

■ 84. Amend § 1.1526 by revising the second sentence of paragraph (a) and revising paragraph (b) to read as follows:

**§ 1.1526 Further proceedings.**

(a) \* \* \* However, on request of either the applicant or Bureau counsel, or on her own initiative, the presiding officer may order further proceedings, such as an informal conference, oral argument, additional written submissions or, as to issues other than excessive demand or substantial justification, an evidentiary hearing.

(b) A request that the presiding officer order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

■ 85. Amend § 1.1527 by revising the section heading and the first sentence, and adding a new last sentence to read as follows:

**§ 1.1527 Initial decision.**

A presiding officer (other than the Commission) shall issue an initial decision on the application as soon as possible after completion of proceedings on the application. \* \* \* When the Commission is the presiding officer, the Commission may, but is not required to, issue an initial or recommended decision.

■ 86. Amend § 1.1528 by revising the last sentence to read as follows:

**§ 1.1528 Commission review.**

\* \* \* If review is taken, the Commission will issue a final decision on the application or remand the application to the presiding officer (other than the Commission) for further proceedings.

■ 87. Amend § 1.1604 by revising paragraphs (b) and (c) to read as follows:

**§ 1.1604 Post-selection hearings.**

(b) If, after such hearing proceeding as may be necessary, the Commission determines that the “tentative selectee” has met the requirements of § 73.3591(a) it will make the appropriate grant. If the Commission is unable to make such a determination, it shall order that another random selection be conducted from among the remaining mutually exclusive applicants, in accordance with the provisions of this subpart.

(c) If, on the basis of the papers before it, the Commission determines that a substantial and material question of fact exists, it shall designate that question

for hearing. Hearing proceedings shall be conducted by a presiding officer. See § 1.241.

**PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE**

■ 88. The authority citation for part 76 continues to read as follows:

**Authority:** 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

■ 89. Amend § 76.7 by revising paragraph (g)(2) to read as follows:

**§ 76.7 General special relief, waiver, enforcement, complaint, show cause, forfeiture, and declaratory ruling procedures.**

\* \* \* \* \*

(g) \* \* \*

(2) Before designation for hearing, the staff shall notify, either orally or in writing, the parties to the proceeding of its intent to so designate, and the parties shall be given a period of ten (10) days to elect to resolve the dispute through alternative dispute resolution procedures, or to proceed with an adjudicatory hearing. Such election shall be submitted in writing to the Commission.

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**SURFACE TRANSPORTATION BOARD**

**49 CFR Part 1250**

[Docket No. EP 724 (Sub-No. 5)]

**Petition for Rulemaking; Railroad Performance Data Reporting**

**AGENCY:** Surface Transportation Board.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Surface Transportation Board (STB or Board) grants in part a petition filed by the American Chemistry Council (ACC) to amend the Board’s railroad performance data reporting regulations. Specifically, the Board proposes to modify its regulations to include chemical and plastics traffic as a distinct reporting category for the “cars-held” metric.

**DATES:** Comments are due by December 6, 2019. Reply comments are due by January 6, 2020.

**ADDRESSES:** Comments and replies may be filed with the Surface Transportation Board either via e-filing or in writing addressed to: Surface Transportation Board, Attn: Docket No. EP 724 (Sub-

No. 5), 395 E Street SW, Washington, DC 20423-0001. Comments and replies will be posted to the Board’s website at [www.stb.gov](http://www.stb.gov).

**FOR FURTHER INFORMATION CONTACT:**

Amy Ziehm at (202) 245-0391.

Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

**SUPPLEMENTARY INFORMATION:** The Board’s railroad performance data reporting regulations at 49 CFR part 1250, which became effective on March 21, 2017, require all Class I carriers and the Chicago Transportation Coordination Office (CTCO), through its Class I members, to report certain service performance metrics on a weekly, semiannual, and occasional basis.

On December 6, 2018, ACC filed a petition for rulemaking<sup>1</sup> to amend those data reporting regulations to: (1) Include chemical and plastics (Standard Transportation Commodity Code (STCC) 28, except fertilizer)<sup>2</sup> traffic as a distinct reporting category for the “cars-held” metric at 49 CFR 1250.2(a)(6); (2) amend 49 CFR 1250.3(a) to clarify that yard dwell must be reported for each yard subject to average daily car volume reporting;<sup>3</sup> and (3) extend the same types of terminal reporting requirements that are applicable to the Chicago gateway (as clarified by comments filed by ACC on May 6, 2019) to the New Orleans, East St. Louis, and Memphis gateways (together, the Mississippi Gateways). (Pet. 1, 5; ACC Comments 1, 12-13.)

