

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS

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

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The Institute of Scrap Recycling Industries, Inc. (“ISRI”) hereby provides these Reply Comments in response to the opening round of comments¹ regarding the “proposed new approach” described in the decision (“Decision”) of the Surface Transportation Board (“Board” or “STB”) issued on September 30, 2020 in this docket.² The opening comments filed on January 29th confirm that the proposed new approach should not be adopted. ISRI reiterates its appreciation to Board staff who developed the proposed new approach in response to Board members’ desire for a more robust data analysis for evaluating market conditions related to a commodity revocation or exemption request. However, no exempt shippers or railroads support adoption of the new model as proposed. Additionally, the former Chief Economist and Director of the Board’s Office of Economics, William F. Huneke, Ph.D, concurred with ISRI that adoption of the proposed approach would serve only to add another layer of litigation at

¹ In these Reply Comments, ISRI uses the term “Opening” without a specific filing date in order to refer to those Opening Comments filed by various parties on January 29, 2021. For earlier rounds of comments in this proceeding, ISRI provides the actual date of filing in order to avoid confusion.

² The due date for reply comments was established in a decision issued January 7, 2021.

significant cost without providing the Board meaningful benefits in determining whether to revoke a commodity exemption.³

ISRI focuses these Reply Comments on the incorrect, misleading, and self-serving assertions made by railroad parties which (i) mischaracterize the exemption revocation standard and precedent, (ii) seek to reverse the long-standing reliance by Congress, this agency, and the courts on revenue-to-variable cost (“R/VC”) metrics as an indicator of railroad market power, (iii) repeat positions on the market conditions for scrap metal that have already been discredited, and (iv) propose arbitrary exemption revocation evidentiary standards that would effectively bar exempt shippers from ever accessing the Board’s procedures. As described herein, the Board should reject these unfounded assertions and, instead, move expeditiously toward a final decision revoking the scrap metal exemption without use of the proposed new approach. There is overwhelming evidence in the current record establishing the substantial changes in market conditions since the scrap metal exemption was granted and strongly supporting the need for Board oversight over ISRI’s members’ rail shipments. Revoking this class exemption would clearly be consistent with the National Transportation Policy at 49 U.S.C. § 10101 (“NTP”) and, thus, the revocation statute at 49 U.S.C. § 10502(d)).

I. Railroad Parties Misstate and Confuse the Applicable Statutory Standard for Exemption Revocations.

Numerous railroad parties evinced confusion in their opening comments by misstating the applicable statutory standard for commodity exemption revocations.⁴ They conflated the

³ Verified Statement of William Huneke, page 6 (“Huneke V.S.”), attached to Opening Comments of American Short Line and Regional Railroad Association.

⁴ As set forth in ISRI’s Opening Comments (filed jointly with the American Forest & Paper Association and the National Industrial Transportation League), this proceeding should only focus on revocations, as it has for many years. For that reason, ISRI will generally only refer to

revocation standard with the exemption standard, advanced the discredited position that “abuses of market power” must be shown before revocation can occur, and mischaracterized precedent and other governing law. These unsupportable assertions tread no new ground; they represent tired arguments previously made by the railroads several years ago – all of which were comprehensively debunked at the time. It is unfortunate that the railroads bring them forward yet again and that ISRI must spend more resources to refute once more the railroads’ attempts to obfuscate the applicable legal standard.

A. Revocations and New Exemptions Are Governed by Different Statutory Standards and Revocations Do Not Require Findings of Abuse of Market Power.

The railroads’ efforts to reinvent the exemption revocation standard must be rejected. They seek to raise the evidentiary bar for exemption revocations far higher than the standard established by Congress by repeating again and again that the Board must find railroad “abuses of market power” to revoke a commodity exemption. But the mere echoing of this statement throughout the railroad comments does not make it so. The AAR states that a class exemption revocation can *only* occur “if the Board has compelling evidence that railroads have *unconstrained* market power.”⁵ However, the words “abuse of market power” and “unconstrained market power” appear nowhere in the revocation statute. Rather, Congress established a simple, straight-forward and discretionary test for revocations that only requires the Board to find that application of the provisions of the statute “is necessary to carry out the transportation policy of section 10101.”⁶

“revocation proceedings” herein when describing the process that should be utilized by the Board unless the context warrants other treatment (such as responding to railroad comments).

⁵ AAR Opening Comments at 7 and 12 (emphasis added).

⁶ 49 U.S.C. § 10502(d).

Conversely, the Board's consideration of whether to *create* a commodity or traffic exemption expressly requires the Board to evaluate both whether regulation "is not necessary to carry out the transportation policy of section 10101...." and "is not needed to protect shippers from the abuse of market power."⁷ Congress' explicitly required the Board to consider the potential "abuse of market power" in exemption creation proceedings where the transaction or service is not "of limited scope."⁸ Thus, only the exemption creation statute requires evaluation of the *potential* for railroads to engage in abuses of market power following the removal of regulatory oversight. This reveals quite plainly that Congress knew how to require consideration of market power issues for proceedings related to exemptions. Thus, Congress, in its wisdom, established a higher standard for *removing* regulatory oversight by requiring an analysis of the potential for market power abuses to occur, than the standard for *reapplying* such oversight, which only requires an evaluation of the NTP. This is logical based on the serious risks and consequences to rail customers associated with the grant of exemptions.

Unfortunately, the railroad parties conflate these two statutory standards and thereby present a distorted and incorrect view of the applicable standard for revocations. For example, the AAR alleged that the Board's focus "should be on data that indicates whether railroads can abuse unconstrained market power" (AAR Opening at 12), thereby relying on language akin to the "abuse of market power" test found *only* in the exemption creation statute. Union Pacific also applied the exemption creation standard to the revocations proposed in this rulemaking. UP Opening at 28-29 ("[t]he record does not show any 'abuse of market power' that can be remedied

⁷ 49 U.S.C. § 10502(a)(2)(B).

⁸ The market abuse test for exemption creation is an alternative test and the Board could also grant an exemption by finding instead that "the transaction or service is of limited scope." *Id.* at 10502(a)(2)(A).

only by reimposing regulation”). Similarly, Norfolk Southern applied the exemption creation standard to revocations, asserting that “the [Board’s] analysis must move....to the judicial task of deciding whether the record supports granting or revoking an exemption under the legal standard that urged exemptions ‘to the maximum extent’ possible.” NS Opening at 25. Meanwhile, CSXT asserted that “any party proposing complete revocation of an exemption must demonstrate that regulation is now necessary to remedy abuses of market power occurring on a commodity-wide basis.”⁹

The railroads’ mistake regarding the statutory standard repeats their similar misconception from several years ago, which ISRI corrected at the time.¹⁰ Just one year ago, the Board admonished railroad parties to recognize that the statutory standards for exemption revocation and exemption creation are different, doing so in a decision that revoked a class exemption for certain agricultural commodities in order to apply demurrage regulation.¹¹ Railroad parties had “mischaracterize[d] the...statutory provisions” according to the Board, which further cautioned them that there is a difference in the standards for creation of a new exemption as compared to revocation of an existing commodity exemption.¹²

The railroads’ repetition of these discredited positions is yet another reason that this long-running proceeding should promptly move toward resolution. The Board’s and ISRI’s scarce

⁹ CSXT Opening at 5 (citation omitted).

