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**SURFACE TRANSPORTATION BOARD
EX PARTE 704 (SUB-NO. 1)
MEMORANDUM OF EX PARTE MEETING
BETWEEN
THE AMERICAN SHORT LINE & REGIONAL RAILROAD ASSOCIATION
AND VICE CHAIRMAN PATRICK FUCHS**

DATE OF THE MEETING: June 4, 2019

LOCATION OF THE MEETING: Office of Vice Chairman Patrick J. Fuchs, 395 E Street SW, Washington, DC 20423-0001

ATTENDEES:

For ASLRRRA: Chuck Baker, President, ASLRRRA; Keith Borman, Senior Vice President and General Counsel, ASLRRRA; and Mike Ogborn, Senior Advisor; ASLRRRA

STB: Vice Chairman Patrick Fuchs; Lisa S. Novins, Attorney-Advisor; Douglas W. Pelsey, Economist

SUMMARY OF MEETING:

The meeting began with introductions of the attendees. The ASLRRRA attendees thanked the Vice Chairman and STB attendees for the opportunity to meet and discuss the NPRM and related issues in this proceeding.

Mr. Baker provided the STB attendees with an overview of the history of the proceedings and ASLRRRA's involvement, including testifying and submitting comments in 2011 and 2016. He reiterated that ASLRRRA opposed the revocation of the exemption of the commodities as proposed by the STB in the NPRM and that the ASLRRRA continues to oppose. Further, he stated that the STB should not decide to revoke the exemption for these commodities based on the stale record in this proceeding.

In addition to ASLRRRA's opposition to the proposed rule change generally, ASLRRRA stated that it had specific reasons for opposing them due to their adverse effects on small railroads. Mr. Ogborn presented Vice Chairman Fuchs and the STB attendees a summary of the key points of opposition, which summary is attached to this Memorandum, and made a part of it by this reference. Additionally, ASLRRRA said there are gaps in the data as applied to small railroads. These gaps are due in part because Class II and III railroads are not required to file R-1 reports and because they do not often appear in the waybill samples. The summary also included reference to the Confidential Verified Statement of Gerald W. Fauth III, the expert witness for ASLRRRA, who filed economic data on behalf of ASLRRRA. Specifically, reference is made in the summary to the Confidential Fauth Verified Statement, which ASLRRRA asserts contains data related to RVC ratios for small railroads. The second attached document contains the relevant tables and discussion of them from the public version of the Fauth Verified Statement containing those data.¹

Vice Chairman Fuchs asked what regulatory burdens would be placed on short line and regional railroads if the commodity exemptions were revoked. ASLRRA responded with some examples of the burdens, including the cumulative burden of regulations and the threat of small railroads being pulled into additional expensive and time-consuming proceedings. In order to further understand the effects of regulating certain commodities, Vice Chairman Fuchs also asked whether ASLRRA would suggest if other specific non-exempt commodities should be exempted. ASLRRA responded that, in general, almost all short line handled traffic is in practice extraordinarily competitive with truck, barge, and/or transload service and that further exemptions would be justifiable, although recognized that was not the issue immediately at hand. Finally, the attendees discussed options to revoke the commodity exemptions without harming Class II and III railroads without reaching any conclusions regarding the same.

¹ See, pages 19 through 26 and Tables 10 – 15, in the Verified Statement of Gerald W. Fauth III, filed July 26, 2016, containing Highly Confidential Materials Containing Waybill Data subject to Protective Order, in which ASLRRA discusses the potential impact on Class II and III railroads resulting from the revocation of the exemption.

ASLRRA key points for Ex Parte meetings with the STB on Ex Parte 704 (Sub-No. 1)

