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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte 704 (Sub-No. 1)

REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS

PETITION FOR WAIVER

Submitted by

**AMERICAN FOREST & PAPER ASSOCIATION AND
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”) hereby submit this Petition for Waiver (“Petition”) pursuant to 49 C.F.R. § 1117.1 and request that the Surface Transportation Board (“Board” or “STB”) waive its prohibition on ex parte communications in this proceeding for the limited purpose of permitting interested stakeholders to engage in meetings with Board members, subject to appropriate disclosures and safeguards that have applied to similar waivers in other proceedings. Following a more than two year delay in this proceeding due to the transition of Board members, and with two new members having been seated on the Board in January 2019, permitting ex parte meetings would help the Board to better understand the important issues in this proceeding and enhance the Board’s ability to make an informed decision without additional lengthy delays. In support hereof, AF&PA and ISRI state as follows.

I. Background of this Proceeding.

The Board's review of commodity and traffic exemptions began well over eight years ago, with a notice of public hearing in October 2010.¹ The Board ultimately proposed to revoke five commodity exemptions in a Notice of Proposed Rulemaking ("NPRM") issued in early 2016, based on sweeping changes in the rail industry since the exemptions were granted decades ago. In the NPRM, the Board sought comments on its proposal as well as the possible revocation of other commodity class exemptions.² The Board specifically proposed to revoke the exemption for iron or steel scrap, commodities shipped by ISRI members, based on its own waybill analysis showing a substantial increase in railroad pricing power and other changes in the competitive landscape.³ Additionally, in response to the Board-initiated rulemaking, AF&PA engaged a consultant to perform a study of railroad pricing power with respect to shipments of paper and forest products and submitted evidence and comments to the Board supporting the revocation of exemptions for those commodities.⁴

The Board originally projected that a final decision would be issued in this proceeding in January 2017,⁵ but that projected action date was later revised to "TBD," with the explanation that the Board was "in a time of transition, with potential changes to the Board's membership."⁶

¹ See Review of Commodity, Boxcar, and TOFC/COFC Exemptions, STB Ex Parte No. 704 (notice served Oct. 21, 2010).

² Notice of Proposed Rulemaking, STB Ex Parte No. 704 (Sub-No. 1) (served March 23, 2016).

³ Id.

⁴ AF&PA also requested revocation of the boxcar exemption to the extent it applies to rail movements of paper and forest products. See AF&PA filings in this proceeding on July 26, 2016, August 26, 2016, and October 3, 2016.

⁵ Report on Pending STB Regulatory Proceedings – October 3, 2016 at p. 10.

⁶ Report on Pending STB Regulatory Proceedings – January 3, 2017 at p. 7.

The projection remains “TBD” in the most recent scheduling report.⁷ With two new members having taken their places in January 2019, the Board is now back to a three-person complement. Although the Board is now authorized to have five members,⁸ there is no legal bar on the Board fulfilling its statutory duties with just three members, especially where two of the three members represent the political party controlling the White House.⁹

There has been no action taken in this docket for well over two years. The time is ripe for the Board to complete its review of the important issues in this proceeding and reach a decision in response to the many comments filed. The composition of the Board has now reached a point of stability – with two new members in place and the appropriate ratio of Republicans to Democrats – and a decision is warranted so that the veil of uncertainty can be lifted from affected industries. During the extended period that this proceeding has been “on hold,” AF&PA’s and ISRI’s members continue to experience unreliable rail service and rising rates and charges; thus, they have a strong interest in obtaining a decision as quickly as possible as to whether STB oversight over their rail shipments will be restored.

II. The Board Has Authority to Waive the Prohibition on Ex Parte Communications.

Unquestionably, the Board has the authority to take the action requested in this Petition. In two recent rulemaking proceedings, the Board waived its long-standing prohibition on ex parte communications.¹⁰ Further, just last year, the Board modified its rule to lift the prohibition

⁷ Fourth Quarter 2018 Report on Pending STB Regulatory Proceedings at p. 7.

