

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

March 1, 2021

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY	1
REPLY COMMENTS	4
A. The AAR Improperly Seeks to Modify the Governing Standard and to Transform the Revocation Inquiry into a Full-Blown Antitrust Analysis	4
1. “Unconstrained” Market Power and Other Railroad Misstatements of the Governing Standard.....	4
2. Antitrust-Style Litigation is Unnecessary and Inappropriate.....	5
3. The Proper Approach to Section 10502(d)	6
B. The Railroads’ Proposed Procedural Approach is Improper and Seeks to Convey a Flawed Impression of the Consequences of Revocation.....	9
1. The Railroads Seek to Preclude the Agency from Making Decisions.....	10
2. A Proper Understanding of Revocation in the Present Regulatory Context is Essential	12
3. The Railroads’ Claims about Potential Shipper Behavior are Irrational	13
4. Requiring Individual Shippers to Seek Partial Revocation is Not a Practical Solution.....	15
C. The Railroads’ Effort to Minimize and/or Preclude Consideration of R/VC Evidence for Revocation Purposes is Inappropriate and Internally Inconsistent.....	16
D. Revocation of the Hydraulic Cement Exemption is Appropriate Under the Governing Section 10502(d) Standard	22
CONCLUSION.....	24

BEFORE THE
SURFACE TRANSPORTATION BOARD

REVIEW OF COMODITY, BOXCAR, AND	)	
TOFC/COFC EXEMPTIONS	)	
	)	
	)	

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

**REPLY COMMENTS OF THE
PORTLAND CEMENT ASSOCIATION**

The Portland Cement Association (“PCA”) hereby submits these Reply Comments in response to the Surface Transportation Board’s (“STB” or “Board”) inquiry regarding a possible new methodology for use in analyzing class exemption and revocation issues. *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704 (Sub-No. 1), at 15 (STB served Sept. 30, 2020), *revised*, EP 704 (Sub-No. 1) (STB served Dec. 11, 2020). These Reply Comments respond, in particular, to the opening comments filed by the Association of American Railroads (“AAR”) and by the other individual Class I railroads.¹

INTRODUCTION AND SUMMARY

In its Opening Comments, PCA asked the Board to abandon its proposed new exemption/revocation methodology as wholly unsuitable to evaluating the revocation of exemptions and instead to rely upon the extensive existing record as a basis for moving forward with its March 23, 2016 proposal to revoke the exemption for hydraulic cement. Such a result would be entirely consistent with, and in furtherance of, the Board’s governing statute (see 49

¹ See Comments of BNSF Railway Company (“BNSF Comments”); Opening Comments of CN (“CN Comments”); Comments of Canadian Pacific Railway (“CP Comments”); Comments of CSX Transportation, Inc. (“CSX Comments”); Comments of Norfolk Southern Railway Company (“NS Comments”); Comments of Union Pacific Railroad Company (“UP Comments”).

U.S.C. § 10502(d)), which focuses the revocation inquiry upon the elements of the National Rail Transportation Policy (“NRTP”). *See* 49 U.S.C. §§ 10101(6), 10101(15).

No commenting party has endorsed the Board’s September 30, 2020 methodology in its entirety and the commenting shipper parties all generally oppose it. In fact, it appears that all commenting parties are in some state of agreement regarding the inappropriateness of the Board’s proposal to the fundamental task at hand, although for different reasons. PCA and the other shippers oppose the Board’s proposal because it is contrary to congressional intent, is unsound, would unfairly block shippers from receiving the Board’s regulatory protections, and would introduce additional complexity and delay into a revocation process that already has consumed far too much time. Likewise, PCA explained that the Board’s proposal would elevate peripheral competitive considerations over and above revenue-to-variable cost (“R/VC”) ratios that should have primary importance in any consideration of whether effective competition exists. PCA requested that the Board rely upon the existing record to revoke the exemption for hydraulic cement.

Conversely, the railroads generally oppose the Board’s proposal because of their perception that it does not introduce enough complexity or delay into the revocation process and because it does not mandate the complete or nearly complete rejection of elevated R/VC ratios as relevant data points (although the railroads insist that low R/VC ratios are tremendously relevant to the same inquiry). The railroads also attempt to distort the proper standard for evaluating revocation issues and to place insurmountable procedural obstacles in the path of any exempt-commodity shipper who would have recourse to the agency. Specifically, the AAR requests that the Board refrain from taking any action with respect to a final decision on revocation and instead

publish complex data sets to be used by the entire Class I railroad community to frustrate any future, individual shipper effort to obtain full or partial revocation.

Notably, the railroads also would adjust the proposed 180% R/VC “Initial Screen 1” from 5% of traffic to 50% of traffic. See AAR Comments at 3-4, 57-58. Stated differently, the railroads would preclude regulatory oversight of any commodity as to which as much as 49% of the existing rail traffic moved at R/VC levels in excess of 180%, even if that traffic exceeded the 180% R/VC level by a substantial margin. As noted in its Opening Comments, PCA believes that the Board should decline to adopt any of the various screening, averaging, and/or ranking processes from its proposal, but PCA nevertheless notes the brazen nature of the AAR’s requested modification. That modification would work a profound hardship upon substantial numbers of shippers that should be entitled to regulatory protection under the NRTP. The AAR’s proposed adjustment to Initial Screen 2 (from 40% intermodal traffic down to 15% intermodal traffic) (*id.* at 4, 58-59) is similarly excessive and inappropriate.

