

301279

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
November 13, 2020
Part of
Public Record

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

REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS

**CONSOLIDATED REPLY
TO PETITIONS FOR TECHNICAL CONFERENCE
AND EXTENSION OF COMMENT DEADLINES**

Karyn A. Booth
David E. Benz
THOMPSON HINE LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036
(202) 331-8800

*Counsel for the American Forest & Paper
Association, the Institute of Scrap Recycling
Industries, Inc., and the National Industrial
Transportation League*

November 13, 2020

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS

**CONSOLIDATED REPLY
TO PETITIONS FOR TECHNICAL CONFERENCE
AND EXTENSION OF COMMENT DEADLINES**

The American Forest & Paper Association (“AF&PA”), the Institute of Scrap Recycling Industries, Inc. (“ISRI”), and the National Industrial Transportation League (“NITL”) (collectively, “Respondents”) hereby reply to two petitions filed by the Association of American Railroads (“AAR”) on November 3, 2020: (1) the Petition for Technical Conference (“Conference Petition”) and (2) the Petition for Extension of Comment Deadlines (“Extension Petition”).¹ For the reasons described herein, the Surface Transportation Board (“Board” or “STB”) should deny the Conference Petition. The lengthy extensions to the comment filing periods requested in the Extension Petition are similarly unwarranted but, in a spirit of compromise, Respondents are willing to agree to a two-week extension of the comment deadlines in this proceeding.

I. The Board Should Deny the Conference Petition.

In its September 30 decision (“Decision”), the Board requested comments on the “possible use” of a proposed new method for evaluating market conditions in the rail industry

¹ This Reply is filed pursuant to 49 C.F.R. § 1104.13(a).

that would inform the issues involved in class revocation and exemption proceedings. The new methodology was developed by the Board's Office of Economics ("OE") and involves various complex quantitative and qualitative data analyses that are dependent on many questionable assumptions that the Board itself recognizes may lead to "over" and "under" inclusive determinations of rail competition.² The AAR asserted that a technical conference is necessary to enable Board staff to "clarify and discuss" the proposed new approach set forth in the Decision. Conference Petition at 1. According to the AAR, a technical conference would allow Board staff to "further explain" the approach, "respond to questions," and "identify potentially beneficial analyses and evidence." Conference Petition at 2.

Respondents appreciate the good faith intentions of the OE in developing the new approach in response to the Board's direction "to give further consideration to this issue."³ However, the proposed approach expands so far beyond the requirements of the revocation statute, the intent of Congress, and recent Board precedent that it would not be a constructive use of resources to schedule a technical conference.⁴ Additionally, the new approach would require an unnecessarily time-consuming, complicated and expensive "do-over" of the issues that have already been adjudicated by the parties in this proceeding in accordance with the revocation statute. The proposed approach aims to create a national market dominance-type analysis, requiring lengthy, complicated, and expensive proceedings, for class revocations that is inconsistent with the revocation statute and Board precedent. Because the new approach is so far

² Decision at 21-24.

³ Decision at 6.

⁴ 49 U.S.C. § 10502(d) (The Board may revoke an exemption "when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title."). See also Exclusion of Demurrage Regulation From Certain Class Exemptions, STB Ex Parte No. 760 (served Feb. 28, 2020).

removed from a reasonable approach for evaluating market conditions, Respondents and other participants should not be required to expend enormous additional resources to evaluate the very complicated proposal and voluminous underlying workpapers to discern its “usefulness.”

Thus, the Respondents strongly believe that the new approach runs this proceeding “off the tracks” and that the Board should deny AAR’s request for a technical conference, which would only add further and unwarranted delay, expense and complexity to this long-running rulemaking proceeding.

Moreover, the denial of AAR’s request will not prejudice AAR because the Board already has provided a comprehensive description and explanation of its proposal. The Decision is 68 pages long, including 15 pages of narrative and 53 pages of appendices. The Board also has provided the AAR with access to the unredacted confidential workpapers underlying the Decision.⁵ With all that information already available to it, the AAR has not identified any “questions” that it has about the proposed approach, nor has it specified any areas where it believes “clarification” is necessary. Instead, the Conference Petition contains vague claims that fail to justify the expense, delay, and prejudice involved with a technical conference. Interested parties would be required to expend significant funds to attend the conference, and engage experts to also attend, in order to protect their interests in this proceeding. This expenditure of resources is not justified by the revocation statute or recent Board precedent interpreting the statute.

