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SERVICE DATE – LATE RELEASE OCTOBER 21, 2010

SURFACE TRANSPORTATION BOARD

NOTICE

Docket No. EP 704

REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS

AGENCY: Surface Transportation Board.

ACTION: Notice.

SUMMARY: The Surface Transportation Board (Board) will hold a public hearing beginning at 9:30 a.m. on December 9, 2010, in the Hearing Room on the first floor of the Board's headquarters in Washington, D.C. The purpose of the public hearing will be to review certain categorical exemptions from regulation under 49 U.S.C. § 10502, specifically the commodity exemptions under 49 C.F.R. §§ 1039.10 and 1039.11, the boxcar exemptions under 49 C.F.R. § 1039.14, and trailer-on-flatcar/container-on-flatcar (TOFC/COFC) exemptions under 49 C.F.R. pt. 1090. Persons wishing to speak at the hearing should notify the Board in writing.

DATES: The public hearing will take place on December 9, 2010. Any person wishing to speak at the hearing should file with the Board a combined notice of intent to participate (identifying the party, the proposed speaker, the time requested, and the topic(s) to be covered) and the person's written testimony by November 30, 2010. Written submissions by interested persons who do not wish to appear at the hearing are also due by November 30, 2010.

ADDRESSES: All filings may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the "E-FILING" link on the Board's "www.stb.dot.gov" website. Any person submitting a filing in the traditional paper format should send an original and 10 copies of the filing to: Surface Transportation Board, Attn: Docket No. EP 704, 395 E Street, S.W., Washington, DC 20423-0001.

Copies of written submissions will be posted to the Board's website and will be available for viewing and self-copying in the Board's Public Docket Room, Suite 131. Copies of the submissions will also be available (for a fee) by contacting the Board's Chief Records Officer at (202) 245-0235 or 395 E Street, S.W., Washington, DC 20423-0001.

FOR FURTHER INFORMATION, CONTACT: Julia Farr at (202) 245-0359. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at: (800) 877-8339.]

SUPPLEMENTARY INFORMATION: The exemption provisions pertaining to railroads first adopted in the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31 (1976) (4R Act), and later modified in the Staggers Act of 1980, Pub. L. 96-448, 94 Stat. 1895 (1980) (Staggers Act), fundamentally changed the economic regulation of the railroad industry by the Board's predecessor, the Interstate Commerce Commission (the Commission). Prior to 1976, the Commission heavily regulated the industry. The Commission focused its regulation on ensuring equal treatment of shippers, which in some instances, led to railroad pricing decisions based on factors other than market considerations.

By the early 1970s, the railroads were in financial decline. In an effort to revitalize the struggling railroad industry, Congress enacted the 4R Act and, 4 years later, the Staggers Act. In both statutes, Congress reduced the Commission's oversight of railroads through various means, including the statutory exemption provisions of 49 U.S.C. § 10505. Under § 10505, which was enacted in the 4R Act and modified in the Staggers Act, Congress directed the Commission to exempt railroad activities when it found that regulation was not necessary to carry out the national rail transportation policy (RTP) of 49 U.S.C. § 10101, and either: (1) the exemption was of limited scope; or (2) regulation was not necessary to protect shippers from abuse of market power. (These exemption provisions are now contained in 49 U.S.C. § 10502.<sup>1</sup>) In the Staggers Act, Congress directed the Commission to pursue exemptions aggressively, and to correct any problems arising as a result of the exemption through its revocation authority.<sup>2</sup>

Consistent with that Congressional directive, the Commission exempted numerous commodities, services, and types of transactions from regulation. In its first "commodity" exemption, in Rail General Exemption Authority—Fresh Fruits & Vegetables, 361 I.C.C. 211 (1979), the Commission exempted certain fresh fruits and vegetables from its regulations, based largely on its conclusion that the rail market share of movements of these goods, which were subject to strong competitive forces, was minimal and declining. Since then, the agency has exempted numerous other individual commodities, listed in 49 C.F.R. §§ 1039.10 and 1039.11, after finding that traffic for these individual commodities was sufficiently competitive and that railroads lacked sufficient market power such that abuse of shippers was not a substantial threat.<sup>3</sup> The Commission also exempted rail (and truck) operations provided in connection with

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<sup>1</sup> 49 U.S.C. § 10505, Pub. L. No. 95-473, 92 Stat. 1361, has been omitted by Pub. L. No. 104-88, Title I, § 102(a).

