copies of the foregoing Reply by The Western Coal Traffic League to The Association of American Railroads' Petition for Rulemaking for Docket No. EP 752, *Association of American Railroads—Petition for Rulemaking*, upon all parties of record in this proceeding by first class mail, postage prepaid, and by email.

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