



U.S. Department of
Transportation
Office of the Secretary
of Transportation

General Counsel

1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

January 31, 2011

Ms. Cynthia Brown
Chief of the Section of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

Re: Ex Parte No. 704

228731

Dear Ms. Brown:

Enclosed herewith for filing in the above-referenced proceeding please find the Comments of the United States Department of Transportation. This letter also serves as the Department's Notice of Intent to Participate at the hearing on February 24 in this matter. Mr. Peter Plocki, the Deputy Assistant General Counsel for Litigation, will appear on behalf of the Department, and requests ten minutes' time to address DOT's perspective on the exemptions at issue.

Please contact me if you have any questions.

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Respectfully,

PAUL SAMUEL SMITH
Senior Trial Attorney

(202) 366-9280

Enclosure

**Before the
Surface Transportation Board
Washington, D.C.**

Review of Commodity,
Boxcar, and
TOFC/COFC Exemptions

Docket No. Ex Parte 704

**Comments of the
United States Department of Transportation**

Introduction

The Surface Transportation Board (“STB” or “Board”) instituted this proceeding and scheduled a public hearing in order to review certain categorical exemptions from regulation. Notice served October 21, 2010 (“Notice”). Specifically, the Board invited written comments on existing exemptions from regulation for certain commodities, boxcar traffic, and trailer-on-flatcar/container-on-flatcar (“TOFC/COFC”) traffic. *Id.* As the Board notes, exemption provisions pertaining to railroads go back 35 years with the enactment of the Railroad Revitalization and Regulatory Reform Act of 1976 and were modified to encourage greater use of exemption authority four years later in the Staggers Rail Act of 1980.

These statutes required that railroad activities be exempted from regulation when regulation “was not necessary to carry out the national rail transportation policy and either (1) the exemption was of limited scope; or (2) regulation was not necessary to protect shippers from abuse of market power.” Notice at 2. The Board’s predecessor, the Interstate Commerce Commission, granted the exemptions at issue when, at the conclusion of comprehensive proceedings, it determined that there was sufficient competition to discipline the rate-making ability and service performance offerings of the railroads. *E.g., Exemption from Regulation for*

Boxcar Traffic, 367 I.C.C. 424, 432-35 (1983); *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731, 732-35 (1981).

Rail shippers can petition to have an exemption revoked in whole (on a national basis) or in part (conceivably, for a single shipper in a single traffic lane). However, since the first exemption was implemented in 1979 for movements of fresh fruits and vegetables, there has never been a petition for revocation of any exemption of which we are aware. This proceeding arises from “informal inquiries questioning the relevance and/or necessity” of existing exemptions “given the changes in the competitive landscape and the railroad industry” that have taken place. Notice at 3.

The Department of Transportation’s Position

The United States Department of Transportation (“DOT” or “Department”) believes that, overall, the regulatory environment since the Staggers Act was enacted has allowed the railroads to respond to market forces that demanded lower costs, greater productivity, and innovation in the form of new transportation products and services. The deregulation of other transportation sectors in much the same timeframe led to similar changes in the trucking and waterway sectors. While there continue to be concerns over infrastructure conditions and capacity, the efficiencies of the nation’s transportation network have improved over the past decades as freight shippers have sought to lower total logistics costs, including those related to transportation. In sum, there is no question that the regulatory climate played a significant role in fueling those improvements.

A significant aspect of these improvements is the growth of intermodal traffic, which has been the subject of one of the exemptions that the Board is proposing to review. Shippers have taken advantage of the efficiencies of each of the modes -- rail, motor, and water carriage -- and

have demanded improvements in services, including seamless intermodal connections, to extract additional efficiencies in the supply chain. This traffic has clearly demonstrated the inherent efficiency of rail for the long-haul portion of a move of a container or trailer to or from an intermodal yard or a port. Shippers will naturally continue their demands for ever greater efficiencies, and railroads will need to be responsive, as will each of the other transportation modes. Moreover, with a growing economy, the tonnage moved on the nation's freight transportation system will increase. The "Intermodal Freight" section of these comments below contains a more detailed discussion of intermodal freight traffic.

