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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Ex Parte 704 (Sub-No. 1)

REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS

**COMMENTS IN RESPONSE TO MEMORANDA
SUMMARIZING EX PARTE COMMUNICATIONS**

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The American Forest & Paper Association (“AF&PA”) hereby submits these Comments in Response to Memoranda Summarizing *Ex Parte* Communications (“Comments”) in this proceeding pursuant to the decisions of the Surface Transportation Board (“Board” or “STB”) served on March 19th and July 2nd. AF&PA sincerely thanks the Board for authorizing *ex parte* meetings with interested stakeholders and greatly appreciates the time dedicated by the Board members in meetings with AF&PA and a number of paper and forest products companies.

In these Comments, AF&PA specifically responds to memoranda offered by the American Iron and Steel Institute and the Steel Manufacturers Association (collectively, “Steel Organizations”) on June 13 and 14, 2019 and by the Association of American Railroads (“AAR”) on June 19-21, 2019. As part of this response to *ex parte* memoranda, AF&PA narrows and clarifies the scope of its exemption revocation request in this proceeding to include only nine out of approximately one hundred combined STCC 24 and STCC 26 commodities at the five-digit STCC level, plus the boxcar exemption only to the extent boxcars are used to transport the nine designated commodities. The narrowed scope of AF&PA’s revocation request reflects those commodities that AF&PA members believe are the most “rail dependent” and in need of Board oversight. AF&PA also identifies herein five STCC 26 (Pulp and Paper)

commodities currently subject to regulation for which exemption may be appropriate in a separate future proceeding.

Accordingly, AF&PA strongly urges the Board to complete the modernization of its paper and woods products exemption policy to better reflect the current state of the rail transportation market and the paper and forest products industry. Modernization is both needed and justified based on the very substantial changes to the rail market, finances, and regulatory regime that have occurred since the exemptions were granted over 25 years ago.

I. Introduction and Summary.

The Steel Organizations submitted 2017 revenue-to-variable cost (“R/VC”) data regarding STCC 24 (Wood Products) and STCC 26 (Pulp and Paper Products) with their *ex parte* memoranda, which were posted on the Board’s website on June 13th and 14th. This was new evidence unavailable to the parties when the substantive filings were made in this proceeding in 2016. This data was also somewhat misleading because it was at the highly-aggregated two-digit STCC level, thereby ignoring qualitative circumstances and factors which show the need for resumed Board oversight for many specific forest and paper products commodities identified at the five-digit STCC level.

Unlike other commodity groups seeking exemption revocations in this proceeding, there are approximately one hundred paper and wood products that are governed by the combined STCC 24 and STCC 26 commodities at a five-digit commodity level.¹ Based on current operations of paper and forest products companies (as explained in the 2016 record and the *ex parte* meetings), as well as its review of the highly aggregated data furnished by the Steel Organizations, AF&PA determined that it could narrow the scope of its revocation request from

¹ See **Exhibit 1-A** attached hereto.

all unregulated commodities within STCCs 24 and 26 (and STCCs 40231 and 40241) to only the following nine commodities, plus the related boxcar exemption:

- 24114 – Pulpwood logs
- 24115 – Pulpwood or other wood chips
- 24211 – Lumber, rough or softwood cut stock or flooring
- 24321 – Plywood or veneer or built-up wood exc. plywood or veneer containers
- 24991 – Strand board
- 24996 – Wood particle board
- 26217 – Special industrial paper or paper car liners
- 26311 – Fiberboard, paperboard, pulp board exc. building insulating board
- 40241 – Paper waste or scrap
- the boxcar exemption to the extent it covers transportation of the above commodities

The narrowed revocation described herein is warranted because the forest and paper products commodity exemptions described in the Board’s regulations are based on a world that no longer exists. These exemptions were granted in the 1980s and early 1990s in reliance not only on a rail market and legal regime that has drastically changed in the interim but also on obsolete data that is now approximately thirty years old. Modernization of the wood and paper products exemptions is needed to ensure that American forest and paper products businesses have access to the same oversight as other industries whose rail dependent facilities are now largely captive to one serving railroad and are not hamstrung by an outdated regulatory framework. This regulatory modernization will ensure that the Board’s commodity exemption regulations reflect current industry and transportation realities, thereby enabling American paper and wood products businesses to operate more efficiently and competitively in a challenging global marketplace. The narrowing of AF&PA’s revocation request will also reduce the issues in dispute in this proceeding.

AF&PA also responds herein to assertions made in AAR memoranda which were posted on the Board’s website on June 19-21, 2019, and to identify currently regulated paper and forest products commodities that may be ripe for exemption in a separate future proceeding.

II. Background.

The Board began its evaluation of commodity and traffic exemptions in late 2010 when it issued a notice of public hearing.² AF&PA participated actively at that time, filing written comments and testifying at the 2011 public hearing. In particular, AF&PA stated in its written comments that “it is appropriate for the STB to initiate a proceeding to evaluate whether the rationales for granting the paper and forest products exemptions continue to exist and whether continuation of such exemptions is proper under the statute.”³

After evaluating the comments and testimony received, the Board issued a Notice of Proposed Rulemaking (“NPRM”) in early 2016, proposing to revoke the commodity exemptions for STCC 142 (crushed or broken stone or rip rap), STCC 29914 (coke produced from coal), STCC 3312 (primary iron or steel products), STCC 324 (hydraulic cement), and STCC 40211 (iron or steel scrap, wastes, or tailings).⁴ However, the Board also invited “interested parties to file comments regarding the possible revocation of other commodity class exemptions; such comments should address any marketplace changes comparable to the ones described below.”⁵ AF&PA filed Comments, Reply Comments, and Supplemental Comments during 2016 in response to the Board’s NPRM. In particular, AF&PA requested that the Board revoke the existing exemptions for forest and paper products in STCC 24 and STCC 26, as well as the exemptions for wood scrap or waste (STCC 40231), paper waste or scrap (STCC 40241), and the

² Notice of Public Hearing, Review of Commodity, Boxcar, and TOFC/COFC Exemptions, STB Ex Parte No. 704 (served Oct. 21, 2010).

³ Notice of Intent to Participate and Written Testimony of The American Forest & Paper Association and The Paper and Forest Industry Transportation Committee, STB Ex Parte No. 704, at page 2 (filed Jan. 31, 2011).

⁴ Notice of Proposed Rulemaking, STB Ex Parte No. 704 (Sub-No. 1) (served Mar. 23, 2016) (“NPRM”).

⁵ NPRM, slip op. at 4.

boxcar exemption to the extent it covers transportation of forest and paper products.⁶ AF&PA supported its request with ample historical, legal, expert, and industry evidence showing that it is appropriate to modernize the Board's regulatory oversight at this time so that forest and paper products companies have direct access to the same recourse and remedies that are available to shippers of other regulated commodities, when needed to address the potential unlawful exercise of railroad market power—a concern that did not exist when the exemptions were granted more than 25 years ago.

After receiving voluminous comments and evidence during 2016, the composition of the Board changed. In early 2019, AF&PA filed a Petition for Waiver, asking the Board to waive its prohibition on *ex parte* communications in order to permit interested parties to meet with Board members to discuss the important issues in this proceeding given the passage of time and new Board members.⁷ The Board granted the Petition, and directed parties to file memoranda summarizing the content of any *ex parte* meeting held with a Board member. The Board also invited any interested party to file comments in response to any memorandum.⁸

AF&PA and five paper and forest products companies participated in *ex parte* meetings and filed memoranda regarding those meetings. During the *ex parte* meetings, the companies explained the critical importance of rail transportation to their supply chains, the challenges they face concerning rail service, car supply, demurrage, rates, and contract negotiations, and why Board oversight of their rail shipments is sorely needed to address rail market power that did not exist when the exemptions were granted.

⁶ See, e.g., AF&PA Comments, pages 1-4 (filed July 26, 2016).

⁷ AF&PA Petition for Waiver (filed Feb. 22, 2019).

⁸ Board decision, slip op. at 2-3 (served Mar. 19, 2019).

As mentioned above, based upon new data covering paper and wood products submitted in *ex parte* memoranda from the Steel Organizations, AF&PA requested and obtained from the Board additional time to respond to this new evidence and narrow its previous revocation request.⁹

III. Comments In Response to *Ex Parte* Memoranda.

A. The Steel Organizations' Data on STCCs 24 and 26 is Incomplete and Somewhat Misleading.

The memoranda filed by the Steel Organizations included average 2017 R/VC ratios for STCC 24 (Wood Products) and STCC 26 (Pulp and Paper Products) based on the Board's Commodity Revenue Stratification Report.¹⁰ Given that the primary substantive filings in this proceeding occurred in 2016, the inclusion of 2017 data in the record is new evidence that warrants a response by AF&PA. Moreover, the R/VC ratios provided in the Steel Organizations' memoranda were provided at an extremely aggregated level, with a single R/VC for all of STCC 24 and a single R/VC for all of STCC 26. In other words, all of the myriad, diverse commodities contained within STCC 24 and STCC 26 (which include both exempt and non-exempt commodities) were reduced to merely two ultra-aggregated R/VC ratios, with no consideration of either qualitative factors applicable to forest and paper products or the pricing and legal changes in the industry since the late 1980s and early 1990s.

This data is misleading if interpreted to mean that all forest and paper products can (or should) be treated the same and have the same R/VC ratio as the aggregated two-digit STCC

⁹ See Motion for Extension of Time, filed June 28, and STB Decision, dated July 2, 2019. To facilitate its response, AF&PA also sought and obtained access to the most current confidential waybill sample. See Letter from the Board's Office of Economics, posted July 1, 2019.

¹⁰ See, e.g., Summary of Ex Parte Meeting Between the American Iron and Steel Institute (AISI) and the Steel Manufacturers Association (SMA) and STB Chairman Ann Begeman, STB Ex Parte No. 704 (Sub-No. 1) (posted on Board website June 14, 2019).