<sup>2</sup> H.R. Rep. No. 96-1430, at 105 (1980).

<sup>3</sup> See, e.g., Rail Gen. Exemption Auth.—Nonferrous Recyclables, 3 S.T.B. 62 (1998); Rail Gen. Exemption Auth.—Petition of AAR to Exempt Rail Transp. of Selected Commodity Groups, 9 I.C.C. 2d 969 (1993); Exemption from Regulation—Rail Transp. Frozen Food, 367 I.C.C. 859 (1983); Liquid Iron Chloride, 367 I.C.C. 347 (1983); Rail Gen. Exemption Auth.—Miscellaneous Agric. Commodities, 367 I.C.C. 298 (1983).

intermodal (TOFC/COFC) services, under 49 C.F.R. pt. 1090,<sup>4</sup> and the rail transportation of all commodities in single-line boxcar service, under 49 C.F.R. § 1039.14.<sup>5</sup>

These agency exemption decisions were instrumental in the U.S. rail system's transition from a heavily regulated, financially weak component of the economy into a mature, relatively healthy industry that operates with only minimal oversight. The transition, however, was not without challenges, sometimes because an exemption under § 10502 excuses carriers from virtually all aspects of regulation,<sup>6</sup> even though the Board's continuing jurisdiction over exempted movements also extinguishes any common law cause of action regarding common carrier duties.<sup>7</sup> Thus, for exempted movements, rail customers could pursue legal remedies under the Interstate Commerce Act only if they successfully petitioned the agency to revoke the exemption under 49 U.S.C. § 10502(d).

As long as 30 years have passed since the adoption of many of these exemptions. In recent years, the Board has received informal inquiries questioning the relevance and/or necessity of some of the existing commodity exemptions, given the changes in the competitive landscape and the railroad industry that have occurred over the past few decades. The Board will, therefore, hold a hearing to explore the continuing utility of and the issues surrounding the categorical exemptions under § 10502, specifically the various commodity exemptions under 49 C.F.R. §§ 1039.10 and 1039.11, the boxcar exemptions under 49 C.F.R. § 1039.14, and TOFC/COFC exemptions under 49 C.F.R. pt. 1090. The Board seeks comments as to the effectiveness of these exemptions in the marketplace and whether the rationale behind any of these exemptions should be revisited.

**DATE OF HEARING:** The hearing will begin at 9:30 am on December 9, 2010, in the 1st floor hearing room at the Board's headquarters at 395 E Street, S.W., in Washington, DC, and will continue, with short breaks if necessary, until every person scheduled to speak has been heard.

**NOTICE OF INTENT TO PARTICIPATE AND TESTIMONY:** Any person wishing to speak at the hearing should file with the Board a combined notice of intent to participate (identifying the party, the proposed speaker, the time requested, and the topic(s) to be covered) and the person's written testimony, by November 30, 2010. Also, any interested person who wishes to

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<sup>4</sup> See Central States Motor Freight Bureau v. ICC, 924 F.2d 1099 (D.C. Cir. 1991), for a summary of the agency's several actions in connection with the progressive deregulation of TOFC/COFC services through the exemption process.

<sup>5</sup> See Brae Corp. v. United States, 740 F.2d 1023 (D.C. Cir. 1984).

<sup>6</sup> See Pejepscot Indus. Park—Pet. for Declaratory Order, 6 S.T.B. 886, 891, reconsideration granted in part, 7 S.T.B. 220 (2003).

<sup>7</sup> See Consol. Rail Corp.—Declaratory Order—Exemption, 1 I.C.C. 2d 895, 898 (1986).

submit a written statement without appearing at the December 9, 2010 hearing should also file that statement by November 30, 2010.

