



**ASSOCIATION OF
AMERICAN RAILROADS**

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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: NOR 42171, *Sanimax USA LLC v. Union Pacific Railroad Company*

Dear Ms. Brown:

In a decision served in the above-captioned proceeding on November 2, 2021, the Surface Transportation Board (“STB” or “Board”) partially revoked five commodity exemptions: animal refuse (STCC 2014491); tankage (STCC 2014490); grease or inedible tallow (STCC 2014350); lard (STCC 2013190); and animal grease (STCC 2013945), “to the extent necessary for the Board to consider the issues raised in the complaint.”¹ Union Pacific Railroad (“UP”) filed a petition for clarification or, in the alternative, reconsideration of that decision on November 22, 2021. UP’s filing seeks clarification of the non-controversial point that the revocation of the exemptions was a forward-looking action and did not impose retroactive regulatory requirements.² The Association of American Railroads (“AAR”) is filing this brief reply in support of UP’s petition.³

¹ November 2 decision at 8. *See also Rail Gen. Exemption Auth.—Exemption of Grease or Inedible Tallow*, 10 I.C.C.2d 453 (1994); *Rail Gen. Exemption Auth.—Pet. of AAR to Exempt Rail Transp. of Selected Commodity Grps.*, 9 I.C.C.2d 969 (1993); *Exemption from Regul.—Poultry, Meat & Dairy Prods.*, 1 I.C.C.2d 173 (1984).

² UP Petition at 1-2.

³ To the extent necessary, AAR respectfully requests that it be permitted to intervene for the limited purpose of submitting these reply comments on the legal effect of a revocation of an exemption. Consistent with 49 C.F.R. § 1112.4, AAR’s comments do not unduly broaden the issues raised in this proceeding and do not unduly delay a procedural schedule established in this proceeding. The Board has previously allowed trade associations to intervene as *amici* in a complaint case to support a party’s petition on an issue of industry-wide significance. *See, e.g., Texas Municipal Power Agency v. Burlington N. & Santa Fe Ry.*, 7 S.T.B. 803, 804 (2004). This matter is one that implicates the entire industry, as precedent established in this proceeding could significantly affect the meaning and usefulness of commodity exemptions.

AAR is a trade association representing the interests of North America’s major freight railroads, and often presents comments and testimony in Board proceedings that implicate issues of industry-wide significance. AAR and its freight railroad members have a strong interest in ensuring that the Board adheres to precedent by revoking a commodity exemption prospectively, and only in instances of demonstrated market power.

The Board has previously recognized that “[t]he exemption of a commodity under 49 U.S.C. 10502 generally excuses carriers from virtually all aspects of regulation involving the transportation of that commodity. This includes the dual requirements that a carrier furnish rates and provide service on reasonable request pursuant to those rates.” *Pejepscot Industrial Park, Inc. d/b/a Grimm Industries – Petition for Declaratory Order*, 6 S.T.B. 886, 891 (2003). Thus, the agency has noted that “even if a carrier’s conduct would constitute a statutory violation during a period of regulation, the exemption bars regulatory relief during the period when the exemption is in force.” *Id.* Any other interpretation of Section 10502 would render exemptions effectively meaningless across the railroad industry.

To be sure, the STB retains authority under 49 U.S.C. § 10502(d) to partially (or completely) revoke a previously issued exemption upon a proper showing.⁴ However, exemptions may not be revoked simply because the railroad has adequate resources to withstand the burdens of regulation. Nor may the Board revoke an exemption simply because it views regulation as harmless or believes it could produce a better outcome through regulation than the marketplace would produce. *See Exemption from Regulation—Boxcar Traffic*, 367 I.C.C. 425, 432 (1983) (“The ultimate issue is not whether regulation is harmless, but only whether it must be retained to carry out the rail transportation policy and protect shippers from market power abuse. If regulation is not necessary under these criteria, our instructions are to grant the exemption.”). When a petitioner makes the requisite showing that regulation is necessary, including a showing of market power, the Board may revoke a commodity exemption and reimpose *prospectively* all of the regulatory requirements of Subtitle IV of Title 49. But the Board’s revocation of an exemption cannot reach backward in time to regulate past conduct that was not subject to regulation when it occurred.

UP’s filing cogently explains why it is impermissible under the statute to regulate railroad activity retroactively via revocation of a commodity exemption. This is clearly contrary to Congressional intent. In partially deregulating the industry, Congress repeatedly recognized that “unnecessary and inefficient” regulations will burden the railroad industry, and “greater

⁴ That authority is constrained, however, by Section 10502 and the statutory scheme as a whole, which evidences congressional intent to favor de-regulation of the railroad industry. *See Brae Corp. v. United States*, 740 F.2d 1023, 1043 (D.C. Cir. 1984). As UP notes, the revocation in this proceeding was legally insufficient due to the failure of the Board to consider railroad market power over the commodities at issue. AAR has pointed out that when considering a request for revocation of a commodity exemption, the agency must consider market power in its RTP analysis. *See* AAR Comments, EP 760 at 4-6 (filed November 6, 2019); AAR Comments, EP 704 (Sub-No. 1) at 6-9 (filed January 29, 2021). *See also Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 1993 U.S. App. LEXIS 27747, at *12-13 (2nd Cir. 1993).

reliance on the marketplace” is “essential to achieve maximum utilization of railroads, to save energy and combat inflation.” Conf. Rep. 96-1430, at 3 (1980). In 1995, Congress noted the deregulatory reforms of the 1970s and 80s “resulted[ed] in the restoration of financial health to the rail industry” and recognized that “exemptions have proven highly beneficial to shippers and railroads,” S. Rep. No. 104-176, 104th Cong., 1st Sess. 3, 8 (1995). Thus, under the statute, the exemption authority is “a crucially important delegated power to expand existing statutory deregulation through administrative action” such that “an explicit part of the [Board’s] statutory duty [is] to utilize exemptions to the maximum extent permissible under the law.” *Id.*

Retroactive regulation would run directly counter to this expressed congressional intent and would undermine the effectiveness of all exemptions. For example, if the Board had authority to declare an exemption or multiple exemptions void *ab initio* for a particular shipper through revocation, then no railroad could ever rely on a § 10502 exemption as a safe harbor against regulation. Railroads instead would have to treat all exempt traffic as presumptively subject to retroactive re-regulation. This would eviscerate the purpose of § 10502.

As UP explained in its filing, the strong legal presumption against retroactive regulation means that the authority to retroactively regulate will only be allowed if the statute indicates “clear intent” to grant that unusual authority.⁵ There are no such indications in 10502(b). On the contrary, Congress’s clearly expressed desire that the Board “utilize exemptions to the maximum extent permissible under the law” would be directly undermined if the agency were to assert the authority to retroactively regulate transportation that was exempt from regulation at the time it occurred.

For the foregoing reasons, UP’s motion for clarification should be granted.

Respectfully submitted,



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of American Railroads

CC: Parties of Record

⁵ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“Requiring 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.”); *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.”).