

REVIEW OF COMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS

Docket No. EP 704 (Sub-No. 1)

The Portland Cement Association (“PCA”) hereby responds to the Surface Transportation Board’s (“Board”) request for comments – “in advance of any formal action” – regarding a new methodology for possible use in considering class exemption and revocation issues. *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704 (Sub-No. 1), at 15 (STB served Sept. 30, 2020), revised, EP 704 (Sub-No. 1) (STB served Dec. 11, 2020) (“Request”).

It has now been over four and a half years since the Board proposed to revoke the exemption of hydraulic cement. That proposal itself came roughly six years after the Board first invited exemption-related comments in EP 704. Cement shippers have established a strong and compelling basis for the Board's proposed revocation of the exemption for hydraulic cement and have shown that notions of fairness and non-discriminatory treatment require that cement shippers be able to participate as full stakeholders in any current or future agency proceeding, without having to bring a full-blown revocation action.

Instead of acting on this long-delayed proposal, the Board has proposed a new, one-size-fits-all methodology for considering commodity exemption requests and revocations. The methodology is overly complex, arbitrary, and by the Board's own description, ill-suited to making final determinations on exemption revocation questions. The Board's proposal improperly uses a

variety of cross-commodity comparisons to gauge market power, relies on generalized and inaccurate assumptions regarding commodity markets and logistics, dilutes the significance of individual indicators, and creates an improper double-standard through which the Board would impose a far greater analytical burden upon shippers seeking revocation than it had placed upon carriers seeking exemption in the first instance.

The methodology is fundamentally flawed for the purpose of any commodity, and particularly for hydraulic cement. The Board's proposed methodology is unduly complex and arbitrary and would prevent cement shippers from having equal and effective access to the Board's backstop regulatory protections. Rather than devote additional consideration to an intricate set of proposed calculations, "Indicators," and "Visualizations" that the Board itself would not treat as determinative, the Board instead should rely on the existing record before it to revoke the exemptions that, in 2016, it proposed to revoke; most notably, the exemption pertaining to hydraulic cement. *See Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704 (Sub-No. 1) (STB served March 23, 2016) ("*NPRM*"). The Board's 2016 analysis was sufficiently rigorous to support revocation of the subject exemptions. There is no need to engage in an analysis of peripheral issues which risks distracting the Board from the principal focus of the market power inquiry, and which would only further delay what has been an excessively long regulatory process.

PCA has several concerns with the proposed methodology, but fundamentally the Board cannot fully automate its regulatory role. Therefore, the Board should withdraw its misguided search for a universal market-power formula and continue to conduct the commodity specific analysis and fact finding it has long utilized. Regardless of its action with respect to the proposed methodology, however, the Board can and should rely on the existing, robust administrative record to reinstate Board oversight related to shipments of hydraulic cement.

BACKGROUND

A. PCA

Portland cement is a manufactured powder that acts as the glue or bonding agent that forms concrete. As an essential construction material and a basic component of the nation's infrastructure, portland cement is utilized in numerous markets, including the construction of highways, streets, bridges, airports, mass transit systems, commercial and residential buildings, dams, and water resource systems and facilities.

Founded in 1916, PCA is the leading voice for the U.S. cement manufacturing industry. PCA's members represent 91 percent of the United States' cement production capacity. PCA members operate manufacturing plants in 33 states, with distribution terminals in all 50 states. PCA members rely on the railroads to move hydraulic cement from manufacturing plants to distribution facilities to market. Frequently, there are no practical, feasible modal alternatives to railroad service to meet the business needs of PCA's members. Thus, PCA members have a strong interest in removing unfair and unnecessary barriers to accessing regulatory protection remedies and in reinstating Board oversight related to hydraulic cement shipments.

