

October 21, 2016

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

Re: EP 704 (Sub-No 1), Review of Commodity, Boxcar, and TOFC/COFC Exemptions

Dear Ms. Brown:

By this letter, the Association of American Railroads (“AAR”) responds to the motion filed by the American Forest & Paper Association (“AFPA”) and the Paper and Forest Industry Transportation Committee (“PFITC”) (collectively, “Movants”) to supplement the record in the above-referenced proceeding. The motion should be denied because Movants’ filing is untimely, contrary to the Board’s rules, prejudicial to AAR and other participants, and improperly seeks to expand these proceedings with respect to commodities that the Board did not even address in its proposal.

The Board issued its notice of proposed rulemaking (“NPRM”) in this matter on March 23, 2016, proposing to revoke the regulatory exemptions for five commodities that did *not* include forest or paper products. Although the NPRM also “welcome[d] interested parties to file comments regarding the possible revocation of other commodity class exemptions,” NPRM at 4, it did not propose to revoke the exemptions with respect to forest or paper products, or to otherwise address these commodities. As AAR explained in its comments, “[a]ny information the Board receives in response to this NPRM with respect to commodities not covered by this proposal cannot form the basis for adopting additional revocations absent a new rulemaking.” AAR Opening Cmt. at 42; *see also* AAR Reply at 21. Nevertheless, AFPA—but not PFITC—filed an opening comment requesting revocation of exemptions applicable to forest and paper products, and the boxcar exemption as it applies to rail shipments of forest products. Movants together then filed a reply through which they addressed points raised in the opening comments.

Now, Movants request leave to supplement the record with yet another filing—an impermissible reply to a reply. 49 C.F.R. § 1104.13(c); *see also Cal. High-Speed Rail Auth.—Petition for Declaratory Order*, FD 35861, slip op. at 5 (served Dec. 12, 2014) (denying leave to file because “[o]ur rules do not permit a reply to a reply”). No reply to a reply should be permitted, but were the Board inclined to disagree, it should nevertheless

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prohibit Movants' proffered reply because it includes additional (and anecdotal) evidence. When "[a] party seek[s] [a] revocation of an exemption"—what AFPA sought through its opening comment—that party “shall provide *all of its supporting information at the time it files its petition.*” 49 C.F.R. § 1121.3(c) (emphasis added).

Movants' proffered reply to a reply is also untimely, even if it were otherwise permitted. For those replies that are permitted, “[a] party may file a reply or motion addressed to any pleading within 20 days after the pleading is filed with the Board.” 49 C.F.R. § 1104.13(a). The motion for leave was filed several weeks late—38 days after AAR and other commenters submitted their replies in this matter.

Movants argue that the Board should grant leave in order to “provide a more complete record.” Mot. for Leave at 4. But any incompleteness is due entirely to AFPA's failure to file *all* supporting evidence with its opening comment (or with its reply). PFITC, for its part, did not even file an opening comment at all. Allowing Movants' belated filing not only would be contrary to the rules, it would be prejudicial to AAR and all of the other participants who complied with the Board's rules and who will not have an opportunity to respond substantively to Movants' untimely filing. For this reason, even where a party has charged that an opposing party's reply is misleading and requires correction—as Movants do here—the Board has denied leave. *See, e.g., Peter Pan Bus Lines, Inc.-Pooling--Greyhound Lines, Inc.*, MC-F-20904, MC-F-20908, and MC-F-20912, slip op. at 3 (served Apr. 19, 2011) (“The alleged misstatements do not, however, constitute good cause for accepting a reply to a reply.”); *E.-W. Resort Transp., LLC—Pet. for Declaratory Order—Motor Carrier Transp. of Passengers in Colo.*, MCF 21008, slip op. at 2 (STB served Apr. 8, 2005) (rejecting a reply to a reply submitted on the ground that the record was incomplete due to representations made in the other party's reply).

For all of these reasons, the Board should deny the motion for leave.

Thank you for your attention to this matter. Please let us know if you have any questions.

Respectfully,

/s/ Cynthia Richman

/s/ Geoffrey Sigler

Cynthia Richman

Geoffrey Sigler