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January 29, 2021

VIA E-FILING

Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings
January 29, 2021
Part of
Public Record

Re: STB Docket No. EP 704 (Sub-No. 1), Review of Commodity, Boxcar, and TOFC/COFC Exemptions

Dear Ms. Brown:

Enclosed for e-filing in the above-referenced proceeding is a highly confidential version of Comments of BNSF Railway Company, to be filed under seal. We are concurrently filing a public version of the Comments with appropriate redactions that the Board can place in its docket.

Please contact me with any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "A. Weiskittel", with a long horizontal stroke extending to the right.

Adam Weiskittel

Enclosures

{{CONTAINS HIGHLY CONFIDENTIAL INFORMATION}}

BEFORE THE SURFACE TRANSPORTATION BOARD

EX PARTE NO. 704 (SUB NO. 1)

REVIEW OF COMMODITY, BOXCAR,
AND TOFC/COFC EXEMPTIONS

COMMENTS OF BNSF RAILWAY COMPANY

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Dated: January 29, 2021

Attorneys for BNSF Railway Company

**Ex Parte 704 (Sub-No. 1)
Review of Commodity, Boxcar, and TOFC/COFC Exemptions**

Comments of BNSF Railway Company

I. Introduction & Summary

In response to the Surface Transportation Board’s (“STB” or “Board”) decision served September 30, 2020, as amended by the Board’s decision served December 11, 2020 (together, the “September 30 Notice”), BNSF Railway Company (“BNSF”) submits the following comments on a new approach developed by the Office of Economics for potential use in considering class exemption and revocation issues. The Board’s request for comments arises out of the 2016 rulemaking in this docket, in which BNSF submitted comments.¹ In comments regarding that 2016 notice of proposed rulemaking (“NPRM”), several parties raised concerns about the data used to reach conclusions about railroad market power and whether the economic analysis supporting the Board’s tentative conclusions regarding revocation of exemptions was sufficiently rigorous. Many parties also raised concerns that the Board’s approach to determining whether to revoke an exemption was not consistent with existing law. The new proposed approach is intended to address some of the concerns over the adequacy of the economic analysis in the 2016 proposal.² It does not, however, address the legal questions raised in response to the 2016 proposal.

¹ *Review of Commodity, Boxcar & TOFC/COFC Exemptions* (NPRM), Docket No. EP 704 (Sub-No. 1) (STB served Mar. 23, 2016) (with Board Member Begeman dissenting) (“2016 NPRM”). BNSF submitted comments on the NPRM on July 26, 2016, available at <https://dems-external.s3.amazonaws.com/MPD/17248/7B69C564BF11636C85257FFC006EB44D/241174.pdf>, and comments in response to the release of summaries of ex parte meetings on July 16, 2019, available at <https://dems-external.s3.amazonaws.com/MPD/17248/6985AD80C51301008525843900688709/248203.pdf>.

² The new approach is set out in *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, Docket No. EP 704 (Sub-No. 1) (STB served Sept. 30, 2020) (“September 30 Notice”).

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BNSF applauds the Board's decision to seek a more rigorous approach to analyzing rail market power issues and to developing more sophisticated tools to carry out the Board's statutory requirement to exempt commodities from regulation to the maximum extent possible when consistent with the Board's other statutory obligations. BNSF agrees that it is appropriate to use available data to the extent possible in considering commodity exemptions. BNSF believes that the approach proposed in the September 30 Notice reflects a significant advance in the STB's analytical techniques. BNSF's comments are intended to focus on particular areas of concern to BNSF and are supplemental to the comments submitted by the Association of American Railroads ("AAR") (the "AAR Comments") in which BNSF joins.

BNSF urges the Board to recognize the limits of any data-based approach to analyzing commodity exemptions in complex rail markets, particularly when the analysis is being carried out across many different markets and regions, and when the analysis is carried out on an industry-wide basis. Moreover, it is important to recognize the limits on inferences that can be drawn about rail market power from certain types of available data, particularly revenue-to-variable cost ("R/VC") ratios. The Board has repeatedly heard from economists and rail experts that R/VC ratios are driven by many factors that have little or nothing to do with the exercise of market power by railroads.³ A focus on R/VC ratios will not only produce inaccurate analyses, but in many cases

³ See, e.g., Laurits R. Christensen Associates, Inc., *A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals That Might Enhance Competition* (Nov. 2009), <http://www.stb.dot.gov/stb/elibrary/CompetitionStudy.html>; Verified Statement of Mark Israel and Jonathan Orszag attachment in Comments of the Association of American Railroads, *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704 (Sub-No. 1) (filed July 26, 2016), <https://dems-external.s3.amazonaws.com/MPD/17248/1FA03126B7A7B1DD85257FFC006D8AB1/241172.pdf>.

it may create counter-productive incentives, such as discouraging investments to increase productivity.