The Interstate Commerce Commission (ICC) exempted the transportation of hydraulic cement from regulation in 1995. *Rail General Exemption Authority – Exemption of Hydraulic Cement*, EP 646 (Sub-No. 34), 1995 WL 438371 (ICC served July 26, 1995) (exempting all rail movements of hydraulic cement from the provisions of 49 U.S.C. Subtitle IV with the exception of shipments from the Dakota plant in Rapid City, South Dakota); *see also Rail General Exemption Authority – Exemption of Hydraulic Cement*, 1 S.T.B. 875 (1996) (extending the 1995 exemption to include the Dakota traffic as well).

B. The Board's EP 704 Proceeding

PCA has participated actively in this proceeding and in the original EP 704 docket since late 2010, a period of over ten years. PCA filed written Comments on January 31, 2011, July 26, 2016, and August 26, 2016, and PCA participated in Ex Parte meetings with each Board member in 2019 and participated in the Board's various hearings and conferences associated with this proceeding.

In 2016, the Board proposed to revoke the existing class exemption for several different commodities, including hydraulic cement. *See NPRM* at 9-10. The Board based its proposal on its view that "changes in the rail and cement industries appear to have significantly reduced the effectiveness of competitive transportation alternatives." *Id.* The Board added that its "waybill data for years 1992 through 2013 reveals that [the revenue-to-variable cost (R/VC)] ratios for hydraulic cement have trended upwards over the course of 22 years." *Id.* at 10. Specifically, the Board explained that:

In 1992, the R/VC ratio for potentially captive cement traffic was 208.3%, compared to 239.6% in 2013. Also, the percentage of potentially captive traffic by revenue increased from 18.9% in 1992 to 54.6% in 2013.

Id.; *see also id.* ("The Board finds that increases in both the R/VC ratio for potentially captive traffic and the percentage of potentially captive traffic by revenue are possible indicators of increased railroad market power sufficient to warrant regulatory oversight.").

In its 2020 *Request* for comments (as revised), the Board similarly finds that 52.2% of the hydraulic cement carloads move at R/VC ratios over 180%. *Revised Request* at 3. Nevertheless, the Board's new methodology identifies only "moderate" evidence in support of revocation of the hydraulic cement exemption under either the R/VC or Revenue Per Car ("RPC") standard. *Id.* at 4-5. In particular, the Board calculates an "Overall Dashboard Signal" for hydraulic cement of

1.25 under the R/VC standard and 0.875 under the RPC standard. Each figure falls within the broad “moderate” range that the Board identifies for Overall Dashboard Signals between 0.67 and 1.33.

It therefore appears that the effect of the Board’s proposed methodology would be to dilute the significance of the R/VC data on which the Board historically has relied to gauge market power. Even though the Board acknowledges that more than half of all hydraulic cement carloads move above the Board’s jurisdictional threshold, the Board’s proposed methodology would undermine that observation and instead would replace it with a variety of analyses with far less relevance to the question of railroad market power.

COMMENTS

A. The Board’s Reliance on the Railroads’ Criticism of R/VC Ratios Is Misplaced

The Board appears to have developed its proposed methodology in response to the railroads’ stated concerns “about whether the data and information in the NPRM warranted revocation” and the railroads’ argument that “R/VC ratios are not a reliable indicator of market power.” Request at 4. However, the railroads R/VC ratio contentions are wrong and in direct contradiction of their use of such factors when petitioning for the exemptions and the Board’s reliance on such metrics when granting the exemptions, including the cement exemption.

As the Board and the courts have found, R/VC ratios calculated using the Uniform Rail Costing System (“URCS”) provide a valid and reliable measure of railroad market power over a particular commodity. *Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004, 1024 (1996) (“URCS is an accepted measure of movement profitability and revenue contribution for the rail industry”); *Mr. Sprout, Inc. v. U.S.*, 8 F.3d 118, 124 (2d Cir. 1993) (use of R/VC ratios is “a valid and reliable measure of market power in the rail industry”).

Moreover, contrary to the railroads' suggestion that the Board's 2016 proposal relied exclusively and/or excessively on R/VC ratios, the Board is perfectly able to (and already does) consider various additional/secondary factors in making its determinations – without the “help” of a complex methodology such as that proposed here.

