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ASSOCIATION OF AMERICAN RAILROADS

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Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423

Re: Ex Parte No. 706, Reporting Requirements for Positive Train Control Expenses and Investments

Dear Ms. Brown:

Pursuant to the Board's Notice of Proposed Rulemaking served October 13, 2011, please find the Reply Comments of the Association of American Railroads for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot

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Attachment

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. EP 706

REPORTING REQUIREMENTS FOR
POSITIVE TRAIN CONTROL EXPENSES AND INVESTMENTS

REPLY COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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Introduction

Pursuant to the Board's October 13, 2011, Notice of Proposed Rulemaking ("NPRM"), the Association of American Railroads ("AAR"), on behalf of its member freight railroads, hereby submits its reply comments regarding the Board's proposal to adopt reporting requirements for investments and expenses associated with the implementation and operation of Positive Train Control ("PTC").

In the NPRM, the Board proposed to amend its reporting rules to require rail carriers that submit annual R-1 reports to file a "PTC Supplement." The PTC Supplement would include versions of several existing schedules to the R-1 that would break out PTC-related expenditures, "so that they can be viewed both as component parts of and separately from other capital investments and expenses." NPRM at 1. The proposed PTC Supplement would also include PTC versions of existing schedules that would report certain PTC-related operating statistics. *See id.* at 5.

The AAR's opening comments supported the Board's proposal to adopt new reporting requirements. The AAR agreed with the Board's conclusion that the agency needed to be aware of PTC-related expenditures to properly perform its oversight role. The AAR noted that, unless PTC-related financial and operating data are reported by the railroad industry on a routine basis, the Board may be unable to reconstruct the data in a manner that it finds satisfactory for its own oversight purposes or in future regulatory proceedings. The AAR also proposed certain minor modifications to the Board's proposal. Specifically, the AAR: (i) provided recommendations regarding the mechanics of implementing the proposed reporting requirements; (ii) explained why the Board *should not* require railroads to provide supplemental reporting in R-1 reports regarding the value of funds from government transfers that are used to implement PTC; and (iii) explained why the Board *should* require railroads to report certain operating statistics pertaining to movements of toxic-by-inhalation and poisonous-by-inhalation materials (collectively, "TIH") in a PTC version of Schedule 755.

Opening comments were also submitted by Union Pacific Railroad Company ("UP"). UP had petitioned the Board to institute this rulemaking. UP supported the Board's proposed rule and suggested modifications consistent with those proposed by the AAR.

Only one set of opening comments was submitted in opposition to the Board's proposal. The American Chemistry Council and the Chlorine Institute (collectively, "ACC/CI") submitted joint comments arguing that the Board should withdraw the proposed rule, or at least delay its adoption, until the Board also develops a rule requiring reporting of the purported benefits of PTC.

In the discussion below, the AAR responds to ACC/CI's arguments and shows that none of them provides a reason for the Board to modify or withdraw its proposal. As the AAR shows, the Board anticipated and correctly rejected each of the arguments in the NPRM.

The AAR urges the Board to complete this rulemaking process promptly and to adopt the proposed new reporting requirements, with the modifications proposed by the AAR.

Discussion

A. The Proposed Rules Will Provide The Board With Meaningful Information Regarding PTC-Related Expenditures.

ACC/CI's first argument against the Board's proposal is that it "does nothing more than give each railroad carte blanche to record whatever expenses it wishes, in the manner each one thinks best." ACC/CI Comments at 5. This claim is without merit. As the Board observed in the NPRM, PTC expenditures are currently incorporated into certain schedules that the railroads submit as part of their R-1 reports, but they "are not separately broken out." NPRM at 2. The Board's proposal follows a straightforward approach by establishing a series of supplemental schedules containing exactly the same property and operating expense accounts as the existing schedules, but in which the railroads will separately break out the PTC-related portion of their overall expenditures. *See* NPRM, Appendix B. Thus, the same well-defined rules that govern which overall expenditures must be reported in what accounts and how they must be reported – that is, the rules comprising the Board's Uniform System of Accounts – will apply to railroad reporting of PTC-related expenditures. *See* 49 C.F.R. part 1201, Subpart A.

