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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 704 (Sub-No. 1)

REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS

**JOINT OPENING COMMENTS CONCERNING PROPOSED NEW APPROACH
FOR CONSIDERING CLASS EXEMPTION AND REVOCATION ISSUES**

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The Institute of Scrap Recycling Industries, Inc. (“ISRI”), the American Forest & Paper Association, and the National Industrial Transportation League (“NITL”) (collectively, “Respondents”) hereby provide their comments in response to the decision (“Decision”) of the Surface Transportation Board (“Board” or “STB”) issued on September 30, 2020 in this docket.¹ The 68-page Decision sought comment on a proposed new approach for evaluation of market conditions, including transportation competition, in class exemption and revocation proceedings. While Respondents sincerely appreciate the Board’s efforts to refine the class exemption and revocation analysis and process, the proposed new approach is conceptually problematic, would be unworkable in practice, and should not be adopted. The proposed new approach would apply a market dominance-style analysis that deviates from the governing revocation statute, adds unnecessary and substantial complexity and delay to exemption proceedings, and would deter shipper parties from seeking regulatory oversight.

¹ The due date for comments was revised in a decision issued January 7, 2021.

I. Introduction.

This proceeding began almost five years ago as a Notice of Proposed Rulemaking (“NPRM”) regarding the possible revocation of existing exemptions for certain commodities and traffic types, as well as any others proposed in comments.² In the NPRM, the Board appropriately recognized that “[w]ith regard to each of these commodity groups, the dynamics of the particular transportation markets appear to have changed so significantly since the exemptions were first promulgated as to warrant the application of the Interstate Commerce Act in order to carry out the Rail Transportation Policy.”³ The Board properly focused on the central role of the National Rail Transportation Policy (“RTP”) of 49 U.S.C. § 10101 in any revocation analysis⁴ and also the importance of ensuring regulatory oversight and access to the Board’s procedures where there is “an increased likelihood of railroad market power”:

The purpose of this proposal is to restore shippers’ access to the Board’s regulatory oversight and processes – in particular, shippers of those commodities where evidence indicates that the competitive landscape has changed significantly enough to indicate that renewed regulation is needed to carry out the RTP. The Board is committed to ensuring that stakeholders have an appropriate, meaningful path to the Board, and the proposal here is an important step towards that goal.⁵

The proposed new approach, however, does not fulfill the intent of the flexible and straight-forward revocation statute or the Board’s objectives of providing oversight and access where meaningful market changes have occurred since adoption of the class exemptions 30 years ago. Rather, the good faith interest of the Board in a more “robust” analysis of market

² NPRM, slip op. at 1 (served March 23, 2016).

³ NPRM, slip op. at 4.

⁴ See NPRM, slip op. at 3 (“As discussed above, pursuant to 49 U.S.C. § 10502(d), the Board may revoke an exemption, in whole or in part, when it finds that regulation is necessary to carry out the RTP.”)

⁵ NPRM, slip op. at 4.

conditions has led it to consider whether to apply the extremely complex one-size-fits-all proposed new economic model approach to the exemption revocations at issue, despite the significant differences and unique characteristics that exist amongst the transportation markets for each of relevant commodities. Application of the new approach at this late stage would require ISRI and AF&PA (and other shipper groups) to re-litigate many market-related issues at significant additional expense and delay. This is not necessary or a sound use of the Board's or ISRI's and AF&PA's resources given the overwhelming evidence in the existing record explaining the substantial changes in market conditions for the transportation of scrap metal and paper and forest products, as well as their need for regulatory oversight in the present-day highly concentrated rail market. The Board should not significantly alter the parties' evidentiary burdens at the tail end of this proceeding when the evidence already strongly supports revoking the scrap metal and paper and forest products exemptions.

As explained herein, the proposed new approach is flawed and unwarranted for a number of reasons and should not be adopted. It goes far beyond what is required by the revocation statute, would turn exemption proceedings into complicated, lengthy, and expensive proceedings, and is inconsistent with the National Rail Transportation Policy that requires the Board "to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part."⁶

II. The Proposed New Approach Deviates from the Governing Statute.

A. The Revocation Statute Requires Analysis of the National Rail Transportation Policy.

Under the revocation statute, the Board "may" revoke an exemption:

⁶ 49 U.S.C. § 10101(15).

when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title.

49 U.S.C. § 10502(d). Despite this clear statutory requirement for the Board to focus its revocation decisions on the RTP, there is no explanation in the Decision how the proposed new approach carries out the RTP. Instead, the Decision merely states that the proposed new approach is a method for “[u]nderstanding market conditions” (p. 5), “identifying changes in market conditions” (p. 6), and “considering certain potential influences from alternative transportation modes that could impact the market” (p. 6). In the end, the Board admits that the proposed new approach “does not seek to answer the ultimate qualitative question of whether a commodity’s regulation is necessary to carry out the RTP,” but the Board says the proposed new approach has “potential usefulness.” Decision at 6. The failure of the proposed new approach to “carry out” the RTP is a fatal flaw, and Respondents contend that any potential usefulness pales in comparison to the challenges and problems that would be created by the proposed new approach.

B. The Proposed New Approach Improperly Ignores the Differing Legal Standards for Exemptions and Revocations.

As explained in the Decision, the proposed new approach would be applied equally to both new exemption requests and exemption revocation requests. Decision at 15. This proposal runs counter to the differing statutory standards for revocations and exemptions, which the Board itself emphasized very recently in justifying different treatment for a revocation request compared to an exemption request.

1. The Exemption Standard Requires Consideration of Market Power if an Exemption Transaction is Not Limited in Scope.

When considering creation of a new exemption, the Board:

to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part –

(1) is not necessary to carry out the transportation policy of section 10101 of this title; and

(2) either –

(A) the transaction or service is of limited scope; or

(B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of *market power*.

49 U.S.C. § 10502(a) (*italics added*). In other words, Congress has explicitly stated that “abuse of market power” must be considered for exemption requests where the transaction or service is not “of limited scope.” This statement reveals quite plainly that Congress knew how to require consideration of market power issues for proceedings related to exemptions.

2. The Revocation Standard Does Not Invoke Market Power; Instead, It Relies Only on the National Transportation Policy.

Unlike the exemption standard in § 10502(a), the statutory revocation standard does not mention market power. Instead, it merely states that the Board “may” revoke an exemption when it finds that “application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title.” 49 U.S.C. § 10502(d). The difference between the statutory exemption standard and the statutory revocation standard could not be more clear. An exemption request *requires* consideration of the RTP and “market power” in situations where an exemption transaction is not limited in scope, while an exemption revocation *omits* any mention of “market power,” requiring only consideration of the RTP. The fact that these differences are located in the same statutory provision indicates that Congress intended for differing standards to apply. Unfortunately, the

Decision proposes to use the new approach identically for revocations and new exemptions, thereby, in essence, increasing the evidentiary burdens and standards for exemption revocations. As explained below in Section IV, the standards applied in the proposed new approach are very closely aligned to the components of market dominance analyses used by the Board to measure market power, which is not required for exemption revocations.

3. The Distinction Between Standards for Exemption Creation and Revocation Has Been Appropriately Recognized by the Board in a Recent Decision.

