

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

SANIMAX USA LLC,

v.

**UNION PACIFIC RAILROAD
COMPANY**

STB Docket No. NOR 42171

**UNION PACIFIC RAILROAD COMPANY'S PETITION FOR
CLARIFICATION OR, IN THE ALTERNATIVE, RECONSIDERATION**

Pursuant to 49 C.F.R. § 1115.3 and § 1117.1, Union Pacific Railroad Company ("Union Pacific") respectfully requests that the Board clarify or, in the alternative, reconsider its decision served November 2, 2021.¹ Specifically, Union Pacific seeks clarification on whether the exemption revocation applies to Union Pacific's service provided to Sanimax before November 2, 2021, the date the decision was issued.

As Union Pacific argued in its Opposition to Sanimax's Petition for Partial Revocation, Sanimax has not met its burden to justify revocation of the exemptions that covered all the traffic inbound to its facility. The Board's decision to partially revoke despite Sanimax's failure is inconsistent with the statute. But Union Pacific is not filing this Petition to relitigate those questions.² Union Pacific is instead seeking clarification that the exemption revocation is not retroactive such as to permit regulation of transportation that occurred before November 2, 2021 (*i.e.*,

¹ *Sanimax USA LLC v. Union Pac. R.R. Co.*, STB Docket No. NOR 42171 (STB served Nov. 2, 2021) ("November 2 Decision").

² Union Pacific reserves its right to challenge the Board's November 2, 2021, decision on appeal.

while the exemption was still in place) and applies only to conduct after November 2, 2021. Union Pacific believes the Board did not intend the exemption revocation to apply retroactively, given past agency precedent and the strong presumption against retroactive regulation. Clarification of this point is necessary to provide guidance as to the appropriate scope of discovery and evidentiary filings in this case.

If the Board did intend its partial revocation to permit regulation of service occurring prior to November 2, 2021, Union Pacific seeks reconsideration of that attempt to retroactively regulate as a material error of law. As detailed below, retroactively regulating railroad conduct that was exempt from the Board’s regulatory authority at the time it occurred would contravene past Board precedent, longstanding federal precedent, and basic principles of due process and fairness.

The current regulation does not allow the Board to hold that Sanimax could be awarded damages³ for alleged service problems with the rail transportation of exempt commodities while those exemptions were in effect. That would be material error, as retroactive regulation would make it impossible for any railroad to rely on a § 10502 exemption. The Board has authority to revoke an exemption in whole or in part upon a showing that § 10502(d) has been satisfied, and thus reimpose regulation on an area previously exempted. But the Board does not have the authority to regulate conduct occurring when an exemption was in place—including imposing damages for alleged statutory violations occurring when the transportation at issue was exempt from regulation under the statute.

³ Verified Compl., STB Docket No. NOR 42171, at 11 (filed Nov. 6, 2020) (indicating Sanimax is seeking “damages” for alleged statutory violations).

I. The Board Should Clarify the November 2 Decision Is Not Retroactive.

In the November 2 Decision, the Board acknowledged it had “exempted from regulation the commodities that UP transports from Sanimax’s facility.”⁴ The Board chose to partially revoke those exemptions “to the extent necessary for the Board to consider the issues raised in the complaint,”⁵ on the ground “the service issues raised by Sanimax . . . warrant closer examination and further development of the record.”⁶ The Board clarified it “has not reached a decision on the merits of the issues raised in Sanimax’s complaint” and desired “further evidentiary development and briefing by the parties so that the Board may evaluate the service issues raised by Sanimax in greater context.”⁷

The November 2 Decision does not indicate whether the partial revocation is intended to be retroactive or forward-looking. Therefore, there are substantial reasons for the Board to clarify that the revocation is forward-looking and does not authorize any retroactive regulation of Union Pacific’s rail service to Sanimax before the exemption was revoked. A clarification would guide the scope of discovery and evidence, while preventing the expenditure of unnecessary resources and increasing the possibility of a settlement.

A. Retroactive Re-regulation Is Neither Authorized nor Supported by Section 10502.

Retroactivity—*i.e.*, the imposition of new legal consequences to already completed conduct—is disfavored in the law.⁸ This presumption against

⁴ November 2 Decision, at 3.

