

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS

REPLY COMMENTS OF UNION PACIFIC RAILROAD COMPANY

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I. Introduction

In their opening comments, Union Pacific and other railroads supported and encouraged the Board’s proposal to develop robust, data-based evidence regarding current market conditions, especially the presence of competition, when considering commodity exemptions or revocations of commodity exemptions. By contrast, shippers pressed the Board simply to adopt the agency’s 2016 proposal to revoke several exemptions, based largely on evidence that then-Vice Chairman Miller described as “less than robust,”¹ and Board Member Begeman described as “a waybill-based hunch.”²

After reviewing the comments submitted by other parties, Union Pacific believes the Board should refine its dashboard proposal along the lines suggested by Union Pacific and other railroads, particularly if it remains inclined to consider revoking existing commodity exemptions. Union Pacific continues to believe the Board should withdraw its 2016 NPRM. However, Union Pacific supports the Board’s efforts to develop a set of relevant metrics and standard methods for compiling those metrics for use in any future commodity exemption or revocation proceedings.

¹ *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704 (Sub-No. 1), slip op. at 15 (STB served Mar. 23, 2016) (Vice Chairman Miller, concurring).

² *Id.*, slip op. at 15 (Board Member Begeman, dissenting).

II. The Board cannot fully revoke existing commodity exemptions without evaluating nationwide market conditions using the basic factors the agency considered when authorizing the exemptions.

In their comments, shippers complained that the Board proposed to adopt a one-size-fits-all, nationwide approach to revocation decisions. However, the Board must consider evidence on a nationwide basis because the shippers themselves are seeking to revoke exemptions on a nationwide basis. And while the Board proposed using a set of basic metrics to inform its decision-making, it also recognized the need for commodity-specific analyses.³

Some shippers claimed that the Board is not required to consider railroad “market power” in deciding whether to revoke commodity exemptions, and that a nationwide analysis of market conditions would be too burdensome.⁴ However, those claims conflict with the same shippers’ assertions that “[t]he Board should evaluate market conditions by taking an approach similar to that used to grant the exemptions.”⁵ When the ICC granted the exemptions, it evaluated market conditions to determine whether railroads could exercise market power over transportation of the commodities at issue, and it performed that evaluation on a nationwide basis. In fact, the ICC considered not merely whether railroads might possess some degree of market power, but whether the presence of competitive alternatives would preclude them from *abusing* any market

³ See Decision at 6 (“Most fundamentally, the approach does not seek to answer the ultimate qualitative question of whether a commodity’s regulation is necessary to carry out the RTP.”).

⁴ See Joint Opening Comments of the Institute of Scrap Recycling Industries, Inc., the American Forest & Paper Association, and the National Industrial Transportation League Concerning Proposed New Approach for Considering Class Exemption and Revocation Issues (“ISRI *et al.* Comments”) at 5–6 (Jan. 29, 2021); Joint Opening Comments Concerning Proposed New Approach for Considering Class Exemption and Revocation Issues (“Highroad Comments”) at 7–9 (Jan. 29, 2021).

⁵ ISRI *et al.* Comments at 27; *see also id.* (“[A]ny evaluation should analyze market conditions in a manner similar to that utilized when the exemptions were first created.”).

power they might possess.⁶ If railroads cannot abuse market power, then regulation is not necessary, and unless the potential for market power abuse is widespread, allegations of abuse can be addressed through partial revocations of exemptions.⁷

Other shippers claimed the rationale for commodity exemptions disappeared when Congress repealed railroads' rate filing requirements in the ICC Termination Act of 1995.⁸ However, Congress plainly disagreed. Congress *strengthened* its deregulatory mandate when it passed ICCTA by requiring the Board to exempt rail services from regulation to the “maximum extent” possible. 49 U.S.C. § 10502(a).⁹ The commodity exemptions continue to provide important public benefits.¹⁰ However, under ICCTA, the relevant question is not whether the exemptions provide specific benefits, but whether *regulation is necessary*. Answering the

⁶ *E.g.*, *Rail Gen. Exemption Auth.—Exemption of Hydraulic Cement*, EP 346 (Sub-No. 34), slip op. at 4 (ICC served July 26, 1995) (“An exemption will not permit railroads to abuse market power. The railroads face pervasive competition in the transportation of hydraulic cement.”); *Rail Gen. Exemption Auth.—Exemption of Ferrous Recyclables*, EP 346 (Sub-No. 35), slip op. at 5 (ICC served May 16, 1995) (“We find that [regulation] is not necessary to protect shippers of iron and steel scrap . . . from the abuse of market power.”); *Rail Gen. Exemption Auth.—Petition of AAR to Exempt Rail Transp. of Selected Commodity Groups*, 9 I.C.C.2d 969, 973 (1993) (“No shipper has expressed concern that any railroad carrying any of these 17 commodities would abuse market power or has even alleged that any carrier handling this freight has any market power to abuse.”).