It is also important for the Board to recognize that the effect of any exemption revocation would not be some broadly burdensome “re-regulation” process. To the contrary, no revocation of an individual commodity exemption would return railroads to the financially difficult days of the 1970s. Revocation would not require carriers to file tariffs with the Board and would not place the burden of proof upon railroads to justify any proposed rate increases. Instead, revocation principally would afford shippers who lack effective competition the opportunity to seek to prove their cases for rate relief before the agency. No amount of railroad posturing or reliance upon outdated rationales associated with staving off railroad bankruptcy should distract from that commercial/regulatory reality.

The Board should reject the railroads' proposed approach, abandon its proposed new methodology, and find that revocation of the hydraulic cement exemption is appropriate under 49 U.S.C. § 10502(d). Any conceivable benefits of the Board's proposed new model are far outweighed by the overwhelming complexity, burden, and expense of its utilization and by the chilling effect it would have on shippers seeking to access critical backstop regulatory protections.

REPLY COMMENTS

A. The AAR Improperly Seeks to Modify the Governing Standard and to Transform the Revocation Inquiry into a Full-Blown Antitrust Analysis

In its Comments, the AAR improperly seeks to modify the legal standard governing revocation and to transform revocation under 49 U.S.C. § 10502(d) into a full-blown antitrust analysis.

1. “Unconstrained” Market Power and Other Railroad Misstatements of the Governing Standard

The AAR's Comments include a remarkable forty-one (41) instances in which the AAR claims – wrongly – that revocation of an existing commodity exemption is appropriate only if the Board first finds that the railroads exercise “unconstrained” market power.² Notably, the AAR fails to provide any citation to a statute or a prior decision in which the term “unconstrained market power” appears as a revocation requirement. It is certainly not the case that the Board must find railroad market power to be entirely “unconstrained” before the Board may revoke an exemption

² See, e.g., AAR Comments at 1 (“[T]he key question in making these [exemption/revocation] decisions is whether railroads have unconstrained market power.”); *id.* at 8 n.4 (“[I]f the Board were to revoke an exemption without finding that railroads have unconstrained market power, then the Board's decision would be unlikely to survive judicial review.”); *id.* at 38 (“This extensive reliance on R/VC ratios and RPC is inconsistent with the Board's goal—to examine reliable data about market conditions for particular commodities so that the Board can identify potentially unconstrained market power.”). The AAR repeats its “unconstrained” market power claim on multiple additional pages of the AAR Comments. See, e.g., *id.* at 7, 9, 12, 16, 23, 31, 37, 42, 52, 53, 54, 57, 59-60, 63-66, 68, 69, 71-72.

under Section 10502(d). The AAR’s repeated suggestion in that regard is simply a transparent advocacy tactic for persuading the Board to adopt the flawed view that railroads never have inappropriate market power and that regulation is never necessary. There is no requirement for the Board – when considering revocation – to find railroad market power over the subject commodity to be entirely unconstrained.

Similarly, the AAR claims that the Board “may revoke an exemption only when no other options are available.” AAR Comments at 1; *see also id.* at 9 (“Congress . . . limited the Board’s discretion to revoke exemptions to circumstances where there are no other options”). Again, the AAR fails to provide any legitimate support for its assertion. There is no requirement for the Board – when considering revocation – to make an affirmative finding regarding the absence of any other theoretically possible solutions.

The railroads also misstate the Board’s governing standard when they argue repeatedly that the Board must exempt transportation “to the maximum extent possible.” *See* AAR Comments at 6, 7, 55, 65; BNSF Comments at 2, 3, 10; NS Comments at 25. Such arguments are inconsistent with the actual language of Section 10502(a), which provides that the Board should grant exemptions “to the maximum extent consistent with this part.” 49 U.S.C. § 10502(a). There is a significant difference between requiring exemption “to the maximum extent possible” and requiring exemption “to the maximum extent consistent with this part.” The railroads’ misstated version of the exemption standard improperly conflates the language of 49 U.S.C. § 10101(1) and the language of 49 U.S.C. § 10502(a) and should be rejected.

2. Antitrust-Style Litigation is Unnecessary and Inappropriate

Stated simply, the railroads are attempting to transform the revocation process into full-blown, antitrust-style litigation in order to ensure that the Board never revokes any commodity

exemption (and/or to ensure that the Board relies upon similar concepts to exempt even more commodities from regulation). In support of that effort, the railroads rely upon antitrust principles and they present testimony from expert antitrust witnesses. *See* AAR Comments at 8, 55-56; *see also id.* at V.S. of John Asker, Kostis Hatzitaskos, and Aviv Nevo. There is no basis for interpreting Title 49 in a manner that would justify (or require) the use of an antitrust approach for evaluating exemption and/or revocation issues, particularly not an approach that would mandate detailed consideration of each and every nationwide movement of a given commodity via any mode of transportation.