In the case of the 2016 hydraulic cement revocation proposal, the significant increases in the R/VC ratios were certainly persuasive, if not conclusive components of the Board's analysis, but the Board cited numerous other factors in support of its proposal, including but not limited to:

- Increased market power of rail carriers resulting from railroad consolidation;
- Declining competition from the motor carrier industry, due to fuel prices, a shortage of drivers, and increased congestion on highways and roads;
- Contraction of the cement industry from 179 plants to fewer than 100;
- Cement shippers shipping greater distances, ranging from 250 miles to 300 miles, far beyond the 100 to 125-mile distance for which truck transportation of cement is economical for most manufacturers;
- Doubling of average plant capacity; and
- Cement shippers shipping greater distances, ranging from 250 miles to 300 miles, far beyond the 100 to 125-mile distance for which truck transportation of cement is economical for most manufacturers; and
- The increase in cement shipments in the United States served by a single railroad (80%).

See NPRM at 9-10.

B. The Board Itself Recognizes the Inadequacy and Limitations of its Proposed Methodology

It is remarkable and seemingly unprecedented that the Board's *Request* for public comments includes many instances in which the Board itself denigrates the usefulness and purpose of its own proposal. In particular, the Board repeatedly emphasizes that the proposed methodology would not allow the Board to make final determinations as to exemption or revocation, but instead, would provide only a partial, imperfect set of information to which the Board necessarily would apply some other, unspecified analysis in order to make final revocation determinations. These candid admissions of the inadequacy of the proposed tool to its fundamental task raise legitimate questions as to why there is any need to engage in such a complex exercise in the first place:

The Board does not anticipate that the approach would necessarily provide a final conclusive answer on whether the commodity exemptions at issue should be revoked, or whether additional commodity exemptions should be adopted. Those determinations are complicated and multi-factored, and the approach has limitations (as does any model) and relies on certain assumptions (described below). . . .

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. . . .

The Board would not expect that the Indicator Dashboard (or the approach as a whole) could fully answer the question of whether revocation or exemption is appropriate, given the market-specific issues, among other matters, that might also need consideration. . . .

As noted above, the Board does not anticipate that this approach would serve as a mechanical test for determining whether the commodity exemptions at issue should be revoked or whether a new exemption should be issued, but as a potential tool for evaluating market conditions governing a commodity, including changes in such conditions over time. . . .

Request at 6, 9, 15.

These criticisms and admissions are particularly significant where, as here with respect to the cement industry, the Board has already conducted extensive analysis and reached a proposed revocation decision.

PCA respectfully submits that this proceeding has lasted far too long already (*i.e.*, 10+ years). There is no basis for affording additional years of consideration to an unquestionably complicated tool that, by the Board's own admission, is unsuited to answering the ultimate question of whether to revoke an existing exemption. If, as the Board notes, that ultimate question is too "complicated and multi-factored" for the Board's proposed approach to resolve, then the Board instead should devote its time and attention to answering that ultimate question.

As PCA noted in its 2016 Comments and Reply Comments, and in the additional evidence it submitted as part of the Board's Ex Parte meetings in 2019, abundant evidence already exists to support the Board's *NPRM* and to justify the revocation of the hydraulic cement exemption.

C. The Proposed Methodology is Overly Complex and Arbitrary and Improperly Relies Upon Comparisons between Different Commodity Groups to Gauge Competition

Even beyond its lack of ultimate utility, the Board's proposed methodology is unduly complex and arbitrary in many respects. Its three main components – *i.e.*, the Geographic Modal Influence Model ("GMIM"), the Indicator Dashboard, and the Data Visualizations – each purport to yield an analysis of competitive issues that is more "robust" than what the Board has used in the past (*cf. Request* at 5), but each depends in large measure upon the various decisions and categorizations made by the methodology's developer. As noted above, the complex process appears to have the effect of second-guessing reliable data regarding the rates and R/VC ratios associated with rail traffic. Rather than accept that R/VC data as persuasive evidence (much like the ICC relied upon low R/VC ratios to exempt traffic in the first instance), the Board instead has

created a complex algorithm in which various factors – which may or may not have meaningful competitive significance – are evaluated and averaged to yield categorical results.