BNSF believes that an appropriate data-based approach can be a helpful tool in a larger toolkit for evaluating whether the movement of particular commodities must be regulated, but that tool must not be the sole or even primary force driving the Board's decision making. Indeed, the Board's September 30 Notice states that "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."⁴ The Board's staff confirmed this position during the technical conferences held on December 18, 2020 and January 15, 2021. BNSF agrees that any analytical tool such as what the Board has proposed should only be the starting point of a more thorough Board analysis.

The Board must also recognize that a data-based approach needs to consider all of the factors relevant to the ability of a rail carrier to exercise market power. Any data-based analysis that does not consider important railroad rate constraints like geographic, product, and modal (particularly truck) competition would be inadequate. While the analysis of such competitive factors can be complex, a full and accurate analysis of market power cannot ignore those factors if the Board is to satisfy its statutory obligation to exempt commodities to the maximum extent possible.⁵ The approach proposed in the September 30 Notice does not adequately address this important issue.

⁴ September 30 Notice, slip op. at 15.

⁵ Indeed, the complexity of analyses of geographic and product competition led the Board previously to eliminate evidence on those issues from market dominance proceedings in an effort to simplify rate reasonableness challenges. But this decision was not made because geographic and product competition are insignificant in rail markets. Rather, the decision was made to

Moreover, as mentioned above, the Board is obligated by statute to exercise its exemption authority “to the maximum extent” consistent with the statute.⁶ An assumption that a revocation decision could be based only, or even primarily, on the results of an analysis of certain data would not be consistent with that legal requirement. The Board’s 2016 Notice failed to acknowledge the important deregulation policy and legal requirements set by Congress. While the new proposed approach is clearly an improvement over the analysis used in 2016, the limitations in the Board’s new proposed model demonstrate that there is still no justification to revoke the exemptions for the five commodity groups at issue.

As stated above, BNSF applauds the Board’s effort to utilize more sophisticated, data-intensive approaches to carrying out its deregulatory statutory obligation. BNSF’s comments below, which focus on those commodities that the Board has proposed to re-regulate, discuss a number of issues that BNSF believes must be addressed for the data-based approach in the September 30 Notice to provide results that are more meaningful and reliable.

II. A Comparison of Data from Two Individual Years That Are 26 Years Apart Can Produce Arbitrary Results.

A central feature of the Board’s dashboard approach involves the comparison of certain data from two individual years that are 26 years apart – 1992 and 2018. The assumption underlying this approach is that data from the two years can reveal a trend that is occurring over time. For example, the approach assumes that if R/VC ratios changed significantly in the two chosen years, that change would indicate a change in the exercise of market power by railroads as a whole. But a major flaw with this approach is that it assumes that the two chosen years are representative of

eliminate consideration of geographic and product competition in rate challenges simply because there was not a streamlined approach to assessing those important market power factors.

⁶ See 49 U.S.C. § 10502 (a).

longer-term market changes, and not circumstances unique to a particular year that instead only reflect short-term market conditions. As a result, the particular years selected for the comparison may lead to the false appearance of a trend over time that does not exist.

Market conditions in many rail-served markets change substantially from year to year. Thus, the specific year chosen for the comparison will have a dramatic impact on the comparison itself, often leading to incorrect assumptions. A compelling example involves steel, one of the commodity groups that the Board proposes to re-regulate. The Board's comparison year – 2018 – happens to be the year when President Trump's § 232 import tariffs went into effect.⁷ The new 25% tariff on imported goods led to dramatic increases in domestic prices for steel. As shown in Figure 1 below, {{

}} But as shown in Figure 2, the change in domestic steel prices, {{ }} was short lived. The use of 2018 as a comparison year would therefore produce a false appearance of a trend {{ }} that was in actuality a single year aberration caused by artificial government intervention.