R/VC ratio included in the Steel Organization's memoranda. The Board's commodity exemptions are frequently described at the five-digit STCC level, meaning that greater specificity is needed before determining whether revocation is appropriate. Not all commodities within STCC 24 and STCC 26 are the same for transportation purposes, nor should they be treated (or interpreted) in the same manner. In short, significant economic, legal, and industry changes have occurred since the exemptions were created, and there is a great diversity of commodities within STCC 24 and within STCC 26.

Nonetheless, the Steel Organizations' memoranda did highlight one important fact. In its testimony in 2011 and its various filings made in this rulemaking proceeding, AF&PA has focused its presentation on the most important and highest rail volumes of forest and paper commodities even though AF&PA sought revocation of the Board's exemptions as to all commodities in STCC 24 and STCC 26 that are currently exempt.¹¹ The Steel Organizations' memorandum caused AF&PA to take a fresh look at the entire universe of commodities that would be affected within STCC 24 and STCC 26. In order to provide the most precise revocation request possible, specifically tailored to the current operating environment, AF&PA is narrowing its revocation request to only nine commodities at the five-digit level (plus the boxcar exemption as applied to those commodities) out of approximately one hundred commodities combined within STCC 24 and STCC 26 at the five digit level. See Section III.B below.

Given the inevitable technological, legal, industrial, and economic changes in the world, occasional regulatory modernization is appropriate and useful in every field of administrative law. Modernization requires tailoring a regulatory regime to the actual, specific facts that exist,

¹¹ See, e.g., Comments of AF&PA (filed July 26, 2016) at page 1 ("the exemptions applicable to forest and paper products (hereafter "forest products"), and the boxcar exemption as it applies to rail shipments of forest products, should be revoked").

and is warranted for rail transportation of forest and paper products. In order to facilitate the most accurate and precise modernization possible, AF&PA has narrowed its revocation request so that it best reflects the current state of rail transportation for forest and paper products. The reasons for this narrowed request are set forth in Section III.B below, which also provides a factual response to the Steel Organizations' data as to the specific commodities described below at the five-digit STCC level.

AF&PA previously focused its evidence in this proceeding at the seven-digit STCC level in order to be as precise as possible.¹² However, this focus at the seven-digit STCC level led to numerous complications because the Board's commodity exemptions are most often described at the five-digit STCC level or less.¹³ Other parties in this proceeding mimicked the Board's prevailing approach, providing evidence at the two-digit or five-digit STCC level.¹⁴ Consequently, there was a mismatch when comparing AF&PA's 2016 evidence to that of the other parties. Discussions during the recent *ex parte* meetings revealed that the participating forest and paper products companies most commonly utilize five-digit STCC codes in the day-to-day running of their businesses. For all these reasons, AF&PA has expressed its narrowed request for revocation at the five-digit STCC level.

B. AF&PA is Narrowing its Request for Revocation.

A fundamentally different legal regime governs rail transportation today compared to the 1980s and early 1990s when the forest and paper products exemptions were created. Thirty

¹² See, e.g., AF&PA Comments, Verified Statement of Jay Roman at pages 5 and 10 (filed July 26, 2016).

¹³ See, e.g., 49 CFR § 1039.11(a).

¹⁴ See, e.g., Comments of CSX Transportation, Inc., Verified Statement of Michael Rutherford at pages 1-4 (filed Aug. 26, 2016); Comments of Norfolk Southern Railway Company at page 21 (filed Aug. 26, 2016); Comments of Association of American Railroads, Verified Statement of Mark Israel and Jonathan Orszag at pages 20-21 (filed Aug. 26, 2016).

years ago, railroads were hampered in responding quickly to requests for rates and service due to the tariff filing and other administrative burdens that existed at the time. See Section III.D below. Therefore, the proposed commodity exemptions were supported by the forest and paper industry in the 1980s and early 1990s because they were pro-competitive and facilitated railroads' ability to promptly respond to market needs and truck pricing. The rail transportation world is completely different now. Laws requiring tariff filing and other administrative burdens no longer exist, and railroads are not prevented from efficiently quoting rates and providing service. AF&PA and large forest products companies no longer support the exemptions (in fact they strongly oppose the exemptions), which create a barrier for needed regulatory oversight – a barrier that non-exempt commodities do not face even though captive rail customers across both exempt and non-exempt industries face similar challenges as a result of a highly concentrated rail market resulting in substantial market power by primarily Class I railroads.

It is important to remember that revocation only deals with the question of Board jurisdiction. Revocation of an exemption does not signify any substantive finding as to the merits of any particular dispute; any such dispute must be separately filed and separately adjudicated pursuant to standard burdens of proof. Given the dramatic legal, industry, and economic shifts that have occurred in the past thirty years, the time is ripe for revocation of exemptions related to the nine forest and paper commodities designated herein.

1. Evidence warrants revocation of the exemption for nine commodities.

As mentioned above, the Steel Organizations' memoranda and the *ex parte* discussions highlighted the fact that, while AF&PA submitted evidence at the seven-digit STCC level, the Board's regulations and most other parties' evidence was provided at a STCC level between two and five digits. The memoranda and the *ex parte* meetings also caused AF&PA to determine that

it is possible for AF&PA to narrow its prior revocation request to encompass those commodities that AF&PA members believe are the most “rail dependent” and in need of Board oversight.

Accordingly, AF&PA is reducing the scope of its revocation request and is now only requesting that the Board revoke the following nine commodity exemptions, plus the boxcar exemption to the extent it applies to transportation of the following nine commodities:

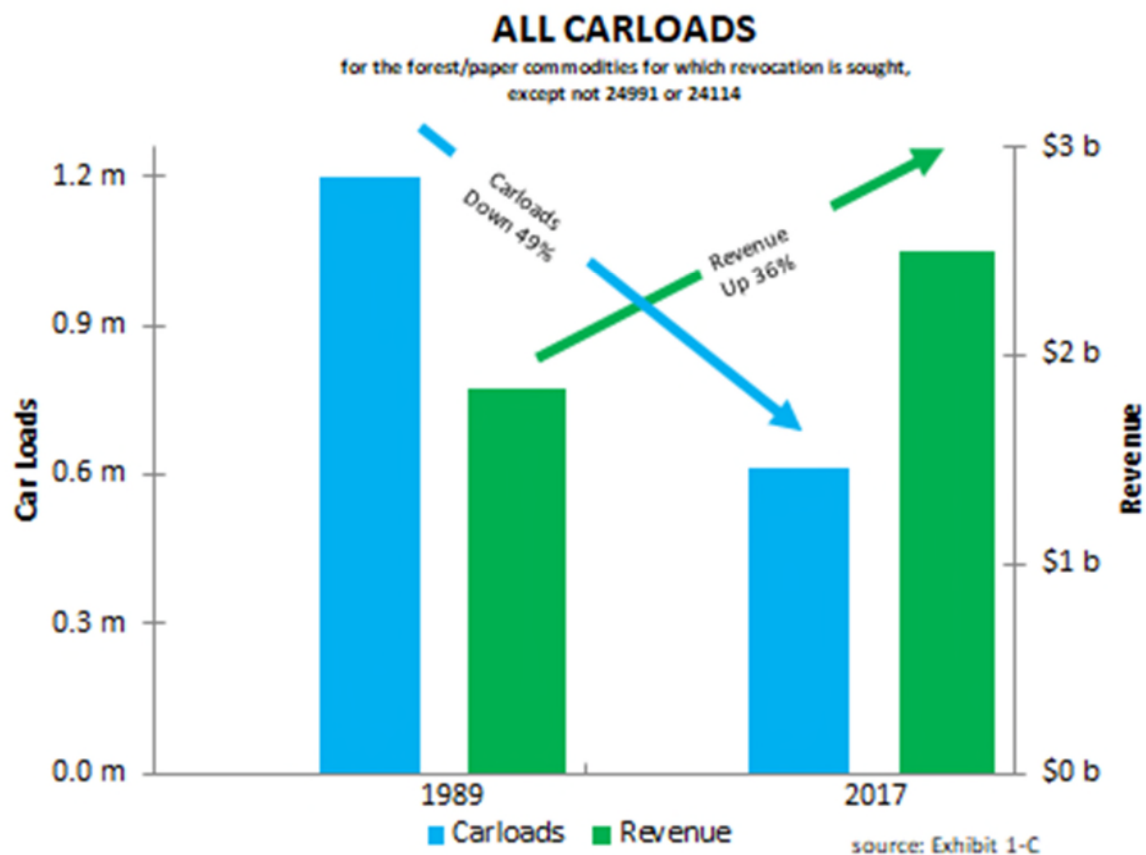
- 24114 – Pulpwood logs
- 24115 – Pulpwood or other wood chips
- 24211 – Lumber, rough or softwood cut stock or flooring
- 24321 – Plywood or veneer or built-up wood exc. plywood or veneer containers
- 24991 – Strand board
- 24996 – Wood particle board
- 26217 – Special industrial paper or paper car liners
- 26311 – Fiberboard, paperboard, pulp board exc. building insulating board
- 40241 – Paper waste or scrap
- the boxcar exemption to the extent it covers transportation of the above forest and paper products

The choice of these nine commodities is addressed in the attached statistical analysis of Henry Julian (Jay) Roman of Escalation Consultants.¹⁵ See Exhibit 1 attached hereto. Mr. Roman conducted this statistical analysis utilizing the Board’s confidential waybill sample. This analysis reveals that the Steel Organizations’ memoranda, with their exclusive focus on 2017 data, only tell a small part of the story. See Exhibit 1-B.¹⁶ A few highlights from **Exhibit 1** confirm that substantial changes have occurred since 1989 in the economics of rail transportation of these forest and paper commodities.

¹⁵ Mr. Roman’s credentials were included in AF&PA’s Comments filed July 26, 2016 in this proceeding as an appendix to his Verified Statement.

¹⁶ Two commodities in **Exhibit 1-B** deserve special mention. There was a very small sample size for STCC 26217 in the Board’s waybill sample in 1989, which led to a distorted comparison to the proportion of cars above 180% R/VC in 2017. Secondly, the Board’s waybill sample for 1989 included no shipments of STCC 24991, thereby preventing a comparison to the data from 2017. As explained in the last paragraph of this Section III.B.1, AF&PA was unable to include STCC 24114 in **Exhibit 1-B**.

