

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE NO. 704 (Sub-No. 1)

**REVIEW OF COMMODITY, BOXCAR,
AND TOFC/COFC EXEMPTIONS**

**COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

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Dated: July 16, 2019

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Norfolk Southern Railway Company (“NS”) files these comments in response to the ex parte meeting summaries filed in Review of Commodity, Boxcar, and TOFC/COFC Exemptions, Ex Parte 704 (Sub-No. 1). The Surface Transportation Board (“Board”) issued its Notice of Proposed Rulemaking (“NRPM”) in this docket more than three years ago, on March 23, 2016, proposing to revoke the existing class exemptions under 49 C.F.R. Part 1039 for five commodities: crushed or broken stone or rip rap; hydraulic cement; coke produced from coal; primary iron or steel products; and iron or steel scrap, wastes or tailings. In a decision dated March 18, 2019, the Board permitted parties to engage in ex parte communications with the Board, provided they filed summaries of those meetings.

NS’s review of those summaries¹ demonstrate that the recent ex parte presentations by shippers and their trade associations suffer from the same fatal flaws as the Board’s original NPRM. First, those parties urge the Board to willingly ignore its statutory mandate “to allow, to the maximum extent possible, competition and demand for services to establish reasonable rates for rail transportation” and “to minimize the need for Federal regulatory control over the rail

¹ NS notes that review of a high-level summary of in-person meetings is no substitute for notice and comment rulemaking. Board action must be grounded in the actual record in this proceeding.

transportation system.” 49 U.S.C. §10101(1)-(2). The fact that regulatory burdens have been reduced for other commodities since these exemptions were originally granted cannot somehow countenance in favor of re-regulation here. Second, these summaries of ex parte discussions do nothing to cure the lack of evidentiary support in the record for any assertion of railroad market power generally over these commodities. Third, none of the comments refute the actual data NS previously submitted in this docket demonstrating significant modal competition and competitive forces in these markets. Fourth, the relief sought in the majority of the meetings, namely revocation of exemptions for paper and forest product commodities, including those moving in boxcars, cannot be granted by the Board on the current record. Finally, as NS previously advised the Board, should the Board identify any individual instances of potential abuse of market power, it already has the proper remedy at its disposal through the partial revocation process.

I. RE-REGULATION WOULD VIOLATE CONGRESSIONAL DIRECTION TO DEREGULATE TO THE MAXIMUM EXTENT POSSIBLE

Preliminarily, the positions advanced in the summaries filed by shipper related parties calling for wholesale revocations are irreconcilable with the Board’s statutory direction from Congress. The current exemptions advance many elements of the Rail Transportation Policy (“RTP”), including most importantly:

- “[T]o allow, to the maximum extent possible, competition and demand for services to establish reasonable rates for rail transportation,” 49 U.S.C. § 10101(1); and
- “[T]o minimize the need for Federal regulatory control over the rail transportation system,” 49 U.S.C. §10101(2).

As then-Commissioner Begeman noted in her dissenting opinion to the NPRM: “The law directs the Board to exercise its exemption authority broadly, and that directive was unchanged with passage of the recent STB Reauthorization Act, P.L. 114-110.” NPRM at 16 (Chairman Begeman, dissenting).

