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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

REVIEW OF COMMODITY, BOXCAR, AND TOFE/COFC EXEMPTIONS

**JOINT OPENING COMMENTS CONCERNING PROPOSED NEW APPROACH
FOR CONSIDERING CLASS EXEMPTION AND REVOCATION ISSUES**

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My name is Sandra Dearden. I am founding President of Highroad Consulting, Ltd., a transportation consulting firm established in 1996. Our practice focuses on all modes of surface transportation; however, because of our knowledge of rail, more than 80% of our projects are rail related. About 70% of our clients are shippers; others include law firms, short line railroads, and other consulting firms and 3PL's that sub-contract rail projects to our firm.

Highroad has been involved in all phases of Ex Parte 704. We prepared comments for shippers, and Highroad presented an Analysis of Data in the Confidential Waybill File for Commodity Group STCC 142, Crushed or Broken Stone or Rip Rap, dated July 26, 2016. Comments submitted herein are based on information submitted by parties in this proceeding, and comments and observations when performing projects for shippers of exempt commodities.

1. Introduction

This proceeding actually began on December 9, 2010 when the Board announced a public hearing “to review categorical exemptions from regulation...” Subsequently, on March 23, 2016, The Board issued a Decision seeking comments on a proposal to revoke the class exemptions on STCC’s:

14-2	Crushed or Broken Stone or Rip Rap
29-914	Coke Produced from Coal
33-12	Primary Iron or Steel Products
32-4	Hydraulic Cement
40-211	Iron or Steel Scrap, Wastes or Tailings

Shippers broadly supported the Board’s proposal. Also, the American Forest and Paper Association and Wisconsin Central Group filed comments arguing the exemption for forest and paper products, and the boxcar exemption as it applies to rail shipments of forest products, should be revoked.

In 2019, the Board conducted Ex Parte meetings with interested parties that included shippers and some trade associations that represent shippers of commodities encompassed in this proceeding.

On September 29, 2020, the Board issued a Decision seeking public comments concerning a potential new approach developed by the Board’s Office of Economics (OE) for potential use in considering class exemption and revocation issues. Two technical conferences were conducted, OE reviewed the analytical model and responded to questions posed by the railroads. Throughout the second technical conference OE stated they are open to suggestions to improve the model. (In a Decision dated December 11, 2020, the Board revised appendices included in the September 30 (sic?) decision.)

2. The Railroads' Position

While the railroads have not yet presented their comments regarding the potential new approach proposed by the Board, it appears that the railroads oppose change, citing the sufficiency of current "case-by-case" revocation.¹ They also commented that this may be too costly and burdensome.

ASLRRRA has followed AAR's lead, opposing the proposed revocations. However, in the comments filed by AAR, some Class I railroads, and ASLRRRA, the railroads failed to explain why shippers of exempt traffic should be treated differently than other industries. Also, they have not produced evidence that the proposed revocations will have a damaging impact on the railroads and the rail industry.

3. There Have Been Logistics Changes and Changes in the Regulatory Regime since the Staggers Rail Act was enacted.

In this most recent Decision, the Board failed to address significant issues submitted by numerous shippers and shipper associations in filings and during the Ex Parte meetings.

When the exemptions were initially created, shippers embraced the exemptions because they would no longer be burdened with tariff filing requirements. However, that legal regime changed and tariff filing is no longer a requirement, so the benefit from the exemptions no longer exists.

¹ Example, BNSF Jill Mulligan Comments in Response to the Release of Summaries of Ex Parte Meetings, STB Docket No. Ex Parte 704 (Sub No. 1), dated July 16, 2019, p.2, "Individual shippers with legitimate concerns can seek revocation of an exemption under 49 U.S.C. 10502(d). This narrowly tailored remedy is available to shippers without bearing the burden of showing the appropriateness of an exemption outside the specific transportation markets that they participate in....."

Regulatory changes have had a significant impact on truck transportation in the United States, and on shippers' supply chains. Regulatory changes such as Hours of Service, CDL licensing laws, and increased drug testing are safety issues that are not subject to dispute. At the same time when the new regulations became effective, the average age of a truck driver was in the late 50's. Thus, many drivers lost their licenses, while others were lost through attrition.

