

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

REVIEW OF COMMODITY,
BOXCAR, AND TOFC/COFC
EXEMPTIONS

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Ex Parte No. 704 (Sub-No. 1)

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**COMMENTS OF
AK STEEL CORPORATION**

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Dated: July 26, 2016

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AK Steel Corporation (“AK Steel”) submits these Comments in response to the Surface Transportation Board’s (“STB” or “Board”) March 23, 2016 Notice (“Notice”) seeking public comments on the Board’s proposal to revoke the existing class exemptions for specified commodities, including the following Standard Transportation Commodity Code (STCC) groups: STCC 29-914, coke produced from coal (“Coke”), STCC No. 33-12, primary iron or steel products (plates, pipes, and rods) (“Steel”) and STCC No. 40-211, iron or steel scrap, wastes or tailings (“Scrap”).

SUMMARY

AK Steel is a major shipper of exempt commodities. On many of these moves, AK is captive to a single rail carrier, and no other mode of transportation is feasible. Railroad market power over AK Steel’s exempt commodity shipments substantially impacts AK Steel’s economic well-being.

AK Steel actively participated in the Board’s prior proceedings in the main docket (EP 704). In EP 704, AK Steel asked the Board to revoke the existing class exemptions for Coke, Steel and Scrap because the rationale and need for continuation of

the Interstate Commerce Commission's ("ICC") former exemption decisions no longer exist. *See* Comments of AK Steel Corporation at 1 (Jan. 31, 2011) ("2011 Comments"). AK Steel submitted detailed supporting evidence in support of its request.

In its Notice, the Board proposes to adopt the relief AK Steel requested the Board to take – revoke the class exemptions for Coke, Steel and Scrap.¹ AK Steel supports the Board's proposal and urges the Board to act expeditiously to adopt it.

IDENTITY AND INTEREST

AK Steel is a major steel producer with approximately 8,500 employees engaged in the production of flat-rolled carbon, stainless and electrical steels at eight major steelmaking and finishing plants in Indiana, Kentucky, Michigan, Ohio and Pennsylvania. These steels are produced primarily for use in the automotive, infrastructure and manufacturing, and distributors and converters markets, with products sold both domestically and internationally. In addition, AK Steel produces through wholly-owned subsidiaries tubular products at plants located in Indiana and Ohio, and coke at a plant located in West Virginia.

AK Steel relies on the railroads to transport the majority of its freight. This freight consists of inbound movements of raw materials, inter-plant movements of in-process products, and outbound movements of finished products. AK Steel's inbound freight used as part of the manufacturing process includes iron ore, coal, coke, chrome, nickel, silicon manganese, zinc, limestone, carbon and stainless steel scrap, and other

¹ *See* Notice at 7-8 n.13 (citing AK Steel's 2011 Comments).

materials. AK Steel's outbound shipments include a variety of steel products that are transported to numerous customers in the United States and abroad.

Altogether, AK Steel currently ships over 20 million tons of raw, in-process, and finished materials and products annually. Due to the size, weight, and other characteristics of AK Steel's freight, the majority of AK Steel's traffic must be shipped by rail as it is not amenable to shipment by motor carrier or other transportation modes alone.

AK Steel has a significant interest in moving its inbound and outbound materials and products efficiently and cost effectively. AK Steel's rail transportation costs are a very substantial component of its overall cost of doing business. These significant expenses ultimately have a considerable impact on AK Steel's ability to compete in the marketplace.

AK Steel has a substantial interest in this proceeding because it ships substantial volumes of Coke, Steel and Scrap by rail. On many of these moves, it is captive to a single rail carrier and is subject to monopoly railroad power and market dominant railroad pricing. AK Steel actively participated in the Board's EP 704 proceeding and AK Steel is pleased that the Board is proposing to adopt the relief AK Steel requested in 2011 – revocation of the class exemptions on Coke, Steel and Scrap.

COMMENTS

AK Steel supports the Board's proposal to revoke the class exemptions for Coke, Steel and Scrap for the reasons set forth in its 2011 Comments, as supplemented by the Board's findings in its Notice, and its additional comments set forth below.

A. Tariff Filing Requirements

The ICC granted class exemptions on Coke, Steel and Scrap to eliminate “[t]he chief burden imposed by regulation” – “the requirement that tariffs be filed.” *Rail Gen. Exemption Auth. – Exemption of Paints, Enamels, Lacquers, Shellacs, Etc.*, EP 346 (Sub-No. 33), slip op. at 6 (STB served April 20, 1998) (“*Paint Exemption*”).²

In 1995, Congress abolished tariff filing requirements. See ICC Termination Act of 1995 (“ICCTA”), Pub. Law No. 104-88, § 102, 109 Stat. 803, 804 (1995) (repealing former 49 U.S.C. § 10761). Since the “chief burden imposed by regulation” is now long gone, the class exemptions for Coke, Steel and Scrap should be revoked. See *Paint Exemption*, slip op. at 6 (denying class exemption request as unnecessary in light of ICCTA’s repeal of tariff filing requirements).

