

BEFORE THE SURFACE TRANSPORTATION BOARD

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

Review of Commodity, Boxcar, and TOFC/COFC Exemptions

REPLY COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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INTRODUCTION AND EXECUTIVE SUMMARY

The Association of American Railroads (“AAR”) respectfully submits these reply comments in response to comments filed by four shipper groups and one consultant that previously submitted comments on behalf of a shipper (the “non-rail commenters”). As AAR explained in its opening comments, the Board’s proposed approach for analyzing data in revocation and exemption proceedings is a commendable effort to ensure that the Board’s decisions are based on a robust analysis and the best available evidence. AAR commends the Board for seeking to better understand market conditions in the freight-rail industry before making regulatory decisions that can have enormous consequences for railroads, shippers, and the broader economy. With some improvements, this could be a valuable tool.

Rather than help the Board improve the proposed approach, the non-rail commenters largely attack the Board for seeking better evidence about market conditions. Remarkably, several of the non-rail commenters argue that the Board should ignore evidence related to market power altogether—despite the Board’s unambiguous statutory mandate to allow competition and market forces, not regulation, to govern the complex economics of the railroad industry so long as railroads lack unconstrained market power.

Similarly, the non-rail commenters urge the Board to revoke longstanding exemptions on the ground that the ICC Termination Act of 1995 (“ICCTA”) did away with tariff-filing requirements. This argument again ignores the text of the statute. ICCTA expanded the Board’s statutory mandate to grant exemptions “to the maximum extent consistent with this part.” 49 U.S.C. § 10502(a). The argument also ignores Congress’s praise for the exemptions granted by the Interstate Commerce Commission (“ICC”), as well as the ICC’s primary reason for granting them in the first place—namely, that railroads lack unconstrained market power over shipments of the commodities at issue in this proceeding.

The non-rail commenters largely ignore the details of the Board's proposed approach, including the actual data that the approach considers. Instead, non-rail commenters argue that data about the broader marketplace for shipments of particular commodities does not necessarily reflect the particular circumstances of individual shippers. But isolated problems faced by individual shippers are exactly the sort of concerns that the statute requires be addressed in the context of a request for a partial revocation. A few anecdotes cannot justify revoking a class-wide exemption for a commodity over which, on the whole, railroads lack unconstrained market power. Non-rail commenters are misguided in urging the Board to focus primarily on R/VC ratios. As AAR and others have explained at length, R/VC ratios and similar metrics are simply not a rational way for the Board to determine that railroads have unconstrained market power. The Board should instead rely on actual, reliable evidence about shippers' competitive alternatives.

There is broad agreement about much of the rest of the Board's proposal. For example, all stakeholders appear to agree that it makes sense for the proposed approach to rely on Initial Screens to rule out potential candidates for revocation early in the process where it is clear that railroads lack market power. Similarly, all stakeholders appear to agree that the proposed Indicator Dashboard is based on an overly complex and arbitrary formula that is more likely to mislead the Board than provide it with any useful information. Eliminating the Dashboard would have the added benefit of redressing many of the non-rail commenters' complaints about the complexity of the proposed approach and the purported burden that it places on commenters. In fact, if the Board were to adopt AAR's suggestion and simply publish the relevant data for all stakeholders to see, then the Board could reduce the burden on itself and commenters. Railroads and shippers alike would have access to a valuable new data source that, combined with their

own knowledge about market conditions in their industries, would help them decide whether to bring proposed revocations or new exemptions to the Board’s attention.

Finally, many of the non-rail commenters urge the Board to revoke the exemptions at issue in this proceeding based on the existing record, without relying on the proposed approach or any other robust data set concerning market conditions. But the existing record contains voluminous evidence demonstrably showing that railroads lack market power over the commodities at issue. Thus, the existing record can support only one outcome—withdrawing the Board’s 2016 proposal to revoke the exemptions.

For these reasons and those in AAR’s opening comments, the Board should improve the proposed approach and allow stakeholders an additional opportunity to comment on a revised approach. The Board should also withdraw its proposal to revoke the exemptions at issue in this proceeding.

DISCUSSION

I. THE STATUTORY FRAMEWORK REQUIRES THE BOARD TO EXEMPT “TO THE MAXIMUM EXTENT.”

A. Several Commenters Fundamentally Misunderstand the Statutory Framework Governing Exemptions.

Many of the comments in opposition to the proposed approach misunderstand the statutory framework for exemptions and, specifically, the Board’s obligation to exempt rail traffic to the maximum extent consistent with the statute. For example, several of the non-rail commenters argue that the proposed approach will improperly allow the Board or railroads to propose new exemptions. *See* The Fertilizer Institute (“TFI”) Comments at 1–4; Institute of Scrap Recycling Industries et al. (“ISRI”) Comments at 7; Highroad Consulting (“Highroad”) Comments at 13. And the Portland Cement Association argues that the proposed approach

would create “an improper double-standard” in favor of exemptions. Portland Cement Association (“PCA”) Comments at 16.

These criticisms are misguided. The proposed approach does not and could not change the Board’s preexisting and ongoing obligation to exempt traffic from regulation to the maximum extent. 49 U.S.C. § 10502(a); AAR 2021 Comments at 6–9. Nor is the statute neutral on whether traffic should be subject to regulation in the first place—both Section 10502 and the Rail Transportation Policy factors embody Congress’s judgment that the Board should regulate as little as possible, and that the presumption must be to favor deregulation, not reregulation. By statutory design, it is necessarily harder for the Board to justify the revocation of an exemption than it is to grant one in the first place.

The non-rail commenters are also incorrect in arguing that the Board could not use the proposed approach (or a similar data-based approach) to consider potential new exemptions. *See* TFI Comments at 1–4. The Board has always had a mandate to consider new exemptions for regulated traffic whenever continued regulation is not necessary to prevent market-power abuse, and the fact that it has not exercised that authority yet for some commodities does not make them immune from exemption.

Nor would lack of notice somehow present an obstacle if the Board were to propose new exemptions. *See* ISRI Comments at 7; Highroad Comments at 14. As the Board itself made clear in announcing the proposed approach (Request for Comments at 1 n.2, 6), and as all stakeholders appear to agree, any approach that the Board adopts in this proceeding would be at most a first step that the Board could use in considering a potential exemption or revocation. *See* AAR 2021 Comments at 9–12.

B. The Potential for Market Power Abuse Is the Sine Qua Non for Class-Wide Revocation.

Several commenters also criticize the proposed approach for focusing on criteria that the Board believes are relevant to market power, including shippers' potential competitive alternatives. ISRI Comments at 4–6, 21; Highroad Comments at 11, 13. This argument again fundamentally misunderstands the statute.