Exhibit 1-C shows that the total carloads of the seven of the nine relevant forest and paper commodities have decreased by 49% from 1989 to 2017, yet the carloads above 180% R/VC have increased by 118% in that same period.¹⁷ Revenue figures are even more vivid, as revenue from all carloads has increased 36.3% (despite that 49% drop in carloads), while revenue from carloads above 180% R/VC have increased 412%. These figures show that a significant subset of the forest and paper products industry is subject to dramatically increased prices compared to 1989. The information in **Exhibit 1-C** is graphically represented below.



¹⁷ The Board's waybill sample for 1989 showed no traffic for STCC 24991, so that commodity was not included in the comparison covered by **Exhibit 1-C**. To draw a negative inference from this lack of data in 1989 would be inequitable and unfairly prejudicial to AF&PA. As explained in the last paragraph of this Section III.B.1, AF&PA was unable to include STCC 24114 in **Exhibit 1-C**.

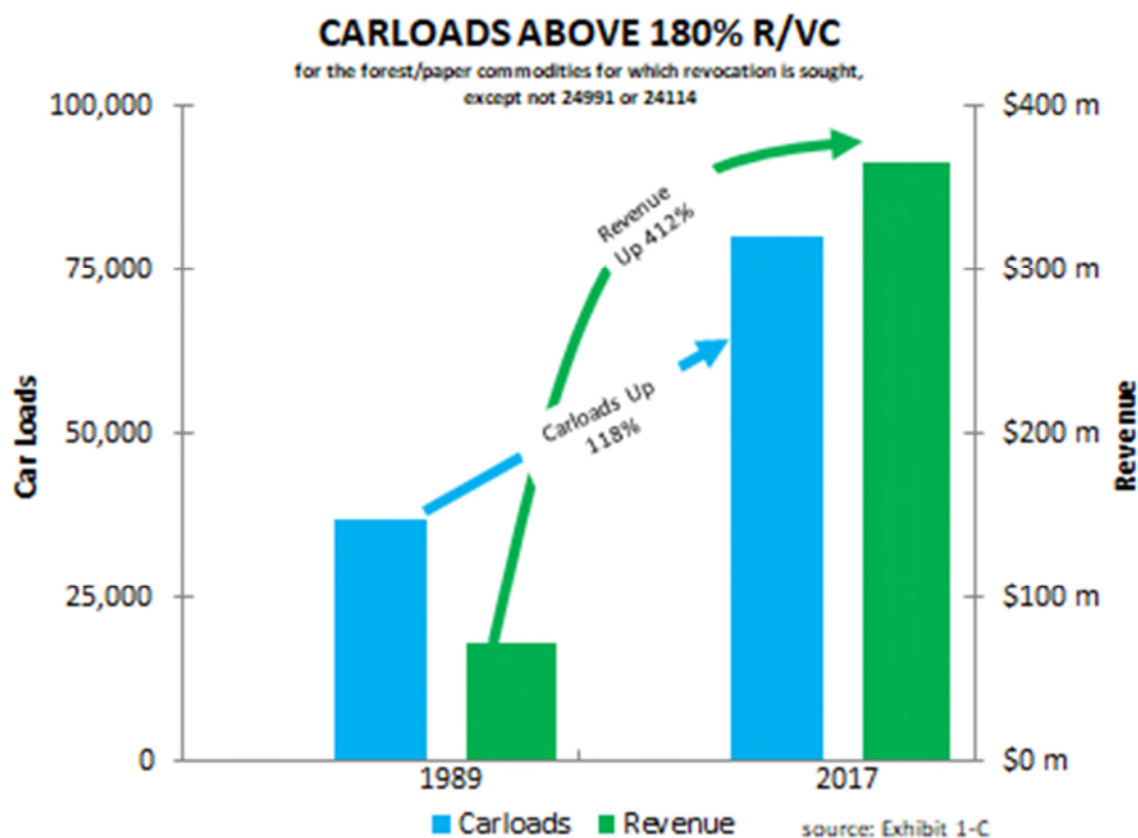


Exhibit 1-D elucidates the same conclusion, though in a different fashion. This table shows that the revenue per ton-mile of seven of these nine commodities increased substantially from 1989 to 2017.¹⁸ This increase occurred during a time when railroads' internal costs, adjusted for productivity, decreased slightly.¹⁹

¹⁸ Again, STCC 24991 is not covered by this comparison in **Exhibit 1-D** because the Board's waybill sample for 1989 showed no traffic for STCC 24991. **Exhibit 1-D** also does not include STCC 24114. The increase in the Class I railroads' average revenue per ton-mile from 1989 to 2017 (50.7%, as shown in **Exhibit 1-D**) is somewhat affected by the increase in the average length of haul over the same time period.

¹⁹ See, e.g., Summary of *Ex Parte* Meeting Between the American Iron and Steel Institute (AISI) and the Steel Manufacturers Association (SMA) and STB Chairman Ann Begeman, STB Ex

Finally, **Exhibit 1-E** reveals that boxcar usage remains very important for most of these nine commodities, and revocation of the boxcar exemption to the extent it applies to forest and paper products is warranted as part of the Board's regulatory modernization effort.

Evidence from AF&PA's filings in 2016 strongly supports revocation of the exemption for STCC 24114. In that evidence, AF&PA showed there was a 1031% increase in carloads over 180% R/C from 1989 to 2014 for STCC 2411411.²⁰ However, AF&PA was unable to include STCC 24114 in the updated analysis for these Comments due to the need to coordinate with many individual companies and the large number of commodities within STCCs 24 and 26.

2. AF&PA's narrowed revocation request covers those commodities which are most rail dependent.

With this narrowing, AF&PA is reducing the scope of its prior revocation request to the most "rail dependent" traffic for which Board oversight is most necessary.²¹ This reduction in scope not only limits the number of issues in dispute in this proceeding, thereby aiding the Board's decision-making process,²² but it also ensures that the Board's current regulatory modernization effort relies on precision rather than broad-brush determinations at the two-digit STCC level.

Parte No. 704 (Sub-No. 1) (posted on Board website June 14, 2019) (last page shows RCAF-A from 1991 to 2017).

²⁰ See, e.g. AF&PA Comments (filed July 26, 2016), Roman V.S. at p. 5 and Appendix C

²¹ Other parties have previously narrowed their requested relief in exemption proceedings. See, e.g., Rail Exemption – Transportation of Selected Commodity Groups, 9 ICC2d 969, 970 (1993) ("In its reply comments...AAR withdrew its exemption request for six of the 12 commodity groups that generated opposition.").

²² Cf. Chelsea Property Owners – Abandonment – Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY, STB Docket No. AB-167 (Sub-No. 1094A), slip op. at 3 (served Mar. 15, 2004) ("[t]he Board favors the private resolution of disputes whenever possible").

Commodities may be “rail dependent” based on a variety of factors, including (1) the size of the commodity (such as the extremely large paper rolls that cannot be transported via motor carrier), (2) the design and layout of manufacturing and receiving facilities, which may be configured for rail service or have restricted access for the many more trucks needed to convert volumes from rail to motor carriers, (3) customer requirements, (4) shipment distance, and (5) limits on truck capacity. AF&PA has already provided ample qualitative evidence as to the relevance of these factors to forest and paper products in this proceeding, as described in its earlier evidence and the *ex parte* meetings.²³

In the *ex parte* meetings, discussions confirmed that certain forest and paper commodities are dependent on rail transportation, and there are significant limitations on the ability of rail customers to switch to other modes of transportation for these commodities. As explained during the meetings, the size and weight of certain commodities are major factors as to whether those commodities can be shipped by truck.²⁴ For instance, the forest and paper industry cannot switch to truck for the movement of large paper rolls, some of which are 130 inches tall, and can weigh up to 17 tons.²⁵ Further, the forest and paper companies also explained that facility design

²³ See, e.g., AF&PA Supplemental Comments (filed Oct. 3, 2016), submitting verified statements of three forest and paper products companies.

²⁴ See e.g., Summary of *Ex Parte* Meeting held on June 11, 2019 between the International Paper Company, American Forest and Paper Association and Chairman Begeman at 1 (Posted June 21, 2019) (“IP-Begeman Meeting”) (“IP explained that it does not have any alternative to rail for the transportation of these products due to their size (e.g., paper rolls can be as large as 110 to 130 inches)”); Summary of *Ex Parte* Meeting held on June 11, 2019 between the Georgia Pacific LLC, American Forest and Paper Association and Board Member Oberman at 1 (Posted June 21, 2019) (“GP-Oberman Meeting”) (“product dimensions and weight dictate and require its use of rail.”); Summary of *Ex Parte* Meeting held on June 7, 2019 between Domtar Corporation, American Forest & Paper Association and Board Member Oberman at 1 (Posted June 25, 2019) (“Domtar-Oberman Meeting”) (“Due to the weight of the rolls it is impossible to move them by truck.”)

²⁵ See *id.* See also Summary of *Ex Parte* Meeting held on June 6, 2019 between the Packaging Corporation of America and Chairman Begeman at Exhibit-2 (Posted June 14, 2019) (“PCA-

is another significant factor that renders the transportation of certain commodities dependent on rail. Many plants and facilities were primarily designed for rail, and do not have sufficient truck dock space for widespread or substantially increased truck usage.²⁶ Some of the companies also explained that their customers are similarly dependent on rail transportation, and that the customers' preference for rail transportation over alternative modes of transportation is a determining factor.²⁷ Affected facilities cannot be converted to accommodate more truck shipments "without significant planning, redesign, time and investment."²⁸ The length of haul is another factor that makes other modes uneconomical for the movement of paper products.²⁹

Begeman Meeting") ("Rail is the preferred mode to transport large rolls of paper and some at 130 inches tall have to go by rail.")

