

ENTERED
Office of Proceedings
November 6, 2019
Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**EXCLUSION OF DEMURRAGE REGULATION)
FROM CERTAIN CLASS EXEMPTIONS)**

Docket No. EP 760

**COMMENTS OF
ARCELORMITTAL USA LLC**

By: John H. LeSeur
A. Rebecca Williams
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for
ArcelorMittal USA LLC

Dated: November 6, 2019

	)	
	)	
EXCLUSION OF DEMURRAGE REGULATION	)	Docket No. EP 760
FROM CERTAIN CLASS EXEMPTIONS	)	
	)	
	)	

ArcelorMittal USA LLC (“AM”) submits these Comments in response to the Surface Transportation Board’s (“Board”) Notice of Proposed Rulemaking served on October 7, 2019 (“NPRM”).

AM is part of ArcelorMittal, the world's leading steel and mining company. Guided by a philosophy to produce safe, sustainable steel, AM is a leading supplier of quality steel products in major North American markets, including automotive, construction, pipe and tube, appliance, container, energy and machinery.

AM's operations are made up of facilities owned and operated by various predecessor companies, all joining together as AM following the merger of Arcelor and

Mittal in 2006, then the world's largest and second largest steel companies, respectively, by production volume. The map appended to these Comments details the locations and functions of each of these facilities and offices.

AM participated in the Board's EP 754 proceeding addressing demurrage and accessorial charges,¹ and AM appreciates the opportunity to present these Comments to the Board. AM ships several partially exempt commodities and supports the Board's proposal to amend its current miscellaneous exempt commodity regulations, codified at 49 C.F.R. § 1039.11(a), to expressly state that the Board retains jurisdiction to regulate demurrage charges on these partially exempt miscellaneous commodity moves.

I. AM'S PARTIALLY EXEMPT COMMODITY MOVES

The Board's regulations, codified at 49 C.F.R. § 1039.11(a), sets forth a list of commodities that are "exempt from the provisions of 49 U.S.C. subtitle IV," subject to stated exceptions. *Id.* The § 1039.11(a) list includes the following commodities that AM routinely transports:

- Flux Limestone, STCC No. 14-212-10
- Dolomite, Raw, STCC No. 14-213-10
- Limestone NEC, STCC No. 14-219-65
- Coke from Coal, STCC No. 29-914

¹ *Oversight Hearing on Demurrage & Accessorial Charges*, Docket No. EP 754 ("EP 754"). In EP 754, the Board received written comments and conducted a two-day public hearing on May 22-23, 2019. AM filed its Written Comments in EP 754 on May 8, 2019.

- Limestone, BPORS, STCC No. 32-812-20
- Slag, Furnace, STCC No. 32-952-78
- Steel Ingot or Semi-Finished (Billets, Slabs), STCC No. 33-121
- Steel Plate, STCC No. 33-122
- Coiled or Cut Steel Sheet, STCC 33-123

The above-listed commodities were partially exempted from regulation in two class exemption decisions served years ago by the Board's predecessor, the Interstate Commerce Commission. *See Rail Gen. Exemption Auth. – Petition of AAR to Exempt Rail Transp. of Selected Commodity Grps.*, 9 I.C.C.2d 969 (1993) (exempting STCC Nos. 14-2, 29-914 and 33-12);² *Rail Gen. Exemption Auth. – Miscellaneous Manufactured Commodities*, 6 I.C.C.2d 186 (1989) (exempting STCC No. 32, subject to specific commodity exceptions).

II.

THE BOARD HAS PREVIOUSLY AND CORRECTLY HELD THAT IT HAS JURISDICTION TO REGULATE DETENTION CHARGES AND PRACTICES ON PARTIALLY EXEMPT MISCELLANEOUS COMMODITY MOVES

The Board's exemption of the miscellaneous commodity moves listed in 49 C.F.R. § 1039.11(a) is subject to an important exclusion – the exemption does not affect “in any way the existing regulations, agreements, prescriptions, conditions, allowances or levels of compensation regarding the use of equipment, whether shipper or railroad

² The Board has proposed to revoke the exemptions – and restore full Board regulatory authority – over STCC Nos. 14-2, 29-914 and 33-12. *See Review of Commodity, Boxcar, & TOFC/COFC Exemptions*, EP 704 (Sub-No. 1) (STB served Mar. 23, 2016). AM supports these revocation proposals and urges the Board to promptly adopt them.

owned or leased, including car hire, per diem and mileage allowances” *Id.* The Board’s boxcar transportation exemption, codified at 49 C.F.R. § 1039.14, contains a similar exclusion. *See* 49 C.F.R. § 1039.14(b) (“The Board retains jurisdiction in the following areas: (1) Car hire and car service . . . [and] (4) Car supply.”).