The agency and its predecessor certainly have not followed such an approach in the past and should not do so now. Prior efforts to expand the analysis of competition into all potential facets of the market led to a manifestly burdensome and unworkable litigation process. *See, e.g., Market Dominance Determinations – Product and Geographic Competition*, EP 627 (STB served July 2, 1999) at 6 (“AAR’s claim that the burdens associated with consideration of product and geographic competition have not been excessive stands in sharp contrast to our own experience as well as the overwhelming evidence and argument submitted by the shipping community”) (footnote omitted). The Board should not allow the railroads to clutter – and to undermine – the Board’s revocation inquiry in the same antitrust-based manner.

3. The Proper Approach to Section 10502(d)

Under 49 U.S.C. § 10502(d), 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.” As the Board observed in its September 30, 2020 Notice in this proceeding (*id.* at 5), there is no explicit reference to market power whatsoever in Section 10502(d), and there certainly is no requirement that the

Board find the existence of “unconstrained” market power as a predicate to any exemption revocation. Moreover, even to the extent that the AAR relies upon caselaw identifying market power as an element of the revocation analysis (indirectly through consideration of the policies set forth in Section 10101), there remains no basis under that caselaw for suggesting that the agency may revoke an exemption solely in the presence of “unconstrained” market power.

In accordance with 49 U.S.C. § 10101(6), it is the policy of the United States Government to maintain reasonable rates where there is an absence of “effective” competition. As the Board’s own prior decisions in the market dominance context recognize, all railroad pricing is constrained at some theoretical level. Significantly, however, competition must be “effective” in order to warrant recognition by the Board:

At the core of the ‘effective competition’ standard is the idea that there are competitive, market pressures on the railroads deterring them from charging monopoly prices for transporting goods. Of course, any such effective competition will always be relative to a particular price that the railroads charge. *At some point the availability of an alternative such as the horse and buggy or even people carrying oil in buckets theoretically prevents railroads from raising their rates beyond an outer bound.* But the mere existence of some alternative *does not in itself constrain the railroads from charging rates far in excess of the just and reasonable rates* that Congress thought the existence of competitive pressures would ensure.

Arizona Public Service Co. v. United States, 742 F.2d 644, 650-51 (D.C. Cir. 1984) (emphasis added). The AAR’s contorted version of the governing legal standard presumably would preclude revocation even in circumstances in which a “horse and buggy” constitute the only competitive constraint on railroad pricing. That form of constraint obviously does not constitute “effective” competition. Similarly, the fact that some – or even many – movements of a given commodity may occur by motor carrier or water carrier should not preclude revocation where certain shippers

(due to their own unique circumstances) must rely upon railroad service and must pay rates that do not reflect effective competition.³

The Board has recognized this same “effective competition” principle repeatedly in its own decisions. For example, in *E.I. DuPont de Nemours and Company v. CSX Transp., Inc.*, NOR 42099 (STB served June 30, 2008), the Board relied upon the D.C. Circuit’s *Arizona Public Service* determination in support of its finding that not all competition constitutes effective competition:

Even if we were to find that the cost of trucking the product is similar to the cost of using rail after the CSXT rate increase, it does not follow that the threat of trucking is evidence of effective competition. After all, even a monopolist finds that there is a profit-maximizing price beyond which it cannot raise prices without adversely affecting its bottom line. A carrier possessing market power might set its rates so high that it would begin to lose business to a higher-cost alternative (such as a trucking company). As the Board has previously noted, while this may create an “outer limit” constraint, it does not necessarily mean that effective competition is present.

Id. at 7-8 & n.50 (citing *FMC Wyo. Corp. v. Union Pac. R.R.*, 4 S.T.B. 699, 718 (2000) (“The transload alternative does impose an outer limit on the rate that UP can charge, although UP can exercise considerable market power before reaching that outer limit. In other words, there is a competitive constraint, even though there is not effective competition.”))).

The Board should reject the railroads’ invitation to modify the governing statute and to transform the revocation inquiry into an antitrust proceeding.

³ See Section D, *infra*, regarding railroad claims as to the presence of substantial truck transportation (*i.e.*, cement mixers) in the narrow market for moving hydraulic cement from plants to shippers. The presence of motor carrier transportation in limited transportation contexts should not preclude broader revocation of the exemption regarding hydraulic cement transportation.

Relatedly, the Board also should reject the railroads' suggestion that, in order to withstand appellate scrutiny, the Board must identify and utilize data regarding all movements of a given commodity in making revocation decisions. *See* AAR Comments at 13-36. There is no obligation of administrative law that would require the Board to engage in a never-ending pursuit of all conceivable data regarding any possible market factor and any possible transportation mode (while at the same time ignoring the most immediate and direct evidence of undue market power, *i.e.*, high R/VC ratios on certain segments of traffic moving via rail). The AAR's suggestion is nothing more than an invitation for the Board to become so enmeshed in an analysis of every nationwide movement of a given commodity that the Board could never manage to reach a final determination. As described in greater detail below, the railroads are not hesitant to admit the goal of their various proposals. To that end, they explicitly admit that their objective is to prevent the Board from ever having to make final determinations on revocation requests. *See, e.g., id.* at 1, 5.