²⁶ See, GP-Oberman Meeting at 1 ("Many facilities were built near railroad tracks due to the large and heavy nature of the products manufactured and the costs to configure the mills for only truck transportation is not economical."); IP-Begeman Meeting at 1 ("IP explained that it does not have any alternative to rail for the transportation of these products due to ... the design of their facilities which are configured mainly for rail shipments."); PCA-Begeman Meeting at Exhibit-2 ("PCA mills are primarily designed for rail and receiving distribution facilities are also configured for and require rail. It would be cost prohibitive to convert to all truck."). See also AF&PA Motion for Leave to Supplement Record, Verified Statement of Bruce Ridley ("Bruce Ridley V.S.") at ¶ 17 (Filed October 3, 2016).

²⁷ See e.g., Summary of *Ex Parte* Meeting held on June 6, 2019 between Verso Corporation, American Forest & Paper Association and Chairman Begeman at 1 (Posted June 17, 2019) ("Verso-Begeman Meeting") ("Verso described its heavy dependence on rail service for its graphic and packaging paper production, and its pulp business, based on the configuration of both its facilities and the facilities of its customers"); Domtar-Oberman Meeting at 1 ("Regarding its paper mill operations, Domtar explained that its use of rail typically depends on its customers' demands and that its customers whose facilities are configured for rail would change suppliers if they do not receive the products by rail.")

²⁸ See, IP-Begeman Meeting at 2.

²⁹ See, PCA-Begeman Meeting at Exhibit-2 (explaining length of haul is another reason for PCA's dependency on rail).

Lastly, there are significant limits on the capacity of truck movements due to various additional reasons, including geography, and driver and truck shortages.³⁰

3. Railroads possess significant market power over the nine commodities for which revocation is sought.

The record is clear in this proceeding that systemic (not episodic) problems exist regarding rail service, unreasonable practices, demurrage issues, lack of adequate railcar supply, rate reasonableness, and a lack of mutuality in negotiations for these nine forest and paper commodities. The problems are widespread and exist at an industry level, making individual commodity exemption revocations unworkable, ineffective, and impractical.

During the *ex parte* meetings, various forest and paper companies explained the common problems they are currently experiencing with rail transportation. For instance, Domtar Corporation (“Domtar”) explained that bunching of railcars creates significant problems, leading to congestion at their facility sites, and resulting in increased demurrage bills.³¹ Georgia Pacific LLC (“GP”) also explained that its demurrage bills have significantly increased during the last two years.³² Packaging Corporation of America (“PCA”) explained that it has challenges with “high demurrage and other costs.”³³ Verso Corporation (“Verso”) stated that it currently has disputed demurrage bills amounting to nearly \$1 million assessed by a Class I railroad, and the

³⁰ See e.g., PCA-Begeman Meeting at 2 (“PCA described the capacity constraints in truck movement due to a variety of factors, including geography, as the mills are often located in remote locations without sufficient truck availability, driver shortages, and the simple fact that there are not enough trucks available to move 100 percent of its volumes by truck.”); Verso-Begeman Meeting at 1 (“It described limitations on its use of truck for these product lines due to capacity constraints and a shortage of drivers especially for longer hauls”).

³¹ See, Summary of *Ex Parte* Meeting held on June 7, 2019 between the Domtar Corporation, American Forest & Paper Association and Chairman Begeman at 2 (Posted June 25, 2019) (“Domtar-Begeman Meeting”).

³² See, GP-Oberman Meeting at 1.

³³ See, PCA-Begeman Meeting at Exhibit-2.

railroad refuses to negotiate to find an amicable solution.³⁴ Verso also explained that the Class I railroad, instead of negotiating with Verso, threatened to embargo a third-party warehouse facility on which Verso heavily relies.³⁵

Car supply is also a significant concern. International Paper Company (“IP”) explained that a Class I railroad’s car supply dropped from 95% to 60% during the implementation of PSR.³⁶ Verso also explained that it has similar concerns with car supply.³⁷ Furthermore, companies explained that the railroads are abandoning the 50 foot boxcars, and shifting to 60 foot boxcars, which substantially reduces the industry’s efficiency as most paper mills are configured to ship by rail and product sizes and dimensions are not compatible with 60 foot boxcars. PCA explained that the 60 foot boxcar model reduces its efficiency “at loading and in the amount of product delivered.”³⁸ Similarly, IP also explained that 60 foot boxcars create inefficiencies for its operations.³⁹ Other companies described similar concerns.⁴⁰

“De-marketing” is another common and troubling phenomenon experienced throughout the forest and paper products industry and described in the *ex parte* meetings. “De-marketing”

³⁴ See, Verso-Begeman Meeting at 2.

³⁵ See *id.*

³⁶ See, IP-Begeman Meeting at 2.

³⁷ See, Verso-Begeman Meeting at 2.

³⁸ See, PCA-Begeman Meeting at Exhibit-2.

³⁹ See, IP-Begeman Meeting at 2.

⁴⁰ See e.g., Domtar-Oberman Meeting at 1 (“Many of Domtar’s customer facilities are set up for 50-foot box cars, and the railroads’ shift to 60-foot cars creates significant inefficiencies.”); GP-Oberman Meeting at 1 (“GP also stated the railroads’ shift to 60-foot box cars adversely affects its business, as some of its facilities are dependent on 50-foot box cars for the transportation of brown paper products due to their size.”); Summary of *Ex Parte* Meeting held on June 6, 2019 between Verso Corporation, American Forest & Paper Association and Member Oberman at 3 (Posted June 14, 2019) (“Verso explained that its products and facilities are designed to utilize the 50 foot cars. However, the railroads are shifting towards 60 foot cars, and it creates significant challenges and inefficiencies for Verso.”).

occurs when railroads dramatically raise rates on certain lanes as part of a strategy to shed traffic viewed as less desirable and to “focus on increasing profitability in the traffic transported.”⁴¹ For instance, Verso explained that its inbound wood supply has been seriously affected by de-marketing.⁴² Domtar also stated that inbound movements of raw materials, which were traditionally dependent on rail, have been de-marketed due to increasing rail rates.⁴³ When the paper and forest products industry supported the exemptions many years ago, it was with an expectation that railroads would compete vigorously with trucks to increase market share; however, today the opposite is occurring with respect to certain commodities and lanes.

Apart from de-marketing, some companies also stated that they have experienced enormous rate increases during recent years. Verso explained that a Class I railroad has increased its rates “by 28% in 2018, after the expiration of a long-term contract.”⁴⁴ IP explained that a Class I railroad imposed substantial increases exceeding 7% in 2018, and that the same railroad is also seeking an increase of over 9% in 2019.⁴⁵ More broadly, companies also stated that they are having difficulties in contractual negotiations with the railroads due to the exempt status of their commodities, and generally the railroads have a “take it or leave it” attitude due to their enormous market power.⁴⁶

Analysis of the Steel Organizations’ new R/VC data by Mr. Jay Roman shows that the narrowed list of commodities is subject to substantially increased railroad market power

⁴¹ See, Summary of *Ex Parte* Meeting held on June 14, 2019 between American Forest and Paper Association, Escalation Consultants, Inc., and Vice Chairman Fuchs at 1 (Posted June 24, 2019) (“AF&PA-Fuchs Meeting”).

⁴² See, Verso-Begeman Meeting at 2.

⁴³ See, Domtar-Begeman Meeting at 2.

⁴⁴ See, Verso-Begeman Meeting at 2.

⁴⁵ See, IP-Begeman Meeting at 2.

⁴⁶ See e.g., GP-Oberman Meeting at 2; Verso-Begeman Meeting at 2.

compared to 1989. In particular, his analysis showed that overall carloads dropped precipitously, yet carloads above 180% R/VC have increased substantially. See Exhibit 1-C. He also showed the rapid rise in revenue per ton-mile from 1989 to 2017 despite slightly decreasing railroad costs over the same time period when adjusted for productivity. See Exhibit 1-D.

4. There is no effective competition to rail service for the nine commodities for which revocation is sought.

The existing record and *ex parte* meetings also confirmed that other modes of transportation do not provide effective competition to rail for these commodities. Truck is not a competitive option due to the weight and size of certain commodities.⁴⁷ Moreover, many facilities were primarily designed for rail, and these facilities do not have “sufficient truck dock space to convert to truck transportation for all of their shipping needs.”⁴⁸ Truck is not a competitive option where supply chain details and characteristics have been developed and designed around use of heavy haul rail shipments, thereby preventing a shift to truck transportation. For instance, Domtar explained how transportation between its facilities and its customers is highly dependent on rail because the origin Domtar facilities and the destination customer facilities are often are designed for rail, and, crucially, these customers would avoid Domtar products if they could not receive these products by rail.⁴⁹ GP also stated that many facilities were built near railroad tracks with heavy rail infrastructure integrated into facility designs, and this, together with the size and weight of the products, dictates their preference of

⁴⁷ See e.g., IP-Begeman Meeting at 1; GP-Oberman at 1; Domtar-Oberman Meeting at 1; PCA-Begeman Meeting at Exhibit-2.

⁴⁸ See, GP-Oberman Meeting at 1; IP-Begeman Meeting at 1; PCA-Begeman Meeting at Exhibit-2. See also, Bruce Ridley V.S. at ¶ 17.

⁴⁹ See, Domtar-Oberman Meeting at 1.

rail transportation over truck.⁵⁰ IP explained that it is highly dependent on rail transportation for the movement of paper products between its paper mills and the converting facilities and box plants, which are configured mainly for rail shipments, and which limits its ability to convert to truck shipments.⁵¹ PCA stated that its mills are “primarily designed for rail and receiving distribution facilities are also configured for and require rail.”⁵² There are also significant capacity constraints in truck shipments due to driver and truck shortages, as well as due to remote locations of some of these facilities where there are not enough trucks available to move sufficient volumes.⁵³

Water transportation is not a viable option for forest and paper companies, as most of the companies, as well as their customers, are not located on navigable waterways.⁵⁴ Intermodal competition is also not an effective competition for rail-dependent traffic because these facilities are often not near intermodal ramps.⁵⁵ Furthermore, the existing record also shows that the forest and paper products cannot be substituted in an effort to shield themselves from railroad market power, and geographic competition is limited due to variety of specialized facilities that are not

⁵⁰ See, GP-Oberman Meeting at 1.

