

PUBLIC VERSION*Via electronic filing*

March 1, 2021

Cynthia Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

**301699
ENTERED
Office of Proceedings
March 1, 2021
Part of
Public Record**

Re: STB Ex Parte No. 704 (Sub-No. 1), Review of Commodity, Boxcar, and TOFC/COFC Exemptions

Dear Ms. Brown:

Pursuant to the revised procedural schedule adopted by the Surface Transportation Board (“Board” or “STB”) in this proceeding on January 7th, the American Forest & Paper Association (“AF&PA”) and the National Industrial Transportation League (“NITL”) hereby provide their Reply Comments regarding the proposed new approach for evaluating market conditions in exemption revocation and creation cases. The Board described the proposed new approach in its decision on September 30, 2020, and interested parties filed Opening Comments on January 29th of this year.¹ With these Reply Comments, AF&PA and NITL respond to certain assertions made by railroad parties in their Opening Comments, and AF&PA reiterates its request for the Board to revoke the exemptions for the nine commodities, and the boxcar exemption for shipments of such commodities, as described in its July 16, 2019 filing. Beyond the specific response herein, AF&PA and NITL also endorse and strongly support the broadly applicable (*i.e.*, not commodity-specific) arguments included in the Reply Comments filed today by the Institute of Scrap Recycling Industries, Inc. (“ISRI”).

As an initial matter, the general tenor of the Reply Comments from many parties – railroads and shippers alike – was opposition to the proposed new approach. As stated in the Opening Comments filed by AF&PA and NITL, the proposed new approach should not be adopted because it is inconsistent with the revocation statute and would add unnecessary complexity, delay, and cost to the Board’s evaluation of exemption revocation requests without sufficient corresponding benefits. AF&PA and NITL urge the Board to promptly move toward final decision in this long-running rulemaking. The current record includes extensive evidence showing that the exemptions covering certain forest and paper products should be revoked so that Board oversight can be reestablished for rail transportation of these commodities. As

¹ AF&PA and NITL jointly filed Opening Comments with the Institute of Scrap Recycling Industries, Inc.

March 1, 2021

Page - 2 -

noted, AF&PA narrowed its revocation request in July 2019 from the approximately one hundred commodities covered by STCCs 24 and 26 combined to only nine that reflect the most rail dependent traffic, as well as movements of such commodities in box cars.

Several railroad parties utilized their Opening Comments to make spurious assertions regarding transportation of forest and paper products. A brief response is warranted to ensure that the Board is not swayed by these incorrect and/or unsupported assertions. For example, CSXT's witness dramatically overstates the importance of truck transportation in the forest and paper products industry, claiming that trucks provide "vigorous competition" to rail movements.² This is exaggeration to say the least. Notably, the only support for this alleged "vigorous" competition is a citation to assertions made in CSXT's Reply Comments from August 2016 – assertions that AF&PA has already refuted. See AF&PA Supplemental Comments (filed Oct. 3, 2016), Verified Statement of Jeanne Sebring, at para. 19-25; Verified Statement of Bruce Ridley, at para. 13-20; and Verified Statement of David White at para. 20-24.

CSXT also tries to emphasize geographic competition in the lumber space,³ but AF&PA and NITL have already explained why it would be improper for the Board to consider geographic (and product) competition in a revocation proceeding. AF&PA and NITL, along with ISRI, described the problems inherent in consideration of product and geographic competition – problems that caused the Board to abandon such analysis years ago in market dominance reviews. See Respondents' Joint Opening Comments, page 16-17. The concerns expressed by the Board in the market dominance context would also apply in the exemption revocation context: analysis of product and geographic competition would lead to substantial burdens (cost and complexity) far in excess of any potential derived value.

The Board should also reject BNSF's suggestion that long-distance truck-rail transloading in the lumber market acts as a competitive alternative to rail transportation. BNSF claims that "[t]ransloading is pervasive in the lumber market" at truck distances "far greater than the 30 miles assumed by the Board."⁴ {{ [REDACTED] }}

² Verified Statement of Arthur Adams, page 9, attached to CSXT Opening.

