

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
July 25, 2017
Part of
Public Record

Ex Parte No. 738

REGULATORY REFORM TASK FORCE

**COMMENTS OF
THE AMERICAN FOREST & PAPER ASSOCIATION**

The American Forest & Paper Association (“AF&PA”) submits these comments in response to the Notice of Regulatory Reform Task Force Listening Session (“Notice”) issued by the Surface Transportation Board (“STB” or “Board”) on June 20, 2017 in this proceeding. In the Notice, the Board invited public comment identifying rules and practices that are burdensome, unnecessary, or outdated, as well as recommendations regarding how these issues could be addressed. AF&PA welcomes this opportunity to provide comments, and thanks the Board for its willingness to engage in the laudable goal of critically examining its existing rules and practices.

I. IDENTITY AND INTEREST OF AF&PA.

AF&PA is interested in this proceeding because its member companies rely upon dependable and efficient rail transportation services in their daily operations. AF&PA is an organization that serves to advance a sustainable U.S. pulp, paper, packaging, tissue, and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA’s member companies make products essential for everyday life from renewable and recyclable resources. The forest products industry accounts for approximately 4 percent of the

total U.S. manufacturing GDP, manufactures over \$200 billion in products annually, and employs approximately 900,000 men and women. The industry meets a payroll of approximately \$50 billion annually and is among the top 10 manufacturing sector employers in 45 states.

II. AF&PA REGULATORY REFORM COMMENTS.

AF&PA strongly supports the mission of the Regulatory Reform Task Force (“RRTF”), which was established by the Board earlier this year to comply “with the spirit” of President Trump’s Executive Order 13777.¹ The goals of the RRTF are to improve implementation of regulatory reform initiatives and policies pursuant to the Executive Order, and identify regulations for repeal, replacement, or modification.² Fortunately, the Board is already considering several important regulatory changes that would implement the goals of the RRTF and the Executive Order. As explained herein, AF&PA urges the Board to move forward expeditiously to implement these important reforms.

A. The Board Should Revoke the Commodity Exemptions for Forest and Paper Products Which Would Eliminate Outdated Regulatory Provisions and Streamline Board Processes.

The Board has currently proposed to eliminate certain antiquated commodity exemptions in its pending Ex Parte No. 704 (Sub-No. 1) proceeding.³ Specifically, in that rulemaking proceeding, the Board proposed to revoke the existing class exemptions for (1) crushed or broken stone or rip rap; (2) hydraulic cement; and (3) coke produced from coal, primary iron or

¹ Notice at 1. The Executive Order is available at 82 Fed. Reg. 12285 (March 1, 2017), Executive Order 13777 (Feb. 24, 2017).

² See Interoffice Memorandum to Acting Chairman Ann Begeman from RRTF Regulatory Reform Officer Rachel D. Campbell (dated May 25, 2017), available on the Board website at <https://www.stb.gov/stb/docs/RRTF/RRTF%20Memo%205.25.pdf>.

³ See Review of Commodity, Boxcar, and TOFC/COFC Exemptions, STB Ex Parte No. 704 (Sub-No. 1) (March 23, 2016).

steel products, and iron or steel scrap, wastes or tailings; but also invited comment as to whether other commodity exemptions should also be revoked. AF&PA actively participated in the proceeding and submitted voluminous comments and evidence supporting revocation of the class exemptions for forest and paper products, and the boxcar exemption as applied to rail movements of these same products.⁴

As demonstrated in EP 704 (Sub No. 1), the existing class exemptions for forest and paper products are no longer necessary because they were based on a rail transportation marketplace and regulatory structure that no longer exist. The exemptions for forest and paper products were initially approved in a series of decisions in the late 1980's and early 1990's before implementation of the major rail mergers that drastically consolidated the railroad market. Consolidation in the rail industry over the last 30 years has fundamentally altered the prevailing landscape, allowing the railroads to exert market power over shipments of forest and paper products as shown in EP 704 (Sub No. 1).

In large part, the exemptions were granted to alleviate the burden of tariff filing that railroads faced whenever they established new transportation rates for forest and paper products. Indeed, the forest and paper products industry itself supported the exemptions at the time they were adopted because the tariff filing requirement seriously hampered the ability of railroads to efficiently respond to customer requests for rates and service.

However, the burdens of tariff filing and other regulatory requirements were eliminated many years ago by the Congress when it passed the Interstate Commerce Commission Termination Act, meaning that, today, the very benefits underlying the exemptions no longer exist. Instead, companies that ship paper and forest products are disadvantaged by the

⁴ See AF&PA's Opening Comments (filed July 26, 2016), Reply Comments (filed August 26, 2016), and Supplemental Comments (filed October 3, 2016) in Ex Parte No. 704 (Sub-No. 1).

commodity exemptions based on their lack of prompt access to STB procedures that are available to non-exempt shippers to address rail rate and service concerns. Consequently, the exemptions for forest and paper products are antiquated and were justified by substantially different legal and commercial environments that simply do not exist today. Thus, the exemptions are outdated and unnecessary and should be revoked based on AF&PA's comments and evidence submitted in the EP 704 (Sub No. 1) proceeding.