The Department believes that railroads will need to play an even larger role in the future than they have in the past. Of course, motor carriers do play and will continue to play a critical role in keeping freight moving safely and efficiently throughout the United States, particularly for pick-ups and drop-offs at the origins and destinations of freight movements. However, the Secretary of Transportation has stated that one of his goals is to move more freight via rail and water carriage as a means to improve safety, preserve infrastructure, and enhance air quality: DOT has "made a huge investment in their opportunity to build capacity," and DOT is working with ports "again, to take trucks off the road and to really utilize the marine highways.." ¹ Moreover, the American Recovery and Reinvestment Act of 2009 included a competitive grant program for federal funds, the Transportation Investment Generating Economic Recovery ("TIGER") grants, in which rail intermodal projects emerged as clear winners. As explained more fully in the "Intermodal Freight" section that follows, both Norfolk Southern Railway

¹/ "DOT Says Freight 'Hierarchy' Favors Water, Rail". *The Journal of Commerce Online*. March 24, 2010 (<http://www.joc.com/government-regulation/dot-says-freight-hierarchy-favors-water-rail>) (quoting interview of Secretary LaHood).

("NS") and CSX Transportation ("CSX") demonstrated that significant public benefits would flow from public investment in rail infrastructure projects (the Crescent Corridor and the National Gateway, respectively). Both carriers identified markets where they could increase their presence and compete with motor carriers for the traffic.

Data are less clear on the railroad industry's performance in moving boxcar traffic and agricultural commodities that have also been the subjects of exemptions. DOT is aware of reports of increases in all rail rates, both for exempt and non-exempt traffic, in recent years: overall, freight rail rates (adjusted for inflation) rose nearly 24 percent from 2002 through 2008. *Bureau of Labor Statistics Producer Price Index Industry Data*, <http://data.bls.gov/cgi-bin/srgate> (PCU482111482111); *Bureau of Economic Analysis*, Table 1.1.4 Price Indexes for Gross Domestic Product. However, overall rates declined 7 percent in 2009. *Id.*

The Department's ultimate views on exempt traffic will be informed by its better understanding of the issues after a factual record is developed by knowledgeable parties. The Department believes that each exemption should be evaluated on its merits, and that each evaluation should be based on a careful, case-by-case review.

Intermodal Freight

A.) Shipper demand drives rail intermodal services.

There have been a number of changes in the railroads' infrastructure, equipment, and business practices that have allowed them to provide better intermodal services. A significant part of intermodal growth since 1980 can be attributed to stacking two containers on top of one

another on one rail car or platform (“double-stack service”). A train so configured can carry twice the load with no additional train length. In 1980, the rail industry handled nearly 3.1 million truck units (includes all trailers and containers). At its highest point before the recession, in 2006, the rail industry moved nearly 12.3 million units, a three-fold increase over the 26-year period, with BNSF Railway and Union Pacific Railroad being the rail intermodal leaders. AAR, *Railroad Facts, 2010 Edition*, at 26; *National Rail Plan Progress Report*, at 19. Indeed, in both 2009 and 2010 rail intermodal traffic declined less and recovered more than all other traffic, despite the recession. *AAR Weekly Rail Traffic, 2009 and 2010*.

An analysis by DOT’s Federal Railroad Administration (“FRA”) shows that rail market share increases with the distance freight is transported. For hauls between 500 and 749 miles, rail intermodal has around 6 percent of the market. For the 750- to 999-mile distance, rail intermodal market share is 18 percent. In the 1,000- to 1,499-mile range, rail intermodal has 21 percent, and in the 1,500- to 2,000-mile segment the rail intermodal market share increases to 37 percent. Finally, for shipments of greater than 2,000 miles, the rail intermodal share is 64 percent. These data strongly suggest that the relative efficiency of rail service increases as distances are increased.²

Although double-stack services and long distances give rail a cost advantage over trucks, simply offering shippers a lower rate than that offered by motor carriers is insufficient for railroads to capture the business. Shippers weigh a number of factors in determining how to transport their goods, with the rate being but one. One significant element is the reliability of services. Failure of the railroads to perform consistently can increase costs to shippers and force them to hold additional stock. This creates the need to invest not only in inventory but also in

² FRA analysis of the USDOT/US Census Commodity Flow Survey, 2007 and STB Carload Waybill Sample, 2007.

warehouse services and storage space. Another factor is the time-sensitive nature of certain commodities. This might include fresh produce or other perishables where timely delivery to market is of critical importance.

