

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Ex Parte 704 (Sub-No. 1)

REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS

**REPLY COMMENTS OF
THE INSTITUTE OF SCRAP RECYCLING INDUSTRIES, INC.
TO MEMORANDA SUMMARIZING EX PARTE COMMUNICATIONS**

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Dated: July 2, 2019

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The Institute of Scrap Recycling Industries, Inc. (“ISRI”) hereby submits its Reply Comments to memoranda summarizing authorized ex parte communications in this proceeding. ISRI is filing these Reply Comments pursuant to the decisions of the Surface Transportation Board (“Board” or “STB”) served on March 19, 2019, and the later decision served on June 19, 2019 granting an extension of time for replies until July 2, 2019.¹

ISRI and its members extend their sincere gratitude and appreciation to the Board members for their time and the opportunity to participate in authorized ex parte communications. ISRI and its member companies were pleased to be able to explain to the Board first-hand the critical importance of rail transportation to the iron or steel scrap industry, the lack of effective alternative modes of transportation for the movement of ferrous scrap, and the need for STB regulatory oversight to address changes in railroad market power since the exemption was granted nearly 25 years ago. ISRI trusts that the ex parte meetings provided valuable information to the Board about the workings of the ferrous scrap industry and that further

¹ See, Review of Commodity, Boxcar, & TOFC/COFC Exemptions, EP 704 (Sub-No. 1) (Served March 19, 2019 and June 19, 2019).

supports the Board's proposal to revoke the class exemption for iron or steel scrap (STCC 40-211) under 49 U.S.C. § 10502(d).

In this submission, ISRI identifies the key themes developed during its ex parte meetings, comments upon updated Waybill data submitted by the steel industry, and responds to memoranda filed by the Association of American Railroads ("AAR").

I. Background

On February 22, 2019, ISRI jointly filed a petition, pursuant to 49 C.F.R. 1117.1, requesting that the Board waive its prohibition on ex parte communications to allow ISRI members to meet directly with the Board's members to explain the importance of revocation of the outdated class exemption for the ferrous scrap industry.² On March 18, 2019, the Board waived its general prohibition on ex parte communications and authorized meetings with Board members between March 19 and June 17, 2019, subject to certain procedural safeguards.³ Between June 4, 2019 and June 13, 2019, ISRI and ten of its respective members held fifteen ex parte meetings with individual Board members.

During the ex parte meetings, the ferrous scrap companies explained their operations, their dependence on rail transportation, and how they are subject to undue market power by their serving railroads. The companies who met with the Board members varied in size and business models but their concerns and challenges in their dealings with serving railroads were very similar. For instance, Tri-State Iron & Metal Company ("TSIMCO") is a generational family

² See, ISRI and AF&PA Petition for Waiver (Served February 22, 2019).

³ See, Review of Commodity, Boxcar, & TOFC/COFC Exemptions, EP 704 (Sub-No. 1) (Served March 19, 2019).

business operating one scrap facility.⁴ Conversely, TMS International (“TMS”) is a large corporation operating fifty scrap facilities in the United States primarily supplying scrap for domestic steel mills.⁵ Sadoff Iron & Metal Company (“SIMC”) operates multiple scrap yards engaging in recycling of ferrous scrap that is shipped to steel mills, foundries, and other scrap consumers, whereas, SIMS Group USA Holding Corporation (“SIMS”) is another large public corporation that primarily serves the export market.⁶ The majority of the companies are clearly dependent on rail transportation for outbound shipments of ferrous scrap to steel mills or other scrap companies. Indeed, several companies explained that they used rail transportation for approximately 90% of their outbound shipments.⁷ Others described their dependency on rail for inbound shipments.⁸ However, what was plainly common among the companies is their dependence on rail transportation, their exposure to undue market power by the railroads, and their need for STB oversight.

⁴ See, Summary of Ex Parte Meeting held on June 4, 2019 between Sadoff Iron & Metal Company and Tri-State Iron & Metal Company and Chairman Begeman at 1 (Posted June 13, 2019) (“SIMC-TSIMCO-Begeman Meeting Summary”).

