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May 18, 2022

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

RE: EP 770-1, *Urgent Issues in Freight Rail Service—Railroad Reporting*

Dear Ms. Brown:

I am writing on behalf of the Class I freight railroad members of the Association of American Railroads (“AAR”) in response to the Surface Transportation Board’s (“Board”) decision on May 6, 2022, in EP 770-1, *Urgent Issues in Freight Rail Service—Railroad Reporting* (“Decision”). The Class I railroads recognize that their recent service performance has not met many customers’ expectations. The testimony of the railroad senior executives at the two-day hearing provided critical insight for all stakeholders to understand the various factors contributing to the breadth and complexity of these problems, and the extensive measures the railroads are taking to address them. The Class I railroads are committed to delivering safe and reliable service.

AAR members also respect and share the Board’s desire to address the situation quickly. In fact, several Class I railroads had voluntarily begun providing the Board with relevant information before the Board’s Decision. It is that respect that is driving AAR’s Class I railroad members to comply with the Decision as best as they are able in this shortened reporting timeframe despite the legal concerns motivating this letter.¹

The Board’s Decision reflects an understandable desire for quick action, but the Decision was not issued in a vacuum. As the Board recognizes several times, there are other pending proceedings—including *First-Mile / Last-Mile Service* (EP 767), and *Revisions to Regulations for Expedited Relief for Service Emergencies* (EP 762)—that also are focused on the provision of service-related data or to which that data is relevant. Indeed, the pending FMLM proceeding presents the precise questions of whether certain data which the Board is ordering to be produced now—on an expedited and temporary basis without notice and comment and other rulemaking procedures and protections—is relevant, reliable, appropriate, and within the scope

¹ Certain information included in the Decision is not available to the railroads on an expedited basis, and not relevant to service performance in any event. However, the railroads will voluntarily comply to the extent they are able, given the circumstances.

of the Board’s authority to order on a permanent basis.² And the opening and reply comments in that proceeding make clear that the railroads have substantial concerns about the significance and utility of such data.³ The Board perhaps has not yet evaluated that record or those concerns.⁴ The important procedural protections and substantive analyses required in regulatory proceedings must not be circumvented or rendered moot by the Board’s Decision in this docket, or by the railroads’ voluntary compliance with the Decision.

For example, there is no explanation by the Board of how specific pieces of requested information will assist it in monitoring the current service challenges. Nor is there any explanation why the Board’s current robust service reporting rules are insufficient for its purposes. Without notice and comment, there has been no opportunity for stakeholders to help tailor the data to be collected to the needs of the Board given the current circumstances in the United States. Nor could stakeholders ensure that the Board was ordering publication of information that would be useful to it and not confusing or misleading to the public.

The Decision also contains no analysis or regard for the burdens it imposes. Generally, government collections of data must undergo a Paperwork Reduction Act analysis and should also contain a cost-benefit analysis—be it formal or informal—both of which help to ensure the necessity of the collection, while considering the burdens on the regulated entities. Though the Board does not yet conduct cost-benefit analyses, in the FMLM proceeding the Board has appropriately requested information to weigh the costs and burdens of the very data

² See *Urgent Issues in Freight Rail Service—Railroad Reporting*, EP 770-1, at 3-4 (STB served May 6, 2022) (*Railroad Reporting*) (citing *First-Mile / Last-Mile Serv.*, EP 767, (STB served Sept. 2, 2021) (“FMLM”) and *Revisions to Reguls. for Expedited Relief for Serv. Emergencies*, EP 762, (STB served Apr. 22, 2022)); see also Testimony of Martin Oberman, Chairman, Surface Transportation Board, Before the United States House of Representatives Committee on Transportation and Infrastructure, Subcommittee on Railroads, Pipelines, and Hazardous Materials, Hearing on “Board Member Views on Surface Transportation Board Reauthorization”, at 6 (May 12, 2022) (“Oberman Testimony”) (admitting, “[w]hile the Board’s recent actions have included temporary reporting on first-mile / last-mile service issues related to the urgent service problems, and other crucial measures of whether shippers received their freight when expected, the Board is considering using its authority to *permanently collect more detailed information on service* reliability and has been considering comments recently filed on this topic from interested parties.”) (emphasis added).

³ See AAR Comment, *First-Mile / Last-Mile Serv.*, EP 767 (Dec. 17, 2021); BNSF Comment, *First-Mile / Last-Mile Serv.*, EP 767 (Dec. 17, 2021); CN Comment, *First-Mile / Last-Mile Serv.*, EP 767 (Dec. 17, 2021); CSX Comment, *First-Mile / Last-Mile Serv.*, EP 767 (Dec. 17, 2021); KCS Comment, *First-Mile / Last-Mile Serv.*, EP 767 (Dec. 17, 2021); AAR Comment, *First-Mile / Last-Mile Serv.*, EP 767 (Dec. 17, 2021); AAR Reply, *First-Mile / Last-Mile Serv.*, EP 767 (Feb. 17, 2022); BNSF Reply, *First-Mile / Last-Mile Serv.*, EP 767 (Feb. 17, 2022); CN Reply, *First-Mile / Last-Mile Serv.*, EP 767 (Feb. 17, 2022); CSX Reply, *First-Mile / Last-Mile Serv.*, EP 767 (Feb. 17, 2022); NS Reply, *First-Mile / Last-Mile Serv.*, EP 767 (Feb. 17, 2022).

⁴ See Surface Transportation Board, Report on Pending STB Regulatory Proceedings First Quarter 2022, at 9 (noting the next scheduled date for action in the FMLM proceeding will be in August 2022).

publication ordered here.⁵ Although this Decision and the burdens it imposes are time-limited, the Decision threatens to, but certainly should not, moot the cost-benefit analysis the Board indicated it would conduct in the FMLM proceeding.

The Class I railroads appreciate the urgency of service problems being experienced by many customers and respect the Board's efforts to respond and assist. As the Board has recognized, this is a complex situation and not one that has a "quick fix."⁶ Notwithstanding their deep concern about the relevance, utility, and potential misuse of some of the information the Board has ordered produced, the railroads will undertake best efforts to comply while continuing to restore service to the levels customers deserve. But if the Board determines it is necessary to collect any similar data permanently, especially as it pertains to pending proceedings, it is imperative the Board not short-circuit the rulemaking processes and protections required by law.

In conclusion, the Class I railroads are committed to resolving the service challenges being experienced on their networks. As uniformly expressed at the hearing, the Class Is are undertaking a variety of efforts to do so safely and efficiently and are confident in their commitment at that hearing to restore the service levels expected of them as quickly as possible.

Sincerely,

A handwritten signature in blue ink, appearing to be 'JFM', written in a cursive style.

J. Frederick Miller Jr. (*admitted in Maryland*)
Counsel for the Association of
American Railroads

⁵ See *FMLM* at 6 (requesting that commenters analyze any "trade-offs", including "what additional burden would be associated with providing any suggested information or measurements?"; "If individual reports directly to shippers are suggested, what, if any, are the drawbacks of such approach...?"; "How should the Board consider relative burden based on the type of carrier involved in the transportation (e.g., Class II or III railroad)?").

⁶ *Railroad Reporting*, at 4; see Oberman Testimony, at 4 ("I am not optimistic about significant improvement in rail service in the near term.").