Ultimately, however, the proposed methodology provides little more than a new set of pictures for an “eyeball” test, in which market power is in the eye of the beholder and the metrics and assumptions themselves are of questionable reliability. *See, e.g.*, Request at 14 (“Drawing from the GMIM and CCWS analysis, the metrics *reflected in the violin plots* could be used to help draw inferences about increased or decreased influence from intermodal and intramodal competition over time . . . [Such data] *might suggest* that railroads are exercising greater pricing power . . . [or] *might indicate* an increase in railroad market power . . . [or] *might also be consistent* with railroads having increased market power.”) (emphasis added).

1. The Board Proposes to Engage in Improper “Relative” Market Power Comparisons Between Different Commodities

The Board’s proposed analysis improperly relies upon comparisons of relative railroad market power over different traffic groups as a means of gauging the need for regulation. In that regard, the proposed analysis assumes that regulation of rail rates for a given commodity is not necessary (or at least is less likely to be necessary) if the railroads exert even greater market power when pricing service for other commodity groups. This improper approach is present in six of the Board’s eight Indicator metrics. This approach fails to take into consideration the different needs and challenges faced by shippers of different commodities and fails to consider how those differences impact railroad market power over the subject commodities.

By way of background, the Board’s “Indicator Dashboard” analysis first considers two “Initial Screens,” each of which pertains only to the subject commodity:

The Indicator Dashboard first applies two initial screens. Initial Screen One is based on the percentage of CCWS commodity-specific carloads that are R/VC 180 traffic, calculated using 2018

CCWS data. If that percentage is below 5%, the commodity is assigned an Overall Dashboard Signal of “weak.” Initial Screen Two is based on the percentage of rail cars moving in intermodal traffic, again using 2018 data. If that percentage is above 40%, the commodity is likewise assigned an Overall Dashboard Signal of “weak.”

Request at 9-10.¹

Assuming that neither Indicator is “weak,” however, the Board’s proposed analysis moves on to an analysis of eight metrics referred to as “Indicators.” *Request* at 10.² Significantly, the first two of those eight Indicator-metrics each compare “R/VC ratios for a given commodity with R/VC ratios *for all carload traffic* – one for 2018, the other over time” *Id.* (emphasis added). For a given commodity, “each of these two indicators is given a ‘weak’ designation if the commodity R/VC metric is more than 5 percentage points below the R/VC metric *for all carload traffic*, a ‘strong’ designation if the commodity R/VC metric is more than 5 percentage point above the R/VC metric *for all carload traffic*, and a ‘moderate’ designation if the commodity R/VC metric is within 5 percentage point above or below the R/VC metric *for all carload traffic*.” *Id.* at 10-11 (emphasis added).

In addition, at least four of the Board’s remaining six Indicators each compare the level of a given metric (or the change in that metric) for the subject commodity to the level of (or the change in) that same metric for “all carload traffic.” Those four Indicators include: (1) the “Competitive Influence in Most Recent Year Indicator;” (2) the “Competitive Influence Change Indicator;” (3) the “Length of Haul Change Indicator;” and (4) the “Competitive Influence R/VC

¹ The Board uses the term “Overall Dashboard Signal” in referring to the two Initial Screens, but then later uses the same term to the average of the eight Indicator metrics. *Cf. Request* at 9, 13.

² For reasons that are not apparent, the Board excludes its two Initial Indicator Signals from the averaging calculation it performs to develop an Overall Dashboard Signal. *See, e.g., Revised Request* at 3-4 & n.3.

Difference Change Indicator.” *Id.* at 11-12; *see id.* at notes 32, 33, 35, and 37 for a description of the manner in which each Indicator relies upon a comparison with data for “all carload traffic.”

