

BEFORE THE
SURFACE TRANSPORTATION BOARD

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EX PARTE NO. 760

EXCLUSION OF DEMURRAGE REGULATION FROM
CERTAIN CLASS EXEMPTIONS

COMMENTS OF THE ASSOCIATION OF AMERICAN
RAILROADS

The Association of American Railroads files these comments in response to the Notice of Proposed Rulemaking issued by the Surface Transportation Board on October 7, 2019, in the above-captioned proceeding. The NPRM proposes to: (1) amend 49 C.F.R. § 1039.11 and § 1039.14 to clarify that those exemptions do not apply to the regulation of demurrage; and (2) partially revoke the exemption codified at 49 C.F.R. § 1039.10 for certain agricultural commodities to reregulate demurrage.¹

AAR does not object to the proposed clarifying edits to 49 C.F.R. § 1039.11 and § 1039.14. The Interstate Commerce Commission (“ICC”) issued its decisions establishing each of those exemptions on full and detailed administrative records, and the ICC specifically elected not to exempt certain equipment charges.² As noted in the NPRM, subsequent legal and

¹ The NPRM does not propose to reregulate demurrage with respect to intermodal transportation. See NPRM at 2 & n.3.

² See *Rail Gen. Exemption Auth.—Miscellaneous Manufactured Commodities*, 6 I.C.C.2d 186, 196 (1989) (codified as amended at 49 C.F.R. § 1039.11) (“Thus we decline to exempt carriers from regulation of car service, car hire, and private car allowances in this proceeding.”); *Exemption from Regulation—Boxcar Traffic*, 367 I.C.C. 425, 455 (1983) (codified at 49 C.F.R. § 1039.14) (“For clarification, we note that this decision also does not affect the obligations of rail carriers to compute demurrage charges and establish rules related to those charges, as provided in 49 U.S.C. 10750.”) *aff’d in part*, *Brae Corp. v. United States*, 740 F.2d 1023 (D.C. Cir. 1984).

regulatory proceedings have concluded based on those holdings that neither exemption reached the regulation of demurrage.³ Accordingly, the STB's *sua sponte* proposal to clarify its regulations is consistent with subsequent legal and regulatory proceedings and simply makes plain the current state of the agency's regulations.

However, the NPRM fails to provide a legally-supported rationale for the reregulation of demurrage for certain agricultural commodities. Most glaringly, the NPRM does not grapple with the first two Rail Transportation Policy ("RTP") factors that favor market forces over governmental regulation, and the NPRM lacks any analysis of railroad market power over the relevant commodities. Accordingly, at minimum, the STB must withdraw the current proposal and issue a revised NPRM that makes the requisite findings. The better course for the agency would be to continue to rely on parties' ability to seek to revoke the exemption in specific cases when warranted.

ARGUMENT

I. THE NPRM VIOLATES STATUTORY REQUIREMENTS AND IGNORES THE MOST RELEVANT RTP FACTORS

Generally, the STB retains authority under 49 U.S.C. § 10502(d) to partially (or completely) revoke a previously-issued exemption. That authority is constrained, however, by the plain language of Section 10502 and the statutory scheme as a whole, which evidences congressional intent to favor deregulation of the railroad industry and a directive that the STB work to further this deregulatory goal. Section 10502 provides that the Board "shall" exercise its exemption authority "to the maximum extent" consistent with the statute and that it "may" revoke exemptions, in whole or in part, only when "necessary" to effectuate the RTP goals in

³ See NPRM at 5.

