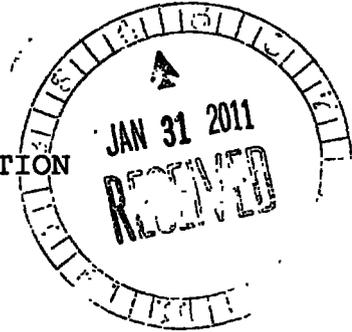


Before the  
SURFACE TRANSPORTATION BOARD

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**ORIGINAL**

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Ex Parte No. 704

REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTION



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WRITTEN SUBMISSION  
OF SAMUEL J. NASCA

ENTERED  
Office of Proceedings  
JAN 31 2011  
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Public Record

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1025 Connecticut Ave.  
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Attorney for Samuel J. Nasca

Due: January 31, 2011

Before the  
SURFACE TRANSPORTATION BOARD

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WRITTEN SUBMISSION  
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Samuel J. Nasca, <sup>1/</sup> for and on behalf of United Transportation Union-New York State Legislative Board (UTU-NY), submits the attached written statement, pursuant to the Surface Transportation Board (STB) Corrected Notice (CN) served October 25, 2010. 75 Fed. Reg. 66187-88 (Oct. 27, 2010). <sup>2/</sup>

The STB seeks comments as to the effectiveness of certain exemptions in the marketplace; whether the rationale behind any of these exemptions should be revisited; and whether the exemptions should be subject to periodic review.

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<sup>1/</sup> New York State Legislative Director for United Transportation Union, with offices at 35 Fuller Road, Albany, NY 12205.

<sup>2/</sup>The Federal Register notice refers to the original Notice served October 21, 2010, rather than to the corrected Notice served October 25. Moreover, this commenter is unaware of any Notice advice given for the decision served November 19, 2010, postponing the initial dates for responses to the Notice and for hearing.

In addition to the restricted nature of the comments sought, as set forth in the CN,<sup>3/</sup> this commenter takes issue with the so-called "Supplementary Information," claimed by the CA, at 2-3.

1. Regulation. The CN erroneously claims that the former Interstate Commerce Commission (Commission) "heavily regulated" the railroad industry, and that 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 consideration. The CN asserts that the 4R Act, as modified in the Staggers Act, fundamentally changed the economic regulation of the railroad industry by the Commission.<sup>4/</sup>

In actual fact, the railroad industry was not "heavily regulated" by the Commission. Indeed, the major criticisms of the Commission in post-World War II years was that the Commission was too lenient with the rail industry.<sup>5/</sup> Moreover, the CN's contention that the Commission's regulation focused on equal treatment for shippers cannot refer to regulation generally, as the agency dealt with a number of issues other than those involving shippers. To the extent the CN may have reference to rate regula-

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<sup>3/</sup>It is the amended notice, not the original notice, which set forth the restricted nature of the desired comments.

<sup>4/</sup> The order instituting this investigation does not bear the signatures of the STB members; rather it was issued by the Director, Office of Proceedings (DOP).

<sup>5/</sup> For example, see: Fellmuth, Robert C. (Ralph Nader Study Group on the ICC & Transp.), The Interstate Commerce Omission (Grossman, 1970).

tion, the Commission properly considered factors other than the "marketplace," as the provisions of the former 49 U.S.C. 15a-- rule of ratemaking--called attention to a number of factors.<sup>6/</sup>

2. Railroad Decline. The CN asserts that railroads in the early 1970's were in financial decline, such that the 4R and Staggers acts were intended to revitalize the industry by the reduction of Commission oversight by various means, including the exemption provisions of 49 U.S.C. 10505, and to correct any problems through revocation authority.

This commenter does not view the railroad industry as being in a financial decline during the 1970's. The major railroad consolidations during the early 1970's, such as the Penn-Central and Northern Lines mergers, were a primary cause for the industry financial problems, rather than conditions inherent to the industry, leading to reorganizations of the Penn-Central, Rock Island, and Milwaukee Road, among others. Major provisions of the 4R and Staggers acts were directed to these major carrier failures stemming from consolidation difficulties. Moreover, the CN does not correctly quote the Staggers Act Conference Report, as the revocation remedy was designed for "market abuse," and not for any exemption problem. (H.Rept. 96-1430, at 105 (1980).

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<sup>6/</sup> The CA seems to suggest that railroad ratemaking should be based solely or primarily upon "market considerations." The current deep economic recession has forced an examination of the marketplace as a substitution for regulation in financial institutions, and this thinking already has been carried forward for some aspects of transportation. Cf. Horan, Hubert: "Double Marginalization" and the Counter-Revolution Against Liberal Airline Competition, 37 Transp. L.J. 251 (2010).

3. Effect of Exemptions. This commenter fails to see any proof for the CN's conclusion that the exemption decisions undergoing review in this proceeding were instrumental in the U.S. rail system's transition from a heavily regulated, and financially weak component of the economy into a mature and relatively healthy industry with minimal oversight.

First, as indicated, the railroad industry was not "heavily regulated" prior to the 4R and Staggers acts. The exemptions undergoing review herein did not deal with commodities where the carriers were being unduly restricted in ratemaking. The major rate review organization was not the Commission; rather, the railroad bureaus were the principal review organizations. See: Wiprud, Arne C., Justice in Transportation (Ziff-Davis, 1945; Shott, John G., The Railroad Monopoly (Public Affairs Inst., 1950); Berge, Wendell, Economic Freedom for the West (Univ. of Neb. Press, 1946). Cf. Drayton, Charles D., Transportation Under Two Masters (Nat'l Law Book Co., 1946). Second, there has been no showing of the extent to which the exemptions under review has contributed to carrier prosperity.

Respectfully submitted,

  
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Attorney for Ssamuel J. Nasca

January 31, 2011

WRITTEN SUBMISSION OF SAMUEL J. NASCA

My name is Samuel J. Nasca, with offices at 35 Fuller Road, Albany, NY 12205. I serve as New York State Legislative Director for United Transportation Union (UTU-NY), a full-time elective position I have held since March 1984. My seniority commenced in 1967 on the former Erie-Lackawanna Railroad Company.

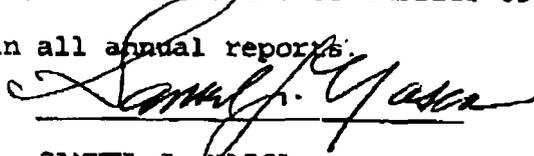
I am fully familiar with railroad operations in New York State. I have read the Notice, and Corrected Notice (CN), dated October 21, 2010, issued by Rachel D. Campbell, Director, Office of Proceedings. I have the following comments in response to the last full sentence on the final paragraph of CN at p. 3.

1. I have no comment as to the effectiveness of the exemptions in the marketplace, and suggest "the marketplace" is not identical with "market abuse."

2. All of the rationale for each of the exemptions should be revisited. I believe this should be mandatory for the boxcar exemption, where I understand there was opposition to the exemption by railroad employee organization to this very broad exemption in its initial adoption and during court review.

3. I have no comment as to the time period for periodic review. I recommend that the STB consider a proceeding to review additional exemptions outside the ratemaking sphere, such as the carrier and non-carrier acquisition class exemptions (49 U.S.C. 10901, 10902), abandonment class exemption (49 U.S.C. 10903), and trackage rights class exemption (49 U.S.C. 11323-24); and the

exemption from filing carrier annual reports by Class II and Class III carriers, along with reinstatement of carrier officer and executive salary data in all annual reports.



SAMUEL J. NASCA

Dated at  
Albany NY  
January 31, 2011