

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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STB Docket No. EP 756
Market Dominance Streamlined Approach

**COMMENTS OF
THE INSTITUTE OF SCRAP RECYCLING INDUSTRIES, INC.**

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Dated: November 12, 2019

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SURFACE TRANSPORTATION BOARD**

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COMMENTS OF THE INSTITUTE OF SCRAP RECYCLING INDUSTRIES

The Institute of Scrap Recycling Industries (“ISRI”) hereby submits its comments on the proposed rules to streamline market dominance evidence in rate reasonableness proceedings. The proposals were included in a Notice of proposed Rulemaking served by the Surface Transportation Board (“STB” or “Board”) on September 12, 2019 and are intended to reduce the time and cost associated with the market dominance phase of rail rate cases.¹ ISRI commends the Board for its efforts to make rate relief more affordable and accessible, especially for smaller companies. ISRI supports and endorses the Opening Comments jointly submitted in this proceeding by the members of the Coalition Associations², however, it provides these individual comments to address the two proposed streamlined market dominance criteria concerning a lack of effective truck competition. ISRI specifically discusses herein the highway mileage factor and percentage of truck shipments factor, and explains how those criteria should be applied to the scrap metal industry based on the unique characteristics of this commodity and information collected from its members about their truck shipments.

¹ Notice of Proposed Rulemaking on Market Dominance Streamlined Approach, STB Docket No. EP 756 (served September 11, 2019) (“Market Dominance NPRM”).

² The Coalition Associations include The American Chemistry Council, The Fertilizer Institute, The National Industrial Transportation League, the Chlorine Institute, and the Corn Refiners Association.

I. ISRI Statement of Interest

ISRI is a non-profit trade association representing approximately 1,300 companies operating in nearly 4,000 locations in the United States, and 41 countries worldwide that process, broker, and consume scrap commodities, including metals, paper, plastics, glass, rubber, electronics, and textiles. In 2017, the U.S. scrap recycling industry generated \$117 billion in domestic economic activity, manufacturing more than 130 million tons per year of highly valued commodities. It is estimated that the scrap recycling industry directly or indirectly supports more than 534,000 well-paying jobs, generating \$13.2 billion in federal, state and local tax revenue. The U.S. scrap recycling industry supplies the commodities that manufacturers use as raw material feedstock to make new products, with more than 70% being consumed in the United States. In addition to providing raw materials to domestic manufacturers, the U.S. scrap recycling industry exports approximately one-third of its commodities worth over \$16.5 billion annually to over 155 nations. ISRI members not only supply domestic manufacturers, including the U.S. steel industry, but the export operations of ISRI members requires an integrated transportation network vital to the global manufacturing supply chain.

Rail transportation is a critical mode for shipments of ferrous and nonferrous scrap. Indeed, due to the unique characteristics of shipping bulk scrap metal, there are many situations where rail is the only feasible mode for shipping this material. Many of ISRI's members are captive customers who are served by only one Class I rail carrier and our members regularly incur rising rail rates. Accordingly, ISRI has a strong interest in the Board's proposal to adopt a streamlined approach for the submission of market dominance evidence in rate reasonableness proceedings.

II. The Board Should Adopt Alternative Truck Competition Criteria for Ferrous Scrap Shipments

ISRI applauds the Board for its efforts to make its remedies for unreasonable rates more accessible, especially for complainants with smaller cases.³ ISRI strongly supports the objectives underlying the Board's proposals in this proceeding, which are intended to reduce the burdens, costs, and lengthy procedures that prevent many shippers, including ISRI members, from pursuing rate remedies before the Board. Indeed, the Board stated in the NPRM:

An overly complicated and costly market dominance inquiry can itself be a barrier to rate relief, even in cases where there is no effective competitive restraint on rail rates. A less complex market dominance inquiry that still provides ample opportunity for both parties to present evidence would help ensure both that the burden of the process will not dissuade complainants with meritorious cases from bringing those cases to the Board, and that rate cases are processed more expeditiously. The agency's predecessor, the Interstate Commerce Commission, noted the Congressional intent expressed in the market dominance statute and in the legislative history, stating that Congress "envisioned the market dominance determination simply as a practical threshold jurisdictional determination to be made without lengthy litigation or administrative delay." Westmoreland Coal Sales Co. v. Denver &

³ NPRM at 1.

