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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Ex Parte No. 711 (Sub-No. 2)

RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

**JOINT REPLY COMMENTS BY
AMERICAN FOREST & PAPER ASSOCIATION
INSTITUTE OF SCRAP RECYCLING INDUSTRIES, INC.**

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The American Forest & Paper Association (“AF&PA”) and the Institute of Scrap Recycling Industries, Inc. (“ISRI”) (collectively, “Respondents”) hereby provide their Joint Reply Comments in the above-captioned proceeding.¹ Respondents previously filed Opening Comments on November 7th, focusing on the Board’s treatment of exempt traffic in the Notice of Proposed Rulemaking (“NPRM”), wherein the Board had stated it would revoke exemptions “to the extent required.”² Respondents explained that the Board should include in the final rule a clarifying statement that, for purposes of a reciprocal switching proceeding under new Part 1145, shippers of certain forest and paper products and scrap metal commodities (the “Covered Commodities”³) may make use of the new rules, meaning that no separate exemption revocation request would be necessary.

¹ The due date for reply comments was modified in a Board decision issued on November 20, 2023.

² NPRM, slip op. at 27 (served Sept. 7, 2023).

³ The “Covered Commodities” are defined on page 6 of the Respondents’ Opening Comments.

To formally effect this clarification, Respondents requested that the Board include a partial revocation of the exemptions for the Covered Commodities in the final rule.⁴ The support for this step was described in Respondents' Opening Comments, including but not limited to the public interest, the purposes of the new regulations, the National Rail Transportation Policy ("RTP") codified at 49 U.S.C. § 10101, testimony describing inadequate rail service experienced by paper and forest products and metal scrap shippers (*see* STB Ex Parte No. 770, Urgent Issues in Freight Rail Service), and the voluminous record in STB Ex Parte No. 704 (Sub-No. 1), Review of Commodity, Boxcar, and TOFC/COFC Exemptions.

I. Overview of Reply Comments.

With these Reply Comments, Respondents comment upon the railroads' discussion of exempt traffic in their opening comments, with special emphasis on the position advanced by the Association of American Railroads ("AAR"). As explained in Section II below, the clarification and request for partial revocation of exemptions described in the Respondents' Opening Comments responds to the Board's discussion of exempt traffic in the NPRM. In contrast, the AAR advocates for a dramatically different approach that would make it highly unlikely that the Respondents and other shippers of exempt traffic would benefit from or ever pursue a reciprocal switching prescription despite their experiencing inadequate rail service. The AAR claims that the objective service standards and reciprocal switching prescriptions that are intended to incentivize Class I railroads to provide adequate service cannot apply to exempt traffic unless and until the Board first revokes the exemption in an individual proceeding. Under this approach, commencement of a Part 1145 reciprocal switching action would need to wait until an initial exemption revocation request is adjudicated at the Board, which could take many weeks or

⁴ See, e.g., Respondents' Opening Comments at page 6.

months in contested proceedings. Then, *if* the shipper achieves exemption revocation, it must wait at least *another* 12 weeks, but likely longer, so that the post-revocation rail service metrics could be collected, evaluated, and considered by the Board.⁵

The AAR's position as to exempt traffic belies the Board's intent to use objective service standards to incentivize more reliable rail service to individual shippers on a continuing basis that, in turn, will "help ensure that the transportation system as a whole meets the public need."⁶ It is contrary to the public interest standards established by Congress in both the reciprocal switching and exemption revocation statutes (see 49 U.S.C. §§ 11102(c) and 10502(d)), and would frustrate the Rail Transportation Policy ("RTP") that requires the Board "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public."

The AAR concedes that the Board "retains jurisdiction over exempt traffic" and can revoke an exemption "at any time." AAR Opening at 37-38. However, the AAR contends that the Board must exempt rail service "to the maximum extent" and that the Board may not rely on service metrics generated during the time that a commodity or service was exempt, otherwise the Board would be engaging in "retroactive regulation." AAR Opening at 37 and 39. Of course, the AAR's contention is a moot point for the Covered Commodities if the Board clarifies in the

⁵ See, e.g., AAR Opening Comments at 41.

⁶ NPRM at 10 and 15 ("Indeed, one of the principal purposes of this proposed rule is to incentivize carriers to provide shippers with more reliable service."). See also, NPRM at 5 ("Through the approach that is proposed in this new subdocket, the Board intends to provide appropriate regulatory incentives to Class I carriers to achieve and to maintain higher service levels on an ongoing basis.").

final rule that the new Part 1145 rules apply to such traffic based on a partial revocation of the exemptions as requested in Respondents' Opening Comments. See Section II.