¹⁰ See, e.g., ISRI Reply Comments at 2-3 (filed Aug. 26, 2016). Other parties also corrected the railroads’ error. See, e.g., AF&PA Reply Comments at 4-10 (filed Aug. 26, 2016).

¹¹ Exclusion of Demurrage Regulation from Certain Class Exemptions, STB Ex Parte No. 760, slip op. at 6 (served Feb. 28, 2020).

¹² Exclusion of Demurrage, STB Ex Parte No. 760, slip op. at 6 (served Feb. 28, 2020) (“the exemption-revocation provision does not say anything about market power, in contrast to the exemption-granting provision”) (emphasis omitted).

resources should not be dedicated to reviewing the same positions that were addressed years ago in this exact proceeding.

B. The Legislative History of the Revocation Statute Does Not Mandate Findings of Railroad Abuses of Market Power.

The AAR believes that legislative history dictates that the Board require “abuse of market power” in order to revoke an exemption, citing to a Congressional conference report which uses the phrase “abuse of market power” in the revocation context.¹³ However, the AAR forgets that legislative history is only relevant if the statutory language is ambiguous:

As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.

Exxon Mobil Corp. v. Allapattah Services, 545 U.S. 546, 568 (2005), *partially superseded by statute on other grounds, as described in* Frisby v. Keith D. Weiner & Associates Co., LPA, 669 F.Supp.2d 863, 871 (n.3) (N.D. Ohio 2009). See also Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997). In the words of Justice Kavanaugh before his appointment to the Supreme Court, “[s]tatutory text matters much more than it once did. If the text is sufficiently clear, the text usually controls. The text of the law is the law.”¹⁴

The language of 49 U.S.C. § 10502(d) could not be more plain – the Board is to consider the RTP when evaluating possible revocation of an exemption. Full stop. There is no plausible alternative interpretation of this statutory sub-section, meaning that resort to extrinsic material such as legislative history is unnecessary. Moreover, even if the cited legislative history is

¹³ AAR Opening at 8, citing to H.R. CONF. REP. 104-422 at page 169 (Dec. 18, 1995).

¹⁴ Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)).

considered, AAR ignores that the relevant Conference Report provides *two alternative* scenarios in which revocation is appropriate: *either* abuse of market power that can be remedied by regulation “or that regulation is needed to carry out the national transportation policy.”¹⁵ Therefore, a revocation decision is entirely appropriate if based solely on evaluation of the national rail transportation policy (which is exactly the text of 49 U.S.C. § 10502(d)). Here, ISRI has introduced substantial evidence that would satisfy both criteria contemplated by Congress for exemption revocation.

C. The Railroads Misconstrue Exemption Revocation Precedent.

The railroads’ invented revocation standard, *i.e.*, whether railroads have exercised “unconstrained market power,”¹⁶ is contradicted not only by the statute and legislative history but also by Board precedent. In a glaring omission, the railroads ignore the most recent Board decision addressing revocation of a class exemption issued just one year ago. In this decision concerning revocation of a class exemption to apply demurrage regulation, the Board rejected railroad assertions that the Board must make specific findings of the existence of railroad market power and stated that “AAR and CSXT’s arguments mischaracterize the Board’s statutory requirements” and “[n]otably, the exemption-*revocation* provision does not say anything about market power.”¹⁷ The Board specifically recognized that, while *not required by the statute*, in some of its past exemption revocation decisions it has addressed market power issues and in others it has not.¹⁸ The Board then clarified that when market power is considered the correct

¹⁵ H.R. CONF. REP. 104-422 at page 169 (Dec. 18, 1995).

¹⁶ AAR Opening at 1, 7, and 9. See also NS Opening at 9.

¹⁷ Exclusion of Demurrage Regulation from Certain Class Exemptions, STB Ex Parte No. 760, slip op. at 6 (served Feb. 28, 2020) (emphasis original).

¹⁸ Id., slip op. at 6-7 (emphasis added).

standard is whether the “potential” for railroad market power to be asserted exists, rather than specific findings of actual market power abuses.¹⁹

Instead of focusing on the Board’s most recent statements regarding the revocation standard, the AAR relied on precedent that did not involve revocations of class-wide exemptions. Specifically, the AAR relied upon WTL Rail Corporation, Ex Parte No. 230 (Sub-No. 9) (served Feb. 17, 2006) (“WTL”), (“extent of railroad market power is an essential issue in exemption revocation proceedings”) and Mr. Sprout v. United States, 8 F.3d 118, 123 (2nd Cir. 1993).²⁰

Mr. Sprout, however, actually undermines the railroad position that revocation can only occur if there are actual instances of market power abuse in the record.²¹ In Mr. Sprout, the Second Circuit evaluated the ICC’s refusal to revoke the existing exemption applicable to rail transportation of potatoes. Petitioners had sought revocation to enable the ICC to adjudicate various discrimination and unreasonable practice claims relating to Conrail’s transportation of potatoes for the petitioners.²² After the appellant argued that the ICC erred by requiring more than just a potential for competitive harm, the Second Circuit found that the ICC never required a “precise level of competitive harm” in the case. Instead, appellants merely needed to show potential injury “grounded in facts indicating a real possibility of competitive harm.” Mr. Sprout, 8 F.3d at 126. Thus, revocation of an exemption is not necessarily intended to remedy past market power abuse, but to protect shippers from *possible* market power abuse. In the

¹⁹ Id., slip op. at 7-9.

²⁰ See, e.g., AAR Opening at 7 and 9.

²¹ See, e.g., Union Pacific Opening at 28 (“[t]he record does not show any ‘abuse of market power’ that can be remedied only by reimposing regulation”) (citation omitted); CSXT Opening at 5 (“

²² Mr. Sprout, 8 F.3d 118, 122 (“G&T’s petition before the ICC was a request under § 10505(d) to reregulate Conrail’s potato traffic.”).

words of the Board, a revocation proceeding evaluates “whether the carrier has market power that it could abuse with respect to the traffic, thus necessitating regulatory oversight.”²³

The WTL decision is also inapposite. In WTL, the Board was faced with a truck trailer lessor (WTL) that wanted the Board to prevent several railroads from terminating the leasing contracts between WTL and the railroad lessees. To enable the Board to take the requested action, WTL sought partial revocation of the trailer-on-flatcar (“TOFC”) exemption.

Significantly, the WTL decision involved requested partial revocation for a particular purpose in a specific dispute, as opposed to the complete revocation of commodity class exemptions being considered in this proceeding, meaning that the Board’s “analysis of the RTP focuses on the particular section(s) of that [rail transportation] policy that relate to statutory provisions that would apply if the exemption were revoked.”²⁴ In contrast, the scrap metal revocation being considered here is a revocation for all purposes, meaning the Board should consider the entire RTP as directed by Congress.

