

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 740

**PETITION BY THE WESTERN COAL TRAFFIC LEAGUE
TO TERMINATE THE REGULATORY FREEZE IN FOUR PENDING PROCEEDINGS**

**COMMENTS OF
THE AMERICAN FOREST & PAPER ASSOCIATION**

EP 740
EP 661 (Sub-No. 2)
EP 722
EP 736
EP 711 (Sub-No. 1)
EP 704 (Sub-No. 1)

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Office of Proceedings
August 31, 2017
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Public Record

The American Forest & Paper Association (“AF&PA”) submits these comments in response to the Petition of the Western Coal Traffic League (“WCTL”) to Terminate the Regulatory Freeze in Four Pending Proceedings (“Petition”) submitted to the Surface Transportation Board (“STB” or “Board”) on August 11, 2017. In the Petition, WCTL asks the STB to “terminate its regulatory freeze in four pending proceedings in which WCTL is an active party.” Petition at 1. WCTL is concerned that the Board does not intend to take further substantive action in the four named proceedings “until such time as the Board has a ‘full complement’ of five Board members.” *Id.* The proceedings identified in the Petition include EP 661 (Sub-No. 2), *Rail Fuel Surcharges*, EP 722, *Railroad Revenue Adequacy*, EP 736 *InterVISTAS Study*, and EP 711 (Sub-No. 1), *Reciprocal Switching*.

Another proceeding that has been stayed informally by the Board since the Presidential election in November 2016, but was not named in the Petition (presumably since WCTL is not a party), is Ex Parte 704—*Review of Commodity, Boxcar, and TOF/COFC Exemptions* (“EP 704”). AF&PA has actively engaged in the EP 704 proceeding, wherein it submitted substantial evidence and analyses supporting the revocation of several outdated paper and forest products exemptions, and the boxcar exemption to the extent it applies to the rail transportation of such

commodities. The revocation relief is critically important to AF&PA's members. Revocation of the exemptions would provide paper and forest products companies who are subject to railroad market power with access to the Board's regulatory oversight and place such companies on equal footing with shippers of non-exempt commodities. As established by AF&PA in EP 704, the paper and forest product exemptions adopted in the late 1980s and early 1990s no longer make sense given today's highly concentrated rail market and the statutory changes which removed the very basis for granting the exemptions.

AF&PA understands that a short-term suspension of Board action can reasonably be expected following a Presidential election to allow for any necessary internal transition in the leadership and staffing at the agency. However, AF&PA is concerned that the informal stay of EP 704 may continue for many more months due to the lack of *any* nominations for additional Board members now nine months since the election and seven months since the inauguration. Given the highly political process involved with Board member nominations and required Senate confirmations, substantial uncertainty exists as to the timing for achieving a full complement of Board members. Accordingly, to the extent that the informal stay of EP 704 is directly tied to such an indefinite political process, AF&PA respectfully asks the Board to lift any informal stay, and to decide the important issues involved in EP 704, which proceeding has been pending at the agency for almost seven years.¹

I. IDENTITY AND INTEREST OF AF&PA.

AF&PA is interested in this proceeding because its member companies rely upon dependable and efficient rail transportation services in their daily operations. AF&PA is an organization that serves to advance a sustainable U.S. pulp, paper, packaging, tissue, and wood

¹ STB Notice, *Review of Commodity, Box Car and TOFC/COFC Exemptions*, Docket No. EP 704 (Oct. 21, 2010, corrected Oct. 25, 2010).

products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA's member companies make products essential for everyday life from renewable and recyclable resources. The forest products industry accounts for approximately 4 percent of the total U.S. manufacturing GDP, manufactures over \$200 billion in products annually, and employs approximately 900,000 men and women. The industry meets a payroll of approximately \$50 billion annually and is among the top 10 manufacturing sector employers in 45 states.