⁵ See, Summary of Ex Parte Meeting held on June 12, 2019 between the Sims Group USA Holding Corporation, TMS International and Institute of Scrap Recycling Industries, Inc. and Vice Chairman Fuchs at 1 (Posted June 24, 2019) (“SIMS-TMS-Fuchs Meeting Summary”).

⁶ See, SIMC-TSIMCO-Begeman Meeting Summary at 1-2, SIMS-TMS-Fuchs Meeting Summary at 2. See also, ISRI Reply Comments (Served August 26, 2016) Verified Statement of David Borsuk (“Borsuk V.S.”) at ¶¶ 1-3.

⁷ See e.g., SIMS-TMS-Fuchs Meeting Summary at 1; SIMC-TSIMCO-Begeman Meeting Summary at 1; Summary of Ex Parte Meeting held on June 13, 2019 between SA Recycling LLC, Consolidated Scrap Resources, Inc. and Institute of Scrap Recycling Industries, Inc. and Vice Chairman Fuchs at 1 (Posted June 24, 2019) (“SAR-CSR-Fuchs Meeting Summary”).

⁸ See, Summary of Ex Parte Meeting held on June 12, 2019 between Tucson Iron & Metal, Rocky Mountain Recycling Inc., and Institute of Scrap Recycling Industries, Inc. and Vice Chairman Fuchs at 2 (Posted June 24, 2019) (“Tucson-Rocky Mountain-Fuchs Meeting Summary”) (Tucson explaining that it primarily relies on rail for inbound shipments).

II. There is No Effective Competition to Rail For Ferrous Scrap Shipments

As explained in the ex parte meetings, there are various factors that influence a company's reliance on rail transportation. Truck transportation is generally not practical for shipping ferrous scrap distances beyond 150 miles.⁹ The substantial volume of ferrous scrap that is shipped to a single consumer is a significant factor that limits the feasibility and competitiveness of trucks.¹⁰ Also, the facility infrastructure of scrap yards, steel mills and foundries are designed to ship and receive ferrous scrap by rail, preventing a substantial conversion to truck shipments which would be highly inefficient and uneconomic as compared to rail.¹¹ Moreover, there simply is not sufficient capacity of the types (e.g. steel bottom trucks also used by the construction industry) and quantities of trucks that would be needed to handle the substantial volumes of ferrous scrap moving to consumers.¹² Other limitations impeding the use of truck transportation are driver shortages, seasonal shortages and the need to use more than one

⁹ See e.g., SAR-CSR-Fuchs Meeting Summary at 2 ("CSR stated that it primarily relies on rail for shipments moving at a distance of 150 miles or more"); SIMS-TMS-Fuchs Meeting Summary at 2 ("SIMS experiences capacity problems with truck over 150 miles based on its substantial volumes and the implementation of ELDs which has only exacerbated the driver shortage."); Tucson-Rocky Mountain-Fuchs Meeting Summary at 1 (Rocky Mountain explaining that longer hauls are not practical for truck transportation, as the number of trucks needed for long hauls are not available and it would be uneconomic).

¹⁰ See e.g., SAR-CSR-Fuchs Meeting Summary at 2 (CSR explaining that the truck shipments are not feasible after 150 miles due to volume constraints of trucks).

¹¹ See e.g., Tucson-Rocky Mountain-Fuchs Meeting Summary at 1 ("Rocky Mountain stated that it does not have any other option but to ship by rail due to the rail infrastructure at its facility."); Summary of Ex Parte Meeting held on June 13, 2019 between Reserve Management Group, Schnitzer Steel Industries, Inc. and Institute of Scrap Recycling Industries, Inc. and Vice Chairman Fuchs at 2 (Posted June 21, 2019) ("Reserve-Schnitzer-Fuchs Meeting Summary") ("truck is not a competitive option for Reserve due to volume constraints, rates, and the design of the shipping and receiving facilities, which have significant rail infrastructure.").