1. ASLRRA appreciates the opportunity to meet with the Board Members to express our views.
2. We reiterate our position that there is no basis to re-regulate the exempt commodities under consideration in this proceeding.
3. The record in this proceeding was stale when the NPRM was issued in 2016 and has only grown staler in the three years since then.
4. The STB used information from 2011 and 2013 waybill cutoff but since then there have been many changes in the marketplace – including changes in demand for the commodities, trade policy changes, fuel prices, and PSR, to name just a few. The record the STB relied on considered none of these changes.
5. The NPRM relies heavily on the confidential waybill sample and the resulting RV/C ratios derived from the study to state that the high RV/C ratios show market power by railroads to reach a conclusion these commodities should now be regulated. If it had used a more current period, it would have seen the ratios have changed little in recent years [see table 7 in the Fauth statement]. The sample is also flawed regarding small railroads.
6. The record shows that for small railroads, the RV/C ratios are either well below or close to 180. Even using the stale record and with all the deficiencies in the waybill sample – it shows that the RV/C's are 130.7% for crushed stone, 186.4% for coke, 190.7 % for iron and steel, and 165.9% for scrap – hardly a showing or market dominance.
7. ASLRRA's expert witness, Gerald Fauth, submitted a verified statement that shows the potential impact on small railroads – see tables 10 through 15 of his confidential statement.
8. While there have been changes in the rail industry overall, the market dynamics for small railroads have remained largely unchanged – we still face extremely intense competition from trucks, barges, transloads, and even Class I's given the short distances our members transport freight.
 - The average length of short line haul for these commodities is 105.9 miles for stone, 19 for coke, 75.1 for cement, 38.9 for iron and steel, and 46.9 for iron and steel scrap – far below the 500-mile length at which the STB says trucks are not competitive.
 - Small railroads do not set the rates in most cases.
 - Even using the limited information extracted from the 2014 waybill sample, it shows that the ratios are as follows: 130.7% for crushed stone, 186.4% for coke, 190.7% 190.7% for cement, 176.4% for iron and steel and 165.9% for scrap.
9. Instead of using an updated transportation market study to determine market shares, the NPRM referenced outdated transportation share studies from the 1970's and 1990's. To be accurate, the STB should use updated data.
10. The Small Business Regulatory Enforcement Act of 1996 (SBREFA) requires the STB to give appropriate consideration to small entities when the proposed rule might have a significant economic impact on them. The NPRM does not show any analysis by the STB to determine the impact of the proposed rule on small railroads. There is no indication in the NPRM that the STB notified SBA of the proposed rule as required by Executive Order 13272.

Issue Class II/III Traffic

The STB failed to analyze the potential impact on Class II and Class III railroads. In order to do so, notwithstanding the problems associated with the STB's CWS, especially in regard to Class II and III railroads, I have reviewed the 2014 CWS records for the impacted traffic. The STB's 2014 CWS is the most current available. I first sorted these records by STCC code and then sorted and summarized the data by railroad combination, e.g., BNSF-direct, BNSF to CN, CN to BNSF, NS to CSX, Class III to UP, etc. I then grouped the traffic into three groups:

- (1) **Class I Exclusive Traffic** - Traffic which moves exclusively on Class I railroads (i.e., Class I direct and Class I to Class I):
- (2) **Class I & Class II/III Traffic** - Traffic which moves in in combination of Class I and Class II/III railroads (i.e., Class I to Class II/III, Class II/III to Class I, and other Class I combinations with Class II and Class III); and
- (3) **Class II/III Traffic** - Traffic which moves exclusively on Class II/III railroads (Class II/Class III direct or Class II/III to Class II/III).

The STB's 2014 CWS indicates that _____ carloads of the impacted commodities moved in 2014. The following table shows the breakdown of these carloads by traffic group:

Table 10

**Summary of 2014 Carloads For
The STB EP 704 (Sub-No.1) STCC Groups**

Ln.	Item	Crushed or Broken Stone STCC 14-2	Coke STCC 29-914	Hydraulic Cement STCC 32-4	Primary Iron or Steel STCC 33-12	Iron or Steel Scrap STCC 40-211	Total
1	Total 2014 Carloads						
2	% of 2014 Carloads by STCC						
3	Class I Direct						
4	<u>Class I to Class I</u>						
5	Total Exclusive Class I						
6	% Exclusive Class I						
7	Class I to Class II/III						
8	Class II/III to Class I						
9	<u>Other Class I & Class II/III</u>						
10	Total Class I & Class II/III						
11	% Class I & Class II/III						
12	Class II/III Direct						
13	<u>Class II/III to Class II/III</u>						
14	Total Exclusive Class II & III						
15	% Exclusive Class II/III						
16	Total 2014 Handled by Class II/III						
17	% 2014 Handled by Class II/III						

As can be seen (Lines 1 and 2), STCC 14-2, Crushed or Broken Stone or Rip Rap, and STCC 33-12, Primary Iron or Steel Products (Plates, Pipes, and Rods), are the largest of the five groups with _____ (____%) and _____ (____%) carloads, respectively. Table 10 also shows (Line 3, 4, 5 and 6) that the Class I railroads exclusively moved the majority of the carloads, i.e., _____ carloads or ____%. In addition, the Class I railroads were involved in the movement of _____ carloads with Class II or III railroads (Lines 7, 8, 9, 10 and 11). Therefore, Class I railroads were involved in the movement of _____ out of a total of _____ carloads or ____% of the carloads.

