Freight Rail Customer Alliance

Commodity Exemption

FRCA Position

FRCA supports efforts of the Surface Transportation Board (STB or Board) in Docket No. EP 704 (Sub-No. 1), to give meaningful consideration to reviewing, reducing, or eliminating most or all of its other existing commodity, boxcar, and Trailer on Flat Car (TOFC)/Container on Flat Car (COFC) exemptions.

FRCA supports the STB's Notice of Proposed Rulemaking (NPRM), Docket No. EP 704 (Sub-No. 1), *Review of Commodity, Boxcar, and TOFC/COFC Exemptions,* issued on March 23, 2016.

FRCA believes that exemptions for certain commodities are no longer needed and have become counterproductive especially given the market, statutory, and regulatory changes for both railroads and shippers. FRCA also advocates that all freight rail shippers, regardless of commodity, should be able to seek rate and/or service relief before the Board.

Issue Background

The STB is currently reviewing allowing various commodities to seek rate and/or service relief from the STB [Docket No. EP 704 (Sub-No. 1), *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*].

On March 23, 2016, the STB issued its notice of proposed rulemaking (NPRM) to revoke the existing class exemptions under 49 C.F.R. Part 1039 for (1) crushed or broken stone or rip rap; (2) hydraulic cement; and (3) coke produced from coal, primary iron or steel products, and iron or steel scrap, wastes or tailings. In this NPRM, the STB also sought public comment regarding the possible revocation of other commodity class exemptions.

As part of the ***Railroad Revitalization and Regulatory Reform Act of 1976*** (separating passenger rail from freight rail), the U.S. Congress gave the Interstate Commerce Commission (ICC), STB's predecessor agency, broad authority to exempt rail carriers from regulation when such regulation was not needed to protect against abuses of market power. Shippers of exempt commodities are not be allowed to see rate or service relief from the ICC/STB.

The ICC first exercised its exemption authority in 1979 by categorically exempting the transportation of certain fresh fruits and vegetables from its regulations [Rail General Exemption Authority—Fresh Fruits & Vegetables, 361 I.C.C. 211 (1979)].

The U.S. Congress expanded the statutory exemption standard in the ***Staggers Rail Act of 1980*** (partially de-regulating the freight railroad industry), mandating that the ICC/STB shall exempt a person, class of persons, or a transaction or service when it finds that the application of this statutory requirement is not necessary to protect shippers from the abuse of market power.

The ***Staggers Act*** also gave the ICC authority to revoke an exemption (partially or completely) if the agency later determines that the exemption is not needed. In other words, the *Staggers Act* anticipated that market conditions could change over time, resulting in commodities being adversely affected by railroad market dominance. Therefore, according to ***Staggers***, the shippers of those commodities should be allowed to seek rate and or service relief from the ICC/STB.

The ICC's exemption decisions facilitated the U.S. rail system's transition from a heavily regulated, financially weak component of the economy into a mature, healthy industry that operates with limited economic oversight. However, more than 40 years have passed since many of the commodity exemptions were adopted, and there have been many changes in the financial health of railroads and exempt commodity shippers as well as the statutory and regulatory scheme, particularly the fact that tariffs and most contracts are no longer filed with the agency.

The STB began reviewing this set of exemptions, Docket No. EP 704 (Sub-No. 1), in 2010. The Board then held a public hearing in 2011 on this issue after receiving informal inquiries questioning the relevance or necessity of some of the existing commodity exemptions. In addition to the 21 individuals who testified, the STB received numerous written comments from parties representing a diverse group of stakeholders including railroads, shippers, and the U.S. Department of Transportation. The STB encouraged all hearing participants to address the: effectiveness of the 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. The STB considered these comments when developing this NPRM.

The STB has the statutory authority – again dating back to the ***Staggers Act of 1980*** – to modify its rules. No additional congressional action is necessary. As such, the recently enacted ***STB Reauthorization Act of 2015***, P.L. 114-110, is silent on this commodity exemption issue.

Status

On Jan 15, 2021, the STB reconvened the technical conference which was first held on Dec 18, 2020 concerning the Board's proposed commodity exemption approach, Docket No. EP 704 (Sub-No. 1), *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*.

This conference was reconvened in response to a Dec 23, 2020 letter filed by the Association of American Railroads (AAR) requesting that the Board either respond in writing to the participants' specific questions that were submitted prior to the Dec 18, 2020 technical conference or reconvene the conference allowing the Board staff to respond the originally submitted questions and then allow participants to ask follow-up questions in real time.

The STB provided additional time for comments: opening comments on Jan 29, 2021; reply comments on March 1, 2021.

The above actions followed the Board requesting public comment on an approach developed by its Office of Economics (OE) for possible use in considering class exemption and revocation issues. This proposal was issued on Sep 30, 2020.

The proposal is intended to help the Board evaluate market conditions by taking into account a variety of metrics related to or indicative of rail transportation competition. It includes:

- Geographic Modal Influence Model – ascertaining how much of the traffic does or could move by other modes, largely water and rail, both in conjunction with trucking up to 30 miles, particularly with respect to lanes.

- Indicator Dashboard – considering R/VC ratios and other related factors.

- Data Visualization – looking at plots of the data to look at market conditions and changes thereto for a particular commodity over time.

FRCA did not submit comments in response to this new approach.

On July 25, 2016, however, FRCA submitted comments supporting the initial NPRM, Docket No 704 (Sub-No. 1), *Review of Commodity, Boxcar, and TOFC/COFC Exemptions* which can be read here: http://railvoices.org/wp-content/uploads/2016/03/FRCA-EP704-Comments-FINAL.pdf