B.) The public benefits of intermodal rail service.

FRA's *National Rail Plan Progress Report*, submitted to Congress in October 2010, laid out a goal to "develop strategies to attract 50 percent of all shipments 500 miles or greater to intermodal rail." *Progress Report*, at 14. The reasons for this are clear: population growth is the principal driver of the increase in freight tonnage that will need to move on our transportation system. *Id.* at 4. The need for transportation infrastructure investments is certain, and going forward public investment decisions will take into consideration delivery of public benefits. Rail can deliver public benefits in a number of areas important to the Department. They include safety, environmental sustainability, economic competitiveness, "state of good repair" (preservation of roadways), and livability.

As to safety, rail fatality rates per billion ton-miles are lower than for trucks. In 2008, the rail fatality rate per billion ton-miles was 0.33. For motor carriers, that rate was 3.19. *National Rail Plan Progress Report*, at 7. By moving some of the growth in truck traffic onto rail, there will be a reduction in the growth in truck ton-miles, with less exposure on the highways translating into fewer deaths.

Rail intermodal also has an advantage over motor carriage in terms of fuel consumption. A recent study by FRA demonstrated that energy consumption for rail double-stack intermodal operations approximated 413 ton-miles per gallon while similar truck moves were around 110

ton-miles per gallon.³ With less fuel consumption, fewer greenhouse gases and other pollutants are emitted into the atmosphere. This also carries with it less dependence on petroleum and its sometimes unreliable sources.

For economic competitiveness, rail's ability to offer shippers a total package of lower logistics costs means that savings will be passed on to consumers in the form of lower prices for goods in stores. For U.S. manufacturers, keeping logistics costs low means goods are more competitive in the domestic and world markets.

With respect to "state of good repair" concerns, each heavy intercity truck imposes some pavement damage. Moving more freight by rail will help contain the public costs of maintaining and repairing the nation's highways. And with fewer trucks on the highways, congestion is reduced, which improves livability.

C.) The TOFC/COFC exemption and new rail intermodal services.

It is not clear what, if any, role the TOFC/COFC exemption has had in promoting the growth in intermodal traffic. While freedom from regulation has allowed the railroads to introduce new services without being concerned about the possibility of their rates being regulated, it is highly unlikely that intermodal services would have been subject to regulation even in the absence of an exemption, because intermodal rates have, in the past, been close to variable costs. In the future, however, as rail's competitive position is strengthened (particularly

^{3/} Rail and truck fuel efficiency is based on FRA's 2009 *Study of Comparative Evaluation of Rail and Truck Fuel Efficiency on Competitive Corridors*. Fuel efficiency is based on comparisons of double-stack rail moves to truck moves of comparable distances in comparable corridors. See http://www.fra.dot.gov/Downloads/Comparative_Evaluation_Rail_Truck_Fuel_Efficiency.pdf.

on long-haul intermodal movements, where it has a significant cost advantage over truck movements), intermodal rates may rise significantly above variable costs.

Conclusion

The Department acknowledges that there are conditions where regulation is necessary to discipline rail market power, and that shippers may have serious concerns about rising rail rates and one or more of the exemptions at issue. We look forward to a full airing of these concerns and to development of a complete factual record to assist the Board, and the Department, in the formulation of appropriate policies.

Respectfully submitted,

A handwritten signature in black ink, consisting of a series of connected loops and curves, representing the name Robert S. Rivkin.

ROBERT S. RIVKIN
General Counsel

January 31, 2011