⁷ *See Santa Fe Southern Pacific Corp.—Control—SPT Co.*, 2 I.C.C.2d 709, 741 (1986) (“Exemption analysis takes a broad-brush approach to analysis of the competitive environment as a whole and looks to the remedy of partial revocation to address specific competitive situations should that become necessary.”); *see also* H.R. Rep. No. 96-1430, at 105 (1980) (“[T]he conferees expect . . . that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power.”).

⁸ *See* Steel Manufacturers Association Comments (“SMA Comments”) at 11–12 (Jan. 29, 2021).

⁹ *See also* H.R. Conf. Rep. 104-422, at 168 (1995) (“The new provision also emphasizes in subsection (a) the Staggers Act policy that the exemption power should be utilized to the maximum extent consistent with applicable law and policy.”).

¹⁰ *See* Comments of Union Pacific Railroad Company at 13–16, *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704 (Sub-No. 1) (July 26, 2016).

relevant question requires an analysis of market conditions, especially the presence of competitive alternatives.

Still other shippers acknowledged that market power analysis is critical in exemption proceedings but complained that the Board is proposing to make the analysis too “rigorous and time consuming.”¹¹ From Union Pacific’s perspective, the Board’s efforts seem aimed at easing burdens on all parties by developing in advance, with input from railroads and shippers, a set of relevant, objective, transparent metrics that would inform the agency’s analysis. Union Pacific disagrees with important aspects of the current dashboard proposal, but it strongly supports the Board’s overall effort to develop a better defined, data-driven process for analyzing commodity exemption and revocation requests.

III. The Board correctly recognized, if only implicitly, that the record does not support revocation of any commodity exemption.

In their opening comments, shippers uniformly urged the Board to abandon its dashboard proposal and simply revoke the exemptions identified in the 2016 NPRM. However, the Board’s dashboard proposal correctly, if only implicitly, acknowledges that the existing record does not support revocation of any exemptions. Record support for revocation consists merely of data regarding changes in R/VC ratios and railroad length-of-haul, with a sprinkling of information about various changes in industry conditions. As discussed below, nothing in the record comes close to showing railroads currently have market power over transportation of the commodities at issue. Indeed, the 2016 NPRM failed to analyze several basic factors that the agency considered in its initial exemption decisions.

¹¹ Comments of the Portland Cement Association (“PCA Comments”) at 17 (Jan. 29, 2021).

A. Changes in R/VC ratios are not evidence of market power.

In their opening comments, most shippers continued to advocate reliance on R/VC data.¹² However, other shippers acknowledged what railroads and independent experts have explained on multiple occasions: “RVC’s do not prove market power,”¹³ and “R/VC’s would not be a valid indicator when considering revocations or exemptions.”¹⁴ Apart from their potential role in excluding commodities from regulation due to the jurisdictional threshold, R/VC ratios should have no place in any analysis of railroad market power.

B. Changes in railroad length of haul are not evidence of market power.

In their opening comments, most shippers continued to rely on railroad length-of-haul data as a proxy for truck competition.¹⁵ However, other shippers appeared to acknowledge what railroads have repeatedly argued: assumptions based on average railroad length of haul are no substitute for direct evidence of whether trucks provide a competitive alternative.¹⁶ The Board could not find railroads have market power over the transportation of any commodity without considering evidence that directly addresses actual and potential truck competition. As railroads suggested, the Board could address truck competition holistically using nationwide modal share data,¹⁷ which is what the ICC did in many of its original commodity exemption decisions.¹⁸

¹² See ISRI *et al.* Comments at 28–29; PCA Comments at 4, 19; SMA Comments at 7–8, 14.

¹³ Highroad Comments at 9.

¹⁴ *Id.* at 10.

¹⁵ See Highroad Comments at 5; PCA Comments at 6; SMA Comments at 6–7, 13–14.

¹⁶ See ISRI *et al.* Comments at 29.

¹⁷ See, e.g., Comments of Norfolk Southern Railway Company, Verified Statement of Mark A. Israel at 28–32 (Jan. 29, 2021); Comments of CSX Transportation, Inc. at 4 (Jan. 29, 2021); Comments of Union Pacific Railroad Company (“Union Pacific Comments”) at 21 (Jan. 29, 2021).