Highroad has performed mode conversion projects for numerous clients (all shippers of exempt commodities) that were impacted by the shortage of truck drivers and trucks for loading. These are major corporations that had not shipped by rail in the past. The key objective of those projects was to identify modal options, i.e., what should move truck and where should we use rail. All of the projects were successful, and the end results included reliability of transportation service and more cost-efficient supply chains.

Another factor considered when creating the exemptions, was the commodities had short lengths of haul, so it was decided that those commodities did not need to be regulated because there was adequate competition within the trucking industry. It was apparent when analyzing the data in the Confidential Waybill File that shippers have extended their market reach, increasing their average lengths of haul.

When rail volumes declined, railroads started to take a second look at shorter hauls. An example is domestic intermodal which is reportedly, a high growth market for the railroads.

Based on USDOT predictions, freight volumes will increase dramatically within the next decade. Some shippers presented anecdotal evidence of rail market

abuse at the Ex Parte meetings, citing excessive rate increases, unfair demurrage charges caused by missed switches and bunching. Then, when the shipper questioned the demurrage charges the railroad bullied the customer for payment, threatening loss of service.

Capacity in the transportation industry will be a progressive issue, and experience has taught us that as capacity tightens, shippers will be challenged when working with the railroads.

Shippers of exempt traffic simply want the same benefits from STB rulings (e.g. fuel surcharge decision), and the right to seek relief at the STB for unfair rates and unreasonable practices. As capacity tightens, they will also need the protection of Common Carrier Obligation, to ensure they will have service and railcars for loading. These shippers are not asking for special privileges; they just want the same privileges as other shippers.

4. The National Rail Transportation Policy

Under the revocation statute, 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."²

In the Board's Decision, dated October 23, 2020, the Board noted that, "the dynamics of the particular transportation market for the commodity groups appeared to have changed significantly since the exemptions were first promulgated, and reestablishing regulatory oversight to the commodities might be

² 49 U.S.C. §10101(15)

necessary to carry out the Rail Transportation Policy.”³ However, the Board’s proposed new approach does not fulfill the intent of the revocation statute by providing oversight where meaningful market changes have occurred since the class exemptions were first adopted. Instead, the Board has proposed a complicated economic model that would be so costly and burdensome that it is unlikely shippers will seek revocation under this new approach.

5. The Proposed Approach is Unrealistic, It Will Increase Litigation Costs, and It Has No Relevance to the Intent of the Initial Proceeding

It is obvious that the Board had good intentions when directing OE to develop a new approach as a potentially *important* new tool for possible use when considering exemptions. OE responded; development of the economic model was a major effort, and we commend them for their work. However, the Board’s interest in a “robust” analysis of market conditions has led to the development of an extremely complicated economic model that would require shippers to incur significant additional costs and delays. Shippers have already commented that the current process for case-by-case revocation is costly and burdensome. This will increase the costs even more.

Further, the Board stated they do not anticipate the approach would necessarily provide a final conclusive answer or whether the commodity exemptions at issue should be revoked, or additional commodity exemptions should be adopted.⁴ However, the Board added the new approach has potential usefulness.

³ STB Docket Ex Parte 704 (Sub No. 1), Decision dated October 23, 2020, p. 3.

⁴ STB Docket Ex Parte 704 (Sub No. 1), Decision dated October 23, 2020, p.6.

As a result, this new approach would create a costly process with little guarantee. Litigation costs may be incurred for an analysis not used in the Board's decision. It is unlikely that shippers will be willing to take on the costs, so it could become a moot issue. However, the additional risk is railroads could file for additional exemptions which would force shippers to incur those costs to defend their regulated traffic. Again, for an analysis that might not be used.

For these and other reasons, I did not perform an in-depth analysis of the proposed model. However, I will comment on some of the proposed values, indicators, and thresholds.

A. The Challenge of Creating a One-Size-Fits-All Standard for All Commodities

The proposed approach for evaluating truck competition assumes that 500 miles represents a reasonable distance for direct trucking alternatives, but 1,000 miles does not, and these mileages do not vary by commodity. This is an apparent oversight, considering the information submitted by some shippers in filings and Ex Parte meetings.