ACC/CI also argue that railroads might engage in misreporting of certain non-PTC-related costs as PTC-related costs. *See* ACC/CI Comments at 4. This claim is also without merit. As the Board observed in the NPRM, "[t]he carrier's R-1 forms are independently audited; the Board monitors these audits and can take action if a carrier is misreporting expenses as PTC related." NPRM at 5 n.9; *see also Certification of Railroad Annual Report R-1 by Independent Accountant*, 1 I.C.C.2d 902 (1985) (requiring Class I railroads to submit reports from independent public accountants that specified data in R-1 reports have been examined using agreed-upon procedures and found in compliance with the Uniform System of Accounts); *Adoption of the Railroad Accounting Principle Board's Recommendation of Its Data Integrity Principle in Reports Prepared Using Agreed-Upon Procedures*, 4 I.C.C.2d 818 (1988) (formally requiring public accountants that perform audits of R-1 reports to comply with generally accepted auditing standards). Indeed, ACC/CI offer just one example of potential misreporting – reporting the entire cost of a new PTC-equipped locomotive as a PTC-related cost – which even they recognize would plainly be "absurd." ACC/CI Comments at 4.[1]

In sum, not only is there no realistic possibility that railroads will misreport their PTC-related costs, but if there are issues requiring interpretation of the Board's reporting rules and their application to PTC-related costs, they can be addressed through the Board's existing oversight of the R-1 reporting process.

B. The Board Should Not Broaden The Scope Of This Rulemaking To Include A Reporting Requirement Involving The Purported Benefits Of PTC.

ACC/CI's second argument against the Board's proposal is that the Board should not adopt a rule requiring the reporting of costs without also including a reporting requirement that tracks the purported benefits of PTC. ACC/CI Comments at 6. PPG Industries ("PPG") raised the same argument in its opposition to UP's petition to institute this rulemaking, and the Board rejected that argument in the NPRM. The Board explained that there is no reason to defer the adoption of cost-reporting rules until shippers propose a method of measuring the purported benefits of PTC. To the contrary, the Board identified two reasons for adopting the cost-

[1] ACC/CI's comments include a verified statement by Thomas D. Crowley and Robert D. Mulholland, consultants with L. E. Peabody & Associates ("Crowley/Mulholland V.S."). Messrs. Crowley and Mulholland also try but fail to identify a realistic reason for concern about consistent reporting. They say there is some variation in "reporting format and level of detail" in the PTC Implementation Plans that railroads have provided to the Federal Railroad Administration, and suggest that the variation may carry over to the R-1 reports. Crowley/Mulholland V.S. at 8. However, the only example they provide – one involving reporting on "Wayside Devices" – does not indicate any difference in railroads' understanding of what constitutes PTC-related wayside devices or how to account for their costs under the Board's established Uniform System of Accounts.

reporting rule now, before addressing PTC's purported benefits. First, railroads are incurring costs now to meet the PTC implementation deadline, but any possible efficiencies that arise "will occur after implementation." NPRM at 5. Second, the proposal "to supplement the R-1 reports" is a "relatively straightforward" and "viable approach" for capturing PTC cost data, while "it is not clear how, at this point, [the Board] would identify those productivity gains that may arise as a result of PTC investments, and [no one] has proposed a method of doing so." *Id.*

