

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
March 8, 2021
Part of
Public Record

SANIMAX USA LLC,

v.

UNION PACIFIC RAILROAD
COMPANY

STB Docket No. NOR 42171

UNION PACIFIC RAILROAD COMPANY'S
REPLY TO SANIMAX USA LLC'S REQUEST FOR REVOCATION

Craig V. Richardson
James B. Boles
Jeremy M. Berman
UNION PACIFIC RAILROAD CO.
1400 Douglas Street
Omaha, NE 68179

Raymond A. Atkins
Matthew J. Warren
Morgan B. Lindsay
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

Counsel for Union Pacific Railroad Company

March 8, 2021

Union Pacific Railroad Company (“Union Pacific”) submits this Reply to Sanimax USA LLC’s (“Sanimax”) request for revocation, which was asserted for the first time in the reply Sanimax filed to Union Pacific’s Motion to Dismiss.¹ While it would have been better procedural order for Sanimax to file a petition for revocation in a separate pleading (and in the appropriate exemption dockets), the Board has the authority to consider its request regardless of formalities.² Sanimax is right about that. But the Board does not have the authority to ignore the statute, which demands that a party seeking revocation prove that re-regulation is necessary to carry out the Rail Transportation Policy of 49 U.S.C. § 10101 (“RTP”) and thus show that the railroad possesses market power over the movements at issue.

Sanimax does not even try to meet this burden of proof. It presents no witnesses, no specific evidence of market power, and no explanation of why re-regulation is necessary to carry out the RTP. Indeed, it presents no evidence at all except an incomplete email string regarding a service issue that Union Pacific was unable to remedy as quickly as Sanimax wished.³

¹ Sanimax Reply & Revocation Request, NOR 42171 (filed Feb. 16, 2021) (“Revocation Request”), at 1. No leave to file a reply to reply is required for Union Pacific to respond to an entirely new revocation request that was raised for the first time in Sanimax’s reply. See 49 C.F.R. § 1104.13(a) (permitting a reply “to any pleading within 20 days after the pleading is filed with the Board”); see, e.g., *Granite State Concrete Co. v. Boston & Maine Corp.*, Docket No. 42083 (STB served Sept. 15, 2003) (“*Granite State*”), at 4 (permitting a “Reply to Request to Revoke” in response to complainants’ Reply to Motion to Dismiss in which complainants requested an exemption revocation). Even if 49 C.F.R. § 1104.13(c) applied, good cause is plainly present to allow Union Pacific to respond to an exemption revocation request that Sanimax made for the first time in its reply.

² See, e.g., *Granite State*, Docket No. 42083 (STB served Sept. 15, 2003), at 7 (“The Board retains the flexibility to evaluate exemption revocation requests that are made in the course of ongoing regulatory proceedings when appropriate.”).

³ As demonstrated below, a complete record of the parties’ communications shows that Union Pacific worked assiduously, despite extreme weather and crew shortages, to remedy this service failure (in which a Union Pacific crew mistakenly picked up the wrong car), and that Union Pacific accurately served Sanimax’s

In lieu of presenting evidence, Sanimax asks for the benefit of the doubt—claiming that the Board should revoke the applicable exemptions because allegations in the complaint must be taken in the light most favorable to Sanimax. But the Board has never held that a party can meet its burden of proving the necessity for a revocation simply by filing a complaint with no supporting evidence (particularly a complaint that says not a word about exemption revocation, market power, or the necessity for re-regulation to carry out the RTP). The statutory requirements for revoking an exemption are not optional, and a party seeking revocation has an obligation to present evidence that justifies that outcome.

Here, relevant evidence shows that Union Pacific does not have market power over Sanimax's traffic. The exemptions for these commodities were created because the ICC found extensive competition for transportation of these commodities. Public modal share data shows that nothing has changed—these commodities are overwhelmingly transported via truck. Nor does Sanimax put forward evidence to show that its individual competitive circumstances are different—indeed, its own complaint states that it receives all inbound product by truck and that it ships outbound product via truck when it is dissatisfied with Union Pacific's rail service.

Moreover, Sanimax has failed to provide any evidence showing that regulation is necessary to carry out the RTP. While this finding is central to the revocation standard in 49 U.S.C. § 10502(d), Sanimax does not explain how re-regulation would serve the RTP or provide any evidence that could bear on that question. Nor can any inferences be drawn from the scrap of evidence Sanimax does include: its email exhibit complaining about an incorrect car pickup on

facility and returned the car later on the day of the email Sanimax appends to its Revocation Request.

February 5th that Union Pacific was unable to remedy for several days due to holiday-related crew shortages and unusually bitter winter weather conditions. Board regulation cannot prevent occasional service mistakes, nor can it prevent temporary crew shortages or extreme weather events. Sanimax points to no provision of the RTP that re-regulation is “necessary” to accomplish, because there is none.

