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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: EP 704 (Sub-No. 1), *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*

Dear Ms. Brown:

Pursuant to the decisions served in the above docketed proceeding on March 19, 2019, and June 19, 2019, the Association of American Railroads submits this letter to comment on the summaries of meetings held between June 4, 2019 and June 17, 2019.

Throughout this proceeding, AAR has made clear that the record does not support the proposal to revoke five commodity exemptions contained in the March 23, 2016, Notice of Proposed Rulemaking or any other exemptions. The record supporting the NPRM was stale in 2016 and is more so now.¹ Moreover, the NPRM's heavy reliance on revenue to variable cost ratios above 180% as a basis to conclude the presence of market power is a fatal flaw, and the only other evidence in the record is scant, anecdotal, and rebutted by contradictory evidence. The NPRM proposal failed to consider more limited, targeted alternatives to wholesale revocation of commodity exemptions. Finally, the NPRM and the process by which it was issued were deficient.

The *ex parte* meetings held last month do nothing to change that situation. Representatives of the Institute of Scrap Recycling Industries (ISRI), Portland Cement Association (PCA), American Iron and Steel Institute (AISI), Steel Manufacturers Association

¹ AAR requested and was recently granted access to updated data from the Carload Waybill Sample and is currently evaluating how that data implicates the NPRM proposals and commodities that should be exempted from regulation. But AAR has made clear in other filings that *ex parte* meetings, and comments on the summaries of those meetings, are not the appropriate procedural vehicle for the presentation of new analyses or data in a proposed rulemaking. Even if such analyses were procedurally proper, a meaningful analysis could not be completed in the time allowed for these comments.

(SMA), and American Forest & Paper Association (AF&PA), largely reprised their arguments from written comments in 2016, which in turn heavily relied on the flawed NPRM. As explained more fully in the AAR reply comments filed on August 26, 2016, these arguments ignore the proper statutory standard, are unsupported by robust analysis, and fail to consider all forms of competition that discipline the transportation marketplace.

Contrary to Thompson Hine's contentions in the recent *ex parte* meetings, the Board does not have broad discretion to revoke exemptions. *See, e.g.*, Summary of Meeting Between AF&PA, Escalation Consultants, Inc. and Board Member Oberman (filed June 25, 2019). The statutory test is explicit: an exemption may be revoked only when necessary to carry out the Rail Transportation Policy codified at 49 U.S.C. § 10101. *See* 49 U.S.C. § 10502(d). Changes made by the ICC Termination Act of 1995 support continued exemption from regulation, rather than re-regulation of any commodity groups. Moreover, Congress did not create an opt-in/opt-out system of regulation for rail shippers in 49 U.S.C. § 10502. Instead, Congress provided the Board clear direction to exempt rail transportation to the maximum extent possible and allowed for limited revocations where necessary to correct demonstrated abuses of market power. *See* AAR Reply Comments at 6-10.

Shipper presentations in support of revocation continue to rely on R/VC ratios over 180% as proxy-justification for revocation. The record in this proceeding, many other proceedings, and Board precedent show that R/VC ratios over 180% do not, standing alone, demonstrate market power. The Department of Transportation specifically observed in its 2016 comments that R/VC ratios "may not be a sufficiently robust indicator of whether revocation of a commodity exemption is warranted." U.S. Department of Transportation Comments at 2. Similar conclusions regarding R/VC ratios have been reached by Christensen Associates, the Transportation Research Board, and other neutral observers. *See* AAR Reply Comments at 2-6.

Meeting summaries that relate shipper appeals citing general "consolidation" in the railroad industry as a reason for revocation of exemptions do not indicate any sort of data support or analysis for this proposition. As demonstrated by the AAR in its written comments, Class I consolidations in the 1980s and 1990s did not result in a reduction in intramodal competition. The proportion of traffic with multiple railroads at both origin and destination has largely remained stable or increased since the 1990s. *See* AAR Reply, Israel/Orszag Reply V.S. at 12-13. In approving the transactions as being in the Public Interest, the agency "ensure[d] that no rail shipper that was [previously served by] at least two carriers received less than that" after railroad mergers; for that reason, there has been no "merger related gain in the number of captive shippers." Transcript of Hearing at 22-23, *The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead*, EP 658 (Oct. 19, 2005) (remarks of U.S Department of Transportation).

Similarly, observations regarding the "financial health of the industry" do not provide any basis for revocation of exemptions. The financial performance of individual railroads or of the industry generally does not provide any insight regarding the specific competitive circumstances relevant to the commodities being considered in this proceeding, is not evidence

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of market power, and is not an appropriate or lawful basis on which to revoke an exemption. *See* AAR Reply at 11.

Finally, the summaries of shipper *ex parte* meetings indicate that no shipper group meaningfully engaged in considering the various forms of competition that constrain railroads' behavior. Instead, shippers focused on their individual shipping preferences and the relative benefits they see using rail in certain circumstances.

The meeting summaries demonstrate that the Board cannot proceed to revoking any exemptions based on the record established in this proceeding. Therefore, the Board should discontinue the proceeding. If any stakeholder believes that a particular exemption is no longer warranted, it can file a fully-supported petition for revocation under the Board's rules.

Sincerely,

A handwritten signature in blue ink, appearing to read "Timothy J. Strafford", with a long horizontal flourish extending to the right.

Timothy J. Strafford
Counsel for the Association
of American Railroads