⁵ *Id.* at 8.

⁶ *Id.* at 6.

⁷ *Id.*

⁸ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“Retroactivity is not favored in the law.”).

retroactivity “is deeply rooted in our jurisprudence[] and embodies a legal doctrine centuries older than our Republic.”⁹ In the context of administrative agencies, the Supreme Court established in *Bowen v. Georgetown University Hospital* that “a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”¹⁰

In 49 U.S.C. § 10502(a), the Board is required to “exempt a person, class of persons, or a transaction or service” “to the maximum extent consistent with this part.” Where, as here, a commodity has been exempted, rail transportation of that commodity is not subject to the Board’s regulations unless and until the Board revokes the exemption.¹¹ In § 10502(d), Congress gave the Board authority to revoke an exemption in part or in whole. But the “legislative rulemaking authority” granted in § 10502(d) contains no authority to revoke exemptions retroactively and regulate conduct occurring while an exemption was in place.¹²

⁹ *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 270 (1994) (presumption against “attach[ing] new legal consequences to events completed before [a new] enactment” is grounded on “[e]lementary considerations of fairness,” which “dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly”).

¹⁰ *Bowen*, 488 US at 208.

¹¹ *See Alliance Shippers, Inc. v. S. Pac. Transp. Co.*, 673 F. Supp. 1005, 1008 (C.D. Cal. 1986) (“Once the [agency] exempts a service pursuant to 49 U.S.C. § 10505 [now § 10502], *that service is no longer subject to the provisions of Subtitle IV of Title 49.*” (emphasis added)).

¹² *See* 49 U.S.C. § 10502(d) (“The Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title.”).

The authority to regulate retroactively cannot be tacit or inferred—the authority must be expressly granted by Congress.¹³ That express grant must be demonstrated by showing “clear intent” to grant authority to retroactively regulate—“[r]equiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.”¹⁴ The lack of express authorization to re-regulate retroactively in § 10502 necessarily limits the Board’s re-regulatory authority to the period after the Board revokes the applicable exemptions. In other words, the Board may adjudicate conduct that occurred after the date of the revocation, but the Board may not retroactively re-regulate actions that occurred prior to the date of the revocation.

Pejepscot Industrial Park, Inc.—Petition for Declaratory Order, 6 S.T.B. 886, 891 (2003), is instructive. There, the agency was asked to consider claimed violations of the common carrier obligation to provide rates and service upon reasonable request that were alleged to have commenced in 1991, and the respondent railroads objected on the grounds that exemptions for the commodities at issue were adopted in 1995 and 1998.¹⁵ The Board held it could only consider potential common carrier violations “prior to the effective dates of the respective exemptions.”¹⁶ “[E]ven if a carrier’s conduct would constitute a statutory violation during a period of regulation, the exemption bars regulatory relief during the period

¹³ *See Bowen*, 488 U.S. at 208; *id.* at 224 (Scalia, J., concurring) (“[A]n agency cannot act with retroactive effect without some special congressional authorization. That is what the APA says, and there is no reason to think Congress did not mean it.”); *accord Landgraf*, 511 U.S. at 272.

¹⁴ *Landgraf*, 511 U.S. at 272–73.

¹⁵ *Pejepscot*, 6 S.T.B. at 888–92.

¹⁶ *Id.* at 892.

when the exemption is in force.”¹⁷ The Board also indicated that a revocation of the applicable exemptions would not mean that statutory violations could have occurred during the period the exemptions were in force; rather, a revocation would mean that the railroads would “again have a common carrier obligation to furnish rates and service upon request.”¹⁸ Just as in *Pejepsco*, where the Board could only regulate conduct that occurred before the applicable exemptions were in place, here the Board may only regulate rail transportation to Sanimax that occurs after the applicable exemptions were partially revoked.¹⁹

This strong presumption against retroactivity is in keeping with the purposes underlying the statute. Retroactive regulation of exempt activity would directly undermine the congressional intent behind § 10502—namely, to free railroads from unnecessary regulations so they could better compete in a market with agile and unregulated competitors.²⁰ If the Board could retroactively regulate exempted

¹⁷ *Id.* at 891.

¹⁸ *Id.* at 893 n.15.