If the Board decides not to clarify the application of the Part 1145 rules to Respondents' Covered Commodities in the final rule based on partial revocation of the exemptions, it must find that requiring Class I railroads to furnish service metrics data to Respondents while the exemptions are in effect is not retroactive regulation. This is because any potential "regulation", i.e., a prescription of reciprocal switching, would only be in the *future* after the Board grants an individual exemption revocation request that is made after receipt and evaluation of the data. This would be consistent with the Board's recent determination that it can evaluate "relevant facts" developed while an exemption was effective to determine whether future regulation is justified after an exemption is revoked.⁷ Further, AAR's retroactive regulation claim ignores that for the Board to decide whether to revoke an exemption to apply the Part 1145 rules, it would always need to evaluate rail service *while the exemption was in effect* to determine if application of the Part 1145 rules is "necessary to carry out the transportation policy of section 10101 of this title."⁸ See Section III.

Finally, as explained in Section IV, clarifying in the final rule that Respondents can use the Part 1145 rules without first adjudicating exemption revocation at the Board would be consistent with the Administrative Procedure Act ("APA").⁹

⁷ Sanimax USA LLC v. Union Pacific Co., Docket No. NOR 42171, slip op. (served Feb. 25, 2022) ("Sanimax USA").

⁸ 49 U.S.C. § 10502(d).

⁹ The Administrative Procedure Act, Pub. L. 79-404, 60 Stat. 237 (1946).

II. Concerns About the Exempt Status of the Covered Commodities are Moot if the Board Partially Revokes those Exemptions in the Final Rule.

In the NPRM, the Board stated that exempt transportation “could be subject to an order providing reciprocal switching” under the new Part 1145. NPRM at 27. The Board explained that it “retains full jurisdiction” over exempt transportation, including “considering whether service received by the petitioner prior to filing the petition meets the performance standards under this proposed part.” NPRM at 27. Finally, the Board stated it retains authority to revoke an exemption at any time, in whole or part, and that it “would do so to the extent required.” NPRM at 27.

The AAR contends that it is not proper for the Board to evaluate performance metrics for exempt traffic that were created while the exemption was effective. Instead, the AAR believes that an individual exemption proceeding must be adjudicated first resulting in successful revocation, and only then may the Part 1145 rules begin to apply. See, e.g., AAR Opening at 40 (objecting to a prescription of reciprocal switching “because of the nature of service provided while that service was expressly exempt”).

AAR’s concerns are moot if the Board agrees with Respondents that partial revocation of the Covered Commodities’ exemptions is warranted and should be included in the final rule. In their opening comments, Respondents explained in detail how the reciprocal switching and exemption revocation statutes require the Board to evaluate similar public interest standards. Respondents further explained that the rationale for the Board’s Part 1145 proposed rules and Respondents request to clarify application of those rules to the Covered Commodities are both necessary to advance the RTP.¹⁰ Respondents explained why their members have a strong need

¹⁰ Ex Parte No. 711 (Sub No. 2), Joint Opening Comments of AF&PA and ISRI (Nov. 7, 2023).

for direct access to the Part 1145 rules based on inadequate rail service they have suffered (see Ex Parte 770 and Ex Parte 704), which has adversely impacted their operations and the broader economy. Thus, the AAR's self interest in advocating an approach for exempt traffic that virtually ensures no shipper of such traffic would ever benefit from the Part 1145 rules can be avoided if the Board decides to clarify in the final rule that partial revocation of the exemptions for Respondents' Covered Commodities is justified and appropriate.

III. Mandating a Prior, Separate Revocation Exemption Proceeding to Apply the Part 1145 Rules to Exempt Traffic is Contrary to the Public Interest.