⁸ The Surface Transportation Board Reauthorization Act of 2015, P.L. 114-110, the size of the Board was expanded from three to five. See 49 USC § 1301(b)(1). However, the Board has not yet had more than three members.

⁹ 49 U.S.C. § 1301(b)(6).

¹⁰ United States Rail Service Issues – Performance Data Reporting, Ex Parte No. 724 (Sub-No. 4), slip op. at 2 (served Nov. 9, 2015); Reciprocal Switching, Ex Parte No. 711, slip op. at 28 (served July 27, 2016).

for future rulemakings and confirmed that it retains the authority to waive the prohibition for any proceedings that were pending at the time the revised rule became effective.¹¹

III. The Board Recently Removed its Prohibition on Ex Parte Communications in Informal Rulemaking Proceedings.

For many years, the Board prohibited ex parte communications in informal rulemaking proceedings.¹² However, the Board began moving away from this prohibition several years ago, in a service performance metrics rulemaking decision, many months *before* the NPRM was issued in this proceeding to review commodity exemptions.¹³ Vice Chairman Begeman commented separately in that decision, which permitted ex parte meetings; she stated that “[i]t would be a definite benefit to the Board and the public for members and staff to meet and hear directly from stakeholders during rulemaking proceedings so that we can establish the most informed policies.”¹⁴ In the same decision, Commissioner Miller similarly stated that “[i]t is my hope that, in the future, the Board waives its prohibition on ex parte communication in other proceedings.”¹⁵

The Board’s movement away from the prohibition continued in another broadly-applicable rulemaking proceeding – the consideration of possible changes to the Board’s

¹¹ Ex Parte Communications in Informal Rulemaking Proceedings, Ex Parte No. 739, slip op. at 20 (served Feb. 28, 2018).

¹² The Board’s notice-and-comment rulemakings qualify as “informal rulemaking proceedings.” See Ex Parte Communications in Informal Rulemaking Proceedings, Ex Parte No. 739, slip op. at 2 (n. 2) (served Feb. 28, 2018).

¹³ See, e.g., United States Rail Service Issues – Performance Data Reporting, Ex Parte No. 724 (Sub-No. 4), slip op. at 2 (served Nov. 9, 2015) (Board waives prohibition on ex parte communications for service performance metrics rulemaking proceeding).

¹⁴ United States Rail Service Issues – Performance Data Reporting, Ex Parte No. 724 (Sub-No. 4), slip op. at 4 (served Nov. 9, 2015).

¹⁵ United States Rail Service Issues – Performance Data Reporting, Ex Parte No. 724 (Sub-No. 4), slip op. at 4-5 (served Nov. 9, 2015).

competitive switching regulations – in which ex parte meetings have been held and are still permitted.¹⁶ In that decision, Vice Chairman Miller commented that “I still advocate the outright elimination of this prohibition [on ex parte communications], rather than waiving it on case-by-case basis.”¹⁷

Soon thereafter, the Board took the final step which had been foreshadowed in its recent decisions, amending 49 C.F.R. Part 1102 and removing the prohibition on ex parte communications in informal rulemaking proceedings.¹⁸ The Board found that “direct communications with stakeholders in informal rulemaking proceedings...would enhance the Board’s consideration of issues and better enable it to promulgate the most effective regulations.”¹⁹ A number of shipper organizations, including AF&PA and the Rail Customer Coalition, had asked the Board to apply the new rule to this commodity exemption rulemaking proceeding.²⁰ The Board did not specifically address that request or Ex Parte No. 704 (Sub-No. 1) in its final decision; instead, the Board merely said that the final rule “would not be applied retroactively to pending proceedings” and that the Board “may waive the prohibition on ex parte communications in pending informal rulemaking proceedings on a case-by-case basis” as was done before the final rule.²¹

¹⁶ Reciprocal Switching, Ex Parte No. 711, slip op. at 28-29 (served July 27, 2016).

¹⁷ Reciprocal Switching, Ex Parte No. 711, slip op. at 33 (served July 27, 2016).