On January 28, 2019, the Association of American Railroads (AAR) filed a reply in opposition to ACC’s petition. By decision served on April 5, 2019 (*April Decision*), the Board opened a rulemaking proceeding and directed ACC and AAR to provide additional information regarding ACC’s proposed amendments to the regulations. Pursuant to that decision, ACC and AAR each filed comments on May 6, 2019, and AAR filed reply comments on May 20, 2019.

After considering the petition for rulemaking and the comments received, the Board will grant ACC’s petition in

<sup>1</sup> On December 12, 2018, ACC filed an errata to its petition.

<sup>2</sup> ACC excludes the fertilizer reporting category of STCC 28 from its request because fertilizer is already included in the Board’s data reporting regulations under 49 CFR 1250.2(a)(6). (See Pet. 6.)

<sup>3</sup> ACC initially sought to extend the weekly average terminal dwell time reporting requirement at 49 CFR 1250.2(a)(2) to include all Class I, terminal, and switching carriers at the Chicago gateway. However, as described below, in its comments filed on May 6, 2019, ACC withdraws this part of its initial request and instead seeks the amendment described here.

part and propose to include chemical and plastics (STCC 28, except fertilizer)<sup>4</sup> traffic as a distinct reporting category for the cars-held metric at 49 CFR 1250.2(a)(6). The Board will deny ACC's petition with regard to its other requested amendments.

### Background

In 2014, the Board initiated a rulemaking proceeding to establish new regulations requiring all Class I railroads and the CTCO, through its Class I members, to report certain service performance metrics on a weekly basis. See *U.S. Rail Serv. Issues—Performance Data Reporting (2014 NPRM)*, 80 FR 473 (Jan. 6, 2015), EP 724 (Sub-No. 4) (STB served Dec. 30, 2014).<sup>5</sup> The primary purpose of that rulemaking proceeding was to develop a set of performance data that would allow the agency to monitor current service conditions in the industry and improve the Board's ability to identify and help resolve future regional or national service disruptions more quickly, should they occur. *Id.* at 3. The Board adopted its final rule on November 30, 2016, *U.S. Rail Service Issues—Performance Data Reporting (Final Rule)*, 81 FR 87472 (Dec. 5, 2016), EP 724 (Sub-No. 4) (STB served Nov. 30, 2016), and the rule became effective on March 21, 2017 (82 FR 9529 (Feb. 7, 2017)).<sup>6</sup>

In its petition, ACC argues that its requested changes “are desirable to give the Board and shippers consistent service metrics across railroads that provide adequate visibility into critical aspects of the national rail system.” (Pet. 1.) ACC states that STCC 28 traffic accounts for the highest number of manifest carloads, compared to all other two-digit STCC groups, and plays a key role in the national economy. (*Id.*) ACC also states that STCC 28 traffic is vital to many essential goods and services for consumers and a variety of industries, such as chlorine and other treatment chemicals for the purification of public water supplies, plastics and polymers for use in the manufacturing of automobiles, and various plastics and chemicals for use in the manufacturing of pharmaceuticals and medical devices. (*Id.* at 6–7.) According to ACC, STCC 28

traffic is especially vulnerable to rail service problems because it cannot readily shift to alternative rail carriers or to other modes. (*Id.* at 7.)

ACC maintains that requiring accurate and consistent reporting of STCC 28 service metrics across rail carriers would enable early identification of service issues and a better opportunity to mitigate them. (*Id.*) ACC also states that STCC 28 traffic is an important bellwether of service issues, because it moves long distances and is a leader in traffic volume, second only to coal in total carloads, which means that service issues have a deeper impact on STCC 28 commodities than most other commodity groups. (*Id.* at 9.) Further, ACC states that STCC 28 traffic is more likely to signal congestion at terminals than many other existing categories for the cars-held metric, because it moves almost exclusively in manifest service that must be switched individually or in small blocks at terminals (whereas the existing categories mostly represent unit train traffic, which requires little or no switching at terminals). (*Id.* at 10.)

Additionally, ACC states that extending the same types of Chicago reporting requirements, including dwell time, to the Mississippi Gateways is important because the problems of one carrier at these points can have a cascading effect on other carriers in the national network. (*Id.* at 11.) ACC states that information about service at the Mississippi Gateways is especially important for STCC 28 traffic because a high proportion of this traffic originates in the west and interchanges at the Mississippi Gateways to reach destinations in the east. (*Id.* at 12.)