Less than one year ago, the Board rejected assertions of several railroads who argued that the Board was required to apply the “market power” standard from the exemption statute in a revocation analysis.⁷ In that decision involving revocation of a class exemption for certain agricultural commodities in order to apply demurrage regulation, the Board stated that the railroads “mischaracterize[d] the...statutory provisions.”⁸ In support of its decision, the Board emphasized the difference in the standards for creation of a new exemption as compared to revocation of an existing commodity exemption.⁹ Additionally, the Board rejected the interpretation put forward by the Association of American Railroads (“AAR”) regarding the legislative history of the revocation statute in support of its position when it stated that “[t]he Conference Report language that AAR emphasizes does not overcome the clear statutory language giving the Board authority to revoke based solely on RTP concern.”¹⁰ These findings

⁷ Exclusion of Demurrage Regulation from Certain Class Exemptions, Ex Parte No. 760, slip op. at 6 (served Feb. 28, 2020).

⁸ Ex Parte No. 760, slip op. at 6 (Feb. 28, 2020).

⁹ Ex Parte No. 760, slip op. at 6 (Feb. 28, 2020) (“the exemption-revocation provision does not say anything about market power, in contrast to the exemption-granting provision”) (emphasis omitted).

¹⁰ Ex Parte No. 760, slip op. at 6 (n. 9) (Feb. 28, 2020).

counsel against application of the proposed new approach here and in all future exemption creation and revocation proceedings.

C. Given the Differing Legal Standards, this Proceeding Should Focus Only on Revocations.

This proceeding has been ongoing for almost five years, and is the outgrowth of a Board hearing over ten years ago regarding whether commodity exemptions should be continued given the substantial changes to the rail industry.¹¹ After more than a decade of testimony, comments, meetings, and more comments, all solely directed toward revocation of commodity and traffic exemptions, the scope of this proceeding was dramatically expanded by the Decision. As explained above, consideration of the evaluation method to be used during new exemption proceedings invokes a statutory standard that is different from the more flexible standard for revocations. More precisely, evaluating the new question of whether to apply the proposed new approach to both types of proceedings in this already-existing rulemaking involving revocations of six specific commodity exemptions improperly expands this proceeding (which has been fully briefed) into issues well beyond the subject commodities, thereby adding questions, unwarranted complexity, and delays.

Further, adding consideration of the standard for initial exemptions to this proceeding at this very late stage is highly problematic because of the lack of proper notice to regulated commodity groups who have not followed this long-running rulemaking proceeding on revocations closely because their industries were not implicated and who may not even be aware of the proposed new methodology and the associated risks and consequences should it be adopted. Thus, questions concerning the proper analysis for new exemptions should not be addressed in this proceeding.

¹¹ Ex Parte No. 704 began with a notice of hearing served October 21, 2010.

III. The Extreme Complexity and Lack of Certainty of the Proposed New Approach Would Result in Unwieldy and Expensive Proceedings that Deter Shippers from Requesting Future Exemption Revocations.

A. The Proposed New Approach Would Vastly Increase the Complexity, Cost, and Time Required for Revocation Proceedings.

The proposed new approach creates an additional layer of required evidence and analysis to be included in any revocation request. This additional evidence would be layered on top of all other legal, policy, and market-driven evidence in the proceeding, thus complicating an already complex and time-consuming process.¹² As the Board recognized, the new approach (which required 68 pages to describe in the Decision) does not even consider the statutorily-required RTP.¹³ Revocation considerations are already complex and time-consuming, as this exact proceeding has shown, yet the proposed new approach would increase the complexity dramatically by adding a further mandated and convoluted evidentiary component – one that does not even “answer the ultimate...question” required in the governing statute.

1. The AAR Letter Confirms That the Proposed New Approach Is Unwieldy and Would Be Unworkable in Practice.

The complexity of the proposed new approach has been confirmed in the months since the Decision. On December 23rd, the AAR submitted a twelve-page letter in this proceeding, asking various questions, most of which had multiple sub-parts, about the proposed new approach. A brief perusal of this letter provides a glimpse of the complexity inherent in the

¹² Decision at 6 (“[t]he Board does not anticipate that the approach would necessarily provide a final conclusive answer on whether the commodity exemptions at issue should be revoked”).

¹³ Decision at 6 (“the approach does not seek to answer the ultimate qualitative question of whether a commodity’s regulation is necessary to carry out the RTP”).

proposed new approach. In particular, the letter contains approximately 84 separate questions regarding the new approach.¹⁴

The AAR's questions pick apart nearly every threshold determination and assumption made by Board staff. This is simply a precursor to how the railroads would likely litigate a revocation case at the Board were the proposed model to be used. It is reasonable to expect that railroad experts would be hired to challenge as many aspects of the model as possible when applied to a given commodity, forcing the shipper proponent to likewise engage experts to respond, thereby making the proceeding cost prohibitive. As evidenced by large rate cases which have grown into litigation behemoths over time, complex and costly proceedings benefit the railroads simply by deterring shippers from even attempting to seek relief at the Board. Moreover, the fact that the parties to a revocation case must incur potentially enormous expense to litigate many aspects of the model to customize its features to a subject commodity makes no sense when the results of the model are not even designed to answer the ultimate question before the Board: "[m]ost 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."¹⁵

2. Adjudication of the Approach in the Context of a Specific Case Plus Any Other Relevant Factors Would Create Unwieldy, Extremely Complicated, and Costly Proceedings.

When considering all factors necessary to apply the proposed new approach in a revocation proceeding, as well as the additional evidence offered (such as evaluation of the statutorily mandated RTP), it becomes clear that the resulting process would be unwieldy, extremely complicated, and costly. The analysis would require imprecision in the evaluation of

¹⁴ When the numbering of the attachment is ignored and each individual query is counted as a separate question, there are approximately 84 questions in the attachment.

¹⁵ See Decision at 6.

potential rail, truck, and water competition influences. See Sections III.C, V.A, V.C, V.E, and VII below. Any proponent would still be required to, and want to, submit other evidence as well. Indeed, the Board itself recognized in the Decision that litigating revocation of commodity exemptions is a complicated process *absent* use of the proposed new approach: “[t]he 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)....”¹⁶ The resulting proceeding would be complex in the extreme, and it is unlikely that many would seek to use such a procedure.

3. Adoption of the Proposed New Approach Would Be Extremely Costly.

Respondents requested that expert consultant Henry Julian Roman, President of Escalation Consultants, review the Decision and the Board’s first technical conference to assess the complexity of the proposed new approach and provide a general estimate of the expert consultancy cost for developing a process to implement the proposed new approach. Mr. Roman has over forty years of experience in rail transportation economics, and he has participated in this proceeding by running various waybill analyses and providing testimony for both ISRI and AF&PA.¹⁷ Mr. Roman found the proposed new approach to have “vast complexity” because it uses multiple databases, large amounts of data, and interactions between these data volumes.¹⁸ It also requires access to (or purchase of) proprietary software programs.¹⁹

¹⁶ Decision at 6 (emphasis added).

¹⁷ See, e.g., Verified Statement of Mr. Roman, attached as Exhibit 3 to ISRI Reply Comments (filed Aug. 26, 2016).