II. The Board Should Deny the Lengthy Delay Requested in the Extension Petition, But Respondents Are Willing to Support a Two-Week Extension.

In the Extension Petition, the AAR seeks a delay of sixty (60) days in the previously-established deadline for opening comments with reply comments to be due thirty (30) days

⁵ See Office of Economics letter (filed October 16, 2020) in this proceeding.

thereafter.⁶ The Board should deny this request which will cause unwarranted delay. This rulemaking proceeding has been pending for over four-and-a-half years.⁷ Furthermore, this proceeding (and the rule proposed by the Board in 2016) is an outgrowth of a public hearing that was held in early 2011 and announced over ten years ago.⁸ In the years since the NPRM was issued, the Board has heard repeatedly from Respondents and other interested exempt shippers, both in comments and via *ex parte* meetings, as to why revocation of certain class exemptions is justified under the statute.

This lengthy rulemaking proceeding has vastly exceeded the statutory time frame for revocation proceedings begun via application. Federal law directs that revocation proceedings “shall” be completed within nine (9) months after a proceeding is begun and twelve (12) months after the application date if the proceeding is begun as a result of an application. 49 U.S.C. § 10502(d). Although this proceeding began on the Board’s own motion – in lieu of an application – it does not obviate the Congressional intent that revocation proceedings be decided expeditiously.

Despite the extensive public involvement in this proceeding over the past four-plus years, and the nearly nine-and-a-half weeks allotted by the Board between the Decision and the due date for opening comments, the AAR seeks a further delay of sixty days. AAR asserts the delay is needed due to the “technical nature” of the proposed approach, the “voluminous” work papers

⁶ In the alternative, the AAR also requests that the 60-day delay be applied after any technical conference that may occur, with comments due 60 days after any such conference and reply comments due 90 days after the conference.

⁷ The Notice of Proposed Rulemaking (“NPRM”) was issued on March 23, 2016.

⁸ See Review of Commodity, Boxcar, and TOFC/COFC Exemptions, STB Ex Parte No. 704 (public hearing notice served Oct. 21, 2010).

that AAR sought and obtained, the alleged “need” for data-intensive analysis, and the “importance” of the issue. Extension Petition at 1.

The AAR has not met its burden to justify the extent of the additional delay it seeks, especially if its request for a technical conference is denied. Further delays only serve to increase the prejudice to the Respondents and other interested parties who seek a timely and cost-effective resolution to this long-standing proceeding. Additional time would merely prolong uncertainty for rail-served businesses regarding the status of the commodities under evaluation by the Board. They seek to revoke the pertinent commodity exemptions based upon the voluminous record already developed in this proceeding, whereas the new proposal would result in further extensive delays pending its consideration and subsequent application if the Board were to adopt it.

Nevertheless, in a spirit of compromise, Respondents are willing to support a two-week extension of time for both the opening and reply comment deadlines established in the Decision. With a two-week extension, comments would be due December 18, 2020 and reply comments would be due January 19, 2021.⁹ Respondents’ support for a two-week extension does not in any way alter Respondents’ opposition to the technical conference sought by the AAR.

III. Conclusion.

As described herein, the Board should deny both the Conference Petition and the Extension Petition. However, Respondents are willing to support a two-week extension of the applicable deadlines, such that comments would be due December 18, 2020 and reply comments would be due January 19, 2021.

⁹ January 18th is Martin Luther King Jr. Day, so Respondents anticipate that any two-week extension would mean the deadline would be extended to the next weekday.

Counsel for the American Forest & Paper Association, the Institute of Scrap Recycling Industries, Inc., and the National Industrial Transportation League

/s/ Karyn A. Booth
Karyn A. Booth
David E. Benz
THOMPSON HINE LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036
(202) 331-8800

- 6 -