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Office of Proceedings
May 17, 2016
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May 17, 2016

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

Re: EP 704 (Sub-No 1), Review of Commodity, Boxcar, and TOFC/COFC Exemptions

Dear Ms. Brown:

The Association of American Railroads (AAR) writes in response to the Board's May 6, 2016 Decision, which purported to resolve AAR's April 8, 2016 Petition for Release of Information and Request for Extension of Time. See STB Decision, *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704 (Sub-No. 1), at 2 & n.1 (STB served May 6, 2016).

By taking the position that AAR's request "is properly addressed through" the Freedom of Information Act (FOIA) and then invoking FOIA's deliberative process privilege to exempt virtually all of the information underlying the proposed rules from disclosure in the above-captioned rulemaking proceedings, the Board has failed to comply with its statutory obligations to disclose the technical analysis, methodology, data, and other materials it relied on for the proposed rules. See 5 U.S.C. § 553.

AAR has separately availed itself of the appeal procedures under FOIA (see enclosed), because that is the process that the Board has provided, but AAR is writing separately to object to this approach.

Respectfully,


Geoffrey Sigler


Cynthia Richman

Counsel for the Association of American Railroads

Enclosure

May 17, 2016

VIA NEXT DAY UPS

The Hon. Daniel R. Elliott III
Chairman
Surface Transportation Board
395 E Street S.W.
Washington, DC 20423-0001

Re: Appeal of STB Response Letter -- FOIA Request No. 16-022 (May 6, 2016).

Dear Chairman Elliott:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Board's implementing regulations at 49 C.F.R. § 1001.3, the Association of American Railroads (AAR) respectfully appeals the determination made by the Board's Office of the General Counsel in the above-captioned letter denying in part a request for Board records as set forth in the AAR's April 8, 2016 Petition for Release of Information and Request for Extension of Time.

Consistent with FOIA's objective of increasing the transparency of agency action, FOIA exemptions are construed narrowly and the agency bears the burden of justifying its decision to withhold requested documents. *See Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 39 (D.C. Cir. 2002). FOIA's deliberative process privilege applies only if the information at issue is both predecisional and deliberative. *Id.*

The Board's decision provides virtually no factual background, let alone facts sufficient to provide a basis to invoke FOIA's deliberative process privilege. *See id.* Among other deficiencies, the Board fails to provide factual or legal support for its position that the materials can be withheld. Moreover, FOIA's deliberative process privilege does not apply to factual reports and technical analysis. *Id.*

The Board has failed to comply with its statutory obligations to disclose the technical analysis, methodology, data, and other materials it relied on for the proposed rules and has deprived the AAR of the opportunity to meaningfully participate in the rulemaking proceedings in violation of the Administrative Procedure Act (APA), 5 U.S.C. §553.

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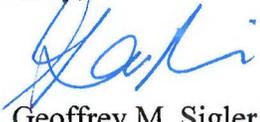
The Hon. Daniel R. Elliott III

May 17, 2016

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For the foregoing reasons, the FOIA Response Letter should be overturned, the information underlying the Board's proposed rules should be disclosed, and the comment deadline should be extended to permit a meaningful opportunity for public comment on the Board's proposed rules as required under the APA.

Respectfully,



Geoffrey M. Sigler



Cynthia E. Richman

Counsel for the Association of American Railroads

Enclosures



Surface Transportation Board
Washington, D.C. 20423-0001

May 6, 2016

Timothy Strafford
Association of American Railroads
425 3rd St., S.W.
Suite 1000
Washington D. C. 20024

Re: STB Response Letter – FOIA Request No. 16-022

Dear Mr. Strafford,

This letter responds to your April 8, 2016, petition on behalf of the Association of American Railroads (AAR) for release of certain records related to the Board's Notice of Proposed Rulemaking in EP 704 (Sub-No. 1), *Review of Commodity, Boxcar, and TOFC/COFC Exemptions* (STB served March 23, 2016) (*Exemptions NPRM*). In your petition, you seek access to all data, reports, workpapers, and other materials that underlie the proposed rules. You also request access to the workpapers and analysis referenced in the concurring opinion, and any other materials related to the NPRM that are not part of the public record. By decision served on May 6, 2016, in response to your petition, the Board's Director of the Office of Proceedings concluded that certain parts of AAR's request for the release of records should be addressed through the Board's Freedom of Information Act (FOIA) procedures. Having reviewed those parts of your request under our FOIA procedures, we are partially granting your request.

After a thorough search of our records, we have located 31 records that are responsive to your request. We are releasing in full (excluding confidential waybill data, which is protected under FOIA Exemption 4) the requested workpaper underlying the Board's decision. We are also releasing certain preliminary analysis referenced in a Board Member's statement concurring with the *Exemptions NRPM*. But we are withholding pre-decisional internal records, as explained below.

Records Released

In a decision dated May 6, 2016, responding to your petition, the Board indicated that it would release a public version of the workpaper that underlies the Board's proposed revocation of the class exemption for, specifically, crushed or broken stone or rip rap; hydraulic cement; coke produced from coal; primary iron or steel products; and iron or steel scrap, waste or tailings. This record will be available on the Board's website at www.stb.dot.gov. On the Board's homepage, select Industry Data/Economic Data/EP 704 (Sub-No. 1). As noted above, the confidential version is protected from disclosure under FOIA Exemption 4.

We are also releasing certain preliminary analysis that was created by the Board's Office of Economics at the request of Vice Chairman Debra Miller and referenced in her concurring opinion in the *Exemptions NPRM*. Because this analysis was not adopted by the Board as a rationale for its decision, it is an internal, pre-decisional, and deliberative record that is protected from disclosure by FOIA Exemption 5. However, the Board is exercising its discretion to release it. This record will be available on the Board's website at the location described above. Again, any confidential data in this analysis is being withheld under Exemption 4.

Records Withheld

We are withholding, as protected from disclosure by FOIA Exemption 5, 29 records that contain other data, analyses, and materials related to the NPRM. These records are internal, pre-decisional, and deliberative. Consistent with the rationale underlying Exemption 5, we believe that release of these records would chill our deliberative process and confuse the public.

Within 30 days of receipt of this letter, you may appeal to the Chairman of the Surface Transportation Board this determination withholding certain records. 5 U.S.C. § 552(a)(6)(A)(i); 49 C.F.R. § 1001.3. Any appeal should be sent to Chairman Daniel R. Elliott III at Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001; or (202) 245-0452 (FAX); or Chairman.Staff@stb.dot.gov.

Sincerely,



Chris Oehrle

Attorney Adviser

Office of the General Counsel

Phone: (202) 245-0271

for

Marilyn Levitt

FOIA/Privacy Officer/Attorney

Office of the General Counsel

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