³ Verified Statement of Arthur Adams, pages 9-10 (referring to imports from Europe, Canadian producers, and "source competition"), attached to CSXT Opening.

⁴ BNSF Opening Comments at page 13.

⁵ {{ [REDACTED] }}

March 1, 2021

Page - 3 -

The BNSF evidence on this point is far too tenuous and inadequate. AF&PA has already explained the limitations on transloading in the forest and paper products industry.⁶

BNSF tries to emphasize truck transportation of forest and paper products in its Opening Comments in other ways.⁷ For example, BNSF makes a tentative and fleeting reference to flat-bed trucks competing with rail transport of lumber (BNSF Opening at 11), but never explains or supports the reference. BNSF also claims that long-haul trucking of lumber increased 2.5% in 2020, but then itself explained why some shippers were forced to use truck instead of rail last year: the lumber buyers “reduce[d] their order quantities” (meaning a rail car would be too large) and needed “expedited” transportation (meaning that slower and less reliable rail service would not be appropriate) given the “record high lumber prices.”⁸ In the context of a minor increase in truck usage during a year of market fluctuations caused by a pandemic, these exigent circumstances do not show that truck is competitive with rail. Again, AF&PA has already shown that trucks are not a viable alternative for that portion of the forest and paper industry that is dependent on rail transport.⁹

Finally, the Association of American Railroads (“AAR”) briefly referred to the “potential” for barge movements of lumber from Memphis to Florida Gulf ports,¹⁰ but never supported this alleged potential or explained how it affects railroad market power in the lumber industry. AF&PA has already submitted specific evidence showing that barges are not competitive with a large portion of the rail transportation on which AF&PA members rely.¹¹

As mentioned above, AF&PA and NITL join in and support the broadly applicable arguments made by ISRI in its Reply Comments. AF&PA and NITL agree with ISRI that the Board must base its revocation determinations on the required statutory standard of 49 U.S.C. § 10502(d), which only requires the Board to find that its oversight “is necessary to carry out

⁶ The limited role of transloading was addressed by actual forest and paper products shippers in Verified Statements that were attached to AF&PA’s Supplemental Comments (filed Oct. 3, 2016). They included Verified Statement of Jeanne Sebring, at para. 33-37; and Verified Statement of Bruce Ridley, at para. 21-25 and 27.

⁷ BNSF Opening Comments at 11-13.

⁸ BNSF Opening Comments at 12.

⁹ See, e.g., AF&PA Supplemental Comments (filed Oct. 3, 2016); Memorandum, filed by AF&PA, Exhibit 3 at pages 2-3 (filed June 25, 2019); Notice of Intent to Participate, filed by AF&PA and the Paper and Forest Industry Transportation Committee, at pages 12-13 (filed Jan. 31, 2011); Respondents’ Joint Opening Comments at 25-26.

¹⁰ AAR Opening Comments at 36.

¹¹ See AF&PA Supplemental Comments (filed Oct. 3, 2016), Verified Statement of Bruce Ridley, at para. 21 and 26; Verified Statement of David White at para. 20 and 25-26.

March 1, 2021

Page - 4 -

the transportation policy of section 10101.”¹² It does not require showings of actual “market abuse” or “unconstrained market power” as asserted by the railroads.

