



ISRI is the voice of the recycling industry, promoting safe, economically sustainable and environmentally responsible recycling through networking, advocacy and education.

January 10, 2020

The Honorable Ann D. Begeman
Chairman
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

The Honorable Patrick J. Fuchs 300261
Member
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

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

**Re: STB Docket No. EP 756, Market Dominance Streamlined Approach—Reply
Comments of the Institute of Scrap Recycling Industries, Inc.**

Dear Chairman Begeman, Vice-Chairman Oberman and Commissioner Fuchs:

The Institute of Scrap Recycling Industries Inc. (“ISRI”) hereby submits its reply comments concerning the Surface Transportation Board’s (“STB” or “Board”) proposals to streamline market dominance evidentiary burdens in rate reasonableness proceedings, as set forth in the Notice of proposed Rulemaking (“NPRM”) served by the Board on September 12, 2019.¹ On November 12, 2019, ISRI filed its opening comments in response to the Market Dominance NPRM.² In its comments, ISRI strongly supported the Board’s proposals, and urged the Board to modify two of the proposed *prima facie* market dominance factors, i.e., the highway mileage factor and percentage of truck shipments factor, in light of the unique characteristics of the scrap metal industry.

In these reply comments, ISRI strongly endorses the joint reply comments submitted by the Coalition Associations.³ The Coalition Associations’ reply filing responds in detail to the railroads’ opening comments. ISRI hereby provides its individual reply comments to address some of the issues raised by various railroad stakeholders regarding the Board’s proposed *prima facie* factors.

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

² Comments of the Institute of Scrap Recycling Industries, Inc., STB Docket No. EP 756 (November 12, 2019) (“ISRI Opening Comments”).

³ The Coalition Associations include the American Chemistry Council, Corn Refiners Association, The Fertilizer Institute, the National Industrial Transportation League, and the Chlorine Institute.

The Board Should Adopt A 200 Highway Miles Threshold for the Ferrous Scrap Industry

In its opening comments, ISRI urged the Board to adopt 200 highway miles as the appropriate threshold to demonstrate that trucking does not provide effective competition to rail for the lane subject to the rail rate reasonableness proceeding.⁴ ISRI explained that it arrived at this number based on the results of a membership survey and quantitative data it received from some of its members.⁵

ISRI continues to believe that 500 highway miles is not a workable distance for ferrous scrap companies. As explained in the opening comments, our members' data shows that ISRI members relied on rail for distances well below 500 highway miles, based on unique factors that compel ferrous scrap companies to ship by rail even for shorter movements.⁶ ISRI continues to believe that 200 highway miles would be a more accurate measure where trucking ceases to provide effective competition to rail for the ferrous scrap industry.

Nonetheless, some of the railroad parties requested the Board to increase the proposed 500 highway miles threshold to 750 miles.⁷ ISRI strongly disagrees with this proposal and reiterates that any distance longer than 200 highway miles would defeat the purpose of streamlining market dominance pleadings for the scrap metal industry. ISRI's membership survey and quantitative data suggest that certain factors unique to the ferrous scrap industry compel ISRI members to rely on rail for movements significantly less than 500 highway mile distances, such as the weight and volumes of scrap metal shipments, and the availability of specialized equipment (i.e. steel bottom trucks). Furthermore, as the Coalition Associations explain, publicly available data relied upon by the railroads actually supports a lower threshold than 750-miles. Specifically, the Commodity Flow Surveys published by U.S. Department of Transportation ("Department") suggests that the average distance for truck shipments is 227 miles, and data on tonnage by distance shows that trucks lose their competitive edge over rail for movements exceeding 250 miles.

The railroad parties further argued that trucking remains competitive for movements longer than 500 miles because trucking has a comparable market share to rail for those movements.⁸ However, as recognized by the ICC, market share is a poor indicator of market dominance due to the difficulties in calculating the appropriate market, and the case-specific nature of competitive implications.⁹ Finally, contrary to the railroad parties' claims that technological advancements

⁴ *Id.* at 5.

⁵ Additional data provided by two ISRI members subsequent to the filing of ISRI's Opening Comments suggests that the average truck shipment distance for lanes where there is also a rail option is significantly below 500 highway miles. Specifically, one of the members' average is 31 highway miles for the last three years, and the other member's average is 227 highway miles for the last three years.