In its reply to ACC's petition, AAR argues that the Board should not adopt additional commodity-specific reporting, (AAR Reply 2–4, Jan. 28, 2019), and that joint Mississippi Gateways information is unnecessary and would be unduly burdensome (*id.* at 5–6). AAR argues that a narrow focus on subsets of rail traffic can remove important context from the full picture of a globalized supply chain, that commodity-specific reporting is particularly susceptible to such distortion, and that granular reports are therefore of limited benefit. (*Id.* at 2–4.) AAR further argues that continuous changes to the Board's reporting rules would impose ongoing costs to railroads that would need to make programming changes to their systems to comply, and that ACC had the opportunity to advocate for chemical-specific reporting during the initial formulation of the reporting rules but did not make such a proposal. (*Id.* at 3.) Additionally, with respect to the Mississippi Gateways

reporting, AAR states that, because the Mississippi Gateways do not have the equivalent of the CTCO,<sup>7</sup> any joint service report would need to be built from the ground up from data from individual carriers. AAR states that this would be burdensome to undertake, and that the burden is not justified. (*Id.* at 5–6.)

In the *April Decision*, 84 FR 14907 (April 12, 2019), EP 724 (Sub-No. 5), slip op. at 2, the Board opened a rulemaking proceeding and directed ACC and AAR to provide additional information. Specifically, the Board directed ACC to elaborate on shippers' experiences using performance data reported under the existing rules to inform their business and supply chain decision-making. *Id.* The Board directed ACC to explain how the additional data requested would materially enhance that decision-making with reference to specific scenarios or real-world circumstances, and, if possible, that ACC quantify the value of additional reporting. *Id.* The Board also directed ACC to provide additional data supporting its selection of the Mississippi Gateways relative to other terminal locations, both in terms of their significance to the overall rail network and specifically to chemical traffic shipments. *Id.* Additionally, the Board directed ACC to explain in greater detail why the existing performance data reported pursuant to § 1250.2(a)(2) are insufficient indicators as to rail performance across the network, including at the Mississippi Gateways. *April Decision*, EP 724 (Sub-No. 5), slip op. at 2.

The Board directed AAR to explain in greater detail the “programming changes” railroads would need to make to comply with the proposed reporting requirements; the “other costs” that would be associated with complying with the proposed reporting requirements; and the specific process individual carriers would need to undertake to build “from the ground up data” to compile a joint service report at each proposed Mississippi Gateway location. *Id.* The Board also directed AAR to provide data that further describes or quantifies the “ongoing costs” and “burden” of the proposed changes. *Id.*

In response to the *April Decision*, ACC and AAR each filed subsequent

<sup>4</sup> STCC 28 is designated for “chemicals or allied products” and referred to generally by ACC as “chemical and plastics”.

<sup>5</sup> For a background of the service problems that led to the Board initiating the 2014 proceeding, see *2014 NPRM*, EP 724 (Sub-No. 4), slip op. at 2–3.

<sup>6</sup> By decision served on March 13, 2017, the Board issued a technical correction to the final rule to include an additional fertilizer STCC in addition to the 14 fertilizer STCCs initially included. *U.S. Rail Serv. Issues—Performance Data Reporting*, 82 FR 13401 (March 13, 2017), EP 724 (Sub-No. 4) (STB served Mar. 13, 2017).

<sup>7</sup> AAR states that the CTCO currently reports weekly average terminal dwell in hours for 11 individual Chicago yards and an average of the group. (AAR Reply 4, Jan. 28, 2019.) AAR further states that the CTCO reports encompass the six Class I railroads and both terminal and switching railroads that operate in Chicago. (*Id.*)

comments, and AAR filed a reply.<sup>8</sup> ACC argues that existing performance data reporting has played a crucial role in helping ACC's membership address rail service issues. (ACC Comments 2.) ACC provides several specific examples of how the existing data reporting has helped its members. Among those examples, ACC explains how one member used a carrier's specific data to elevate the member's concerns and establish regular communication with the carrier to address service issues, as well as an example of how a member used such data to make operational and business planning decisions. (*Id.* at 2–5.) ACC states that, with the additional reporting metrics it proposes, chemical shippers would be better prepared to identify rail service issues, address them with railroads, make internal operational adjustments, and manage their railcar fleet. (*Id.* 5–6.) According to ACC, railroads are generally reluctant to collaborate on service issues unless the shipper is able to provide data identifying the issue and possible solutions. (*Id.* at 9.) ACC asserts that the additional reporting would enable shippers to engage with railroads to identify alternative routings involving the Mississippi Gateways or address network issues impacting STCC 28 traffic. (*Id.*) ACC states that the additional reporting would also enhance shippers' ability to internally manage service issues and may lead to substantial cost savings. (*Id.*) ACC provides specific examples of how its members would benefit from the additional data reporting. (*Id.* at 9–11.)