The Board referred to “abuse of market power” once in the WTL decision, but only to describe the statutory standard for granting exemptions.²⁵ The Board also stated that “extent of market power is an essential issue in exemption revocation proceedings.”²⁶ Thus, the Board did not require findings of actual market power abuses to revoke an exemption but rather noted the relevancy of considering the “extent of market power” in the context of a case involving a partial

²³ Pejepscot Industrial Park, Inc. d/b/a Grimmel Industries — Petition for Declaratory Order, STB Docket No. 33989, slip op. at 7 (n. 15) (served May 15, 2003).

²⁴ WTL Rail Corp., Ex Parte No. 230 (Sub-No. 9), slip op. at 3. In the ensuing paragraph, the Board focuses on those specific statutory provisions that WTL wants to apply to the railroads’ TOFC service.

²⁵ WTL Rail Corp., Ex Parte No. 230 (Sub-No. 9), slip op. at 3.

²⁶ WTL Rail Corp., Ex Parte No. 230 (Sub-No. 9), slip op. at 3.

exemption to address a specific dispute. Even though this proceeding involves revocation of a class-wide exemption, ISRI, in fact, has provided substantial evidence regarding the extent of the railroad industry's market power over the rail transportation of scrap metal. Among other things, ISRI described the "take-it-or-leave it rates" common in the scrap metal industry, the unreliable rail service, and the lack of adequate car service.²⁷

II. It is Proper for the Board to Review Changes in R/VCs When Evaluating Changes in Commodity Market Conditions.

A. R/VC Figures Have Long Been Used by the ICC, the Board, the Courts, and the Railroads Themselves as an Indicator of Railroad Market Power.

The railroads have almost universally criticized the inclusion of R/VC figures in the proposed new approach. While ISRI agrees that the proposed new approach should not be adopted, the increasing R/VC (and revenue per car, or "RPC") figures for scrap metal should not be ignored. Congress, the ICC, and the Board have all utilized pricing metrics and, especially, R/VC figures for rail regulatory purposes for several decades. The railroads seek a dramatic reversal in long-standing agency practice, which itself is based on Congressional directives. The Board should not countenance these coordinated efforts that are clearly motivated by self-interest rather than the public interest.

As just one example, Norfolk Southern incredibly asserts that "policy makers cannot ascribe competitive significance to high or changing R/VC ratios."²⁸ Of course, Congress specifically directed the Board to utilize R/VC figures in exactly this manner when determining whether market dominance exists.²⁹ Specifically, Congress has defined "market dominance" as a lack of "effective competition" and precluded the Board from finding that market dominance

²⁷ See ISRI Reply Comments at 17-22 (filed Aug. 26, 2016).

²⁸ NS Opening at 9-10.

²⁹ See 49 U.S.C. § 10707.

exists if the R/VC is less than 180%.³⁰ There can be no more clear enunciation of the fact that federal law finds R/VC figures to be relevant in assessing the competitive landscape of rail transportation.

Ironically, one the cases relied upon heavily by the AAR, Mr. Sprout, directly conflicts with the railroads' criticism of using R/VC analyses in revocation cases. In deciding that revocation was not warranted, the ICC relied upon R/VC figures applicable to Conrail's potato transportation – a reliance with which petitioners disagreed. The Second Circuit found no fault with the ICC's use of R/VC figures, stating that (1) "revenue-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," and (2) "Congress itself has recognized that revenue-to-variable cost ratios can be indicative of market power."³¹ The court also determined that it was not arbitrary for the ICC to use R/VC figures as a "threshold question." Mr. Sprout, 8 F.3d 118, 124. These statements unambiguously reveal the untenable nature of the railroads' criticisms of using R/VC figures in this proceeding.³²

The tired positions espoused by the railroads in their Opening Comments tread no new ground. They are the same discredited positions taken previously by the railroads in 2016, and ISRI has already painstakingly explained the fallacy of the assertion that R/VC figures and

³⁰ See 49 U.S.C. § 10707(d).

³¹ Mr. Sprout, 8 F.3d 118, 124.

³² See, e.g., AAR Opening at 38 ("high or increasing R/VC ratios do not imply market power"); CSXT Opening at 2 ("R/VC ratios and changes in R/VC ratios are not a reliable indication of market power"); NS Opening at 9-10 ("policy makers cannot ascribe competitive significance to high or changing R/VC ratios"); BNSF Opening at 16 ("R/VC ratios are an inadequate and inappropriate basis for assessing rail market power").

the agency. If the railroads believe there are specific problems with URCS, they should raise the alleged problems via a separate Petition for Rulemaking; the railroads' desired changes to URCS are far outside the scope of this proceeding.

The Board should not fall for the railroads' self-serving "about face" as to R/VC analyses in an attempt to "move the evidentiary goal posts" at the tail end of this rulemaking. Any concerns that Board members themselves may have with URCS and its impact on R/VCs should not be addressed in this proceeding, especially when the Board itself initiated this rulemaking based on R/VC analyses. To do so would be highly arbitrary, inequitable, and improper. As explained, the fact is that R/VCs have long been used by Congress and the agency as an indicator of railroad market power. It is obvious that the railroads are engaging in this improper attack on R/VC comparisons only because such data shows the substantial changes in the rail transportation market for scrap metal, including the increased assertion of pricing power.

B. R/VC Figures Were Used by the ICC to Create the Exemptions, and Changes in R/VC Figures Should Be Evaluated When Considering Revocation.

Low R/VC figures were repeatedly cited and relied upon by the Board and the ICC when the exemptions were created for a wide variety of commodities in the early to mid-1990s, including scrap metal. In particular, the Board stated that "[w]e continue to believe that R/VC ratios are useful in analyzing the degree of market power by the railroad industry in connection with transportation of particular commodity groups."⁴¹ In light of this reliance to create the exemptions, it would be improper and inequitable for the Board to ignore the same type of evidence – R/VC figures – in evaluating whether to resume regulatory oversight.

⁴¹ Rail General Exemption Authority – Exemption of Ferrous Recyclables, 1 STB 173, 176 (1996). See also Rail General Exemption Authority – Exemption of Ferrous Recyclables, 10 ICC2d 635, 641 (1995) ("these competitive market forces act effectively to keep rail rates for these commodity groups at competitive levels, i.e., at average revenue-to-variable cost (R/VC) ratios far below 180.0%").

pricing in general have no “significance” for evaluation of the rail competitive landscape.³³ ISRI cited to not just court decisions³⁴ and agency precedent³⁵, but the railroads’ own extensive reliance upon R/VC figures to create the commodity and traffic exemptions in the first place.³⁶ The Board’s former Chief Economist agrees that profit margin is a “reasonable indicator of market power.”³⁷ Obviously, a the railroads’ dramatic increases in prices since the exemptions were granted have resulted in substantial increases in profits.³⁸

The railroads’ criticism of R/VC figures includes their related antagonism to the Board’s use of the Uniform Rail Costing System (“URCS”). The AAR contends that “URCS costs are not a useful measure of shipment-specific (or even commodity-specific) marginal costs and thus URCS-based R/VC ratios are not reliable measures of margins.”³⁹ Again, however, these arguments have already been made and refuted in this proceeding years ago.⁴⁰ The railroads’ assertions regarding URCS are an improper collateral attack on a costing system used throughout

³³ See, e.g., ISRI Reply Comments at 4-14 (filed Aug. 26, 2016). Other parties concurred with ISRI’s position. See, e.g., AF&PA Reply Comments at 12-22 (filed Aug. 26, 2016).