As the ICC understood, the purpose of granting exemptions was that “the Commission will eventually reduce its exercise of authority to instances where regulation is necessary to protect against abuses of market power and that as many as possible of the Commission’s restrictions on changes in prices and services by rail carriers will be removed.” *Rail General Exemption Authority—Miscellaneous Manufactured Commodities*, 6 I.C.C.2d 186, 190 (1989) (quoting H.R. Rep. No. 1430) (alterations omitted). From the beginning, it was understood that exemptions should be as broad as possible, with specific market concerns corrected after the fact through regulation targeted at those specific concerns. The ICC explained that Congress required it to “‘adopt a policy of reviewing carrier actions after the fact to correct abuses of market power.’” *Santa Fe S. Pac. Corp. – Control – S. Pac. Transp. Co.*, 2 I.C.C.2d 709, 741 n.28 (1986) (citation omitted).

The non-rail commenters argue that market power is irrelevant in the revocation context because Section 10502 expressly mentions the potential for “abuse of market power” in the standard for an exemption, but the standard for a revocation mentions only the Rail Transportation Policy factors. ISRI Comments at 5–6. This assertion is inconsistent with precedent. Revocation or partial revocation is the mechanism by which the Board might “reregulate,” and in 1993 the Second Circuit held that “[t]he Commission properly found the

initial inquiry in a reregulation case is whether the carrier has market power.” *Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 123 (2d Cir. 1993).

Congress legislated against that backdrop when it enacted ICCTA. The Committee Report to ICCTA stressed that “[w]hen considering a revocation request, the Board should continue to require demonstrated abuse of market power that can be remedied only by reimposition of regulation or that regulation is needed to carry out the national transportation policy.” H.R. Conf. Rep. 104-422, at 169 (1995), 1995 U.S.C.C.A.N. 850, 854. The Board itself has recognized that revoking an exemption cannot be justified where a carrier “lacks market dominance over [the shipments] at issue.” *FMC Wyo. Corp. v. Union Pac. R.R.*, EP 346 (Sub-No. 29A), 2000 WL 33527851, at *5 n.17 (STB served May 12, 2000); *see also* AAR 2021 Comments at 7–9.

The argument that revocation of a commodity exemption need not consider market power also misunderstands the structure of the statute and the fundamentally different burdens that Congress imposed on the Board with respect to exemptions and revocations. The Board *must* exercise its authority to exempt traffic “to the maximum extent consistent with” the statute, including where railroads lack unconstrained market power. 49 U.S.C. § 10502(a). The Board *may* revoke an existing exemption, but only where doing so is “necessary to carry out the rail transportation policy of section 10101.” *Id.* § 10502(d). As Congress, the ICC, and the Board itself have all recognized, a revocation could be “necessary” only where railroads have unconstrained market power. *See supra* at 5–6; AAR 2021 Comments at 7–8.

The Rail Transportation Policy factors themselves make this clear. Those factors require the Board to, for example, “allow, *to the maximum extent possible*, competition and the demand for services to establish reasonable rates for transportation by rail”; “*minimize the need for*

Federal regulatory control over the rail transportation system”; “maintain reasonable rates *where there is an absence of effective competition*”; and “*reduce regulatory barriers* to entry into and exit from the industry”; but also strive to “*avoid undue concentrations of market power*.” 49 U.S.C. § 10101(1), (2), (6), (7), (12) (emphases added). This “strong language favoring rail deregulation,” “so forcefully expressed, manifests a preference for market-based rather than regulatory rate setting.” *AAR v. STB*, 237 F.3d 676, 677, 680 (D.C. Cir. 2001). The Board could not revoke an exemption consistent with these statutory criteria unless it first concluded that market-based solutions are unavailable—*i.e.*, that railroads have unconstrained market power.

This aspect of the statutory structure is further confirmed by the practical consequence of any alternative interpretation. Even if the Board had discretion to revoke an exemption without finding that railroads have unconstrained market power, the absence of unconstrained market power would immediately require re-exemption of that commodity in light of Congress’s mandates to use its exemption authority to the maximum extent and allow competition to determine the terms of railroad shipments. *See* 49 U.S.C. §§ 10101, 10502(a). A cycle of exemption, revocation, and re-exemption would obviously be absurd, further demonstrating that the Board should not revoke a class-wide exemption without first concluding that railroads have unconstrained market power.

This is the only correct outcome from the standpoint of economic and regulatory policy as well. Economic regulation promotes the public interest “in markets where competition is decidedly absent,” where “abuses of market power may systematically harm consumers with excessively high prices and suppression of healthy levels of supply.” Ex Parte 704, AAR Comments, Willig V.S. at 3 (Jan. 31, 2011). “By the same token, in situations where competition can work effectively, the public’s interest is best served by allowing competition—

not regulation—to set railroad rates.” *Id.* at 4; *see also* Ex Parte No. 704 (Sub-No. 1), Union Pacific Comments, Murphy V.S. at 4–6 (July 26, 2016). The railroad industry’s history after the Staggers Act and the ICC’s exercise of its exemption authority proves as much. Deregulation “ushered in increased market flexibility, competitive and differential rates for rail service, and a climate open to innovation.” Laurits R. Christensen Assocs., Inc., *A Study of Competition in the U.S. Freight R.R. Indus. and Analysis of Proposals that Might Enhance Competition – Executive Summary*, ES-1 (Nov. 2009). As a result, “the railroad industry experienced dramatic reductions in costs and increased productivity, which yielded higher returns for carriers and lower inflation-adjusted rates for shippers.” *Id.*

Congress’s desire to allow competition rather than regulation to determine market outcomes necessarily means that activities should not be regulated—or re-regulated—absent a valid basis for concluding that there is a market-wide concern about the potential abuse of market power. As witnesses Asker, Hatzitaskos, and Nevo explain, “[i]n the absence of clear evidence that railroads are exerting market power, there is therefore no economic basis to regulate.” Cornerstone Reply V.S. at 4. As they note, regulation carries inherent costs and cannot reliably replicate competitive market forces. *Id.* at 3-4. “[I]n many cases, the ‘imperfectly competitive market is far superior to inherently imperfect regulation.’” *Id.* at 3 n.5 (quoting Nancy L. Rose, *After Airline Deregulation and Alfred E. Kahn*, 102 AMERICAN ECONOMIC REVIEW 378 (2012)). As another former chief economist in DOJ’s Antitrust Division observed: “This conclusion, while familiar to students of economic regulation, is far too often neglected in discussions that presume one simply needs ‘better regulation’ or ‘better-intentioned’ regulators to correct a given market failure.” Rose, *supra*, at 378.

