Freight Rail
Customer Alliance

July 25, 2016

BY ELECTRONIC FILING

Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

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

Dear Ms. Brown:

The Freight Rail Customer Alliance ("FRCA") is an alliance of freight rail shippers impacted by continued unrestrained freight rail market dominance over rail-dependent shippers. FRCA's members include individual shippers as well as trade associations representing more than 3,500 manufacturing and agriculture companies, electric utilities, and their customers, all with an interest in affordable and reliable rail freight transportation.

FRCA is submitting this letter in support of the exemption revocations that the Surface Transportation Board (Board) proposed in its notice served March 23, 2016. The exemptions are no longer needed and have become counterproductive for the reasons stated in the Board's notice. FRCA further submits that the Board should give meaningful consideration to reviewing and reducing or eliminating most or all or its other existing commodity, boxcar, and TOFC/COFC exemptions.

The exemptions served a potentially useful purpose when they were adopted by the Board's predecessor. At the time, common carrier rates needed to be included in tariffs filed and maintained with the agency, and contracts needed to be signed and at least summaries filed with the agency. Exemptions provided a cost-effective alternative mechanism for establishing and maintaining rates and service terms, but the ICC Termination Act of 1995 effectively eliminated the burdens associated with establishing both common carrier and contract rates. Common carrier rates are now rarely challenged, especially as the burdens for a shipper to bring a rate case have become so enormous. Contract rates, and even common carrier rates, can be established and maintained in much the same manner as exempt rates. The distinction between common carrier and contract rates has become very thin at times. *E.g., Rail Transportation Contracts Under 49 U.S.C. 10709* (STB served Jan. 6, 2009). The administrative ease formerly conferred by exemptions can now be readily achieved through other means.

Exemptions do, however, undermine the Congressional requirements in 49 U.S.C. § 10702 that rates on captive non-contract traffic are to be reasonable and practices on all non-contract traffic are to be reasonable. Exemptions represent a substantial barrier for an affected shipper seeking compliance with those statutory requirements by impeding their ability to seek rate and/or service relief before the Board.

The basic thesis on which the exemptions were adopted is that regulatory protection is not needed because traffic falls below the jurisdictional threshold, signifying the presence of effective competition, and the traffic would not be eligible for regulatory relief in any event. This linkage between the jurisdictional threshold, effective competition, and unavailability of regulatory relief is deficient in several respects.

First, traffic that is not subject to unreasonable rates may still be subjected to unreasonable practices. For example, a percentage-based fuel surcharge does not become any more cost-based, or any less deceptive, because it is applied to traffic falling below the jurisdictional threshold. Exempt traffic also suffers when the railroads experience service problems. Even if there is the possibility of obtaining transportation from some other mode, the alternatives may not be available on short notice or may have their own limitations, such as driver unavailability, traffic congestion, higher fuel costs, etc. The Board has taken an interest in the treatment of exempt traffic from time to time, such as during the service problems of 2013-2014. However, taking an interest, and even offering consumer assistance, are not equivalent to providing a regulatory remedy for an unreasonable practice or failure to provide service upon reasonable request. The exemption hinders access to otherwise available remedies for unreasonable practices. Accordingly, to the extent that any exemption may be deemed appropriate because a type of traffic falls below the jurisdictional threshold, it should only be for unreasonable rates and not for unreasonable practices.

Second, the exemption from unreasonable rate relief is largely superfluous because traffic that falls below the jurisdictional threshold is ineligible for rate relief in any event. The exclusion of movement-specific adjustments simplifies the process of determining the jurisdictional threshold (albeit by distorting costs for many movements) and eliminates most uncertainty. Traffic falling below the threshold is unlikely to seek rate relief in any event, especially considering the high cost of showing of establishing other elements of market dominance and demonstrating rate unreasonableness. There is no need to maintain or establish additional barriers to obtaining rate or other relief.

Third, the Board's focus on average revenue to variable cost (R/VC) ratios for particular traffic segments is too narrow. While a particular commodity or type of movement may, on average, fall below the jurisdictional threshold, there may still be individual movements that fall above it. The Board should not exempt traffic that falls above the threshold from being able to obtain rate (or unreasonable practice) relief just because the bulk of other traffic of the same STCC or type of movement similar traffic falls below the threshold.

Fourth, some traffic will fall under the threshold only because of application of the make-whole adjustment. The make-whole adjustment should not become a vehicle to deprive traffic that falls above the threshold from the opportunity to obtain relief from unreasonable rates or to subject such traffic to unreasonable practices. Likewise, traffic that is burdened by the make-whole adjustment should not, by virtue of the adjustment, also be burdened by unreasonable practices. Single-car and multiple-car shippers may still lack effective alternatives and be dependent on railroad service, even if their rates happen to fall below the jurisdictional threshold. In some cases, rates fall below the jurisdictional threshold because margins in the industries in which the shippers happen to operate are too thin to prevent larger R/VC mark-ups. The fact that such industries may be very competitive is not a reason to deprive shippers of statutory remedies, especially unreasonable practices.

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Accordingly, FRCA supports the revocations proposed in the Board's notice, but those proposed revocations should be only the starting point for further Board action.

Respectfully submitted,

Ann Warner

Ann Warner
Executive Director