**BEFORE THE**

**SURFACE TRANSPORTATION BOARD**

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**DOCKET NO. EP 704 (Sub-No. 1)**

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

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**REPLY OF THE**
**AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION**

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The American Short Line & Regional Railroad Association ("ASLRRA" or "Association") is a non-profit trade association representing the interests of over 500 short line and regional railroad members and railroad supply company members in legislative and regulatory matters. Short lines operate about 50,000 miles of track or approximately 30 percent of the national freight network, connecting manufacturers, businesses, and farmers in communities and small towns to larger markets, urban centers and ports. The ASLRRA railroad members operate in 49 states and in some cases, account for the state's entire rail network. Class II and III railroads play a vital role in maintaining rail service over hundreds of miles of light density lines throughout the country that in many cases were candidates for abandonment by their former Class I owners. These small railroads have short lengths of haul, high fixed costs, and large capital needs for infrastructure investment, including the task of upgrading bridges and track to handle heavier freight cars. They also face pervasive competition from trucks, barges, and transloading operations for freight traffic.

In the September 30, 2020 Decision, the STB announced it was seeking comments concerning a new approach its Office of Economics ("OE") developed for possible use in considering class exemption and revocation issues. In a Decisions served on December 4, 2020, the Board announced it would hold a technical conference on December 18, 2020, at which Board staff would provide a presentation on and answer technical questions related to the approach proposed by OE. Subsequently, in a decision served January 7, 2020, the Board announced the OE would hold a second technical conference to answer questions about the proposed approach. Representatives of ASLRRA and its expert witness, William F. Huneke, attended both technical conferences. In comments filed on January 29, 2021, ASLRRA submitted that the overall attempt to regulate the exempt commodities listed in the 2016 NPRM Decision would be inconsistent with rail transportation policy, particularly regarding short lines and regional railroads. The STB should not rely upon the rationale contained in the 2016 NPRM Decision to regulate the exempt commodities that are the subject of that decision, it should not apply them to any other proceeding wherein a party seeks to have any exempt commodity regulated. In particular, not one of the stated rationales apply to short line railroads.

Nor should the Board use the methodology proposed in the September 30, 2020 Decision. The proposed approach is overly complicated, relies on models or assumptions for which EO provided no basis for using, the models are internally inconsistent, the added regulatory burdens are not outweighed by any benefits, the costs and complexity of filing a petition to revoke an exemption or to seek to have a commodity exempted would clearly be exorbitant, and relies on data that are not relevant to short lines. The STB should not adopt the proposed methodology.

**ASLRRA Reply**

Five shippers or shipper associations filed Comments: Jointly - Institute of Scrap Recycling Industries, Inc. ("ISRI"). American Forest & Paper Association ("AF&PA"), and the National Industrial Transportation League ("NITL"); the Fertilizer Institute ("TFI"); the Steel Manufacturers Association ("SMA"); and the Portland Cement Association ("PCA"). The overarching positions taken by these Commenters was: (1) the proposed new approach deviates from the governing statute; (2) the proposed new approach is extremely complex and would result in unwieldly and expensive proceedings and deter shippers from requesting future exemption revocations; (3) the revocation statute does not mention market power or a market dominance-style evaluation; (4) a nationwide market dominance-style is inequitable and unworkable; (5) the new approach could be used to evaluate not just exemption requests but also creation of new class-wide exemptions; and (6) the Decision discussing the new approach did not even address the extensive work already done in the proceeding and should revoke the exemptions of the commodities covered in the NPRM in 2016.

While the shipper Comments generally opposed the proposed new approach, there are a few points that merit a Reply from ASLRRA.

ISRI, AF&PA, and NITL state that the Board improperly failed to address the significant comments filed by parties regarding legal changes occurring after the involved commodity exemptions were created. While there have been changes in the rail industry in general since this proceeding began in 2011, as was the case when the exemptions were adopted, small railroads still continue to provide the first and last mile of service, largely at the fringes of the national rail network. Small railroads are still characterized by high fixed costs, short distances they transport freight, light traffic densities, intense competition from trucks, barges, intermodal and transload operations, and lack of control over pricing. Thus, despite the passage of many years, the dynamics of small railroads have not significantly changed.

PCA stated that, instead of an unduly complex and arbitrary methodology, the Board should just rely on the existing record and to revoke the exemption for hydraulic cement. As ASLRRA has previously provided regarding hydraulic cement, the average length of haul for small railroads for cement is 75.1 miles, well within the 500-mile range within which the STB considers to be truck-competitive. Trucks and barges remain strong competitors to transport cement, particularly for small railroads. There is insufficient evidence to support revoking the exemption for hydraulic cement.

PCA also stated that the Board's reliance on the railroads' criticism of R/VC ratios is misplaced as the Board and courts have found RV/C ratios calculated using the Uniform Costing System ("URCS") is a valid and reliable measure of railroad market power. As ASLRRA has stated in previous Comments to this Docket, URCS is not useful as it relates to Class II and Class III railroads. URCS relies entirely upon data obtained from Class I railroads and does not contain any of the operating characteristics of short line or regional railroads or their cost structures. To permit reliance on URCS' framework in deciding the R/VC aspect of this proceeding, without resolution of the outstanding issue for small railroads, is widely unfair.

SMA restated its arguments that regarding the revocation of coke produced from coal, primary iron and steel products, and iron or steel scrap, wastes or tailings was supported by the evidenced it adduced regarding changes in the steel and rail industries, the analysis of the confidential waybill samples, and the changes in the average R/VC ratios for these commodities justified revocation. Even if the argument about changes in the transportation of iron and steel necessitating the revocation of these exemptions may be true, very little has changes regarding small railroads' service to shippers of coke, steel and scrap. Additionally, the confidential waybill sample used in this Docket is relevant only to Class I railroads, and the R/VC calculation aspect of this proceeding should not pertain to small railroads for all of the concerns regarding URCS.

None of the Comments support adoption of the methodology proposed in the September 30, 2020 Decision.

Respectfully submitted,

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