The intensely competitive transportation market for Sanimax’s products is more than sufficient to discipline rates and service. That does not mean Sanimax will always get what it wants, and it does not mean that service will always be flawless. But it does mean that the transportation that Union Pacific provides for Sanimax sits squarely within the category of inherently competitive traffic that Congress expected the agency to exempt, and that the ICC did in fact exempt. Sanimax has advanced no facts to the contrary that could support revocation.

Section I sets forth the two-pronged legal standard for revocation, which requires both proof of market power and proof that re-regulation is necessary to carry out the RTP. Sections II and III address those two elements in turn.

Union Pacific’s Reply is supported by two verified statements. One is from Chris Kankousky, General Director, Marketing & Sales for Union Pacific, who testifies about the current competitive market for the commodities that Sanimax ships. The other is from Emma Sethe, Manager I – Marketing & Sales, who testifies about Union Pacific’s customer service efforts to meet Sanimax’s needs and to respond to service failures when they occur.

I. SANIMAX BEARS THE BURDEN OF SHOWING THE NECESSITY OF A PARTIAL REVOCATION.

The proponent of an agency action bears the burden of proof.⁴ Here, Sanimax is seeking partial revocation, and thus has the burden of proving that revocation is appropriate under § 10502(d).⁵ That requires proof of two elements. First, Sanimax must prove that Union Pacific has market power over the movements in question. The Board has consistently recognized that “the extent of railroad market power is an essential issue in exemption revocation proceedings.”⁶ Federal courts agree that “the initial inquiry in a reregulation case is whether the carrier has market power.”⁷ And the Board (and the ICC before it) has denied requests for revocation when the petitioner failed to offer specific evidence showing market power, or when the evidence proffered failed to prove market dominance.⁸

⁴ 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”); see *Rail General Exemption Authority—Miscellaneous Manufactured Commodities*, EP 346 (Sub-No. 24), 1991 WL 94784, at *2 (May 8, 1991) (“The party seeking revocation has the burden of proof...”).

⁵ *Pejepscot Industrial Park, Inc., d/b/a Grimm Industries—Petition for Declaratory Order*, FD 33989 (STB served May 15, 2003) (“*Pejepscot*”), at 7, n.15 (“To obtain revocations, [the petitioner] would need to demonstrate that regulation of *each* commodity is necessary to carry out the rail transportation policy of 49 U.S.C. 10101.” (emphasis added)).

⁶ *WTL Rail Corp. Pet. for Declaratory Order & Interim Relief*, STB Docket Nos. NOR 42092 et al., slip op. at 3 (STB served Feb. 17, 2006) (“[W]e have held that the extent of railroad market power is an essential issue in exemption revocation proceedings.”). see also *Pejepscot Industrial Park, Inc., d/b/a Grimm Industries—Petition for Declaratory Order*, FD 33989 (STB served May 15, 2003), at 7, n.15.

⁷ *Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 123 (2d Cir. 1993).

⁸ See, e.g., *Rail General Exemption Authority—Miscellaneous Manufactured Commodities*, EP 346 (Sub-No. 24), 1991 WL 94784, at *2 (May 8, 1991); *FMC Wyoming Corp. v. Union Pacific R.R. Co.*, Docket No. 42022, at 13 n.17 (STB served May 12, 2000).

Second, Sanimax must prove that re-regulation is necessary to carry out the RTP.⁹ As the ICC explained, “the [agency] may revoke an exemption only when it finds regulation is necessary to carry out the NRTP. A petition to revoke must demonstrate conduct that frustrates the NRTP, and it must show that [agency] regulation can and will be effective in carrying out the NRTP.”¹⁰

Sanimax did not provide evidence of either element. Instead of offering evidence, Sanimax argues that its revocation request should be viewed “in the light favorable to Sanimax,” and thus that all facts must be construed in its favor when deciding its revocation request.¹¹ That argument has no basis in the statute. While the Board may view the factual assertions in Sanimax’s *complaint* in the light most favorable to Sanimax when considering Union Pacific’s motion to dismiss, the Board cannot view Sanimax’s *revocation request* in such a light. Union Pacific did not move to dismiss the complaint on the basis that the facts in the complaint would have failed to state a claim as to a regulated commodity. In such a motion, Sanimax’s factual allegations indeed would have been assumed to be true. Rather, Union Pacific moved to dismiss on the ground that Sanimax’s complaint exclusively concerns transportation that has been exempted from Board regulation and that will remain exempt unless and until the Board finds that revocation is appropriate under § 10502(d).

Put differently, Sanimax is not merely asking for a chance to prove that certain relief should be granted. It is asking for the Board to grant it immediate

⁹ See 49 U.S.C. § 10502(d).

¹⁰ *Rail General Exemption Authority – Miscellaneous Agricultural Commodities – Petition of G. & T. Terminal Packaging Co., Inc., et al., To Revoke Conrail Exemption*, 8 I.C.C.2d 674, 676–77 (1992).

¹¹ Revocation Request at 6.

relief by revoking existing exemptions. That relief cannot be granted without evidence that it is appropriate and consistent with the statute.