Revocation would also simplify and streamline the Board's processes. Specifically, revocation of the paper and forest products exemptions would remove the burdensome requirement that a Petition for Revocation must be filed and litigated before the Board can address any complaint involving forest and paper products. This extra step wastes both industry and Board resources, adding unnecessary costs to and prolonging the outcome of Board proceedings.

Additionally, revocation of the exemptions for forest and paper products would not involve the creation of any new regulation. Instead, it would merely simplify the existing regulatory landscape by eliminating outdated regulations and ensuring that rail shipments of forest and paper products are treated the same as other commodities within the Board's jurisdiction.

B. The Board Should Replace Outdated and Burdensome Rules and Standards Related to Reciprocal Switching and Rate Reasonableness.

The RRTF should also remove regulatory barriers and outdated regulations that govern reciprocal switching arrangements and large Stand Alone Cost ("SAC") rate cases, which AF&PA will briefly address. First, the Board should move forward to adopt its reciprocal switching proposal being considered in the rulemaking proceeding known as Ex Parte No. 711

(Sub-No. 1).⁵ The proposal under review in that proceeding would replace the existing reciprocal switching regulations, which have proven to be burdensome and wholly unworkable, and which the Board itself described as rules that “have effectively operated as a bar to relief rather than as a standard under which relief could be granted.”⁶ As the Board knows, when reciprocal switching occurs, it facilitates competition that is otherwise possible but currently inaccessible to rail customers due to the existing regulatory barrier arising from application of a “competitive abuse” standard in order to obtain a switching remedy. In its rulemaking decision, the Board itself stated that this standard “makes less sense in today’s regulatory and economic environment.”⁷ By expanding reciprocal switching arrangements, it would allow rail customers to rely on marketplace competition, rather than Board regulatory intervention, to address rail rate and service issues.

Second, the Board should adopt an alternative rate reasonableness standard that would enable rail customers to avoid the incredibly complex, expensive and time-consuming regulatory process involved in large SAC cases. Although the governing statutes mandate reasonable rates for captive shippers whose movements are subject to railroad market power,⁸ the current rules for SAC cases require epic, multi-year litigation that costs millions of dollars. Even worse, recent cases have shown that the SAC standard is entirely unworkable for shippers of carload traffic. The lack of a workable rate case standard and the Board’s cumbersome litigation process evokes regulatory barriers to ensuring the reasonableness of railroad rates for captive shippers which, in turn, harms the competitiveness of U.S. manufacturing and other rail-dependent

⁵ Reciprocal Switching, STB Ex Parte No. 711 (Sub-No. 1).

⁶ Id. at 8.

⁷ EP 711 (Sub. No. 1) Decision at 9.

⁸ See, e.g., 49 U.S.C. §§ 10701, 10702, and 10704.

industries, as well as the American economy. The existing SAC procedures have grown over the years to become an unwieldy behemoth that must be replaced. As the Board is well aware, the large rate case rules were originally designed, and have been developed and modified over the years, for a small class of unit train coal shippers. Of course, the vast majority of shippers are not unit train coal shippers. Consequently, as a result of the Board's implementation of the rate reasonableness requirements in the governing statute, most captive shippers have no viable rate remedy at all. Accordingly, the Board should consider adopting an alternative large rate case standard, along the lines of the competitive benchmarking concept recommended by the Transportation Research Board in its recent study of the state of freight rail regulation.⁹

III. CONCLUSION.

Consistent with the stated goals of the RRTF, this proceeding reinforces the need for the Board to move forward with eliminating the outdated and unnecessary paper and forest products exemptions, as well as the boxcar exemption as it applies to rail shipments of these products, based on the substantial evidence submitted by AF&PA in Ex Parte No. 704 (Sub-No. 1).

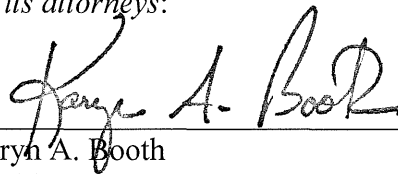
⁹ Transp. Research Bd., Special Report 318, Modernizing Freight Rail Regulation (2015), available at <https://www.nap.edu/download/21759#>.

AF&PA also requests that the Board proceed to revise its existing reciprocal switching rules as proposed in its EP 711 (Sub No. 1) proceeding, and adopt an alternative rate reasonableness standard and process for large cases.

Respectfully submitted,

The American Forest & Paper Association

By its attorneys:

A handwritten signature in black ink, appearing to read "Karyn A. Booth", is written over a horizontal line.

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July 25, 2017