The Board should renounce the proposed new approach, which is extremely complicated and would create exemption revocation evidentiary standards that go far beyond the revocation statute. It incorrectly applies the same standards to revocations as to the creation of new exemptions, even though the statutory requirements differ.¹³ Congress determined that revocations should be subject to a lower evidentiary standard, since findings of railroad market are not required for revocations. Applying the proposed new approach would be inequitable and arbitrary since the agency removed its oversight over rail shipments of paper and forest products based on far less evidence. AF&PA and NITL also agree that the railroads have distorted the applicable standard for exemption revocations by mischaracterizing legislative history and exemption revocation precedent.¹⁴

AF&PA and NITL agree with ISRI that the railroads have improperly sought to discredit the use of pricing metrics, namely, revenue-to-variable cost ratios (“R/VC”), in the Board’s consideration of whether to revoke current exemptions. In fact, such pricing information is utilized routinely throughout the Board’s regulatory oversight because it is a metric that Congress has determined is a valid indicator of railroad market power.¹⁵ Also, the ICC justified the original commodity exemptions with R/VC figures and the railroads themselves relied upon R/VC figures in advocating for these same exemptions in the first place several decades ago. It is obvious that the railroads “about face” as to the use of R/VC data is self-serving and is motivated by the fact that such data no longer supports continuing the outdated commodity exemptions. Rather, such data shows the increase in the potential for railroads to assert market power over paper and forest products movements.¹⁶

Finally, AF&PA and NITL have serious concerns with implementing the proposed new approach at the tail-end of this nearly 5-year proceeding. The new approach would improperly “move the evidentiary goal posts” and require AF&PA and NITL to re-litigate many of the issues already pending before the Board for too long at significant additional expense. This is particularly problematic because the Board itself has admitted that the proposed new approach “does not seek to answer the ultimate qualitative question of whether a commodity’s regulation is necessary to carry out the RTP.”¹⁷ As noted by the former Chief Economist and Director of the Board’s Office of Economics, William F. Huneke, Ph.D, use of

¹² 49 U.S.C. § 10502(d).

¹³ Cf., 49 U.S.C. §§ 10502(d) and 10502(a).

¹⁴ See ISRI Reply Comments at 2-10 (March 1, 2021).

¹⁵ See 49 U.S.C. § 10707(d).

¹⁶ See, e.g., AF&PA Opening Comments at 14-24 (filed July 26, 2016) and AF&PA Comments on Memoranda at 9-13 and Exhibits 1-C, 1-D, and 1-E (filed July 16, 2019).

¹⁷ Decision at 6.

March 1, 2021

Page - 5 -

the proposed new approach would only add another layer of litigation and unnecessary complexity, delay, and cost without meaningful benefits.¹⁸

Accordingly, the Board should not adopt the proposed new approach and should move expeditiously to final decision in this proceeding. Ample evidence has been submitted to warrant revocation of the existing exemptions for certain forest and paper products, as summarized by AF&PA in its Comments to Memoranda, filed on July 16, 2019. AF&PA has already described the substantial changes that have occurred in the forest and paper products industry since the exemptions were first created, using detailed expert analysis to elaborate on the railroads' market power. See AF&PA Opening Comments at 15-21 (filed July 26, 2016). AF&PA has submitted detailed quantitative evidence¹⁹ and extensive qualitative evidence from numerous shippers²⁰ regarding railroad market power over paper and forest products and the need for revocation. Moreover, AF&PA narrowed the extent of its revocation request in July 2019 to facilitate the Board's ability to promptly issue a final decision on those forest and paper products commodities where regulatory oversight is most needed.²¹ It is now time for the Board to modernize the paper and forest products exemptions by issuing such a decision.

Respectfully submitted,

/s/ Karyn A. Booth

Karyn A. Booth

David E. Benz

*Attorneys for the American Forest & Paper
Association and the National Industrial
Transportation League*

¹⁸ Verified Statement of William Huneke, page 6, attached to Opening of American Short Line and Regional Railroad Association.

¹⁹ See, e.g., AF&PA Comments (filed July 26, 2016) at pages 7-24; AF&PA Comments in Response to Memoranda (filed July 16, 2019) at pages 8-21.

²⁰ See, e.g., AF&PA Motion for Leave to Supplement the Record (filed Oct. 3, 2016) at Exhibit A (attaching three verified statements); AF&PA Comments in Response to Memoranda (filed July 16, 2019) at pages 14-21.

²¹ AF&PA Comments in Response to Memoranda (filed July 16, 2019) at pages 8-10.