Sanimax's assertion that the Board should "adopt the *Granite State* approach" does not help its cause.¹² In *Granite State*, the proponent of revocation produced specific evidence showing that its particular competitive situation was uniquely not subject to the competitive forces that otherwise still characterized the market for the exempt commodity. Specifically, Granite State produced uncontradicted evidence, supported by a verified statement, that it "lack[ed] the competitive service options that were the basis for the original class exemption because its excavation permit requires that stone move by railroad, not by truck."¹³ On that factual record, the Board concluded that the general conclusions of the exemption proceeding about pervasive truck competition did not apply to Granite State because of its permit requirements, and therefore revocation was appropriate.

Here, Sanimax has produced no evidence that it faces a different competitive landscape than other shippers of the exempt commodities it ships. On the contrary, Sanimax's own complaint alleges that it exclusively uses trucks for inbound shipments, and that it uses trucks for outbound service when it is dissatisfied with rail service.¹⁴ "[A]pply[ing] the *Granite State* approach" thus requires denial of the Revocation Request.

¹² *Id.* at 4.

¹³ *Granite State*, Docket No. 42083 (STB served Sept. 15, 2003), at 7.

¹⁴ Sanimax Complaint, Verified Statement of Greg Rawe ¶ 23 ("When Union Pacific fails to provide adequate service, Sanimax must find commercial trucks that are available and capable of shipping the outbound final products."); *id.*, Verified Statement of Todd Strickler ¶ 2 (noting that Sanimax moves raw materials and finished products "by all modes of transportation, truck, rail, and ocean"); *id.* ¶ 21 ("The service disruptions ... have forced Sanimax to ship finished products by truck."); *id.*, Attachment No. 4 ("Due to miss/incomplete last week, we loaded 11 truck tankers with fat/UCO vs. 3 railcars").

II. SANIMAX HAS NOT PROVEN THAT UNION PACIFIC HAS MARKET POWER.

Sanimax acknowledges that it must demonstrate that Union Pacific has market power in order to revoke the applicable exemptions, but it falls far short of its burden to do so.¹⁵ Sanimax provides no evidence that the conclusions about competition made in the applicable exemption decisions are now incorrect or that those conclusions do not apply to Sanimax. Indeed, public data shows that railroads continue to face robust modal competition in the market for these commodities. Moreover, Union Pacific's market experience with the commodities at issue is consistent with continuing and intense competition. And Sanimax's own evidence shows that it is fully capable of utilizing truck alternatives when it chooses.

The exemptions that Sanimax now seeks to revoke did not appear by happenstance. They were created because the ICC found that extensive competition precluded rail market power, and that commodity exemptions were consistent with Congress's instruction that the Board shall issue exemptions "to the maximum extent consistent with this part."¹⁶ The exemptions for animal refuse and tankage were adopted as a result of evidence that "the market is extremely competitive" for these products, that the market was dominated by trucks, and that

¹⁵ While the Board recently questioned whether the market power analysis was an essential statutory requirement or merely "an important issue" to consider in the revocation analysis, it has consistently taken market power into account when considering requests to revoke commodity exemptions. *Exemption of Demurrage Regulation from Certain Class Exemptions*, STB Ex Parte 760, at 6 (Feb. 28, 2010); see *id.* at 7–9 (finding that potential for market power abuse justified partial revocation of agricultural commodities exemption as applied to demurrage). Here, Sanimax does not dispute that it is required to demonstrate market power.

¹⁶ 49 U.S.C. § 10502(a).

it featured “intense product competition.”¹⁷ The exemption for grease and inedible tallow was adopted because the ICC found that “[t]he railroads face pervasive competition in the transportation of these commodities.”¹⁸ It went on to conclude that “intermodal, intramodal, geographic and product competition, taken together, appear to create an environment in which it would be extremely difficult for a railroad to exercise any significant market power.”¹⁹

Sanimax has produced no evidence from which the Board could conclude that the competitive landscape has changed. Indeed, publicly available data from the Federal Highway Administration’s Freight Analysis Framework database (“FAF”) shows that trucks dominate transportation in these markets. The FAF is derived from Commodity Flow Survey data collected as part of the Economic Census. It is updated every five years, and the most recently available data is from 2017. FAF data is organized by Standard Classification of Transported Goods (“SCTG”) codes. It is reported at a two-digit SCTG level, which roughly corresponds to the detail at 2-digit STCC.

Sanimax’s commodities fall within SCTG codes 04 and 07.²⁰ As Tables 1 and 2 below show, trucks have a market share of over 90% of the transportation of these commodities. Multimodal transportation has approximately 5%, and only a tiny

¹⁷ *Exemption from Regulation—Poultry, Meat, and Dairy Products*, 1 I.C.C.2d 173, 180 (1984)

¹⁸ *Rail General Exemption Authority—Exemption of Grease or Inedible Tallow*, Ex Parte 346 (Sub-No. 31), 1994 WL 687462, at *4 (I.C.C. served Dec. 9, 1994).

¹⁹ *Id.* at *5.