Similarly, the Board should reject any suggestion that revocation is appropriate only where market power abuses impact *all* shippers of a given commodity. *See* CSX Comments at 5 (arguing that shippers seeking revocation must "demonstrate that regulation is now necessary to remedy abuses of market power occurring *on a commodity-wide basis*") (emphasis added). There is no basis for requiring such a showing in order to justify revocation. Indeed, the railroads' view of the requirements of the revocation process even appears to go beyond what the Board would require from a complainant in an individual maximum rate case.

B. The Railroads' Proposed Procedural Approach is Improper and Seeks to Convey a Flawed Impression of the Consequences of Revocation

The railroads have proposed a going-forward procedural structure that is entirely improper and that is premised upon – and seeks to convey – a flawed impression of the nature and consequences of revocation. As described in greater detail below, there is no legitimate basis for

the railroad industry's vehement opposition to exemption revocation with respect to the various commodities that the Board identified in 2016. *See Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704 (Sub-No.1) (STB served March 23, 2016). Revocation would not impose substantial new burdens upon railroads, but instead, only would prevent railroads from charging supra-competitive rates in situations in which effective competition is truly lacking. (There is, of course, no risk that any shipper paying rates at or below the 180% R/VC level would prevail on a challenge to a rail carrier's rates.) As such, the railroads procedural and substantive arguments each amount to an effort to preserve the railroads' ability to prevent truly captive customers from obtaining any recourse with respect to excessive rates.

Any railroad suggestion that a shipper facing undue market power could seek partial revocation in anticipation of filing a maximum rate reasonableness complaint ignores the practical realities of STB adjudication. It is entirely unreasonable to expect that an individual shipper of an exempt commodity would first litigate a partial exemption request against the entire Class I railroad industry and then, only if successful in that first endeavor, litigate its maximum rate challenge. The railroads no doubt recognize the profound financial and regulatory burden associated with such a procedural approach. Indeed, placing such unreasonable burdens upon exempt-commodity shippers appears to be part of the railroads' overall strategy. The Board should not countenance such an approach.

1. The Railroads Seek to Preclude the Agency from Making Decisions

In its Comments, the AAR envisions a process through which the Board would refrain from taking any final action in this already ten-year old proceeding and instead (after further refining its proposed methodology and seeking further comment thereon), would limit its future function in the exemption/revocation context largely to that of an information-compiler. Effectively, the AAR

asks the Board to abdicate its role as regulatory agency and instead to leave it to the railroad industry to draw its own conclusions from data – to be supplied by the Board – that is not presently available:

The Board should improve and augment the body of data and related metrics it has compiled for purposes of the proposed approach, and then, *instead of using that information directly to reach its own conclusions*, simply publish it for review by all interested parties, who can then decide for themselves whether to petition for exemptions or revocations based on a more complete record.

AAR Comments at 1 (emphasis added). The AAR adds that the Board can better “conserve its limited resources” by “collecting and publishing information on market conditions for all stakeholders to see rather than attempting to draw initial conclusions from the data by itself.” *Id.* at 5; *see also id.* at 54 (“screens are a smart way to conserve the Board’s resources”).

According to the AAR, railroads and shippers could “use the Board’s data – *e.g.*, information about competitive alternatives revealed by the GMIM Model – to guide their own decisions whether to seek new exemptions or the revocation of existing exemptions, and then present their requests to the Board along with additional information in their possession.” *Id.* at 5. The great advantage that such a procedural approach supposedly would provide would be to spare the Board of the inconvenience of actually having to reach decisions on regulatory questions: “That would ensure that stakeholders can present meritorious cases for exemptions or revocations to the Board based on more complete data than is currently publicly available, *while avoiding the need for the Board to sort through commodities on its own*, without the benefit of the additional information in the possession of railroads and shippers.” *Id.* (emphasis added).

To the extent that any shipper ever would take the extraordinary step of seeking revocation of an exemption, the AAR’s plan would ensure that such a shipper would bear the brunt of substantial, burdensome discovery obligations: “And if shippers pursued a request for a wholesale

or partial revocation . . . *they could be required at the outset* to provide the Board with additional information beyond that already available to the Board to guide its decision whether to pursue a revocation or exemption and thereby commit to a costly, full-blown proceeding.” AAR Comments at 74 (emphasis added). The AAR’s proposal is entirely improper and should be rejected. Essentially, the AAR would require shippers to make their cases before the Board twice, resulting in two costly proceedings. As discussed below, the AAR’s proposal reflects a flawed view of the nature of revocation and regulation in the present time period.

2. A Proper Understanding of Revocation in the Present Regulatory Context is Essential

There was a time in the history of the agency (more specifically, in the history of its predecessor) in which the regulation of particular classes of railroad traffic imposed substantial burdens upon the carriers. Those burdens included onerous tariff-filing requirements. They also included the need to obtain agency approval for rate increases (as to which the carriers bore the burden of proof). Significantly, however, the days of such burdens are long gone.