³⁴ ISRI Reply Comments at 7-9 (filed Aug. 26, 2016); AF&PA Reply Comments at 16-17 (filed Aug. 26, 2016).

³⁵ ISRI Reply Comments at 8-10 (filed Aug. 26, 2016); AF&PA Reply Comments at 16-19 (filed Aug. 26, 2016).

³⁶ ISRI Reply Comments at 9-11 (filed Aug. 26, 2016).

³⁷ See Verified Statement of William F. Huneke, page 7, attached to Opening Comments of the American Short Line and Regional Railroad Association (filed Jan. 29, 2021).

³⁸ Revenue of the Class I railroads, in 2013 dollars, increased 59% from 1995 to 2013. Modernizing Freight Rail Regulation, Special Report 318, page 18, Transportation Research Board, National Academy of Sciences (2015). See also An Update to the Study of Competition in the U.S. Freight Railroad Industry, Final Report, Laurits R. Christensen Associates, Inc. (Jan. 2010), page i (“Overall railroad rates have been steadily increasing since 2004, with a particularly steep increase in 2008.”). Famed conglomerate Berkshire Hathaway, controlled by investing guru Warren Buffet, acquired the entirety of BNSF in a transaction that closed in 2010.

³⁹ AAR Opening at 39-40.

⁴⁰ ISRI Reply Comments at 11-14 (filed Aug. 26, 2016).

C. Railroads Relied Upon and Utilized R/VC Figures When Seeking Exemptions for Scrap Metal and Other Commodities.

The railroads' current position lacks credibility given that they frequently cited to and relied upon R/VC figures when advocating for elimination of agency oversight in the 1990s. Railroads were not reluctant to submit R/VC data in an effort to convince the agency to create new exemptions. With respect to scrap metal:

- The AAR's witness submitted commodity-level R/VC data to the ICC in support of a petition to exempt ferrous recyclables. Rail General Exemption Authority – Exemption of Ferrous Recyclables, 10 ICC2d 635, 641-642 (1995).

The railroads' prior reliance on R/VC figures extended to other commodities, too, revealing again their willingness to argue for the compelling nature of R/VC figures as long as such data supports the railroad position. For example:

- When the AAR and nine individual railroads petitioned the ICC to exempt scrap paper, they cited to the nine railroads' R/VC ratios for that commodity. Petition to Exempt from Regulation the Rail Transportation of Scrap Paper, 9 ICC2d 957, 960 (1993).
- Conrail submitted R/VC data to the ICC to advocate for a boxcar exemption. Brae Corp. v. United States, 740 F.2d 1023, 1040 (D.C. Cir. 1984).
- When the AAR supported the ICC's proposal to exempt salt and rock salt, its "chief argument" was that "R/VC ratios of salt and rock salt are far below the level of 180%." Rail General Exemption Authority – Exemption of Rock Salt, Salt, 10 ICC2d 241, 249 (1994).
- In advocating for exemption of nonferrous recyclables transportation, AAR claimed the market was "highly competitive and characterized by declining rates...and low revenue-

to-variable cost (r/vc) percentages.” Rail General Exemption Authority – Nonferrous Recyclables, 3 STB 62, 63 (1998).

- AAR submitted R/VC figures for cement traffic during the ICC’s consideration of whether to exempt that commodity. Rail General Exemption Authority – Exemption of Hydraulic Cement, 10 ICC2d 649, 652 (1995).

The Board should not countenance the railroads’ effort to change the very same evidentiary standard relied upon to grant the scrap metal exemption simply because such evidence (R/VC figures) no longer supports their desire to maintain the status quo. Simply put, the railroads are avoiding R/VC figures only because the railroads no longer like the result derived from such figures. This dramatic change in position between exemption creation and exemption revocation exposes the lack of authenticity of the railroads’ current attack on R/VC comparisons in revocation proceedings.

D. The Board Should Evaluate Changes in R/VC Figures Supplemented by RPC Data.

To the extent that the Board were to evaluate the potential for railroads to exercise market power (even though it is not obligated to do so under the revocation statute), the Board can do so using R/VC figures supplemented as appropriate with RPC data. Courts have long found that R/VC figures are relevant when assessing railroad market power and the broader transportation market, including whether there is competition to rail transportation. For example, the D.C. Circuit has found that an agency’s reliance on aggregated R/VC data was “justified” in a boxcar exemption analysis even though it may have been “imperfect.”⁴² As described above in Sections II.B and II.C, the ICC and the Board have long relied on R/VC figures for exemption analysis, and the railroads themselves have found such evidence to be persuasive. This unanimity is no

⁴² Brae Corp. v. United States, 740 F.2d 1023, 1040-1041 (D.C. Cir. 1984).

coincidence: R/VC figures have been a common and accepted component of rail competition analysis for decades, as Congress itself has stated. See, e.g., 49 U.S.C. § 10707(d)(1)(A).

The railroads also object to any use of RPC data by the Board. For example, the AAR states that RPC is an “even worse” metric than R/VC.⁴³ Again, however, this objection is misplaced. Pricing power, as reflected in high and/or rising RPC data for a particular commodity, is well-established as an indicator of railroad market power. Basic economics teaches that a firm with greater market power can raise prices. In the words of the D.C. Circuit, an “accepted method of measuring market power” is “based on the recognition that although a firm in a competitive market cannot raise its prices without a net loss of revenue, a firm with market power can.”⁴⁴ The Board’s rail rate reasonableness methodology is based on the theory that shippers with “inelastic demand” can be “charge[d]...higher rates [by railroads] with a lower risk of losing their business.”⁴⁵

The AAR’s critique of RPC is based largely on the complaint that rail car capacity and length of haul are ignored by RPC-based metrics.⁴⁶ Even if these criticisms are true, they do not warrant wholesale rejection of RPC and similar rail pricing data sources. Pricing metrics are an important indicator to be considered in evaluating railroad market power, as the D.C. Circuit has repeatedly found. They are one factor to be utilized alongside all other relevant factors in analyzing whether revocation of a particular exemption is warranted. No one factor should be dispositive. Instead, the Board must follow the revocation statute, 49 U.S.C. § 10502(d), and

⁴³ AAR Opening at 51. See also AAR Opening at 37-38 (referring to RPC as a “flawed metric”) and 65; NS Opening at 20; and UP Opening at 11.

⁴⁴ CF Industries, Inc. v. STB, 255 F.3d 816, 823 (D.C. Cir. 2001) (citation omitted).

⁴⁵ BNSF Railway Company v. STB, 526 F.3d 770, 774 (D.C. Cir. 2008). See also Arizona Public Service Company v. United States, 742 F.2d 644, 654 (D.C. Cir. 1984).

⁴⁶ AAR Opening at 52.

apply the RTP, a process that requires “a reasonable accommodation of the conflicting policies set out in the Staggers Act.”⁴⁷ This is exactly the sort of multi-factor analysis that is squarely within the Board’s expertise; indeed, the Board’s entire existence is necessary specifically to engage in these sorts of policy decisions.