¹⁸ See Exhibit 1, statement from Henry Julian Roman, dated January 28, 2021 (attached hereto).

¹⁹ See Exhibit 1.

From the Decision, it is unclear if the Board intends to apply the new approach itself to any revocation request in an individual proceeding or if the Board will require a party seeking revocation to hire a consultant to replicate and apply the model and submit the results, and any requested deviations based on unique commodity characteristics, as evidence. Both scenarios, however, would dramatically increase the complexity, time, and costs required for revocation proceedings. Even if the Board itself plans to apply the proposed new approach in the context of a particular revocation request, the proponent of the revocation would need to take the following steps to address application of the proposed new approach with assistance from an economic consultant:

1. Before filing its revocation request, the proponent would need to engage an expert to fully develop and apply the proposed new approach to the subject commodity/traffic as part of due diligence to determine the potential success of the case *in order to determine if* a revocation case should be filed.
2. After filing a revocation request, the proponent would need expert assistance to evaluate the Board's implementation of the proposed new approach to the subject commodity/traffic and determine if any modifications or adjustments are needed, and possibly re-run alternative scenarios in the model to better reflect the subject commodity's true transportation characteristics.
3. The proponent would need to analyze the railroad opponents' reply evidence, which would likely include modifications or adjustments to the proposed new approach.
4. In rebuttal evidence, the proponent would want to address the shortcomings of the modifications and adjustments made by the opponents to the proposed new approach.

It is important to remember that the above steps and associated costs would be *on top of* the litigation costs for all other evidence in the revocation case, including assessment of the RTP as the governing statute requires.

Mr. Roman has generally estimated that step #1 only, that is, replicating the proposed model, would cost around \$150,000.²⁰ This cost is simply for application of the approach to a particular case; it does not include evaluation of the propriety of the assumptions inherent in the

²⁰ See Exhibit 1.

approach, nor does it include evaluation of the opponents' reply evidence, development of rebuttal evidence, or verification of the eventual Board decision. After a model for implementing the approach has been developed, the cost for any subsequent case where the same expert consultant is used could be less, though still in the range of many tens of thousands of dollars simply for step #1 above – the initial application of the approach to a particular commodity or traffic type. The costs for step numbers 2, 3, and 4 above are difficult to predict but, depending on the complexity of a case and the scope of the railroads' evidence, would also require tens of thousands in expert costs and could easily rise into the six figures.²¹ When considering legal service expenditures on top of the expert's costs it is reasonable to expect that exemption revocation cases could involve total litigation costs of \$500,000 or more, particularly for industries seeking exemption revocations for several commodities governed by multiple STCCs.

B. The Proposed New Approach Would Deter Parties from Using the Board's Procedures.

The complexity and cost of the proposed new approach would significantly curtail the ability of interested parties to utilize the Board's procedures. Only those parties with substantial financial resources and a willingness to engage in complex (and potentially multi-year litigation²²) would be able to make revocation requests. The fact that the proposed new approach adds enormous complexity but does not provide a clear answer only amplifies the potential

²¹ See Exhibit 1.

²² Although 49 U.S.C. § 10502(d) effectively requires revocation proceedings to be completed within 12 months after an application, the complexity of the proposed new approach might inevitably lead to proceedings far in excess of 12 months, as has happened in rate cases with respect to the 3-year guideline of 49 U.S.C. § 11701(c). See, e.g., AEP Texas North Company v. BNSF Railway Company, STB Docket No. 41191 (Sub-No. 1) (served Nov. 13, 2006).

chilling effect on shipper parties. This sort of deterrence is contrary to the RTP and recent directives from Congress. The RTP states that:

[I]t is the policy of the United States Government.....to require fair and expeditious regulatory decisions when regulation is required [and]....to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.

49 U.S.C. §§ 10101(2) and (15). Just a few years ago, the Congress reiterated and emphasized these policies in the Surface Transportation Board Reauthorization Act of 2015. As mentioned in a Senate Committee Report, Congress took specific actions in 2015 “[t]o increase the efficiency of dispute resolution” and “to require the STB to complete a report that indicates whether current large rate case methodologies are sufficient, not unduly complex, and cost effective.”²³ The report required of the Board “must....indicate whether alternative methodologies exist, or could be developed, to streamline, expedite, or address the complexity of large rate cases.”²⁴ The Senate Committee further stated that the Reauthorization Act “would improve inefficiencies at the STB and reduce delays in the case review process....helping to ensure rail service problems are addressed in a balanced and timely manner.”²⁵

It strains credulity to imagine that Congress would condone significant additional complexity in exemption revocation proceedings following its recent directives to simplify procedures in other areas. The Board should not adopt new procedures that discourage access to regulatory oversight. The proposed new approach would create “substantial threshold litigation” requirements that act as an “overwhelming obstacle that dissuades shippers” from bringing valid

²³ Report of the Committee on Commerce, Science, and Transportation on S. 808, Surface Transportation Board Reauthorization Act of 2015, S. REPORT NO. 114-52 (May 21, 2015), at pages 7-8.

²⁴ S. REPORT NO. 114-52 (May 21, 2015), at page 8.

²⁵ S. REPORT NO. 114-52 (May 21, 2015), at page 10.

revocation requests to the Board.²⁶ Thus, “the scale tips in favor of limiting the...inquiry to the literal statutory requirement” of the RTP.²⁷ The Board should not adopt the proposed new approach.

C. The Proposed New Approach is Faulty Because It Creates a One-Size-Fits-All Nationwide Standard for All Commodities.

The proposed new approach relies on numerous assumptions which inevitably treat all commodities and all traffic types the same, despite the differences inherent in each commodity or traffic type. This sort of “one-size-fits-all” approach would infect the approach’s results with a large degree of imprecision, casting doubt on the value of the approach given the cost and complexity issues already mentioned. For example, the proposed new approach assumes that rail movements of less than 500 miles have potential “competitive influence” from trucking.²⁸ The Board’s reliance on a 500-mile threshold for potential trucking influence was subject to extensive critique in the recent Market Dominance Streamlined Approach, Ex Parte No. 756, proceeding.²⁹ Railroads and shipper parties both provided extensive evidence regarding the over-inclusive and under-inclusive nature of that 500-mile figure when considering specific commodities. Although the Board ultimately retained the 500-mile standard in Ex Parte No. 756 as the default figure, the Board also permitted parties in individual cases to argue for a different figure based on commodity-specific characteristics. More broadly, the analysis in Ex Parte No. 756 does not alter the imprecision inherent in the 500-mile assumption when used in the

²⁶ Quoted language from Market Dominance Determinations – Product & Geographic Competition, 3 STB 937, 949 (1998).

²⁷ Quoted language from Market Dominance Determinations – Product & Geographic Competition, 3 STB 937, 949 (1998).

²⁸ Decision at 11-13.