Regulated carriers no longer must file tariffs with the agency and such carriers have initial rate-setting discretion subject only to the possibility of individual shippers asserting the presence of market dominance and demonstrating that a given rate exceeds a reasonable statutory maximum. *See, e.g., Rail Gen. Exemption Auth. – Exemption of Paints, Enamels, Lacquers, Shellacs, Etc.*, EP 346 (Sub-No. 33) (STB served Apr. 20, 1998) at 6 (“[T]he chief burden imposed by regulation was the requirement that tariffs be filed. With that requirement eliminated, the principal obligation imposed on the railroads has been removed. . . .”).

Accordingly, there is little-to-no immediate and/or broad consequence of an agency revocation decision. Instead, a railroad transporting a newly regulated commodity would continue to provide service in the same manner it had provided when transportation of the commodity had

been exempt from regulation. No obligation to file a tariff would exist. No obligation to obtain agency approval for rate increases would exist. No risk of any rate regulation whatsoever would exist for traffic moving at or below a 180% R/VC level. And even with respect to traffic priced at higher R/VC levels, no risk of having to defend a rate case would exist in all but the most unusual circumstances (*i.e.*, the absence of effective competition and the presence of a shipper willing to engage in an arduous and uncertain fight before the agency).

In light of this present state of STB regulation, it is essential to carefully scrutinize any railroad claims regarding the supposed perils of “re-regulation” and to balance the actual impact of revocation against the harm borne by one or more shippers of an exempt commodity who lack adequate competitive leverage over a given rail carrier. For example, NS uses alarmist language in its comments about the pre-1980 “regulatory chokehold on the railroad industry” and argues that there is no basis for the STB to “resurrect superfluous regulation.” NS Comments at 25-26; *see also* CN Comments at 2 (referring to the “weighty” consideration of “re-regulation”); AAR Comments at 74 (referring to the prospect of “re-regulat[ing] an entire commodity as a class”). No amount of STB exemption revocation in the present regulatory climate would risk sending railroads back to the financial difficulties that they experienced in the 1970s. The Board should reject any effort to suggest that revocation threatens such harm.

3. The Railroads’ Claims about Potential Shipper Behavior are Irrational

In its effort to preclude any further Board consideration regarding revocation, the AAR takes issue with the Board’s prior observations regarding the unlikelihood that shippers with legitimate competitive alternatives ever would file maximum rate reasonableness cases at the Board. *See* AAR Comments at 26 n.30 (citing EP 627, 2001 Decision at 7 & n.16 (decided Apr.

2, 2001); *id.* 1999 Decision at 10 (decided July 1, 1999)). The AAR’s arguments in that regard fail to present any legitimate basis for maintaining the exemption as to hydraulic cement.

First, the AAR alleges that the Board’s stated rationale “lacks substance” because – if the Board were correct – then it would be reasonable to conclude that market dominance likely does not exist in situations in which shippers elect to spend millions of dollars to litigate maximum rate cases. AAR Comments at 26 n.30. But a review of the history of market dominance determinations in STB maximum rate cases demonstrates that shippers do not act in an irrational manner. No rational shipper would turn its back on the benefits of effective market competition and instead would take on the substantial cost and uncertainty associated with a multi-year rate case, simply to spite a given railroad.

The Board’s market dominance analyses are entirely consistent with that principle and routinely result in findings of market dominance, particularly outside the context of rate cases involving large numbers of origin-destination pairs. Notwithstanding the AAR’s argument, the Board’s routine findings regarding the existence of market dominance are not “contrary to statute.” There is no requirement in administrative law that an agency must reach an even mix of results over time on a given issue in order to prove the agency’s compliance with its governing statute.

In any event, the AAR then appears to concede in its Comments that even if shippers are rational actors with respect to maximum rate cases (and therefore do not file such cases where better, less expensive market options exist), there could be some pernicious harm associated with “unnecessary” recourse to the agency in non-rate contexts. *See* AAR Comments at 26 n.30 (“[T]he possibility that a shipper might not bear the costs of a rate reasonableness challenge if competition is truly effective does not mean that it would refrain from invoking the “visible hand” of regulation in other contexts that Congress was equally adamant should be governed instead by market

competition—including service levels, non-price terms, and many other aspects of rail transportation.”). The AAR’s non-rate argument regarding potential shipper behavior is no better.

There is no reason why the shipper of a newly regulated commodity would forego the benefits of competition in the market regarding “service levels, non-price terms, and many other aspects of rail transportation” and instead would seek regulatory relief in those respects. The same logic that applies in the rate review context applies in the non-rate context as well. In that regard, there is no reason why the shipper of a regulated commodity would forego the immediate, definitive benefits of effective competition in order to take its chances with the slow, expensive, and uncertain prospect of agency adjudication, regardless of the specific subject of that adjudication. There is even less reason for a shipper to turn its back on potential market solutions where, as the railroads’ argument appears to assume, a given shipper’s regulatory claim is baseless. Congress was not “adamant” that the Board should assume that shippers will act in an irrational manner and that the Board should protect the Class I railroads from the danger that a shipper enjoying the many benefits of competitive rate and/or service options instead would elect to spend months (or more likely years) fighting a well-funded railroad before the Board.

