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January 31, 2011

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

ENTERED  
Office of Proceedings  
FEB - 1 2011  
Part of  
Public Record

Re: Ex Parte No. 704 -- Review of Commodity, Boxcar and TOFC/COFC Exemptions  
-- Notice of Intent to Participate and Comments of CSX Transportation, Inc.

Dear Ms. Brown:

Enclosed for filing in the above referenced matter are the Comments of CSX Transportation, Inc. ("CSXT"). CSXT welcomes the opportunity to provide testimony at the Board's hearing on February 24, 2011 in Washington, D.C., and this letter will serve as CSXT's Notice of Intent to Participate.

The speaker representing CSXT will be Clarence Gooden, Executive Vice President and Chief Commercial Officer of CSX Transportation, Inc. Also, enclosed is a written summary of the testimony Mr. Gooden will present at the Board's hearing. CSXT requests ten (10) minutes for Mr. Gooden's power point presentation, which will be provided to the Board in advance of the hearing.

CSXT also supports and adopts the Written Testimony of the Association of American Railroads filed today in this proceeding.

CSXT is e-filing this notice. Thank you for your assistance.

Respectfully submitted,

Peter J. Shutz

PJS/krb

Enclosure

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**EX PARTE NO. 704**

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**REVIEW OF COMMODITY, BOXCAR,  
AND TOFC/COFC EXEMPTIONS**

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**COMMENTS OF  
CSX TRANSPORTATION, INC.**

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Dated: January 31, 2011

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Ex Parte No. 704**

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**REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS**

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**COMMENTS OF CSX TRANSPORTATION, INC.**

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CSX Transportation, Inc. ("CSXT") appreciates this opportunity to submit written comments to the Board on the legal and policy-based rationales that support continuation of the commodity, boxcar, and TOFC/COFC exemptions. CSXT joins in the comments submitted by the Association of American Railroads ("AAR"), and submits these additional comments in response to the Board's corrected notice of October 25, 2010, as amended by a decision served on November 19, 2010. These comments principally address the legal framework and historical context that should govern the Board's consideration of the commodity, boxcar, and TOFC/COFC exemptions. Included with these comments is the written summary of the testimony that Clarence W. Gooden, Executive Vice President and Chief Commercial Officer of CSXT will provide on behalf of CSXT at the Board's hearing scheduled for February 24, 2011.

**I. THE BOARD'S EXEMPTION AUTHORITY IS AN INTEGRAL ELEMENT OF THE DEREGULATORY REFORMS THAT HAVE IMPROVED THE CONDITION OF THE RAIL TRANSPORTATION INDUSTRY**

Beginning with the passage of the 4-R Act in 1976,<sup>1</sup> the Board (and its predecessor agency, the ICC) has held the authority to exempt transactions and services from regulatory constraints. The exemption power was conceived of as an important means by which the Board could continuously advance the broad deregulatory goals embodied both in the 4-R Act and in the subsequent Staggers Rail Act of 1980. Over the last three decades, the Board has acted precisely as Congress intended by using its exemption authority to lift regulatory constraints for a substantial share of total rail traffic. And the results of this deregulatory experiment have been undeniably successful, as the railroad industry has taken advantage of the commodity, boxcar, and TOFC/COFC exemptions to compete more aggressively and more successfully for this traffic. By freeing the industry to compete, the exemptions have played a significant role in advancing the rail transportation policy of 49 U.S.C. §10101 and in supporting the development of a modern and competitive railroad industry.

A clear understanding of the critical role played by exemptions in the structure of the governing statute is essential to answering the question, raised in the Board's Notice, of "whether the rationale behind any of these exemptions should be revisited." The most basic "rationale" for the exemptions arises directly from the statute itself and from the clearly-expressed intent of Congress, which mandate that exemptions be implemented "to the maximum extent possible" as a means of furthering the deregulation that has allowed meaningful, incremental steps toward

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<sup>1</sup> Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976) ("4-R Act").

revitalization of the railroad industry. As described in the following sections, the exemption statute reflects a legislative judgment that maximal use of exemptions would foster enhanced and more effective competition among railroads and with other modes of transportation. This rationale—which Congress has maintained and strengthened over the past thirty-five years—supports continuation of all of the existing exemptions and the issuance of new exemptions where the statutory criteria are satisfied.

**A. Congress Recognized That Deregulatory Reform Was a Necessary Condition for Revitalization of the Rail Industry.**

The ills afflicting the railroad industry under the intrusive, pre-Staggers Act regulatory environment are well-known and need not be recounted here in detail. Regulatory constraints had long prevented the railroads from flexibly responding to the demands of a competitive marketplace. The predictable results of overregulation were evident in the ongoing loss of the railroad's share of freight traffic to competition from trucks and in the industry's inability to attract sufficient investment capital to maintain its infrastructure.<sup>2</sup>

These conditions gave rise to a broad consensus that the railroad industry must be substantially deregulated to ensure its continued survival. The key to these reforms was the recognition that the railroad industry should be freed from regulatory constraints to the maximum extent possible and allowed to compete on price and service like a normal industry. These objectives were spelled out precisely by the then-Secretary of Transportation in hearings preceding the enactment of the Staggers Act:

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<sup>2</sup> See, e.g., Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. 96-1035, 96th Cong., 2d Sess. 95-119 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 3978, 4039-4063.

