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The Honorable Martin J. Oberman
Chairman
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Dear Chairman Oberman:

Recently, you wrote to the Class I freight railroad members of the Association of American Railroads ("AAR") to express your concern about disruptions within the aspects of the international intermodal supply chain involving the Class I freight rail network. In particular, you noted your concerns "about significant increases in container congestion at key U.S. terminals, and substantial charges being levied by the railroads for container storage at these terminals." Each of the Class I railroads submitted information responsive to your request regarding their individual situations and practices. AAR writes now to respond to the suggestion you report by some stakeholders that the Board consider revoking aspects of the regulatory exemption for intermodal traffic, and to provide the rail industry's views as to the legal and policy implications of that request.

The global supply chain faces unprecedented challenges in its recovery from the global pandemic, caused by factors beyond the Board's regulatory regime. Shutdowns of entire sectors of the global economy throughout the pandemic, an uneven recovery in 2020, backlogs of container supply due to decisions of international shipping lines, port delays, and surging demand as the domestic economy reopened all contributed to create the highest rail intermodal volumes ever for the first half of 2021. As a consequence, railroads' logistics partners at intermodal terminals have been hampered in their ability to absorb the traffic, due in part to their own labor challenges and equipment shortages, creating a backlog of containers at some locations. As explained in their individual responses, Class I railroads have taken steps within the small pieces of this chain that are within their control to keep the overall system as fluid as possible. One of the few levers available to them to incentivize the removal of containers from terminal facilities is to charge storage fees to those entities with which they have commercial relationships.

We noted and appreciated your observation that any potential Board action related to intermodal exemptions would warrant careful examination. The Interstate Commerce Commission, and later the Board, broadly exempted from regulation trailer-on-flatcar/container-on-flatcar (TOFC/COFC) services at 49 C.F.R. Part 1090 due to the fiercely competitive nature of intermodal traffic. *See Improvement of TOFC/COFC Regulation*, 364 I.C.C.

731 (1981); *Improvement of TOFC/COFC Regulations (R.R.-Affiliated Motor Carriers & Other Motor Carriers)*, 3 I.C.C.2d 869 (1987); *Improvement of TOFC/COFC Regulations (Pickup & Delivery)*, 6 I.C.C.2d 208 (1989). Any action to limit those exemptions would face a high bar in meeting the revocation standard of 49 U.S.C. § 10502, particularly in light of the statute's specific reference to the exemption of intermodal traffic. See 49 U.S.C. § 10502(f); *WTL Rail Corp.—Petition for Declaratory Order and Interim Relief*, NOR 42092 *et al.* (STB served Feb. 17, 2006) (citing *Rail Exemption Misc. Agricultural Commodities*, 8 I.C.C.2d 674, 682 (1992)).

While the STB retains authority under 49 U.S.C. § 10502(d) to revoke a previously issued exemption, that authority is constrained by the plain language of Section 10502 and the statutory scheme as a whole, which reflects congressional intent to favor deregulation of the railroad industry. Specifically, Section 10502 provides that the Board “shall” exercise its exemption authority “to the maximum extent” consistent with the statute, but that it “may” revoke exemptions, in whole or in part, only when “necessary” to effectuate the Rail Transportation Policy goals contained in Section 10101. The U.S. Court of Appeals for the D.C. Circuit has recognized that this statutory language mandates the “deregulation of the entire railroad industry to the maximum extent possible in conformity with the national rail transportation policy.” *Brae Corp. v. United States*, 740 F.2d 1023, 1043 (D.C. Cir. 1984); see also *Ass’n of Am. R.Rs. v. Surface Transp. Bd.*, 237 F.3d 676, (D.C. Cir. 2001).

Congress has stressed that when considering revocation, “the Board should continue to require 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.” H.R. Conf. Rep. 104-422, at 169 (1995), 1995 U.S.C.C.A.N. 850, 854. Congress has also emphasized that it “expects the Board to examine all competitive transportation factors that restrain rail carriers’ actions and that affect the market for transportation of the particular commodity or type of service for which revocation has been requested.” H.R. Conf. Rep. 104-422, at 169; see also S. Rep. No. 104-176, at 8–9 (same). The Board itself has previously recognized that an “exemption will be revoked [only] where regulation is shown to be necessary,” and “that showing cannot be made” where a carrier “lacks market dominance over [the shipments] at issue.” *FMC Wyo. Corp. v. Union Pac. R.R.*, EP 346 (Sub-No. 29A), 2000 WL 33527851, at *13 n.17 (STB served May 12, 2000). Storage charges assessed in these circumstances are not a reflection of market power over transportation that would trigger the Board’s regulatory authority.

More importantly, even partial revocation in this instance would not mitigate the problem and would have unintended consequences. Capacity at rail terminals is finite. To maintain terminal and network fluidity, railroads use storage fees to incentivize the prompt removal of containers. Allowing railyards to overflow with containers has adverse impacts on the entire supply chain, as well as other rail customers. Regulation of demurrage and storage charges, even if permitted by the exemption revocation standard, would only incentivize those unregulated portions of the supply chain to shift the burdens of higher volumes onto railroads. This, in turn, would have the unintended consequence of forcing railroads to meter or halt the inflow of containers to terminals, until the backlog of containers on the ground clears.

That is not to say that the Class I freight railroads have no role to play in working through the challenges currently facing the global supply chain. AAR's freight members have made clear in their own responses how they are collaborating with all stakeholders to keep intermodal terminals and the entire national rail network fluid. The Board should refrain from any regulatory action that would undermine those efforts.

Sincerely,



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of American Railroads*