¹² See e.g., SIMS-TMS-Fuchs Meeting Summary at 2; Reserve-Schnitzer-Fuchs Meeting Summary at 2.

driver for longer movements.¹³ Rail shipments are also far more environmentally friendly as compared to truck. Scrap yards that are located near more dense populations would require multiples of tens to hundreds of trucks which would traverse and idle in neighborhoods, making a substantial conversion to truck shipments not only inefficient and uneconomic but impractical.

Further, water transportation is generally not competitive with rail transportation, since most scrap dealers and their consumers are not located on navigable waterways.¹⁴ Water transportation is also restrained by “barge availability and seasonal issues (e.g., drought in summer adversely affecting water level, or freezing waterways in winter).”¹⁵

There is no effective competition in terms of potential product substitutions and geography as well. It is an incorrect assumption that all ferrous scrap commodities are interchangeable with all other ferrous scrap.¹⁶ There are different grades and specifications of ferrous scrap, and the specific grade of scrap shipped to the consumer is dictated by the consumer’s manufacturing requirements.¹⁷ The ferrous scrap industry is not monolithic or operated purely as a regional marketplace, as some scrap yards may receive inbound materials locally whereas others can receive inbound shipments from across the United States due to

¹³ See ISRI Reply Comments at 21; Borsuk V.S. at ¶¶ 12, 28, 31, 32, 33 and 34; and Verified Statement of Greg Dixon (“Dixon V.S.”), at ¶¶ 18, 20 and 21; See also Reserve-Schnitzer-Fuchs Meeting Summary at 2.

¹⁴ Id. at 22; Borsuk V.S. ¶¶ 36 and 37; and Dixon V.S. ¶ 23. See also Reserve-Schnitzer-Fuchs Meeting Summary at 2.

¹⁵ Id.; Borsuk V.S. ¶ 38; and Dixon V.S. ¶ 23. See also Reserve-Schnitzer-Fuchs Meeting Summary at 2.

¹⁶ Id. at 20.

¹⁷ Id. at 19-20; Borsuk V.S. ¶¶ 7-10 and 13; Dixon V.S. ¶¶ 12-13.

varying availability of the volumes needed, specifications of scrap produced in each region, as well as the fluctuating production rates and delivery capabilities of each local supplier.¹⁸

III. Railroads Possess and Exercise Significant Market Power over Iron and Steel Scrap Companies

During the ex parte meetings, companies shared their significant challenges in dealing with their serving railroads, primarily Class Is but also some short lines. The concerns expressed were not limited to isolated or episodic occurrences. Rather, the challenges faced by iron or steel scrap companies are widespread and systemic, impacting companies of all sizes, business models and geographic locations. Specifically, companies have experienced significant problems with unreasonable practices, such as demurrage and storage rules, as well as inconsistent service and car supply.¹⁹ For instance, SA Recycling LLC (“SAR”) explained its challenges with increasing demurrage bills resulting from the railroads’ failure to furnish an adequate supply of gondola cars, missed switches and bunching, as well as the unreasonableness of the railroads’ refusal to offer credits for empty car deliveries that miss the ETAs.²⁰ SAR also explained that the lack of sufficient car supply caused it to lose almost \$800,000 in lost sales at one of its West Coast facilities.²¹

Consolidated Scrap Resources, Inc. (“CSR”) explained that recent changes in railroad demurrage rules and practices caused significant increases in its storage bills, and that “it is restricted from adding storage tracks to alleviate the increasing private car storage charges it

¹⁸ Id. at 20; Borsuk V.S. at ¶¶ 8-9, and 29.

¹⁹ See e.g., SAR-CSR-Fuchs Meeting Summary at 2; Tucson-Rocky Mountain-Fuchs Meeting Summary at 2.

²⁰ See, SAR-CSR-Fuchs Meeting Summary at 2.