The Board’s approach in this regard is not sound. It is entirely possible that railroads could exert improper market power over a large number of different commodity groups simultaneously. There is no provision in Title 49 that restricts Board rate jurisdiction solely to the transportation of those commodities which must bear the greatest burden of railroad market power relative to all other commodities. Stated differently, Title 49 does not excuse railroads from exerting improper market power over a given commodity simply because the railroads happen to exert the same or even more market power over some other commodity or commodities. It would be improper for the Board to decide that – at most – only a subset of rail traffic (regardless of the degree of market power exerted by the railroads) can ever be entitled to regulatory oversight. The transportation of a given commodity should not be any less deserving of regulatory scrutiny simply because shippers of other commodities also face high revenue demands from rail carriers.

2. The Board’s Analysis Relies Upon Many Arbitrary Distinctions

In addition to this flawed reliance on the concept of relative market power, the Board’s proposed approach is arbitrary in a number of additional respects. In PCA’s view, the following items demonstrate that the Board’s effort to add empirical rigor to its exemption analysis raises more questions than it answers:

- Unsupported Simple Averaging of Eight Indicators: There is no basis for electing to use an unweighted average to transform the eight separate Indicators for each commodity into an Overall Dashboard Signal. *See Revised Request* at 4 n.3 and 5 n.4. In that regard, why – for example – should “Competitive Influence Change” be afforded the same weight as “Length of Haul in Most Recent Year”? Has the Board performed some analysis showing that those two

Indicators are equally meaningful in gauging the need (or the absence of any need) for regulatory oversight? The same question could be asked regarding any of the other Indicators. And as noted above, there does not appear to be: (i) a basis for excluding the Board's two initial Indicator Screens from the Overall Dashboard Signal calculation; or (ii) a basis for considering Indicators that rely on comparisons between market power over the subject commodity and market power over all other commodities.

- Arbitrary Use of Three Broad Result Categories without Sufficient Differentiation:

Similarly, the Board's use of only three "result" categories for each Indicator blurs the distinction between: (i) a metric that barely falls below the dividing line between the "moderate" and "weak" ranges; and (ii) a metric that is far into the "strong" range. Under the Board's approach, any "weak" metric would receive a "0" rating and any strong metric would receive a "2" rating. If those two items were averaged, they purportedly would indicate a "1" signal ("moderate") but that "moderate" signal would not present an accurate picture of the two actual Indicators. In that regard, why has the Board decided to use three "result" categories rather than five? Or rather than ten? Would a more granular set of Indicators that included a "very strong" category and a "very weak" category be more helpful?

- Arbitrary Reliance on the 5% Increment: There is no basis for the Board's repeated reliance on a 5% increment (relative to other traffic) when assigning either a "strong," "moderate," or "weak" indicator to a given commodity. *See, e.g., Request* at 9-12 What has the Board considered to settle upon the 5% figure as opposed to some other percentage difference? Could the increment have been 3%? Has the Board chosen the 5% figure in order to ensure that a "sufficient" share of evaluated commodities falls into each of the "weak," "moderate," and "strong" categories? This same process of arbitrarily selecting thresholds and cut-offs appears in a

number of other respects throughout the Board's methodology, such as the 40% intermodal threshold, the 500-mile cut-off between short and long movements, and the 0.67 and 1.33 figures used to separate Overall Dashboard signals. With regard to arbitrary mileage increments, the Board's proposal does not consider the unique shipping needs of different commodities seeking a revocation. As the cement industry made clear in written communication and meetings with Board members, a 500-mile cut-off between short and long-haul movements is far too long to truly take into account what is economically feasible for the shipment of hydraulic cement. The Board's 2016 NPRM itself supported the cement industry's point in this regard by recounting the 250- to 300-mile common length of cement shipments and the impracticability of truck transportation beyond 100 to 125 miles. *See* NPRM at 10. This example demonstrates the flaws behind an arbitrary "one size fits all" mileage scale.