In its May 6 comments, as described further below, AAR provides information on the formation and development of the CTCO and programs, efforts, and systems to collect and report performance data on the Chicago terminal. (AAR Comments 2–6, May 6, 2019.) AAR also provides quantitative estimates of the costs associated with each of ACC's requested reporting requirement changes. (*Id.* at 7–10.) In its reply, AAR argues that ACC has failed to demonstrate that the additional reporting would have public benefits tied to the Board's regulatory authority that would justify the expense and burden that reporting would place on carriers. (AAR Reply 2, May 20, 2019.) Additionally, according to AAR, ACC's filings illustrate continued

<sup>8</sup> As noted earlier, in its comments ACC withdraws its second request to extend the reporting at 49 CFR 1250.2(a)(2) to the Chicago gateway, and instead seeks revisions to the Chicago terminal reporting requirements to clarify that yard dwell must be reported for each yard subject to average daily car volume reporting. See *supra* note 3.

misconceptions regarding the utility of railroad performance metrics. (*Id.* at 4.) AAR also argues that the utility of railroad service data is limited to identifying changes and trends on a particular railroad, and that the data cannot reliably be used to understand causality, compare rail performance across different commodities or time periods, or compare railroads. (*Id.* at 4–5.)

#### *Discussion of ACC's Requests*

*ACC Request #1: Include chemical and plastics (STCC 28) traffic as a distinct reporting category for the cars-held metric at 49 CFR 1250.2(a)(6).* According to ACC, separately reporting cars-held data for STCC 28 traffic would enable shippers to identify regional issues affecting that traffic. (ACC Comments 6.) ACC argues that the cars-held metric is an important indicator of rail system fluidity, and that for STCC 28 traffic, a fluid rail system is especially important in the Gulf Coast, where a substantial portion of this traffic is concentrated. (*Id.*) ACC asserts that the current data reporting masks the severity of service events having a disproportionate impact on STCC 28 traffic, and ACC provides charts that it asserts show an example of this dynamic. (*Id.* at 6–7.) ACC reiterates that additional reporting will enhance shippers' ability to internally manage service issues and may lead to substantial cost savings. (*Id.* at 9.)

AAR responds that additional reporting of STCC 28 traffic as a line item in the “cars-held for more than 48 hours” report would necessitate each Class I carrier to alter the coding necessary to pull the data prescribed by the Board. (AAR Comments 9–10.) According to AAR, the cost associated with this request would total approximately \$34,000 for all seven Class I railroads, as it would require three to four employees totaling roughly 80 hours to update existing computer coding, write new code to modify the search parameters, test new code against existing systems to make sure it does not cause problems, and have the new code approved. (*Id.* at 10.) AAR again objects to “continuous changes to the Board's reporting rules,” as such changes “impose ongoing costs to railroads that would need to make programming changes to their systems to enable compliance.” (*Id.* at 9 (quoting AAR Reply 3, Jan. 28, 2019).) AAR again notes that ACC had the opportunity to make this request in the past and failed to do so. (AAR Comments 9.)

After considering ACC's petition and the responsive comments filed, the Board concludes that including STCC