⁷ See, e.g., Jeremy Diamond, *Trump says US will impose steel and aluminum tariffs*, CNN (Mar. 1, 2018), <https://www.cnn.com/2018/03/01/politics/steel-aluminum-trade-trump-chaos/index.html>.

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Figure 2



Source: Hot Rolled Coil (HRC) Steel price date from Steel Market Update.

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There are other examples of short-term market shifts that make a comparison of two individual years highly problematic, including the market for coke from coal, another commodity that the Board proposes to re-regulate. As illustrated in Figure 3 below, {{

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III. The Proposed Approach Fails to Adequately Account for Other Factors That Are Critical to an Analysis of Market Power.

A. Geographic & Product Competition

One of the most important flaws in the proposed approach is its failure to account for geographic competition which is pervasive in rail markets. BNSF has explained in several prior

matters the central importance of geographic competition in constraining rail rates, and the Board and its predecessor have repeatedly acknowledged that geographic competition is a powerful constraint on the exercise of market power by rail carriers.⁸ The assessment of geographic competition in a particular market can be complicated, since it is often necessary to evaluate industry data and dynamics outside the rail industry, but geographic competition cannot be ignored. It would be improper to make any decision to revoke a commodity exemption without first conducting a full analysis of geographic competition.

The market for the transportation of coke from coal, one of the products that the Board has focused on in this proceeding, provides a prominent example of geographic competition and shows that a focus on changes in R/VC ratios fails to account for the existence of competitive constraints on the exercise of market power. {{

⁸ See, e.g., *Market Dominance Determinations—Product and Geographic Competition*, EP 627, slip op. at 6 (STB served Dec. 21, 1998) (“In applying its revised market dominance guidelines, the ICC in fact found that product or geographic competition provided effective competition for certain traffic in several cases.”).

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Another compelling example of geographic competition is seen in BNSF's grain markets. BNSF provided an extensive discussion of geographic competition in grain markets in its comments in Docket No. EP 756. As BNSF explained, the rates that BNSF charges for the movement of grains are constrained by strong competition from different transportation providers and the availability of different domestic and international markets for BNSF's customers.⁹ BNSF transports grain that is destined for both export and domestic markets. In both markets, a range of different transportation options are available for our customers to reach the various destinations

⁹ See Verified Statement of John H. Miller attachment in Reply Comments of BNSF Railway Company at 5-10, *Market Dominance Streamlined Approach*, Docket No. EP 756 (filed Jan. 10, 2020), https://dcms-external.s3.amazonaws.com/DCMS_External_PROD/1578931683268/300268.pdf [hereinafter Miller Verified Statement].

for the sale of grain, including extensive truck and barge options. The availability of these wide-ranging commercial choices and transportation options constrains the rates that BNSF can charge even on movements where BNSF is the sole rail provider.

Product competition is also an important factor in many product markets, including those identified by the Board for possible revocation.¹⁰ But the Board’s proposed approach does not even attempt to assess the existence of product competition. In EP 717, *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*,¹¹ the AAR presented extensive evidence of the constraint imposed by product competition – the availability of natural gas as an alternative to coal transported by rail – on rail rates and the possible exercise of rail market power in one important rail market. The Board denied AAR’s Petition, but not because it disagreed with the importance of product competition in assessing market power. Instead, the Board concluded that AAR had not presented a “practical framework” for assessing the existence of product competition in a market dominance context.¹² The practical considerations driving that conclusion in the context of adjudicating a single rate reasonableness case cannot justify similarly ignoring market realities when the Board is performing a commodity exemption analysis that will have much wider impacts. The Board’s statutory mandate to exempt commodities to the maximum extent possible creates a standard that

¹⁰ See, e.g., *Rail General Exemption Authority—Petition of AAR to Exempt Rail Transportation of Selected Commodity Groups*, 9 I.C.C.2d 969, 978 (1993) (referring to “product competition from mini-mill steel produced without coke”).

¹¹ *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*, EP 717, slip op. at 7 (STB served Mar. 19, 2013).

¹² Miller Verified Statement at pp. 10-11 (noting that abundant natural gas resources serve as a fundamental constraint on rail rates for coal movements).

does not permit such a myopic approach.