- Arbitrary Inference that R/VC Differentials with and without Modal Influence are Meaningful: The Board's "Competitive Influence R/VC Difference in Most Recent Year" and "Competitive Influence R/VC Difference Change Indicator" metrics consider the difference between the R/VC's of carload traffic with and without GMIM-assigned modal influences (and the change in such differences over time). *Request* at 12. The premise of the Board's comparison seems to be the expectation that railroads with market power will charge higher rates (on an R/VC basis) where some hypothetical competitive alternative does not exist. Significantly, that premise may or may not be valid. Contrary to the Board's assumption, situations may exist in which railroads charge high rates for a given commodity regardless of the presence of some modal alternative that the Board's approach deems to constitute a competitive option.

Notably, the Board's own calculations show that the 75th percentile R/VC ratio for hydraulic cement in 2018 actually is *higher* where the Board finds "Rail Influence" to exist than

where the Board finds “Rail Influence” not to exist. *See, e.g., Revised Request* at 11 (“The results for traffic with rail influences are similar to the results for railroad or water carrier influences, though the 2018 upper quartiles R/VC ratio for traffic with railroad influences is even closer to 250%.”).³ That result appears to contradict the premise underlying the Board’s “Competitive Influence R/VC Difference” metrics. Accordingly, rather than proving the absence of market power (as the Board appears to assume), a situation showing relatively unchanged R/VC ratios either in the presence or absence of presumed modal alternatives instead could prove: (i) the presence of railroad market power; and (ii) the irrelevance of the model alternative that the Board has identified for the subject commodity. The Board’s proposed approach assumes these intermodal transportation options are truly economic and feasible. As the cement industry highlighted during its Ex Parte meetings with Board members, however, there is not a large delta between the cost to manufacture cement and the sale price of the product. As a result, even if the Board’s methodology assumes the existence of competitive intermodal transportation options, these options may cost too much to truly constitute meaningful competitive alternatives.

- Arbitrary Reliance on the Overall Dashboard Signal Thresholds: How and why did the Board identify 0.67 and 1.33 as the specific thresholds for separating Overall Dashboard Signals into “weak,” “moderate,” and “strong” categories? *See Request* at 13. Did the Board consider using 0.8 and 1.2 as thresholds instead? If not, what is the special significance of 0.67 and 1.33? What is the basis for treating 0.68 and 1.32 signals as falling within the same “moderate” regulatory category? Given the broad and arbitrary nature of the result categorization, what, if anything, does the Board learn from receiving output from the proposed methodology showing

³ *See also id.* at 10 (showing that the 75th percentile R/VC ratio figure for hydraulic cement in 2018 was the same regardless of the presence or absence of any railroad or water influence).

that the case for revocation for a given commodity is “moderate”? In that regard, it would be possible to generate the same Overall Dashboard Signal of 1.0 with a multitude of different Indicator combinations. For example, the Board’s proposed system would rate each of the following two Indicator patterns as identical “moderate” signals, each averaging 1.0: $2+2+2+2+0+0+0+0$ and $1+1+1+1+1+1+1+1$. Would the Board treat these two commodities as equivalent in terms of railroad market power?

In the end, the “intent” of the Dashboard is irrelevant. The Dashboard offers nothing more than a list of eight insufficiently justified “indicators,” each equally weighted according to a crude three-value system; each based on arbitrary if not incorrect data and assumptions; and all summarized in a single average number and descriptor that dilutes any potential signal that might have been offered by the data itself. Far from providing greater rigor to the Board’s analysis, this one-size-fits-all methodology is more likely to hide evidence of market power than illuminate it.

PCA respectfully submits that the foregoing list of questions is by no means exhaustive. By way of summary, there is no means through which the agency can fully automate its regulatory role. As the Board repeatedly recognizes in the *Request*, the Board ultimately must utilize its own expert judgment to decide whether competitive factors make the revocation of existing exemptions appropriate. Interposing complex layers of data analysis will not answer every possible question that potentially could arise and, more importantly, is not necessary as a precondition for protecting shippers who can show – on the basis of the same sort of traffic, revenue, and R/VC data the Board has accepted previously – that regulation of railroad rates is necessary. This data related to traffic, revenue, and R/VC data has historically been used by the Board to make revocation decisions. Application of this economic model to previous revocation decisions may have resulted in a

different outcome. As a result, the Board should not apply the use of this economic model to a proceeding that has been underway for more than ten years.