The non-rail commenters also rely on the Board’s decision in Ex Parte 760, where the Board asserted that the statute did not require it to find that railroads have market power before revoking demurrage exemptions. *See* ISRI Comments at 6 (citing Ex Parte No. 760, *Decision: Exclusion of Demurrage Regulation from Certain Class Exemptions* (“*Demurrage Decision*”), at 6–7 (STB served Feb. 28, 2020)). Whatever the merits of the Board’s evaluation of the potential “market power” issues associated with demurrage, the considerations are inapplicable to the commodity exemptions at issue in this proceeding for at least four reasons. First, the legal analysis in Ex Parte 760 (with which AAR respectfully disagrees) relied on Board precedent for the revocation of exemptions that, unlike the exemptions here, were granted for reasons unrelated to the absence of market power, including those governing “temporary trackage rights.” *Demurrage Decision* at 6–7. Second, Ex Parte 760 involved a partial revocation that was applicable *only* to demurrage charges, not a potential class-wide revocation. *See id.* at 12. Third, demurrage charges occur after a shipper has already chosen to use a railroad for a particular shipment, and are often assessed on receivers of railcars that did not participate in the choice of transportation mode in any event. Accordingly, demurrage charges are likely influenced by competitive forces in very different ways than railroad rates and other practices. Fourth, even in Ex Parte 760, the Board ultimately considered market power and concluded that railroads could abuse it in the unique context of demurrage. *Id.* at 7–10. For each of these reasons, the Board’s decision in Ex Parte 760 does not justify ignoring the absence of market power in this proceeding.

Here the Board has correctly recognized that the question whether railroads have market power is an essential part of the Board’s “RTP analysis.” Request for Comments at 5. Thus, the Board appears to recognize that it could not revoke any class-wide exemptions without first

assessing whether railroads have unconstrained market power. As explained above, and in AAR’s opening comments, if the Board did otherwise, its decision would be unlikely to survive judicial review. *See supra* at 4–7; AAR 2021 Comments at 6–9 & n.4.

C. ICCTA Strengthened Congress’s Mandate that the Board Use Its Exemption Authority to the Maximum Extent.

Multiple commenters incorrectly assert that Congress’s abolition of tariff-filing requirements in ICCTA justifies revoking exemptions that the ICC granted when those requirements were still in place. Steel Manufacturers Association (“Steel Manufacturers”) Comments at 11–12, 19; ISRI Comments at 31; Highroad Comments at 4.

These arguments fail for essentially the same reasons that AAR already explained in response to shippers’ similar assertions in 2016. AAR 2016 Reply Comments at 6–10. ICCTA did not undermine the case for existing exemptions. To the contrary, Congress left the exemptions in place, continued to require the Board to grant exemptions whenever regulation is unnecessary, and even added the new phrase “to the maximum extent consistent with this part” to further emphasize that the Board must exempt as much traffic as possible. *See* ICCTA, Pub. L. No. 104-88 § 10502, 109 Stat. 803, 808 (1995); *cf.* 49 U.S.C. § 10505(a) (1994). The Senate Report reaffirmed that “exemptions have proven highly beneficial to shippers and railroads.” S. Rep. No. 104-176, at 8 (1995). A statute that was enacted for the express purpose of deregulating the freight-rail industry cannot plausibly be interpreted to require the Board to increase regulation by revoking exemptions that were already in place.

As AAR explained in 2016, the non-rail commenters also overstate the importance of the tariff-filing requirements to the ICC’s exemption decisions. AAR 2016 Reply Comments at 7–10. For example, when the ICC exempted hydraulic cement, “the costs associated with tariff and contract rate establishment and management” were just one of six factors supporting the

exemption. *Rail Gen. Exemption Auth.—Exemption of Hydraulic Cement*, Ex Parte No. 346 (Sub-No. 34), 1995 WL 438371, at *4 (ICC-served July 26, 1995). For coke and primary iron, the tariff-filing requirements were mentioned only in the ICC’s description of comments received from a shipper. *See Rail Gen. Exemption Auth.—Petition of AAR to Exempt Rail Transp. Of Selected Commodity Groups*, 9 I.C.C.2d 969, 978–80 (Sept. 17, 1993). Tariff filings were not mentioned at all in explaining the exemption for crushed stone. *Id.* at 974–75. Similarly, the exemption for iron and steel scrap mentioned tariff filing only as one factor among many that supported deregulation. *See Rail Gen. Exemption Auth.—Exemption of Ferrous Recyclables*, Ex Parte No. 345 (Sub-No. 35), 1995 WL 294272, at *3–4 (ICC-served May 16, 1995). As should be true in this (and every exemption or revocation) proceeding, the primary factor driving the ICC’s decision was the fact that “the railroads face extensive competition in the transportation of these commodities,” including “strong intermodal, intramodal, and geographic competition” that limited “railroads’ market power.” *Id.*

* * *

In sum, the Board’s statutory obligations in this proceeding and other exemptions proceedings are clear. The Board must exercise its exemption authority to the maximum extent permissible, and may revoke an exemption only where doing so is necessary to prevent potential abuses of market power. Nothing in ICCTA or anything since has changed Congress’s strong preference for deregulation.

II. THE BOARD SHOULD LOOK PRIMARILY TO DATA ON COMPETITIVE ALTERNATIVES IN EVALUATING EXEMPTIONS.

A. The Proposed Data on Competitive Alternatives Should Be Expanded and Not Evaluated in a Vacuum.

Although many of the non-rail commenters are skeptical of the entirety of the Board’s approach, they focus most of their criticism on the Indicator Dashboard and the potential that the

complexity of the Dashboard will lead to delay and increased cost for commenters. By and large, they do not contest the importance of data reflecting the transportation alternatives available to shippers.¹

To the extent the non-rail commenters engage at all with the data on transportation alternatives, they quibble that the Board cannot draw categorical conclusions about the competitiveness of every single rail movement from the kinds of data the Board proposes to deploy. For example, the Institute of Scrap Recycling Industries emphasizes that there are often unique factors in play at individual shippers' origins or destinations that can influence the availability of competitive alternatives. ISRI Comments at 19. Highroad Consulting similarly argues that not all ports are suitable for all commodities, and that driver shortages may impact shippers' alternatives in some circumstances. Highroad Comments at 5, 11.

None of these concerns warrants disregarding available data on competitive alternatives. Instead, they highlight and buttress three points that AAR made in its opening comments:

First, the data and metrics in the proposed approach should not be the sole basis for a revocation decision, unless the evidence clearly rules out the potential for class-wide market-power concern. *See* AAR 2021 Comments at 57–60 (discussion of Initial Screens); *infra* at 15–16. The Board must evaluate a full record before deciding to revoke an exemption. AAR 2021 Comments at 9–10.

¹ One non-rail commenter contends that the mere fact that shippers might seek a revocation should be viewed as grounds for concluding that shippers lack competitive alternatives. ISRI Comments at 22. The D.C. Circuit correctly rejected similar reasoning, noting that even where the marketplace offers alternatives “it is certainly plausible that some shippers would consider regulators’ hands to be friendlier than invisible ones.” *AAR v. STB*, 306 F.3d 1108, 1111 (D.C. Cir. 2002). And any approach that ignored actual evidence in favor of a shipper’s naked request for a revocation obviously could not be reconciled with the Board’s statutory obligations or general rules of administrative law.