Given these facts, the Board should continue to utilize R/VC figures, supplemented by RPC data, as a relevant factor in the analysis of whether revocation is warranted under 49 U.S.C. § 10502(d).

III. The Board Should Not Impose a Revocation Standard Greater Than the Standard Used to Create the Exemption in the First Place.

ISRI made clear in its Opening Comments that the proposed new approach is faulty in that it uses the same standard for exemption revocation as for exemption creation, thus deviating from the statute.⁴⁸ In their critique of the proposed new approach, the railroads push this flaw even further, seeking changes to the proposed new approach that would create an even higher standard – much higher than the one applied when the exemptions were created. Several railroads assert or imply that the Board must take product and geographic competition into account in a revocation proceeding.⁴⁹ ISRI has already explained to the Board why this would be unwise, would lead to unwieldy Board proceedings, and should be rejected.⁵⁰

The AAR also requested that the Board substantially revise the numeric hurdles represented by the initial screens (an increase in the R/VC screen from 5% to 50% and a

⁴⁷ Association of American Railroads v. Surface Transportation Board, 306 F.3d 1008, 1111 (D.C. Cir. 2002).

⁴⁸ See, e.g., ISRI Opening at 22-23 (filed jointly with AF&PA and the National Industrial Transportation League).

⁴⁹ See, e.g., Norfolk Southern Opening at 4, 14-15, and 22; AAR Opening at 3-4, 23-27, 29-32, and 59-60; and CSXT Opening at 7-8.

⁵⁰ See, e.g., ISRI Opening at 16-17 and 22.

decrease in the intermodal share screen from 40% to 15%) and increase the 30-mile radius to 50 miles.⁵¹ The changes desired by the railroads would make the proposed new approach – already significantly more burdensome than the methodology used by the ICC when first creating the exemptions – an even higher hurdle. These arbitrary changes should not be taken seriously by the Board as they are not intended to improve the Board’s analysis but rather to effectively deny access to the Board’s procedures and bar important segments of the nation’s rail dependent traffic from reinstating regulatory oversight. ISRI already described not just the relatively minimal evidence utilized to create the scrap metal exemptions in the first place, but also the fact that this evidence no longer exists in today’s highly concentrated rail market – meaning that revocation is appropriate.⁵² Given the higher statutory standard for exemption creation as compared to revocations (see Section I.A above), and the minimal evidentiary showings relied upon by the agency when the exemptions were initially established, it would be inequitable for the Board to now increase significantly the showing required for revocation and create complex unwieldy litigation proceedings. But this would be precisely the result if the Board were to adopt the proposed new approach or the changes desired by the railroads.

IV. The Board Must Compare Today’s Transportation Conditions to Those That Existed When the Exemptions Were Originally Created.

Several railroad parties have urged the Board to base its exemption revocation decision primarily on more recent changes in the transportation market for the subject commodities, while downplaying the market conditions that existed when the exemptions were first created. For example, the AAR wants the Board to evaluate transportation data at five-year internals (with a

⁵¹ AAR Opening at 3, 35 and 57-59.

⁵² See, e.g., ISRI Opening Comments at 4-5 (filed July 26, 2016); ISRI Reply Comments at 22-24 (filed Aug. 26, 2016).

special three-year span for the most recent interval): 1982, 1987, 1992, 1997, 2002, 2007, 2012, and 2016-2018.⁵³ Such a method would over-emphasize the period after the exemptions were created (namely, 1997 and later), thereby improperly enshrining as normative the post-exemption and post-ICCTA market power of the railroads. As ISRI has repeatedly emphasized, ICCTA removed the main impetus for the exemptions in the first place – the elimination of tariff filing and other regulations that had complicated railroads’ ability to quickly respond to other transportation providers in the pre-ICCTA period.⁵⁴ For this reason, evaluation of whether to revoke an existing exemption should include a comparison of the transportation and legal conditions that existed at the time the exemption was created, and that were relied upon by the agency to grant the exemption, with the conditions that exist today. This type of analysis will inform whether the application of oversight is consistent with the NTP.

V. The Railroads Seek Untenable Changes to the Board’s Consideration of the Impact of Truck Transportation.

A. The Railroads’ Conclusory Assertions of Truck Competition Should Be Rejected.

The Board should disregard the railroads’ unsupported and conclusory assertions of truck competition to rail service for the scrap metal. CSXT’s Senior Vice President of Sales, Arthur Adams, claimed there is “vigorous” truck competition for scrap metal movements, but the only support for this claim is a citation to CSXT’s Opening Comments from July 26, 2016.⁵⁵ ISRI has already shown the erroneous nature of CSXT’s July 2016 Opening Comments with detailed descriptions from actual scrap metal shippers regarding how its members’ businesses operate and

⁵³ AAR Opening at 53-54.

⁵⁴ See, e.g., ISRI Opening at 31-32.

⁵⁵ Verified Statement of Arthur Adams, page 3, attached to CSXT Opening Comments.

the narrow and bounded role played by truck transportation.⁵⁶ Indeed, even a cursory examination of Mr. Adams' assertions reveals their tenuous nature. He asserted that scrap metal shippers can benefit from "efficient roundtrip service" via trucks, delivering "scrap...feedstock to scrap processors and departing with finished steel products," but never described this alleged roundtrip service, who is purchasing the finished steel products, and whether this "roundtrip" is actually a three-sided triangle movement.

Mr. Adams also makes the discredited assertion that scrap metal is a "fungible commodity." ISRI has already explained the naïve and plainly incorrect nature of this assertion; in fact, ISRI regularly publishes a scrap specification circular listing over 100 different ferrous scrap metal grades.⁵⁷ The products to be manufactured by scrap metal purchasers will determine which grades can be utilized in any particular manufacturing process. Scrap metal dealers can only ship the grades ordered; they cannot simply ship any metal that they want.

{{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁵⁶ See Verified Statement of David J. Borsuk, para. 27-34, and Verified Statement of Greg Dixon, para. 18-21, both appended to ISRI Reply Comments (filed Aug. 26, 2016); ISRI Reply Comments to Memoranda at pages 4-10 (filed July 2, 2019). See also Ex Parte Meeting Summaries filed by ISRI in June 2019.

⁵⁷ ISRI Reply Comments at pages 18-20 (filed Aug. 26, 2016).

⁵⁸ BNSF Opening Comments at page 15 (filed Jan. 29, 2021).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

B. The Board Should Reject the Railroads' Assertions that Truck Transportation is Competitive with Rail for Long-Haul Traffic.

Length-of-haul has long been used by the ICC and the Board to assess the viability of truck transportation as an alternative to rail. The ICC "closely examined modal shares for all

⁵⁹ {{ [REDACTED] }}

⁶⁰ {{ [REDACTED] }}

weight and distance blocks” when deciding to create various exemptions,⁶¹ thus showing that length-of-haul has been a relevant factor in exemption cases. Therefore, the Board should deny railroad attempts to discredit this metric.⁶² The Board should also deny the railroads’ requests to increase the truck mileage threshold to 750 miles or 1,000 miles.⁶³ As already explained by ISRI in its Opening Comments, a blanket, one-size-fits-all mileage threshold is already problematic – even at 500 miles – because it treats all commodities the same and would increase litigation costs.⁶⁴ Increasing this blanket threshold would be unwise in the extreme. ISRI has described, at length, the many hurdles that attach to truck transportation in its particular industry, showing that the average length of truck hauls is often well below 500 miles. Factors include origin facility configuration, destination facility configuration, hours-of-service rules for truck drivers, rail service problems, time constraints, volume and size of shipped commodities, and fuel prices.⁶⁵ Evidence submitted by the ISRI includes Verified Statements from individual shippers describing the limitations in truck transportation and the fact that 500 miles is often too far for truck transportation to remain competitive with rail, especially for the substantial volumes of heavy commodities such as ferrous scrap.⁶⁶

⁶¹ Rail General Exemption Authority – Miscellaneous Manufactured Commodities, 6 ICC2d 186, 194 (1989).