In the Ex Parte meeting with Verso Corporation, Verso cited capacity constraints and the shortage of truck drivers, especially for longer hauls. They further explained that rail shipments of inbound wood to one of their mills ranged from 170 to 400 miles.⁵ Another example of the variance in lengths of haul was presented by a shipper that ships unit trains of limestone. He explained that due to the volumes shipped and the shortage of truck drivers, it is not practical to ship by

⁵ STB Ex Parte 704, Summary of Ex Parte Meeting held on June 6, 2019 between Verso Corporation, American Forest & paper Association, and Member Oberman, p.2.

truck beyond 60 miles.⁶ Of course, that benchmark would probably be different for a shipper of that same commodity with lower volumes that, for example, moves single cars in manifest train service.

Applying the one-size-fits-all 500-mile standard does not convey a true picture of truck competition, and adoption of the standard will only increase litigation costs as parties will be required to develop and submit additional arguments explaining why deviations and adjustments are required, and to contract experts to re-run the model with different mileages.

B. There is No Market Dominance or Market Power Requirement in the Revocation Statute.

The market dominance analysis in rail rate cases covers specific individual moves involving a specific origin, destination and railroad. Market dominance analysis in rail rate cases is a time consuming and labor - intensive process that is very costly. Congress specifically omitted any mention of market dominance or market power in the revocation statute. Including a market dominance style analysis will exacerbate the complexity of the analysis but, more important, it is not relevant for revocation and exemption proceedings, nor is it warranted.

One of the proposed indicators is the 180% R/VC threshold. Judging market dominance based on a revenue-to-variable-cost threshold is problematic, in that RVC's do not prove market power.⁷

⁶ STB Ex Parte No. 704 (Sub-No. 1), Comments of Texas Crushed Stone, July 26, 2016, p. 4.

⁷ STB Ex Parte No. 704 (Sub-No.1), Comments of Norfolk Southern Railway, p.6, "Many commenters in this record have already identified the failings of using R/VC data to justify any revocation. See e.g., Association of American Railroads Opening Comments, Ex Parte 704 (Sub-No. 1), at 22 – 29 (filed July 26, 2016 (R/VC is simply 'not a reliable indicator of market dominance')) Underscore for emphasis.

Highroad has performed numerous projects for clients, that included an assessment of the clients' competitive position in the respective markets, and we do not view R/VC's as relevant to those analysis. Instead, when comparing the client's rates versus their competitors, we have found rates-per-ton-mile (RPTM) to present a more accurate picture of the clients' competitive posture.

While we run cost studies through our cost model, which calculates R/VC's, the R/VC's seldom portray an accurate picture. One flaw with R/VC's is they can be skewed by distance. For example, a railroad delivering first-mile or last-mile service to or from a connecting carrier, may have what would be considered to be a reasonable rate or charge, base on industry standards. However, R/VC's for those short moves skyrocket and often exceed 400%.

We acknowledge and respect the fact that Congress has mandated the 180% R/VC threshold for rate cases. However, they have no relevance here as R/VC's would not be a valid indicator when considering revocations or exemptions.

The proposed new approach creates a market dominance style analysis that includes two components: a R/VC calculation, and an analysis of "effective competition." Again, it is not our understanding that shippers will need to claim market dominance, so it is important to address the analysis of proximity to water competition outlined in the proposed approach.

The proposed approach assumes the potential of water competition on all rail movements of any given commodity if ports exist within 30 miles of the origin railroad station, within 30 miles of the destination railroad station, and on the same

waterway.⁸ The Decision also states that “Ports are considered viable if they transported any commodity....”⁹

First of all, the statute does not require shippers to show market dominance, and assessing the potential impact of water competition would fall under the *market dominance analysis* umbrella, so it has no relevance when considering revocations or exemptions.

Further, this type of analysis to judge access to water competition is not practical because there are too many variables. The fact that a port may exist does not mean a commodity can be handled by that port and via route(s) on the waterway. Also, the additional costs to transport the commodities to and from the ports must be considered when deciding whether or not a port is a practical alternative.

The scope of one of our projects was to assist the client with a port selection to receive shipments of a food product (an exempt commodity) produced in the Netherlands. Of course, there were numerous factors considered, but a primary consideration was whether or not the ports had the necessary infrastructure and if they were certified to handle food products. As a result, based solely on this single question, the number of ports was narrowed from seven to three potential ports.

Other uncertainties exist, proving this to be an impractical assumption when analyzing revocation or exemption of a commodity class. Assessment of market power is not mentioned in the revocation statute, and there are too many variables,

⁸ Decision at 8.