AAR desires to narrow the application and effectiveness of the Board's proposed rules by requiring shippers of exempt traffic that are experiencing inadequate rail service to continue to endure inadequate service for many weeks or months longer than other non-exempt traffic, unless and until an exemption revocation request is successfully adjudicated at the Board. Practically speaking, if the involved railroad contests revocation, this proceeding could take many months or even a year to resolve. According to AAR, even if the shipper's revocation request was ultimately granted by the Board, the shipper would still not be able to seek immediate relief from inadequate service under the Part 1145 rules.¹¹ Rather, the shipper must continue to suffer from inadequate rail service for at least another 12 weeks (the time period applicable to at least two of the service metrics in the NPRM) but, realistically, it must wait even longer before it could collect and evaluate the predicated service metrics and request the Board

¹¹ AAR Opening at 41 (describing the "proper path" to include, first, "obtain[ing] a proper determination by the Board that the exemption should be revoked" and, then, "seek[ing] a determination that service provided *after* revocation is inadequate under the Proposed Rule's terms") (emphasis original).

to begin a reciprocal switching proceeding.¹² In the AAR's view, inadequate rail service for exempt commodities cannot be addressed until after an individual revocation request is granted because "rather than regulation other forces (principally competition from other modes of transportation) will assure adequacy of service."¹³

AAR is wrong. As demonstrated in the Board's recent EP 770 proceeding regarding severe rail service challenges, and the voluminous record in EP 704, exempt scrap metal and paper and forest products companies have experienced abysmal rail service of the same scope and nature as regulated commodities. As explained in those proceedings, the Covered Commodities are highly dependent on rail service and many of Respondents' members' facilities are now captive to only one serving railroad. AAR failed to provide any evidence that intermodal competition has in fact operated to protect Respondents from inadequate service. Quite the contrary, exempt shippers are deeply concerned that the mere existence of the exemption, and lack of direct access to STB oversight, operates as a *disincentive* for railroads to timely address service challenges for exempt shippers as compared to regulated traffic where regulatory consequences are immediately available.

If the AAR's position holds it would render the Part 1145 rules completely unworkable for Respondents' Covered Commodities and all other exempt traffic, which collectively involves significant rail traffic volumes.¹⁴ It would negate the Board's intent to incentivize Class I railroads to proactively address service problems when the service standard thresholds are

¹² See service reliability and consistency performance standards in the NPRM at 13-19). AAR Opening at 38 (asserting that the Board "lacks authority to commence a regulatory intervention based on the application of performance metrics to traffic that is not regulated").

¹³ AAR Opening at 38.

¹⁴ See 49 C.F.R. § 1039.11 for list of miscellaneous commodity exemptions.

triggered for the Covered Commodities, and would not advance the public need for reliable rail service, contrary to 49 U.S.C. § 11102(c) and the RTP at 49 U.S.C. § 10101. As the Board explained in the NPRM, “It is clear that both the reliable and timely delivery of rail shipments and the efficient movement of shipments through the rail system are essential to meeting the public need for adequate rail service. The public need for adequate rail service is, in turn, central to the design of the Interstate Commerce Act, as amended by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803: an essential aspect of the rail transportation policy set forth in the Act is to ensure the development and continuation of a rail system that meets the needs of the public and the national defense. 49 U.S.C. § 10101(4).”¹⁵

The Board made clear that the new Part 1145 is necessary due to “developments in the freight rail industry” since 2016, “including critical and ongoing service problems.” NPRM at 1-2. To require shippers of the exempt Covered Commodities (and all other exempt traffic) to suffer “ongoing service problems” for months – and perhaps a year or more – before a reciprocal switching proceeding could even be initiated would not address the Board’s concerns and would not meet the needs of the public by ensuring “the development and continuation of a sound rail transportation system” as required by the RTP. More broadly, it would countenance severe economic distress to local businesses, jobs, and the economy at large. The public interest would be harmed, perhaps irreparably, through discounting these impacts, thereby thwarting the public interest prong of 49 U.S.C. § 11102(c), the underlying authority for the NPRM. See, e.g., NPRM at 2 (“it is in the public interest” to prescribe reciprocal switching in response to inadequate rail service, “which is consistent with the public interest prong of § 11102(c)”). AAR’s apparent objective is to render the Part 1145 rules unworkable for exempt traffic, either

¹⁵ NPRM at 6.

because the service challenges experienced would be mooted by the time the shipper could initiate a Part 1145 proceeding, or even more likely, the cost, timing, and uncertainties associated with the need to adjudicate *both* a revocation proceeding and a reciprocal switching proceeding would have not just a chilling effect but a freezing effect on the willingness of any exempt shipper to pursue this course of action.

Therefore, as described by Respondents in their Opening Comments, the Board should use the final rule to clarify the NPRM's treatment of exempt traffic in the new Part 1145 by partially revoking the commodity exemptions for the Covered Commodities. This would allow shippers of such commodities to make full utilization of the new rules without a separate revocation request proceeding consistent with the Board's intent to incentivize adequate rail service across the national rail network to promote the public interest and RTP.