⁵¹ See, IP-Begeman Meeting at 1.

⁵² See, PCA-Begeman Meeting at Exhibit-2.

⁵³ See e.g., Summary of *Ex Parte* Meeting held on June 6, 2019 between Packaging Corporation of America, American Forest & Paper Association and Member Oberman at 2 (Posted June 13, 2019) (“PCA-Oberman Meeting”) (“PCA described the capacity constraints in truck movement due to a variety of factors, including geography, as the mills are often located in remote locations without sufficient truck availability, driver shortages, and the simple fact that there are not enough trucks available to move 100 percent of its volumes by truck.”); Verso-Begeman Meeting at 1 (“It described limitations on its use of truck for these product lines due to capacity constraints and a shortage of drivers especially for longer hauls”);

⁵⁴ See, PCA-Begeman Meeting at Exhibit-2.

⁵⁵ See e.g., PCA-Begeman Meeting at Exhibit-2; Verso-Begeman Meeting at 1. See also, Bruce Ridley V.S. at ¶ 27.

interchangeable, which impedes companies' ability to change origins or destinations to benefit geographic competition.⁵⁶

5. Legal and policy reasons support revocation for these nine commodities.

AF&PA has already described the legal and policy basis for revocation of the exemptions applicable to forest and paper products commodities. Despite the narrowing of AF&PA's revocation request, the overall legal and policy reasons have not changed. The Board's consideration of the paper and forest products commodities in this proceeding is a logical outgrowth of the NPRM.⁵⁷ The Board retains broad revocation authority, and such revocation can be warranted merely on application of the national rail transportation policy. Previous railroad abuse of market power is not necessary for revocation; instead, the Board looks at whether transportation alternatives exist and whether a railroad has market power that it could abuse. As AF&PA previously explained, the exemptions were originally created largely due to the cumbersome tariff filing and other burdensome requirements for regulated commodities which no longer exist. When the exemptions were adopted, they bestowed mutual benefits on railroads and rail customers both, but there are no longer *any* benefits for rail customers.

The legal and policy reasons were discussed at the *ex parte* meetings and attached to AF&PA *ex parte* memoranda. For the Board's convenience, AF&PA has reattached that same summary here as **Exhibit 2**.

⁵⁶ See, Bruce Ridley V.S. at ¶¶ 29-33. See also, Verified Statement of Jeanne Sebring at ¶¶ 26-32 (Filed October 3, 2016).

⁵⁷ See, e.g., Reply Comments of AF&PA and PFITC at pages 23-24 (filed Aug. 26, 2016).

C. AAR’s Claim that An Industry Petition is Required To Revoke an Exemption Is Expressly Contradicted by the Statute; and AAR’s Other Procedural Concerns Lack Any Merit.

AAR is simply incorrect in its recent statement to the Board that a petition under 49 CFR Part 1121 is required before any exemption can be revoked. The Board can open proceedings on its own motion to consider changes to its rules, and Congress expressly granted the Board authority to do so with respect to *both* granting and *revoking* commodity exemptions. The relevant exemption *and revocation* statute states plainly that the “Board may, where appropriate, begin a proceeding under this section on its own initiative.”⁵⁸ The Board can and does revoke exemptions on its own motion.⁵⁹ In fact, the ICC previously began certain commodity class exemption proceedings on its own initiative.⁶⁰

The AAR also recently expressed skepticism regarding these Comments – even *before* seeing their content – asserting that AF&PA will not be able to “undertake any significant consideration of market forces applicable to the transportation of paper and forest products.”⁶¹ The AAR asserted that this multi-year proceeding is “incomplete” and should be summarily “discontinued” despite the years of effort, evidence, hearings, meetings, expert analysis, and

⁵⁸ 49 U.S.C. § 10502(b).

⁵⁹ See, e.g., Metropolitan Council – Petition for Declaratory Order, STB Docket No. 36178, slip op. at 6 (served Aug. 23, 2018) (“Given the shipper concerns that were not present when the ICC granted the exemption in 1995, and HCRRA’s acquiescence, the Board will, on its own motion under 49 U.S.C. § 10502(d), revoke HCRRA’s Subtitle IV exemption for the Kenilworth Corridor so that HCRRA can assume the responsibilities of a non-exempt carrier subject to the Board’s regulatory authority on the Kenilworth Corridor once the Council acquires the rail assets on the corridor.”).

⁶⁰ See, e.g., Rail General Exemption Authority; Miscellaneous Manufactured Commodities, 53 Federal Register 3900 (Feb. 10, 1988) (“Under its authority in 49 U.S.C. 10505, the Commission proposes to add to the list of exempt commodities”). In the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”), 49 U.S.C. § 10505 was renumbered to 49 U.S.C. § 10502.

⁶¹ See Reply of the Association of American Railroads, page 4 (filed July 1, 2019).

other evidence submitted both in this docket and Ex Parte No. 704. The AAR’s contention of “incompleteness” is plainly incorrect.

The voluminous evidence of record in this long-running proceeding – which has its origins in a Notice of Public Hearing published in late 2010 – reveals that the time is ripe for the Board to modernize its commodity exemptions for paper and forest products so that American businesses that depend on competitive and efficient rail service can meet the challenges of the 21st century. In sheer volume, content, and quality, the evidence submitted in this proceeding exceeds that upon which the Interstate Commerce Commission (“ICC”) relied when it originally granted the forest and paper products exemptions thirty years ago. The evidence also reveals the fallacy of the AAR’s recent assertion that the record in this proceeding is “incomplete” and that an entirely new “fully supported petition under 49 C.F.R. § 1121.4(f)” should be filed if any party “believes an existing exemption is no longer warranted.”⁶²

Of course, AF&PA has fully participated in this proceeding from the outset and was unambiguous regarding its objective. See Section II above. AF&PA responded to the Board’s request for comments on the “possible revocation of other commodity class exemptions.”⁶³ In short, the Board has the authority to manage its docket⁶⁴ and the issue of the forest and paper products commodity exemption was raised years ago in this proceeding. Therefore, revocation of forest and paper exemptions is a logical outgrowth of the NPRM.⁶⁵ A decision by the Board

⁶² Reply of the Association of American Railroads, page 4 (filed July 1, 2019).

⁶³ NPRM, slip op. at 4.

⁶⁴ Idaho Northern & Pacific Railroad Company – Abandonment and Discontinuance Exemption – In Washington and Adams Counties, ID, STB Docket No. AB-433 (Sub-No. 2X), slip op. at 3 (served Nov. 14, 1996) (“The Board has authority to control its own docket.”).

⁶⁵ National Mine Association v. Mine Safety & Health Administration, 116 F.3d 520, 531 (D.C. Cir. 1997) (“[a]gencies are not limited to adopting final rules identical to proposed rules”);

to require the filing of a petition for revocation at this time, after years of collecting evidence and comments in response to a proceeding that it properly initiated on its own, would be highly prejudicial and wasteful, as it would further delay the outcome of this proceeding and would require AF&PA to resubmit and re-adjudicate the very same issues at unnecessary expense.

The record in this proceeding has much greater depth and quantity of evidence than that considered by the agency when the ICC first granted the relevant class-wide exemptions. The Board's decision in 2016 to pursue modernization of its exemption policy was completely appropriate given that the current commodity exemption regulatory framework is based on a legal regime that no longer exists and outdated data from thirty years ago.⁶⁶

The AAR is also incorrect in its claim that "AF&PA has now used *ex parte* meetings to further supplement the record."⁶⁷ It was not AF&PA that submitted new evidence; instead, the Steel Organizations submitted new 2017 R/VC evidence in their memoranda regarding forest and paper products, meaning that it is proper for AF&PA to respond. The AAR has been given the same opportunity to participate in *ex parte* meetings, file memoranda, and file responsive comments to those memoranda. The AAR's recent responsive filing also tries to undermine the relevance of R/VC ratios.⁶⁸ AAR ignores and apparently forgets that R/VC ratios have long been

Agape Church, Inc. v. FCC, 738 F.3d 397, 411 (D.C. Cir. 2013) ("[t]he final rule need not be the one proposed in the NPRM").

⁶⁶ ICCTA abolished the cumbersome tariff filing requirement that had caused shippers to support the exemptions in the first place. See, e.g., Rail General Exemption Authority – Exemption of Paints, Enamels, Lacquers, Shellacs, Etc., STB Ex Parte No. 346 (Sub-No. 33), slip op. at 6 (served Apr. 20, 1998) ("Congress enacted the ICCTA, which...eliminated the requirement for the railroads to file tariffs"). See also Reply Comments of AF&PA and PFITC, pages 11-12 (filed Aug. 26, 2016).

⁶⁷ Reply of the Association of American Railroads, page 3 (filed July 1, 2019).

⁶⁸ Reply of the Association of American Railroads, page 4 (filed July 1, 2019).

utilized by the AAR, individual railroads, the ICC, and the Board in a wide variety of regulatory applications, including commodity exemption decisions.⁶⁹

A summary discontinuance of this proceeding, after so many American businesses have expended significant sums on outside lawyers, expert consultants, and testimony, would be improper and inappropriate at best given the efforts of these businesses to have their commodities treated the same as other commodities so that they can survive and thrive in a competitive global marketplace. Plainly enough, the AAR seeks to prevent the Board from modernizing its regulatory scheme to fit the laws and facts actually in existence today. Instead, the AAR would have the Board continue with a framework developed in the 1980s, well before the elimination of tariff filing when the transportation realities of rail, truck, and barge were different and the economic circumstances for the nation's freight railroads were markedly unlike those that exist today.

D. The Removal of Cumbersome Tariff Filing Was an Important Reason for the Exemptions, A Fact That the AAR Memoranda Erroneously Disavow.

In memoranda regarding its *ex parte* meetings, the AAR erroneously stated that “the administrative burdens of tariff filing were never a principle [sic] consideration in the exemption proceedings.”⁷⁰ This assertion is plainly not true, and the Board should reject the AAR's attempt to rewrite history. The ICC's decisions adopting the forest and paper commodities exemptions are replete with the desire to free the railroads from tariff filing, to wit:

⁶⁹ See AF&PA and PFITC Reply Comments, pages 12-22 (filed Aug. 26, 2016).