4. Requiring Individual Shippers to Seek Partial Revocation is Not a Practical Solution

The AAR also presents an improper argument regarding the prospect of partial revocation, and in so doing, seeks to place the burden of proof upon individual shippers of exempt commodities to demonstrate widespread market power. *See* AAR Comments at 56-58, 60. As noted above, it would be improper for the Board to require individual shippers to seek partial revocation when the impact of a broader commodity exemption upon railroads would be negligible. Requiring an individual shipper to seek a partial revocation in order to challenge an excessive rate would place that shipper in preliminary litigation against the entire Class I railroad

industry as a precondition to seeking rate relief. Sequencing litigation in that manner would provide substantial advantages to railroads and would help them to immunize themselves from any rate challenge, regardless of the supra-competitive level of the rates that they charge. Such an approach also would impose substantial additional costs and risks upon shippers. While the railroads profess concern in their Comments about conserving resources and avoiding the inconvenience associated with defending against meritless complaints (*see, e.g.*, AAR Comments at 54, 56), it is evident that the net effect of following the railroads' self-serving approach to considering revocation issues would be to shift significant financial and regulatory burdens to the shipping community.

It is far more appropriate for the Board to grant commodity exemptions in situations in which the Board observes a lack of effective competition with respect to at least some segment of the transportation of the subject commodity. *See* H.R. Conf. Rep. 104-422 at 169 (1995) ("While the Conference supports the current practice of granting exemptions from regulation when regulation is not needed to carry out the national transportation policy or protect against market abuse, *the Conference is equally concerned that requests to revoke exemptions be given careful consideration by the Board.*") (emphasis added). Again, the act of revoking a class exemption will have no effect whatsoever in circumstances in which a give shipper enjoys competitive leverage. And the act of revoking a class exemption will impose little burden upon carriers in all but the most egregious instances of market power.

C. **The Railroads' Effort to Minimize and/or Preclude Consideration of R/VC Evidence for Revocation Purposes is Inappropriate and Internally Inconsistent**

The railroads contend wrongly that the Board should refrain from using high R/VC ratios as a means of identifying undue market power (or as a means of identifying the absence of effective competition), but those same railroads – without any acknowledgment of the internal inconsistency

in their argument – insist that low R/VC ratios constitute important proof of the absence of market power. The Board should reject this blatant inconsistency and should continue to look to R/VC ratios as the most important, the most direct, and the most reliable indicator of undue railroad market power.

The railroads couch their arguments regarding market power in the form of dubious concern that the Board might lack sufficient sophistication to avoid being fooled by the meaning of high R/VC ratios, repeatedly suggesting that R/VC and RPC metrics “are likely to mislead the Board.” AAR Comments at 37; *see also id.* at 5, 13, 38, 51, 61, 62 (reiterating the same concern that rate-related metrics would “mislead the Board”). From that premise, the railroads go on to argue that high R/VC ratios simply have no meaningful relevance to the revocation question. *See, e.g., id.* (“[T]he Board should eliminate its reliance on R/VC and RPC ratios to the extent the metrics in the proposed approach draw an inference of market power from these data points.”); *id.* (“Neither R/VC Ratios nor RPC Is a Rational Way to Identify Unconstrained Market Power”); *id.* at 38 (“High or Increasing R/VC Ratios Do Not Imply Market Power”); *id.* (“That high ratios do not indicate market-power concerns is widely acknowledged.”).

Contrary to the railroads’ claims, the most immediate and direct manifestation of market power that the Board is charged, *by statute*, to preclude is excessive *rates*. In that regard, Section 10101 of Title 49 states that, “[i]n regulating the railroad industry, it is the policy of the United States Government . . . to *maintain reasonable rates* where there is an absence of effective competition” 49 U.S.C. § 10101(6) (emphasis added). Market power constitutes the power to charge elevated and/or excessive rates to shippers who lack competitive options. Consequently, there could be no more appropriate or more useful gauge of railroad market power than R/VC ratios, which identify the relationship between the rates and costs for a given movement. In this

regard, the AAR's own submission demonstrates that railroads priced at least one quarter of their 2018 movements of hydraulic cement at R/VC ratios over 200%, with some movements occurring at ratios as high as 300%. See AAR Comments at 44.

An assessment of market power that lacked consideration of R/VC ratios would be meaningless. What meaning would be left to the term "market power" if the Board were to ignore pricing within the market as a symptom (or a result) of such power? Stated differently, it is the level of the rates charged by a given carrier (relative to its variable costs) that gives rise to regulatory concern under the NRTP. In that regard, a market power inquiry that looked only to secondary market considerations (such as the number of theoretically available transportation alternatives) without evaluating the level of rates charged by the subject rail carriers would willingly blind itself to the key regulatory concern (*i.e.*, to the results of the competitive dynamics in the particular marketplace).

In that regard, Norfolk Southern argues wrongly in its Comments that Congress "prohibited" the Board from drawing "any inference" about "market power" from R/VC ratios over the 180% level:

Congress understood the inherent limitation of this metric and how easily a change in R/VC ratios could be misunderstood. It therefore *prohibited* the Board from drawing any inference about market power from the fact that R/VC ratios are above the 180% jurisdictional threshold. 49 U.S.C. § 10707(d)(2).

NS Comments at 24 (emphasis in original). The statute does nothing of the sort.