²⁰ Specifically, SCTG codes 04199 (“Other products of animal origin, and residues and waste from the food industries used in animal feeding”) and 07410 (“Animal fats and oils and their fractions”). See U.S. Departments of Transportation and Commerce, 2017 Commodity Flow Survey Standard Classification of Transported Goods, available at <https://www.bts.gov/sites/bts.dot.gov/files/docs/browse-statistical-products-and-data/surveys/commodity-flow-survey/210866/2017-cfs-commodity-code-sctg-manual.pdf>.

fraction moves by all-rail: less than 3% for SCTG 04 and less than 4% for SCTG 07.

This is plainly not consistent with railroad market power.

Table 1
SCTG 04 – Animal Feed, Eggs, Honey, and Other Products of Animal Origin²¹

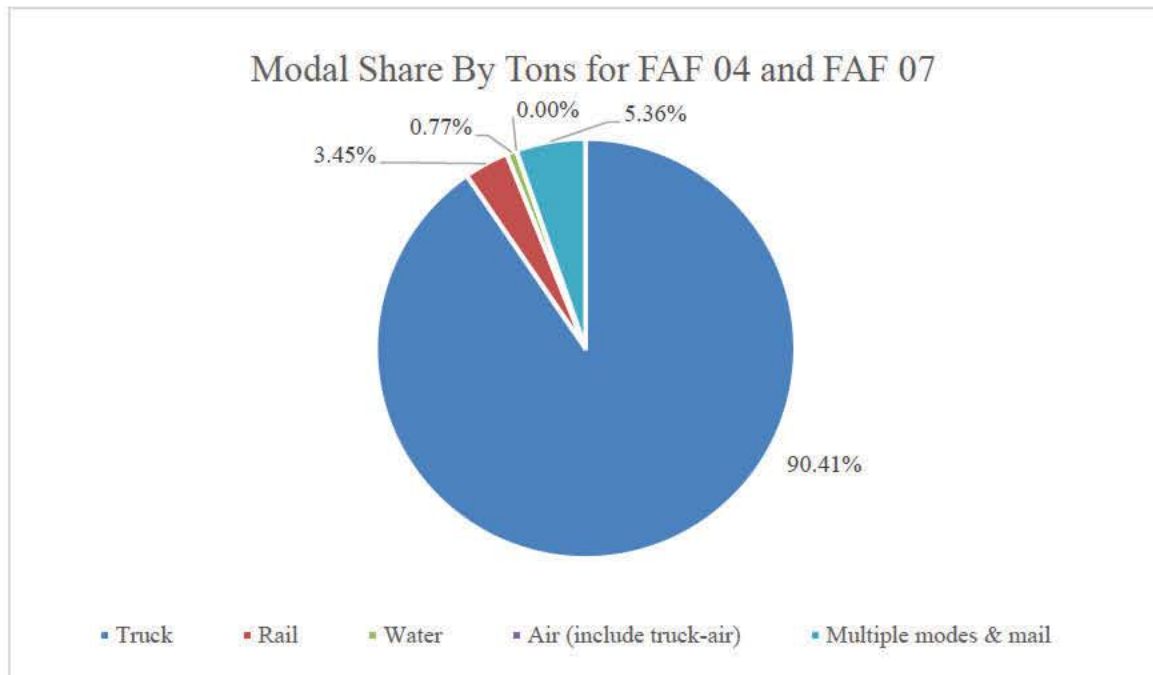
Mode	thousand tons in 2017	Percentage of total
Truck	366,200	90.96%
Rail	11,477	2.85%
Water	4,344	1.08%
Air (include truck-air)	0	0.0%
Multiple modes & mail	20,575	5.11%
Total	402,596	100%

Table 2
SCTG 07 – Other Prepared Foodstuffs, Fats, and Oils

Mode	thousand tons in 2017	Percentage of total
Truck	566,056	90.06%
Rail	24,130	3.84%
Water	3,581	0.57%
Air (include truck-air)	32	0.01%
Multiple modes & mail	34,706	5.52%
Total	628,505	100%

And because a picture is worth a thousand words, Figure 1 below combines the FAF results for SCTG 04 and SCTG 07 into a pie chart:

²¹ Data calculated from the public FAF database are available at faf.ornl.gov/faf5/dtt_domestic.aspx. Screenshots of selections and results are attached as Exhibit 4.

Figure 1

To be sure, FAF data aggregates the specific commodities that Sanimax ships with other related commodities, and thus it cannot provide a precise breakdown of modal market share for commodities like animal refuse, tankage, grease, and tallow. But Sanimax has not provided any evidence from which the Board could conclude that Sanimax's commodities are uniquely dependent on rail transportation.

