

**BEFORE THE
SURFACE TRANSPORTATION BOARD****ENTERED**
Office of Proceedings
November 30, 2020
Part of
Public Record**SANIMAX USA LLC,****v.****UNION PACIFIC RAILROAD
COMPANY****STB Docket No. NOR 42171****UNION PACIFIC RAILROAD COMPANY'S
MOTION TO DISMISS**

The Complaint filed by Sanimax USA LLC (“Sanimax”) asks the Board to dictate service terms for rail transportation. Sanimax claims that serving its South St. Paul facility less than five days per week violates the Interstate Commerce Act. While such a claim has little merit (particularly for a facility that shipped an average of { }¹ railcars per week over the past twelve months), the claim fails for the more fundamental reason that all of the commodities Sanimax ships on Union Pacific are exempt from Board regulation. Sanimax has not sought revocation of the applicable exemptions and could not meet the standard for revocation if it had tried. Accordingly, the Complaint does not state a claim for which relief can be granted and should be dismissed.

I. SANIMAX’S COMPLAINT IS FOCUSED ON THE SHIPMENT OF EXEMPT COMMODITIES.

This dispute involves a Sanimax rendering facility in South St. Paul, Minnesota that processes “restaurant grease and animal waste” into a variety of

¹ See Verified Statement of Emma Sethe ¶ 2 (“Sethe V.S.”). Items marked in single braces (e.g., “{ }”) are designated Confidential under the proposed Protective Order that Union Pacific is submitting today.

products, some of which are transported outbound by Union Pacific. Complaint § V. Sanimax’s Complaint does not identify the commodities that it has shipped via rail. But the Verified Statement of Emma Sethe demonstrates that Union Pacific only transports five loaded commodities from the Sanimax South St. Paul facility: animal refuse (STCC 2014491), tankage (STCC 2014490), grease or inedible tallow (STCC 2014350), lard (STCC 2013190), and animal grease (STCC 2013945). Sethe V.S. ¶ 1.² Each of these commodities is exempt from STB regulation pursuant to 49 U.S.C. § 10502 and 49 C.F.R. Part 1039, as detailed below.

- **Animal Refuse (STCC 2014491).** Animal Refuse (STCC 2014491) is included in the list of exempt agricultural commodities in 49 C.F.R. § 1039.10. This exemption was adopted in Ex Parte 346 (Sub-No. 18), where the Interstate Commerce Commission (“ICC”) exempted poultry, meat, and dairy products in a “proceeding aimed at essentially completing the exemptions process” for “virtually all agricultural and food products” “(other than for grain and sunflower seeds).” *Exemption from Regulation—Poultry, Meat and Dairy Products*, EP 346 (Sub-No. 18), 1 I.C.C.2d 173, 174 (1984). This decision exempted, *inter alia*, “animal wastes” and “animal refuse, meat meal, dried blood, or related animal by-products” and was incorporated into the exemptions set forth in 49 C.F.R. § 1039.10. *Id.* at 178, 180–81.
- **Tankage (STCC 2014490).** Tankage (STCC 2014490), like Animal Refuse above, is included in the list of exempt agricultural commodities in 49 C.F.R. § 1039.10. This exemption was likewise adopted in Ex Parte 345 (Sub-No. 18). *See id.* at 181.
- **Grease or Inedible Tallow (STCC 2014350).** Grease or Inedible Tallow is included in the list of miscellaneous exempt commodities in 49 C.F.R. § 1039.11. In Ex Parte 346 (Sub-No. 31), the ICC exempted “grease, inedible tallow, and the other products in ... (STCC) 20-143,” finding that railroads “face pervasive competition in the transportation

² Ms. Sethe considered all shipments from the South St. Paul facility since January 2019. Sethe V.S. ¶ 1. Incidental to its transportation of these commodities, Union Pacific also moves empty cars to (and, at times, from) the South St. Paul facility. But the only loaded railcars that Union Pacific transports to or from the South St. Paul facility consist of exempt commodities.

of these commodities” and thus regulation was not necessary to protect shippers from market power abuse. *Rail General Exemption Authority—Exemption of Grease or Inedible Tallow, Etc.*, EP 346 (Sub-No. 31), 1994 WL 687462, at *1, *4 (ICC served Dec. 9, 1994). This decision added grease or inedible tallow (STCC 20-143) to the list of exempt commodities in 49 C.F.R. § 1039.11 (Miscellaneous commodities exemptions). *Id.* at *7.