B. Truck Competition

The Board's proposed approach vastly underestimates the importance of the competitive constraint resulting from long-haul trucking. The Board's approach assumes that long-haul trucking is only able to exert competitive pressure on railroads if the distance for the move in the waybill is less than 500 miles. This proposed 500-mile threshold is too low because, in reality, truck competition often occurs for movements well beyond 500 miles. Indeed, the U.S. Department of Transportation reported in its Transportation Statistics Annual Report for 2018 that "[t]rucks carry the largest share of goods shipped in the United States—62.7 percent of the tonnage and 61.9 percent of the value—and remain the primary mode for shipments moved less than 750 miles."

BNSF experiences strong truck competition for multiple commodities for movements of distances above the proposed 500-mile threshold. For instance, BNSF faces strong competition from flatbed trucks that serve steel and forest products markets. These trucks can minimize the cost of empty positioning miles through loaded return trips, which allows the trucks to compete with other transportation modes, including rail, well over 500 miles. To give an example of the flexibility that allows trucks to compete for movements well over 500 miles, in the structural steel beams market, flatbed trucks move freight from Indiana to Dallas, a distance of 1,050 miles and from Texas to Southern California, a distance that also exceeds 1,000 miles. In the Texas-California example, such long-distance movements are possible because the trucks can then move steel coils from Southern California to pipe producers in the Pacific Northwest, and then the trucks can turn around and transport lumber to the Dallas-Fort Worth metroplex. In the Indiana-Dallas example, once in Texas trucks can then compete for outbound loads of processed pipe to the

Bakken Shale in North Dakota for drilling. The assumption that trucks simply go from a fixed origin with a certain product to a fixed destination and then back to the origin to repeat the transportation does not reflect the reality of truck transportation. The truck movements described above are more than double the proposed 500-mile threshold and they show that trucks provide strong competitive pressure on rail transportation for movements well over 500 miles.

The lumber market is another area where BNSF experiences substantial long-haul truck competition. In 2020, due to COVID-19's impact on lumber production, there was a shortage of lumber causing lumber prices to rise significantly. Current numbers indicate that consumption in the United States of lumber and panel products in 2020 increased 6.2% over 2019, in part due to increased construction and remodeling activity during the COVID-19 pandemic.¹³ Additionally, due to record low interest rates and the growing trend of home buyers purchasing single family homes rather than choosing multifamily housing options, the housing market remained strong. With record high lumber prices, the market saw lumber buyers reduce their order quantities in order to keep inventories and carrying costs low. Lumber buyers then relied on expedited trucking in order to replenish needs quickly as market demand remained strong. This circumstance, combined with lower fuel prices, made trucks more competitive to rail, even in long distance lanes. As a result, rail market share actually fell by 2.5% as volume increasingly shifted to truck.¹⁴ The increase in truck market share for these products, including many movements by truck over long distances, shows that the transportation market for lumber is highly competitive.

¹³ Forest Economic Advisors, *Lumber Advisor* (January 2021).

¹⁴ Rail Traffic Data hosted by Association of American Railroads, available at <https://www.aar.org/data-center/rail-traffic-data/>.

C. Transload Competition

The Board's approach assumes that 30 miles represents a reasonable distance for feasible truck transloading. But 30 miles is arbitrary and does not reflect the strength and scope of this form of competitive constraint. BNSF has explained in prior submissions the importance of transload competition.¹⁵ BNSF's transload network now includes 397 facilities that are capable of handling multiple commodities, including steel products, aggregates, and bulk cement. On average, BNSF has added 29 transload facilities to its network every year, and in 2018 alone, BNSF's steel product transload volume increased by 20%. BNSF has successfully used transload operations to expand its ability to compete with other railroads.

Similarly, transload competition from other transportation providers also constrains the rates that BNSF can charge in many markets, including the market for steel transportation. For example, {{

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The lumber market is another good example of strong transload competition. Transloading is pervasive in the lumber market and the distances moved by truck to railhead are far greater than the 30 miles assumed by the Board in the proposed approach. Figure 5 below {{

¹⁵ See Opening Comments of BNSF Railway Company at 4-5, *Market Dominance Streamlined Approach*, Docket No. EP 756 (filed Nov. 12, 2019), https://dcms-external.s3.amazonaws.com/DCMS_External_PROD/1574095935507/248949.pdf.