Second, the potential for shipper-by-shipper variation in competitive conditions does not mean that commodity exemptions should be revoked. The whole point of granting class-wide exemptions is to remove regulation when competitive market conditions can be relied upon, in the main, to prevent any individual railroad from abusing market power. The possibility that individual shippers, or groups of shippers facing similar circumstances, might be differently situated is an issue that the Board could address in the context of a request for a partial revocation. *See* AAR Comments at 57 (citing *Exemption from Regulation – Boxcar Traffic*, 367 I.C.C. 425, 436 (1983)).

Third, to the extent the commenters' concern is that the data on competition are imperfect, AAR agrees that the data sources the Board proposes to use to assess shippers' competitive transportation alternatives would benefit from improvement. For example, AAR pointed out ways to improve the GMIM Model's treatment of rail and water competition and to improve the evaluation of truck competition by drawing from available data on highway mileage and modal share. AAR 2021 Comments at 13–23, 31–37. Among other benefits, these improvements would show the Board the extent to which trucks are actually competing for shipments, and therefore would reflect the impact of purported truck and driver shortages. *See* Highroad Comments at 5. And AAR also showed how easy it would be to use existing data sources to carry out a useful, if not perfect, assessment of the potential for geographic competition. AAR 2021 Comments at 27–31. The Board should take all of these steps. But it should not ignore relevant data in favor of regulation-by-anecdote simply because the data are not perfect.

B. Arguments for Relying on R/VC Ratios Remain Unsupported.

Data regarding the competitive alternatives available to shippers are directly probative of the presence of competitive market forces, and far superior to attempting to draw inferences

about market power from data on margins and price. *See* AAR 2021 Comments at 38–42. Nonetheless, several non-rail commenters continue to insist that R/VC ratios or other putative measures of price or margin are probative of railroad market power. These assertions lack substance and are wrong for the reasons addressed at length in the AAR’s opening comments and by others in this proceeding and elsewhere.² In fact, even a commenter who supports revocation advises the Board that its extensive experience working with shippers of numerous commodities shows that “RVC’s do not prove market power.” Highroad Comments at 9. Indeed, Highroad “do[es] not view R/VC’s as relevant” at all to its “assessment of [its] clients’ competitive position in the respective markets.” *Id.* at 10.

Comments by two shipper groups suggest that R/VC is to be preferred over evidence of actual competitive conditions as a measure of market power. The Institute of Scrap Recycling Industries asserts that “rail competitive influence for a specific commodity proposed for revocation can be assessed by evaluating R/VC ratios,” but it offers not one iota of evidence to support that proposition. In fact, the precedents cited by the Institute used low R/VC ratios as a basis for granting exemptions, not the other way around. *See* ISRI Comments at 18–19 & n.37. Likewise, the Portland Cement Association claims to find support for the relevance of R/VC ratios in *Mr. Sprout*. PCA Comments at 5 (citing 8 F.3d at 124). But that case is further support for the proposition that low R/VC ratios support leaving exemptions in place, not that higher ratios support revocation. In *Mr. Sprout*, the D.C. Circuit upheld the ICC’s denial of a revocation request. The court explained that the ICC was right to rely on low R/VC ratios in

² *E.g.*, AAR 2016 Comments at 22–31; *id.*, Israel/Orszag V.S. at 9–17; *id.*, Baranowski/Fisher V.S. at 6–26; AAR 2016 Reply Comments at 2–6; *id.*, Israel/Orszag R.V.S. at 5–10; *id.*, Baranowski/Fisher R.V.S. at 4–12; Union Pacific 2016 Comments at 11–13; *id.*, Murphy V.S. at 6–9; BNSF 2016 Comments at 2–12; Norfolk Southern 2021 Comments at 23–26; *id.*, Israel V.S. at 12–16.

support of its finding of “a lack of substantial market power” because “rates barely returning variable costs tend to indicate a competitive, not a captive, market.” *Mr. Sprout*, 8 F.3d at 123–24. The court endorsed the ICC’s practice of exempting traffic from regulation when “low revenue-to-variable cost ratios” established the “absence of market power.” *Id.*

III. THE BOARD SHOULD DEPLOY IMPROVED INITIAL SCREENS.

AAR’s opening comments supported the Board’s proposal to implement data-based Initial Screens, and recommended some ways in which the proposed screens could be improved. AAR 2021 Comments at 57–60.³

Several of the non-rail comments lend support to AAR’s recommended use of Initial Screens. *First*, the Institute of Scrap Recycling Industries explicitly supports the use of screens. ISRI Comments at 27. The Institute’s proposed modifications, however, would undermine the screens’ ability to achieve their purpose—to avoid wasting resources examining commodities that plainly are not candidates for revocation. Specifically, the Institute proposes to combine the two screens in the proposed approach so that they would preclude further consideration of a revocation only where: (1) 40 percent of all rail traffic moves in intermodal service; *and* (2) no more than 5 percent of all carloads move at R/VC ratios above 180%. Far from offering a means of reducing the administrative costs associated with revocation proceedings, the Institute’s proposal would achieve next to nothing: the commodities to which such a screen would apply are a virtual null set, with only primary iron or steel products, NEC (STCC 33129) meeting both

³ Individual railroad comments also explored ways the Board could utilize data in considering exemptions. For example, the “waterfall” approach to the Initial Screens proposed by Norfolk Southern witness Mark Israel may warrant further examination. *See* Norfolk Southern 2021 Comments, Israel V.S.

criteria for revocation.⁴ There is no reason that the Board should proceed with a more comprehensive look at a potential revocation for a commodity for which more than 95% of the traffic is below the jurisdictional R/VC ratio simply because the screen for intermodal service is not satisfied.

Second, the Institute points out that competitive conditions applicable to individual origins or destinations, or in particular geographic areas, may differ from the overall conditions, which according to the Institute undermines the appropriateness of addressing exemptions on a class-wide, nationwide basis. *See* ISRI Comments at 19. But when the evidence shows that most rail traffic has adequate competitive alternatives, exemptions remained justified, and the different circumstances facing particular shippers can be addressed through partial revocation.

IV. THERE IS BROAD AGREEMENT THAT THE INDICATOR DASHBOARD IS DEEPLY FLAWED AS PROPOSED.

AAR's opening comments pointed out several concerns about the proposed Indicator Dashboard. AAR 2021 Comments at 61–74. Several of the non-rail commenters agree.