The ex parte summaries largely ignore altogether how calls for revocation conflict with the Board's mandate. Rather, several summaries include limited assertions that the removal of certain regulatory burdens on non-exempt commodities pursuant to the ICC Termination Act of 1995 ("ICCTA") somehow lessens the justification for continuing existing commodity exemptions. *See, e.g.*, Summary of Ex Parte Meeting held on June 7, 2019 between the Domtar Corporation, The American Forest & Paper Association ("AF&PA"), and Chairman Begeman, Ex Parte 704 (Sub-Not. 1), at 3 (filed June 25, 2019) ("Furthermore, it was explained that [ICCTA] eliminated the benefits to ISRI [sic] members gained from the exemption since Congress eliminated tariff filing, contract summary filing and other pricing restrictions for all rail movements."); Summary of Ex Parte Meeting held on June 7, 2019 between the Domtar Corporation, AF&PA, and Member Oberman, Ex Parte 704 (Sub-Not. 1), at 3 (filed June 25, 2019) ("Today, the industry does not benefit from the exemption and requests its revocation."); Summary of Ex Parte Meeting held on June 14, 2019 between AF&PA, Escalation Consultants, Inc., and Board Member Oberman, Ex Parte 704 (Sub-Not. 1), at 1-2 (filed June 25, 2019) ("Thompson Hine also explained that revocation is justified by the substantial changes that have occurred in the rail market and the statute since the exemptions were granted, including the loss of any benefits to rail customers.").

Such arguments turn Congress's direction on its head. Congress intended that the Board supplement the legislative deregulatory actions in ICCTA, not undercut them. The Interstate Commerce Commission correctly pointed out that the preference for exemptions never rested on the benefits to shippers or turned on the burdens of regulation:

Congress has directed that the Commission shall grant exemptions wherever it finds that continued regulation is not necessary. The ultimate issue is not whether regulation is harmless, but only whether it must be retained to carry out the rail transportation policy and protect shippers from market power abuse.

Exemption from Regulation - Boxcar Traffic, 367 I.C.C. 424, 428 (1983) (emphasis added). And Congress further strengthened the mandate to exempt traffic from regulation at the same time it was removing regulatory burdens in ICCTA. *See* Pub. L. No. 104-88 § 10502, 109 Stat. 803, 808 (1995) (revising exemption provision to direct that “the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds” that regulation “is not necessary to carry out the [rail] transportation policy of Section 10101” and “is not needed to protect shippers from the abuse of market power.”) (emphases added). Accordingly, any arguments that ICCTA or other deregulatory actions somehow dilute the RTP or justify re-regulation are nonsensical.

II. REGULATORY RECORD REMAINS NOTHING MORE THAN A “WAYBILL-BASED HUNCH”

When the Board initially issued this NPRM in 2016, then-Commissioner Begeman rightly criticized the lack of analysis supporting the Board’s proposal, terming it a “waybill-based hunch using limited information on these commodities” that “fail[ed] to account for the present” by only considering data through 2013. NPRM at 15-16 (Chairman Begeman, dissenting). Indeed, even the United States Department of Transportation (“DOT”) acknowledged concerns about “the adequacy of the existing record.” DOT Opening Comments, Ex Parte 704 (Sub-No. 1), at 2 (filed July 26, 2016). In its Reply Comments, NS observed that “the opening comments contain no new support for the Board’s flawed proposal. Instead, those commenters in favor of the NPRM offer at most unsupported claims contradicted by the actual evidence in the record, along with regurgitations of the Board’s revenue-to-variable cost (“R/VC”) calculations.” NS Reply Comments, Ex Parte 704 (Sub-No. 1), at 5 (filed Aug. 26, 2016).

The passage of three years has not improved the record in this proceeding, while rendering the Board's prior analysis only more dated. Other "considerable and important events", NPRM at 16 (Chairman Begeman, dissenting), have arisen, including significant trade and tariff policy changes specifically affecting steel, among other commodities, and market reactions to ongoing foreign trade developments.

Yet the ex parte meeting summaries again only point to limited R/VC data and anecdotes lacking sufficient detail to properly evaluate in support of their requests for revocation. Many commenters in this record have already identified the failings of using R/VC data to justify any revocation. *See, e.g.*, Association of American Railroads Opening Comments, Ex Parte 704 (Sub-No. 1), at 22-29 (filed July 26, 2016) ("R/VC is simply 'not a reliable indicator of market dominance'") (quoting the Board's Christensen Report); DOT Opening Comments at 2 ("[R/VC], while useful, may not be a sufficiently robust indicator of whether revocation of a commodity exemption is warranted."). And even if R/VC data was a reliable proxy for market power, which it is not, the R/VC charts attached to many shippers' ex parte meeting summaries actually show a decline in R/VC ratios in most commodities over the last three years of data. *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, Ex Parte 704 (Sub-No. 1), at 22-29 (filed June 14, 2019). In short, the ex parte process has done nothing to address the deficiencies previously identified with this proposal.