¹⁸ Ex Parte Communications in Informal Rulemaking Proceedings, Ex Parte No. 739 (served Feb. 28, 2018).

¹⁹ Ex Parte Communications in Informal Rulemaking Proceedings, Ex Parte No. 739, slip op. at 16 (served Feb. 28, 2018).

²⁰ Ex Parte Communications in Informal Rulemaking Proceedings, Ex Parte No. 739, slip op. at 5 and 20 (served Feb. 28, 2018).

²¹ Ex Parte Communications in Informal Rulemaking Proceedings, Ex Parte No. 739, slip op. at 20 (served Feb. 28, 2018).

IV. Ex Parte Meetings Would Facilitate Understanding and Enable this Proceeding to Move Forward Expeditiously.

The Board's consideration of the commodity exemptions in this proceeding would be greatly aided by ex parte communications. Given the new membership on the Board, as well as the passage of time since comments were filed, ex parte communications would facilitate not only the forward progress of this proceeding but also the Board's ability to expeditiously reach an informed decision on the important issues addressed in the comments.

Circumstances surrounding this proceeding mirror those found in earlier proceedings where the ex parte prohibition was lifted. The issues being considered in this proceeding are legislative in nature because they focus on broadly-applicable policies to be implemented in the future, rather than on an evaluation of specific past conduct as in an adjudication.²² In the two-and-a-half years since comments were filed in this proceeding, the composition of the Board has changed significantly, with two departures and two new members. Ex parte meetings would allow Board members to "ask follow-up questions" and help the members "better understand" the important issues at stake in this proceeding.²³

As was evident from the comments filed in 2016, a "vigorous debate" exists regarding the possible revocation of commodity exemptions, with "complicated and often inter-related" benefits and impacts.²⁴ Dozens of comments and reply comments were filed, many of which were lengthy and involved expert consultant witnesses. For example, the Association of American Railroads submitted Opening Comments that were 147 pages in length and Reply Comments of 67 pages; both included multiple verified statements of expert consultants. Ex

²² See, e.g., United States Rail Service, Ex Parte No. 724 (Sub-No. 4), slip op. at 2 (n. 4) (served Nov. 9, 2015).

²³ United States Rail Service, Ex Parte No. 724 (Sub-No. 4), slip op. at 2 (served Nov. 9, 2015).

²⁴ Reciprocal Switching, Ex Parte No. 711, slip op. at 28 (served July 27, 2016).

parte discussions with stakeholders would enable the Board members to “better understand [the]...complex issues”²⁵ raised by these expert witnesses.

In its filings in this proceeding, AF&PA has shown that the existing commodity exemptions for forest products (including the boxcar exemption to the extent that forest products are transported) should be revoked. AF&PA explained that these exemptions were created 25 to 30 years ago, and that changing circumstances in the rail industry warrant revocation at this time.²⁶ In its filings, ISRI strongly supported the Board’s proposal to revoke the exemption for iron or steel scrap and explained that its members’ experiences were consistent with the Board’s own waybill analysis showing a substantial increase in railroad pricing power with respect to this commodity. ISRI further explained that the findings of the Interstate Commerce Commission supporting a grant of the ferrous scrap metals exemption in 1995 no longer apply to current market conditions.²⁷ These facts reveal that ex parte meetings would be ideal in this proceeding.²⁸

As described in the new rule permitting ex parte communications in informal rulemaking proceedings, ex parte meetings authorized under that rule are to occur before reply comments. Of course, reply comments have already been filed in this commodity exemption proceeding, but this fact should not and does not bar use of ex parte meetings here. In fact, ex parte meetings occurred *after* reply comments in both Ex Parte No. 711 (Sub-No. 1) and Ex Parte No. 724 (Sub-No. 4). Hence, the current procedural posture of Ex Parte No. 704 (Sub-No. 1) does not and

²⁵ Reciprocal Switching, Ex Parte No. 711, slip op. at 28 (served July 27, 2016).

²⁶ See AF&PA filings in this proceeding on July 26, 2016 and August 26, 2016.

²⁷ See ISRI filings in this proceeding on July 26, 2016 and August 26, 2016.