²¹ Id.

incurred since implementation of PSR by a Class-I railroad.”²² Tucson Iron & Metal (“Tucson”) stated that its demurrage bills significantly increased due to a reduction of the number of service days from five to two days and the continuing refusal of the railroad to work with the company to help mitigate the charges.²³

In terms of rates, companies described other examples of the exertion of market power by the railroads. Reserve explained that a Class I railroad has proposed an excessive rate increase of more than 300% for a particular lane in the Midwest, which may be designed to “de-market” the movement.²⁴ Other companies complained about excessive rate increases and their lack of ability to negotiate with the railroads due to unequal bargaining power.²⁵ Some of the companies perceive the excessive rate increases as an intentional de-marketing strategy of the railroads for lanes that may be seen as less profitable or desirable in the age of Precision Scheduled Railroading.²⁶ Further, virtually all of the companies expressed concerns with the lack of negotiating leverage and the “take it or leave it” attitude of the railroads, surfacing in commercial dealings between the carriers and their ferrous scrap customers. For instance, TSIMCO explained that a Class I railroad refused to negotiate a \$100,000 demurrage bill exacerbated to a

²² Id.

²³ See, Tucson-Rocky Mountain-Fuchs Meeting Summary at 2.

²⁴ See, Reserve-Schnitzer-Fuchs Meeting Summary at 2 (“Reserve stated that a Class-I railroad has increased its rates more than 300% between Chicago, IL and Toledo, OH. Reserve also explained that, in April 2019, another Class-I railroad quoted rate increases of more than 70% for private cars and more than 80% for system cars. Reserve stated that it believes that the rate increases are intended to de-market certain lanes.”).

²⁵ See, SAR-CSR-Fuchs Meeting Summary at 1 (“Rail rates also continue to rise and it is challenging to negotiate with the railroads who have significant market power.”); SIMS-TMS-Fuchs Meeting Summary at 1. (“TMS also stated that the annual increases of rail rates average around 7%, which is unreasonable.”).

²⁶ See, Reserve-Schnitzer-Fuchs Meeting Summary at 2.

significant extent by missed switches and bunching, and future services were threatened if the entire invoice was not paid in full.²⁷

The Board's own analysis of the Confidential Waybill data for the period between 1992 through 2013 showed that the railroads' pricing power over the iron and steel scrap industry increased substantially since the exemption was granted decades ago in 1995.²⁸ Accordingly, the Board found that "for iron and steel scrap (STCC No. 40-211), the percentage of revenue that was potentially captive doubled from 22.1% to 44.0%."²⁹ The Board also determined that "[f]or the iron or steel scrap commodity group, the average R/VC ratio for potentially captive traffic increased by approximately four points, from 225.6% to 229.8%."³⁰

A more recent analysis of the Waybill data submitted in the summary memoranda of the American Iron and Steel Institute and the Steel Manufacturers Association also demonstrates that the iron and steel scrap industry remains subject to potentially captive pricing (i.e. the amount of traffic with R/VC ratios above 180%) at far greater levels than was the case in 1995 (10% versus 39.7%) and railroad rates remain far above railroad costs.³¹ The 2017 Waybill also shows that the average R/VC ratio for iron or steel scrap products is 154.8%, above the average R/VC ratios for regulated commodities such as coal and petroleum products.

Regardless, ISRI strongly believes that Board should not focus its analysis of market power entirely on R/VC ratios. It is clear that R/VC ratios are one important factor in evaluating

²⁷ See, SIMC-TSIMCO-Begeman Meeting Summary at 1.

²⁸ See, ISRI Opening Comments at 5 (Served July 26, 2016).

²⁹ See, EP 704 Notice of Proposed Rulemaking at 8 (Served March 23, 2016).

³⁰ Id.