- **Animal Grease (STCC 2013945).** Animal Grease (STCC 2013945) is included in 49 C.F.R. § 1039.11’s general exemption of STCC 20 “food or kindred products” (with certain enumerated exceptions that do not include STCC 2013945). This exemption was adopted in Ex Parte No. 346 (Sub-No. 29), in which the ICC exempted 17 classes of commodities from its regulation, including STCC 20-139 “Meat products,” which includes Animal Grease (STCC 2013945). *Rail General Exemption Authority—Petition of AAR to Exempt Rail Transportation of Selected Commodity Groups*, 9 I.C.C.2d 969, 971 (1993). The ICC concluded that “regulation of the 17 commodity groups is not necessary to protect shippers from an abuse of market power,” as “the transportation of these commodities is competitive.” *Id.* at 973. The exemptions adopted in this decision were incorporated into 49 C.F.R. § 1039.11. *Id.* at 985.
- **Lard (STCC 2013190).** Finally, like Animal Grease above, Lard (STCC 2013190) is included in 49 C.F.R. § 1039.11’s general exemption of STCC 20 “food or kindred products” (with certain enumerated exceptions that do not include STCC 2013190). This exemption was likewise adopted in Ex Parte No. 346 (Sub-No. 29). *See id.* at 971, 985.

Shipments of exempt commodities are “exempt from the provisions of subtitle IV of title 49” of the U.S. Code. *See* 49 C.F.R. §§ 1039.10, 1039.11. As such, the applicable statutory exemptions for the commodities shipped by Union Pacific for Sanimax’s South St Paul facility preclude all of the claims Sanimax seeks to assert in its Complaint (which all stem from Title 49 Part IV). This preclusion is not a regulatory technicality. It is a fundamental part of the statutory scheme under which Congress instructed the agency to exercise its exemption authority “to the maximum extent consistent with this part.” 49 U.S.C. § 10502(a). The ICC found, after compiling a full record, that robust competition existed for the transportation

for each of the commodities at issue here, and that regulation of the rail transportation of those commodities was not necessary. The agency's decisions are not negated because a rail customer wants a different service schedule.

Put differently, to the extent a rail carrier ships exempt commodities, that traffic is not governed by the common carrier obligations set forth in 49 U.S.C. § 11101, the reasonable practices provisions of § 10702, or any other provision of 49 U.S.C. Part IV. Thus, Sanimax's Complaint, which asserts that Union Pacific violated 49 U.S.C. §§ 11101 and 10702 with its service moving those exempt commodities, fails to state a claim upon which relief may be granted.³

II. EVEN IF SANIMAX SOUGHT EXEMPTION REVOCATION, ITS EFFORTS WOULD BE UNAVAILING.

Sanimax has not petitioned for partial revocation of the applicable exemptions. But even if it had, there would be no grounds to grant such a petition. The Board may only revoke an exemption if it finds that revocation is necessary to carry out the Rail Transportation Policy of 49 U.S.C. § 10101. *See* 49 U.S.C. § 10502(d). To determine whether an exemption should be revoked, the agency often has focused its inquiry on whether traffic for the commodity at issue is sufficiently competitive such that railroads lack the ability to abuse market power. *See, e.g., WTL Rail Corp. Pet. for Declaratory Order & Interim Relief*, NOR 42092 et al., slip op. at 3 (STB served Feb. 17, 2006) (“[W]e have held that the extent of railroad market power is an essential issue in exemption revocation proceedings.”).

Here, Sanimax does not allege that Union Pacific is abusing market power. Nor can it. Sanimax's own allegations establish that it can ship its commodities by truck, and that it does so when it is dissatisfied with rail service. *See* Complaint at

³ In its Complaint, Sanimax references \$8,555 in demurrage charges it has received in recent months. Complaint § XI. Sanimax does not challenge the legality of these demurrage charges or make any claims predicated on them.