²⁹ See Ex Parte No. 756, slip op. at 9-13 (served Aug. 3, 2020).

proposed new approach. Even if 500 miles is assumed to be a useful figure for the entire rail industry as a whole (when considering all commodities at the same time), the figure is demonstrably imprecise when considering a specific commodity. Of course, revocation requests do not concern the entire rail industry at one time; they are commodity-specific. Thus, in any actual revocation request proceeding (which would only address one or a few related commodities at once), the 500-mile figure is too imprecise to be valuable, especially in light of the cost and complexity of the new approach.

Even though the Decision allows for parties to present evidence as to why the 500-mile rule should not apply to a given commodity and should be replaced with a different and more accurate mileage-figure,³⁰ this process only adds to the complexity and litigation costs. Absent the model, a proponent seeking an exemption revocation would present evidence in its opening as to the proper mileage figure where trucks no longer effectively compete with rail, and any railroad opponents may contest this evidence. This approach properly and more efficiently identifies the proper issue to be resolved right at the start. Application of the proposed new approach, however, would add another layer of complexity and cost by requiring the proponent to engage experts to run different scenarios of the model, using the 500-mile rule and the mileage claimed by the proponent to be more accurate based on the commodity characteristics. Changing this feature of the model may alter the model's strength or weakness indicators requiring additional explanations and potential adjustments. Presumably, the railroads' experts will also run different mileages through the model, forcing the proponent to hire experts to respond to each different scenario, resulting in a litigation nightmare. The costs and uncertainty of the proposed new approach would deter parties from ever going down this road.

³⁰ Decision at 13 (n. 38).

D. The Board Should Not Further Complicate the Analysis by Incorporating Geographic Competition as Suggested by the Railroads.

In its questions submitted to the Board's staff for the technical conference, the AAR indicated that the Board should have included "metrics indicative of geographic competition" in the proposed new approach, and other railroads made similar insinuations.³¹ Such a step would exacerbate an already unwieldy process as proposed in the Decision, and Respondents urge the Board not to include geographic competition as a consideration in the model or in any revocation proceeding. The Board has already had numerous opportunities to consider the complexities and problems endemic to consideration of geographic competition in its proceedings. Over twenty years ago, the Board decided to omit geographic competition from market dominance reviews due to the "substantial burdens" and "the time and resources required" for an analysis of product and geographic competition.³²

More recently, the Board again considered the value of a geographic competition analysis in comparison to the cost and complexity required. In particular, the Board rejected a request to consider product and geographic competition (so-called "indirect competition") as a factor in market dominance determinations involving transportation of coal to utilities.³³ The rejection was based on numerous factors, including the "undue burdens and obstacles an analysis of indirect competition would impose upon the parties."³⁴

³¹ AAR letter, page 2 (filed Dec. 23, 2020).

³² Market Dominance Determinations – Product & Geographic Competition, 3 STB 937, 947 and 948 (1998).

³³ Petition of the Association of American Railroads to Institute a Rulemaking Proceeding to Reintroduce Indirect Competition as a Factor Considered in Market Dominance Determinations for Coal Transported to Utility Generation Facilities, Ex Parte No. 717 (served March 19, 2013).

³⁴ Petition of the AAR, Ex Parte No. 717, slip op. at 8 (served March 19, 2013).

The rationale underpinning these two earlier decisions applies equally today, in response to the AAR's request in its December 23rd letter. Consideration of geographic competition in a revocation proceeding would add unnecessary complexity and cost far in excess of any value that would be provided by such a consideration. The Board should reject the AAR's request.

IV. The Revocation Statute Does Not Mention Market Power or a Market Dominance-Style Evaluation.

As explained above, the revocation statute requires consideration of the National Rail Transportation Policy and does not mention market power. 49 U.S.C. § 10502(d). While the Board has the discretion under the revocation statute to consider changes in market conditions when evaluating an exemption revocation request, the proposed new approach would effectively require revocation requests to undergo a complex market dominance-style analysis conducted on a nationwide scale, of all possible origins, destinations, and lanes. Such a proposal would be unwieldy in the extreme and is contrary to the governing statute.³⁵

A. The Proposed New Approach Improperly Creates a Nationwide Market Dominance-Style Analysis.

Market dominance includes two components: an R/VC calculation and an analysis of "effective competition." 49 U.S.C. § 10707. The proposed new approach effectively mimics those two components. Decision at 9-12. In the technical conferences held on December 18, 2020 and January 15, 2021, Board staff took pains to state that the new approach consists of an

³⁵ One of the fifteen elements of the RTP does mention market power (49 U.S.C. § 10101(12) states that it is the policy of the U.S. government to "avoid undue concentrations of market power"). However, this invocation of market power does not warrant use of the proposed new approach. Application of the RTP requires "a reasonable accommodation of the conflicting policies set out in the Staggers Act." Association of American Railroads v. Surface Transportation Board, 306 F.3d 1008, 1111 (D.C. Cir. 2002). A reasonable accommodation does not exist if an overly complex, imprecise, and expensive new approach – based on assumptions that are identical for all commodities – is utilized for individual revocation proceedings. In short, the "market power" reference in § 10101(12) should not be allowed to supersede the combined weight of the other considerations in the RTP.

analysis of “market conditions over time,” not an analysis of market power or market dominance. However, the analysis of market conditions contained in the new approach (with its emphasis on rail rates, rail competition, truck competition, and water competition³⁶), in combination with the two screens, various assumptions, and algorithms, is effectively an analysis of the market power of the railroads transporting the commodity in question. The proposed new approach seeks to measure changes in market conditions by comparing modal competitive influences (rail, truck, and water) in 1992 and 2018 and applying formulaic procedures to identify weak, moderate, and strong cases. The Decision plainly states that the proposed new approach is designed to evaluate “increased or decreased influence from...competition over time” and that “increases in the proportion of traffic without modal influences might also be consistent with railroads having increased *market power*.” See Decision at 14 (emphasis added). Precedent from the courts, the Interstate Commerce Commission, and the Board reveals that the types of R/VC data analyzed in the proposed new approach enable assessments of market power.³⁷ By focusing on modal competitive influences and changes in R/VC figures, the proposed new approach is similar to a nationwide market dominance analysis. To be clear, a measured consideration of market conditions and railroad market power is appropriate in a revocation proceeding (and ISRI and AF&PA have submitted such evidence already in this proceeding), but the proposed new

³⁶ See, e.g., Decision at 9-10 (rates), 8 and 11 (rail competition), 11-12 (truck competition), and 7-8 and 11 (water competition).

³⁷ See, e.g., BNSF Railway Company v. STB, 526 F.3d 770, 774 (D.C. Cir. 2008) (“Because captive shippers have inelastic demand, the railroads can charge them higher rates with a lower risk of losing their business.”); Rail General Exemption Authority – Exemption of Grease or Inedible Tallow, Etc., 10 ICC2d 453, 460-461 (1994) (“We believe that an examination of shipper and rail contracting prices, rail pricing behavior, rate levels, and R/VC ratios in these markets indicates that railroads have not been able to assert any meaningful market power.”); Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 13 (served Oct. 30, 2006) (“the SARR (and therefore the carrier) must be allowed to engage in demand-based differential pricing”) (citation omitted).

approach is faulty in its emphasis on a simultaneously imprecise and complex formulaic methodology to the detriment of commodity-specific information.