⁶² See, e.g., UP Opening at 16.

⁶³ AAR Opening at 22 (n. 22).

⁶⁴ ISRI Opening at 25-26.

⁶⁵ See, e.g., ISRI Opening at 25-26. See also ISRI Reply Comments (filed Aug. 26, 2016) at Exhibit 1 (David J. Borsuk V.S. at pages 4 and 7-8) and Exhibit 2 (Greg Dixon V.S. at pages 4-5).

⁶⁶ See, e.g., ISRI Reply Comments (filed Aug. 26, 2016) at Exhibit 1 (David J. Borsuk V.S. at pages 4 and 7-8, explaining that many factors prevent truck transportation regardless of haul length) and Exhibit 2 (Greg Dixon V.S. at pages 4-5, explaining that the average truck haul is approximately 125 to 150 miles).

CSXT claims that “Commodity Flow Survey data shows that trucks have substantial market share for movements above 500 miles,” citing to Canadian National’s comments in Ex Parte No. 756.⁶⁷ However, the Commodity Flow Survey (“CFS”) data relied upon by Canadian National (“CN”) and CSXT is not probative regarding the degree of *competition* afforded by truck transportation to rail transportation. CFS data includes less-than-truckload (“LTL”) shipments, meaning that there are vast numbers of shipments (such as “electronic shopping and mail-order”⁶⁸) included that would never be shipped by rail due to the small volumes and nature of the cargo (*e.g.*, packaged, non-bulk) involved.⁶⁹ CFS data is also based on the theory that “[i]f a truck makes multiple deliveries on a route, the goods delivered at each stop are counted as one shipment.”⁷⁰ As the Board recently stated, “[r]ail shipments and LTL shipments...are generally not comparable.”⁷¹ Furthermore, the CFS does not use Standard Transportation Commodity Codes (“STCCs”), creating problems when trying to compare exempted commodities in 49 C.F.R. § 1039.11 to CFS data.⁷² Finally, the Board has found unexplained variances between the

⁶⁷ CSXT Opening at 4.

⁶⁸ See <https://www.bts.gov/cfs/faqs> (answer to question: “What types of establishments are included in the CFS?”).

⁶⁹ Market Dominance Streamlined Approach, STB Ex Parte No. 756, slip op. at 12 (served Aug. 3, 2020).

⁷⁰ See <https://www.bts.gov/cfs/faqs> (answer to question: “What type of information is collected in the CFS?”).

⁷¹ Market Dominance Streamlined Approach, STB Ex Parte No. 756, slip op. at 12 (served Aug. 3, 2020).

⁷² The CFS uses the North American Industry Classification System (“NAICS”). See <https://www.bts.gov/cfs/faqs> (answer to question: “What type of information is collected in the CFS?”).

CFS and the Waybill Sample, thus “rais[ing] questions about relying on CFS data here, at least for rail volumes and distances.”⁷³

C. The Mere Existence of Truck Transportation Does Not Mean There Is Adequate Competition to Rail Transportation.

Several railroad parties criticize the proposed new approach because it does not emphasize “actual marketplace data about the relative market share of trucks and railroads.”⁷⁴ These railroad parties urge the Board to use the various public data sources (such as CFS and the Freight Analysis Framework) and private data sources (Transearch) to assemble the allegedly necessary information on “market share.”⁷⁵ For example, BNSF quotes from the U.S. DOT’s Transportation Statistics Annual Report (2018), which stated that “trucks carry the largest share of goods shipped in the United States – and remain the primary mode for shipments moved less than 750 miles.”⁷⁶

The railroads overemphasize the importance of their evidence regarding trucks’ share of the freight market. Invocation of the Transportation Statistics Annual Report (2018) provides a telling example. This Annual Report, which is published by the Bureau of Transportation Statistics (“BTS”), includes all sorts of shipments that would never move by rail and, indeed, have no access to rail. The data used by the BTS is heavily skewed to short-distance shipments,

⁷³ Market Dominance Streamlined Approach, STB Ex Parte No. 756, slip op. at 12 (served Aug. 3, 2020).

⁷⁴ CSXT Opening Comments at 4 (filed Jan. 29, 2021). See also AAR Opening Comments at 13-15 (filed Jan. 29, 2021) and NS Opening Comments at 15-16 (filed Jan. 29, 2021).

⁷⁵ See, e.g., AAR Opening Comments at 15 (filed Jan. 29, 2021); NS Opening Comments at 16-17 (filed Jan. 29, 2021); and CSXT Opening Comments at 4 (filed Jan. 29, 2021).

⁷⁶ BNSF Opening Comments at page 11 (filed Jan. 29, 2021).

such as “package deliveries” in response to “online shopping.”⁷⁷ Thus, a “large percentage of goods movement occurs close to home.”⁷⁸ Obviously, these are shipments that do not have access to rail and would never use rail. As the BTS states, approximately one-half of the weight of shipments included by the BTS moved less than 100 miles.⁷⁹ The relevance of this data to an exemption revocation analysis evaporates upon inspection.

Similar limitations undermine the relevance of CFS and Freight Analysis Framework (“FAF”) data for a modal share evaluation. As ISRI described above, the CFS is not based on STCC designations, includes LTL shipments, and – like the BTS Annual Report – includes e-commerce and mail-order shipments that would never use rail for residential delivery. The FAF database relies upon data from the CFS⁸⁰ and, therefore, suffers from the same flaws. More broadly, the comprehensive nature of the CFS and FAF databases means that they include origins and destinations with no rail access whatsoever; a modal share comparison clearly loses potency if truck transportation must be used.

Finally, several railroad entities recommended that the Board use Transearch data to analyze whether truck transportation is competitive with rail.⁸¹ Transearch is a proprietary program that requires purchase; therefore, ISRI was unable to evaluate it. Nevertheless, publicly

⁷⁷ Transportation Statistics Annual Report, page 4-4, published by the Bureau of Transportation Statistics (2018), available at: <https://rosap.ntl.bts.gov/view/dot/37861>. See also Annual Report at page 4-1 (referring to the impact of “E-commerce sales” on freight transportation, “such as increasing truck and delivery vehicle traffic in urban and residential areas”).

⁷⁸ Transportation Statistics Annual Report, page 4-4, published by the Bureau of Transportation Statistics (2018), available at: <https://rosap.ntl.bts.gov/view/dot/37861>.