Indeed, as the Verified Statement of Chris Kankousky shows, Sanimax's commodities are subject to multiple forms of robust competition. There are many sources of consumption for Sanimax's end products, including over 100 biodiesel plants that dot the country, and over twenty such plants within short trucking distances from South St. Paul.²² This diverse group of potential customers creates robust geographic competition. In addition, trucks are a ready substitute for rail

²² Verified Statement of Chris Kankousky ¶¶ 3–4; see Exhibit 3.

service for these commodities²³; indeed, Sanimax relies exclusively on trucks for all inbound shipments. Union Pacific also ships these commodities from truck-rail transload facilities, which is an indication that transloading from trucks to railcars is a realistic competitive option for Sanimax as well.²⁴ In short, all the competitive factors that caused the ICC to create these exemptions remain in existence today.

Unlike the complainant in *Granite State*, which proved that a revocation was necessary due to its permit restrictions (which required it to ship exclusively by rail),²⁵ Sanimax has failed to produce any specific (or verified) facts about its facility or situation that would suggest an island of market power in an otherwise competitive market. Its assertion that it has “no alternative” merely because Union Pacific is the only railroad that *directly* serves Sanimax’s South St. Paul facility does not justify a revocation.²⁶ The agency did not limit its exemptions to only those shippers served by more than one railroad. Rather, exemptions were created because the agency found intermodal, geographic, and product competition—*i.e.*, market forces that give customers directly served by only one railroad a myriad of alternative competitive options.²⁷

Similarly, Sanimax’s assertion that its use of trucks is only a “stop-gap” and thus does not constitute effective competition is just that—an assertion supported by no actual evidence. Sanimax tries to fill the evidentiary gap with three broad and unverified assertions, but none of these are sufficient to carry its burden.

²³ *Id.* ¶ 5.

²⁴ *Id.* ¶¶ 6–7.

²⁵ *Granite State*, Docket No. 42083 (STB served Sept. 15, 2003), at 7–8.

²⁶ Revocation Request at 5.

²⁷ See, e.g., *Rail General Exemption Authority—Exemption of Grease or Inedible Tallow, etc.*, EP 346 (Sub-No. 31), 1994 WL 687462, at *5 (ICC served Dec. 9, 1994) (considering, *inter alia*, “intermodal, intramodal, geographic and production competition” as well as “market share” data when determining market power).

First, Sanimax alleges that it “has invested significant capital and resources for its South St. Plant to use rail service.”²⁸ Sanimax does not say how much capital was invested or identify any rail-specific loading equipment it invested in that could not be used to load trucks. In any event, this unsupported allegation that Sanimax is somehow forced to use rail service because of its own investment choices is at odds with Sanimax’s representations in its complaint about its ability to use trucks.²⁹ Exhibit 4 to its complaint indicates that Sanimax has a “loading lane” that trucks can use and sufficient equipment to load 11 trucks during a week in 2020.

Second, Sanimax cites “structural limitations on truck transportation at the South St. Paul yard.”³⁰ But it does not explain what those might be. As noted above, all of Sanimax’s inbound deliveries arrive by truck, and its own complaint states that it shipped 11 outbound trucks in a single week. And Sanimax does not dispute that its volumes amount to an average of [REDACTED]

Third, Sanimax cites “the rigid time constraints imposed by the decay of inbound organic materials,” which it asserts “make Sanimax captive to rail service.”³² But Sanimax does not explain why rail shipments are necessary to meet any time constraints. The Board knows from its experience that speed is one typical natural advantage that trucks have over rail service.

²⁸ Revocation Request at 5.

²⁹ *See supra* note 14.

³⁰ Revocation Request at 5.

³¹ Motion to Dismiss at 1.

³² Revocation Request at 5.

In short, even if bare allegations were sufficient to prove market power (which they are not), Sanimax’s allegations do not come close to demonstrating that Union Pacific has any meaningful market power.

III. SANIMAX HAS NOT PROVEN THAT RE-REGULATION IS NECESSARY TO CARRY OUT THE RTP.

Even if Union Pacific had the requisite market power, Sanimax falls far short of § 10502(d)’s requirement to prove that re-regulation is necessary to carry out the RTP.

Sanimax cites only one RTP provision: § 10101(2)’s policy “to require fair and expeditious regulatory decisions when regulation is required.”³³ But Sanimax only does so for the purpose of asking the Board to consider its revocation request without a separate proceeding.³⁴ It does not argue that re-regulation is somehow necessary to carry out the purpose of § 10101(2). Nor could it—the beginning clause of § 10101(2) states Congress’s policy “to minimize the need for Federal regulatory control over the rail transportation system.”³⁵ Sanimax’s revocation request would accomplish the precise opposite of that policy.

While Sanimax does not address the core statutory question of whether re-regulation is necessary to carry out the RTP, it seems to argue that the Board should revoke exemptions as to Sanimax because of alleged Union Pacific service problems, including “missed service this very month.”³⁶ But Union Pacific has regularly responded to Sanimax’s occasional requests for service corrections, typically addressing the issue by the next day.

³³ *Id.* at 4.

³⁴ *Id.* (quoting 49 U.S.C. § 10101(a)(2)).

³⁵ 49 U.S.C. § 10101(a)(2).

³⁶ Revocation Request at 6.