⁷⁰ See, e.g., Summary of Ex Parte Meeting Between the Association of American Railroads and STB Chairman Ann Begeman, STB Ex Parte No. 704 (Sub-No. 1) (posted on Board website June 20, 2019).

- Exemption from Regulation—Boxcar Traffic, 367 ICC 425, 445 (1983) (“Freedom from tariff filing requirements is an essential part of the ratemaking flexibility being sought in this proceeding.”).⁷¹
- Rail General Exemption Authority – Miscellaneous Manufactured Commodities, 6 ICC2d 186, 188 (1989) (“AAR notes that this exemption, like previous exemptions, will promote efficiency and improve the railroads’ financial health by eliminating costly tariff filing requirements.”).⁷²
- Rail Exemption – Lumber or Wood Products, 7 ICC2d 673, 675 (1991) (exemption “will result in reductions in overhead expenses, in administrative and paperwork burdens, and in the delays and costs associated with tariff filing”).
- Petition to Exempt From Regulation the Rail Transportation of Scrap Paper, 9 ICC2d 957, 959 (n. 2)(1993) (“Petitioners [AAR and nine individual railroads] state that an exemption would enable railroads to compete more efficiently with motor carriers by eliminating the delay and expense of filing tariffs and complying with the administrative requirements connected with contracts”).
- Rail Exemption – Transportation of Selected Commodity Groups, 9 ICC2d 969, 973 (1993) (exemption is warranted because it will enable “quick, selective rate changes” and allow “carriers to reduce costs associated with contract rate establishment and management”).⁷³

⁷¹ This exemption covered boxcar transportation of all commodities, including forest and paper commodities, except not nonferrous recyclable materials. See 367 ICC 425, 426 and 440.

⁷² This exemption included a great variety of forest and paper products in STCC 249, 26, and 27. See 6 ICC2d 186, 205-206.

⁷³ This exemption included forest and paper products in STCC 241, 244, and 26613. See 9 ICC2d 969, 971.

The Board should recognize and acknowledge the extreme relevance of the change in legal regime that occurred after these exemptions were created, a change that means these exemptions are no longer of any benefit to American forest and paper products businesses.⁷⁴

E. Other Exemptions May Be Appropriate.

During the *ex parte* meetings and the evaluation of the Steel Organizations' memoranda, AF&PA determined that there may be certain regulated forest and paper products for which exemption may be appropriate. In particular, AF&PA has determined that it would not now oppose exemption of the following commodities which are currently subject to Board oversight:

- STCC 26211 – Newsprint
- STCC 26212 – Ground Wood Paper Uncoated
- STCC 26218 – Sanitary Tissue Stock
- STCC 26471 – Sanitary Tissues or Health Products
- STCC 266 – Building Paper or Building Board

AF&PA's members are not currently concerned with the exercise of railroad market power with respect to these five commodities, and do not believe that continued Board oversight is currently needed. Accordingly, AF&PA right now would not oppose exemption for these five commodities. AF&PA makes this suggestion in order to assist the Board in modernizing its regulatory regime to correlate with present marketplace realities.⁷⁵

⁷⁴ In the 1980s and early 1990s, the forest and paper industry believed the exemptions were warranted in order to remove the problematic tariff filing requirement and other administrative burdens. The ICC granted the exemptions in large part due to the support of the forest and paper industry. See, e.g., Rail Exemption – Transportation of Selected Commodity Groups, 9 ICC2d 969, 973 (1993) (“In determining whether regulation is necessary to protect shippers from an abuse of market power, a significant consideration is whether the participating shippers actually seeking transportation are concerned about an abuse of market power. No shipper has expressed concern....”); Rail Exemption – Lumber or Wood Products, 7 ICC2d 673, 676 (1991) (“the lumber shippers themselves initially sought, and overwhelmingly support, this exemption to improve their competitive position”).

⁷⁵ Obviously, any new class-wide commodity exemption would not foreclose the ability of any party from seeking revocation of that exemption in the future for purposes of a particular proceeding.

Of course, any exemption of these five commodities would require the Board to initiate a separate proceeding, given that the possibility of new exempt commodities has not been addressed in the instant proceeding. The Board could initiate such a separate proceeding on its own motion, or it could be requested by any interested party. AF&PA is not now requesting, and does not intend to file, its own exemption request for these commodities which would require a separate analysis at additional time and expense. It is clear that exemption of any commodities is not ripe for decision in the instant proceeding.⁷⁶

IV. Conclusion.

For the reasons explained herein, the Board should be careful not to place too much credence on the 2017 R/VC data submitted by the Steel Organizations in their memoranda because this data was at the extremely aggregated two-digit STCC level, which is not probative given the substantial diversity of forest and paper products commodities. As also described herein, revocation of the outdated commodity exemption for nine specific forest and paper products commodities (plus the boxcar exemption) is appropriate based on current market realities and information. Revocation of this highly limited group of commodities will enable the Board to modernize its regulatory framework. Modernization is appropriate to ensure that American forest products businesses are treated the same as other industries that face the exercise of railroad market power and not hampered by an outdated regulatory framework. This regulatory modernization will also ensure that the Board's commodity exemptions reflect current

⁷⁶ Cf. Rail Exemption – Transportation of Selected Commodity Groups, 9 ICC2d 969, 972 (1993) (when party withdraws request for exemption of certain commodities in midst of proceeding, the ICC stated it would “make no findings as to whether exemption” is warranted for those commodities, but, instead, would open “separate proceedings...in order to seek further comment” on those commodities for which the petitioner requested further proceedings).

industry and transportation realities, thereby enabling American businesses to operate efficiently and compete in a challenging global marketplace.

Respectfully submitted,

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Exhibit 1

Exhibit 1-A

24	Lumber or Wood Products Exc. Furniture See 25
24111	Saw Logs
24112	Hewn Railroad or Mine Ties
24113	Short Logs or Wood Bolts
24114	Pulpwood Logs
24115	Pulpwood or Other Wood Chips
24116	Wood Posts, Poles or Piling
24117	Fuel Wood, Hogfuel or Cordwood
24118	Wood Mine Props or Mine Timbers
24119	Primary Forest or Wood Raw Materials, NEC Exc. From Sawmills See 24211-24299, From or Veneer Mills See 24321, From Pulp Mills See 26111 or See Stcc 6001Aa For Full Description
24211	Lumber, Rough or Softwood Cut Stock or Flooring
24212	Sawed (Railroad, Ties Mine) Etc.
24214	Hardwood Dimension Stock or Furniture Parts or Vehicle Stock
24215	Hardwood Flooring
24219	Lumber or Dimension Stock, NEC
24291	Shingles
24292	Cooperage Stock
24293	Shavings or Sawdust
24294	Excelsior, Baled
24299	Sawmill or Planing Mill Products, NEC Exc. Box Springs or Boxes See 24416, Millwork See 24311-24319, Plywood or Veneer See 24321 or Textile Machinery Wood See STCC 6001AA For Full Description
24311	Window Units, Wood
24312	Window Sash or Combination Screen And Storm Sash, Wood Exc. Window Screens, Wood Framed
24313	Window or Door Frames or Jams, Wood
24314	Doors or Shutters or Units, Wood
24316	Wood Mouldings
24319	Millwork, NEC, or Cabinet Work, To Be Built In Exc. Metal Covered See 34421-34425 or Structural Wood Products See 24332-24391
24321	Plywood or Veneer or Built-Up Wood Exc. Plywood or Veneer Containers See 24411-24414, Hard-Board See 24993 or Wood Particle Board See 24996
24332	Prefabricated Buildings, Wood
24333	Ready-Cut Wood Buildings or Panels or Sections Prefabricated Buildings
24341	Kitchen Cabinets, Wood
24391	Prefabricated Structural Members or Wood
24411	Boxes, Cases, Crates or Carriers Exc. Animal or Poultry
24412	Carriers, Coops or Crates, Animal
24413	Fruit or Vegetable Baskets or Hampers or Till Boxes or Baskets
24414	Baskets or Hampers Exc. Ambulance or Undertaker See 39941, Bait or Fishes See 39491, Fruit or Table See 24413 or Toy See 39411
24415	Cooperage
24416	Box Shooks
24419	Wooden Containers, NEC, or Container NEC
24911	Wood Piling, Posts, or Timbers, Etc. ,Creosoted, or Treated With Other Preservatives
24912	Ties, Mine, Railroad, Etc., Creosoted, or Treated With Other Preservatives
24913	Lumber, Creosoted or Treated With Other Preservatives
24914	Plywood, Veneer or Built-Up Wood, Creosoted or Treated With Other Preservatives
24919	Treated Wood Products, NEC, Creosoted, or Ed With Other Preservatives
24921	Rattan, Bamboo or Ware Exc. Furniture See 25, Baskets or Hampers See 24413 or 24414