As an initial matter, this section of Title 49 does not pertain to revocation proceedings. As a result, there certainly is no sense in which Congress – through Section 10707(d)(2) – "prohibited" the Board from relying upon high R/VC ratios when considering the absence of effective competition under 49 U.S.C. § 10101(6) in the context of a revocation proceeding. In other words,

there is no basis for NS's effort to extend the "presumption"-related language of Section 10707(d)(2) to the revocation context.

Moreover, Section 10707 of Title 49 only prevents the Board from relying *exclusively* on R/VC ratios above 180% when deciding: (i) whether "market dominance" exists; or (ii) whether a challenged rate exceeds a reasonable maximum. *See* 49 U.S.C. § 10707 (a high R/VC ratio "does not establish [such] a presumption"). Nothing in the statute suggests that R/VC ratios are discouraged, let alone prohibited, in evaluating the reasonableness of rates, or the presence or lack of competition within a specific industry (particularly where ratios reach the alarming levels seen in parts of the cement industry). On the contrary, the Rail Industry itself cites to statutory language using R/VC ratios where it suits its purposes.

Under the railroads' proposed system, the Board would limit itself to considering whether railroads have the *ability* to impose undue market power without considering whether the railroads actually were doing so. There is no legitimate basis for ignoring the principal statutory consideration in circumstances without effective competition – *i.e.*, the need for "reasonable rates" – when assessing revocation questions. As the D.C. Circuit observed, it is necessary to consider the effectiveness of competitive alternatives "relative to a particular price that the railroads charge." *Arizona Public Service Co., supra*, 742 F.2d at 650-51 (emphasis added). Similarly, the Second Circuit has endorsed the concept of treating R/VC ratios as the "threshold question" in market power analyses. *Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 124 (2d Cir. 1993) ("[R]evenue-to-cost ratios have been employed by the Commission, the courts, and Congress as a valid and reliable measure of market power in the rail industry."); *id.* ("Congress itself has recognized that revenue-to-variable cost ratios can be indicative of market power."); *id.* (linking the concepts of market dominance, the jurisdictional threshold, and revenue-to-variable cost

ratios).⁴ In other words, railroad rate levels are essential in evaluating the effectiveness of any supposed competition. The use of actual R/VC levels to identify undue market power (rather than reliance on secondary considerations like the presence of potential competitors within a certain distance of a given facility) constitutes the “most concrete and least theoretical” approach to fulfilling the Board’s regulatory responsibility:

Thus, contrary to petitioners’ claim, the ICC did not substitute economic theory for economic reality. Rather, the Commission, after extensive factfinding, relied on Conrail’s persuasive cost data, *which was the most concrete and least theoretical evidence of market power presented.*

Id. at 125 (emphasis added).

As noted above, the AAR’s Comments in this proceeding indicate that railroads priced at least 25% of the 2018 rail shipments of hydraulic cement at levels yielding R/VC ratios between 200% and 300%. *See* AAR Comments at 44. It makes no difference to a shipper paying 300% of a railroad’s variable costs that some hydraulic cement shippers may have plentiful competitive alternatives, that some shippers may pay rates on the order of 150% of variable costs (or less), or that some shippers may have the luxury of using truck transportation for some or even all of their hydraulic cement movements.

Unless their circumstances change, those more fortunate cement shippers would never have reason to seek STB rate relief even if the Board were to revoke the existing commodity exemption. Accordingly, the competitive circumstances of those shippers should be irrelevant to the question

⁴ The Second Circuit also rejected an argument that the Commission should not have placed primary importance on R/VC ratios. *Id.* (“Petitioners make the further argument that, even if the Commission was within its discretion in relying on cost ratios as one factor in the market power analysis, the Commission abused its discretion in relying on such ratios as the ‘threshold question.’ We disagree. While we believe that other more ‘subjective’ factors are often important in market power determinations . . . with respect to an analysis of market power in the railroad industry, we decline to hold that the ICC abused its discretion in using cost ratios in its threshold inquiry.”).

of whether the Board should refrain from continuing to insulate the railroads' pricing from regulatory scrutiny when those railroads do exert undue market power (*e.g.*, by charging 300% R/VC rates). It does little good to inform a 300% R/VC shipper that other shippers of the same exempt commodity enjoy substantial competitive alternatives and low railroad rates and that the high-R/VC shipper need only single-handedly fight the entire Class I railroad industry in a partial exemption dispute if it wishes to earn the right to challenge the level of its current rail rate. Instead, the Board should look to the existence of high R/VC ratios for at least some segment of exempt-commodity traffic as the most important proof of the need to revoke the commodity exemption and thereby to make rate relief for the most captive railroad customers a realistic possibility.