Rio Grande W. R.R., 5 I.C.C.2d 751, 754 (1989) (discussing 49

U.S.C. § 10709, the predecessor of the current § 10707).⁴

Accordingly, to reduce the burdens associated with market dominance evidence in rail rate proceedings, the Board has proposed six elements that can be satisfied to establish a complainant's *prima facie* showing of market dominance. The elements include:

- The movement has an R/VC ratio of 180% or greater;
- The movement would exceed 500 highway miles between origin and destination;
- There is no intramodal competition from other railroads;
- There is no barge competition;
- The complainant has used truck for 10% or fewer of its movements subject to the rate at issue over a five-year period; and
- The complainant has no practical build-out alternative due to physical, regulatory, financial, or other issues (or combination of issues).⁵

As noted above, ISRI supports and endorses the joint Opening Comments of the Coalition Associations submitted on November 12, 2019 in this proceeding, except that ISRI submits these comments separately to address the Board's two proposed truck competition elements as applied to shipments of ferrous scrap.

In response to the Board's notice, ISRI conducted a survey on the distance at which truck shipments of ferrous scrap are no longer competitive with rail to evaluate the Board's proposal that trucks would not be considered competitive for origin to destination movements exceeding 500 highway miles. It also collected quantitative data from certain of its members on this element and to address the element that trucks have been used for 10% or fewer of a complainant's movements subject to the challenged rate over a five-year period. The data ISRI

⁴ Id. at 4.

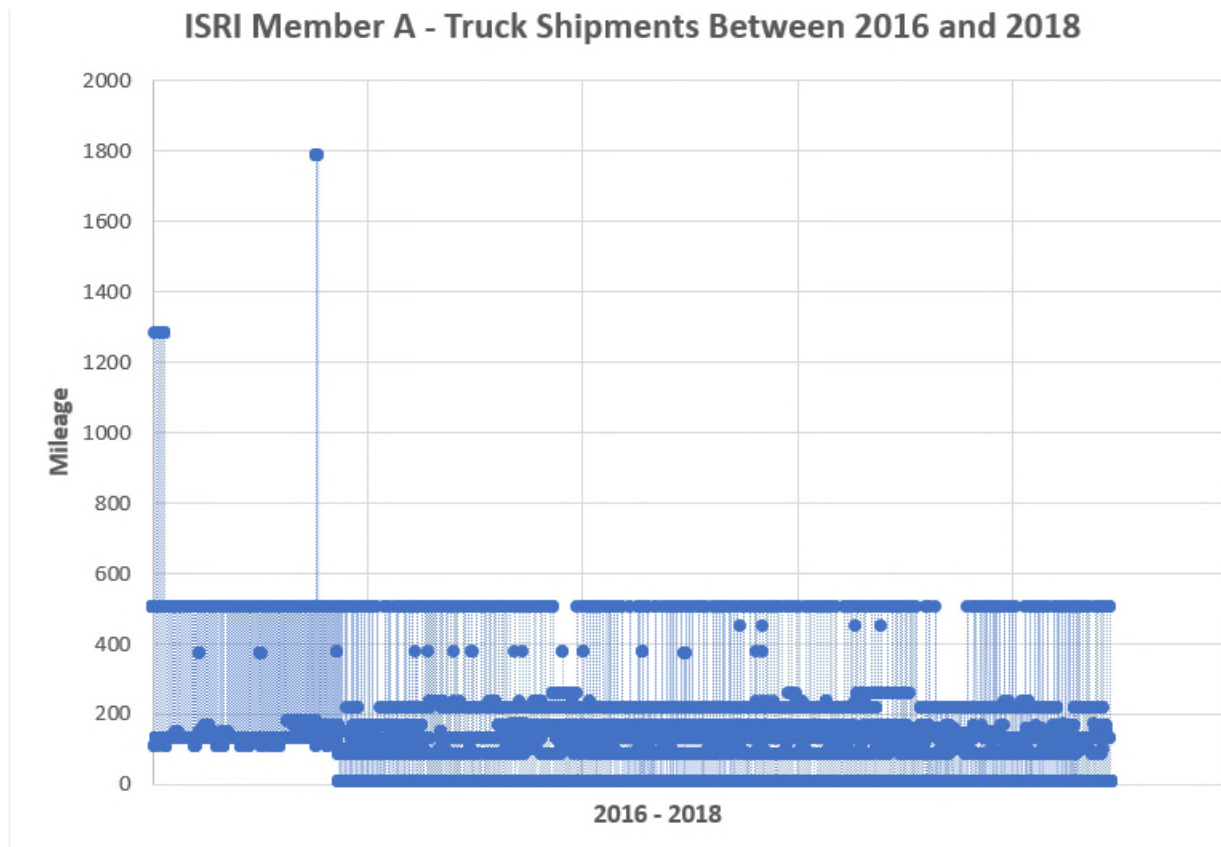
⁵ Id. at 6-7.

received from its members indicate certain patterns that would support adoption of a lower mileage threshold and a higher percentage of total annual truck shipments to be workable for scrap metal shipments. ISRI describes its survey and data findings below.