⁷⁹ Transportation Statistics Annual Report, page 4-4, published by the Bureau of Transportation Statistics (2018), available at: <https://rosap.ntl.bts.gov/view/dot/37861>.

⁸⁰ Description of the FAF’s reliance on CFS data sources can be found at: https://ops.fhwa.dot.gov/freight/freight_analysis/faf/.

⁸¹ See, e.g., AAR Opening Comments at 15 (filed Jan. 29, 2021);

available information indicates that Transearch is a future-focused database designed to help users “[p]repare for future transportation demand.”⁸² It is further described as a “planning tool [that] lets you predict US freight flows over 30 years by origin, destination, commodity and transportation mode.”⁸³ It is unclear if this future-focused database would be relevant to the Board’s purposes. Even if it could be used to evaluate past and present statistics, it may still suffer from the same flaws as CFS and FAF. Thus, when evaluating trucking versus rail in the context of a revocation proceeding, the Board should continue to evaluate changes in length of haul as one relevant factor which can be garnered directly from the Confidential Waybill Sample. This information should also be considered and weighed against specific market information and relevant factors used to select a particular transportation mode and provided by the industry representatives who actually purchase both transportation services.

Also, as ISRI has already explained, rail-dependent shippers may use trucks for a variety of reasons even when rail may be more cost-effective and efficient, due to unreliable railroad service, intentional “de-marketing” of particular lanes by a railroad, customer delivery needs, and destination facility restrictions.⁸⁴ Thus, simply reviewing modal share data is woefully insufficient in providing the Board with the information it needs to understand the true workings of the market for the subject commodity.

VI. Water Competition Should Only Be Considered by the Board Where There is Evidence of Actual and Substantial Use of the Waterways for the Subject Commodity.

The Board should not credit the excessive emphasis placed by several railroads on the role of water transportation as a viable competitor to rail service. For example, CSXT’s Senior

⁸² See, e.g., <https://ihsmarkit.com/products/transearch-freight-transportation-research.html>.

⁸³ See, e.g., <https://ihsmarkit.com/products/transearch-freight-transportation-research.html>.

⁸⁴ ISRI Opening at 25-26.

Vice President of Sales, Arthur Adams, alleged that “water carriers continue to provide Steel Scrap customers competitive options.”⁸⁵ Mr. Adams’ conclusory assertion of water transportation options for scrap metal shippers is unpersuasive. Few scrap metal dealers are located on a navigable waterway, and even for those so located, water transportation would only be viable in the unlikely scenario where the customer also is located on the same (or connected) waterway, where sufficient volume is ordered to justify barge usage, and where barges of the correct type are available.⁸⁶ For the “stars to align” in this fashion is unlikely in the scrap metal market. Even for those few scrap dealers who can use water, seasonal limitations during the winter months prevent water transportation from being a consistent competitive alternative.⁸⁷

The AAR asked the Board to “expand” its consideration of potential water competition to include water movements that use two “adjacent” waterways.⁸⁸ Although water movements across two adjacent waterways are possible and do occasionally occur, the Board should not consider them inevitable as a default. The key question is not whether waterborne freight transportation is generally possible for *any* commodity, the key question for a revocation analysis is whether waterborne freight transportation is a viable competitor to rail transportation of the *subject* commodity. As ISRI explained in its Opening Comments, water transportation has several prerequisites that dramatically reduce its viability as a widespread transportation option.⁸⁹

⁸⁵ Verified Statement of Arthur Adams, page 3, attached to CSXT Opening. See also Verified Statement of Michael Rutherford, page 4, attached to CSXT Opening Comments (July 26, 2016) for similarly conclusory statements (“On the shipper or processor side, those with water access also have competitive options to move material export or domestic”).

⁸⁶ ISRI Reply Comments at page 22 (filed Aug. 26, 2016).

⁸⁷ Borsuk V.S. at ¶ 38; Dixon V.S. at ¶ 23, attached to ISRI Reply Comments (filed Aug. 26, 2016).

⁸⁸ AAR Opening at 35-36.

⁸⁹ ISRI Opening at 23-25.

Most shippers are not located on navigable waterways, meaning that an intermediate movement (likely via truck) would be needed before water transportation would be possible. This added handling and transloading would inevitably involve inefficiencies and costs, and could potentially render the water option unworkable. Moreover, ships and barges are only feasible for large commodity volumes; it would be improper to assume the existence of water competition for a single rail car. Similarly, the simple existence of a waterway does not mean that a particular commodity can be handled there. There are many considerations that determine the feasibility of a water transportation option, including the location of the consignee, loading and unloading infrastructure, equipment availability, customer requirements, shipment volume, availability of ships and barges of the appropriate type, and plant configurations. For all these reasons, the Board should only consider water transportation in a revocation case in the event that a party objecting to the revocation proves the existence of substantial waterborne movement of the commodity that is the subject of the proceeding.

VII. ISRI and Railroads Agree That the Dashboard Indicator is Unworkable and Should Not Be Adopted.

In its Opening Comments, ISRI explained to the Board that the dashboard indicator metrics should not be adopted due to the complexity, cost, delay, and the formulaic one-size-fits-all structure inherent in the required analyses.⁹⁰ Railroad parties generally agree that the dashboard indicator is unworkable and should not be implemented. For example, the AAR stated that the proposed dashboard indicator “suffers from too many flaws to provide the Board with a useful tool for evaluating commodity exemptions.”⁹¹ NS’s expert witness asserted that the dashboard “falls short of a robust decision-making tool for regulators,” and, therefore, he

⁹⁰ ISRI Opening at 8-26.

⁹¹ AAR Opening at 61.

proposed significant changes to it.⁹² BNSF found fault with the dashboard's reliance on averages, and advocated that the Board use a "more focused evaluation of market conditions in particular circumstances."⁹³ UP's analysis was more blunt: "the current dashboard proposal is far more likely to mislead than enlighten."⁹⁴

The former Chief Economist of the Board, William Huneke, raised a slightly different concern. In a Verified Statement attached to Opening Comments of the American Short Line and Regional Railroad Association ("ASLRRA"), he highlighted various "curious" results derived from application of the dashboard indicator.⁹⁵

Instead of reliance on the dashboard indicator, the Board should evaluate each commodity individually by applying the statutorily-required RTP standard, considering the commodity's unique shipping characteristics and market conditions.⁹⁶ As ISRI mentioned in its Opening Comments, the Board can rely on evidence submitted by the parties regarding whether there are competitive alternatives for the subject commodity in any revocation proceeding.⁹⁷ The Board's former Chief Economist agrees that stakeholders "have a more current feel for the pulse of transportation markets."⁹⁸ Another major flaw in the Dashboard indicators is the comparison

⁹² Verified Statement of Mark A. Israel, page 3, attached to NS Opening Comments.

⁹³ BNSF Opening at 19.

⁹⁴ UP Opening at 1.

⁹⁵ See Verified Statement of William F. Huneke, page 10-11, attached to Opening Comments of the American Short Line and Regional Railroad Association.

⁹⁶ ISRI Opening at 3-4 and 27-30.

⁹⁷ ISRI Opening at 23, 26, and 29.