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Class II and Class III railroads exclusively moved _____ carloads (____%) (Lines 12, 13, 14 and 15). With the aforementioned movement of _____ carloads in which Class I railroads were involved in joint-line movements, Class II and/or Class III railroads handled a total of _____ carloads or _____% of the five issue commodity groups (Lines 16 and 17).⁷ However, Class II and Class III railroads received a much smaller percentage of the revenues (____%), as shown in the following table:

Table 11
Summary of 2014 Revenues for the
STB EP 704 (Sub-No.1) STCC Groups

Ln.	Item	Crushed or Broken Stone STCC 14-2	Coke STCC 29-914	Hydraulic Cement STCC 32-4	Primary Iron or Steel STCC 33-12	Iron or Steel Scrap STCC 40-211	Total
1	Total 2014 Revenue						
2	Average Revenue Per Carload						
3	% of 2014 Revenue by STCC						
4	Class I Direct						
5	<u>Class I to Class I</u>						
6	Total Class I Exclusive						
7	% Class I Exclusive						
8	Class I to Class II/III						
9	Class II/III to Class I						
10	<u>Other Class I & Class II/III</u>						
11	Total Class I & Class II/III						
12	% Class I & Class II/III						
13	Class II/III Direct						
14	<u>Class II/III to Class II/III</u>						
15	Total Class II/III Exclusive						
16	% Class II/III Exclusive						
17	Class I Revenue						
18	% Class I Revenue						
19	Class II/III Revenue						
20	% Class II/III Revenue						

⁷ Since many Class II and Class III railroads do not report carload waybill data, the total Class II and Class III carloads and revenues are likely understated.

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Although STCC 14-2, Crushed or Broken Stone or Rip Rap, is the largest STCC group in terms of volume with _____ (_____%), STCC 33-12, Primary Iron or Steel Products (Plates, Pipes, and Rods), is by far the largest group in terms of revenue, with a total of \$_____ or _____% of the total.

The 2014 average revenue per car for STCC 33-12 was also significantly higher than STCC 14-2 with an average of \$_____ per car and \$_____ per car, respectively (Line 2). This difference is partially due to the fact that the average haul for STCC 14-2 (_____ miles) is significantly lower than the average haul for STCC 33-12 (_____ miles). The average miles for the five impacted STCC groups are summarized in the following table:

Table 12
Summary of Average Railroad Miles for the
STB EP 704 (Sub-No.1) STCC Groups

Ln.	Item	Crushed or Broken Stone STCC 14-2	Coke STCC 29-914	Hydraulic Cement STCC 32-4	Primary Iron or Steel STCC 33-12	Iron or Steel Scrap STCC 40-211
All Impacted Traffic						
1	Total Average Miles					
Class I Exclusive						
2	Average Class I Miles					
Class I & Class II/III						
3	Average Class I Miles					
4	<u>Average Class II/III Miles</u>					
5	Total Average Miles					
Class II/III Exclusive						
6	Average Class II/III Miles					

Class II/III R/VC Ratios

The STB studied the total R/VC ratios of the five STCC groups, but failed to review the R/VC differences between Class I and Class II/III railroads. The following table summarizes and compares the R/VC ratios for the five impacted STCC groups and by the three aforementioned traffic groups (Class I Exclusive Traffic; Class I and Class II/III Traffic and Class II/III Exclusive Traffic).