II. THE BOARD SHOULD END ITS INFORMAL STAY OF THE EP 704 PROCEEDING.

Based on substantial changes in the competitive landscape of the rail industry that occurred in the 30 years since the commodity and boxcar exemptions were adopted, the Board opened its EP 704 proceeding in October 2010, and held a public hearing in February 2011. The purpose of the proceeding was to examine "the effectiveness of these exemptions in the marketplace; whether the rationale behind any of these exemptions should be revisited; and whether the exemptions should be subject to periodic review."² AF&PA participated in the 2011 hearing and submitted written testimony for the record, in which it strongly encouraged the Board to open a proceeding to review the propriety of the paper and forest products exemptions, including whether there was any justification to retain the exemptions based on substantial changes to the statute and rail market.³

Five years later, in March of 2016, the Board opened a Notice of Proposed Rulemaking ("NPRM") in EP 704 (Sub No. 1), in which it proposed to revoke exemptions for several

² STB Corrected Notice, *Review of Commodity, Box Car and TOFC/COFC Exemptions*, Docket No. EP 704 at 3 (Oct. 25, 2010).

³ Notice of Intent to Participate and Written Testimony of The AF&PA and The Paper and Forest Industry Transportation Committee at 3 (filed Jan. 1, 2011).

commodity groups and invited parties to comment as to whether additional exemptions should be revoked.⁴ Specifically, the Board stated:

The purpose of this proposal is to restore shippers' access to the Board's regulatory oversight and processes—in particular, shippers of those commodities where evidence indicates that the competitive landscape has changed significantly enough to indicate that renewed regulation is needed to carry out the RTP. The Board is committed to ensuring that stakeholders have an appropriate, meaningful path to the Board, and the proposal here is an important step towards that goal. The Board also welcomes 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 responded to the Board's request and submitted substantial evidence and analyses in the EP 704 rulemaking which support revocation of the class exemptions for paper and forest products, and the boxcar exemption to the extent it applies to rail transportation of such commodities.⁶ Clearly, there are significant issues involved in the EP 704 proceeding, including the stated commitment of the Board to restore regulatory oversight where necessary to address the increase in railroad market power following the substantial consolidation of the rail industry since the exemptions were adopted. These issues are of critical importance to AF&PA members who depend on competitive and reliable rail service and are seeking to restore access to the Board's processes.

Based on the Board's Report on Pending STB Regulatory Proceedings issued on October 3, 2016 ("Oct. 2016 Report"), a decision in EP 704 was scheduled to be released in January

⁴ STB NPRM, *Review of Commodity, Boxcar and TOFC/COFC Exemptions*, Docket No. EP 704 (Sub-No. 1) (served Mar. 23, 2016).

⁵ STB NPRM, *Review of Commodity, Boxcar and TOFC/COFC Exemptions*, Docket No. EP 704 (Sub-No. 1) at 4 (served Mar. 23, 2016) (emphasis added).

⁶ See AF&PA's Opening Comments (filed Jul. 26, 2016), Reply Comments (filed Aug. 26, 2016), and Supplemental Comments (filed Oct. 3, 2016), Docket No. EP 704 (Sub-No. 1).

2017.⁷ However, after the 2016 Presidential Election, the Board modified the decision date in its next report on pending proceedings to be stated as “TBD” and provided an explanation that “the next action target date has been modified given that the Board is in a time of transition, with potential changes to the Board’s membership due to the changeover in administration.”⁸ More recently, in its quarterly report to Congress, the Board clarified that “it remains appropriate for the Board’s larger regulatory proceedings to be considered by a full complement of members before taking major action (the Board is currently comprised of two Democrats and one Republican, and there are two vacancies). . . .”⁹ Thus, the need for a post-election transition period and the desire for a fully staffed Board resulted in the suspended target date.