In any event, the railroads compound the fallacy and inconsistency of their efforts to preclude the consideration of high R/VC levels by arguing that the Board should treat low R/VC ratios as particularly relevant and important. *See* AAR Comments at 37 n.45 (“[L]ow R/VC or RPC ratios might suggest the absence of unconstrained market power.”); *id.* at 38 (“The Board should eliminate or significantly deemphasize R/VC ratios and RPC from the proposed approach, except to the extent the Board relies on low ratios as evidence of the absence of unconstrained market power.”); *id.* at 52 (“In short, although low R/VC and RPC metrics are relevant to identifying the absence of unconstrained market power, high or increasing ratios simply are not probative of the questions that govern the Board’s consideration of exemptions.”). It is, of course, entirely improper to argue that a low R/VC ratio could have important relevance to the market power inquiry but that a high R/VC ratio is a dangerous and potentially misleading bit of information that the agency must ignore when making the same market power determination. The Board should reject the railroad’s self-serving and internally inconsistent effort to suggest otherwise. Notably, the AAR’s Comments also reach a peculiar conclusion regarding

circumstances in which the Board’s proposed methodology yields inconsistent results for the same commodity as between (i) indicators that consider R/VC levels; and (ii) indicators that do not consider R/VC levels. See AAR Comments at 49-50 (identifying “apparent contradictions” between Indicator 1 and Indicator 3). In particular, the AAR attempts to use such inconsistencies to justify the rejection of R/VC-based indicators. *Id.* It would be far more reasonable and far more consistent with 49 U.S.C. § 10101 to use such inconsistencies to justify the rejection of any indicator that failed to consider R/VC levels.

D. Revocation of the Hydraulic Cement Exemption is Appropriate Under the Governing Section 10502(d) Standard

Section 10502(d) of Title 49 authorizes the Board to 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). As PCA demonstrated in its 2016 Comments and as the Board itself proposed in its March 23, 2016 notice, revocation of the exemption regarding hydraulic cement is appropriate under that standard.

As noted above, Section 10101(6) of Title 49 states that it is the NRTP to “maintain reasonable rates where there is an absence of effective competition.” 49 U.S.C. § 10101(6). The AAR’s own Comments confirm that a large percentage of the railroads’ hydraulic cement shipments move at R/VC levels in excess of 200%. Regardless of the availability of competitive service options for other hydraulic cement shippers, the fact that more than one quarter of all railroad movements reflect R/VC ratios as such elevated levels confirms that there is an “absence of effective competition.” See also NS Comments, V.S. of Mark A. Israel at 21 (finding that the “mean” R/VC level for hydraulic cement in 2018 was 176.9%). In the face of such circumstances, it is the policy of the United States for the Board to maintain reasonable rates.

Moreover, Section 10101 provides that it is the policy of the United States Government “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(15). The instant proceeding now has lasted more than ten years. The railroads have invited the Board to engage in additional analysis but ultimately to refrain from taking any formal action. Instead, the railroads prefer that the Board engage in ongoing information collection and publication. In addition, the railroads argue that any shipper of an exempt commodity who may believe that it lacks competitive alternatives should file its own partial revocation proceeding (and should be required to provide substantial information at the outset of any such proceeding). The railroads’ suggested approach essentially would guarantee the elimination of future efforts to revoke exemptions, and in so doing, would violate the NRTP set forth in Section 10101(15) (the “expeditious handling and resolution of all proceedings”).

UP observes in its Comments that certain movements of hydraulic cement routinely occur by motor carrier, whereas other movements occur either by rail or by truck. *See* UP Comments at 25 (“The vast majority of cement moves *directly from cement plants to customers* by truck. *See* Bendon VS at 1. Railroads become a factor only where *they move cement to distribution terminals*, from which cement subsequently moves to customers by truck.”); *id.*, V.S. of Jacqueline M. Bendon at 1 (“Most sales are made to ready mixed concrete producers, who mix the cement with aggregates and water to create *concrete that is delivered to job sites via trucks commonly called cement mixers.*”) (emphasis added). Effectively, UP’s Comments suggest that multiple transportation sub-markets exist with respect to hydraulic cement. It would be inappropriate to use the existence of motor carrier service in one or more of those transportation sub-markets (*i.e.*, cement mixers moving cement short distances) to justify a refusal to revoke an exemption with respect to rail service overall. Revocation of the hydraulic cement exemption would have no

adverse effect on what UP identifies as the non-rail, “plant-to-customer” transportation market insofar as service in that market occurs via truck. Revocation would, however, allow hydraulic cement shippers (by rail) in other contexts to obtain the benefit of protection from supra-competitive rates in circumstances in which effective competition is absent.

CONCLUSION

There is no basis for continuing the Board’s analysis of its proposed new evaluation methodology. That proposed methodology is unduly complex and impermissibly arbitrary. Moreover, the proposed methodology is ill-suited to the task of making final determinations as to revocation questions.

Importantly, however, the Board should refrain from accepting the railroads’ invitation to further complicate and delay this proceeding. There is nothing to be gained by perpetuating the analysis of peripheral issues and by fine-tuning metrics (or adding new metrics) that only would have the effect of obscuring the proper competitive analysis under 49 U.S.C. § 10101(6) (*i.e.*, the availability of reasonable rates).

PCA respectfully requests that the Board decline to afford any additional consideration to its proposed methodology and that it instead apply the Section 10502(d) standard to revoke the exemption regarding the transportation of hydraulic cement.

Respectfully submitted,

PORTLAND CEMENT ASSOCIATION

A handwritten signature in cursive script, appearing to read "Charles Franklin".

Charles Franklin
Vice President and Counsel, Government Affairs
Portland Cement Association
200 Massachusetts Ave., N.W., Suite 200
Washington, D.C. 20001

March 1, 2021