III. MANY SUMMARIES CONFIRM DATA FROM NS'S FILED COMMENTS DEMONSTRATING BROAD MODAL COMPETITION

The ex parte meetings summaries also demonstrate that shipper interests (and the Board) still have yet to undertake any credible or comprehensive analysis of market power. Indeed, many of the participants readily admitted significant utilization of other modal options, including

trucking and barge, for a significant portion of their business. *See, e.g.*, Summary of Ex Parte Meeting held on June 13, 2019 between SA Recycling LLC, Consolidated Scrap Resources, Inc. and Institute of Scrap Recycling Industries, Inc. and Chairman Begeman, Ex Parte 704 (Sub-No. 1), at 2 (filed June 25, 2019) (“CSR stated that rail transportation represents approximately 30-40% of its total ferrous scrap metal shipments.”). Such reports are not indicative of broad² railroad market power warranting wholesale revocation of existing exemptions, but in fact show that there is robust competition in the transportation marketplace for these commodities.

Such information should be unsurprising. NS provided significant data in its Opening Comments in 2016 from the Freight Analysis Framework (“FAF”) and IHS’s Transearch database. *See* NS Opening Comments at 17-28. In particular, the Transearch data demonstrated for each of the five subject commodities, trucking was responsible for a greater share of transportation than rail in both 2012 and 2014. Further, in no year did rail transportation even make up a plurality of the movements of any of those commodities. The data also reveal significant amounts of water transportation for all commodities except broken stone and riprap. These data directly contradict any assertions or conclusions in the ex parte meetings that rail transportation exerts market power over most, let alone all, shippers of these commodities.

IV. PAPER AND FOREST PRODUCTS ARE OUTSIDE THE SCOPE OF THE BOARD’S NPRM

Notwithstanding the five commodities actually identified in the Board’s NPRM, a majority of the shipper or shipper groups participating in ex parte meetings instead advocated for

² *See Santa Fe Southern Pacific Corp. - Control - SPT Co.*, 2 I.C.C.2d 709, 741 (1986) (“The competitive analysis in an exemption decision does not necessarily examine separate specific origin-destination markets in terms of traffic flows, distances involved, the number of railroad competitors involved, the possible impacts of technological changes on each mode, and the shipper's options to choose between available competing carriers within the chosen mode once the modal choice itself has been made. Exemption analysis takes a broad-brush approach to analysis of the competitive environment as a whole and looks to the remedy of partial revocation to address specific competitive situations should that become necessary.”).

revocation of the exemptions for (unspecified) paper and forest products, including those moving in boxcars. While NS is confident that any such revocation is unwarranted, any consideration of those issues would not constitute a logical outgrowth of the Board's NPRM and is outside the scope of the Board's proposal. Indeed, expanding the scope would be in direct contradiction to Vice Chairman Miller's concurring expression in the NPRM that no further revocations are warranted. NPRM at 14 (Vice Chairman Miller, concurring) ("In particular, based on the conclusions I have drawn from the analyses, I believe that the railroads have likely not increased market power for any exempt commodities other than those addressed in this decision."). DOT also echoed caution about the Board proceeding without a suitable record. *See* DOT Opening Comments at 2 ("In addition, although the Board has invited comment on potential revocation of other exemptions beyond those specified in the NPRM (*id.*), it will be particularly important to ensure that any such potential revocations are reviewed on the basis of a robust record as well."). The fact that AF&PA admitted in its Motion for Extension of Time that "[t]he exact contours" of its revocation request "are still being considered" and will be supported by unseen "evidence" only reinforces these concerns. AF&PA Motion for Extension of Time, Ex Parte 704 (Sub-No. 1), at 3 (filed June 28, 2019); *see also id.* at 2 (noting, ironically, the "inevitable due process concerns" with the inability of parties to respond to newly submitted information). Accordingly, the Board cannot take any action on such commodities at this time.