The partial email string that Sanimax attaches to its Revocation Request reflects an unusual exception, where extreme weather conditions and lack of available crew members meant that Union Pacific was unable to remedy a service error as quickly as it wished. In particular, on Thursday, February 4, 2021, the Union Pacific crew inadvertently pulled a partially loaded car rather than the loaded car that should have been pulled. Union Pacific was not able to remedy that mistake until Tuesday, February 9th, in part due to crew shortages over the unofficial holiday weekend of Super Bowl Sunday, and in part because of unusually frigid weather conditions driven by the polar vortex.³⁷ Sanimax objected that weather was no excuse, but ignored the extraordinary nature of this weather event, which is attested to by local Minnesota weather reporters.³⁸ As Union Pacific explained to Sanimax (in an email that Sanimax chose not to include in its exhibit string), “the team will do whatever is physically possible but sub-zero temperatures have real physical effects on equipment and infrastructure. We also have an obligation to keep our employees safe in these dangerous situations.”³⁹ Despite the challenging conditions, Union Pacific did serve Sanimax on February 9th, returning the mistakenly taken car.

Far from proving that re-regulation is required, this example shows that Union Pacific responded conscientiously to provide corrected service to Sanimax in

³⁷ See Supplemental Verified Statement of Emma Sethe ¶¶ 8–9.

³⁸ *E.g.*, *Character-Building Cold: Temps Stay Subzero Sunday*, Minnesota Star-Tribune (Feb. 6, 2021), available at <https://www.startribune.com/character-building-cold-temps-stay-subzero-sunday/600019971/>; *Polar vortex blows in: Winter’s coldest sustained air mass ahead*, MPR News (Feb. 4, 2021), available at <https://www.mprnews.org/story/2021/02/04/polar-vortex-blows-in-winters-coldest-sustained-air-mass-ahead>; *The Arctic Freezer Arrives in Time for the Weekend*, Minnesota Star-Tribune (Feb. 4, 2021), available at <https://www.startribune.com/the-arctic-freezer-arrives-in-time-for-the-weekend/600019140/>.

³⁹ See Ex. 2.

spite of difficult conditions. Occasional service complaints are not evidence of market failure—they happen in competitive markets all the time.⁴⁰ Nor does a plan for thrice-weekly service to a plant that averages only [REDACTED] outbound cars per week suggest a need for re-regulation (particularly when Union Pacific offers additional switches when needed). While it is apparent that Sanimax wants the Board to reimpose regulation, that is not sufficient. Courts have warned that participants in competitive markets may prefer to try their luck before regulators, with the belief that “regulators’ hands [could] be friendlier than invisible ones.”⁴¹

In short, nothing in Sanimax’s Revocation Request demonstrates that Union Pacific possesses market power or that a partial revocation is necessary to carry out the RTP. This fundamental failure of proof requires rejection of the Revocation Request.

⁴⁰ For example, one would not assume that a company is not operating in a competitive market and in need of government regulation simply because of negative customer service reviews. *See* Sanimax Google Reviews (visited Mar. 7, 2021), available at <https://tinyurl.com/56djshvc> (“they almost NEVER show on time” (emphasis in original)). Undoubtedly, Sanimax strives to provide its customers with perfect service and sometimes falls short, as does Union Pacific. Like Sanimax, Union Pacific remains committed to its customers and learning from its mistakes.

⁴¹ *Ass’n of Am. R.Rs. v. STB*, 306 F.3d 1108, 1111 (D.C. Cir. 2002).

IV. CONCLUSION

For the reasons stated above, the Board should deny Sanimax's request to revoke the exemptions that apply to its traffic.

Respectfully submitted,

/s/ Raymond Atkins

Raymond A. Atkins

Matthew J. Warren

Morgan B. Lindsay

SIDLEY AUSTIN LLP

1501 K Street, N.W.

Washington, D.C. 20005

(202) 736-8000

Craig V. Richardson
James B. Boles
Jeremy M. Berman
UNION PACIFIC RAILROAD COMPANY
1400 Douglas Street
Omaha, NE 68179

Counsel for Union Pacific Railroad Company

March 8, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March 2021, I served a copy of Union Pacific Railroad Company's Reply to Sanimax USA LLC's Request for Revocation by first class mail and email.

Richard F. Riley, Jr.
David T. Ralston, Jr.
R. Nicholas Englund
Foley & Lardner LLP
Washington Harbour
3000 K Street, N.W., Suite 600
Washington, D .C. 20007-5109

/s/ Morgan B. Lindsay
Morgan B. Lindsay

**VERIFIED STATEMENT
OF
EMMA SETHE**

My name is Emma Sethe. I am a Manager I – Marketing & Sales for Union Pacific Railroad Company. In this role, I have primary responsibility for marketing & sales interactions with Sanimax USA LLC (“Sanimax”). I am submitting this supplemental statement in support of Union Pacific’s response to Sanimax’s request for revocations in this proceeding. In particular, I will address the February 2021 service issue referenced by Sanimax in their revocation request, as well as Union Pacific’s general efforts to serve Sanimax.