We are concerned above all that control of railroad pricing as well as operating and investment decisions rest as much as possible with the individual railroad companies. Legislation should minimize the involvement of the Interstate Commerce Commission in internal management matters and also limit generalized, industrywide actions to those areas in which the railroads are affected as a system.<sup>3</sup>

The passage of the 4-R Act and the Staggers Act reflected Congress' judgment that marketplace competition would become the norm for the railroad industry and that continued regulation was, "to a large degree, both undesirable and unnecessary." *Exemption from Regulation – Boxcar Traffic*, 367 I.C.C. 425, 427 (1983). As the ICC explained, regulation was undesirable "because it deprived the railroads of the marketing and pricing flexibility needed to compete effectively both inter- and intramodally." *Id.* Similarly, the need for regulation was minimal "because the option of truck transportation gave most shippers all the protection they needed against unfair or unreasonable railroad practices." *Id.* The substitution of marketplace competition for government regulation reflected a "totally new approach to the railroad industry by the Congress" and was seen as "the first step toward treating the American railroad industry as any other business, which is best 'regulated' by the marketplace."<sup>4</sup>

**B. The Exemption Authority Was Established as a Primary Means of Continuing Deregulatory Reform Through Administrative Action.**

The exemption authority has been—and remains—indispensable to the achievement of Congress' deregulatory mandate for the railroad industry. The statutory delegation of authority to exempt particular classes of transactions or services from regulation permits the Board to use

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<sup>3</sup> *Railroad Transportation Policy Act of 1979: Hearing on S. 1946 Before the Senate Comm. On Commerce, Science and Transportation*, 96th Cong. 87 (Nov. 7, 1979) (statement of Neil A. Goldschmidt, Secretary of Transportation, U.S. Department of Transportation).

<sup>4</sup> 126 Cong. Rec. H10,084-85 (daily ed. Sept. 30, 1980) (statement of Rep. Staggers).

its regulatory expertise to continue and further the goals established by Congress. Legislative history to the Staggers Act specifies that “the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress.”<sup>5</sup> Thus, “[t]he exemption mechanism allows for the elimination of regulatory burdens without requiring Congress continuously to reexamine the statute.”<sup>6</sup> For this reason, the Board’s exemption authority has long been viewed as “an important cornerstone” for implementing the deregulatory mandate of Congress.<sup>7</sup>

The significance that Congress has invested in the power to exempt transactions or services from regulation is clearly visible in the evolution of the statutory language over time. The initial grant of exemption authority to the ICC, in the 4-R Act, quickly proved to be insufficiently broad to achieve Congress’ aims because it required findings, *inter alia*, that transactions or services were “of limited scope” as a condition for granting an exemption.<sup>8</sup> In response, Congress broadened the scope of the exemption provision in the Staggers Act. The new language, enacted as section 10502 of the Act, imposed on the ICC an affirmative duty

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<sup>5</sup> Report of the Committee on Conference, H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 105 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 4110, 4137.

<sup>6</sup> *Disposition of the Railroad Authority of the Interstate Commerce Commission: Hearings Before the Subcomm. on Railroads of the House Comm. on Transportation and Infrastructure*, 104th Cong. 424-25 (Feb. 22, 1995) (statement of Gail McDonald, Chairman, Interstate Commerce Commission).

<sup>7</sup> Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. 96-1035, 96th Cong., 2d Sess. 60 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 3978, 4005.

<sup>8</sup> 4-R Act, § 207.

("*shall* exempt a person, class of persons, or a transaction or service") to grant exemptions whenever regulation was not necessary to carry out the rail transportation policy and was not needed to protect shippers from abuse of market power.<sup>9</sup> The new authority was not intended merely to give the ICC discretion to exempt categories of traffic from regulation; rather, "[t]he exemption authority has been carefully drafted to limit regulation to the bare essentials necessary to protect against abuses of market power."<sup>10</sup>

The legislative history to the Staggers Act goes even farther in spelling out exactly how Congress intended that the exemption authority be used to advance deregulation:

The conferees expect that, consistent with the policies of this Act, the Commission will pursue partial and complete exemptions from remaining regulation. The conferees anticipate that through the exemption process the Commission will eventually reduce its exercise of authority to instances where regulation is necessary to protect against abuses of market power where other federal remedies are inadequate for this purpose. Particularly, the conferees expect that as many as possible of the Commission's restrictions on changes in prices and services by rail carriers will be removed and that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power.<sup>11</sup>

In sum, Congress saw the exemption statute as an essential tool through which continued deregulation could be advanced through delegation of authority to the Board.

