

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**JOINT PETITION FOR RULEMAKING TO ESTABLISH A VOLUNTARY
ARBITRATION PROGRAM FOR SMALL RATE DISPUTES**

Docket No. EP 765

**REPLY TO THE COALITION ASSOCIATIONS' REQUEST FOR
CLARIFICATION**

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On January 24, 2023, Norfolk Southern Railway Company and Union Pacific Railroad Company (collectively, “Petitioners”) sought reconsideration of five aspects of the Final Rule adopting a new voluntary arbitration program in this proceeding.¹ Among other things, Petitioners have asked the Board to replace the term “regulated commodities” in 49 C.F.R. § 1108.24(a)(1) with “regulated traffic,” in order to eliminate ambiguity.²

On February 13, 2023, the Coalition Associations responded to Petitioners’ reconsideration requests.³ The Coalition Associations state that they support Petitioners’ request to modify § 1108.24(a)(1) by replacing “regulated commodities” with “regulated traffic.” However, they go on to request that the Board “confirm that, when arbitrators determine that market dominance over otherwise exempt traffic exists, the arbitrators likewise are qualified to determine rate reasonableness for such traffic pursuant to 49 C.F.R. § 1039.11.”⁴

This new request by the Coalition Associations would substantially change current law in a way that ignores regulatory history, breaks with Board precedent, and would violate the statute. It should be denied.⁵

¹ See Final Rule, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765 (STB served Dec. 19, 2022) (“Final Rule”).

² Norfolk Southern Railway Company and Union Pacific Railroad Company Petition for Reconsideration, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765, at 22 (filed Jan. 24, 2023).

³ Coalition Associations’ Reply to Petitions for Reconsideration, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765 (filed Feb. 13, 2023).

⁴ *Id.* at 19.

⁵ The Board’s rules prohibit a reply to a reply. 49 C.F.R. § 1104.13(c). However, parties may respond to new requests for relief set forth in a reply filing. See, e.g., Decision, *Petition of Texas Railway Exchange LLC for Issuance of a Crossing Order Pursuant to 49 U.S.C. § 10901(D)*, Docket No. FD 36186 (Sub-No. 1), at 2 (STB served Apr. 4, 2019) (accepting TREX’s reply to a prior reply which had “include[d] a new request for relief . . . to which TREX is entitled to respond.”). To the extent that the Board deems it necessary, Petitioners seek leave to submit this limited response to the Coalition Associations’ new request.

Section 1039.11(a) sets forth a list of miscellaneous commodities that are exempt from the provisions of 49 U.S.C. Subtitle IV. That section goes on to state that “[e]xcluded from this exemption are any movements for which a finding of market dominance has been made.” Relying on this language, the Coalition Associations argue that, if a shipper can establish market dominance over a challenged movement of otherwise exempt traffic under § 1039.11, then the exemption does not apply and a separate petition to revoke the exemption would not be required. This reading of the regulation is not supported by its history, is inconsistent with the Board’s practice, and is contrary to the statute.

The language at issue was added by the Interstate Commerce Commission (“ICC”) in 1989 to exclude “movements previously found market dominant” from the exemption.⁶ It arose in response to a comment in the exemption rulemaking asking the agency to not extend the exemption to any commodity movement as to which the ICC had “previously concluded that the railroads have market dominance or for which there is a rate prescription in effect.”⁷ In order to clarify that the exemption would not automatically vacate preexisting rate prescriptions for particular movements where market dominance had been found, the ICC stated that it would “not exempt any specific movements already determined to be market dominant.”⁸ In other words, the language that the Coalition Associations seize upon had a clear, well-explained regulatory purpose: it ensured that adoption of the § 1039.11 exemption would not negate prior rate case adjudications of market dominance.

There is no evidence to support the novel notion that the ICC intended to allow shippers of certain exempt commodities to file future rate cases in the hopes

⁶ *Rail General Exemption Authority—Miscellaneous Manufactured Commodities*, 6 I.C.C.2d 186, 194 (1989) (cleaned up) (emphasis added).

⁷ *Id.* at 195.