¹⁹ In *Granite State*, the Board partially revoked a class exemption in light of evidence that the complainant was legally barred from using truck transportation and thus could not take advantage of the competitive options that were the basis for the exemption in question. *Granite State Concrete Co. v. Bost. & Me. Corp.*, STB Docket No. 42083 (STB served Sept. 24, 2004), slip op. at 2 (“to consider the complaint, the Board revoked [the applicable class exemptions]”). The Board in *Granite State* did not address the extent to which its revocation was retroactive or forward-looking, and that question ultimately was not relevant to the outcome since the Board found that the railroad’s actions were lawful. *Id.* at 3–5.

²⁰ See, e.g., 49 U.S.C. § 10101(1), (2), (5); H.R. Conf. Rep. No. 96–1430, 96th Cong., 2d Sess. 105 (1980); *Id.* at 79–80 (“[T]oday, most transportation is competitive and many of the government regulations affecting railroads have become unnecessary and inefficient. . . . Modernization of economic regulation of railroads, with greater reliance on the marketplace, is essential to achieve maximum utilization of railroads, to save energy and to combat inflation. . . . The overall purpose of the Act is to provide, through . . . freedom from unnecessary regulation, the opportunity for railroads to obtain adequate earnings . . .”).

activity any time it revoked an exemption, railroads would not be able to rely upon the exemption and act with the kind of freedom to compete Congress intended would result from the agency's exemption authority.

B. Retroactive Re-Regulation Contravenes Principles of Due Process and Fairness.

Investigating and potentially regulating exempt transportation movements to Sanimax prior to November 2, 2021, based on a substantive legal standard that did not apply when transportation occurred, would contravene well-established principles of due process and fairness. As noted by the U.S. Supreme Court:

Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the “principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.” ... In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.

Landgraf, 511 U.S. at 265–66 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

Applying the standards of Subtitle IV of Title 49 of the U.S. Code to Union Pacific's conduct prior to November 2, 2021, would alter the consequences of Union Pacific's completed actions—which were legally exempt from those statutory provisions at the time. Such an action by the Board would run afoul of fair notice and violate due process.²¹

²¹ See *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012) (holding it is a due process violation to punish a person or company for engaging in conduct that was lawful at the time the conduct was performed); see *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (An agency decision “branding as ‘unfair’ conduct stamped ‘fair’ at the time a party acted[] raises judicial hackles.”).

Ultimately, the dispositive question in evaluating retroactivity is whether the agency's action "change[s] the legal landscape" with respect to the behavior already past, holding in view the expectations and reliance of the parties prior to the change.²² Here, there is no question that an exemption revocation changes the landscape as to the affected transportation. The Board should therefore clarify that its revocation is forward-looking and not retroactive.

II. In the Alternative, the Board Should Reconsider the November 2 Decision to the Extent It Retroactively Revokes Exemptions.

In the alternative, the Board should reconsider the November 2 Decision to the extent the decision was intended to be retroactive. As discussed above, longstanding Supreme Court and federal court precedent establishes retroactivity is highly disfavored and agencies may only regulate retroactively if they have a clear indication from Congress. No such indication exists in § 10502(d).²³ Any decision to revoke an exemption retroactively is material error. The Board should correct this error through reconsideration.²⁴

CONCLUSION

For the reasons set forth above, the Board should clarify its November 2 Decision to partially revoke its exemption is not retroactive and therefore does not apply to pre-November 2, 2021 Union Pacific service. Alternatively, for the reasons set forth above, the Board should reconsider its November 2 Decision to the extent it retroactively applied to pre-November 2, 2021 Union Pacific service.

²² *Arkema Inc. v. EPA*, 618 F.3d 1, 7, 9–10 (D.C. Cir. 2010); see *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1362–63 (Fed. Cir. 2005) (“[T]he court must consider . . . ‘familiar considerations of fair notice, reasonable reliance, and settled expectations.’” (quoting *Landgraf*, 511 U.S. at 270)).

²³ See *Pejepscot*, 6 S.T.B. at 891.

²⁴ 49 C.F.R. § 1115.3(b).

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

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November 2021, I served a copy of Union Pacific Railroad Company's Petition for Clarification or, in the Alternative, Reconsideration by first class mail and email upon all parties of record in this proceeding.

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