28 traffic as a distinct reporting category for the cars-held metric at 49 CFR 1250.2(a)(6) would be reasonable, warranted, and consistent with the rail transportation policy (RTP) of 49 U.S.C. 10101. As explained in the *Final Rule* in EP 724 (Sub-No. 4), service adequacy is a key part of the Board's mandate under the Interstate Commerce Act. *Final Rule*, EP 724 (Sub-No. 4), slip op. at 5. Pursuant to the RTP, in regulating the railroad industry, it is the policy of the United States Government to minimize the need for regulatory control, 49 U.S.C. 10101(2), promote a safe and efficient rail transportation system, 49 U.S.C. 10101(3), ensure the development of a sound rail transportation system to meet the needs of the public, 49 U.S.C. 10101(4), and encourage efficient management of railroads, 49 U.S.C. 10101(9). ACC's requested amendment to 49 CFR 1250.2(a)(6) would advance these RTP goals.<sup>9</sup> The additional data reporting on chemical and plastics traffic would promote the RTP by allowing the agency, as well as shippers and other stakeholders, to more quickly identify and respond to service issues related to these important commodities. ACC has demonstrated both the critical importance of this particular traffic as well as the benefits to specifically identifying this traffic in the cars-held metric.<sup>10</sup> Reporting of chemicals and plastics as a stand-alone category of cars holding for 48 hours or longer would, in addition to allowing the Board and shippers to monitor the fluidity of these commodities vital to essential goods and services, have the potential to help shippers address such issues privately with railroads, make operational adjustments, and improve their business planning, including through the management of their rail car fleets. These private solutions, without further involvement by the Board, could reduce the need for litigation and could lower overall costs of the provision of these commodities. In light of these significant public benefits, AAR has not shown in its comments to date that the modest one-time coding cost it describes

<sup>9</sup> Further, as discussed in the *Final Rule*, the Board has the responsibility for monitoring the adequacy of service under specific statutory provisions, including service emergencies under 49 U.S.C. 11123. Moreover, service issues can also be relevant when the Board considers whether railroad service practices are reasonable, 49 U.S.C. 10702, whether to force a line sale in the event of inadequate service, 49 U.S.C. 10907, and whether railroads are fulfilling their common carrier obligations, 49 U.S.C. 11101, or providing safe and adequate car service 49 U.S.C. 11121. *Final Rule*, EP 724 (Sub-No. 4), slip op. at 5.

<sup>10</sup> AAR concedes that “granular reports” provide at least a certain “limited benefit.” (AAR Reply 4, Jan. 28, 2019.)

would be unduly burdensome to the reporting railroads.

*ACC Request #2: Amend 49 CFR 1250.3(a) to clarify that yard dwell must be reported for each yard subject to average daily car volume reporting.* In lieu of its initial request, ACC instead seeks amendments to the Chicago terminal reporting requirements that ACC states would clarify that yard dwell must be reported for each yard subject to average daily car volume reporting. (ACC Comments 1.) ACC claims that, while reviewing the Chicago reporting, ACC discovered a disconnect between the current reporting practice and the Chicago terminal reporting rule. (*Id.* at 12.) ACC states that AAR has been reporting the seven-day average yard dwell for the Chicago terminal yards that are subject to average daily car volume reporting under 49 CFR 1250.3(a). (*Id.*) According to ACC, the Board appears to have required this reporting in its decision that issued the Chicago terminal reporting requirements, but the Board did not include the requirement in the rule's text. (*Id.*, citing *Final Rule*, EP 724 (Sub-No. 4), slip op. at 22–23.) ACC requests that the Board make clarifying edits to 49 CFR 1250.3(a) to capture the full scope of required reporting. (*Id.* at 12–13.)

AAR asserts that the “disconnect” noted by ACC is merely the text of the Board's decision that accepted AAR's offer to voluntarily report the metrics that were already being shared with Chicago stakeholders. (AAR Reply 5–6, May 20, 2019.) AAR argues that the Board should not codify that voluntary report; instead, the Board should allow the railroads and Chicago stakeholders the flexibility to change reports as business and technology changes warrant, without having to come back to the Board and petition it to begin a rulemaking proceeding. (*Id.* at 6.)

The Board does not agree with ACC's claim of a disconnect between the Board's decision and the rule as codified, which is the sole basis for ACC's request to amend 49 CFR 1250.3(a). The Board explicitly stated in the *Final Rule* that it would “accept the AAR's voluntary offer to include the data it is reporting to [the Chicago Metropolitan Agency for Planning] in CTCO's report to the Board.” *Final Rule*, EP 724 (Sub-No. 4), slip op. at 23 (emphasis added). The Board further stated that, “[t]he final rule, as augmented by the data that AAR has offered to submit voluntarily, will continue to maintain a robust view of operating conditions in the Chicago gateway.” *Id.* (emphasis added). Accordingly, there is no confusion

regarding the scope of required reporting for Chicago. Therefore, the Board will deny ACC's request to amend 49 CFR 1250.3(a).