B. Congress Knew How to Require Market Dominance Review, Which It Did in 49 U.S.C. § 10707, But There is No Market Dominance or Market Power Requirement in the Revocation Statute.

The governing statute specifically requires a market dominance analysis as a precursor to rate reasonableness jurisdiction. 49 U.S.C. § 10707. Consequently, Congress undoubtedly knew how to require evaluation of market power and market dominance-style factors in its statutory drafting. Congress specifically omitted any mention of market power and market dominance-style factors in the revocation statute, however, indicating that Congress did not intend for them to play a central role in the revocation analysis – an intent that is upended by the proposed new approach.

V. A Nationwide Market Dominance-Style Analysis is Manifestly Inequitable and Unworkable.

A. Due to the Unique Factors Applicable to Each Individual Origin, Destination, and Rail Movement, Market Dominance Cannot Be Evaluated on a Nationwide Basis.

The market dominance analysis in rail rate cases covers specific individual rail movements, each with a specific origin, destination, and railroad. The evaluation of competitive options for the rail transportation at issue is defined to particular circumstances, meaning actual origin and destination facilities that are configured in certain ways, actual commodity volumes, and other lane-specific factors. In contrast, the proposed new approach attempts to apply its market dominance-style analysis to the entire nation at one time, purportedly evaluating competitive options and influences from rail, truck, and water transportation. Such a nationwide and formulaic analysis of competitive influences and market power is not able to take into account the actual factors that play a role in determining whether competition exists, namely:

origin facility configuration and loading equipment, destination facility configuration and unloading equipment, traffic volumes, functional infrastructure and capabilities of any nearby ports, whether ships or barges exist that could transport the commodity in question on actual nearby waterways, and countless others.

In short, the attempt to engage in a market dominance-style evaluation on a nationwide basis imparts such a large degree of imprecision into the analysis that the excessive costs and complexity of the proposed new approach are not warranted or justified.³⁸ The Board should not adopt the proposed new approach.

B. The Proposed New Approach Requires Evaluation of Market Power, Which Congress Specifically Omitted from the Revocation Statute, and Which the Board Has Not Considered in Recent Revocation Decisions.

As made clear in § 10502(d), the revocation statute does not mention market power – a point that the Board emphasized less than a year ago in its demurrage decision in Ex Parte No. 760. See Section II.B.3. In that decision, the Board nonetheless considered market power as part of the justification for the revocation, even though it was “not statutorily required to do so.”³⁹ However, the Board’s analysis of market power bore no resemblance whatsoever to the formulaic and imprecise manner of analysis being proposed here. It was a far more reasonable approach consistent with the revocation statute. It is also notable that the Board has previously

³⁸ Cf. Petition of the AAR, Ex Parte No. 717, slip op. at 8 (served March 19, 2013) (“This agency has long recognized that the mere existence of a competitive alternative does not in itself constrain the railroads from charging rates far in excess of just and reasonable levels.”).

³⁹ Exclusion of Demurrage Regulation from Certain Class Exemptions, Ex Parte No. 760, slip op. at 7 (Feb. 28, 2020) (“Although not statutorily required to do so....the Board nonetheless addressed market power in the NPRM...”) and at 9 (“Therefore, even if a finding about market power were necessary – which it is not – the specific findings in the 1996 decision are more persuasive than any inferences about market power and demurrage that might be drawn from the 1983 exemption decision.”).

issued revocation decisions that omitted a market power analysis altogether – just as permitted under the statute.⁴⁰

C. Even if the Board Considers Market Power in a Revocation Proceeding, Qualitative Evidence is Sufficient for Such an Analysis, As Shown by Precedent.

The proposed new approach is based on a complicated series of numeric calculations derived from multiple data sources, including comparison years of the Confidential Carload Waybill Sample, the GDP Price Deflator, the Centralized Station Master Mark Register, and Port Geographic Information from the U.S. Army Corp of Engineers and U.S. Geological Survey to assess degrees of modal competition and related market power issues. Precedent shows that a numeric analysis is not required to assess market power. For example, the Board previously evaluated whether to exempt demurrage from regulation in a rulemaking proceeding.⁴¹ As an exemption case, the Board was implementing a statute that explicitly mentions market power as a factor. 49 U.S.C. § 10502(a)(2). To make the determination of market power, the Board relied only on “comments” and “concerns” expressed in the rulemaking process. See, e.g., Exemption of Demurrage, Ex Parte No. 462, 1996 STB Lexis 101 at *7 (March 20, 1996) (“The comments on the issue of whether regulation is needed...to protect shippers from abuse of market power were somewhat mixed.”).

The Board justified its refusal to grant the proposed exemption by concluding that the comments had influenced if not dictated its decision on market power:

The shippers’ concerns are not without basis....Thus, there is the potential with such an exemption for an abuse of market power.

⁴⁰ See, e.g., BNSF Railway – Temporary Trackage Rights Exemption – Union Pacific, Docket No. 35963 (Sub-No. 1), p. 2 (served Dec. 17, 2015); South Plains Switching – Acquisition Exemption – BNSF Railway, Docket No. 33753 (Sub-No. 1), p. 2 (served Sept. 15, 2006).

⁴¹ Exemption of Demurrage from Regulation, Ex Parte No. 462, 1996 STB Lexis 101 (March 20, 1996).

Given the record of significant opposition to the exemption by the users of rail service, we will not adopt the proposal.⁴²

Less than a year ago, the Board again addressed market power in the demurrage realm by relying on the “testimony and comments” in Ex Parte No. 754 and the Board’s own “observations” of what is occurring in the marketplace, stating:

- “[t]he testimony and comments in Docket No. 754 validate the Board’s concerns...that there is a potential for abuse of market power”
- “[t]he concerns that led the Board to find the potential for abuse of market power in the 1996 decision....have been borne out by the Board’s observations”

See Exclusion of Demurrage Regulation from Certain Class Exemptions, Ex Parte No. 760, slip op. at 7 and 8 (Feb. 28, 2020).

Over twenty years ago the Board found that exclusion of product and geographic competition in a market dominance evaluation would not result in “substantial hardship” for railroads because “if there are product and geographic competitive alternatives that are obviously effective, a shipper would be unlikely to pursue a regulatory rate challenge.”⁴³ The same reasoning applies here – if “market conditions” and competitive alternatives exist for a particular commodity or traffic type, the affected shippers would have no incentive to pursue an exemption revocation at the Board. As the past five years have shown, a revocation proceeding is an agonizingly expensive, complex, and time-consuming affair. Shippers with competitive alternatives in the marketplace would not voluntarily go down such an arduous path.

The proposed new approach would also apply exemption revocation standards that far exceed the type and amount of evidence that was presented to the Interstate Commerce Commission to grant the scrap metal and paper and forest products exemptions, including

⁴² Exemption of Demurrage, Ex Parte No. 462, 1996 STB Lexis 101 at *8-9 (March 20, 1996).