⁸ *Id.* (emphasis added).

that a finding of market dominance would nullify the exemption. In fact, the ICC stated the opposite: “Should there be isolated instances in which regulation remains appropriate, parties may apply to us for partial revocation of the exemption as it relates to those movements.”⁹

Since then, Board precedent has remained clear that a shipper of exempt commodities must file a petition for partial revocation under 49 U.S.C. § 10502(d) in order to access the remedies provided in 49 U.S.C. Subtitle IV. For example, the Board has considered petitions for partial revocation of exempt commodities listed in § 1039.11 in conjunction with complaints seeking relief under Subtitle IV.¹⁰ There was no suggestion in those proceedings that the filing of a petition was unnecessary or that a finding of market dominance alone was sufficient to render the commodity non-exempt. Rather, the Board in *Rail General Exemption Authority—Selected Commodities* recognized that revocation petitions were the appropriate path and that “the market power review for revocation petitions is not necessarily the same as the market dominance test in a rate complaint.”¹¹

⁹ *Id.* (citing *G&T Terminal Packaging v. Consol. Rail Corp.*, 830 F.2d 1230, 1240 (3d Cir. 1987)).

¹⁰ See, e.g., Decision, *Rail General Exemption Authority—Selected Commodities*, Docket No. EP 346 (Sub-No. 29A), et al. (STB served Aug. 31, 1998) (petition for partial revocation of exemption for coke in connection with Docket No. 42022); Decision, *Rail General Exemption Authority—Lumber or Wood Products*, Docket No. EP 346 (Sub-No. 25) (STB served May 15, 2003) (petition for partial revocation of exemption for lumber and wood products in connection with Docket No. FD 34236).

¹¹ Decision, *Rail General Exemption Authority—Selected Commodities*, Docket No. EP 346 (Sub-No. 29A), et al., at 3 (STB served Aug. 31, 1998). Indeed, the standards for revocation of an existing exemption are stringent. See, e.g., *Rail General Exemption Authority—Miscellaneous Agricultural Commodities—Petition of G&T Terminal Packaging Co.*, 8 I.C.C.2d 674, 682 (1992) (explaining that the agency’s standard for assessing a petition to revoke an exemption includes assessing whether the carrier possesses substantial market power, whether regulation is necessary to protect against carrier abuse of shippers as a result of that power, and whether regulation or exemption would, on balance, better advance the objectives of the rail transportation policy and the interests of the shipping public overall).

Under the Coalition Associations’ theory, there would be no way to know whether a movement of a commodity listed in § 1039.11 is actually exempt or regulated until the moment the Board (or an arbitration panel) makes a determination as to market dominance for that movement in a specific case. Practically speaking, this makes little sense. More importantly, it would be contrary to the deregulatory mandate that the agency exempt classes of service to the maximum extent consistent with Part A, with revocation available as a backstop.¹² The agency was well aware of this Congressional policy at the time it adopted the language of § 1039.11, and there is no reason to believe that the ICC intended anything other than a limited exception for specific movements previously determined to be market dominant.

As such, the Board should deny the Coalition Associations’ request. If the arbitration program becomes operative and a shipper of exempt traffic wishes to avail themselves of the program, that shipper would need to file a petition for partial revocation of the exemption with the Board.¹³

¹² 49 U.S.C. §§ 10502(a) & (d); *Rail General Exemption Authority—Lumber or Wood Products*, 7 I.C.C.2d 673 (1991) (Congress envisioned the agency removing as many as possible of its restrictions on prices and services and rely instead on revocation for correction after the fact) (citing H.R. Rep. No. 96 - 1430, 96th Cong., 2d. Sess., 105 (1980)); *Class Exemption for the Acquisition & Operation of Rail Lines Under 49 USC 10901*, 1 I.C.C.2d 810, 812 (1985) (“explicit legislative directive to grant exemptions and then rely on after-the-fact remedies, including revocation”), *aff’d Ill. Com. Comm’n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).

¹³ Although the Board in this proceeding determined that the arbitration panel can rule on issues of market dominance as part of the arbitration, the Board did not notice or otherwise suggest that the panel can rule on issues of revocation.

Respectfully submitted,

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Dated: February 24, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February 2023, a copy of the foregoing Reply to the Coalition Associations' Request for Clarification was served by email or first-class mail on the service list for Docket No. EP 765.

/s/ Raymond A. Atkins

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