Section 10101. The U.S. Court of Appeals for the D.C. Circuit has recognized that this statutory language mandates the “deregulation of the entire railroad industry to the maximum extent possible in conformity with the national rail transportation policy.”⁴ As Chairman Begeman has observed, “The law directs the Board to exercise its exemption authority broadly, and that directive was unchanged with passage of the recent STB Reauthorization Act, P.L. 114-110.”⁵

While the NPRM gives cursory consideration of the RTP goals, the analysis is both legally insufficient and incompatible with precedent. To be sure, the NPRM makes conclusory statements concerning 49 U.S.C. § 10101(4), (5), (9) and (15). *See* NPRM at 6. Yet the NPRM fails to even address the first two RTP factors, which underscore Congress’s mandate to exempt to the maximum extent possible under 49 U.S.C. § 10502:

- “[T]o allow, to the maximum extent possible, competition and demand for services to establish reasonable rates for rail transportation,” 49 U.S.C. § 10101(1) (emphasis added); and
- “[T]o minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required.”⁶

The NPRM does cite to 49 U.S.C. § 10101(2), but only by selectively quoting the second portion of the factor without any reference to the goal of minimizing federal regulatory control.

Indeed, the statement in the NPRM that “[t]here does not appear to be any significant conflict between the proposed partial revocation of the exemption for transportation of agricultural commodities and the other aspects of the rail transportation policy of § 10101” is in direct contradiction to the agency’s past holdings with regard to revocation. The ICC itself

⁴ *Brae Corp. v. United States*, 740 F.2d 1023, 1043 (D.C. Cir. 1984).

⁵ *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704 (Sub-No. 1), (STB served Mar. 23, 2016) at 16 (Chairman Begeman, dissenting).

⁶ 49 U.S.C. § 10101(2) (emphasis added).

explained that “the RTP contemplates that market discipline in competitive markets, *rather than government regulation*, is the best way to ensure a healthy transportation system that will most efficiently meet the needs of the shipping public.”⁷ And the agency found when issuing the very exemption under consideration here that “[o]ur examination of these markets, indicates that these exemptions *will further the national rail transportation policy . . .*.”⁸

The NPRM’s failure to even address, let alone resolve, the conflict between its action and the broad deregulatory mandate of 49 U.S.C. § 10502 and § 10101(1)-(2) undermines its proposal. The Board “must consider all aspects of the [rail transportation] policy bearing on the propriety of the exemption and must supply an acceptable rationale therefor. Only by doing so can [the Board] avoid the taint of arbitrariness.”⁹ And as the U.S. Court of Appeals for the D.C. Circuit has previously stated, the “maximum extent possible” language, “so forcefully expressed, manifests a preference for market-based rather than regulatory rate setting,” and the Board may not simply ignore this “strong language favoring rail deregulation.”¹⁰ The STB’s choice to ignore the deregulatory thrust of the RTP here invalidates its justification for the NPRM to partially revoke the exemption codified at 49 C.F.R. § 1039.10 for certain agricultural commodities to reregulate demurrage.

⁷ *Improvement of TOFC/COFC Regulations (Pickup & Delivery)*, 6 I.C.C.2d 208, 214-15 (1989) (emphasis added).

⁸ *Rail Gen. Exemption Auth.—Miscellaneous Agric. Commodities*, 367 I.C.C. 298, 300 (1983) (emphasis added).

⁹ *Illinois Commerce Comm’n v. I.C.C.*, 787 F.2d 616, 627 (D.C. Cir. 1986).

¹⁰ *Ass’n of Am. R.Rs. v. Surface Transp. Bd.*, 237 F.3d 676-77, 680 (D.C. Cir. 2001).

II. THE NPRM FAILS TO UNDERTAKE THE REQUISITE EXAMINATION OF MARKET POWER

The NPRM proposal for partial revocation is also legally insufficient due to the absence of any discussion of railroad market power over the commodities at issue. When finalizing the ICC Termination Act (“ICCTA”), Congress explained that:

When considering a revocation request, the Board should continue to require demonstrated abuse of market power that can be remedied only by reimposition of regulation or that regulation is needed to carry out the national transportation policy. The Conference expects the Board *to examine all competitive transportation factors that restrain rail carriers’ actions and that affect the market for transportation of the particular commodity or type of service for which revocation has been requested.*¹¹