1. Since August 18th, 2020, Union Pacific has served Sanimax based on a Sunday-Tuesday-Thursday service schedule. Sanimax may request special switches on non-service days if additional service is needed. Sanimax has made a total of three such requests through Union Pacific’s case system, all in February 2021. Sanimax also occasionally contacted Union Pacific to ask for a recovery switch to address a service issue.
2. Union Pacific works to respond to service recovery requests promptly, but its response time is affected by network conditions and available resources. In recent months, Union Pacific has typically provided recovery service the day after the service issue occurs.
3. For example, on Friday, February 12, Sanimax asked for a recovery switch to spot empties that were not spotted on its scheduled service day, February 11.

Union Pacific provided the recovery service the following day, Saturday, February 13, which was not a regular service day.

4. While Union Pacific works diligently to serve all of its customers at the highest level of service, external forces can interfere with service and prevent Union Pacific from meeting its service goals. Some of those external forces include network externalities, extreme weather, and unexpected crew shortages. Given these realities, service schedules will be disrupted at times. Typically, customers have back-up plans to ensure their operations remain resilient despite these external forces.
5. Union Pacific monitors its customer service performance in part by tracking internal metrics, such as performance to plan. Performing to plan means that service was provided on the scheduled date within the scheduled window. Over the last 90 days, Union Pacific's overall service to Sanimax shows that Union Pacific provided service to plan over 87% of the time.
6. The particular service issue that Sanimax cites in the Exhibit to its Revocation Request arose on Thursday, February 4th, 2021, which was a regular switch day for Sanimax. The Union Pacific crew served Sanimax as usual, but mistakenly left a loaded car and took a partially loaded car instead.
7. On Friday, February 5th, Sanimax emailed Union Pacific about the case issue and requested a special switch for that day. Union Pacific advised Sanimax that no crews were currently available, but Union Pacific was reaching out to try to

find a crew with capacity. Union Pacific was not able to locate any on-duty crews with capacity to provide the switch that day.

8. Over the weekend (February 6th and 7th), the area experienced sub-zero weather conditions that limited the network. In addition, Super Bowl Sunday on February 7th resulted in crew shortages, as is typical for holidays (and unofficial holidays like the Super Bowl). As a result, Union Pacific did not have the crew capacity to serve Sanimax over the weekend and missed Sanimax's regularly scheduled service day on Sunday. Due to continued extreme weather conditions, no crews were available to provide a recovery switch on Monday, either.
9. In response to Sanimax's understandable frustration, Union Pacific assured Sanimax that under normal circumstances, recovery switch requests should be able to be fulfilled, as "crew base was strong." Ex. 1 at 1. In addition, Union Pacific explained that the service issues were due to being "short on crews due to the -10 weather as well as crew lay offs [*i.e.*, crew members not showing up for work] due to the super bowl. We tend to experience this during holidays as well." *Id.* Union Pacific asked for Sanimax's feedback on its preferred switch time and assured Sanimax that "the team is going to work with the conductors on the accuracy of notifications." *Id.*
10. The problem was remedied on Tuesday, February 9th. That morning, Sanimax asked for assurance that Union Pacific would provide service that day. Union Pacific responded that "[o]ur field team provided ... a commitment yesterday that they would do everything possible to ensure service is provided today." Ex.

2 at 3. However, because the area was still experiencing extreme weather conditions, Union Pacific explained to Sanimax that it was still “dealing with extreme weather temperatures ... and the operation is not moving as efficiently as normal.” *Id.* at 2. When Sanimax responded that they would [REDACTED]

[REDACTED] Union Pacific explained that its “team w[ould] do whatever is physically possible but sub-zero temperatures have real physical effects on equipment and infrastructure. We also have an obligation to keep our employees safe in these dangerous situations.” *Id.* at 1–2.

11. On the evening of Tuesday, February 9th, Union Pacific accurately provided regularly scheduled service and the recovery switch. Sanimax subsequently confirmed that service had been performed accurately.

12. During this six-day period, Union Pacific remained attentive and responsive to Sanimax. It is unfortunate that the extreme weather conditions and crew shortages prevented Union Pacific from providing a faster recovery. However, Union Pacific worked diligently to remedy the issue as quickly as possible given the extreme weather conditions and crew shortages.

VERIFICATION

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

Executed on March 8, 2021.

Emma Sethe

Emma Sethe

**VERIFIED STATEMENT
OF
CHRIS KANKOUSKY**

My name is Chris Kankousky. I am a General Director for Union Pacific Railroad Company. In this role, I have Marketing and Sales responsibility for our Grain Products line, which includes the commodities listed below.