⁶ ISRI Opening Comments at 8.

⁷ AAR Opening Comments at 9 (November 12, 2019); BNSF Opening Comments at 13-14 (November 12, 2019); Canadian National Railway Co. (CN) Opening Comments at 2 (November 12, 2019); UP Opening Comments at 12 (November 12, 2019).

⁸ CN Opening Comments at 4 ("Truck and rail have equal market shares for tons moved between 500 and 750 miles, a feature that is consistent between 2007 and 2012."); BNSF Opening Comments at 13 ("Trucks carry the largest share of goods shipped in the United States-62.7 percent of the tonnage and 61.9 percent of the value-and remain the primary mode for shipments moved less than 750 miles.").

⁹ Mkt. Dominance Determinations, 365 I.C.C. 118, 123 (1981).

(e.g., platooning, remote operation and autonomous trucks) will allow trucks to travel longer distances, these advancements are not likely to become a reality in the very near term for technological, regulatory and other reasons. Even assuming these advancements are realistically possible in the short-term, they are still not likely to eliminate the need to have drivers in the motor vehicles, who would remain subject to FMCSA's hours of service regulations, which restricts the utility and competitiveness of trucks as compared to rail at longer distances. Further, even if autonomous trucks were to have the impact claimed by the railroads (which is unlikely), the railroads could petition the Board to reopen this docket to modify the highway distance threshold and introduce new evidence on the effect of this technological advancement. Thus, ISRI urges the Board to reject railroad arguments to increase the highway miles threshold, and to adopt the 200-highway miles threshold which would better comport to the realities of the ferrous scrap industry.

The Board Should Adopt A 20% Truck Volume Threshold for the Ferrous Scrap Industry

In its opening comments, ISRI also requested the Board to adopt a higher threshold (i.e., 20% as opposed to 10%) as a *prima facie* factor for the volume of truck movements in a given lane over a five-year period, based on data provided by ISRI members.¹⁰ ISRI explained that the correct metric for comparison should be the volume percentage (i.e. tonnage) moved by truck as compared to the total volume of traffic for a given lane, instead of the number of truck movements versus rail movements.¹¹ ISRI reiterates that, based on the members' data provided, a 20% volume threshold more accurately reflects the actual shipping patterns for ferrous scrap metal companies when choosing between truck and rail, while still demonstrating their strong dependence on rail.

Although railroads generally did not address this *prima facie* factor in their opening comments, one railroad criticized the Board for not identifying any "empirical evidence supporting the use of 10% factor for movements by truck."¹² ISRI does not oppose the Board using empirical evidence to determine the correct threshold for the truck movement factor. In fact, as explained above, ISRI's opening comments contain an explanation of the data provided by ISRI members as empirical evidence. This data suggests that the appropriate threshold for scrap metal shipments is a 20% truck volume when measured over the three-year period for which data was provided. ISRI urges the Board to reconsider the 10% threshold in light of the feedback received from the scrap metal industry.

The Board Should Reject the Railroads' Request to Include Product or Geographic Competition as an Additional *Prima Facie* Factor

ISRI strongly disagrees with the railroads' claims that the Board should add an additional *prima facie* factor to address indirect competition, such as geographic and product competition.¹³ As explained by the Coalition Associations, this factor has not only been removed by the Board in the past for being unduly burdensome on the litigants,¹⁴ the railroad parties' proposals fail to

¹⁰ ISRI Opening Comments at 9.

¹¹ *Id.*

¹² UP Opening Comments at 12.

¹³ AAR Opening Comments at 10; BNSF Opening Comments at 12-13.

¹⁴ *Mkt. Dominance Determinations—Prod. & Geographic Competition*, 3 S.T.B. 937, 946 (1998).

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address the issues that made the litigation of these factors unworkable in past cases. Introduction of product and geographic competition would undermine the very purpose of this proceeding to streamline market dominance evidence and, to the contrary, would make such submissions more complicated. Thus, ISRI strongly believes that the Board should reject this proposal.

Very truly yours,

/s/ Billy Johnson

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Chief Lobbyist

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