As previously noted, AF&PA appreciates and understands that the Board would consider imposing a temporary short-term delay in proceedings to allow sufficient time for an orderly transition. However, now that nine months have passed since the election without *any* nominations to fill the two open Board seats, AF&PA encourages the Board to lift any self-imposed informal stay to avoid further delays to the outcome of the exemption proceeding. A decision to lift the stay would seem prudent, since nine months post-election (and seven months

⁷ SURFACE TRANSP. BD., REPORT ON PENDING STB REGULATORY PROCEEDINGS at 5 (Oct. 3, 2016), <https://www.stb.gov/stb/docs/Reauthorization/Quarterly%20Reports/Report%20on%20Unfinished%20STB%20Regulatory%20Proceedings%2C%20Third%20Quarter%2C%20October%203%2C%202016.pdf>.

⁸ SURFACE TRANSP. BD., REPORT ON PENDING STB REGULATORY PROCEEDINGS at 7 (Jan. 3, 2017), <https://www.stb.gov/stb/docs/Reauthorization/Quarterly%20Reports/Report%20on%20Unfinished%20Regulatory%20Proceedings,%20Fourth%20Quarter,%20January%203,%202017.pdf> (“Jan. 2017 Report”).

⁹ SURFACE TRANSP. BD., STB STATUS LETTER TO U.S. SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION (Jul. 3, 2017), <https://www.stb.gov/stb/docs/Reauthorization/Monthly%20Implementation%20Reports/STB%20Status%20Letter%20to%20U.S.%20Senate%20Committee%20on%20Commerce,%20Science%20and%20Transportation%20July%203,%202017.pdf>.

after the inauguration) is an appropriate and reasonable transition period. Additionally, achieving a full complement of Board members in the near term may not be realistic due to the highly unpredictable political process involved in Board member nominations and confirmations. Notably, the propriety of existing exemptions, and their possible revocation, have already been the subject of a lengthy review by the Board, as the EP 704 docket was first established almost seven years ago and the record in a subsequent related rulemaking proceeding has closed. Thus, a continuation of the EP 704 informal stay would be inconsistent with the National Transportation Policy which requires an “expeditious handling and resolution of all proceedings required or permitted to be brought [under the statute].”¹⁰

Under the statute, the Board retains the authority to make policy and decide adjudications without a full complement of members. Specifically, the current statute provides that “a vacancy in the membership of the Board does not impair the right of the remaining members to exercise all of the powers of the Board.”¹¹ Thus, there does not appear to be a legal impediment for the Board to proceed to a final decision in EP 704. Moreover, even if the Board could achieve a full complement of members based on two new nominations and Senate confirmations, the terms of existing Board members are not coincident and can be expected to cause other vacancies. Thus, practically speaking, it may be challenging for the Board to achieve and maintain a full complement of members. Accordingly, AF&PA is concerned that the EP 704 proceeding could remain in regulatory limbo for quite some time to the detriment of its members who are seeking access to the Board’s processes and procedures to address the substantial increase in railroad market power that has occurred since the currently outdated paper and forest products exemptions were granted decades ago.

¹⁰ 49 U.S.C. § 10101(15).

¹¹ 49 U.S.C. § 1301(b)(6).

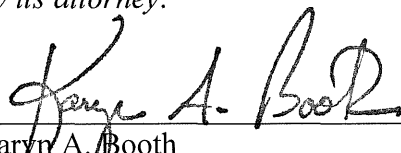
III. CONCLUSION

AF&PA appreciates and understands the Board's initial decision to suspend action in certain proceedings to allow for sufficient time for transition following the 2016 Presidential election. However, given the passage of a reasonable transition period and the highly uncertain political process associated with nominating and confirming two additional Board members, AF&PA respectfully asks the Board to lift the informal stay imposed in its EP 704 proceeding and reschedule a target date for issuing a decision.

Respectfully submitted,

The American Forest & Paper Association

By its attorney:



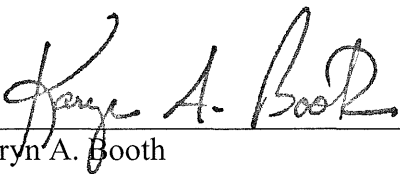
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August 31, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August 2017, I served a copy of the foregoing
Comments upon the following via U.S. first-class mail, postage prepaid:

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