²⁸ Cf. Reciprocal Switching, Ex Parte No. 711, slip op. at 28 (served July 27, 2016) (“Given that there has been no significant change in agency policy regarding reciprocal switching in more than 30 years, the Board believes it would be beneficial to hear directly from stakeholders on these issues and ask follow-up questions.”).

should not prevent granting of the waiver requested in this Petition. As described herein, ex parte meetings would promote well-reasoned decision-making and an expeditious determination of whether to revoke the exemptions for iron or steel scrap and forest and paper products (including such shipments in boxcars).

V. In Conjunction with Ex Parte Meetings, the Board Should Utilize Special Procedures to Maintain Fairness and Accessibility.

The Board's new rule regarding ex parte communications includes special procedures to ensure that the public is aware of the attendees and content of discussions at each ex parte meeting. See 49 C.F.R. § 1102.2(g)(4). Primarily, these procedures require the party engaging in the ex parte communication to prepare a memorandum which lists the attendees at the ex parte meeting, describes the date and location, summarizes the data and arguments presented, and includes any written or electronic material shown or given to the Board.²⁹ The memorandum is then submitted to the Board and posted on the Board's website.³⁰ The Board established similar requirements in earlier cases where ex parte meetings were allowed, and specifically stated that third parties could comment upon the meeting summaries.³¹

AF&PA and ISRI believe the special procedures set forth in § 1102.2(g)(4) and utilized in recent proceedings should also apply to the ex parte meetings that are sought in this Petition to ensure appropriate disclosure of the content of any such meetings. The procedural safeguards, coupled with the ability for any interested stakeholder to participate in ex parte meetings, alleviate any potential concern of unfairness.

²⁹ 49 CFR § 1102.2(g)(4)(i).

³⁰ 49 CFR § 1102.2(g)(4)(vi).

³¹ United States Rail Service Issues – Performance Data Reporting, Ex Parte No. 724 (Sub-No. 4), slip op. at 3 (served Nov. 9, 2015); Reciprocal Switching, Ex Parte No. 711, slip op. at 29 (served July 27, 2016).

VI. Conclusion.

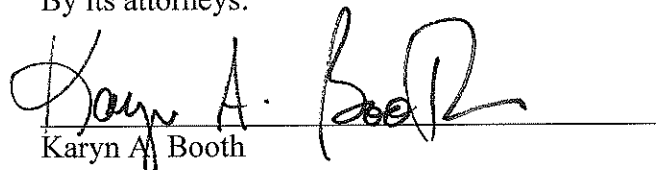
The important issues being considered in this proceeding have been on hold for over two years, which is far too long. Two of the three Board members have changed since the comments were filed in this rulemaking proceeding, and ex parte meetings would enable these new Board members to familiarize themselves with the possible exemption revocations and reach a decision expeditiously. For these reasons, AF&PA and ISRI respectfully request that the Board waive the prohibition on ex parte meetings for this proceeding for the limited purpose of permitting interested stakeholders to engage in ex parte meetings with Board members under appropriate fairness and accessibility safeguards as described herein.

Should the Board grant this Petition, it should also establish a reasonable but limited period of time for the occurrence of ex parte meetings to avoid additional lengthy delays.

Respectfully submitted,

*American Forest & Paper Association and
Institute of Scrap Recycling Industries, Inc.*

By its attorneys:

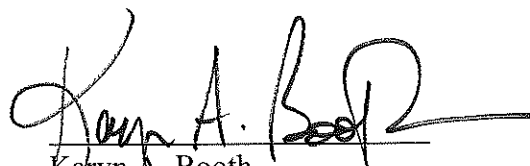
Handwritten signatures of Karyn A. Booth and David E. Benz. The signature of Karyn A. Booth is on the left, and the signature of David E. Benz is on the right. Both signatures are written in black ink and are positioned above a horizontal line.

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February 22, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this day, February 22, 2019, I have served a copy of the foregoing
Petition for Waiver by U.S. Mail to all Parties of Record in this proceeding.


Karyn A. Booth