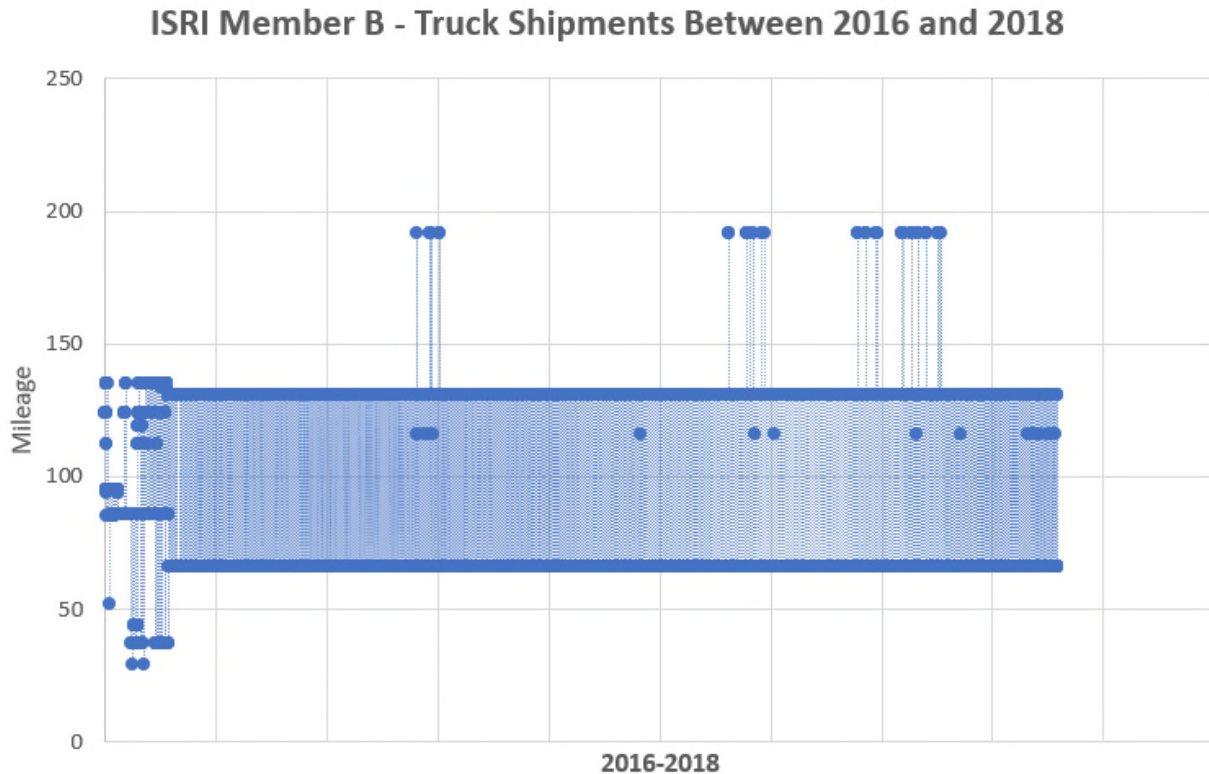
A. The Board Should Adopt A 200 Highway Miles Threshold For Scrap Metal Shipments

Based on its survey, ISRI strongly believes that the Board should adopt a lower *prima facie* mileage threshold to show that trucking does not provide effective competition to rail. The survey results and quantitative data suggest that a more appropriate and workable threshold for the scrap metal industry is 200 highway miles.

A majority of the ISRI members that responded to the survey stated that trucking ceases to provide effective competition between 100 and 200 highway miles, and approximately 35% of the respondents stated that trucking becomes uncompetitive between 200 and 300 highway miles. No survey respondents identified trucks as competitive to rail above 300 miles. Furthermore, data provided from two members regarding all of their U.S. domestic truck movements between 2016 and 2018 where a rail option is also available for the same origin-destination pair also supports a lower mileage threshold for scrap metal. Specifically, one member (“Member A”) used trucking as an alternative to rail for lanes with an average length of 120 highway miles between 2016 and 2018, and the median distance of all shipments during the same period was 133 highway miles. Furthermore, as the below table suggests, apart from a handful of outlier shipments, a significant amount of these truck shipments were significantly below 500 miles, falling between zero and 250 miles. In fact, for Member A, about 91.5% (20392 out of 22,300 shipments) of their total truck shipments between 2016 and 2018 were 250 highway miles or less; whereas approximately 1915 out of total 22,300 shipments (8.5%) are above 250 miles, and 1823 of these shipments (8%) are above 500 miles.