IV. Evaluating Part 1145 Service Metrics While an Exemption is in Effect Is Not Retroactive Regulation.

In support of its position, AAR contends that the proposed Part 1145 would be impermissible "retroactive" regulation, asserting that the Board cannot consider performance of rail service while the transportation was exempt. In support of this contention, AAR emphasizes 49 U.S.C. § 10502(a), which says the Board shall exempt transportation "to the maximum extent consistent with this part." See, e.g., AAR Opening at 40. The AAR relies wholly on the first part of the quoted language ("to the maximum extent") while disregarding the second part ("consistent with this part"). The Board has many statutory directives from Congress to implement. These include not just the exemption of transportation in § 10502 that properly qualifies, but also the public interest prong of § 11102(c) and the RTP of § 10101. The language ignored by the AAR ("consistent with this part") explicitly acknowledges the fact that the Board must balance a wide variety of directives from Congress. The courts have recognized that the

many statutes the Board must implement occasionally represent competing interests and that it is up to the Board to determine the manner in which to balance these competing interests.¹⁶ The proposal in the NPRM is a reasonable use of the Board’s discretion to implement often-competing principles found within the RTP. While it may not be “the only permissible” method that accomplishes this task, the Board’s “attempt to strike a balance between the various statutory objectives is reasonable.” AAR v. STB, 306 F.3d at 1111. As explained, the alternative proposed by the AAR is unworkable and would several harm the public interest. See Section III.

More specifically, the attempt to characterize the new Part 1145 as “retroactive” regulation collapses upon closer inspection. Any potential “regulation” – a prescription of reciprocal switching – would only be in the *future*.¹⁷ Details regarding prior rail service (i.e., performance metrics) would only be one piece of evidence utilized by the Board in determining whether to prescribe such future reciprocal switching.¹⁸ In fact, following the AAR’s retroactive regulation theory would mean that the revocation of an exemption could *never* occur. This is because any revocation of a commodity (or other) exemption necessarily requires the Board to evaluate rail transportation service for that commodity *during* the time it was exempt.¹⁹

¹⁶ See, e.g., Association of American Railroads v. Surface Transportation Board, 306 F.3d 1008, 1111 (D.C. Cir. 2002) (“it is up to the Board to arrive at a reasonable accommodation of the conflicting policies set out in the Staggers Act”).

¹⁷ Cf. Expedited Relief for Service Emergencies, 3 STB 968, 976 (1998) (“AAR argues that we lack authority to provide any relief for transportation that has been exempted from our regulation....AAR is clearly wrong with respect to exempt traffic.”).

¹⁸ See, e.g., NPRM at 23-24 (requirement of practical physical access to only one Class I rail carrier), 25-26 (various affirmative defenses possible), and 26 (practicability requirement). Moreover, if reciprocal switching were prescribed, the incumbent railroad still might transport all of the subject traffic. See NPRM at 8.

¹⁹ See, e.g., Notice of Proposed Rulemaking, Review of Commodity, Boxcar, and TOFC/COFC Exemptions, STB Ex Parte No. 704 (Sub-No. 1), slip op. at 3-4 (served March 23, 2016). See

AAR's reliance on the Pejepscot case does not save its desired characterization of retroactive regulation to restrict application of the Part 1145 rules to the Covered Commodities and other exempt traffic.²⁰ Any impact of reciprocal switching would only affect *future* rail movements and *future* competition between the incumbent and the alternate carrier; this is fundamentally different from Pejepscot, where the impact of applying the common carrier obligation was potential money damages for past rail service.²¹ Additional authority cited by the AAR in its Opening Comments similarly undercuts the AAR's extreme position. In PYCO Industries, the Board ordered alternative rail service to a shipper under 49 U.S.C. § 11123(a) even though 74% of the subject rail traffic consisted of exempt commodities.²² When an extension of the alternative service was proposed, the respondent railroad objected, arguing that, "where...rail transportation of a commodity has been exempted from the Board's regulatory authority, the Board cannot entertain" a petition under § 11123.²³ In other words, the railroad argued that the alternative rail service could not lawfully be extended because the Board "did not

also STB Ex Parte No. 704 (Sub-No. 1), slip op. at 5-15 (served Sept. 30, 2020) (describing proposed "metrics" for analysis of whether an exemption should be revoked).