When Congress subsequently revisited the language of section 10502, in connection with the ICC Termination Act of 1995 ("ICCTA"), it strengthened the exemption provision yet again, expressly instructing the Board to grant exemptions "to the maximum extent consistent with this

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<sup>9</sup> Section 213 of the Staggers Act, codified at former 49 U.S.C. § 10502(a).

<sup>10</sup> 126 Cong. Rec. H10,085 (daily ed. Sept. 30, 1980) (statement of Rep. Staggers).

<sup>11</sup> Report of the Committee on Conference, H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 105 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 4110, 4137.

part.”<sup>12</sup> This renewed statutory command reflected the view of Congress that the use of exemptions, described as a “crucially important delegated power to expand existing statutory deregulation through administrative action,” should be not only preserved but expanded.<sup>13</sup> The legislative history to the ICCTA further emphasized that “the exemption power should be utilized to the maximum extent consistent with applicable law and policy.” *Id.*

**C. The Exemption Authority Has Been Used Aggressively.**

Consistent with the framework established by Congress, the exemption authority has been used liberally to exempt a wide range of commodities and types of rail traffic from the confines of regulation. *See, e.g.*, 49 C.F.R. §§ 1039.10, 1039.11 (commodity exemptions); 1039.14 (boxcar exemption); pt 1090 (COFC/TOFC exemptions). The ICC’s practice in approving exemption requests was cited approvingly by Congress in enacting the ICCTA.

Congress observed that:

The ICC has used exemption authority aggressively over the past 15 years, deregulating the transportation of various commodities and types of rail service when competitive factors have been found to restrain the economic behavior of rail carriers. These exemptions have proven highly beneficial to shippers and railroads.<sup>14</sup>

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<sup>12</sup> Section 102 of the Interstate Commerce Commission Termination Act of 1995 (“ICCTA Act”), codified at 49 U.S.C. § 10505(a).

<sup>13</sup> Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 104-422, 104th Cong., 1st Sess. at 168-69 (Dec. 15, 1995), *reprinted in* 1995 U.S. Code Cong. & Admin. News 850, 853.

<sup>14</sup> Report of the Committee on Commerce, Science and Transportation, S. Rep. No. 104-176, 104th Cong., 1st Sess. 8 (1995).

Congress has made no amendments to section 10502 since the enactment of the ICCTA, indicating that the rationale supporting the exemption authority as a critical piece of the overall statutory framework remains unchanged.

In each exemption proceeding, review of the specific competitive conditions affecting the traffic at issue demonstrated that continued regulation was not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101 or to protect shippers from an abuse of market power. Various types of evidence have been used to demonstrate the presence of effective competition in exemption proceedings under section 10502(a), including rail market shares,<sup>15</sup> evidence of pervasive competition from trucks,<sup>16</sup> and the existence of product or geographic competition.<sup>17</sup>

Conversely, the standard for exemptions has never turned on an attempt to measure the quantum of harm imposed by regulation, because nothing in the statute contemplates such an inquiry. The ICC correctly rejected this argument in the context of the *Boxcars* exemption proceeding, noting that it “fundamentally misconceives the mandate of section 10505(a).” As the decision notes,

Congress has directed that the Commission *shall* grant exemptions wherever it finds that continued regulation is *not necessary*. The ultimate issue is not whether regulation is harmless, but only whether it *must* be

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<sup>15</sup> See, e.g., *Rail General Exemption Authority – Liquid Iron Chloride*, Ex Parte No. 346 (Sub-No. 9A), 367 I.C.C. 347 (1983); *Rail General Exemption Authority – Hops*, Ex Parte No. 346 (Sub-No. 10), 365 I.C.C. 701 (1982).

<sup>16</sup> See, e.g., *Exemption from Regulation – Boxcar Traffic*, Ex Parte No. 346 (Sub-No. 8) 367 I.C.C. 425 (1983); *Rail General Exemption Authority – Used Motor Vehicles*, Ex Parte No. 346 (Sub-No. 27A), 9 I.C.C.2d 884.

<sup>17</sup> See, e.g., *Rail General Exemption Authority – Ferrous Recyclables*, Ex Parte No. 346 (Sub-No. 35), 10 I.C.C.2d 635 (1995); *Rail General Exemption Authority – Carbon Dioxide*, Ex Parte No. 346 (Sub-No. 32), 10 I.C.C.2d 359 (1994); *Rail General Exemption Authority – Scrap Paper*, Ex Parte No. 346 (Sub-No. 12), 9 I.C.C.2d 957 (1993).

retained to carry out the rail transportation policy and protect shippers from market power abuse.