For example, the Portland Cement Association notes that it would be inappropriate to base revocation decisions on where a particular commodity's score on a particular metric falls relative to the average of all other commodities. PCA Comments at 9–11. AAR agrees that a commodity's rank cannot dictate revocation (or exemption) if market power is absent (or present). But Portland Cement Association's premise that market-power concerns are widespread is contrary to fact. Nonetheless, the Association's point that the Dashboard is not helpful in examining the underlying facts is valid and correct.

⁴ Request for Comments at 66. Of the commodities examined by Board Staff for potential exemption, only kerosene (STCC 29112) meets both criteria. *Id.* at 67.

The Portland Cement Association also catalogs many of the ways in which the design choices underlying the Indicator Dashboard are arbitrary. PCA Comments at 11–15. For example, the Association describes the potential mischief created by the proposed Dashboard’s use of 5% thresholds to distinguish among commodities, its arbitrary inferences from R/VC data, its arbitrary bright lines between three categories of signals, and its averaging of eight Indicators. AAR agrees with these concerns for the reasons explained in its own opening comments. The Board should jettison the Dashboard in favor of simply presenting relevant data for analysis by interested parties. *See* AAR 2021 Comments at 74–75.

V. AN APPROACH LIKE THAT RECOMMENDED BY AAR WOULD NOT BE TOO COSTLY OR COMPLEX.

A principal theme of the non-rail comments is that the Board’s proposed approach is too costly and complex. ISRI Comments at 9–13 (“complexity and cost of the proposed new approach would significantly curtail the ability of interested parties to utilize the Board’s procedure”); PCA Comments at 17–18 (“it would be profoundly burdensome to require a shipper seeking revocation of a given commodity exemption to develop evidence under that methodology”); Highroad Comments at 8 (“new approach would create a costly process with little guarantee”); TFI Comments at 2 (the proposed approach “would require multiple steps to assemble, process, and calculate various data points”).

As an initial matter, this is yet another reason for the Board to adopt robust Initial Screens to ensure that that neither the Board nor commenters will waste resources considering and debating class-wide revocations when the applicable market-wide facts are sufficiently clear.

In cases where Initial Screens do not apply, the Board can make use of potentially relevant evidence without relying on a complicated model that attempts to convert objective data into subjective numerical scores and indicators suggesting potentially strong, moderate, or weak

cases for revocations or new exemptions. A simplified approach that simply collects and reports relevant data need not create any onerous burdens.

In fact, the approach that AAR recommends would have the opposite effect, reducing the burden on the Board and stakeholders by replacing the proposed Indicator Dashboard with an array of potentially relevant data in a publicly available format that would be easy for the Board and the public to use and understand. *See* AAR 2021 Comments at 74–75. Neither railroads nor shippers would be under any obligation to hire experts to double-check the Board’s calculations (although they would of course be free to do so if they chose). And the increased transparency of such an approach would reduce burdens on the Board’s stakeholders by providing additional information to better understand whether an effort to seek class-wide revocation (or a new exemption) would be worthwhile. An approach similar to what AAR proposes would also reduce burdens on the Board by allowing it to rely on shippers and railroads, armed with their own knowledge in addition to the Board’s data, to take the lead on proposing new revocations or exemptions.

Moreover, the Board is more than capable of analyzing data and making evidence-based decisions based on the best available information about market conditions in the rail industry. Although the Board obviously does not have unlimited resources, Congress created it as an expert agency on surface transportation matters and has mandated that the Board grant and retain exemptions to the maximum extent permissible. Any proposal to revoke an exemption must therefore demonstrate that regulation is in fact necessary to protect shippers from the abuse of market power. That kind of analysis requires a robust showing that cannot simply be waved away by shippers’ desire to restore regulation without collecting the evidence necessary to demonstrate why class-wide regulation is necessary. These burdens are part and parcel of the

governing statutory framework and the general requirement that agency decisionmakers must consider all of the available evidence.

Nor is it a flaw in the proposed approach that by itself “the proposed methodology would not allow the Board to make final determinations as to exemption or revocation.” PCA Comments at 7. The Board is always the ultimate decisionmaker, and it is correct to recognize that no mechanical formula can substitute for reasoned decisionmaking. The Board should be commended, not criticized, for seeking to rely on the best available evidence in exercising its responsibilities.

VI. THE EXISTING RECORD DOES NOT SUPPORT REVOKING THE EXEMPTIONS APPLICABLE TO THE FIVE COMMODITIES AT ISSUE AND THE BOARD SHOULD WITHDRAW THE NPRM.

The refrain of most of the non-rail commenters is that the Board should dispense with its proposed approach and instead proceed directly to a decision about the five commodities for which revocation was proposed in 2016 without further delay. The Institute of Scrap Recycling Industries argues, for example, that the Board’s decision to initiate this proceeding “does not obviate the Congressional intent [expressed in 49 U.S.C. § 10502(d)] that revocation proceedings be expeditiously completed.” ISRI Comments at 30; *see also* PCA Comments at 19–20. For its part, the Steel Manufacturers Association simply asks the Board to “do what is equitable.” Steel Manufacturers Comments at 18–19.

Contrary to the views of the non-rail commenters, however, the existing record compels the conclusion that the Board should retain each of the five exemptions and withdraw the NPRM. AAR fully supports the Board rendering a prompt decision doing so, drawing on the entire body of evidence compiled to date. For each of the five commodities, the record precludes a finding that there is a sufficient basis for finding market-power concerns. And the Board certainly could

not justify revoking any exemptions without allowing railroads an opportunity to update the record, much of which is now several years old.

The attached Appendix summarizes the evidence offered by commenters for and against revocation of each of the commodities at issue in this proceeding, omitting only the R/VC-based evidence that AAR and others have demonstrated cannot support revocation. Other than R/VC ratios, the only evidence that even arguably supports revocation is either purely anecdotal in nature or simply not probative of any bona fide *class-wide* concern about market power. Evidence like this would at most warrant examination in a partial-revocation proceeding based on a particular shipper's individualized circumstances. And on the other side of the equation, there is compelling evidence as to all of these commodities regarding the powerful forces of competition that drive outcomes in these marketplaces.

Accordingly, the Board should conclude that the high bar for revoking these five commodity exemptions has not been satisfied, withdraw the NPRM, and close this proceeding.

CONCLUSION

For these reasons and those in AAR's opening comments, the Board should continue to focus on objective and verifiable data related to market power and competitive alternatives. Before relying on the proposed approach to make any decisions, the Board should revise the proposed approach to ensure that it is consistent with the Board's objectives and its statutory obligations and allow stakeholders an opportunity to comment on a revised approach.