³¹ See, Summary of Ex Parte Meeting Between the American Iron and Steel Institute (AISI) and the Steel Manufacturers Association (SMA) and STB Chairman Ann Begeman (Posted June 14, 2019).

railroad market power and should be considered by the Board as they were considered by the Interstate Commerce Commission (“ICC”) in granting the exemption. However, they should not be the sole indicator, since broad aggregated averages are not able to capture the actual dealings and experiences between the railroads and their customers. Thus, ISRI submits that R/VC ratios must be supplemented by other market information, including whether the exempt industry supports or opposes the exemption. Indeed, the ICC expressly stated that “In determining whether regulation is necessary to protect shippers from an abuse of market power, a significant consideration is whether the participating shippers actually seeking transportation are concerned about an abuse of market power.”³²

Previously submitted evidence in the record, as well as the more recent ex parte meetings, demonstrate that railroads exert significant market power over the iron or steel scrap industry.³³ ISRI members have provided the Board with specific examples of their concerns involving the railroads’ rates, practices, service reliability, equipment shortages, demurrage and accessorial charges and practices, and their inability to negotiate with the railroads to address these concerns due to inordinate market power held by the railroads. Most importantly, these concerns are widespread and systemic, and are not limited to isolated or episodic occurrences for which an individual revocation requested by an individual company may be warranted. Across the board, all of the companies who met with the Board members expressed their strong need for access to STB regulatory oversight and an avenue for recourse against the railroads for the problems they

³² See, Rail General Exemption Authority - Petition of AAR to Exempt Rail Transportation of Selected Commodity Groups, 9 I.C.C.2d 969, 973 (1993).

³³ See ISRI Opening Comments at 7; ISRI Reply Comments at 18-19 and Borsuk V.S. ¶¶ 14, 17, 18, 21-23 and 24-26, Dixon V.S. ¶¶ 24-25; See also, SAR-CSR-Fuchs Meeting Summary, Tucson-Rocky Mountain-Fuchs Meeting Summary, Reserve-Schnitzer-Fuchs Meeting Summary, SIMC-TSIMCO-Begeman Meeting Summary, SIMS-TMS-Fuchs Meeting Summary.

are experiencing.³⁴ It is clear that the totality of the evidence in the record strongly supports a finding that the railroads can and do exercise market power over the ferrous scrap industry and that the class exemption should be revoked based on substantially changed circumstances since the exemption was granted.

IV. Other Evidence in the Record Strongly Supports Revocation of the Class Exemption

ISRI has already established in its prior submissions that the Board's proposal to revoke the exemption for the iron and steel scrap industry is entirely consistent with the revocation statute and National Rail Transportation policy.³⁵ Further, the substantial changes in the rail market and regulatory regime since the exemption was granted justify the change in the Board's exemption policy. Evidence in the record strongly shows that the railroads have and do exercise significant market power over the industry, and that a showing of "abuse of market power" is not required under the statute for the Board to revoke the class exemption. Further, the railroads' exercise of market power over iron and steel scrap shippers is systemic and not episodic, and the industry's dependence on rail transportation and the lack of effective competitive alternatives impedes the industry's ability to alleviate the railroads' market power. Accordingly, the Board should exercise its oversight over rail shipments of ferrous scrap and provide the industry with direct access to its regulatory processes and remedies. See Exhibit-1.

³⁴ See e.g., Reserve-Schnitzer-Fuchs Meeting Summary at 2-3; SIMS-TMS-Fuchs Meeting Summary at 2.

³⁵ ISRI Opening Comments at 2 and 8; ISRI Reply Comments at 2-3.

V. Contrary to the AAR's Memoranda, the Removal of Administrative and Regulatory Requirements on the Railroads Was an Important Factor Considered by the ICC in Granting the Ferrous Scrap Exemption

In memoranda summarizing ex parte meetings between the AAR and the Board members, it is stated that “AAR acknowledged that there are no longer administrative burdens associated with tariff filing requirements for regulated traffic, but explained that the administrative burdens of tariff filing were never a principle consideration in the exemption proceedings. . . .”³⁶ This statement contradicts both the ICC’s 1995 decision granting the ferrous scrap exemption, as well as evidence submitted on the underlying Petition for Exemption jointly filed by AAR and ISRI, among others, with the ICC in 1994.