*Boxcars*, 367 ICC 425, 432 (1983) (emphasis in original). In other words, the statute does not contemplate any sort of “balancing test” between the benefits and harms of regulation, but directs the Board to grant exemptions unless continued regulation is a necessity. The Board reaffirmed this principle recently in *WTL Rail Corp.*, observing that the “statute favors exemption from regulation whenever appropriate, and directs us to grant exemptions ‘to the maximum extent consistent with [the Interstate Commerce Act].’” *WTL Rail Corp. Petition for Declaratory Order et al.*, STB Docket No. 43092 (served Feb. 17, 2006).

**D. The Railroad Industry Has Benefited Immensely From Implementation of Congress’ Deregulatory Mandate.**

The wisdom of the deregulatory model embodied in the Staggers Act has become indisputably clear with the passage of time. “The deregulation of the railroad industry ushered in increased market flexibility, competitive and differential rates for rail service, and a climate open to innovation.”<sup>18</sup> The details of the industry’s transformation under deregulation has been extensively detailed in other forums, including the Board’s own proceeding in Ex Parte 658 to review and evaluate the impact of the Staggers Act 25 years after enactment. Testimony from the Department of Transportation in that proceeding characterized the Act as a “resounding

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<sup>18</sup> Laurits R. Christiansen Assoc., Inc., *A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals That Might Enhance Competition*, Prepared for the Surface Transportation Board (Nov. 2009), at ES-1.

success” and noted further that “the dramatic overhaul of economic regulation brought about by the Staggers Act has been absolutely essential” to the revitalization of the railroad industry.<sup>19</sup>

The beneficial effects of the Staggers Act reforms were already evident during Congress’ consideration of the ICCTA. The Chairperson of the ICC testified, in connection with a hearing preceding the ICCTA, that “Congress’ decision to lift the burdensome regulation and allow the rail industry to operate in a far less restrictive environment has proven successful as shown by the renewed economic strength of the rail industry.”<sup>20</sup> The DOT testimony at the same hearing similarly noted that “[n]ot only are most railroads more financially sound today, but rail rates are lower than they were before the Staggers Act for all major commodity groups.”<sup>21</sup> The House report accompanying the ICCTA summarized the accomplishments as follows:

The Staggers Act has produced a renaissance in the railroad industry. Its return on investment, now approximately 8%, compares favorably to the 4% earned prior to 1980. Railroads have been able to maintain market share at approximately 38% during the last decade in a growing market, and recent indications show that their market share is increasing. Shippers

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<sup>19</sup> *The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead*, STB Ex Parte No. 658, Transcript of Hearing (Oct. 19, 2005), pp. 14-15 (remarks of Paul Samuel Smith).

<sup>20</sup> *Oversight of the Interstate Commerce Commission: Hearing Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science and Transportation*, 103rd Cong. 48 (July 12, 1994) (statement of Gail C. McDonald, Chairman, Interstate Commerce Commission).

<sup>21</sup> *Oversight of the Interstate Commerce Commission: Hearing Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science and Transportation*, 103rd Cong. 43 (July 12, 1994) (statement of Frank E. Kruesi, Assistant Secretary for Domestic Transportation, U.S. Department of Transportation).

have benefited from the Staggers Act reforms as well, since the railroads' real rates have declined by 1.6% annually since 1980.<sup>22</sup>

The tangible benefits of this improved financial performance are visible in the enormous investments (approximately \$480 billion since passage of the Staggers Act) that railroads have made in new infrastructure to respond to projected growth in demand for freight transportation.<sup>23</sup>

The statutory goals of deregulation ushered in by the Staggers Act remain unchanged, and the policy-based rationale for continued use of the exemption authority remains strong and self-evident. The exemption authority is deeply embedded in the fabric of the statute and is directly tied to the advancement of multiple objectives of the rail transportation policy. The use of exemptions (i) allows “competition and demand for services to establish reasonable rates” for rail traffic, (ii) “minimize[s] the need for Federal regulatory control over the rail transportation system,” and (iii) promotes “effective competition among rail carriers and with other modes.”<sup>24</sup> The Board’s Notice acknowledges that the body of prior agency exemption decisions “have been instrumental” to the improved health of the railroad industry that has developed under deregulation. In sum, the language of the exemption provision and its relationship to the broad

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<sup>22</sup> Report of the House Committee on Transportation and Infrastructure, H.R. Rep. 104-311, 104th Cong., 1st Sess. at 91 (Nov. 6, 1995), *reprinted in* 1995 U.S. Code Cong. & Admin. News 793, 803.

<sup>23</sup> Comments submitted in response to the Board’s notice by U.S. Gypsum emphasize the important points that both shippers and railroads make capital investments in reliance on a stable regulatory environment and that unexpected changes in regulatory policies can increase the risk associated with such investments. *See Comments of United States Gypsum Company* at 3-5 (Jan. 25, 2011).