The Board has previously – and correctly – construed these exclusion provisions as retaining the Board’s jurisdiction to regulate detention charges and practices on miscellaneous commodity and boxcar shipments moving in common carrier service:

These [miscellaneous commodity and boxcar] exemptions, however, are not total. By their terms, the commodity exemptions contained in 49 C.F.R. 1039.11 do not affect regulation regarding the use of equipment, 49 CFR 1039.11(a), and the boxcar exemption does not extend to matters regarding car hire, car service, or car supply, 49 CFR 1039.14(b)(1) and (b)(4). Demurrage is a matter regarding use of equipment and is related to car service. Thus, neither of these exemptions extends to controversies over assessment of demurrage. *Delaware & Hudson Ry. Co. v. Offset Paperback Mfrs.*, 126 F.3d 426, 428-29 (2d Cir. 1997); *Exemption from Regulation–Boxcar Traffic*, 367 I.C.C. 424, 455 (1983), *aff’d in part*, *Brae Corporation v. ICC*, 740 F.2d 1023 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1069 (1985); and *Rail Exemption–Misc. Manufactured Commodities*, 6 I.C.C.2d 186 (1989). Indeed, the Board has expressly declined to exempt demurrage matters from regulation. *Exemption of Demurrage from Regulation*, Ex Parte No. 462 (STB served Mar. 29, 1996).

See Savannah Port Terminal R.R. – Pet. for Declaratory Order – Certain Rates & Practices as Applied to Capital Cargo, Inc., FD 34920, slip op. at 7-8 (STB served May 30, 2008).

In its NPRM, the Board correctly acknowledges that “[t]he class exemptions for miscellaneous commodities and boxcar transportation already exclude the regulation of demurrage.” NPRM at 4. The Board specifically states with regard to the miscellaneous commodity exemption:

[T]he regulations state that the exemption for miscellaneous commodities “shall not be construed as affecting in any way the existing regulations . . . regarding the use of equipment, whether shipper or railroad owned or leased, including car hire, per diem and mileage allowances.” 49 C.F.R. § 1039.11(a). The Board has also explained that the exemption “does not affect regulation regarding the use of equipment,” and because “[d]emurrage is a matter regarding use of equipment,” such matters are expressly excluded from the exemption. *Savannah Port Terminal R.R.—Pet. for Declaratory Order—Certain Rates & Practices as Applied to Capital Cargo, Inc.*, FD 34920, slip op. at 7-8 (STB served May 30, 2008) (rejecting argument that § 1039.11 precluded the Board from hearing a demurrage dispute related to commodities listed in that section).

Id.

III. AM SUPPORTS THE BOARD’S PROPOSED AMENDMENT TO 49 C.F.R. § 1039.11(a)

The Board notes that while it has clearly and correctly construed the miscellaneous commodity exemption in 49 C.F.R. § 1039.11(a) as retaining the Board’s jurisdiction to regulate carrier demurrage rates and practices on otherwise exempt miscellaneous commodity shipments, the text of the regulation “do[es] not use the term ‘demurrage,’ which could cause confusion.” *Id.* at 5.

To eliminate any such confusion, the Board proposes to add text to the current regulation that expressly states, “this exemption shall not apply to the regulation

of demurrage” *Id.* AM supports the Board’s proposal to add this text for the reason articulated by the Board – its addition will avoid any confusion concerning the Board’s retention of jurisdiction over demurrage involving miscellaneous commodity shipments.³

CONCLUSION

For the reasons set forth above, AM respectfully requests that the Board adopt its proposed revision to 49 C.F.R. § 1039.11(a).

Respectfully submitted,

By: /s/ John H. LeSeur
A. Rebecca Williams
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for
ArcelorMittal USA LLC

Dated: November 6, 2019

³ The Board should also clarify, or add text stating, that its proposed rules apply to both detention and accessorial charges.

ArcelorMittal in the United States