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D. Other Non-Quantifiable Factors

In addition to geographic, product, and modal competition, there are many other factors that constrain any potential exercise of market power by BNSF and are not easily shown through available data. As an example, one important steel customer provided BNSF with a detailed explanation of the factors that led it recently to choose BNSF as its rail provider. The shipper noted that BNSF's ability to serve several of the shipper's origins and destinations was an important factor in choosing BNSF as its rail provider. The shipper also emphasized the importance of service features offered by BNSF, such as BNSF's willingness to provide unit train service, which had beneficial effects on transit time and reduced stress on the freight during transit. The shipper also identified the importance of a reliable car supply and noted that its choice of BNSF was in part based on BNSF's history of a fluid car supply, which in turn reduced the

shipper's loading costs. Simply put, the shipper's selection of BNSF was largely based on BNSF's provision of reliable high-quality service, not any undue exercise of market power. But these are not factors that would be reflected in any part of the Board's proposed analysis, although they are clearly relevant to the question of whether transportation of this commodity should be re-regulated.

Indeed, these same non-quantifiable competitive factors often lead shippers to locate their facilities on BNSF's lines even if those locations would not enjoy access to another railroad. In other words, shippers often choose to become sole-served because of the benefits they see from service by BNSF, and they choose to expand their investment in such facilities knowing that the transportation service they receive from BNSF will satisfy their needs. As BNSF has previously explained to the Board, from 2015-2018, shippers and receivers invested almost \$15 billion in 450 new or expanded facilities on BNSF's lines.¹⁶

Examples of shippers choosing to site facilities at locations that are solely served by BNSF are numerous. For example, {{

}} The shipper

chose a sole-served BNSF location to take advantage of BNSF's unit train operations. In the grain transportation market, grain shippers have similarly made substantial investment in large, efficient grain elevators that are located on BNSF's lines in order to take advantage of BNSF's shuttle service.¹⁷

¹⁶ Miller Verified Statement at 4-5.

¹⁷ Figure 1 in the Miller Verified Statement shows the growth in shuttle facilities on BNSF lines over the past several years.

IV. The Board's Continued Reliance on R/VC-Based Metrics Undermines the Reliability of the Proposed Approach.

The principal data tool used in the proposed approach is the average R/VC ratio of a group of movements. Five of the ten dashboard factors rely upon R/VCs. But for years economists and other stakeholders have explained why R/VC ratios are an inadequate and inappropriate basis for assessing rail market power. As BNSF explained in its comments regarding the Board's 2016 NPRM, R/VC-based metrics can be misleading because increases over time do not necessarily reflect an exercise of market power by a railroad.¹⁸ Indeed, the examples set out above in Section II of these comments show that changes in R/VC ratios in two selected years cannot be relied upon to identify long-term trends because R/VC ratios can reflect short-term changes in market conditions that have nothing to do with the railroad industry exercise of market power. Instead, other factors often drive R/VC changes, such as changes in traffic mix, the impact of competitive transportation alternatives, cost-control measures, or other external market changes.

BNSF used the example of aggregates transportation (crushed or broken stone or rip-rap) in its comments on the 2016 NPRM to illustrate the flaw in relying on R/VC ratios.¹⁹ Over two decades, BNSF developed and invested in an innovative unit train model for aggregates traffic. This model has enabled us to effectively compete in a market that has been historically truck-dominated. However, implementation of the new unit train model required significant investment by both BNSF and its aggregate customers. These mutual investments were pro-competitive, resulting in BNSF's aggregates traffic more than doubling since 1992. But an R/VC ratio

¹⁸ Opening Comments of BNSF Railway Company at 3-4, 7, *Review of Commodity, Boxcar & TOFC/COFC Exemptions*, Docket No. EP 704 (Sub-No. 1) (filed July 26, 2016), <https://dems-external.s3.amazonaws.com/MPD/17248/7B69C564BF11636C85257FFC006EB44D/241174.pdf>.