<sup>24</sup> 49 U.S.C. § 10101(1),(2),(4),(5). *See also Rail General Exemption Authority – Petition of AAR to Exempt Rail Transportation of Selected Commodity Groups*, Ex Parte No. 346 (Sub-No. 29), 9 I.C.C. 2d 969, 973 (1993).

deregulatory goals of the statute confirm that the basic policy rationales supporting aggressive and appropriate use of the Board's exemption authority remain unchanged.

## **II. THE EXEMPTIONS HAVE BEEN EFFECTIVE IN PROMOTING COMPETITION AND ADVANCING THE OBJECTIVES OF THE RAIL TRANSPORTATION POLICY.**

As Congress intended, use of the exemption authority has substantially contributed to furthering deregulation and helping to build a stronger and more competitive rail industry. The exemptions have been and remain "effective" in the marketplace in terms of freeing the railroad industry to compete on even terms with unregulated competitors and in permitting the Board to efficiently allocate its own resources to the areas in which continued regulatory oversight is perceived to be necessary.

The effectiveness of the exemption authority was addressed by Congress in hearings preceding the enactment of the ICCTA. The ICC was asked by Congress to describe its "experience with use of [the] rail exemption authority." The ICC's response is enlightening and should inform the Commission's instant consideration of the effectiveness of the commodity, boxcar, and TOFC/COFC exemptions:

We believe that the rail exemption authority is one of the most beneficial legislative reforms enacted by the Congress. It has enabled the Commission to use its experience and expertise to channel its resources effectively into overseeing activities that require regulatory review and to forgo issuing thousands of unnecessary regulatory rulings....<sup>25</sup>

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<sup>25</sup> *Oversight of the Interstate Commerce Commission: Hearing Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science and Transportation, 103rd Cong. 166 (July 12, 1994) (Questions Asked by Senator Packwood and Responses Thereto by ICC) (emphasis added).*

Fifteen years of experience with the exemption authority demonstrated to the ICC that exemptions are “one of the most beneficial legislative reforms” that enabled the agency to focus regulatory oversight only where it was needed.<sup>26</sup>

This view of the efficacy and value of the exemption authority was echoed by the Department of Transportation in later testimony to Congress. The DOT offered a resoundingly positive assessment of the benefits that had accrued through the ICC’s grant of exemptions from regulation:

The exemption provision has proved to be one of the Staggers Act’s most significant innovations. Using this broad authority, the ICC has exempted significant classes of traffic subject to intense competition – e.g., intermodal shipments, perishables, and a wide range of manufactured items...The traffic exemptions have allowed railroads to retain or increase market share and meet competition by offering innovative rates and services without regulatory lag. The exemptions of transactions have also lifted significant paperwork burdens for actions that were approved routinely, thus cutting administrative costs for the railroads (and, ultimately, shippers) and the ICC itself.<sup>27</sup>

For these reasons, DOT recommended that the “authority to lift regulatory requirements administratively should be retained and used aggressively. It has proven to be a particularly

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<sup>26</sup> The same emphasis on limiting regulatory oversight is clearly visible in the recent Executive Order on “Improving Regulation and Regulatory Review” issued by President Obama. The Order instructs all federal administrative agencies to review existing regulations to determine whether they may be streamlined or modified to “make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.” See Exec. Order 13,563, 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011).

<sup>27</sup> *Disposition of the Railroad Authority of the Interstate Commerce Commission: Hearings Before the Subcomm. on Railroads of the House Comm. on Transportation and Infrastructure*, 104th Cong. 217 (Feb. 22, 1995) (statement of Joseph Canny, Deputy Assistant Secretary for Transportation Policy, U.S. Department of Transportation) (emphasis added).

useful way to promote competition and eliminate costly regulatory lag and unnecessary paperwork.” *Id.*

These positive assessments of the marketplace value of exemptions were consistent with the ICC’s observations as to the immediate beneficial effects that resulted from the grant of particular exemptions. One of the considerations taken into account in exempting boxcar traffic, for example, was that “[u]nder other broad exemptions applying to fresh fruits and vegetables and TOFC/COFC service, rail traffic has increased, suggesting that exemptions make rail service easier and more attractive for shippers to use.” *Exemption from Regulation – Boxcar Traffic*, 367 I.C.C. 425, 445 (1983). In granting an exemption for frozen food traffic, the ICC similarly noted that “the railroads’ new ability to compete more aggressively has allowed them to recapture traffic moving by lower-priced motor carriers. Moreover, service quality and timeliness have improved dramatically, making rail service a much more attractive option.” *Exemption from Regulation – Rail Transportation Frozen Food*, Ex Parte No. 346, 367 I.C.C. 859 (1983). Overall, the ICC’s evaluation of the “impact of prior exemptions” concluded that experience “attest[s] to numerous positive benefits to shippers and railroads.” *Miscellaneous Manufactured Commodities Exemption Decision*, 6 I.C.C. 2d 186, 191 n.8 (citing studies by ICC staff performed in the late 1980s).