Dated: March 1, 2021

Respectfully submitted,

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APPENDIX A-1
EVIDENCE IN THE RECORD RELATING TO STCC NO. 14-2, CRUSHED OR BROKEN STONE OR RIP RAP

Category of Evidence	Evidence (Other than R/VC Ratios) Advanced by Commenters in Favor of Revocation	Evidence Against Revocation
Innovation Since 1992	NO EVIDENCE	- BNSF 2016 Comments at 8-10 (unit trains) - CSX 2016 Comments, Muldrow V.S. at 2-3 (unit trains) - UP 2016 Comments, Thrasher V.S. at 3 (“Rocktimization”)
Truck competition	Texas Crushed Stone 2016 Comments, Grantner/Highroad Letter at 6 (unverified) (“supply of drivers continues to decrease”)	- CN2021 Comments, Aeppli/Beagan V.S. at 4 (truck share 92%) - CN 2021 Comments, Levis V.S. at 7 - CSX 2016 Comments, Muldrow V.S. at 5 - NS 2016 Comments, Schaaf V.S. at 2 (small rail share, Transearch data); <i>id.</i>, McLemore V.S. (same, FAF data) - UP 2016 Comments, Thrasher V.S. at 3-5
Rail Competition	Texas Crushed Stone 2016 Comments at 7 (unverified) (“[m]any of our shipments are captive to one railroad”)	- BNSF 2021 Comments at 13-14 (transload competition) - CSX 2016 Comments, Muldrow V.S. at 3-4 - UP 2016 Comments, Thrasher V.S. at 5-7
Water Competition	NO EVIDENCE	- CSX 2016 Comments, Muldrow V.S. at 4 - NS 2016 Comments, Schaaf V.S. at 3 - UP 2016 Comments, Thrasher V.S. at 7
Geographic Competition	NO EVIDENCE	- AAR 2016 Comments at 28-29 (2021) (96 % destinations within 500 miles of 10 alternative origins; 97 % of origins within 500 miles of 10 alternative destinations) - CN 2021 Comments, Levis V.S. at 7 - CSX 2021 Comments, Adams V.S. at 7-8 - NS 2016 Comments, Schaaf V.S. at 3 - UP 2016 Comments, Thrasher V.S. at 4-7
Product Competition	NO EVIDENCE	- CSX 2021 Comments, Adams V.S. at 8 (imported stone) - NS 2016 Comments, Schaaf V.S. at 3 (cheaper limestone)
Specific Testimony in Favor of Revocation	GraniteRock 2016 Comments (unverified)	UP 2016 Comments, Thrasher V.S. at 8
	Texas Crushed Stone 2016 Comments	UP 2016 Comments, Thrasher V.S. at 7

APPENDIX A-2
EVIDENCE IN THE RECORD RELATING TO STCC No. 29-914, COKE PRODUCED FROM COAL

Category of Evidence	Evidence (Other than R/VC Ratios) Advanced by Commenters in Favor of Revocation	Evidence Against Revocation
Innovations Since 1992	• NO EVIDENCE	• CSX 2016 Comments, Epting V.S. at 11 (“Coke Express” fleet innovations)
Truck Competition	• SMA/AISI 2016 Comments at 14-16 (unverified) (length of haul has increased; driver shortages have limited trucking availability)	• CN 2021 Comments, Aeppli/Beagan V.S. at 8 (truck share 50%) • CSX 2016 Comments, Epting V.S. at 8-9 • NS 2016 Comments, Zehringer V.S. at 2
Rail Competition	• NO EVIDENCE	• CSX 2016 Comments, Epting V.S. at 6-7 • CSX 2021 Comments, Adams V.S. at 7-8 • NS 2016 Comments, Zehringer V.S. at 2
Water Competition	• NO EVIDENCE	• CSX 2016 Comments, Epting V.S. at 7-8 • CSX 2021 Comments, Adams V.S. at 7-8 • NS 2016 Comments, Zehringer V.S. at 2 (truck to water)
Geographic Competition	• NO EVIDENCE	• BNSF 2021 Comments at 8-9 • CSX 2016 Comments, Epting V.S. at 5-6, 10 (competition with in-house or nearby production)
Product Competition	• NO EVIDENCE	• CSX 2016 Comments, Epting V.S. at 3, 9-10 • NS 2016 Comments, Zehringer V.S. at 2
Specific Testimony Offered by Supporters of Revocation	• AK Steel 2016 Comments at 1 (unverified) (“On many of these moves, AK is captive to a single rail carrier, and no other mode of transportation is feasible”)	• NS 2016 Reply Comments, Exhs. A-C (correspondence with AK contradicting assertions)

APPENDIX A-3

EVIDENCE IN THE RECORD RELATING TO STCC NO. 33-12, PRIMARY IRON OR STEEL PRODUCTS (PLATES, PIPES, AND RODS)

Category of Evidence	Evidence (Other than R/VC Ratios) Advanced by Commenters in Favor of Revocation	Evidence Against Revocation
Truck Competition	SMA/AISI 2016 Comments at 14-16 (unverified) (“trucking companies have found it difficult to satisfy steel shipper demand” due to driver shortages; length of haul has increased)	- BNSF 2021 Comments at 11-12 - CN 2021 Comments, Aeppli/Beagan V.S. at 11 (truck share 49%) - CSX 2016 Comments, Rutherford V.S.2 at 2, 5-6 - CSX 2021 Comments, Adams V.S. at 3-4 - NS 2016 Comments, Schaaf V.S. at 5 & App. B - UP 2016 Comments, Thrasher V.S. at 16-20
Rail Competition	NO EVIDENCE	- BNSF 2021 Comments at 13-14 (via transloading) - CSX 2016 Comments, Rutherford V.S.2 at 5-6 - CSX 2021 Comments, Adams V.S. at 3-4 - NS 2016 Comments, Schaaf V.S. at 4-5; <i>id.</i>, McLemore V.S. at 4 (low rail share, FAF data) - UP 2016 Comments, Thrasher V.S. at 20-22
Water Competition	NO EVIDENCE	- CSX 2016 Comments, Rutherford V.S.2 at 5-6 - CSX 2021 Comments, Adams V.S. at 3-4 - UP 2016 Comments, Thrasher V.S. at 20
Geographic Competition	NO EVIDENCE	- AAR 2021 Comments at 28-29 (87% (sheet), 64% (pipe) destinations within 500 miles of 10 alternative origins; 99% (sheet), 97% (pipe) origins within 500 miles of 10 alternative destinations) - CSX 2016 Comments, Rutherford V.S.2 at 2, 5 (including imports) - CSX 2021 Comments, Adams V.S. at 4-5 - NS 2016 Comments, Schaaf V.S. at 5-6 (including shipments to warehouses) - UP 2016 Comments, Thrasher V.S. at 16-23
Specific Testimony Offered by Supporters of Revocation	AK Steel 2016 Comments at 1 (unverified) (“On many of these moves, AK is captive to a single rail carrier, and no other mode of transportation is feasible”)	- BNSF 2016 Comments at 13 - NS 2016 Reply Comments, Exhs. A-C (correspondence with AK contradicting assertions)