The U.S. Court of Appeals for the Second Circuit confirmed that “the initial inquiry in a reregulation case is whether the carrier has market power.”¹² The STB itself has similarly stated that “[r]econciling the RTP with the statutory admonition to be liberal in granting exemptions when regulation is not necessary to protect against abuse of market power, we have held that *the extent of railroad market power is an essential issue in exemption revocation proceedings.*”¹³ Accordingly, the ICC instructed in finalizing the very exemption at issue here that, “if the railroads are shown to be abusing their market power (a highly unlikely event), then the Commission can revoke the exemption and reimpose regulation.”¹⁴

But the NPRM lacks any consideration of market forces for the certain agricultural commodities at issue. The ICC’s original findings that railroads have no market power over

¹¹ Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 104-422, at 169 (1995), reprinted in 1995 U.S. Code Cong. & Admin. News 850, 853 (emphasis added).

¹² *Mr. Sprout, Inc. v. United States*, 8 F.3d 118 (2d Cir. 1993).

¹³ *WTL Rail Corp. Pet. for Decl. Order & Interim Relief; WTL Rail Corp. Pet. for Partial Revocation of Exemption*, EP 230 (Sub-No. 9), slip op. at 3 (STB served Feb. 17, 2006) (emphasis added).

¹⁴ *Rail Gen. Exemption Auth.—Miscellaneous Agric. Commodities*, 367 I.C.C. at 303.

these agricultural commodities stand unrefuted.¹⁵ The ICC has cautioned that in seeking to revoke an exemption, “a party has a burden of showing that our prior findings supporting the initial exemption were clearly wrong, or that changed circumstances require us to revisit them.”¹⁶ Such a showing is no less necessary for the agency. The failure to address this issue or make any findings as to railroad market power in its NPRM demonstrates a lack of reasoned decision-making. An agency’s “failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making.”¹⁷

III. THE NPRM’S LIMITED JUSTIFICATIONS FOR REREGULATION ARE UNAVAILING

Even setting aside the NPRM’s failures to consider all of the RTP factors or conduct any inquiry into market power, the affirmative justification for reregulation is unavailing. The NPRM states that partial revocation is needed “[t]o ensure that regulatory relief is on par with other, and accessible to all, non-intermodal transportation shippers and receivers.”¹⁸ The NPRM goes on to note that the agency has “long regulated demurrage,” and identifies “no reason why demurrage claims should be permitted under § 1039.11 and § 1039.14 but barred under § 1039.10, given that all three exemptions are otherwise substantially similar and were promulgated for similar reasons.”¹⁹

¹⁵ See *id.* at 300 (“... the record in this case is adequate to demonstrate that sufficient actual or potential competition exists in the movement of each of the exempted commodities to insure [sic] against abuse by the railroads.”); *id.* at 302 (“The evidence with regard to the commodities to be exempt is ample to demonstrate the availability of competitive alternatives . . .”).

¹⁶ *General Exemption Authority – Miscellaneous Agricultural Commodities – Petition of G&T Terminal Packaging Co., Inc., to Revoke Conrail Exemption*, 8 I.C.C.2d 674 (1992), *aff’d*, *Mr. Sprout, Inc. v. United States*, 8 F.3d 118 (2d Cir. 1993).

¹⁷ *Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (internal quotation marks omitted).

¹⁸ NPRM at 5.

¹⁹ *Id.* at 6.

The logical misstep in this argument is that there is a fundamental reason that these certain agricultural commodities must be treated differently: unlike the other commodities, the ICC *affirmatively exempted these commodities from regulation including demurrage*. The Board has previously noted and been governed by the “marked contrast” between exemption decisions in which the agency expressly retained authority over specific matters and those that “broadly exempted the commodities ‘from the provisions of 49 U.S.C. Subtitle IV’”.²⁰ Indeed, the ICC adopted the commodity exemption after consideration of a full record, including comments from:

three Senators and two Congressmen, the U.S. Department of Transportation and the Departments of Transportation of Iowa and Utah, the U.S. Department of Agriculture and four State agencies, six farm organizations and one individual, six poultry industry associations, the Minneapolis Grain Exchange and the North Dakota Grain Dealers Association, several agribusiness firms and associations, the Association of American Railroads and six individual railroads, and two tobacco manufacturers.²¹

The fact that the STB subsequently has not further deregulated its regulation of demurrage for *other* commodities does not somehow negate the ICC’s findings in 1983.²² The STB cannot capriciously set aside the ICC’s prior holdings on the basis of an unsubstantiated statement that the commodities are “substantially similar.”