Another ISRI member's data ("Member B") suggests that it relied on trucking for lanes with an average length of 94 highway miles between 2016 and 2018, and the median distance for the truck shipments of Member B was 66 miles. Furthermore, as the table below shows, Member B does not have any truck shipment above 500 miles, and almost all its truck shipments are in the range of 50 miles and 150 miles.



Clearly, distance is one important factor for companies to consider in deciding whether to ship by truck instead of rail transportation. However, there are other factors affecting ISRI's members' modal selection for shipping ferrous scrap. ISRI members have identified several of these other factors in their survey responses. Specifically, the members reported that a lack of sufficient truck capacity is a significant consideration which favors shipments by rail. Limited truck capacity results from various factors, including the commodity weight which requires a far greater number of trucks to move the same volume than can be shipped by rail, as well as highway weight limits applicable to truck transportation. Also, the long-standing shortage of truck drivers can be a limiting factor, as well as the Federal Motor Carrier Safety Administration's hours of service regulations which impede the drivers' ability to complete a run and return to their work reporting location typically restricts origin to destination truck

movements to about 250 miles. The scrap metal industry also relies on specialized equipment (e.g., steel dumps) which are often cost-prohibitive to use as compared to rail given the volume of ferrous scrap shipments, and have more limited availability compared to other types of trucks. Size, weight and density and methods of handling are significant factors that makes it difficult to use trucks over rail. Furthermore, ISRI's members' scrap yards and their customers' facilities are commonly designed to ship/receive by rail, which is another reason that ISRI members will choose rail over trucking regardless of the distance between the origin and destination.

Overall, these other factors affect ISRI's members' decisions as to which transportation mode to rely on, and more often than not, they compel ferrous scrap companies to use rail instead of trucking for distances well below 500 highway miles. Accordingly, the Board's proposal to set a truck mileage threshold at 500 highway miles would be substantially unworkable and not workable for scrap metal shipments. For instance, ISRI's survey responses and data indicate that it is more likely than not that a scrap metal complainant may be compelled to use rail on a haul that is a distance of only 150 miles due to these other factors, and it would not be able to come close to satisfying the Board's proposed *prima facie* factor on the length of haul of 500 miles. Thus, setting a high 500 mileage threshold that disregards all these other important factors that are independent from a mileage threshold, would prevent the majority of ISRI members from ever being able to use the proposed streamlined market dominance approach to the disadvantage of smaller scrap metal shippers with smaller rate cases. Thus, ISRI requests that the Board take account of the ISRI survey responses regarding the mileage at which scrap metal companies tend to use trucking, as well as the other factors which restrict their ability to use trucking described herein, and establish a market dominance highway mileage threshold at 200 miles. A 200 mile threshold would be conservative based on the data and survey responses

and would better align with the reality of the scrap metal industry. A 200 mile threshold would also be more consistent with the Board's stated purpose of establishing a streamlined approach for pleading market dominance in rate reasonableness proceedings and make the Board's rate relief more accessible for complainants with smaller cases.⁶

B. The Board Should Adopt A “No More Than 20% Truck Volume” Metric

With respect to the Board's proposal that “the complainant has used truck for 10% or fewer of its movements subject to the rate at issue over a five-year period,” ISRI strongly agrees with the Coalition Associations' comments that the proposed metric comparing truck movements versus rail movements is inappropriate.⁷ A single truck has significantly less commodity carrying capacity as compared to a single rail car. As a result, the number of trucks needed to replace a single rail shipment for the same volume can be as much as four. Furthermore, this number is not consistent, as it can vary based on different commodity-specific equipment needs and other factors. Thus, ISRI strongly believes that the Board should adopt a volume-based metric that identifies the total percentage of truck shipments out of the total volume moving between a single origin and destination, since this metric would provide a more accurate and reliable comparison of truck versus rail shipments.