Specifically, in its decision granting the ferrous scrap exemption the ICC first relied upon the statements made by the joint petitioners who supported the exemption:

The petitioners, supporting shippers, and individual class I railroads assert that there are real, substantial benefits to be achieved by the proposed exemption. **They contend that the exemption would increase competition in this already competitive market by freeing the railroads from administrative and regulatory burdens that hinder and often prevent them from competing effectively with other carriers for this ferrous recyclables traffic.** According to petitioners, one such burden is the railroads' inability to respond quickly to shipper demand for changed rates and services as a result of changes in

³⁶ See, e.g., Summary of Ex Parte Meeting Between Association of American Railroads and Vice-Chairman Fuchs at 2 (Posted June 21, 2019).

market conditions. Railroads can only establish rates for this traffic in one of two ways, either by filing a tariff with the Commission under 49 U.S.C. 10761 and 10762, or by entering into a transportation contract with a shipper under 49 U.S.C. 10713 and filing a contract summary with the Commission. In contrast, petitioners note that barge competitors are generally unregulated, and that less regulated truck carriers have no such contract summary filing requirement and no longer have to file tariffs under section 206 of the Trucking Industry Regulatory Reform Act of 1994. [*5] Petitioners aver that the proposed exemption would enable railroads to quote spot prices when the market requires. **As a result, railroads that cannot always compete effectively because of the administrative burdens occasioned by rail contract summary and tariff filing requirements would be better able to meet shippers' needs.**"³⁷

Additionally, in analyzing the exemption statute, the ICC determined that:

We note first that, by its very nature, an exemption "minimize[s] the need for Federal regulatory control" [10101a(2)]. In addition, the exemption would "allow, to the maximum extent possible, competition and the demand for services to establish reasonable [*10] rates" [10101a(1)]; **and would encourage effective**

³⁷ Ex Parte No. 346 (Sub-No. 35), Rail General Exemption Authority-Exemption of Ferrous Recyclables, 10 I.C.C.2d 635, 636 (1995) ("Ferrous Recyclables").

competition [10101a(4) and (5)] by making it easier for the railroads to compete without unwarranted regulatory restraint. Moreover, it would "allow rail carriers to earn adequate revenues" [10101a(3)] by improving the speed and flexibility with which they could respond to competition -- especially by enabling them to quote spot prices as changes in the market may require. Further, the exemption would "encourage honest and efficient management of railroads" [10101a(10)] by enabling rail management to respond more quickly to changing market conditions, and by reducing the administrative costs associated with the filing of tariffs and contract summaries. Finally, to the extent that an exemption would enable the railroads to attract traffic from motor carriers, it would encourage energy conservation [10101a(15)]. The remaining provisions of the RTP will not be adversely affected.³⁸

Clearly, the commercial and regulatory benefits to be derived from the exemption by removing regulatory burdens imposed on the railroads in the form of tariff and contract summary filings, were intended to allow the railroads to compete for ferrous scrap market share more expeditiously and effectively.³⁹ This was obviously an important consideration of the ICC, as well as both the railroads and ISRI members at that time.

³⁸ See, Ferrous Recyclables, 10 I.C.C.2d at 639-640.

³⁹ The ICC's findings are also clearly inconsistent with a de-marketing business model, in which railroads increase prices to shed traffic rather than compete for market share.

Moreover, in its Reply Comments submitted to the Board in August of 2016, ISRI explained and summarized the Joint Petition for Exemption that ultimately resulted in the ferrous scrap exemption. Specifically, ISRI provided that:

ISRI, the AAR, and nine individual railroads jointly petitioned the ICC for exemption of ferrous scrap in 1994 based on reasons that are now absent. By far, the biggest goal of the exemption sought by ISRI, the AAR, and the railroads was elimination of cumbersome administrative burdens associated with tariff and contract filing, which impeded the ability of railroads to expeditiously respond to market conditions. The Petition to Exempt filed in 1994 is replete with references to the need for “decreased administrative burdens” and “ratemaking flexibility.” (See Petition to Exempt From Regulation the Rail Transportation of Ferrous Recyclables, ICC Docket No. 346 (Sub-No. 35) at p. 3 (filed Apr. 25, 1994) (“Petition to Exempt”).