*ACC Request #3: Extend the terminal reporting requirements applicable to the Chicago gateway to the Mississippi Gateways.* ACC states that it requests additional data reporting for the Mississippi Gateways because a substantial amount of its members' traffic move through these gateways. According to ACC, “multiple large ACC members indicated that approximately 25% of their traffic moves through the Mississippi Gateways.” (ACC Comments 11.) However, ACC states that it is unable to provide additional data regarding the Mississippi Gateways because the Public Use Waybill Sample does not identify specific interchange locations. (*Id.*) ACC states that, for additional data regarding the volume of STCC 28 traffic moving through the Mississippi Gateways, the Board could review the Confidential Carload Waybill Sample (CCWS), which would enable the Board to calculate the volume of STCC 28 traffic moving through the Mississippi Gateways as well as other gateway locations. (*Id.*) ACC states that it would support the inclusion of additional gateways that the Board determines are significant to the overall rail network. (*Id.*)

According to ACC, the Mississippi Gateways are complex terminals with many interchange yards and multiple carriers, and congestion may impact some, but not all, of the yards and carriers serving a gateway. (*Id.* at 7–8.) Therefore, ACC requests that the proposed Mississippi Gateway reporting provide the terminal- and yard-level data necessary for chemical shippers to pinpoint service issues in these gateways. (*Id.* at 8.) ACC indicates that this information could be used to anticipate bunching and other delays. (*Id.*) ACC states that this information would allow members to know whether a Mississippi Gateway issue is attributable to a carrier or a specific gateway yard and to plan accordingly. (*Id.* at 10.)

ACC also argues that the additional data reporting would enable shippers to more accurately predict their transit times and, thus, more efficiently manage their own private railcar fleets. (*Id.*) For example, according to ACC, the data would enable a member to identify the source of gateway dwells and reduce its fleet accordingly, and potentially help an ACC member advocate for shifting traffic from one gateway to another. (*Id.* at 10–11.)

AAR maintains that ACC has not justified its request for joint reporting of

metrics from the Mississippi Gateways. (AAR Reply 3, May 20, 2019.) As noted above, in its May 6, 2019 comments, AAR describes the circumstances that gave rise to the formation of the CTCO and the development of programs, efforts, and systems to address the complexity of Chicago operations, as well as the significant estimated costs of replicating them in the Mississippi Gateways. (AAR Comments 2–9.) AAR estimates that the cost to the Class I carriers of reproducing the joint yard inventory, yard dwell, and trains held reports for the Mississippi Gateways would total approximately \$1.6 million in initial development, and approximately \$330,000 in annual maintenance expenses. (*Id.* at 6–7.) AAR argues that the Mississippi Gateways do not approach the complexity associated with Chicago operations, nor are any of the Mississippi Gateways as central to the national rail network. (AAR Reply 3, May 20, 2019.) AAR also states that, while ACC's members report that approximately 25% of their individual traffic moves through the Mississippi Gateways, ACC does not attempt to prove that this sampling is representative of chemical traffic generally. (*Id.*) In response to ACC's suggestion that the Board review the CCWS, AAR cautions that the CCWS contains information on commercial interchanges, not necessarily the operational interchanges reflecting where traffic actually moved, so the CCWS can give the Board only a rough understanding of the volume of interchange traffic at each Mississippi Gateway. (*Id.* at 3–4.)

The Board finds that ACC's petition and comments do not provide adequate justification to extend the terminal reporting requirements applicable to Chicago to the Mississippi Gateways at this time. The Board has focused on reporting at Chicago due to Chicago's unique importance to the overall fluidity of the national rail network. *See, e.g., 2014 NPRM*, EP 724 (Sub-No. 4), slip op. at 6 (reiterating “the longstanding importance of Chicago as a hub in national rail operations and the impact that recent extreme congestion in Chicago has had on rail service in the Upper Midwest and nationwide”). ACC has not demonstrated, nor does analysis of the waybill support,<sup>11</sup> that the Mississippi Gateways have a similar level of importance across commodities and the rail network. Furthermore, ACC

<sup>11</sup> The Office of Economics reviewed the confidential Waybill Sample data for 2017 and determined that 831,606 cars were interchanged in Chicago, while only 410,320 cars were interchanged in the Mississippi Gateways combined.

has not sufficiently explained why the data already collected from each Class I carrier's 10 largest terminals is inadequate to identify problems with fluidity of STCC 28 traffic across the national network, especially if the existing data reporting requirements for the largest terminals are enhanced by the Board's proposal to require separate reporting of cars held for chemical and plastics traffic. Given the costs asserted by AAR of providing such information, ACC has not provided sufficient data to demonstrate the benefits of a separate reporting mechanism at the Mississippi Gateways. Based on the foregoing, the Board concludes that the requested reporting is not warranted at this time and therefore will deny this request.