§ XI; *id.*, Verified Statement of Todd Strickler ¶ 21. Thus, Sanimax's allegations establish that Union Pacific lacks market power over the traffic identified in the Complaint.

Moreover, the record could not support any finding that Union Pacific is abusing any hypothetical market power. As the Answer filed today details, Union Pacific has worked with Sanimax to address service issues and has provided relief (such as additional switches) to address service shortcomings. Union Pacific has explained to Sanimax that many of the service disruptions it experienced in 2020 were pandemic-related. But Union Pacific has improved its service and will continued to improve its efforts to serve Sanimax.

Union Pacific's decision to serve the South St. Paul facility three times per week was made after careful consideration of Sanimax's outbound volumes and track capacity, and several communications with Sanimax to discuss the change. *See Sethe V.S.* ¶ 3. Union Pacific initially provided Monday-Wednesday-Friday service to the South St. Paul facility. But after mid-August discussions with Sanimax, Union Pacific moved to a Sunday-Tuesday-Thursday schedule and assigned a dedicated crew, to better meet Sanimax's operating needs. *See Sethe V.S.* ¶ 4. In addition, Sanimax remains able to request special switches in the event additional service beyond the Sunday-Tuesday-Thursday schedule is needed.⁴ *See id.* ¶ 5. Sanimax's South St. Paul facility has been operating with this modified service schedule for over three months now. *See id.* ¶¶ 4–5.

Union Pacific understands that Sanimax would prefer five-day-a-week rail service. But this preference creates no legal basis for the Board to set aside its conclusion that regulation of the highly competitive transportation market for the

⁴ Since August 1, 2020, to date, Sanimax has not requested any special switches at its South St. Paul facility. *Sethe V.S.* ¶ 5.

commodities at issue in this proceeding is inconsistent with the rail transportation policy and not needed to guard against any abuse of market power.

III. CONCLUSION

Because the movements subject to Sanimax's Complaint are exempt from the Board's regulations, and because there is no valid basis to revoke any of the applicable exemptions (even if a petition to revoke had been filed), Sanimax fails to state a claim upon which relief may be granted, and Union Pacific respectfully requests that the Board dismiss the Sanimax Complaint with prejudice.

Respectfully submitted,

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November 30, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November 2020, I served a copy of
Union Pacific Railroad Company's Motion to Dismiss by first class mail and email.

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**VERIFIED STATEMENT
OF
EMMA SETHE**

My name is Emma Sethe. I am a Manager I – Marketing & Sales for Union Pacific Railroad Company. In this role, I have primary responsibility for marketing & sales interactions with Sanimax USA LLC (“Sanimax”). I am submitting this statement in support of Union Pacific’s motion to dismiss the complaint Sanimax filed in this proceeding.

1. Since January 1, 2019, Union Pacific has only transported the following commodities from Sanimax’s South St. Paul facility: animal grease (STCC 2013945), lard (STCC 2013190), grease or inedible tallow (STCC 2014350), tankage (STCC 2014490), and animal refuse (STCC 2014491).
2. Over the past twelve months (October 2019 through October 2020), the Sanimax South St. Paul facility has shipped an average of ■ railcars per week.
3. Union Pacific’s decision to serve Sanimax’s South St. Paul facility three times per week was made after considering the facility’s utilization rate and the service needs of all customers in the corridor and wider region. Union Pacific engaged in discussions with Sanimax regarding the service change between July 17 and August 3, 2020. In both e-mail and phone communications, Union Pacific explained its reasoning for implementing the service change and answered Sanimax’s questions.

4. Beginning on August 3, 2020, Union Pacific's schedule provided for service to Sanimax's South St. Paul facility on Mondays, Wednesdays, and Fridays. Following discussions with Sanimax, the service schedule was changed, at Sanimax's request, to Sunday, Tuesday, and Thursday, effective August 18, 2020. At the same time, Union Pacific also assigned a dedicated train crew to the train serving Sanimax's South St. Paul facility.
5. Sanimax is able to request special switches if it needs service on a non-scheduled service day. Sanimax has not requested any special switches at its South St. Paul facility between August 1, 2020 and today.

VERIFICATION

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

Executed on November 30, 2020.

Emma Sethe
Emma Sethe