

Commissioner Francis P. Mulvey  
Opening Statement  
EP 704 – Review of Commodity, Boxcar, and TOFC/COFC Exemptions  
February 24, 2011

A personal note: Jack Rizer was part of a team that provided me with Biweekly briefings on the status of the railroad industry. I will greatly miss his help and advice.

I am pleased that the Board is having this hearing today and I look forward to the oral testimony. Several years ago, I suggested that it might be a good idea to periodically review exempt commodities to ensure that the exemptions are still appropriate. I have always thought it important for the Board to be aware of what is going on “on the ground” in the rail industry that we regulate and the shipper industries that are affected by that regulation. This particular hearing allows the Board to get information from industry participants on whether there have been any major changes in the competitive landscape that would merit the Board’s reconsideration of any specific exemption. After all, the ICC exempted the first commodities more than 30 years ago in 1979 (fruits and vegetables). The last commodity was exempted in 1998 (non-ferrous recyclables). In the interim, nearly 100 other commodities/traffic-types have been exempted from regulation following a finding by the agency that regulation was not necessary primarily because there was sufficient competition from other transportation modes – chiefly trucking and, to a lesser degree, barge.

Much has changed since 1979 in the transportation competitive landscape – within the railroad industry, in the trucking industry, and in the barge industry. Likewise, many of the industries shipping exempted commodities have experienced significant changes. Some of the pleadings filed in this proceeding suggest that the only mechanism by which the Board can or should be made of aware of such changes is in a specific exemption revocation proceeding. I’m sure that is an issue that we will hear more about today. In my opinion, however, regardless of any next steps the Board could take, I hope that our stakeholders would not have the Board to turn a blind eye for decades as to whether competitive changes undercut the basis for an exemption. This is particularly so when you are talking about industries characterized by smaller shippers who may not be inclined, in the first instance, to initiate an exemption revocation proceeding. Indeed, this hearing could serve as a way to develop ideas about how the Board could make its exemption revocation process more efficient and accessible; an effort the Board recently undertook with regard to rate reasonableness cases.

I also want to make clear that this is an informational hearing. I have seen suggestions that the Board is poised to eliminate many or all exemptions, force the economic regulation of every commodity, or otherwise return the rail industry to its pre-Staggers condition. I think that such suggestions encourage our stakeholders to line up with their most extreme positions. Whether you support a particular exemption or not, most would agree that exemptions have played an important role in reducing economic regulation of the railroads and reduced regulation has contributed to growth and innovation in the

railroad industry. So, from my perspective, this hearing is about ensuring that the Board has the most up-to-date competitive information about the industry that it regulates.

Finally, I want to make clear that I believe that most regulations and most regulatory practices including exemptions should be subject to periodic review to ensure that they still make sense. Regulations that have outlived their usefulness or serve as an impediment to economic progress with no concomitant benefit to society should be reviewed and repealed if need be. The President has made it clear that he believes that regulation should be efficient and in place only when it is beneficial to the national well-being. I hope to hear more today about what time period is appropriate for reviewing.