⁹ Decision at 7.

including matching shippers and receivers to ports, to evaluate the potential impact of water competition on a commodity.

6. The Proposed New Approach Should Not Be Adopted

This proposed new approach goes beyond what is required by the revocation statute, and it has no relevance to the Board's objectives when opening this proceeding, to provide oversight and access where meaningful market changes have occurred since the class exemptions were adopted, nearly 30 years ago.

The proposed new approach is flawed and unnecessary for a number of reasons and should not be adopted. In 2015, Congress issued a report asking the Board to indicate whether alternative methodologies exist, or could be developed, to streamline, expedite, or address the complexity of large rate cases. The Senate Committee further stated that the Reauthorization Act, "would improve efficiencies at the STB and reduce delays in the case review process...helping to ensure rail service problems are addressed in a balanced and timely manner."¹⁰

The new approach proposed in this Decision is very complex and it would create an overwhelming obstacle that will deter shippers from bringing a revocation request to the Board.

On December 23, 2020, AAR submitted a twelve - page letter asking some very insightful questions about the proposed economic model. Those questions, in addition to questions posed by some of the railroads and ASLRRRA were addressed in a lengthy technical conference on January 15, 2021. While OE stated throughout that they are open to suggestions for change, it was apparent that the

¹⁰ S. Report No. 114-52, May 21, 2015, p. 10.

proposed new approach is not manageable nor practicable. Furthermore, in the proposal, the Board has reserved the option to decide whether or not to even use the results of an analysis when considering a revocation.

Even if shippers decide not to bring revocation requests to the Board because the process is too costly and burdensome, because the new approach is proposed for consideration of revocations *and* exemptions, shippers would be forced to incur the costs of an analysis to defend their commodity's regulatory position if a request for additional exemption(s) is brought to the Board.

7. The Board Should Go Back to the Original Intent of EP 704, and Make Decisions Based on Evidence Presented in the Proceeding

In the Decision, the Board failed to address major comments presented by shippers and shipper associations regarding regulatory and market changes that have occurred since Staggers. In fact, when reviewing the proposed economic model, it seemed some of those important comments were overlooked or disregarded. Instead, the Decision creates a false impression that the only issue to address is "market power" and the proposed numeric analysis for that evaluation.

Ex Parte 704 was first initiated on December 9, 2010. Since then, numerous shippers and shipper associations have filed several rounds of comments, explaining how (1) changes in the transportation landscape; (2) regulatory change and the shortage of truck drivers; and (3) market changes and the lessening of competition has impacted on their business. All good reasons to consider revocation of the exemptions.

In the Notice of Proposed Rulemaking (NPRM) served March 23, 2016, the Board stated, with regard to each of the proposed commodity groups, "the dynamics of the particular transportation markets appear to have changed so

significantly since exemptions were first promulgated as to warrant the application of the Interstate Commerce Act in order to carry out the Rail Transportation Policy.”¹¹

Shippers and shipper associations that have participated in these proceedings have been very responsive and patient. These shippers of exempt traffic simply want the same benefits from STB rulings (e.g. fuel surcharge decision), and the right to seek relief at the STB for unfair rates and unreasonable practices. As capacity tightens, the need for the protection of Common Carrier Obligation, to ensure they will have service and railcars for loading, will be even more important. These shippers are not asking for special privileges; they just want the same privileges as other shippers.

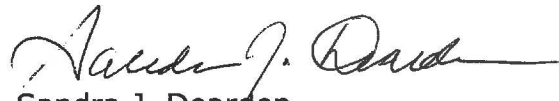
The revocation statute is straight forward and there is no mention of market power or a market dominance evaluation.

We respectfully submit:

- A. That the proposed new approach should not be adopted.
- B. If the approach, or a modified approach is adopted, it should be limited to revocations. Applying the approach to potential future exemption requests would be unfair to the impacted parties that have not had the opportunity to present views in this proceeding.
- C. The Board should make a decision based on evidence filed in response to the NPRM, and additional information presented by parties in the Ex Parte meetings.
- D. That the Board bring closure to this proceeding in a timely and expeditious manner.

¹¹ NPRM, p. 4

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sandra J. Dearden", with a long horizontal flourish extending to the right.

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