Petitioners argued in 1994 that:

[t]he exemption sought here would increase competition...because it would free the railroads of administrative and regulatory burdens that hinder and often prevent them from competing effectively with other carriers....One such burden is the railroads’ inability to respond quickly to shipper demand for changed rates and services as a result of changes in market conditions. Railroads must file tariffs or contract summaries with the ICC. Unregulated or less

regulated truck and barge competitors respond by entering into contracts of carriage without being burdened by such filing requirements. Petition to Exempt at p. 12 (emphasis original).

The Petition to Exempt was supported by two Verified Statements from members of the ferrous scrap industry, and both witnesses expressed their support for the exemption almost exclusively in terms of elimination of administrative burdens. Thomas Pellington of the D.J. Joseph Company penned a short, five-paragraph Verified Statement. The first two paragraphs described his company, the third paragraph discussed the administrative burden of maintaining 500 separate rail contracts, the fourth paragraph expressed the need for his company to be able to respond quickly to the marketplace without waiting for a railroad to file the respective tariff, and the fifth paragraph was a one-sentence summary. Similarly, Ronald Havrilla of the Columbia Iron and Metal Company stated that “[t]he current regulatory requirements viz, rates still published in tariffs, contract rates that need to be filed with the ICC, limits [sic] the railroads’ ability to be responsive to market conditions.” Columbia Iron supported the exemption, according to Mr. Havrilla, because his company needed to be able to “react to our customers as quickly as

possible.” The remainder of the Statement merely described his company and quoted the National Rail Transportation Policy.⁴⁰

Accordingly, it is inaccurate for AAR to claim that the removal of regulatory burdens such as tariff and contract filings, was not a principle consideration underlying the ferrous scrap exemption. The ferrous scrap industry, the railroads, and the ICC *all* placed significant weight on this factor. As previously explained by ISRI, the contract and tariff filing requirements no longer exist for any railroad or customer regardless of whether a commodity is exempt.⁴¹ Thus, one of the main reasons for ISRI’s support for the exemption in 1994 no longer exists. There are simply no benefits to the ferrous scrap industry derived from the exemption today—rather, there are only detriments. ISRI submits that this is an important consideration for the Board, which also clearly justifies revocation of the ferrous scrap exemption.

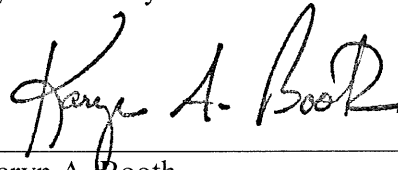
VI. CONCLUSION

For the foregoing reasons, ISRI respectfully requests that the Board adopt its current proposal to revoke the existing class exemption for iron or steel scrap.

Respectfully submitted,

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⁴⁰ See, ISRI Reply Comments at 22.

⁴¹ ISRI Opening Comments at 7-8.

Exhibit-1

Summary of Key Evidence Supporting Revocation of the Ferrous Scrap Exemption

I. Revocation Statute Provides the Board with Broad Discretion to Apply Regulation When It is Needed:

- STB may revoke an exemption “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.” See, 49 USC § 10502(d); ISRI Opening Comments at 8.
- Statutory provision provides the Board with substantial discretion to determine whether regulatory oversight is necessary and consistent with the governing statute. See, ISRI Opening Comments at 2.