### Proposed Rule

For the reasons discussed above, and as set forth below, the Board proposes to include chemical and plastics (STCC 28, except fertilizer) traffic as a distinct reporting category for the "cars-held" metric at 49 CFR 1250.2(a)(6). Interested persons may comment on the proposed rule by December 6, 2019; replies are due by January 6, 2020.

### Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) Assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. Sections 601–604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, Section 603(a), or certify that the proposed rule would not have a "significant impact on a substantial number of small entities," Section 605(b). Because the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities "whose conduct is circumscribed or mandated" by the proposed rule. *White Eagle Coop v. Conner*, 553 F.3d 467, 480 (7th Cir. 2009).

The Board's proposed change to its regulations here is intended to improve the quality of the service data reported by Class I carriers and does not mandate or circumscribe the conduct of small

entities. For the purpose of RFA analysis for rail carriers subject to the Board's jurisdiction, the Board defines a "small business" as only including those rail carriers classified as Class III rail carriers under 49 CFR 1201.1–1. See *Small Entity Size Standards Under the Regulatory Flexibility Act*, 81 FR 42566 (June 30, 2016), EP 719 (STB served June 30, 2016) (with Board Member Begeman dissenting).<sup>12</sup> The change proposed here is limited to Class I carriers. Therefore, the Board certifies under 5 U.S.C. 605(b) that the proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. This decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

### Paperwork Reduction Act

Pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501–3521, Office of Management and Budget (OMB) regulations at 5 CFR 1320.8(d)(3), and appendix, the Board seeks comments about the impact of the amendments in the proposed rules to the currently approved collection of the United States Rail Service Issues-Performance Data Reporting (OMB Control No. 2140–0033) regarding: (1) Whether the collection of information, as modified in the proposed rule and further described below, is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate. The Board estimates that the new requirement to include chemical and plastics (STCC 28) traffic as a distinct reporting category would add a one-time hour burden of 15 hours (or 45 hours amortized over three years) per railroad because the railroads will need to update their existing reporting software programs to implement this

<sup>12</sup> Class III carriers have annual operating revenues of \$20 million or less in 1991 dollars or \$39,194,876 or less when adjusted for inflation using 2018 data. Class II carriers have annual operating revenues of less than \$250 million or \$489,935,956 when adjusted for inflation using 2018 data. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds in decisions and on its website. 49 CFR 1201.1–1; *Indexing the Annual Operating Revenues of R.Rs.*, 84 FR 27829 (June 14, 2019), EP 748 (STB served June 14, 2019).

change.<sup>13</sup> In addition to the burden of the one-time programming change, the Board estimates that the annual hour burden of this collection has decreased over the last two-plus years to approximately half of its original estimate, due to efficiencies of routine and improvements in technology. The Board welcomes comment on the estimates of actual time and costs of collection of the United States Rail Service Issues-Performance Data Reporting, as detailed below in Appendix. The proposed rules will be submitted to OMB for review as required under 44 U.S.C. 3507(d) and 5 CFR 1320.11. Comments received by the Board regarding the information collection will also be forwarded to OMB for its review when the final rule is published.

### List of Subjects in 49 CFR Part 1250

Administrative practice and procedure, Railroads, Reporting and recordkeeping requirements.

#### It is ordered:

1. ACC's petition for rulemaking is granted in part and denied in part, as discussed above.
2. The Board proposes to amend its rules as set forth in this decision. Notice of the proposed rules will be published in the **Federal Register**.
3. Comments regarding the proposed rule are due by December 6, 2019. Replies are due by January 6, 2020.
4. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.
5. This decision is effective on the day of service.

Decided: September 30, 2019.

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

**Kenyatta Clay,**  
Clearance Clerk.

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend part 1250 of title 49, chapter X, of the Code of Federal Regulations as follows:

### PART 1250—RAILROAD PERFORMANCE DATA REPORTING

- 1. The authority citation for part 1250 continues to read as follows:

**Authority:** 49 U.S.C. 1321 and 11145.

- 2. Amend § 1250.2 by revising paragraph (a)(6) to read as follows:

<sup>13</sup> In making this estimate, the Board has taken into account the information provided by AAR. (See AAR Comments 10.)