Table 13

**Summary of Average R/VC Ratios For
The STB EP 704 (Sub-No.1) STCC Groups**

Ln.	Item	Crushed or Broken Stone STCC 14-2	Coke STCC 29-914	Hydraulic Cement STCC 32-4	Primary Iron or Steel STCC 33-12	Iron or Steel Scrap STCC 40-211	Total
1	Total 2013 R/VC All Traffic						
2	Total 2014 R/VC All Traffic						
3	2014 Class I Direct						
4	<u>2014 Class I to Class I</u>						
5	2014 Class I Exclusive						
6	Class I to Class II/III						
7	Class II/III to Class I						
8	<u>Other Class I & Class II/III</u>						
9	2014 Class I & Class II/III						
10	2014 Class I Direct						
11	<u>2014 Class II/III to Class II/III</u>						
12	2014 Class II/III Exclusive						
13	2014 Class II/III RVC						
14	2014 Class I RVC						

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As can be seen, the 2014 R/VC ratios for all traffic which I developed (Line 2) are only slightly different from the 2013 R/VC ratios developed by the STB (Line 1).⁸ However, the STB did not provide a breakdown of these R/VC ratios by the type of movement. Several key points can be determined from this analysis:

- The average R/VC ratios for STCC 33-12 (____%) and STCC 40-211 (____%) are below 180% (Line 2);
- The highest average R/VC (____%) is for STCC 29-914 (Line 2). However, STCC 29-914 has the lowest number of annual carloads (____ carloads or only ____% of the total impacted carloads). STCC 29-914 also has lowest annual revenue (\$____ or only ____% of the total impacted revenue);
- The highest average R/VC ratios are for Class I Exclusive traffic (Lines 3, 4 and 5). The Class I Exclusive R/VC ratios are, in most cases, higher than the R/VC ratios for Class I & Class II/III traffic (Lines 6, 7, 8 and 9) and Class II/III Exclusive traffic (Line 10, 11 and 12);
- The lowest average R/VC ratios are for Class II/III Exclusive traffic (Lines 10, 11 and 12);
- The largest Class II/III Exclusive movements are STCC 14-2 (____ out of ____ carloads). This STCC 14-2 Class II/III Exclusive traffic has an average R/VC ratio of only ____%, which is far below the average of ____% (Line 2).

Clearly, in most cases, movements involving Class II/III railroads have lower R/VC ratios than Class I Exclusive movements and Class II/III Exclusive movements have lower R/VC ratios than movements involving Class I railroads.

⁸ I excluded all 2014 CWS records with no (\$0) variable cost from my analysis. It is unclear whether or not the STB excluded these \$0 cost records.

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In order to study this issue in more detail, I reviewed all railroad routing groups for the five impacted commodities involving Class II/III railroads with more than 1,000 carloads per year. This group of movements involved ___ individual routing groups (e.g., BNSF to a Class II/III railroad, a Class II/III railroad direct, etc.) and represents ___% of the total Class II/III carloads. I sorted these ___ routing groups first by total carloads and second by R/VC, both in descending order. This analysis is attached hereto as Appendix GWF-3.

This analysis indicates these ___ largest Class II/III movements have an average R/VC of only ____%. Most of the largest Class II/III movements have R/VC ratios below 180%. The five largest Class II/III movements are summarized below:

Table 14
Summary of Five Largest Class II/III Movements
For The STB EP 704 (Sub-No.1) STCC Groups

STCC	Type of Movement	Average Miles	Carloads	Revenue (000)	R/VC
14-2	Class II/III Direct				
14-2	Class II/III Direct				
33-12	Class II/III to Class I				
14-2	Class II/III to Class I				
14-2	Class II/III to Class II/III				

These five largest Class II/III movements represent ___% of the total Class II/III carloads. The three largest movements, which represent ___% of the total Class II/III carloads, have R/VC ratios well below 180%. The only movement with a R/VC ratio above 180% is only marginally above 180% (i.e., ____%) and would likely not be high enough to justify a STB rate complaint.

Table 15

**Summary of Class II/III Movements with Highest R/VC
For The STB EP 704 (Sub-No.1) STCC Groups**

STCC	Type of Movement	Average Miles	Carloads	Revenue (000)	R/VC
32-4	Class II/III to Class I				
33-12	Class I to Class II/III				
14-2	Class II/III to Class I				
33-12	Class II/III to Class I				
40-211	Class I to Class II/III				

These five movements involving Class II/III railroads represent only ____% of the total movements involving Class II/III railroads. The studied movement with the highest R/VC (____%) has a ratio that is significantly higher than 180%, but its low volume (____ carloads) and relatively short distance (____ miles) means that it would likely be subject to truck competition and, therefore, market dominance may be difficult to prove. In fact, out of the ____ Class II/III movements studied, only ____ have R/VC ratios in excess of 180%. These ____ movements represent only ____% of the total Class II/III impacted carloads and have an average R/VC ratio of ____%, which would likely not be found unreasonable by the STB.