⁹⁸ See Verified Statement of William F. Huneke, page 12, attached to Opening Comments of the American Short Line and Regional Railroad Association.

of the subject commodity to all other commodities (both exempt and regulated).⁹⁹ Given the unique shipping characteristics and operating markets between commodities, the proposed approach has built in an apples-to-oranges comparison that undermines the validity of the Dashboard results. Indeed, one-half (4 of the 8 total) Dashboard indicators include comparisons to all traffic in the waybill reducing their relevancy. On this point, ISRI agrees with the critique included in the Opening Comments of the Portland Cement Association (“PCA”), which found the Board’s approach “not sound.” PCA summarized its apt analysis by stating that “[t]he transportation of a given commodity should not be any less deserving of regulatory scrutiny simply because shippers of other commodities also face high revenue demands from rail carriers.”¹⁰⁰

VIII. The Board Should Reject the AAR’s Desire to Revise the Initial Screens.

The AAR complains that the initial screens included in the proposed new approach are “too conservative,” leading the AAR to seek an increase in the R/VC screen from 5% of shipments moving at an R/VC ratio above 180 to 50% and a decrease in the intermodal share screen from 40% to 15%.¹⁰¹ These proposed changes are ludicrous on their face and should be interpreted for what they obviously are—a mechanism to bar or, at best, severely impede access to the Board’s procedures by shippers of exempt commodities. Initial screens, if utilized at all, should set a reasonably low threshold that would not operate to deny access to the Board’s revocation procedures in the first place. There is nothing in the revocation statute that would justify restricting access to the Board’s revocation procedures by requiring initial screens as

⁹⁹ Board decision, slip op. at 7 (n. 17) and Appendix A, slip op. at 19-20 (served Sept. 30, 2020). ISRI addressed this issue at page 24 of its Opening Comments.

¹⁰⁰ Portland Cement Association, Opening Comments at 9-11. The quoted language is found on page 11.

¹⁰¹ AAR Opening at 54 and 57-59.

proposed by the Board, and adopting AAR's proposed screen modifications would clearly be an arbitrary action that is contrary to law.

Moreover, although R/VC ratios are important, they are but one factor to consider among the many factors that should inform a revocation decision.¹⁰² In short, the Board should not create an R/VC screen that would exacerbate the unlevel playing field already faced by shippers of exempt commodities.

IX. Some Agreement Exists That the Proposed New Approach Would Result in Complex and Unwieldy Board Proceedings.

ISRI expressed serious concern in its Opening Comments that the proposed new approach, if implemented, would substantially increase the complexity of revocation proceedings, making them unwieldy and extremely expensive, thereby effectively deterring parties from seeking Board assistance with transportation problems.¹⁰³ At least one railroad party agrees with this assessment. The ASLRRRA stated that it is "adamantly" opposed to the proposed new approach.¹⁰⁴ In support of its opposition, ASLRRRA submitted a statement from William Huneke, former Chief Economist at the Board, who expressed significant doubt about the proposed new approach because it would "just add[] another regulatory layer, increasing the potential burden on stakeholders" without any meaningful benefit.¹⁰⁵ He expressed concern about the cost of implementation.¹⁰⁶ Moreover, the proposed new approach is "not simple"

¹⁰² ISRI Opening at 27-30.

¹⁰³ ISRI Opening at 8-15.

¹⁰⁴ ASLRRRA Opening at 5.

¹⁰⁵ Huneke V.S. at 6, attached to ASLRRRA Opening.

¹⁰⁶ Huneke V.S. at 1, attached to ASLRRRA Opening.

because, among other things, “statisticians and data tools” would be needed and the approach would likely increase in complexity over time as it “morph[s].”¹⁰⁷

ASLRRA’s members, like many of ISRI’s members, include small to mid-sized companies who do not have the resources to spend \$500,000 or more on Board adjudications.¹⁰⁸ The Board should be mindful of these concerns and should not require data analyses that are so complex that they will result in unwieldy Board proceedings where the costs far outweigh the potential benefits. That is precisely the case here when the Board itself has indicated that the proposed new approach does not even specifically address the RTP analysis required by the revocation standard.¹⁰⁹

X. The Board Should Revoke the Scrap Metal Exemption Based on the Existing Record.

The Board should reject the numerous requests by railroad parties to prolong this already-extended proceeding by revising the proposed new approach, implementing additional steps in the proposed new approach, including analysis of geographic and product competition, and otherwise providing for more rounds of comments.¹¹⁰ The Board should not “behave like Penelope, unravelling each day’s work to start the web again the next day.”¹¹¹ As ISRI has

¹⁰⁷ Huneke V.S. at 6, attached to ASLRRA Opening.

¹⁰⁸ ISRI Opening at 10-12. See also Exhibit 1 (statement of Henry J. Roman) to the ISRI Opening, estimating costs of using the proposed new approach.

¹⁰⁹ Board Decision at 6 (served Sept. 30, 2020).

¹¹⁰ See, e.g., NS Opening at 14 (asking the Board to revamp the proposed new approach using a “waterfall” concept); UP Opening at 8-9 (asking the Board to consider geographic and product competition); AAR Opening at 12 (asking the Board to explain the “reasoning underlying the methodology” so that interested parties can comment upon it); UP Opening at 10 (suggesting changes to the indicator dashboard); and AAR Opening at 23-31 asking the Board to create a step to evaluate geographic and product competition).

¹¹¹ Western Coal Traffic League v. ICC, 735 F.2d 1408, 1411 (D.C. Cir. 1984) (citation omitted).

explained, this proceeding has already been far too lengthy.¹¹² Extensive evidence supporting revocation of the existing exemption applicable to scrap metal products has already been submitted. The Board should expeditiously move to final decision, resuming regulatory oversight over the rail transportation of these important commodities, and restoring the ability of shippers of these commodities to promptly seek Board assistance with rail transportation issues. The need for revocation as to scrap metal has already been shown by the Board itself, using quantitative evidence,¹¹³ and ISRI supported this Board showing by both updating the quantitative evidence and submitting extensive qualitative evidence¹¹⁴ regarding railroad market power over scrap metal. ISRI's members engaged extensively in ex parte meetings with the Board members in 2019 further explaining their dependence on rail transportation, their challenges with the railroads, and their need for Board oversight.

XI. Conclusion.

ISRI appreciates the efforts by the Board's staff in developing the proposed new approach for evaluating market conditions but, as nearly all parties agree, the approach should not be adopted. The Board should also reject the efforts by the railroads to reinvent the evidentiary standards for revocation proceedings and to make the proposed new approach even more onerous, in order to create overly complex, time-consuming and costly Board proceedings for exemption revocations. Based on the existing and overwhelming evidence submitted in this

¹¹² ISRI Opening at 2-3 and 30-31.

¹¹³ Notice of Proposed Rulemaking, slip op. at 6-9 (served March 23, 2016). See also ISRI Comments (filed July 26, 2016) at page 6 (citing to quantitative evidence submitted by the Rail Customer Coalition).

¹¹⁴ See, e.g., ISRI Reply Comments (filed Aug. 26, 2016) at pages 18-22 (citing attached verified statements from shippers).

rulemaking since 2016 supporting revocation of the scrap metal exemption, the Board should move forward expeditiously to revoke this exemption and restore Board oversight.

Respectfully submitted,

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