24931	Lasts or Related Products, All Materials
24941	Cork Products
24951	Hand Tool Handles
24961	Scaffolding Equipment
24962	Ladders or Ladder Parts
24971	Wooden Ware
24972	Wooden Novelties or Ware
24981	Poles, Rods or Stakes, Finished
24982	Billboards or Sign or Related Articles
24983	Seats, Bathtub or Laundry Tub Covers, Radiator Covers or Guards, Sink Drain or Related Articles
24985	Bottle Stoppers, Ice Cream Sticks, Paint Paddles or Pencil Slats
24987	Quilting Frames or Curtain Stretchers
24988	Boards or Tables, Ironing
24992	Skids, Pallets or Plat-Forms Exc. Metal See 35373
24993	Hardboard
24994	Masts, Spars or Oars, Wooden, or Related Boat Accessories
24995	Pipe, Conduit, or Fittings, Wooden
24996	Wood Particle Board
24997	Fencing or Gates, Wood
24998	Wood Reels or Spools Textile Machinery Spools See 35522
24999	Wood Products, NEC Exc. Containers See 24411-24414 or 24419
26	Pulp, Paper or Allied Products
26111	Pulp
26112	Pulp Mill By-Products
26211	Newsprint
26212	Ground Wood Paper, Uncoated
26213	Printing Paper, Coated, Uncoated, Coated Ground Wood Paper, Ground Wood Paper Containing Less Than 60% Ground Wood, Coated or Writing Paper
26214	Wrapping Paper, or Coarse Paper
26217	Special Industrial Paper or Paper Car Liners
26218	Sanitary Tissue Stock
26219	Paper, NEC Exc. Building Paper See 26611-26619
26311	Fibreboard, Paperboard Pulp Board Exc. Building Insulating Board See 26611-26619
26421	Envelopes Exc. See 26491
26431	Paper Bags
26441	Wallpaper
26451	Office Supplies
26452	Coated Paperboard
26453	Closures, For Bottles, Cans or Jars Viz. Caps, Covers, Tops, Etc.
26459	Die-Cut Paper Products, NEC, or Paperboard Products or Cardboard, NEC
26461	Bituminous Fibre Pipe, Sewer or Drainage or Conduit or Fittings
26462	Egg Cartons, Cases or Related Articles
26469	Pressed or Molded Pulp Goods, NEC
26471	Sanitary Tissues or Health Products
26472	Sanitary or Cotton Sanitary Napkins or Tampons
26491	Stationery or Stationery Envelopes, Tablets or Related Articles
26492	Wrapping Products (Gift Wrap, Etc.)
26495	Business Machine
26497	Packing Cushions, Liners or Related Articles
26499	Converted Paper NEC, or Paperboard Products, NEC

26511	Containers or Boxes, Paperboard, Fibreboard Pulp Board Exc. Butter, Frozen Food, Ice Cream Margarine Boxes or Containers See 26542-26549
26514	Baskets, Hampers or Till Boxes, Paperboard or Fibreboard
26515	Pallets, Skids or Platforms, Paperboard
26542	Bottles or Cartons or Other Liquid-Tight Food Containers
26543	Paper, Fibreboard, Board or Pulp Board Cans, Covers, Cups, Pails, Straws or Tubs
26545	Paper Plates, Dishes, Forks, Spoons or Related Articles
26549	Sanitary Food NEC
26551	Fibre Cans, Drums or Tubes or Similar Exc. Sanitary Food Containers See 26542-26549
26611	Insulating Board
26612	Construction Paper
26613	Wallboard Exc. Hardboard See 24993
26614	Insulating Material Exc. Insulating Board See 26611
26615	Construction Panels, Partitions, Siding or Forms
26619	Building Paper or Building Board, NEC

Exhibit 1-B

**1989 vs 2017 Carloads with RVCs Above 180%
for Eight Primary AF&PA Commodities**

		(a)	(b)	(c)	(d)	(e)	(f)	(g) (d-a)	(h) (d-b)	(i) (f-c)
		1989			2017			DIFFERENCE		
STCC	Description	Carloads ALL	Carloads >180	% of Total Carloads >180	Carloads ALL	Carloads >180	% of Total Carloads >180	ALL Carloads	Carloads >180 Difference	Difference in % of Total Carloads >180
24115	Pulpwood or Other Wood Chips	372,844	21,664	5.8%	56,288	9,548	17.0%	-316,556	-12,116	11.2%
24211	Lumber, Rough or Softwood Cut Stock or Flooring	193,056	3,240	1.7%	177,888	24,208	13.6%	-15,168	20,968	11.9%
24321	Plywood or Veneer or Built-Up Wood Exc. Plywood or Veneer Containers	103,632	1,820	1.8%	18,040	2,160	12.0%	-85,592	340	10.2%
24991	Strand Board	n/a	n/a	n/a	26,960	3,680	13.6%	n/a	n/a	n/a
24996	Wood Particle Board	72,260	440	0.6%	12,720	2,360	18.6%	-59,540	1,920	17.9%
26217	Special Industrial Paper or Paper Car Liners	240	80	33.3%	102,240	6,560	6.4%	102,000	6,480	-26.9%
26311	Fibreboard, Paperboard Pulp Board Exc. Bldg Insulating Board	373,140	8,140	2.2%	215,292	32,992	15.3%	-157,848	24,852	13.1%
40241	Paper Waste or Scrap	84,316	1,420	1.7%	31,588	2,356	7.5%	-52,728	936	5.8%
	Average									
	Total 7 Commodities ⁽¹⁾	1,199,488	36,804	3.1%	614,056	80,184	13.1%	-585,432	43,380	117.9%
	Total 8 Commodities	1,199,488	36,804	3.1%	641,016	83,864	13.1%	-558,472	47,060	127.9%

⁽¹⁾ Total for seven (7) commodities excludes STCC 24991 in 2017 as it did not have any carloads in 1989.

* Carloads decrease by 585,432 (-48.8% [column G]), while the carloads with RVCs above 180% increased by 43,380 (+117.9% [Column H])

* The percent of carloads with RVCs greater than 180% increased by more the 10% for five (5) of the seven (7) commodities (Column I)

* In 1989 3.1% of Carloads had RVCs above 180% (Column C), while in 2017 13.1% had RVCs above 180% (Column F)

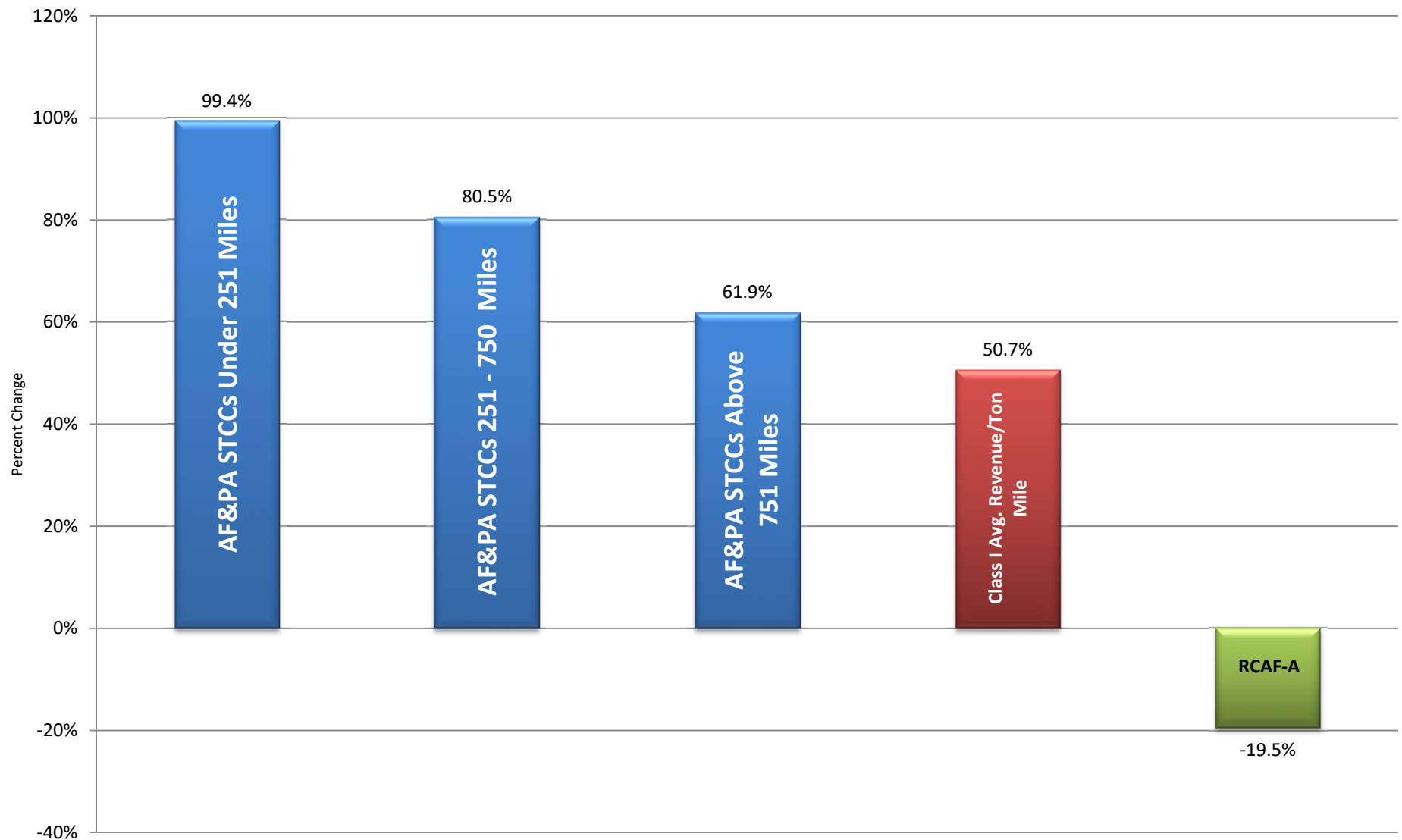
Exhibit 1-C

Change in Carloads and Revenue for Seven Forest and Paper Commodities (see note)			
	1989	2017	percent change
all carloads	1,199,488	614,056	(48.8%)
revenue of all carloads	\$1,835,009,594	\$2,501,470,724	36.3%
carloads above 180% R/VC	36,804	80,184	117.9%
revenue of carloads above 180% R/VC	\$71,408,360	\$365,605,848	412.0%

Note: Covers STCCs 24115, 24211, 24321, 24996, 26217, 26311, and 40241 based on analysis of the Surface Transportation Board's waybill sample from 1989 and 2017. STCC 24991 (Strand Board) is not covered because the waybill sample included no carloads for this commodity in 1989. STCC 24114 (Pulpwood Logs) is also not covered.

Exhibit 1-D

Percent Change in Avg. ¢/Ton Mile by Mileage Range for the Seven Primary AF&PA STCCs vs Class I Railroad ¢/Ton Mile Avg. and the RCAF-A Index (1989-2017)



Seven primary 5-digit AF&PA STCCs with carloads in both 1989 and 2017 - 24115, 24211, 24321, 24996, 26217, 26311, 40241. Average Class I railroad Revenue/Ton Mile is taken from the AAR's "Railroad Facts Book".