IV. THE NPRM DOES NOT EXPLAIN WHY THE EXISTING PROCESS FOR PETITIONS TO REVOKE IS INSUFFICIENT

Finally, the NPRM acknowledges that the STB “has a process for case-specific revocations,” NPRM at 7, but fails to explain why that process is insufficient should any customer demonstrate that a railroad did exert market power over its transportation. The STB expresses concern that shipper and receivers “might interpret the absence of the exclusion of

²⁰ *Pejepscot Industrial Park, Inc., d/b/a Grimm Industries—Petition for Declaratory Order*, 6 S.T.B. 886, 892 n.13 (2003).

²¹ *Rail Gen. Exemption Auth.—Miscellaneous Agric. Commodities*, 367 I.C.C. at 299.

²² See NPRM at 6 (discussing EP 462),

demurrage in § 1039.10 . . . to mean that the Board lacks the authority (unless it revokes the exemption) to hear demurrage disputes.”²³ Of course, such an interpretation would make sense; it is an accurate understanding of the STB’s regulation.

The existence of the exemption “does not mean that a railroad customer is without an avenue for relief.”²⁴ “Notwithstanding the findings that the agency has already made that, in most circumstances, regulation is not necessary, [the customer] could come to the agency and seek to have the exemptions revoked, pursuant to 49 U.S.C. 10502(d).”²⁵ What defines prior case-by-case reviews that the STB has undertaken are explicit findings about railroad market power.²⁶ Given that the STB has not made any findings about market power in the NPRM, it is unclear whether there are any shippers of these certain agricultural commodities that lack competitive options. To the extent some exist, they retain a regulatory avenue for seeking more targeted relief.

CONCLUSION

As explained above, the NPRM fails to consider the relevant RTP factors, make any requisite finding of market power, acknowledge or justify the departure from precedent, or otherwise demonstrate reasoned decision making. In contradiction to Section 10502 and the

²³ *Id.* at 7.

²⁴ *Pejepscot Industrial Park, Inc., d/b/a Grimm Industries—Petition for Declaratory Order*, 6 S.T.B. 886, 893 n.15 (2003).

²⁵ *Id.*

²⁶ *Compare Granite State Concrete Co., Inc. & Milford-Bennington R.R. v. Boston & Maine Corp. & Springfield Terminal Ry.*, FD 42083 (STB served Sept. 15, 2003) (partially revoking applicable commodity exemption for crushed or broken stone, sand, and gravel after making particularized findings that the shipper “lacks the competitive service options that were the basis for the original class exemption because its excavation permit requires that stone move by railroad, not by truck, to avoid movements through Wilton.”), with *General Exemption Authority – Miscellaneous Agricultural Commodities – Petition of G&T Terminal Packaging Co., Inc., to Revoke Conrail Exemption*, 8 I.C.C.2d at 682 (“Although Conrail has imposed surcharges on petitioners’ traffic, in our view it does not possess enough market power to warrant regulation.”).

overall statutory scheme, the NPRM assumes that, because some exempt commodities remain subject to regulation for demurrage, all exempt commodities should be. But the ICC's original exemption and finding of a lack of market power over these certain agricultural commodities stand unrefuted. Without a showing of market power, the STB has no authority to regulate, because shippers have the ability to turn to competitive options in the marketplace rather than governmental intervention. Accordingly, the Board must withdraw its proposal for partial revocation. Given that the general competitive forces affecting these commodities have not disappeared, the STB should instead focus its attention on revoking exemptions in individual cases, where appropriate, rather than seeking to reregulate *en masse*.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'K. D. Kirmayer', with a stylized flourish at the end.

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