1. I am familiar with the markets for the commodities shipped by Sanimax USA LLC ("Sanimax"), specifically animal refuse (STCC 2014491), tankage (STCC 2014490); grease or inedible tallow (STCC 2014350); lard (STCC 2013190); and animal grease (STCC 2013945). The transportation market for these commodities is highly competitive, due to substantial intermodal and geographic competition.
2. In 2020, Union Pacific handled over 5,000 carloads of these commodities from 89 origins to 80 destinations all throughout the Western United States and Mexico. We also deliver carloads to Port locations in the United States for exports to other countries like Singapore.
3. The first critical point to understand is that there are a substantial number of consumers and uses for these products. Traditionally, these products were used in soap manufacturing and as an animal feed. More recently, due to increasing margins for biofuel production, these products have been shipped throughout the Midwest and Southern United States to biodiesel and renewable diesel plants.

[REDACTED]

Exhibit 3 is a map of biodiesel plants in the United States, which shows over 100 plants that are widespread across the nation, as well as over 20 biodiesel plants throughout Southern Minnesota, Iowa, and Northern Illinois—all within a short truck haul of Sanimax's facility in South St. Paul, Minnesota.

4. The large number of customers creates natural geographic competition, as producers will have multiple potential destinations for their products. Union Pacific and other transportation providers must quote competitive rates for movements of these commodities, because our customers always have the option of taking their business to another destination via another provider.
5. In addition, each of these commodities can be, and is, transported by truck. In fact, when these commodities move by rail, a large portion of that volume originates in trucks and is then consolidated from multiple plants into a single tank car. For these reasons, trucks are a particularly competitive option for low-volume movements like Sanimax's.
6. Transloading is a competitive option as well. Customers solely served by one railroad can truck product to a transload facility served by a different railroad, and thus generate effective rail-to-rail competition.
7. Transloading is not just a hypothetical option. Union Pacific's traffic records show [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

VERIFICATION

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

Executed on March 8, 2021.


Chris Kankousky

Exhibit 1

*February 8, 2021 Email from
E. Sethe to T. Strickler*

[Omitted from Public Version]

Exhibit 2

*February 9, 2021 Email from
B. Thrasher to T. Strickler*

[Omitted from Public Version]

Exhibit 3

*U.S. & Canada
2020 Biodiesel Plant Map,
available at
[https://issuu.com/bbiinternational/
docs/bmap2020](https://issuu.com/bbiinternational/docs/bmap2020)*

Exhibit 4

Screenshots of FAF Data Selections and Results

Custom Selection of FAF Data

Flow Type:
Domestic Flows

Measure:
tons
value
t/miles
curval

Origin-Destination Geography:

Domestic Origin

Domestic Destination

Commodity:

Commodity

01 - Live animals/fish
02 - Cereal grains
03 - Other ag prods.
04 - Animal feed
05 - Meat/seafood
06 - Milled grain prods.
07 - Other foodstuffs
08 - Alcoholic beverages

Mode & Distance:

Domestic Mode

1 - Truck
2 - Rail
3 - Water
4 - Air (include truck-air)
5 - Multiple modes & mail
6 - Pipeline
7 - Other and unknown
8 - No domestic mode

Distance Band

Year:

2017
2018
2019
2020
2025
2030
2035
2040
2045
2050

Forecast
Scenarios:
(2020-2050)
☐ Low (pes)
☐ High (opt)

Display output labels as descriptive (e.g., descriptive: '1-truck' vs numeric: '1') : ☒

Run

Custom Selection of FAF Data

Extracted Data

scta2	dms_mode	thousand tons in 2017
04-Animal feed	1-Truck	366,199.9
04-Animal feed	2-Rail	11,477.1
04-Animal feed	3-Water	4,344.1
04-Animal feed	4-Air (include truck-air)	0.0
04-Animal feed	5-Multiple modes & mail	20,574.6

>>Download CSV

Custom Selection of FAF Data

Flow Type:
Domestic Flows

Measure:
tons
value
t/miles
curval

Origin-Destination Geography:

Domestic Origin

Domestic Destination

Commodity:

Commodity

01 - Live animals/fish
02 - Cereal grains
03 - Other ag prods.
04 - Animal feed
05 - Meat/seafood
06 - Milled grain prods.
07 - Other foodstuffs
08 - Alcoholic beverages

Mode & Distance:

Domestic Mode

1 - Truck
2 - Rail
3 - Water
4 - Air (include truck-air)
5 - Multiple modes & mail
6 - Pipeline
7 - Other and unknown
8 - No domestic mode

Distance Band

Year:

2017
2018
2019
2020
2025
2030
2035
2040
2045
2050

Forecast
Scenarios:
(2020-2050)
☐ Low (pes)
☐ High (opt)

Display output labels as descriptive (e.g., descriptive: '1-truck' vs numeric: '1') : ☒

Run

Custom Selection of FAF Data

Extracted Data

scta2	dms_mode	thousand tons in 2017
07-Other foodstuffs	1-Truck	566,055.9
07-Other foodstuffs	2-Rail	24,130.2
07-Other foodstuffs	3-Water	3,581.2
07-Other foodstuffs	4-Air (include truck-air)	32.0
07-Other foodstuffs	5-Multiple modes & mail	34,706.0

>>Download CSV