D. The Proposed Methodology Creates an Improper Double-Standard

As noted above, the root cause of the Board's present inquiry appears to be the concern expressed by railroad interests in their 2016 Comments that the Board's existing approach to deciding revocation requests lacks sufficient rigor. *See Request* at 3-4, 5-6 (noting, *inter alia*, that the Board is "committed to ensuring that a robust analysis be conducted when determining whether to proceed with any commodity exemptions or exemption revocations" and noting that that Board "directed OE to give further consideration to the issue").

Strikingly, however, the approach that the Board now has presented would create an improper double-standard as compared with the approach that the ICC and the Board used to grant exemptions in the first instance. Stated differently, it would be improper to allow railroads to secure an exemption based upon a comparably lean (and now outdated) record but then to require a complex analysis of "Indicators," "Signals," "Operationalize[d] Latitude and Longitude," "Bivariate Distribution Matrices," and "Violin-Plot Visualizations," merely as a first step in an extended effort to secure revocation of such an exemption.

The 1995 exemption of hydraulic cement provides an apt example. *Rail General Exemption Authority – Exemption of Hydraulic Cement*, EP 646 (Sub-No. 34), 1995 WL 438371 (ICC served July 26, 1995). In its very brief exemption decision, the ICC devoted slightly more than one page to its discussion of the parties' evidence and argument regarding the requested exemption. After recounting the parties' evidence regarding market share, length of haul, and rates, the ICC relied principally upon R/VC ratios to conclude that an exemption was appropriate:

An exemption will not permit railroads to abuse market power. The railroads face pervasive competition in the transportation of

hydraulic cement. Intermodal and intramodal competition exist in many markets. Trucks are the dominant mode, while barges and alternative rail carriers also compete. AAR also submitted evidence of extensive geographic competition . . .

The evidence suggests that these competing forces have acted to keep rail rates at competitive levels. A very small percentage of all current cement shipments are actually moving within reach of the Commission's rate reasonableness jurisdiction.

Id. at * 4 (emphasis added) (footnotes omitted). The ICC's 1995 decision, of course, lacks any discussion of Bivariate Distribution Matrices, an Overall Dashboard Signal, or Violin Plot Visualizations. Nevertheless, the agency concluded that its exemption determination was justified on the basis of the rate evidence then in existence and the ICC presumably concluded that its analysis was defensible under the Administrative Procedure Act.

It therefore would be inappropriate for the Board now to determine that the revocation of an exemption requires a far more detailed and exacting analysis. There is nothing in the National Rail Transportation Policy that requires the evaluation of market power for revocation purposes to be any more rigorous and time-consuming than the evaluation of market power for exemption purposes, particularly where the output of the new analysis has questionable reliability with respect to the issue at hand.

E. The Board's *Request* Does Not Address Practical and/or Administrative Considerations Regarding the Methodology

The Board's *Request* does not directly address the manner in which the Board envisions that either it or shippers might use the proposed methodology. Stated differently, the Board does not indicate whether it expects to use the proposed methodology on its own initiative (to revoke class exemptions for different commodities) or whether the Board will expect individual shippers to use the methodology to make their own affirmative cases in support of revocation. Given the level of detail and the extent of work obviously associated with the Board's development of the

proposed methodology, it would be profoundly burdensome to require a shipper seeking revocation of a given commodity exemption to develop evidence under that methodology.

