

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 704 (Sub-No. 1)

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REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS

REPLY OF THE
ASSOCIATION OF AMERICAN RAILROADS

On June 28, 2019, the American Forest & Paper Association filed a motion for an extension of time and requested that the Surface Transportation Board extend, until July 16, the deadline for comments in response to memoranda regarding the *ex parte* meetings recently held in this proceeding.¹ The Association of American Railroads takes no position on the specific request for a two-week extension of time, but is concerned about the growing number of serious procedural and substantive problems with this proceeding, several of which are reflected in AF&PA's motion.

This proceeding began in 2016 when the Board, on its own initiative, published a Notice of Proposed Rulemaking proposing to fully revoke the exemptions for: (1) crushed or broken stone or rip rap; (2) hydraulic cement; (3) coke produced from coal; (4) primary iron or steel products; and (5) iron or steel scrap, wastes or tailings. Despite a statutory mandate to *exempt* rail transportation to the maximum extent, and despite the fact that the Board's rules at 49 C.F.R.

¹ AF&PA states that it "is requesting an extension of time simply for its own comments. However, AF&PA would not be opposed to an extension that broadly applied to all parties' comments if the Board believes that a broad-based extension is more appropriate." Motion at 2 & n. 5. AAR submits that the Board should treat all commenters equally and if it decides to extend the deadline for the submission of comments on meeting summaries, it should extend the deadline for all commenters.

Part 1121 provide a path for stakeholders to seek revocation of an individual or class exemption by petition where appropriate, and despite the absence of any such petition, the Board acted *sua sponte* to propose revocation. In other words, the Board proposed to re-regulate without first being asked to do so.

The 2016 NPRM relied on selective and incomplete testimony from a hearing five years earlier in *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704 (STB served Oct. 21, 2010), and on the Board's internal analysis of revenue to variable cost ratios derived from the Carload Waybill Sample through 2013. The NPRM ignored all the contrary written comments in the lead docket, and much of the oral testimony given by twenty-one witnesses. At the time, several railroads and railroad associations, including AAR, had submitted expert witness testimony and evidence demonstrating that revoking the existing exemptions could not be reconciled with statutory requirements, and would be misguided as a matter of policy.

The 2016 NPRM also sought comments regarding the possible revocation of commodity class exemptions beyond the five the Board had identified on its own, and that invitation – coupled with the Board's indication of regulatory activism – drew a predictable response. AF&PA, in its opening comments, requested revocation of exemptions applicable to forest and paper products, and the boxcar exemption as it applies to rail shipments of forest products. As no petition was filed, AAR was forced to explain why AF&PA had failed to justify the revocations it sought in reply comments. *See* AAR Reply Comments (filed Aug. 26, 2016).

The Board's rules provide that when “[a] party seek[s] [a] revocation of an exemption” – the relief AFPA sought in its opening comment – that party “shall provide all of its supporting information at the time it files its petition.” 49 C.F.R. § 1121.3(c). AF&PA nonetheless sought to supplement the record with additional materials after reply comments were filed. AAR

opposed that attempt to circumvent the rules in a letter dated October 21, 2016, arguing that AF&PA's motion should be denied because the filing was untimely, contrary to the Board's rules, prejudicial to AAR and other participants, and improperly sought to expand this proceeding with respect to commodities that the Board did not even address in its proposal.

AF&PA has now used *ex parte* meetings to further supplement the record with respect to a revocation request it has never made in a petition and that was not even proposed by the Board in the NPRM. AF&PA now requests more time to supplement even further by incorporating data from the most recent waybill sample.² *Ex parte* meetings, and comments on the summaries of those meetings, are not the appropriate procedural vehicle for the presentation of new analyses or data in a proposed rulemaking. When the Board recently reformed its rules regarding *ex parte* communications in informal rulemaking proceedings, it specifically concluded that it would not allow *ex parte* communications after reply comments were submitted precisely because the presentation of significant information after the close of the comment period creates substantial challenges. See *Ex Parte Communications in Informal Rulemaking Proceedings*, EP 739, slip op. at 18-19 (STB served Feb. 28, 2018) (noting the recommendations of the Administrative Conference of the United States in *Ex Parte Communications in Informal Proceedings*, 79 Fed. Reg. 35,988, 35,994 (June 25, 2014)).

² AF&PA states that "[i]n recent memoranda, the American Iron and Steel Institute ("AISI") and the Steel Manufacturers Association ("SMA") submitted new pricing evidence regarding paper and forest products commodities. This new pricing evidence includes R/VC information regarding Standard Transportation Commodity Code 24 (Wood Products) and STCC 26 (Pulp & Paper Products) based on 2017 data. These two STCC codes encompass the commodities for which AF&PA is seeking revocation in this proceeding." Motion at 2. AF&PA states that it "plans to include in its comments a statement narrowing the scope of its previous request for revocation. The exact contours of this narrowing are still being considered by AF&PA and its members, and the reduction in scope will be supported by evidence based on the most recent waybill sample." Motion at 3. AF&PA further states that it will use the requested extension of time to consider "whether it can identify currently-regulated commodities for which regulation is not needed." Motion at 3-4.

As a practical matter, the requested two-week extension sought by AF&PA will not afford it enough time to undertake any significant consideration of market forces applicable to the transportation of paper and forest products, and will likely only allow it to conduct a superficial analysis of R/VC ratios. As the comments and replies filed by AAR and its railroad members in this proceeding establish, comparisons of R/VC ratios are of limited probative value in considering whether to revoke an exemption. *See, e.g.,* AAR Opening Comments at 22-29 (filed July 26, 2016).

Regardless of whether AF&PA updates its R/VC ratio calculations, this record is so distorted, compromised, and incomplete that the Board cannot proceed to a final action revoking any exemptions, and should discontinue this proceeding. The original 2016 NPRM was based on flawed legal and economic analysis unsupported by current, meaningful evidence. Two rounds of public comments and *ex parte* meetings have not remedied those deficiencies, nor established that any other exemptions should be revoked. If any stakeholder believes an existing exemption is no longer warranted because of changed market conditions, the appropriate path is for that stakeholder to file a fully supported petition under 49 C.F.R. § 1121.4(f), and for the railroads to have a full and fair opportunity to respond.

Respectfully submitted,



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