²⁰ See, e.g., AAR Opening at 37-38 and 41, relying heavily on Pejepscot Industrial Park, Inc. d/b/a Grimm Industries – Petition for Declaratory Order, STB Docket No. 33989 (served May 15, 2003).

²¹ See also Groome & Associates, Inc. and Lee K. Groome v. Greenville County Economic Development Corporation, STB Docket No. 42087 (served July 27, 2005) (awarding damages for violation of common carrier obligation).

²² PYCO Industries, Inc. – Alternative Rail Service – South Plains Switching, Ltd. Co., STB Docket No. 34802, slip op. at 1 and 3 (served June 21, 2006).

²³ Supplement to Petition to Terminate Alternative Rail Service, pages 4-5, filed by South Plains Switching, Ltd. Co. on May 24, 2006 in PYCO Industries, Inc. – Alternative Rail Service – South Plains Switching, Ltd. Co., STB Docket No. 34802.

have authority to order [it] in the first place.”²⁴ The Board rejected this position. The Board not only found that the transportation covered “a mix of regulated and exempt commodities,” but also that “[e]ven if partial revocation....were considered necessary, we conclude that the standard for revocation has been met here.”²⁵ Notably, the original prescription of alternative rail service occurred without exemption revocation, and the Board never stated that that decision was in error.

Finally, the Board recently addressed a retroactive regulation claim by the Union Pacific Railroad in a case involving an exempt shipper’s complaint alleging a violation of the common carrier obligation. Although the Board determined that it could not award damages, i.e. regulatory relief, for a potential common carrier obligation violation based on conduct that occurred prior to partial revocation of the exemption, it made very clear that it may consider “relevant facts” occurring prior to revocation to determine if *prospective* relief is warranted.²⁶ Here, allowing an exempt shipper access to rail performance data developed prior to exemption revocation is akin to allowing discovery of relevant facts as was permitted in Sanimax USA. Access to the service standards data is a far cry from an award of “regulatory relief.” Rather, after evaluating the relevant performance metrics, an exempt shipper presumably could file simultaneously its request for partial revocation with a Part 1145 complaint, and any regulatory

²⁴ Supplement to Petition to Terminate Alternative Rail Service, page 5, filed by South Plains on May 24, 2006 in PYCO Industries, STB Docket No. 34802.

²⁵ PYCO Industries, Inc. – Alternative Rail Service – South Plains Switching, Ltd. Co., STB Docket No. 34802, slip op. at 4 (served June 21, 2006).

²⁶ Sanimax USA, slip op. at 4.

relief in the form of a reciprocal switching prescription ultimately awarded by the Board would necessarily occur *in the future*, after it first determines to partially revoke the exemption.²⁷

V. Partial Revocation is a Logical Outgrowth of the Board’s Exempt Traffic Discussion in the NPRM.

The courts acknowledge that an administrative agency engaged in rulemaking is not required to re-start a new rulemaking proceeding every time that the agency wants to revise its proposed rule in response to comments. As stated by the D.C. Circuit several decades ago, “[s]urely every time the Commission decided to take account of some additional factor it was not required to start the proceedings all over again. If such were the rule the proceedings might never be terminated.”²⁸ This is sometimes known as the “logical outgrowth” rule under the Administrative Procedure Act (“APA”).²⁹

The NPRM clearly provided notice to the public that the Board was considering how the new Part 1145 would apply to exempt commodities. The Board stated that it “retains full jurisdiction” over exempt transportation, including “considering whether service received by the petitioner prior to filing the petition meets the performance standards under this proposed part.”³⁰ The Board stated that exempt transportation “could be subject to an order providing reciprocal switching” under the new Part 1145, and that the Board would revoke any exemption “to the

²⁷ For the reasons explained in Sections II and III, Respondents strongly oppose the need for an exempt shipper to first petition to revoke an exemption each time it hopes to access the Part 1145 rules.

²⁸ Logansport Broadcasting Corporation v. United States, 210 F.2d 24, 28 (D.C. Cir. 1954). See also International Harvester Company v. Ruckelshaus, 478 F.2d 615, 632 (n. 51) (D.C. Cir. 1973).

²⁹ National Mining Association v. Mine Safety and Health Administration, 512 F.3d 696, 700 (D.C. Cir. 2008).