¹⁹ *Id.* at 8-9

comparison of 1992 to 2018, or other recent years, would not reflect the pro-competitive changes that have occurred. R/VC ratios focus on variable costs and fail to capture the high costs associated with investments in the infrastructure needed to implement a new unit train program. Moreover, the Uniform Rail Costing System (“URCS”) program itself produces significant distortions in measuring the variable costs of unit train movements, particularly when costs for non-unit train movements are compared to unit train movements. In 1992, less than 10% of BNSF’s aggregates traffic moved in unit train service, while in 2013, over 90% was moving in unit train service. An R/VC comparison of those two years would not be at all meaningful in analyzing whether there has been an increase in the exercise of market power.²⁰

An R/VC comparison will also be distorted by changes over time in length of haul. The STB understands that the length of haul of a movement or class of movements affects rates and costs.²¹ Indeed, the dashboard approach includes length of haul metrics, although the apparent objective is simply to assess the strength of potential truck competition based on the length of haul. But, as explained more fully in the AAR Comments, changes in length of haul can occur over time and therefore can also affect the reliability of the metrics themselves, i.e., the R/VC ratios at the heart of the approach.

²⁰ See, e.g., Verified Statement of Michael R. Baranowski and Benton V. Fisher attachment in Comments of the Association of American Railroads, *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704 (Sub-No. 1) (filed July 26, 2016), <https://dcms-external.s3.amazonaws.com/MPD/17248/1FA03126B7A7B1DD85257FFC006D8AB1/241172.pdf>.

²¹ See STB, Study of Railroad Rates: 1985-2007 (Jan. 16, 2009) (“2009 Rate Study”), <https://prod.stb.gov/wp-content/uploads/files/docs/railRateStudies/1985-2007RailroadRateStudy.pdf>.

Another flaw in the Board's approach is that it assumes that an R/VC>180% is associated with "potentially captive" traffic.²² But the Board itself has acknowledged that R/VC ratios in excess of the 180% threshold do not, alone, establish market power or an abuse of such power. A rate that results in a R/VC>180% says nothing about the extent to which other market dynamics, such as geographic, product, or modal competition, may be effectively constraining a railroad's pricing power. Congress has recognized and codified this reality by requiring that an R/VC>180% may not be used to establish a presumption of market dominance.²³ The R/VC>180% metric is particularly inappropriate in this proceeding because Congress has purposefully created a very high standard for an exemption to be revoked. The practical result of the Board's over-reliance on R/VC>180% in considering whether to revoke an exemption for an entire class of commodity shipments is to impermissibly create a lower standard than is used for assessing market dominance in the context of a challenge to an individual rate.

BNSF acknowledges that the approach set out in the September 30 Notice appears to recognize the problem with relying on the absolute level of an R/VC ratio. Instead, the proposed approach focuses more on relative R/VC ratios and the changes in R/VC ratios over time. But this does not solve the problem. In fact, a comparison approach raises several new concerns. As discussed above, R/VCs for particular years will often be driven by circumstances in the particular year that do not relate to market power, like the changes in length of haul, changes in underlying costs, or external events like the imposition of new steel tariffs. Other changes in transportation

²² In the 2016 NPRM, the Board expressly referred to traffic with R/VC ratios of more than 180% as "potentially captive." 2016 NPRM, slip op. at 4. In the September 30 Notice, the Board stated that it is referring to such traffic as "R/VC 180 traffic." September 30 Notice, slip op. at 3 n.7.

²³ 49 U.S.C. § 10707(d)(2).

markets, like the increased use by BNSF of unit trains in the aggregates market, similarly may produce changes in R/VC levels that have nothing to do with the exercise of market power.

V. An Industry-Wide Approach Sweeps Too Broadly.

The Board's approach aggregates data from across the rail industry and bases its dashboard conclusions on averages. Such an approach fails to recognize the substantial differences in market conditions in different regions and the different market approaches of the various rail carriers. The average value calculated by the Board's approach could be driven by localized circumstances that are better addressed through a more focused evaluation of market conditions in particular circumstances. The use of an average as the basis for deciding whether to revoke class exemptions may therefore result in an unjustified expansion of regulation. The industry-wide averages also will obscure important differences among carriers and subject some carriers to regulation that is not warranted.

VI. Conclusion

BNSF applauds the Board's efforts to pursue a rigorous data-based analysis of rail markets. However, it is important for the Board to understand the limits of a data-based analysis and the potential infirmities in the Board's proposed approach. Congress intended class exemptions to be used to implement its deregulation policy. Given the limits on available data and the inferences that can be drawn from such data relating to rail market power, over-reliance on a data-based approach to analyzing rail market power could frustrate Congress's deregulation objectives.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'Adam Weiskittel', written over a horizontal line.

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Dated: January 29, 2021

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