ACC/CI's comments reinforce the Board's conclusion in the NPRM. ACC/CI concede that there is no urgent need for the Board to adopt a rule requiring reporting of PTC's purported benefits – they acknowledge that the "amount of benefits that will accrue to railroads as a result of PTC may not be known until after PTC is installed." ACC/CI Comments at 6. ACC/CI also show that they have no actual proposal for measuring the purported benefits of PTC: they offer two paragraphs on this issue from their consultants, who suggest that the Board somehow assess "relative changes in performance" between line segments with and without PTC "to tease out productivity gains attributable to PTC." Crowley/Mulholland V.S. at 15. That suggestion is a long way from a straightforward, viable proposal.[2] Indeed, if the Board could not adopt a rule requiring reporting of PTC costs until shippers develop a way to "tease out" a measure of PTC-related productivity gains and then translate those gains into reportable benefits, it might never adopt its proposed cost-reporting rule – which would be ACC/CI's preferred outcome, as they readily admit. *See* ACC/CI Comments at 8.

[2] ACC/CI's consultants offer no means of accounting for significant differences between line segments on which PTC is installed and line segments on which PTC is not installed that have nothing to do with PTC – including differences in the physical characteristics, the mix of traffic types, and the traffic density. Moreover, the Board's proposal (with the exception of a form for recording government transfers) involves a straightforward reporting of costs in existing schedules in R-1 reports. ACC/CI offer no suggestion for translating any PTC-related differences in "performance" into offsetting benefits that could be reported in R-1 reports without considerable modification and creation of new schedules capable of capturing line-specific service metrics.

Moreover, notwithstanding the "studies" prepared by the ACC/CI consultants, independent government studies have already shown that the benefits to railroads from PTC will be exceedingly small in relation to the costs.[3]

In any event, the Board's adoption of its proposed cost-reporting rule now would not preclude a future rulemaking to address PTC benefits, if the Board would ever deem such an analysis to be productive in view of the already extensive data and studies referenced above. Thus, there is no reason for the Board to broaden, complicate, and delay this rulemaking by addressing PTC benefits in the same proceeding.

Railroads are presently incurring substantial costs to implement PTC. The Board has proposed a viable, straightforward method of reporting those costs. Whether or not the Board decides to institute a rulemaking regarding the benefits of PTC at some point in the future, it should adopt its proposed cost-reporting rule without delay.

C. The Board Should Not Credit ACC/CI's Claims About Potential Misuse Of PTC Cost Data.

ACC/CI's final argument against the Board's proposal is that railroads will use, and even potentially misuse, the PTC cost data in an effort to recover their PTC-related costs from TIH shippers. ACC/CI Comments at 7-8. Once again, the Board addressed the issue in the NPRM. The Board acknowledged that "[h]aving the costs broken out may encourage carriers to seek to recover specific PTC costs in individual cases," but it explained that carriers "are already free to do that, and thus this rulemaking does not determine the outcome of disputes over PTC expenses in particular cases or in the broad proceeding in *Class I Railroad & Financial Reporting – Transportation of Hazardous Materials*." NPRM at 4 n.8. ACC/CI's baseless claims that

[3] *See* Federal Railroad Administration, Docket No. FRA-2008-0132, Notice No. 3, *Final Rule: Positive Train Control Systems, 49 CFR Parts 229, 234, 235 and 236* (Jan. 15, 2010).

railroads will misuse PTC data are also entirely irrelevant to this rulemaking, which involves only the decision to require reporting.

Indeed, ACC/CI plainly recognize that the Board's adoption of the proposed rule will not determine whether or how the PTC cost data are used, and that the Board has ample authority to investigate claims of abuse. ACC says that it "will contest any unwarranted charges, just as it is currently involved in contesting railroad practices such as special handling requirements for TIH, indemnification demands, and so forth." ACC/CI Comments at 4 n.3.

A Board rule requiring railroads to report of PTC cost data will not determine whether or how those data are used in any Board proceeding or in other regulatory matters. The Board will ultimately make those determinations in separate proceedings, where interested parties will have the opportunity to raise any objections with the Board.

Conclusion

The Board should adopt the PTC reporting requirements as set forth in the NPRM with the modifications proposed by the AAR.

Respectfully submitted,

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