¹⁸ E.g., *Exemption of Hydraulic Cement*, slip op. at 3 (“AAR estimates the railroads’ share of the hydraulic cement market to be 20.4% in 1992.”); *Petition of AAR*, 9 I.C.C.2d at 974 (discussing

C. Other changes in market conditions described in the NPRM are not evidence of market power.

In the NPRM, the Board justified its revocation proposals not only by citing quantitative changes in R/VC ratios and rail length-of-haul data, but also by noting qualitative changes in the markets for the commodities at issue, such as the steel industry's shift from blast furnaces toward electric arc furnaces¹⁹ and the decrease in the number of cement plants.²⁰ Shippers continued to cite those qualitative market changes in their opening comments.²¹ However, as some shippers acknowledged, the relevant question is not whether *some* changes have occurred, but whether there have been "*meaningful* market changes."²² Even when changes may have caused some reduction in the availability of certain competitive alternatives, those impacts may have been offset by other developments. In other words, change alone is not relevant – the question is whether current market conditions show a need for regulation. That question can only be answered by undertaking a robust analysis of the existing competitive alternatives.

For example, Union Pacific agrees the cement industry has undergone consolidation since the ICC exempted hydraulic cement from regulation. But as Union Pacific's Vice President of Industrial testified on opening, the basic transportation marketplace characteristics for cement remain unchanged: trucks still dominate the market, and intense rail, water, and geographic competition still exists.²³ With the reduction in the number of cement manufacturing plants,

rail market share of crushed or broken stone or riprap); *id.* at 979 (discussing rail market share of primary iron or steel products).

¹⁹ See NPRM at 7.

²⁰ See *id.* at 10.

²¹ See PCA Comments at 6; SMA Comments at 6.

²² ISRI *et al.* Comments at 2 (emphasis added).

²³ See Union Pacific Comments, Verified Statement of Jacqueline M. Bendon at 2–6.

geographic competition might play a marginally larger role now than in the past, and direct rail-truck competition might play a marginally smaller role, but competition remains pervasive. The continued existence of a highly competitive transportation environment should not be a surprise: plainly, cement manufacturers would not have consolidated operations without ensuring they would not become subject to railroad market power.

D. Any proposal to revoke a commodity exemption should address the same competitive factors that would justify an exemption in the first place.

The principle that a Board decision to revoke an exemption should consider at least the same basic factors the ICC evaluated when granting the exemption should not be controversial: as noted above, even shippers agreed that “[t]he Board should evaluate market conditions by taking an approach similar to that used to grant the exemptions.”²⁴

Some shippers nonetheless urged the Board not to consider geographic competition.²⁵ But as Union Pacific and other railroads have shown, geographic competition is too significant, both practically and legally, to ignore.²⁶ The Board could, of course, continue relying primarily on qualitative evidence in evaluating geographic competition. However, Union Pacific believes the Board should build on the suggestions offered in railroad comments and develop a more systematic, data-based approach to evaluating this critical source of competition.

²⁴ ISRI *et al.* Comments at 27.

²⁵ *See id.* at 16–17.

²⁶ *See, e.g.*, Comments of the Association of American Railroads at 23–26 (Jan. 29, 2021); Comments of BNSF Railway Company at 7–10 (Jan. 29, 2021); Union Pacific Comments at 9–10 & Bendon VS at 2–6.

IV. The Board should withdraw the NPRM and continue pursuing a data-based approach to evaluating market conditions in exemption proceedings.

When the Board issued the NPRM, it plainly expected stakeholders to present evidence that ultimately supported the proposed revocations of exemptions.²⁷ While railroads presented evidence showing that markets for transportation of the commodities at issue remain highly competitive, rail customers rested on the NPRM's irrelevant calculations of changes in R/VC ratios and length-of-haul data. The Board has now challenged stakeholders to review an evidence-based approach. Railroads responded with carefully considered suggestions for developing the type of relevant, reliable evidence that is needed to evaluate exemption issues. By contrast, rail customers responded with complaints about the burden of undertaking a nationwide analysis of market conditions, seemingly failing to recognize their own choice to pursue revocation of exemptions on a nationwide basis.

Union Pacific urges the Board to withdraw the NPRM. However, we encourage the Board to continue its efforts to improve the analysis of market conditions in proceedings involving commodity exemptions.

²⁷ See NPRM at 15 (Vice Chairman Miller, concurring) ("I agree with Commissioner Begeman that the record on which we are basing this decision is less than robust and could benefit from additional information.").

Respectfully submitted,

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