The commodity, boxcar and TOFC/COFC exemptions continue to provide practical marketplace benefits, even under the less pervasive regulatory system that the Board administers today. First, exemptions minimize the likelihood that claims of “unreasonable” rates or practices

under the ICCTA will be interposed into negotiations between railroads and shippers.<sup>28</sup> The Board is intimately familiar with the costs of litigating such cases,<sup>29</sup> and even the potential threat of such claims can impose time-consuming and costly preparations. These risks are mitigated in the context of exempt commodities, where railroads are on an equivalent competitive footing with trucks and other transportation modes. Second, with respect to exempt commodities and services, railroads are able to adjust rates and service offerings immediately in response to marketplace conditions without being subject to the time constraints provided in section 11101(c). Again, this flexibility places rail carriers on equal ground with alternative modes of transport and enhances competitiveness. Third, the exemptions generally relieve railroads of their common carrier and car supply obligations<sup>30</sup> and, as a result, allow railroads to efficiently manage their service network and allocate limited capacity where it can best be used.

The exemptions remain important and effective in terms of allowing railroads to compete without shouldering regulatory burdens and allowing the terms of rail traffic to be dictated by marketplace outcomes to the maximum possible extent. More generally, the exemptions are an important element of a balanced regulatory system that has produced sharply reduced rail rates

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<sup>28</sup> Shippers with valid rate claims, of course, retain the ability to pursue simultaneously a partial revocation of an exemption in the context of a rate complaint. *See, e.g., Rail General Exemption Authority – Selected Commodities Petition for Partial Revocation of Exemption for Coke*, Ex Parte No. 346 (Sub-No. 29A), 1998 WL 547262 at \*2-3.

<sup>29</sup> *See, e.g., Simplified Standards for Rate Cases*, Ex Parte No. 646 (Sub-No. 1), 2007 WL 2493509 at \*3 (recognizing that litigation costs in full standalone cost cases may approach \$5 million).

<sup>30</sup> The scope of the boxcar exemption does not encompass exemptions from car supply obligations, *see* 49 C.F.R. § 1039.14(a)(4), or from common carrier obligations under section 11101(a). *See Exemption from Regulation – Boxcar Traffic*, Ex Parte No. 346 (Sub-No. 8), 367 I.C.C. 425, 455 (1983).

relative to the pre-Staggers era and that continues to afford protection to shippers where needed. The Board should not only maintain the existing categories of exemptions, but should also be proactive in identifying additional commodity groups that are ripe for deregulation through the granting of new exemptions.

**III. PERIODIC REVIEW OF PREVIOUSLY-GRANTED EXEMPTIONS IS NOT CONTEMPLATED BY THE STATUTE AND IS UNNECESSARY IN A HIGHLY COMPETITIVE TRANSPORTATION MARKET.**

The final issue upon which the Board's Notice requests comments is whether existing exemptions should be "subject to periodic review." They should not. It is far from clear that the Board has statutory authority to undertake such "reviews" on its own initiative. Indeed, such an approach would be at odds with the Board's historic practice of evaluating exemptions only when asked to do so. Adhering to the Board's longstanding approach of reviewing exemptions on a case-by-case basis maintains fidelity to the text, structure and legislative history of the statute, and makes sense as a prudential matter. There is simply no need to create a burdensome and unnecessary system of periodic, *sua sponte* Board review, particularly when the market conditions that led the Board to grant the exemptions in the first place—namely the presence of strong competitors to freight rail—continue to exist.

First, nothing in the text of section 10502(d) suggests that the Board has the authority to conduct periodic exemption reviews at its own initiative. In fact, the text and structure of 10502 as a whole indicate that the Board *lacks* this power, and that its authority is triggered only when it receives a specific complaint or request that an exemption be reviewed. It is instructive to compare the terms of section 10502(b), which sets forth procedural requirements governing exemption proceedings, with those of section 10502(d), which relates to revocation of exemptions. Section 10502(b) specifically notes the Board's authority to "begin a proceeding under this section on its own initiative...." By contrast, section 10502(d) contains no such

reference to the Board initiating a proceeding. All of the timing requirements for revocation proceedings under section 10502(d) are, to the contrary, tied to the Board's "receipt of a request for revocation."<sup>31</sup> The structure and language of section 10502 is substantially different from other provisions in which the Board has been granted express authority to conduct periodic reviews of previously-granted exemptions.<sup>32</sup>

The intentional asymmetry of section 10502—empowering the Board to begin exemption proceedings on its own initiative in section 10502(b) while referencing only specific requests for revocation in section 10502(d)—is also in accord with Congressional intent as expressed in the Staggers Act and the ICCTA. Congress intended that exemptions from regulation be granted liberally and that revocations should be limited to "reviewing carrier actions after the fact to correct abuses of market power."<sup>33</sup> As the D.C. Circuit has observed, "Congress has encouraged [the Board] to apply its exemption authority in a manner of 'general applicability.'"<sup>34</sup> An abuse of market power inquiry is necessarily fact-specific and dependent upon an analysis of competitive conditions affecting a particular shipper, however, so that it stands to reason that exemptions should be considered only on a case-by-case basis. Congress said as much in

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<sup>31</sup> See *Duncan v. Walker*, 533 U.S. 167, 173 (2001) (noting the "well settled" rule that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (citations omitted).