**§ 1250.2 Railroad performance data elements.**

(a) \* \* \*

(6) The weekly average of loaded and empty cars, operating in normal movement and billed to an origin or destination, which have not moved in 48 hours or more, sorted by service type (intermodal, grain, coal, crude oil, automotive, ethanol, fertilizer (the following Standard Transportation Commodity Codes (STCCs): 2812534, 2818142, 2818146, 2818170, 2818426, 2819173, 2819454, 2819815, 2871235, 2871236, 2871238, 2871244, 2871313, 2871315, and 2871451), chemicals or allied products (all remaining STCC 28), and all other).

\* \* \* \* \*

**Note:** The following appendix will not appear in the Code of Federal Regulations.

**Appendix**

**Information Collection**

*Title:* United States Rail Service Issues—Performance Data Reporting.

*OMB Control Number:* 2140–0033.

*Form Number:* None.

*Type of Review:* Revision of a currently approved collection.

*Summary:* As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521, the Surface

Transportation Board (Board) gives notice that it is requesting from the Office of Management and Budget (OMB) approval for the revision of the currently approved information collection, United States Rail Service Issues-Performance Data Reporting, OMB Control No. 2140–0033. The requested revision to the currently approved collection is necessitated by this notice of proposed rulemaking (NPRM), which would require respondents to include chemical and plastics (STCC 28) traffic as a distinct reporting category for cars-held metric at 49 CFR 1250.2(a)(6). All other information collected by the Board in the currently approved collection is without change from its approval (currently expiring on June 30, 2020).

*Respondents:* Class I railroads (on behalf of themselves and the Chicago Transportation Coordination Office (“CTCO”).

*Number of Respondents:* Seven.

*Estimated Time per Response:* The proposed rules seek three related responses, as indicated in the table below.

**TABLE—ESTIMATED TIME PER RESPONSE**

Type of responses	Estimated time per response (hours)
Weekly .....	1.5
Quarterly .....	1.5
On occasion .....	1.5

**TABLE—TOTAL BURDEN HOURS [per year]**

Type of responses	Number of respondents	Estimated time per response	Frequency of responses (year)	Total yearly burden hours
Weekly .....	7	1.5 hours .....	52	546
Quarterly .....	7	1.5 hours .....	4	42
On occasion .....	1	1.5 hours .....	2	3
One-Time .....	7	15 hours (45 hours/3 years) .....	1	105
<b>Total</b> .....				<b>696</b>

*Total “Non-hour Burden” Cost:* There are no other costs identified because filings are submitted electronically to the Board.

*Needs and Uses:* The information collection allows the Board to better understand current service issues and potentially to identify and resolve possible future regional and national service disruptions more quickly. Transparency would also benefit rail shippers and stakeholders, by allowing them to better plan operations and make informed business decisions based on publicly available data, and their own analysis of performance trends over time. As described in more detail above in the NPRM, the Board is amending the rules that apply to this collection to add chemical and plastics (STCC 28, except fertilizer) traffic as a distinct reporting category. The reporting of this traffic as a stand-alone category of cars will allow the

Board to monitor the fluidity of these commodities and give chemical and plastics shippers the ability to identify and mitigate service issues more readily. The collection by the Board of this information, and the agency’s use of this information, enables the Board to meet its statutory duties.

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**BILLING CODE 4915–01–P**

*Frequency:* The frequencies of the three related collections sought under the proposed rules are set forth in the table below.

**TABLE—FREQUENCY OF RESPONSES**

Type of responses	Frequency of responses (year)
Weekly .....	52
Quarterly .....	4
On occasion .....	2

*Total Burden Hours* (annually including all respondents): The recurring burden hours are estimated to be no more than 591 hours per year, as derived in the table below. In addition, there are some one-time, start-up costs of approximately 45 hours for each respondent that must be added as a one-time burden due to the programming changes to add the additional reporting category. To avoid inflating the estimated total annual hourly burden, the 45-hour start-up burden has been divided by three and spread over the three-year approval period. Thus, the total annual burden hours for each of the three years are estimated at no more than 696 hours per year.

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

[Docket No. FWS–R6–ES–2018–0045; FXES1113060000C6–178–FF06E11000]

**RIN 1018–BC03**

**Endangered and Threatened Wildlife and Plants; Removal of *Howellia aquatilis* (Water *Howellia*) From the List of Endangered and Threatened Plants**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.