			AF&PA ¢/RTM					
	Percent Change <u>1989-2017</u>		<u>1989</u>	<u>2017</u>			1989	2017
0-250	99.4%		¢6.44	¢12.84		RCAF-A	0.527	0.424
251-750	80.5%		¢4.01	¢7.24		RR Avg. Revenue/Ton Mile	2.669	4.021
751+	61.9%		¢2.70	¢4.37				
RR Avg. Revenue/Ton Mile	50.7%							
RCAF-Adjusted	-19.5%							
						AAR Facts Books		

		1989 - Average Captive Cents Per Revenue Ton Mile									
	Milage Range	<u>24115</u>	<u>24211</u>	<u>24321</u>	<u>24991</u>	<u>24996</u>	<u>26217</u>	<u>26311</u>	<u>40241</u>	Total Less STCC 24991 (see note)	Total
	0-250	¢6.08	¢7.76	¢6.51		¢6.16	¢0.00	¢7.34	¢8.88	¢6.44	¢6.44
	251-750	¢3.97	¢3.43	¢3.23		¢3.29	¢12.16	¢4.60	¢4.47	¢4.01	¢4.01
	751+	¢3.11	¢2.37	¢2.05		¢2.33	¢3.54	¢3.46	¢3.10	¢2.70	¢2.70
		2017 - Average Captive Cents Per Revenue Ton Mile									
	Milage Range	<u>24115</u>	<u>24211</u>	<u>24321</u>	<u>24991</u>	<u>24996</u>	<u>26217</u>	<u>26311</u>	<u>40241</u>	Total Less STCC 24991 (see note)	Total
	0-250	¢8.71	¢16.37	¢18.08	¢11.55	¢12.97	¢73.10	¢20.40	¢23.90	¢12.84	¢12.83
	251-750	¢5.09	¢6.25	¢7.23	¢5.53	¢7.03	¢4.82	¢8.46	¢8.30	¢7.24	¢7.13
	751+	¢2.34	¢4.02	¢3.99	¢4.32	¢4.39	¢2.89	¢5.33	¢4.17	¢4.37	¢4.36
		Percent Change in Average Captive Cents Per Revenue Ton Mile									
	Milage Range	<u>24115</u>	<u>24211</u>	<u>24321</u>	<u>24991</u>	<u>24996</u>	<u>26217</u>	<u>26311</u>	<u>40241</u>	Total Less STCC 24991 (see note)	Total
	0-250	43.3%	111.0%	177.7%		110.6%		177.9%	169.1%	99.4%	99.2%
	251-750	28.2%	82.2%	123.8%		113.7%	-60.4%	83.9%	85.7%	80.5%	77.8%
	751+	-24.8%	69.6%	94.6%		88.4%	-18.4%	54.0%	34.5%	61.9%	61.5%
Note: STCC 26217 is excluded from the 0-250 mile range comparison because the 1989 waybill sample included no carloads in this range.											

Exhibit 1-E

**2017 Boxcar Movements as a Percent of All Movements for the Eight Primary
AF&PA Commodities**

STCC	Description	All Carloads	Boxcars	% of Total Cars that are Boxcars
26311	PulpBoard/Fibreboard/Linerboard	215,292	208,092	96.7%
24211	Lumber/Timber	177,888	240	0.1%
26217	Gypsum Board	102,240	960	0.9%
24115	Wood Chips	56,168	0	0.0%
40241	Scrap Paper	31,588	25,988	82.3%
24991	Strand Board	26,960	18,080	67.1%
24321	Plywood	18,040	13,760	76.3%
24996	Boards, Sawdust	12,720	8,480	66.7%
		640,896	275,600	43.0%

VERIFICATION

I, Henry Julian Roman, verify under penalty of perjury that I have read the foregoing Exhibit 1 to the Comments in Response to Memoranda in STB Ex Parte No. 704 (Sub-No. 1), that I know the contents thereof, and that the same are true and correct based on my knowledge, information, and belief. Further, I certify that I am qualified and authorized to file this statement.



Henry Julian Roman

Executed on July 15, 2019

Exhibit 2

**Legal Arguments Supporting Revocation of
the Paper and Wood Products Commodity Exemptions**

I. Statute

- “The Board may revoke an exemption, to the extent it specifies, when it finds that application whole or 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.” 49 U.S.C. § 10502(d). AF&PA Comments 08.26.16 at 4.
 - STB has broad discretion to decide when restoring regulatory oversight is necessary.
- Abuse of market power is not required by the revocation statute. Compare 49 U.S.C. § 10502(a)(2) to 49 U.S.C. § 10502(d). AF&PA Comments 08.26.16 at 5-6.
- Revocation can occur on a class-wide basis, as made clear by the plain language of 49 U.S.C. § 10502(d). AF&PA Comments 08.26.16 at 22.
- Revocation does not require a finding of market abuse. Comments 08.26.16 at 7.
- Revocation is supported by the national rail transportation policy of 49 USC § 10101. Comments 01.31.11 at 9. Comments 07.26.16 at 21-22. Comments 08.26.16 at 5.
 - Transportation Policy has competing interests, STB balances and determines the weight to provide to the factors based on the circumstances:
 - Historically—revenue adequacy and minimizing regulation was focus
 - Present—promoting sound economic conditions; regulating where there is a lack of effective competition; honest and efficient management; avoiding undue concentrations of market power.

II. Legislative History

Conference report emphasizes that, in evaluating a revocation request, Board can require demonstrated abuse of market power **or that regulation is needed to carry out the rail transportation policy**. H.Rep. 104-422 at p. 169 (Dec. 18, 1995). AF&PA Comments 08.26.16 at 8-9.

- Board itself has stated: it looks at “whether the shipper lacks sufficient intermodal alternatives and whether the carrier has market power that **it could** abuse with respect to the traffic, thus necessitating regulatory oversight.”¹

III. Revocation is Supported By Substantial Changes Since Exemptions Were Granted

Since exemptions were granted in 1989-1993:

¹ Pejepscot Industrial Park, Inc. d/b/a Grimmel Industries—Petition for Declaratory Order, STB Docket No. 33989, slip op. at 7 (n. 15) (served May 15, 2003).

- The rail industry is no longer financially fragile. AF&PA Comments 07.26.16 at 4 and 9-13. AF&PA Comments 01.31.11 at 9-11.
- Substantial consolidation in the rail industry resulting in high degree of rail customer captivity to a single railroad. Comments 07.26.16 at 7.
- Economic changes in railroad pricing demonstrate increased exercise of market power. Comments 07.26.16 at 8, 14, and 19-20. Comments 08.26.16 at 13.
- ICCTA removed railroads' tariff and contract summary filing requirements and other regulatory burdens, thereby mooting one of the main reasons for the original exemptions. AF&PA Comments 01.31.11 at 8-9. AF&PA Comments 07.26.16 at 5. AF&PA Comments 08.26.16 at 11-12.

IV. ICC Found Mutual Benefits; Today Exemptions Offer No Benefits to Rail Customers

- Shippers previously supported the exemptions to lower railroads' costs and allow railroads to compete more efficiently with trucks for paper and forest products market share; and ICC found mutual benefits and no concerns about market power by paper and forest products shippers. AF&PA Testimony 1.31.11 at 3-8.
 - "In determining whether regulation is necessary to protect shippers from an abuse of market power, a significant consideration is whether the participating shippers actually seeking transportation are concerned about an abuse of market power...."²
- Today, AF&PA members strongly support revocation of the exemptions. AF&PA Comments 08.26.16 at 11.

V. Exercise of Railroad Market Power is Systemic Not Episodic

- Exercise of market power and challenges with railroads are wide-spread and systemic (rail service, equipment, practices/demurrage, rates, inability to negotiate). AF&PA Supplemental Comments 10.3.16, Exhibit A and Ex Parte Meetings with PCA, Verso, IP and GP.
- Highly impractical to require individual revocations—too costly, time-consuming, burdensome, and uncertain.

VI. Trucking/Intermodal is Not Effective Competition for Rail Dependent Traffic

- Truck transportation is impossible or infeasible for many shipments due to facility limitations and size/weight restrictions applicable to trucks. Comments 07.26.16 at 8 and 24-25.

² Rail Exemption—Transportation of Selected Commodity Groups, 9 I.C.C.2d 969, 973 (1993).

- Truck transportation is limited due to high fuel prices, driver shortages, enforcement, and other constraints. Comments 07.26.16 at 8-9.
- Intermodal and intramodal competition has decreased since the exemptions were created and trucks, barges and intermodal service are not effective for rail dependent traffic. Transload and intermodal are the exception and not workable for outbound mill shipments. AF&PA Supplemental Comments 10.3.16, Exhibit A; Ex Parte Meetings with PCA, Verso, IP and GP; Comments 07.26.16 at 4 and 7-9; Comments 01.31.11 at 11-13.

VII. Additional Precedent Supporting Revocation

- Revocation can be warranted merely by “facts indicating a real possibility of competitive harm.” Mr. Sprout, 8 F.3d 118, 126 (2nd Cir. 1993). AF&PA Comments 08.26.16 at 8.
- Use of R/VC Data is Consistent with Precedent, Authority, and Railroad Practice:
 - Reliance on aggregated R/VC data in exemption analysis is “justified” even though it may not be “perfect.” Brae Corp. v. U.S., 740 F.2d 1023, 1040-1041 (D.C. Cir. 1984). AF&PA Comments 08.26.16 at 17.
 - An accepted method of “measuring market power” is based on the view that “a firm with market power” can raise prices without a loss of net revenue. CF Industries v. STB, 255 F.3d 816, 823 (D.C. Cir. 2001). AF&PA Comments 08.26.16 at 16.
 - “Competitive pressure” is related to a railroad’s ability to raise prices. Arizona Public Service Co. v. U.S., 742 F.2d 644, 654 (D.C. Cir. 1984). Comments 08.26.16 at 16.
 - The Board uses R/VC ratios for a wide variety of regulatory purposes, including market dominance and the Maximum Markup Methodology. AF&PA Comments 08.26.16 at 14-16 and 19.