³⁰ NPRM at 27.

extent required.”³¹ Based on the Board’s express inclusion of exempt traffic considerations in the NPRM, there was no need for commenters to “monitor all other comments” to be aware of the coverage of exempt transportation or even that the Board was assessing how to treat exempt transportation.³² Thus, there is no concern that interested parties would have to “’divine [the agency’s] unspoken thoughts’ because the final rule was surprisingly distant from the proposed rule.”³³ Similarly, based on the Board’s explicit statement that it would revoke exemptions “to the extent required,” this is not a situation where application of the proposed Part 1145 rules to exempt traffic was not contemplated by the Board in the NPRM.³⁴

The Respondents’ view that the Board should clarify in the final rule its statements on exempt traffic by partially revoking the exemptions for the Covered Commodities was made in opening comments, allowing the AAR and other railroad parties to respond if desired in their replies submitted to the Board. Finally, it goes without saying that “[a]gencies are not limited to adopting final rules identical to proposed rules”³⁵ and “[t]he final rule need not be the one

³¹ NPRM at 27.

³² Fertilizer Institute v. EPA, 935 F.2d 1303, 1312 (D.C. Cir. 1991).

³³ CSX Transp., Inc., 584 F.3d at 1079-80 (quoting Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1259-60 (D.C. Cir. 2005)).

³⁴ Cf. International Union, United Mine Workers of America v. Mine Safety and Health Administration, 407 F.3d 1250, 1260 (D.C. Cir. 2005) (An agency’s “unexpressed intention” is not a logical outgrowth of a proposed rule.). See also Kooritzky v. Reich, 17 F.3d 1509, 1513 (D.C. Cir. 1994) (“Agencies should be free to adjust or abandon their proposals in light of public comments or internal agency reconsideration without having to start another round of rulemaking....The necessary predicate, however, is that the agency has alerted interested parties to the possibility of the agency’s adopting a rule different than the one proposed.”) (citation omitted).

³⁵ National Mining Association v. Mine Safety & Health Administration, 116 F.3d 520, 531 (D.C. Cir. 1997).

proposed in the NPRM.”³⁶ Otherwise, the very purpose of notice-and-comment rulemaking would be perpetually thwarted. Accordingly, clarification by the Board in the final rule that the Covered Commodities are covered by the Part 1145 rules would be consistent with the APA.

However, if the Board were to ultimately determine that partial revocation of the Covered Commodities’ exemptions may not satisfy the APA’s logical outgrowth standard, then Respondents urge the Board to immediately take steps to rectify this shortcoming. If necessary, the Board should issue a Supplemental NPRM in this proceeding or a new sub-docket to clarify that exempt traffic, including the Covered Commodities are governed by the Part 1145 rules given the public interest considerations and overlapping legal standards involved in the reciprocal switching (§ 11102(c)) and exemption revocation statutes (§ 10502(d)). Alternatively, the Board should promptly complete its long-standing and stalled EP 704 proceeding. As explained, requiring Respondents to adjudicate exemption revocations at the Board on a case-by-case basis each time they desire to use the Part 1145 rules will effectively render the rules unworkable. No reasonable shipper will repeatedly file separate and costly revocation actions to address inadequate service that may occur on multiple occasions over time and involve different railroads and different lanes and facilities. This would be especially true if the AAR’s assertion of retroactive regulation was accepted by the Board, since exempt shippers could not use the proposed rules immediately upon the grant of a requested revocation due to the need to accumulate the service performance metrics over the applicable 12-week periods for the service reliability and consistency metrics. Without Board action clarifying the application of the Part 1145 rules to Respondents’ exempt traffic they (and all other shippers of exempt traffic) will be effectively excluded from the public interest benefits the Board seeks to achieve by incentivizing

³⁶ Agape Church, Inc. v. FCC, 738 F.3d 397, 411 (D.C. Cir. 2013).

adequate rail service. Instead, the exemption will operate as a disincentive for Class I carriers to promptly address Respondents' rail service challenges and they will be left to endure the consequences of inadequate rail service without STB oversight.

VI. Conclusion.

For all the reasons stated herein, Respondents respectfully request that the Board clarify in the final rule that the Covered Commodities will be governed by the new Part 1145 rules, and that it is partially revoking the commodity exemptions for such traffic. This would allow Respondents' members to access directly the reciprocal switching rules under new Part 1145 without having to adjudicate a separate revocation request each time they experience inadequate rail service based on the performance thresholds established by the Board.

Respectfully submitted,

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