<sup>32</sup> 49 U.S.C. § 13702(a)(2) (requiring the Board to conduct periodic reviews of motor carrier rate agreements exempted from application of the antitrust laws).

<sup>33</sup> Report of the House Committee on Conference, H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 105 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 4110, 4137.

<sup>34</sup> *Brae Corp. v. United States*, 740 F.2d 1023, 1041 (D.C. Cir. 1984).

enacting the ICCTA, instructing that “[w]hen considering a revocation request, the Board should continue to require a demonstrated abuse of market power that can be remedied only by reimposition of regulation or that regulation is needed to carry out the national transportation policy.”<sup>35</sup>

Second, the Board’s own practice has been equally consistent in evaluating requests for revocation of exemptions only in response to specific requests. The Board has consistently required a three-part showing in assessing whether revocation is necessary to achieve the regulatory objectives of the statute:

[T]he first thing we look at...is whether the carrier possesses substantial market power. If it does not, then there is generally no basis for revoking an exemption. If it does, then we focus on whether regulation is necessary to protect against carrier abuse of shippers as a result of such market power. Finally, in assessing whether regulation is necessary or appropriate, we address whether regulation or exemption would, on balance, better advance the objectives of the RTP and the interest of the shipping public overall.<sup>36</sup>

The ICC and the Board have correctly placed the burden of proof in such proceedings on the party petitioning for revocation to “show[] that our prior findings supporting the initial exemption were clearly wrong, or that changed circumstances require us to revisit them.”<sup>37</sup> As

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<sup>35</sup> Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 104-422, 104th Cong., 1st Sess. at 168-69 (Dec. 15, 1995), *reprinted in* 1995 U.S. Code Cong. & Admin. News 850, 853.

<sup>36</sup> *Simplified Standards for Rail Cases*, Ex Parte No. 646 (Sub-1), 2007 WL 2493509, at \*81 (citing *Rail Exemption Misc. Agricultural Commodities*, 8 I.C.C.2d 674, 682 (1992)).

<sup>37</sup> *Rail General Exemption Authority – Misc. Agricultural Commodities – Petition of G.&T. Terminal Packaging Co., Inc., et al to Revoke Conrail Exemption*, Ex Parte No. 346 (Sub-No. 14A), 8 I.C.C.2d 674, 677 (1992).

this discussion indicates, particularized evidence of market power and the potential for abuse of market power is a fundamental prerequisite to revoking an existing exemption.

Third, institution of a system of “periodic reviews” of previously-granted exemptions would create a new set of regulatory burdens that would impose substantial costs on both the Board and participants and offer few if any practical benefits in return. The decisions of the ICC and the Board to grant exemptions rested largely on findings that railroads faced pervasive competition for exempted commodities and classes of service. That competition remains vibrant to this day. Under these circumstances, there is no “problem” affecting exempted traffic that re-regulation could conceivably solve.

The findings of pervasive competition between railroads, trucks, and other inter- and intramodal forms of transportation that supported the original exemption determinations remain indisputably valid today. Customers often perceive trucks as having advantages over rail transport in terms of flexibility and service reliability. As a result, shippers will often use trucks to transport their freight even when rail rates may be lower. These advantages are accentuated in the case of short-distance hauls, which accounts for a substantial share of movements for many of the exempted commodities. The extent, however, to which trucks are able to compete for both short-haul and long-haul traffic was noted in the recent study by Christiansen Associates that was commissioned by the Board:

For shorter hauls, all-truck movements tend to have cost advantages over intermodal movements, despite relatively high per-mile costs for trucks, as all-truck movements avoid “drayage” costs associated with hauling the containers or trailer to and from railroad terminals, as well as the costs of loading and unloading the railroad flat cars. For longer hauls, truck shipments may have more desirable service qualities despite higher costs,

although railroads have developed and expanded higher-speed and scheduled services in competition with trucking.<sup>38</sup>

In addition to trucks, intramodal competition among railroads themselves has not diminished. CSXT competes vigorously with the Norfolk Southern and other railroads across the eastern United States. This competition has been enhanced, to the benefit of railroads and shippers alike, by the railroad consolidation process. As a result of consolidation, both CSXT and NS have been able to reduce costs, offer new and improved single-line services covering a wider geographic scope, and become more effective competitors. These improvements have previously been acknowledged by the Board.<sup>39</sup>

For many of the previously-granted exemptions, the ICC and the Board also noted the presence of product and geographic competition, which remains in place today. For widely-produced commodity products such as iron and steel scrap, carbon dioxide, or waste paper, any attempt to raise prices above competitive levels would lead to an immediate loss of traffic, as purchasers simply shifted to an alternative supplier.<sup>40</sup> Similarly, the ability to source products

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<sup>38</sup> Laurits R. Christiansen Assoc., Inc., *A Study of Competition in the U.S. Freight R.R. Indus. and Analysis of Proposals That Might Enhance Competition*, Prepared for the S.T.B. at 15-1 (Nov. 2009).