APPENDIX A-4
EVIDENCE IN THE RECORD RELATING TO STCC NO. 32-4, HYDRAULIC CEMENT

Category of Evidence	Evidence (Other than R/VC Ratios) Advanced by Commenters in Favor of Revocation	Evidence Against Revocation
Innovation Since 1992	• NO EVIDENCE	• CSX, Muldrow V.S. at 5-6 (2016) (investments in rail facilities, unit trains)
Truck Competition	• PCA 2016 Comments at 6-7 (unverified) (length of haul has increased; “trucking is not a feasible option in many circumstances”)	• CN 2021 Comments, Aeppli/Beagan V.S. at 10 (truck share 63%) • CSX 2016 Comments, Muldrow V.S. at 5-6 • NS 2016 Comments, Schaaf V.S. at 8-9 (truck share over 96%) • UP 2021 Comments, Bendon V.S. at 2-3 • UP 2016 Comments, Thrasher V.S. at 10-11
Rail Competition	• NO EVIDENCE	• BNSF 2021 Comments at 13-14 (via transloading) • CSX 2016 Comments, Muldrow V.S. at 5 • NS 2016 Comments, Schaaf V.S. at 9 • UP 2021 Comments, Bendon V.S. at 3-5 • UP 2016 Comments, Thrasher V.S. at 12-13
Water Competition	• NO EVIDENCE	• CSX 2016 Comments, Muldrow V.S. at 6 • NS 2016 Comments, Schaaf V.S. at 9 • UP 2021 Comments, Bendon V.S. at 5-6 • UP 2016 Comments, Thrasher V.S. at 13-14
Geographic Competition	• NO EVIDENCE	• AAR 2021 Comments at 28-29 (91% destinations within 500 miles of 10 alternative origins; 100% origins within 500 miles of 10 alternative destinations) • CSX 2016 Comments, Muldrow V.S. at 6 (competition from imports) • NS 2016 Comments, Schaaf V.S. at 9 • UP 2016 Comments, Thrasher V.S. at 10-14 • UP 2021 Comments, Bendon V.S. at 2-6

APPENDIX A-5
EVIDENCE IN THE RECORD RELATING TO STCC NO. 40-211, IRON OR STEEL SCRAP, WASTES OR TAILINGS

Category of Evidence	Evidence (Other than R/VC Ratios) Advanced by Commenters in Favor of Revocation	Evidence Against Revocation
Truck competition	- ISRI 2016 Reply Comments, Borsuk V.S. at 4 (“not always easy to find a dozen or more idle scrap-hauling trucks when needed”) - ISRI 2016 Reply Comments, Dixon V.S. at 4-5 (trucks “best for short movements and for small-volume shippers”; “well-known driver shortage”) - SMA/AISI 2016 Comments at 14-16 (unverified) (“trucking companies have found it difficult to satisfy steel shipper demand” due to driver shortages; length of haul has increased)	- CN 2021 Comments, Levis V.S. at 5 - CN 2021 Comments, Aeppli/Beagan V.S. at 13 (truck share 76%) - CSX 2016 Comments, Rutherford V.S.1 at 2, 4 - CSX 2021 Comments, Adams V.S. at 3 - NS 2016 Comments, Schaaf V.S. at 6-7 & App. C (shorter distances intensify truck competition); <i>id.</i>, McLemore V.S. at 5 (low rail share, FAF data)
Rail-to-Rail Competition	- ISRI 2016 Reply Comments, Borsuk V.S. at 5 (“Sadoff has service from only one railroad”) - ISRI 2016 Reply Comments, Dixon V.S. at 5 (“very few have direct service from more than one railroad”)	- BNSF 2021 Comments at 13-14 (via transloading) - CSX 2016 Comments, Rutherford V.S.1 at 2, 4 - CSX 2021 Comments, Adams V.S. at 3-4
Water Competition	- ISRI 2016 Reply Comments, Borsuk V.S. at 8 - ISRI 2016 Reply Comments, Dixon V.S. at 5 (“[o]ptions such as import/export and/or water transportation are very limited also”)	- CN 2021 Comments, Levis V.S. at 5 - CSX 2016 Comments, Rutherford V.S.1 at 4 - CSX 2021 Comments, Adams V.S. at 3-4 - NS 2016 Comments, Schaaf V.S. at 7 & App. C (shorter distances intensify truck competition)
Geographic Competition	NO EVIDENCE	- CN 2021 Comments, Levis V.S. at 6 - CSX 2016 Comments, Rutherford V.S.1 at 1-2, 4 (exports, competition among scrap producers) - NS 2016 Reply Comments, Schaaf V.S. at 8 - ISRI 2016 Reply Comments, Borsuk V.S. at 3 (“scrap market is highly susceptible to supply and demand”)
Product Competition	NO EVIDENCE	NS 2016 Reply Comments, Schaaf V.S. at 6-7
Specific Testimony Offered by Supporters of Revocation	AK Steel 2016 Comments at 1 (unverified) (“On many of these moves, AK is captive to a single rail carrier, and no other mode of transportation is feasible”)	- NS 2016 Reply Comments, Exhs. A-C (correspondence with AK contradicting assertions) - UP 2016 Reply Comments at 9

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS

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

**VERIFIED REPLY STATEMENT OF
JOHN ASKER, KOSTIS HATZITASKOS, AND AVIV NEVO**

March 1, 2021

1. We were asked to submit a Verified Statement on behalf of the Association of American Railroads (AAR) regarding the proposed Office of Economics Staff Approach (“Proposed Approach”), which is designed to be used when considering class exemption and revocation issues. We submitted our Verified Statement on January 29, 2021, concluding that the Surface Transportation Board (“Board”) should not use the Proposed Approach as anything more than an initial, descriptive data visualization tool.¹

2. We have now been asked by counsel for AAR to respond, from the perspective of regulatory and competition economics, to contentions made by some commenters that exemptions should be revoked without regard to the question whether there is a class-wide concern about railroad market power.

3. The benefits of competitive markets are well documented in academic and policy research that draws from industry examples from around the world.² Economists have long recognized that properly functioning markets can solve complex allocation problems and maximize surplus without need for regulation and centralized intervention.³ Competitive allocations typically result in increased output, lower (but not necessarily uniform) prices, and levels of service that match consumer demand. It is understood that introducing competition can make some individual market participants worse off, even though overall consumer surplus increases. Nonetheless, unless there are clear

¹ Verified Statement of John Asker, Kostis Hatzitaskos, and Aviv Nevo, January 29, 2021 (“Asker, Hatzitaskos, and Nevo V.S.”) §§ 1.2 and 5. See also § 1.1 for an overview of our qualifications.