Pursuing such complex proceedings on revocation does not comport with Congress' intent that the Board "provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part." 49 U.S.C. § 10101(15). As the Transportation Research Board has found: "[t]he standards and procedures used by the ICC and STB for ruling on the reasonableness of challenged rates have proved to be slow, costly, and inappropriate to many shippers' circumstances over three decades. Thus, they prevent shippers from having equal and effective access to the law's maximum rate protections. Efforts to streamline and expedite the process . . . have not overcome these deficiencies and in some respects have made matters worse." Transp. Research Bd., Special Report 318, *Modernizing Freight Rail Regulation* (2015) ("TRB Report"), at 6-7, <http://onlinepubs.trb.org/onlinepubs/sr/sr318.pdf>. In addition, the Board's proposal would deter shippers from availing themselves of the Board's regulatory processes. *See, e.g., Market Dominance Determinations – Product and Geographic Competition*, STB Ex Parte No. 627 (STB served July 2, 1999) at 6 ("[a] railroad need not be able to prevail on its . . . competition arguments for the costs of litigating those issues – in terms of time, money, and other resources – to act as a barrier to rate complaints").

Any approach that places extraordinary burdens upon the processing of revocation requests (whether those burdens are to be borne by shippers or would exist as part of the Board's internal analysis) would work a significant hardship upon the shipping community and would frustrate the need of shippers for regulatory meaningful regulatory assistance as protection from the abuse of railroad market power.

F. The Board Should Act Immediately on the Pending Hydraulic Cement Proposed Revocation, Independent of Further Consideration of the Proposed Methodology

Regardless of how the Board proceeds with the proposed methodology, it has the record and justification to finalize its proposed revocation of the hydraulic cement exemption. In its 2016 Comments in the instant proceeding, and its supplemental analysis provided to the Board in 2019, PCA submitted extensive evidence demonstrating that the market characteristics upon which the ICC relied in its 1995 exemption decision no longer exist. PCA showed that cement manufacturers are shipping cement over longer distances and from fewer plants, and that competition among railroads and alternative shipping options has shrunk over time. PCA Aug. 26, 2016 Reply Comments at 5. With regard to the effect of that shrinking competition on rates, PCA showed that average R/VC ratios for hydraulic cement (which the railroads had sought to downplay as a relevant measure) were 191% for the latest year available (2014) and have been growing over time. PCA July 26, 2016 Comments at 7-13.

In addition, PCA explained – in response to the railroads’ objections – that the Board’s Proposal was fully justified by the record:

Board decisions will be set aside only if found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). This standard is easily met here as the record is complete. The facts, data, and the Board’s analysis of those facts and data justify the Proposal with respect to hydraulic cement.

PCA Aug. 26, 2016 Reply Comments at 12.⁴ Rather than adopt its proposed *NPRM* to revoke the hydraulic cement exemption, the Board instead has taken four years to determine that a vastly

⁴ Citing *AEP Texas N. Co. v. STB*, 609 F.3d 432, 438 (D.C. Cir. 2010) for the proposition that agency orders will be upheld where there is a “rational connection between the facts found and the choices made.”

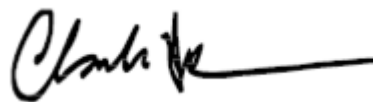
more complex methodology might have “potential usefulness” as an initial input for the Board’s subsequent exercise of regulatory judgment. It would not. For the cement industry, this new methodology would, at best, delay much needed and long-awaited relief or, more ominously, establish a vague and ambiguous, if not arbitrary standard for Board protections.

CONCLUSION

PCA respectfully submits that it would be counterproductive, at the present time, to embark upon the implementation of a new and highly complex methodology for evaluating potential exemptions when the Board itself acknowledges that the proposed methodology cannot, and would not, resolve the ultimate questions associated with an exemption analysis. Moreover, PCA submits that the approach proposed by the Board includes a number of flaws, including but not limited to: (i) reliance upon relative market power between different commodities as a means of determining whether to grant revocation; (ii) the assumption that R/VC differentials between situations with and without supposed model influence is an essential trait of market power; and (iii) and reliance on unsubstantiated and arbitrary thresholds and assumptions.

Rather than engage in its proposed exercise, the Board should return to the record and foundation for its 2016 *NPRM* and should revoke the exemptions discussed therein.

Respectfully submitted,



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