<sup>39</sup> *CSX Corp. & CSX Transportation, Inc., Norfolk Southern & Norfolk Southern Ry. – Control & Operating Leases/Agreements – Conrail Inc. & Consolidated Rail Corp. [General Oversight]*, STB Finance Docket No. 33388 (Sub-No. 91) (Decision No. 17, served Oct. 20, 2004) (noting “[t]here has been significant across-the-board improvement in the rail transportation environment in the territories previously served by CSX, NS, and Conrail. Balanced rail competition has been brought to many points throughout the Eastern United States.”).

<sup>40</sup> *See Rail General Exemption Authority – Ferrous Recyclables*, Ex Parte No. 346 (Sub-No 35), 100 I.C.C. 2d 635 (1995); *Rail General Exemption Authority – Carbon Dioxide*, Ex Parte No. 346 (Sub-No. 32), 10 I.C.C. 2d 359 (1994); *Rail General Exemption Authority – Scrap Paper*, Ex Parte No. 346 (Sub-No. 12), 9 I.C.C. 2d 957 (1993).

from many different regions, as noted in the decisions exempting, *inter alia*, hydraulic cement, used automobiles and lumber products, remains an effective constraint on rail rates for many commodities.<sup>41</sup> Because these fundamental competitive factors affecting the previously-granted exemptions remain unchanged, there is no compelling reason for the Board to self-initiate periodic reviews of these exemptions.

#### IV. CONCLUSION

The Board's "review" of the commodity, boxcar and TOFC/COFC exemptions in this proceeding should conclude that no action is warranted with respect to these exemptions. The statutory mandate in favor of widespread deregulation is unchanged, and railroads continue to operate in highly competitive markets for these commodities and types of traffic. There is little evidence to suggest that railroads either possess market power or are in a position to abuse any market power with respect to the exempted commodities. Rather than conducting reviews of the previously-granted exemptions, the Board should instead undertake to identify additional commodities for which it appears that exercise of the exemption authority is appropriate and thereby carry out its statutory obligation to grant exemptions "to the maximum extent possible."

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<sup>41</sup> See *Rail General Exemption Authority – Hydraulic Cement*, Ex Parte No. 346 (Sub-No. 34), 10 I.C.C. 2d 649 (1995); *Rail General Exemption Authority – Used Motor Vehicles*, Ex Parte No. 346 (Sub-No. 27A), 9 I.C.C. 2d 884 (1993); *Rail General Exemption Authority – Lumber or Wood Products*, Ex Parte No. 346 (Sub-No. 25), 7 I.C.C. 2d 673 (1991).

## **SUMMARY TESTIMONY OF CLARENCE W. GOODEN**

As stated in CSXT's Notice of Intent to Participate, Clarence W. Gooden, Executive Vice President and Chief Commercial Officer of CSX Transportation, Inc., will be speaking on behalf of CSXT and will provide a power point presentation at the Board's hearing on February 24, 2011 in Washington, D.C.

Mr. Gooden will be addressing the fundamental principle, as set forth by the Rail Transportation Policy, that competition and demand for services is the preferred method of establishing reasonable rates for rail services. Deregulation was the primary means of revitalizing the rail industry, and the Congressional directive to grant exemptions to the "maximum extent possible" was an important cornerstone in achieving that goal. Having taken meaningful, incremental steps over the last thirty years towards railroad revitalization, it makes little sense to disrupt the substantial progress initiated by Harley Staggers and Congress now over 30 years ago.

Mr. Gooden will also speak to the ways in which railroads and customers both benefit from exemptions. Unwarranted regulation increases costs, decreases efficiency, and impedes the railroad from responding quickly to market demands. It also creates uncertainty that discourages the rail carrier from investment in infrastructure and equipment. This ultimately results in less funds being available for service, capacity, productivity, and environmental improvements, all of which have dramatically advanced over the last thirty years to the benefit of railroads and customers alike.

Finally, Mr. Gooden will address the competitive landscape with respect to exempt commodities. Whether it be other railroads, other modes, geographic, or product, competition is abundant, and CSXT works hard to earn the business of its customers. In a transportation world

where the largely unregulated truck industry remains the dominant player, every cost, every inefficiency, and every dollar not reinvested inhibits CSXT's ability to compete. Given this reality, Congress's vision for the railroad industry, as embodied in Staggers and similar legislation, remains as vibrant and vital as ever.