

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

241830

ENTERED
Office of Proceedings
October 21, 2016
Part of
Public Record

Docket No. EP 704 (Sub-No. 1)

REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS

REPLY TO MOTION FOR LEAVE TO SUPPLEMENT THE RECORD

RHONDA S. FERGUSON
LOUISE A. RINN
CRAIG V. RICHARDSON
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
(402) 544-3309

MICHAEL L. ROSENTHAL
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001
(202) 662-6000

Attorneys for Union Pacific Railroad Company

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Union Pacific Railroad Company urges the Board to deny the October 3, 2016, motion for leave to supplement the record filed by The American Forest & Paper Association (AF&PA) and The Paper and Forest Industry Transportation Committee (PFITC) (collectively, the Forest Products Shippers). The Forest Products Shippers are attempting to submit opening evidence more than two months late. The Board should not allow the Forest Products Shippers to undermine the schedule in this proceeding and the rights of other parties to file reply comments through their unjustified delay in submitting material they should have included in their July 26, 2016, opening comments. If the Board allows the additional material to become part of the record, it should give Union Pacific and other parties 30 days to file substantive replies.

In a Notice of Proposed Rulemaking served March 23, 2016 (NPRM), the Board sought public comments on a proposal to revoke existing class exemptions for certain commodities. The Board also “invite[d] interested parties to file, during the comment period for these proposed rules, comments regarding the possible revocation of other commodity class exemptions.” NPRM at 1.

The Paper Shippers had abundant time to prepare opening comments. On April 27, 2016, AF&PA filed a letter supporting a request by the Association of American Railroads to extend

the deadline for filing opening comments by 60 days, from May 27 to July 26.¹ On May 6, the Board granted the requested extension and established a July 26 deadline for opening comments and an August 26 deadline for reply comments. *See* Decision, EP 704 (Sub-No. 1) (STB served May 6, 2016).

On July 26, AF&PA filed opening comments. AF&PA relied on counsel's arguments and an economic consultant's analyses of waybill data to support its request that the Board revoke (i) commodity exemptions for paper and forest products, and (ii) the boxcar exemption, to the extent it applies to rail shipments of paper and forest products.

Union Pacific and other parties replied to AF&PA's opening comments. Union Pacific's reply highlighted flaws in the assertions of AF&PA's counsel and in the analyses performed by AF&PA's consultant. Union Pacific's reply also included an excerpt from a witness statement submitted in an earlier proceeding that describes the intensely competitive marketplace for transportation of paper and forest products. The Association of American Railroads, Norfolk Southern Railway, and CSX Transportation also submitted replies that criticized AF&PA's submission and contained evidence supporting the paper and forest products exemptions.

After reviewing the reply evidence, the Forest Products Shippers apparently decided that AF&PA's opening comments were insufficient to support their request. They now seek to submit verified statements containing testimony from three witnesses who make claims about competition for transportation of paper and forest products.

The Board should reject this attempt at sandbagging. Much of the testimony the Forest Product Shippers seek to submit is irrelevant—it challenges premises supporting the Interstate

¹ *See* Letter from Karyn A. Booth (Counsel for AF&PA) to Cynthia T. Brown (Chief, Section of Administration, Office of Proceedings) (Apr. 27, 2016).

Commerce Commission’s initial decisions to exempt paper and forest products from regulation. However, the testimony also makes claims about changes in marketplace conditions, including changes in railroad behavior, that purportedly support revocation of the exemptions. This is exactly the type of information the Board invited parties to file—but *as opening comments*. See NPRM at 4 (“The Board also welcomes interested parties to file comments regarding the possible revocation of other commodity class exemptions; such comments should address any marketplace changes comparable to the ones described below.”).² The Forest Products Shippers now say they just want to provide a “more complete record.” Motion at 4. But the Board gave them a fair opportunity to provide a more complete record, and they elected not to file their witness testimony on opening, thus depriving Union Pacific and other parties of the chance to provide even more complete record on reply. That is a textbook case of sandbagging.³

Under the schedule established for this proceeding, Union Pacific and other parties were entitled to an opportunity to respond to such evidence through reply comments. When company representatives made substantive claims in their opening comments about marketplace conditions affecting those companies, Union Pacific addressed those comments in its reply.⁴ By seeking to submit their testimony as “supplemental evidence” long after the deadline for filing comments

² It is also exactly the type of information the Board’s rules require to be included in a petition to revoke an exemption as part of the petitioner’s case-in-chief. See 49 C.F.R. § 1121.3. AF&PA’s opening comments in this proceeding are a de facto petition to revoke the exemptions for paper and forest products and boxcars when used for shipping those products.

³ As for the Forest Product Shipper’s citation to late submissions in *Major Rail Consolidation Procedures* (Motion at 4), the fact-specific witness testimony that the Forest Product Shippers are seeking to submit here is entirely different from the submissions at issue in *Major Rail Consolidation Procedures*, which involved legal arguments about the North American Free Trade Agreement’s impact on the Board’s proposed merger rules.

⁴ See Union Pacific Reply Comments at 2-3 (addressing opening comments of Graniterock and Texas Crushed Stone); *id.* at 9 (addressing opening comments of AK Steel).

has passed, the Forest Products Shippers are depriving Union Pacific and other parties of a chance to reply to that testimony.

If the Board accepts the Forest Products Shippers' late-filed testimony into the record, it must give Union Pacific and other parties an opportunity to respond. If Union Pacific and others *are not* allowed to respond, then contrary to the Forest Products Shippers' claim (Motion at 3), the Board's acceptance of the late-filed testimony *would* cause "prejudice to other parties." 49 C.F.R. § 1110.5.⁵ Likewise, if Union Pacific and others *are* allowed to respond, that would extend the time required to complete this proceeding, consume company resources, and increase legal expenses. Thus, contrary to the Forest Products Shippers' claim (Motion at 3), the Board's acceptance of their late-filed testimony *would* cause other parties to "incur[] additional expense [and] delay." 49 C.F.R. § 1110.5. The outcome that is most consistent with 49 C.F.R. § 1110.5 is also the one that would reinforce respect for Board scheduling orders: deny the motion and reject the untimely verified statements.

⁵ In their Motion, the Forest Products Shippers insert the word "undue" when they purport to quote 49 C.F.R. § 1110.5. However, § 1110.5 does not use the word "undue." Rather, § 1110.5 uses the word "additional," which has a very different meaning. Section 1110.5 says late-filed comments "will be considered so far as possible without incurring additional expense, delay, or prejudice to other parties."

Respectfully submitted,

/s/ Michael L. Rosenthal
MICHAEL L. ROSENTHAL
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001
(202) 662-6000

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