⁴³ Market Dominance Determinations, 3 STB 937, 948 (1998).

evidence of the lack of railroad market power over such commodity movements at that time.⁴⁴ The Board should not require exemption revocation to meet an evidentiary bar far in excess of the evidence that was deemed sufficient to take away direct access to the Board's procedures. Such a requirement would be inequitable. This is especially true given the substantial evidence already submitted to the Board in this proceeding, showing a need for its oversight over rail transportation of paper and forest products and scrap metal. For example, AF&PA submitted detailed quantitative evidence⁴⁵ and extensive qualitative evidence from numerous shippers⁴⁶ regarding railroad market power over paper and forest products. As for scrap metal, the Board itself put forth extensive quantitative evidence in support of revoking the scrap metal exemption,⁴⁷ and ISRI supported this Board showing by both updating the quantitative evidence and submitting extensive qualitative evidence⁴⁸ regarding railroad market power over scrap metal.

D. The Proposed Approach for Evaluating Water Competition is Problematic, Over-Inclusive, and Would Increase Litigation Costs.

The proposed new approach would assume the potential of water competition influences on all rail movements of a given commodity if ports exist within 30 miles of the origin railroad

⁴⁴ See, e.g., AF&PA Comments (filed July 26, 2016) at pages 4-5 and 7-15. See also ISRI Reply Comments (filed Aug. 26, 2016) at pages 22-24.

⁴⁵ See, e.g., AF&PA Comments (filed July 26, 2016) at pages 7-24.

⁴⁶ See, e.g., AF&PA Motion for Leave to Supplement the Record (filed Oct. 3, 2016) at Exhibit A (attaching three verified statements); AF&PA Comments in Response to Memoranda (filed July 16, 2019) at pages 14-21.

⁴⁷ NPRM, slip op. at 6-9. See also ISRI Comments (filed July 26, 2016) at page 6 (citing to quantitative evidence submitted by the Rail Customer Coalition).

⁴⁸ See, e.g., ISRI Reply Comments (filed Aug. 26, 2016) at pages 18-22 (citing attached verified statements from shippers).

station, within 30 miles of the destination railroad station, and on the same waterway.⁴⁹ The Decision states that “[p]orts are considered viable if they transported *any* commodity, *though transportation of the specific commodity at issue is not required* as a simplifying assumption.”⁵⁰ This assumption is clearly over-inclusive and problematic for many reasons. Assuming a competitive water influence based only on the simple existence of a nearby port facility, without any evidence that the port has been used to transport the subject commodity, creates a false premise. It would be more appropriate to assume the lack of water competition unless a party can demonstrate that the ports have in fact been used for transportation of the subject commodity.

The assumption also says nothing about key considerations that must exist before water transportation can be a viable alternative. Most obviously, a port facility 10, 20, or 30 miles distant from a railroad station is of no use by itself – some sort of intermediate transportation (such as truck transportation after transloading) would be needed from the railroad station to the port. The added handling and transloading may involve inefficiencies and costs that render the option unworkable. Second, ships and barges are only feasible for large commodity volumes; the proposed new approach would assume the existence of water “influence” even for a single rail car. Third, the mere existence of a port does not mean that a particular commodity can be handled there. There are many considerations that determine the feasibility of a water transportation option, including infrastructure, equipment availability, customer requirements, plant configurations, among many others, that are ignored in the proposed model. Fourth, the existence of a waterway similarly does not mean that ships and barges of the appropriate type

⁴⁹ Decision at 8.

⁵⁰ Decision at 7 (n. 17) (emphasis added).

exist for transporting the commodity in question. Many other uncertainties exist and reveal that the proposed new approach is extremely over-inclusive regarding water competition and would require litigants and the Board to research and evaluate these sorts of factors for untold numbers of origin-destination pairs which would be incredibly time-consuming and costly.

E. The Proposed Approach for Evaluating Truck Competition Wrongly Assumes that All Commodities Can Competitively Ship by Truck for Up To 500 Miles.

As mentioned in Section III.C, the proposed new approach is problematic because it applies blanket uniform assumptions to all possible commodities and traffic types, generating prohibitively imprecise results. One such assumption is the use of 500 miles as the signal for when there is “competitive influence” from truck transportation in one of the pairs of indicators.⁵¹ As set forth in the Decision, “[t]he metrics assume that 500 miles represents a reasonable distance for direct trucking alternatives, and that 1,000 miles does not, and these mileages do not vary by commodity.”⁵²

The distance at which trucking could provide a viable alternative to a particular rail movement depends upon numerous factors, including the commodity involved, the loading equipment and facility configuration at the origin, the unloading equipment and facility configuration at the destination, area traffic patterns, the volume of commodity desired by the consignee, the reliability of rail service⁵³, and innumerable other lane-specific factors. Use of a

⁵¹ Decision at 11.

⁵² Decision at 13 (n. 38).

⁵³ As the Board knows, shippers may be forced to use truck transportation due to rail service failures. See, e.g., Letter from STB to Lance Fritz, Chairman, President, and Chief Executive Officer of Union Pacific Railroad (Sept. 20, 2018) (“We are well aware of UP’s service challenges during this year, and believe it is essential that all carriers strive to provide efficient and reliable rail service to their customers.”); Public Listening Session Regarding CSX Transportation, Inc.’s Rail Service Issues, Ex Parte No. 742, slip op. at 3 (served Aug. 24, 2017)

blanket 500-mile assumption in the proposed new approach would significantly increase the imprecision of the results obtained. Just six months ago, the Board itself found that “the concept of creating commodity-specific thresholds has merit and is preferable to a blanket [500-mile] threshold.”⁵⁴ The Board should make the same finding here, reject the new approach as proposed, and allow the parties in any individual revocation proceeding to submit evidence regarding whether and under what circumstances truck transportation provides a competitive alternative.

Indeed, based on the evidence already submitted by ISRI and AF&PA, the 500-mile threshold does not apply to their members’ scrap metal and paper and forest products commodities.⁵⁵ Applying the one-size-fits all 500-mile assumption to all revocation and exemption proceedings as the starting point would not provide a true picture of competitive truck influences in these cases and would only serve to drive up litigation costs as the parties would be required to engage experts to re-run the proposed new approach’s model with different mileages and/or to submit additional evidence and arguments to the Board explaining why deviations and adjustments are needed.

(“The Board will direct executive-level officials from CSXT to appear at the listening session to discuss their ongoing and future efforts to improve service and to provide an estimated timeline for recovery of normal service levels.”).

⁵⁴ Market Dominance Streamlined Approach, Ex Parte No. 756, slip op. at 13 (served Aug. 3, 2020).

⁵⁵ See, e.g., AF&PA Motion for Leave to Supplement the Record (filed Oct. 3, 2016) at Exhibit A (Bruce Ridley V.S. at pages 3-6, explaining that many factors prevent truck transportation regardless of haul length); ISRI Reply Comments (filed Aug. 26, 2016) at Exhibit 1 (David J. Borsuk V.S. at pages 4 and 7-8, explaining that many factors prevent truck transportation regardless of haul length) and Exhibit 2 (Greg Dixon V.S. at pages 4-5, explaining that the average truck haul is approximately 125 to 150 miles).