B. Market Power

The ICC also concluded that most shippers of Coke, Steel and Scrap had many competitive transportation choices, so exempting these commodities from regulation would not injure most shippers of these commodities. The ICC based these

² See *Rail Gen. Exemption Auth. – Pet. of AAR to Exempt Rail Trans. of Selected Commodity Groups*, 9 I.C.C.2d 969, 978 (1993) (“*Coke/Steel Exemption*”) (granting exemption for Coke “would reduce the administrative burden associated with tariff and contract filing”) (internal quotation marks omitted); *id.*, 9 I.C.C.2d at 980 (granting the exemption for Steel “would reduce the administrative burden associated with tariff and contract filing”) (internal quotation marks omitted); *Rail Gen. Exemption Auth. – Exemption of Ferrous Recyclables*, EP 346 (Sub-No. 35), 1995 WL 294272 at * 1 (ICC served May 16, 1995) (“*Scrap Exemption*”) (granting exemption for Scrap would remove “administrative burdens occasioned by rail contract summary and tariff filing requirements”). The ICCTA also eliminated all contract/contract summary filing requirements for Coke, Steel and Scrap. *Id.*, § 102, 109 Stat. 804 (repealing former 49 U.S.C. § 10713(b)).

conclusions on its consideration of aggregated market share data, aggregated traffic profitability data, and anecdotal evidence.³

In its Notice, the STB observes that “[s]everal changes relating to the transportation of these commodity groups suggest that railroads have greater market power today than they did when the ICC issued its exemption decisions.” *Id.* at 7. The Board then carefully enumerates several pertinent changes: reduction in water carrier competition; reduction in motor carrier competition; significant increases in the percentage of revenue that is potentially captive – *i.e.*, revenues on traffic with revenue-to-variable cost (“R/VC”) ratios over 180%; and significant increases in the R/VC ratios for this potentially captive traffic. *Id.* at 7-9.

Of particular note is the Board’s calculation of the current average R/VC ratios on potentially captive traffic – Coke (248%), Steel (237%), and Scrap (230%). *Id.* at 8-9. Common sense dictates that traffic with R/VC ratios at these levels and higher (since these figures are averages) should not be exempt from STB regulation. The Board correctly proposes to reinstate regulation on Coke, Steel and Scrap, and should do so immediately.

C. Partial Revocation Proceedings

The ICC believed that captive shippers of exempt commodities would be protected because they could obtain orders partially revoking the class exemptions as applied to their traffic and then seek regulatory relief under governing Board standards.

³ See *Coal/Coke Exemption*, 9 I.C.C.2d at 978-981; *Scrap Exemption*, 1995 WL 294272 at *2-4.

One prescient ICC Commissioner – Commissioner Simmons – questioned the wisdom of the Board’s approach. He maintained that “aggregating hundreds of commodities into a few broad categories . . . makes it impossible to identify which commodities can or should be exempted” and that leaving “errors [to] be corrected through the time consuming process of revocation” will have “serious deleterious effects on shippers.” *Rail Gen Exemption Auth. – Misc. Manufactured Commodities*, 6 I.C.C.2d 186, 200 (1989) (Commissioner Simmons, dissenting).

Commissioner Simmons was right. Very few shippers have the resources to pursue both a partial revocation order and a request for merits relief, and few shippers have even attempted to do so. Indeed, matters are worse for shippers today than they were in the 1980s and early 1990s when the ICC adopted the class exemptions.

At that time, a shipper could simultaneously seek a partial revocation order and STB relief on the merits.⁴ Not so today, as the Board has ruled that relief must be pursued sequentially in some cases – first obtain an exemption order, and then pursue an STB merits decision.⁵ This approach adds a new layer of costs and delays to the STB regulatory relief processes.

⁴ See, e.g., *FMC Wyoming Corp. v. Union Pac. R.R.*, NOR 42022, slip op. at 2 (STB served Aug. 31, 1998) (petition for partial revocation could be considered with the complaint for rate relief); *Rail Gen. Exemption Auth. – Nonferrous Recyclables*, EP 561, slip op. at 7 (STB served Apr. 21, 1998) (same).

⁵ See *Simplified Standards For Rail Rate Cases*, EP 646 (Sub-No. 1), slip op. at 99 (STB served Sept. 5, 2007) (“We will . . . generally hold any rate complaint in abeyance . . . while parties litigate the merits of the request for a partial revocation.”).

The STB should recognize the partial exemption revocation process for what it is – an insurmountable barrier for most shippers to even try to obtain regulatory relief – and aggressively revoke class commodity exemptions where, as here for Coke, Steel and Scrap, they do not serve to advance the public interest, but instead work to deprive shippers of their basic rights to reasonable rail service and reasonable rail rates on market dominant traffic.

D. Carrier Financial Health

The ICC's many decisions granting broad commodity exemptions were made at a time when all major railroads were deemed by the ICC to be revenue inadequate. The exemption decisions were part of a series of decisions made by the ICC to give railroads more pricing freedom.

Today, things have changed. Major railroads are extraordinarily profitable,⁶ while many industries the railroads serve, like the steel industry, are struggling. The STB can and should do everything it can to insure the health of railroad customers, and one way it can do so is to revoke the class exemptions on Coke, Steel and Scrap.

⁶ See, e.g., *Railroad Revenue Adequacy – 2014 Determination*, EP 552 (Sub-No. 19) (STB served Sept. 8, 2015).

CONCLUSION

AK Steel appreciates the opportunity to present its views to the Board and urges the Board to expeditiously revoke the current class exemptions on Coke, Steel and Scrap.

Respectfully submitted,

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