II. Abuse of Market Power is Not Required by the Revocation Statute:

- Legislative history emphasizes that in evaluating a revocation request, Board can require demonstrated abuse of market power **or that regulation is needed to carry out the rail transportation policy**. See, H.Rep. 104-422 at p. 169 (Dec. 18, 1995); See, ISRI Reply Comments at 2-3.
- Abuse of market power is not required by the revocation statute. Compare 49 U.S.C. §10502(a)(2) to 49 U.S.C. § 10502(d). See, ISRI Reply Comments at 2-4.
- The Board itself has stated that it looks at “whether the shipper lacks sufficient intermodal alternatives and whether the carrier has market power that it could abuse with respect to the traffic, thus necessitating regulatory oversight.” See, Pejepscot Industrial Park, Inc. d/b/a Grimm Industries—Petition for Declaratory Order, STB Docket No. 33989, slip op. at 7 (n. 15) (served May 15, 2003).
- Precedent reveals that revocation can occur without particular instances of market power. See, Mr. Sprout, Inc. v. U.S., 8 F.3d 118 (2nd Cir. 1993); ISRI Reply Comments at 3.
- “In determining whether regulation is necessary to protect shippers from an abuse of market power, a significant consideration is whether the participating shippers actually seeking transportation are concerned about an abuse of market power.” See, Rail General Exemption Authority - Petition of AAR to Exempt Rail Transportation of Selected Commodity Groups, 9 I.C.C.2d 969, 973 (1993).

III. Policy Considerations:

Revocation is supported by the Rail Transportation Policy. See, ISRI Opening Comments at 8-11.

- Revocation of the exemption would be consistent with the rail transportation policy under 49 U.S.C. § 10101, including to “foster sound economic conditions in transportation,” “maintain reasonable rates where there is an absence of effective competition,” and “to prohibit predatory pricing and practices, avoid undue concentrations of market power, and prohibit unlawful discrimination.” See 49 U.S.C. § 10101(5), (6) and (12). See also, ISRI Opening Comments at 9.
- Given the substantial changes in the railroad industry since the ICC’s decision to grant the exemption for the iron and steel scrap industry, the Board should give less weight on policies promoting the earning of adequate railroad revenues and minimizing the need for federal regulatory control over the rail transportation system. Railroads have resounding financial strength, and the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”) removed the administrative burden for the carriers, including requirements for rail carriers to file with the government tariffs, contracts, and contract summaries. See, ISRI Opening Comments at 8 and 10-11.
- The main reason for shippers’ support in 1994 no longer exists. ICCTA removed railroads’ tariff and contract summary filing requirements and other regulatory burdens, thereby mooted one of the main reasons for the original exemptions. See, ISRI Opening Comments at 8 and 10-11. See also, ISRI Reply Comments at 22-24.
- The policy to minimize the need for regulation is directly at odds with the Board’s authority to revoke an exemption provided under 49 U.S.C. § 10502(d). See, ISRI Opening Comments at 10-11.
- Requiring additional litigation for shippers of exempt commodities discourages those shippers from seeking relief at the Board due to the costs, burdens and uncertainty, and revoking the exemption would be consistent with the policy “to require fair and expeditious regulatory decisions when regulation is required.” See 49 U.S.C. § 10101(2). See also, ISRI Opening Comments at 9-10.

IV. Exercise of Railroad Market Power Over the Ferrous Scrap Industry is Systemic Not Episodic

- The record shows that the exercise of market power by the railroads over ferrous scrap customers is wide-spread and systemic (concerns over rates, service reliability, equipment shortages, railroad practices/demurrage, inability to negotiate). See, ISRI Opening Comments at 7; ISRI Reply Comments 18-19, Borsuk V.S. ¶¶ 14, 17, 18, 21-23 and 24-26, Dixon V.S. ¶¶ 24-25. See also, SAR-CSR-Fuchs Meeting Summary, Tucson-Rocky Mountain-Fuchs Meeting Summary, Reserve-Schnitzer-Fuchs Meeting Summary, SIMC-TSIMCO-Begeman Meeting Summary, SIMS-TMS-Fuchs Meeting Summary.
- It is highly impractical to require individual revocations—it is far too costly, time-consuming, burdensome, and uncertain given the scope of the problems and scope of the exercise of market power.