VI. The Two Screens in the Proposed New Approach Could Be Retained if Modified.

A. Simple and Easy-to-Calculate Screens Could Be Useful as Part of a New Approach.

Respondents believe the proposed new approach is problematic and should not be adopted, as these Comments make clear. Nonetheless, if the Board is inclined to adopt some portion of the proposed new approach, the initial screens (Decision at 9-10) could be workable if modified.⁵⁶

B. A Revocation Proponent Should Only be Adversely Affected in Moving Forward with its Case if Both Screens are “Weak.”

The import of the screens should be modified. That is, a result of “weak” in only one of the two screens should not prohibit a petitioner from moving forward with the revocation request. Instead, a “weak” result in both screens should only result in a rebuttable presumption that revocation is unnecessary, a presumption that the petitioner would be free to overcome with its own evidence. Similarly, if both screens result in an assessment of “strong,” then there should be a rebuttable presumption that the requested revocation should be granted.

VII. The Board Should Evaluate Market Conditions by Taking an Approach Similar to the That Used to Grant the Exemptions, Supplemented by RPC Calculations and Other Market Information.

Market conditions can be useful in evaluation of a revocation request, but any evaluation should analyze market conditions in a manner similar to that utilized when the exemptions were first created. Such an analysis would encompass the rate-based and competitive influence factors that are contained within the proposed new approach but do so in a manner that does not entail the complexity, cost, and imprecision of the proposed new approach. As an example, the ICC

⁵⁶ Respondents are particularly concerned about Initial Screen Two (percentage of rail cars moving in intermodal traffic). In the event the Board adopts the screens but does not include the revisions described above in Section VI, changes to Initial Screen Two would be necessary before it can be utilized in the manner proposed by the Board.

granted the boxcar exemption in 1983 based on numerous factors, including the need to remove burdensome tariff filing requirements, evaluation of revenue to variable cost (“R/VC”) ratios, qualitative evidence regarding negotiations between railroads and shippers, rail traffic volumes, the feasibility of truck transportation, and an assessment of the national rail transportation policy.⁵⁷ These same factors can be analyzed in a commodity-specific manner in individual revocation request cases through use of the two screens (as modified above) and evidence submitted by the parties in an individual case. Competitive influences from rail, truck, and water modes can be analyzed by reviewing evidence submitted by the parties, as explained below. Therefore, the Indicator Dashboard of the proposed new approach (Decision at 9-13) would not be necessary.

A. Potential Rail Influence Can Be Evaluated by Reviewing Changes in R/VC Ratios and RPC Calculations.

The proposed new approach would evaluate rail influence by first determining if there are railroad stations within 30 miles of each railroad station that handled the same commodity in 1992 and 2018. Decision at 8-9. This method is cumbersome and problematic for numerous reasons. It assumes the potential existence of intramodal competition simply by proximity (within 30 miles) without consideration for the need to transload or otherwise transport the subject commodity from the first railroad station to the second station in order to take advantage of the “competition.” Many commodities cannot be easily transloaded, the volume of traffic could preclude transloading, and the necessary equipment and station configuration at the original station and the “competitive station” may not exist.

Instead of the method in the proposed new approach, rail competitive influence for a specific commodity proposed for revocation can be assessed by evaluating R/VC ratios and

⁵⁷ Exemption from Regulation—Boxcar Traffic, 367 ICC 425, 433, 437, 445, and 446 (1983).

revenue per car (“RPC”) figures. This type of evidence is readily available from the Confidential Carload Waybill Sample without the complications and problems inherent in the evaluation of railroad stations within 30 miles handling similar traffic.

B. Potential Truck Influence Can Be Evaluated by Changes in Average Length of Haul, Other Market Data Such as Commodity Flow Surveys, DOT Statistics, and Qualitative Evidence.

The proposed new approach would use the 500-mile assumption in order to determine whether potential truck competitive influences exist, comparing the average length of haul in 1992 and 2018. Decision at 12-13. As described above in Sections III.C and V.E, this assumption is problematic because it applies the 500-mile figure to all commodities. As explained above in Section V.E, the Board should permit a petitioner to submit evidence regarding the appropriate distance for truck competitive influences, thus replacing the 500-mile assumption, along with any meaningful changes in the average length of haul of movements that may have occurred since the exemptions were granted. This change acknowledges that each commodity is different, as the Board itself recognized in Ex Parte No. 756 in August 2020, and would result in the submission of evidence that is more relevant to the subject commodities than the one-size-fits-all 500-mile assumption. Furthermore, the Board should allow the parties in any individual revocation proceeding to submit evidence regarding whether and under what circumstances truck alternatives provide a competitive alternative. This evidence could be drawn from Commodity Flow Surveys or other sources including qualitative evidence explaining the unique characteristics of the subject commodity.

C. Potential Water Influence Can Be Evaluated if Opponents Make a Showing of Likely Competition.

As mentioned above in Section V.D, the existence of water transportation competition for a given commodity is narrowly constrained by numerous factors. Water competition would only

exist if several prerequisites are met, including but not limited to: a commodity appropriate for water-borne ships or barges, a sufficient quantity of commodity for water transportation, the existence of proper loading facilities at the nearby ports, the existence of proper unloading facilities at the destination ports, the ability of the commodity to have direct access to the origin port (or be transloaded at origin for transport to the port), the existence of appropriate equipment at the consignor facility for transloading or direct water access, and the ability of the commodity to have direct access from the destination port to the consignee (or be transloaded at the destination). Given these restrictions, water transport should not be assumed merely through the existence of ports within 30 miles. Water transport should only be evaluated in an individual case if an opponent of the revocation makes a sufficient showing that water competition exists. In such a situation, the proponent of the revocation would then be required to submit evidence regarding water competition influences.

VIII. The Continuing Delay in This Proceeding is Inequitable and Contrary to Congressional Intent, and the Proposed New Approach Would Only Exacerbate the Delay in This Proceeding and All Future Revocation Proceedings.

It is inequitable for the Board to take several years to reach a decision on revocation, given that the applicable statute says that revocation proceedings “shall” be completed within nine (9) months after a proceeding is begun and twelve (12) months after the application date if the proceeding is begun as a result of an application. 49 U.S.C. § 10502(d). The simple fact that this particular proceeding may have begun on the Board’s own motion – absent an application – does not obviate the Congressional intent that revocation proceedings be expeditiously completed.

The failure to reach a timely decision is also inequitable when considering the Congressional recognition that revocation of existing exemptions may be warranted,⁵⁸ and the Board's prior statement that, when an exemption exists, the Board "continues to 'monitor the effects of the exemption to assure that continued regulation is not needed.'"⁵⁹

IX. The Board Improperly Failed to Address Significant Comments Filed by Numerous Parties Regarding the Dramatic Legal Change That Occurred After Most Commodity Exemptions Were Originally Created.

In the Decision, the Board failed to address major comments filed by ISRI, AF&PA, and other shipper organizations regarding the transformative legal changes that occurred with ICCTA after the commodity exemptions were first created in the 1980s and early 1990s. Numerous commenting parties made concerted and detailed arguments on this point, including that (1) the exemptions were generally created with shipper support under a different legal regime in order to facilitate railroad competition with other transportation modes in light of the then-existing cumbersome tariff filing requirements, and (2) the relevant legal regime has now changed such that exemptions are not necessary to facilitate such competition because tariff filing is no longer required.⁶⁰ Additionally, valid arguments were made explaining that the mutual benefits that both shippers and railroads derived from the exemptions no longer exist. Today, the commodity

⁵⁸ 49 U.S.C. § 10502(c).