V. PARTIAL REVOCATION REMAINS THE PROPER AVENUE FOR ANY POTENTIAL RELIEF

Finally, to the extent that any participants in the ex parte meetings suggest that there may be particular movements or shippers being harmed by abuse of market power, the proper procedure is to file a petition to revoke partially an exemption. *See, e.g., Pejepscot Industrial Park, Inc., d/b/a Grimm Industries—Petition for Declaratory Order*, FD 33989 (STB served

May 15, 2003) (“This does not mean that a railroad customer is without an avenue of relief in such circumstances. Notwithstanding the findings that the agency has already made that, in most circumstances, regulation is not necessary, Grimmel could come to the agency and seek to have the exemptions revoked, pursuant to 49 U.S.C. 10502(d), at least as to shipments from Topsham.”). Despite unsubstantiated references in the summaries to litigation risk and expense, experience shows that the Board has partially revoked the exemptions when justified. *See, e.g., Granite State Concrete Co., Inc. & Milford-Bennington R.R. v. Boston & Maine Corp. & Springfield Terminal Ry.*, FD 42083 (STB served Sept. 15, 2003) (partially revoking applicable commodity exemption for crushed or broken stone, sand, and gravel after making particularized findings that the shipper “lacks the competitive service options that were the basis for the original class exemption because its excavation permit requires that stone move by railroad, not by truck, to avoid movements through Wilton.”).

Indeed, several of the summaries eloquently illustrate why a wholesale revocation of exemptions of any of these commodities is unfounded due to significant variation within the respective markets. For example, “ISRI/SIMC/TSIMCO explained that it is hard to compare their industry with others because of the wide diversity in the scrap market. . . . Thus, there are different transportation characteristics and the use and dependence on rail can vary for each individual shipper.” Summary of Ex Parte Meeting held on June 4, 2019 between Sadoff Iron & Metal Company and Tri-State Iron & Metal Company and Vice Chairman Fuchs, Ex Parte 704 (Sub-No. 1), at 3 (filed June 13, 2019). Similarly, “AF&PA explained that from the association’s perspective, their members have unique problems, depending on their business model and location of their customers, and these issues determine how they utilize the rail services.” Summary of Ex Parte Meeting held on June 7, 2019 between the Domtar

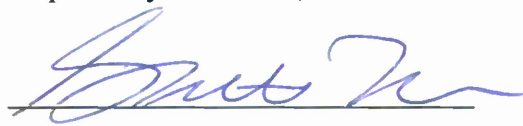
Corporation, AF&PA and Chairman Begeman, Ex Parte 704 (Sub-No. 1), at 2 (filed June 25, 2019). Such circumstances certainly do not warrant wholesale revocation.

VI. CONCLUSION

As previously covered in detail in NS's Opening and Reply Comments, the NPRM is fatally flawed many times over. The Board failed to disclose the materials that it relied on in issuing the NPRM, depriving the public of their chance to meaningfully comment on the rulemaking. The justifications actually found in the NPRM range from anecdotal to those outright prohibited by statute. The Board has provided no credible or comprehensive analysis of market power; indeed, NS's own examination demonstrates that the Board's conclusions are contrary to both comprehensive industry data and NS's experiences in these markets. Finally, the Board ignored any consideration of a large swath of the RTP, including those provisions it found applicable when instituting the very same exemptions that it now proposes to revoke.

Nothing found in the ex parte meeting summaries can do, or does, anything to remedy these deficiencies. Any final rule issued on the basis of this faulty and stale record will not withstand legal review. Accordingly, the Board should terminate this proceeding.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Vanessa A. Sutherland", is written over a horizontal line.

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