ISRI further believes that the proposed 10% threshold is too low, and it does not comport with the actual experience of ISRI members. In order to evaluate the propriety of the proposed 10% truck metric, ISRI asked its members to provide quantitative data on their annual truck movements for their top 10 rail movements by volume moving between the same origin-destination pairs between 2016 and 2018. Unfortunately, most of our members determined that this request was too burdensome and time-consuming based on the available timing and their

⁶ Id. at 1.

⁷ Id. at 9.

internal data processes. However, based on three responding companies of differing size, one company who was able to respond used truck on only 15% of their top volume rail lanes for this three year period, while the others used truck for 22% and 29% of their top volume lanes. Albeit a small sample, ISRI believes that this data suggests that a more appropriate metric for the ferrous scrap industry would be 20%. The Board should also take into account that the overall numbers provided by our members include a certain volume that needs to move by truck due to various other factors (e.g., expedited shipments, customers without rail access, rail service delays or force majeure conditions), and that it covers only a three year (and not a five year) period to try and minimize the data collection burden. In light of these findings, ISRI strongly believes that the Board should adopt a higher percentage threshold, such as 20% as supported by the ISRI data and proposed by the Coalition Shippers, since this figure would align more closely with the shippers' actual shipping patterns, which shows a somewhat higher use of trucking than the proposed 10% factor but still establishes a strong dependence on rail for the vast majority of shipments.

III. The Board Should Allow Complainants to Satisfy Either of the *Prima Facie* Factors Related to Truck Competition

The Board's proposal includes two separate *prima facie* factors to prove the absence of effective truck competition. However, existence of either of these objective factors is highly indicative of the lack of truck competition on a given lane. For instance, as the Board suggests, a showing that truck movements for the issue traffic are below a certain threshold indicates that a complainant's "truck options are ineffective, based on its limited use of the option over a historical period."⁸ Thus, trucking may be an ineffective option compared to rail even if the lane at issue is shorter than the proposed length of haul threshold. Similarly, the length of haul for the

⁸ Id.

lane at issue may be longer than the proposed threshold, yet the complainant's reliance on truck may be higher than the proposed threshold, which would result in the complainant not being able to satisfy the *prima facie* factors to plead market dominance.

ISRI therefore believes that the Board should adopt an "either/or" approach when it comes to satisfying the *prima facie* factors related to truck competition. As the Board acknowledges in its notice, the existence of any of these *prima facie* factors is already a strong indication of the absence of truck competition for separate and independent reasons. For instance, the Board indicates that "trucking becomes less viable when the length of haul exceeds 500 miles because any transport over that threshold, in many instances, could not be completed in one day."⁹ Whereas, with regard to the 10% truck movement threshold, the Board recognizes that "[u]nlike complainants that regularly move large volumes of traffic by truck, complainants that move less than 10% of their traffic by truck, despite rates with high R/VC ratios and the absence of intramodal and barge competition, are reasonably likely to have persuasive arguments for why trucking does not provide effective competition, including customer contracts, product characteristics, and price of the trucking alternative."¹⁰ In other words, the Board's reasoning for why the foregoing *prima facie* factors should be indicative of a lack of effective truck competition is completely separate, and the existence of either of these factors should be sufficient to establish a rebuttable presumption. Of course, as explained above, these thresholds should be changed for the scrap metal industry but the underlying rationale supporting the establishment of the thresholds does not.

Furthermore, the *prima facie* factors proposed by the Board would merely serve as rebuttable presumptions, where the railroads would have the opportunity to prove otherwise. As

⁹ *Id.* at 7.

¹⁰ *Id.* at 9.

a result, the railroads would be able to show other case-specific factors that would help the Board determine whether the serving carrier is in fact market dominant on the lane at issue.

Finally, ISRI strongly believes that requiring the complainants to satisfy either of these *prima facie* factors, instead of requiring them to satisfy both, would comport more with the Board's overarching purpose of reducing the burden on parties, expediting the proceedings and making rate relief procedures more accessible, especially for complainants with smaller cases.¹¹

IV. CONCLUSION

ISRI commends the Board's efforts to address the needs for reduced market dominance evidentiary burdens on complainants, expedite the market dominance phase of rate proceedings, and make the Board's rate relief procedures more accessible, especially for complainants with smaller cases. ISRI urges the Board to modify its proposed rules in light of the comments provided herein.

Respectfully submitted,

THE INSTITUTE OF SCRAP RECYCLING INDUSTRIES,
INC.

By its attorney:

A handwritten signature in dark ink, appearing to read 'Karyn A. Booth', is written over a horizontal line.

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Dated: November 12, 2019

¹¹ *Id.* at 1.