⁵⁹ Exclusion of Demurrage Regulations from Certain Class Exemptions, Ex Parte No. 760, slip op. at 4 (served Oct. 7, 2019), quoting Improvement of TOFC/COFC Regulation, 364 ICC 731, 733 (1982).

⁶⁰ See, e.g., ISRI Reply Comments at 22-23 (filed August 26, 2016) ("ISRI, the AAR, and nine individual railroads jointly petitioned the ICC for exemption of ferrous scrap in 1994 based on reasons that are now absent....the biggest goal of the exemption sought by ISRI, the AAR, and the railroads was elimination of cumbersome administrative burdens associated with tariff and contract filing, which impeded the ability of railroads to expeditiously respond to market conditions.") and ISRI Comments at 8 (filed July 26, 2016) ("when Congress passed ICCTA in late 1995, it further deregulated the rail industry and removed burdensome rate and contract requirements for shippers of all commodities"). See also AF&PA Comments to Memoranda at 25-27 (filed July 16, 2019).

exemptions operate as a detriment to shippers governed by the exemption but railroads still benefit greatly, since the exemptions are a deterrent to shippers' access to the Board's procedures.

However, the Board did not mention or acknowledge these arguments (as well as others) in the Decision, thus transgressing the intent of the Administrative Procedure Act ("APA"). Voluminous arguments in support of revocation asserted by ISRI, AF&PA, NITL, and others were reduced to a generic summary of all shippers' comments in a single paragraph.⁶¹ Although the Decision is not final agency action (and is not the termination of the rulemaking process), the Board's failure to even mention the significant comments on the fundamental change in the legal regime conflicts with the goals of the APA. "An agency must consider and respond to significant comments received during the period for public comment." Perez v. Mortgage Bankers Association, 135 S.Ct. 1199, 1203 (2015). The Board cannot evade the APA's requirements⁶² simply by adding another step in the rulemaking process.

As a result of the Board's failure, the Decision creates the false impression that the only issue in dispute is the "market power" evaluation and the numeric analysis required for this evaluation. Therefore, the Decision rests on a faulty assumption. The Board's failure to acknowledge or respond to the comments is significant because it demonstrates that the Decision was not "based on a consideration of the relevant factors." Thompson v. Clark, 741 F.2d 401, 409 (D.C. Cir. 1984) (quotation omitted). Although the Decision is not final agency action, the Board cannot disregard its obligation to address substantive comments by inserting yet another step in the rulemaking process.

⁶¹ Decision at 4.

⁶² 5 U.S.C. §§ 553(b) and 553(c).

X. Conclusion.

As described herein, the Board should not adopt the new approach as proposed in the Decision. It would add unnecessary complexity, delay, and cost to evaluation of a revocation request, especially because of the faulty assumptions and imprecision inherent in the proposed approach. In other words, the results derived from the proposed approach would be of limited value and pale in comparison to the problems and challenges. Based on the straight-forward and flexible revocation statute, as well as existing precedent, the Board can evaluate revocation requests based on more targeted quantitative and qualitative evidence submitted by proponents, including the evidence options set forth herein.

Respectfully submitted,

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EXHIBIT 1

REVIEW OF PROPOSED STB PROCESS FOR EVALUATING MARKET CONDITIONS RELATED TO CHANGES IN CLASS EXEMPTIONS AND REVOCATIONS

I have reviewed the STB's decision issued in its EP 704 proceeding on September 30, 2020 and listened to the STB Technical Conference held on December 18, 2020 in order to respond to the request from certain shipper organizations for general cost estimates involved with (1) replication and evaluation of the proposed model; and (2) adjudication of the model in a STB exemption revocation or creation proceeding. The information reviewed demonstrates that the STB is considering whether to adopt a very complex process for evaluating if changes in market conditions for a given commodity warrant revocation of an existing class exemption or the creation of new class exemptions.

The process laid out by the STB:

- Uses multiple databases and source data;
- Requires large amounts of data to be generated from each database;
- Requires the data retrieved from each database to interact with the data obtained from other databases;
- Generates many types of results which need to be summarized several different ways;
- Requires the purchase of several proprietary programs to handle the data; and,
- Summary results need to be shown graphically a number of different ways.

This oversimplifies the vast complexity of the process. However, it helps demonstrate why any party in the pending proceeding who desired to evaluate the propriety of the assumptions and procedures imbedded in the approach, or any party in a future proceeding who desired to test the approach to determine if a new case would be "weak", "moderate" or "strong" prior to petitioning the Board for revocation of an exemption, would be required to engage an expert consultant. To perform these tasks, I believe that significant man hours at significant expense in the six figures would be involved.

Escalation Consultants has quite a bit of experience in simplifying difficult rail costing and other data analytical issues through computer programming. Our team for doing this includes:

- Computer programmers dedicated exclusively to our rail projects;
- Mathematicians who create algorithms that automatically access different databases and perform calculations that generate results; and,
- Rail experts to guide the process, provide oversight and sanity check the results.

Escalation Consultants has had a consistent team in place to perform this type of work for the last ten years. Bottom line, our past projects with simplifying complicated rail data provides insight as to what it would cost to create the programming to automatically generate the type of results in the STB decision.

We are familiar with some of the databases used in the proposed STB process, such as the Confidential Waybill and Centralized Station Master list as we frequently work with such data. However, I have not studied all the data and calculations included in the STB process.

Based on my experience with related types of projects, our general estimated cost to create a computer model that would automatically generate the results in the STB decision would be in the six figures. My best estimate based on what I have reviewed in the STB Decision and in the Technical Conference would be a price around \$150,000.

This is only a price for developing the model which would include the ability to automatically update source data. The use of the model after its completion would require far less cost from shippers or railroads that used the model. This price does not include the man hours and cost to assess the propriety of the process, procedures, and assumptions imbedded in the model, including a comprehensive review of:

- The STB's work papers;
- The algorithms used in generating results; and,
- Results generated for commodities currently before the STB.

A general estimate for this type of evaluation would be in the tens of thousands of dollars. A ballpark estimate is \$60,000 to \$80,000.

Separate and additional costs would be required for any engagements involving adjudication of a commodity exemption revocation or new exemption in the context of an STB proceeding. This estimate is difficult to provide since each case and commodity is likely to have unique characteristics that may need to be addressed within the context of the model itself. For example, certain assumptions included in the STB's model may not apply, such as the 500-mile rule for imputed truck competition or assumed water competition for movements where the commodity has never moved by water. Additionally, there is a strong likelihood that railroad parties would engage experts who would raise other technical issues that would need to be addressed. Based on these issues, it is entirely possible that adjudication costs would easily be tens of thousands of dollars and could also be six figures in a case involving substantial customization and that is highly contested.

I, Henry Julian Roman, verify under penalty of perjury that the foregoing is true and correct based on my knowledge, information, and belief. Further, I certify that I am qualified and authorized to file this letter.



Jay Roman
President, Escalation Consultants
4 Professional Drive #129
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Executed on: 1/28/2021