² For example, see “The OECD Report on Regulatory Reform, Synthesis,” Organisation of Economic Co-operation and Development, Paris, 1997 at p. 11, available at <https://www.oecd.org/gov/regulatory-policy/2391768.pdf> (“By sharpening competitive pressures, elimination of economic regulations has encouraged firms to become more efficient and helped to boost the productivity of entire industries: In Europe, labour [sic] productivity growth in the manufacturing sectors most affected by competition-enhancing reforms in the Single Market Programme [sic] were double those of other sectors . . . In air transport in the United States, real fares dropped by one-third between 1976 and 1993 . . . Following airline liberalization in 1993 under the European Single Market, 800 new licenses were granted in Europe, and more people are using lower-cost economy fares . . . Road haulage industries in the United States and United Kingdom enjoyed increases in capital productivity of around 50 percent after relaxation or elimination of out-dated [sic] operational controls . . . Market liberalisation [sic] in telecommunications and technological advances led to new services and striking improvements in efficiency”).

³ For example, see Hayek, Friedrich August. “The Use of Knowledge in Society,” *The American Economic Review*, 35 (1945): 519–530; or Coase, Ronald H. “The Problem of Social Cost,” *The Journal of Law and Economics*, 56 (2013): 837–877.

market failures, economists generally agree that regulatory action is unnecessary, and at times can even exacerbate inefficiencies.⁴

4. In light of this, before intervening, regulators should first identify whether there is a clear need for regulation and then evaluate whether or not the costs of regulation are likely to outweigh the benefits. In practice, as the Board is surely aware, regulation is complicated and efficient regulatory outcomes are difficult to achieve. By contrast, economists widely recognize that competition reliably delivers benefits to society, in both the short and long term. When competition is absent, regulation is at best an imperfect substitute and typically carries substantial compliance costs.⁵

5. Regulation may also have unintended consequences. For example, the economic costs borne by regulating dynamic industries may include diminished innovation. Consistent with this view, railroads have demonstrated a drive to innovate in terms of new services offered to shippers and ways to lower

⁴ Carlton, Dennis W. and Perloff, Jeffrey M. *Modern Industrial Organization* (Boston: Pearson/Addison Wesley, 2005) at pp. 682 (“Government regulation of firms may increase welfare in markets that are not perfectly competitive. Unfortunately, actual regulation often deviates considerably from optimal regulation and exacerbates market inefficiencies . . . Even where regulations are properly applied, the cost of administering them may exceed the benefits”) and 686 (“Unfortunately, the same factors that make market inefficiencies frequently make correcting the inefficiencies difficult. Moreover, not all inefficiencies can be corrected even by optimal government intervention. For example, if the inefficiency stems from limited information, the government may not be able to obtain and disseminate the relevant information cost effectively. That is, the world would be better off with full information, but that is not a viable option”); Tirole, Jean. “Market Failures and Public Policy,” Nobel Prize Lecture, December 8, 2014: 507–527 at p. 513, available at <https://www.nobelprize.org/prizes/economic-sciences/2014/tirole/lecture/> (“Regulators face a double asymmetry of information, called adverse selection and moral hazard respectively . . . Unsurprisingly, authorities that neglect the asymmetry of information fail to deliver effective, cost-efficient regulation”). Littlechild (2018) describes examples of industry regulations that were unable to achieve the intended efficient outcomes, particularly in the UK telecommunication and energy sectors. By his observation, those industries experienced little growth until after regulators removed price controls on recently privatized incumbents—examples by which he concludes that “Substituting the regulator’s judgement for the market process could dampen market signals and hence impair the evolution of competition.” See Littlechild, Stephen. “Regulation and the Nature of Competition,” *Journal of Air Transport Management*, 67 (2018): 211–223 at pp. 217–218.

⁵ For example, according to Nancy Rose, the former Deputy Assistant Attorney General for Economic Analysis at the DOJ Antitrust Division, “regulating well is hard,” and there are inherent imperfections stemming from regulation. Thus, in many cases, “the imperfectly competitive market is far superior to inherently imperfect regulation.” See Rose, Nancy L. “After Airline Deregulation and Alfred E. Kahn,” *American Economic Review*, 102 (2012): 376–80 at pp. 376–378.

operations costs since the passage of the Staggers Act, which suggests that a light regulatory touch delivers significant returns from enabling innovation.⁶

6. In the railroad industry, the most relevant concern regarding market failure (or distortion) is the possible exercise of market power on the part of railroads. In the absence of clear evidence that railroads are exerting market power, there is therefore no economic basis to regulate.

7. In our January 29 statement submitted to the Board, we noted that the metrics proposed by the Office of Economics Staff (R/VC, RPC, length of haul, and the proportion of traffic subject to “competitive influences”) do not have a clear interpretation for the purpose of evaluating competitive conditions for railroad shipments.⁷ As such, they would not allow the Board to determine whether there is clear evidence that railroads are exerting market power.

8. Accordingly, as the Board has recognized,⁸ a complete, detailed, fact-specific analysis is needed to evaluate whether it is necessary to revoke the exemptions for the commodities that are at issue in this proceeding.

⁶ Wilson, Wesley W., and Frank A. Wolak. “Freight Rail Costing and Regulation: The Uniform Rail Costing System,” *Review of Industrial Organization*, 49 (2016): 229–261 at p. 230 (“These reforms culminated with the passage of the Staggers Rail Act of 1980 . . . The impact of these changes on the industry has been dramatic, with significant reductions in operating costs and rail rates, the removal of uneconomic capacity, the introduction of many new services, and greater industry consolidation. Overall, these changes have resulted in a substantial improvement in the financial health of the freight rail sector, which is consistent with the goals of the Staggers Act”).

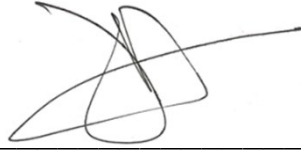
⁷ Asker, Hatzitaskos, and Nevo V.S. § 3.4.

⁸ For example, see 49 U.S.C. § 10501. Surface Transportation Board Decision, Docket No. EP 704 (Sub-No. 1), September 30, 2020 at p. 6 (“The Board does not anticipate that the approach would necessarily provide a final conclusive answer on whether the commodity exemptions at issue should be revoked, or whether additional commodity exemptions should be adopted. Those determinations are complicated and multi-factored, and the approach has limitations (as does any model) and relies on certain assumptions”).

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct. I further certify that I am qualified and authorized to sponsor and file this testimony.

Executed on March 1, 2021

A handwritten signature in black ink, consisting of a large, stylized 'A' with a horizontal line extending to the right, positioned above a solid horizontal line.

John Asker

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct. I further certify that I am qualified and authorized to sponsor and file this testimony.

Executed on March 1, 2021



Kostis Hatzitaskos

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct. I further certify that I am qualified and authorized to sponsor and file this testimony.

Executed on March 1, 2021

A handwritten signature in blue ink, appearing to read 'Avi Nevo', is written above a horizontal line.

Aviv Nevo