**BOARD RELEASES AND LIVE VIDEO STREAMING AVAILABLE VIA THE INTERNET:** Decisions and notices of the Board, including this notice, are available on the Board's website at "www.stb.dot.gov." This hearing will be available on the Board's website by live video streaming. To access the hearing, click on the "Live Video" link under "Information Center" at the left side of the home page beginning at 9:00 a.m. on December 9, 2010.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Dated: October 21, 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 704

REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS

Decided: November 19, 2010

By notice served on October 21, 2010, and corrected by notice served on October 25, 2010 (October notice),<sup>1</sup> the Board announced its intent to hold a public hearing on December 9, 2010, beginning at 9:30 a.m. The purpose of the public hearing is to review certain categorical exemptions from regulation under 49 U.S.C. § 10502, specifically the commodity exemptions under 49 C.F.R. §§ 1039.10 and 1039.11, the boxcar exemptions under 49 C.F.R. § 1039.14, and trailer-on-flatcar/container-on-flatcar (TOFC/COFC) exemptions under 49 C.F.R. pt. 1090. In the October notice, the Board sought comments as to the effectiveness of the commodity, boxcar, and TOFC/COFC exemptions in the marketplace; whether the rationale behind any of the exemptions should be revisited; and whether the exemptions should be subject to periodic review. The October notice instructed interested persons to submit a notice of intent to participate, along with written testimony, by November 30, 2010. The October notice also required written submissions by persons who do not wish to appear at the hearing to be submitted by November 30, 2010.

On November 4, 2010, the American Short Line and Regional Railroad Association (ASLRRA), which represents approximately 458 Class II and Class III railroads and approximately 900 suppliers and contractors to the short line and regional railroad industry, filed a request to extend the procedural schedule by 120 days. ASLRRA states that the exemptions to be reviewed are complex and impact ASLRRA members and their customers in disparate ways. As a result, ASLRRA requests an extension of time to gather, organize, analyze, and edit the testimony of its members.

On November 15, 2010, the National Industrial Transportation League, the American Forest & Paper Association, and the Paper & Forest Industry Transportation Committee (collectively, interested parties) jointly filed a reply opposing ASLRRA's request for a 120-day extension.<sup>2</sup> They indicate that the requested extension is unnecessarily long, given the scope of testimony the Board has requested, but state that they would not oppose a 30-day extension.

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<sup>1</sup> As stated in the corrected notice, the notice served on October 21, 2010, inadvertently omitted a phrase in describing the comments sought by the Board for the public hearing.

<sup>2</sup> On November 16, 2010, the Alliance of Automobile Manufacturers submitted a filing in support of the interested parties' reply.

In the interest of accommodating ASLRRRA's request, while also avoiding unnecessary delay, the Board will grant a 60-day extension of time for the submission of comments.<sup>3</sup> Due to the holidays in November and December, a 60-day, rather than 30-day, extension is appropriate. In light of the 60-day extension, the public hearing scheduled for December 9, 2010, will be postponed. The hearing will now be held on February 24, 2011, at 9:30 a.m., in the 1st floor hearing room of the Board's headquarters located at 395 E Street, S.W., Washington, DC. Any person wishing to speak at the hearing should file with the Board a combined notice of intent to participate (identifying the party, the proposed speaker, the amount of time requested, and the topic(s) to be covered) and the person's written testimony by January 31, 2011. Written submissions by interested persons who do not wish to appear at the hearing are also due by January 31, 2011.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The request for an extension of the procedural schedule, as modified, is granted.
2. The public hearing scheduled for December 9, 2010, is rescheduled for February 24, 2011.
3. Any party wishing to speak at the hearing must provide a notice of intent to participate and written testimony by January 31, 2011. Written submissions of parties who do not wish to appear at the hearing are also due by January 31, 2011.
4. This decision is effective on the date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

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<sup>3</sup> Because a 60-day extension would require notices of intent and written submissions to be due by Saturday, January 29, 2011, the actual due date will be Monday, January 31, 2011.