



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

**General Counsel**

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

July 26, 2016

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**FILED ELECTRONICALLY**

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

ENTERED  
Office of Proceedings  
July 26, 2016  
Part of  
Public Record

**Re: Docket No. EP 704 (Sub-No. 1)  
Review of Commodity, Boxcar and TOFC/COFC Exemptions  
Opening Comments of the United States Department of Transportation**

Dear Ms. Brown:

Attached please find the Opening Comments of the United States Department of Transportation in this matter. Thank you for your assistance, and please feel free to contact me with any questions.

Respectfully,

Christopher S. Perry  
Senior Trial Attorney

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The Honorable Daniel R. Elliott III  
Chairman  
Surface Transportation Board  
395 E. Street, S.W.  
Washington, D.C. 20423

**Re: Docket No. EP 704 (Sub-No. 1)  
Review of Commodity, Boxcar and TOFC/COFC Exemptions  
Comment on Notice of Proposed Rulemaking**

Dear Chairman Elliott:

The United States Department of Transportation (DOT or Department) and the Federal Railroad Administration (FRA), an operating administration of DOT, are pleased to submit this comment in response to the Board's Notice of Proposed Rulemaking (NPRM) in the above-referenced proceeding, dated March 23, 2016. DOT appreciates the Board's continued attention to the issues raised here, particularly in light of the information that was submitted, and the many viewpoints that were expressed, during an earlier stage of the Board's proceedings on commodity exemptions. *See* Hrg. Trans., STB No. EP 704, *Review of Commodity, Boxcar, and TOFC/COFC Exemptions* (Feb. 24, 2011 hearing).

As explained in the NPRM, Congress has given the Board the authority to exempt rail traffic from regulation, consistent with national rail transportation policy, where such regulation "is not necessary to protect shippers from the abuse of market power." NPRM at 2 (citing 49 U.S.C. § 10502). Such exemptions are consistent with Congress's intent to promote reliance on market forces and "to minimize the need for Federal regulatory control over the rail transportation system." 49 U.S.C. § 10101(2). In exercising its authority, the Board and its predecessor, the Interstate Commerce Commission (ICC), have for several decades exempted various classes of commodities and railroad traffic from regulatory oversight, including trailer-on-flatcar/container-on-flatcar services and single-line boxcar services. *See* 49 C.F.R. §§ 1039.10, 1039.11 (commodities); 49 C.F.R. part 1090 (intermodal service); 49 C.F.R. § 1039.14 (boxcars). The Board also has the authority to revoke an exemption if it determines that doing so is necessary to

effectuate national rail transportation policy. 49 U.S.C. § 10502(d). However, to the Department's knowledge, the Board has never taken this step.

Along with the Board, DOT has continued to be attentive to market conditions and to the continued utility of exempting traffic from regulation. To that end, DOT filed comments and offered testimony in connection with the Board's February 2011 hearing on this subject. Noting that the Board and the ICC had exempted various forms of traffic in years past, DOT observed that "the regulatory environment since the Staggers Act was enacted [in 1980] 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." STB No. EP 704, *Comments of the United States Department of Transportation*, at 2 (filed Jan. 31, 2011). DOT also expressed the view that "each exemption should be evaluated on its merits, and that each evaluation should be based on a careful, case-by-case review." *Id.* at 4.

In the Department's view, the same principles apply to the Board's consideration of the specific commodities that it has identified in the NPRM for potential revocation of regulatory exemptions. DOT appreciates that the Board has focused upon these specific commodities based upon a threshold consideration of "the dynamics of the[se] particular transportation markets." NPRM at 4. In addition, DOT is hopeful that the submissions of other parties, particularly those who are closely involved in the shipment of these specific commodities, will help to allay concerns about the adequacy of the existing record. As these proceedings continue, DOT suggests that the Board remain open to considering all available evidence, without placing undue reliance upon any single measure as a proxy for market conditions. As one example, although the NPRM focuses in large part upon changes in the revenue/variable cost ratio for the specified commodities, that measure, while useful, may not be a sufficiently robust indicator of whether revocation of a commodity exemption is warranted. In addition, although the Board has invited comment on potential revocation of other exemptions beyond those specified in the NPRM (*id.*), it will be particularly important to ensure that any such potential revocations are reviewed on the basis of a robust record as well.

The Department looks forward to reviewing the submissions of other parties and may submit further views or information at a later stage. We appreciate your consideration of our views.

Respectfully,

A handwritten signature in black ink, appearing to read 'Molly J. Moran', with a long horizontal flourish extending to the right.

Molly J. Moran  
Acting General Counsel