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October 12, 2005 past 5 pm

Via electronic filing
The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

**Re: The 25th Anniversary of the Staggers Rail Act of 1980: A Review and
Look Ahead, Ex Parte No. 658**

Dear Secretary Williams:

Please accept for electronic filing in the above-referenced docket the Written Comments of Cemex, Inc.

This filing is a day late due to a problem with our internet server. We had planned to file the attached Written Comments by e-filing on Wednesday October 12. However, our internet server went down immediately prior to 4:30, and it was too late to hand deliver.

No party will be prejudiced by your acceptance of this e-filing one day late, especially considering that the Staggers Act hearing has not occurred yet and the service copies of the filing were made on October 12, 2005. Moreover, Cemex previously notified the Board of its intent to participate in this proceeding. If there are any questions concerning this matter, please contact the undersigned at 202.274.2959.

Sincerely,



Sandra L. Brown

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 658

**THE 25TH ANNIVERSARY OF THE STAGGERS RAIL ACT OF 1980:
A REVIEW AND LOOK AHEAD**

WRITTEN COMMENTS OF CEMEX, INC.

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October 12, 2005

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 658

**THE 25TH ANNIVERSARY OF THE STAGGERS RAIL ACT OF 1980:
A REVIEW AND LOOK AHEAD**

WRITTEN COMMENTS OF CEMEX, INC.

I. INTRODUCTION

In a Notice of Public Hearing issued by the Board on September 14, 2005,¹ the Surface Transportation Board ("STB" or "Board") announced that it would hold a public hearing to provide a forum for the expression of views on the impact, effectiveness, and future of the Staggers Rail Act of 1980 ("Staggers Act" or "Act"). The Board invited interested persons, including large and small rail customers, large and small railroad companies, representatives of local communities, and state and federal government officials, to participate. The Board asked parties to address broad issues regarding the Staggers Act. These Written Comments of CEMEX, Inc. ("CEMEX") are hereby submitted in response to the Board's Notice.

CEMEX applauds the Board for providing an opportunity for parties to comment on the Staggers Act. Since the passage of the Staggers Act, there has been a growing trend toward lessened competitive choice amongst carriers and growing disregard for common carrier

obligations, which has negatively impacted the U.S. economy and shipping community. As such, CEMEX respectfully asks the Board to (a) review the effect of exemptions promulgated under the Staggers Act, in particular for construction materials, and (b) either more aggressively implement the pro-competitive provisions of the Staggers Act or complete the full deregulation of the rail industry.

II. IDENTITY AND INTEREST OF CEMEX

CEMEX is a subsidiary of CEMEX Corp. – the U.S. division for CEMEX SA, de CV, a Mexico-based international construction materials company. Currently, CEMEX is the largest cement, fly ash, and ready-mix company in the United States, and one of the leading producers of limestone aggregate – sand, gravel, and crushed stone – both within the U.S. and worldwide.² From crushed rock to industrial sands, CEMEX's aggregate products are used in everything from ready mixed concrete and concrete products, to sand blasting and golf course landscaping. CEMEX supplies a wealth of experience and technical knowledge in extracting and processing building materials for the construction industry.

Due to CEMEX's lengthy and widespread presence in the construction materials market, CEMEX has acquired deep institutional knowledge of the shipping issues for construction materials, giving CEMEX a unique perspective on the related rail exemptions for construction materials (including aggregates) transportation and need for the Board to establish an effective forum for the users, as well as the providers, of rail transportation. As discussed in more detail below, CEMEX proposes several topics relating to the exemption of aggregates (including

¹ *The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead*, Ex Parte No. 658, Slip op. (STB served Sept. 14, 2005) ("Notice").

construction materials) for Board review. Importantly, CEMEX believes these issues are ripe for Board evaluation, and looks forward to the Board's leadership in balancing the forum for rail transportation issues.

III. OVERVIEW OF STAGGERS ACT IMPACT ON RAIL CUSTOMERS

In enacting the Staggers Act in 1980, Congress took necessary action to address the declining structure of the rail industry and numerous railroad bankruptcies. The partial deregulation of the rail industry from the Staggers Act (and related antitrust immunities) resulted in rationalization of rail assets and increased profitability for the rail industry. However, the Act also created unforeseen problems for rail customers and should be reevaluated in light of the growth in rail power and changing conditions over the past 25 years.

As a result of partial deregulation and competition from other modes, railroads abandoned plants, downsized work forces, invested in technology, increased density by focusing operations on key corridors, and shifted costs to customers to increase productivity. However, rather than increase market share by competing to better meet shipper's needs, railroads pursued increased market share through a strategy of eliminating the competition through financial acquisition and mergers, resulting in increased concentration and market dominance for railroads and few options and unacceptable service for shippers. Examples of the harmful effects from selective implementation of the Staggers Act includes: a dramatic reduction in rail-to-rail competition, the shift of rail infrastructure costs to shippers; ineffective truck competition; poor pricing policies; and overreaching fuel surcharge policies.

² CEMEX currently operates 12 cement plants, 48 strategically located distribution terminals, 283 ready-mix plants, and 49 construction aggregate quarries.

Numerous unintended consequences have flowed from passage of the Staggers Act. The reduction from over 45 Class I railroads to a 4 mega-railroad system has eliminated nearly all pre-merger routing alternatives and comparative shipper advantage. The elimination of shipping alternatives and resulting rail freight increases, in effect, expropriated property and extracted value from their shippers' enterprises. Through mergers and acquisitions, railroads divided territory and allocated customers, most visibly evidenced in the buy-out of Conrail.

As a result of the railroads' increasing market dominance, rail carriers have shifted costs to customers as a means of decreasing costs and increased accessorial charges to increase revenue. In particular, railroads have dramatically curtailed investment in system railcars for bulk commodities of low value to weight ("LVW") ratio, such construction materials, etc. For example, in 2005 private ownership of freight cars represented 58% of the entire freight car market, up from 20% in 1980. Much of the increase in rail industry productivity in dollar per ton-mile has been driven by increases in the average capacity per railcar. In 1980, average capacity per car was 78 tons. Today, the average capacity per car is over 100 tons, and there is 28% more capacity per car. Although this reduces carrier costs, it creates increased shipper investment in railcars that further ties shippers to rail and reduces alternatives to rail. This is especially true for shippers of LVW bulk commodities, such as grains or construction materials (limestone, fly ash, gypsum, cement, etc.). LVW bulk commodities have no viable transportation options other than rail (or marine) beyond approximately 100 miles. Whereas high value to weight commodities can and are shipped by truck longer distances via intermodal shipments), at some point trucking is uneconomic and only rail-to-rail competition prevents market dominance at long distances by a single rail carrier.

LVW commodities inherently have low profit margin relative to freight cost, so higher truck freight rates consume all profit. For example, a shipper of a high value to weight commodity with a substantial per unit profit margin can still profitably ship by truck even if the truck rate is greater than three times the rail freight rate, but a shipper of LVW commodities would often incur a loss if the truck rate exceeds the rail rate by even as little as one half. In addition, it is common for the rail freight rate on a LVW commodity to substantially exceed the value of the product shipped. For example, the dollar per ton rail freight rate is commonly three to four times higher than the FOB cost of limestone aggregate in dollars per ton.

Railroads have further limited shippers' transportation alternatives by opposing increased allowable truck gross weights (as exists in Canada, MI, PA, and CA), and compelling suspensions of legislative efforts to increase truck weights in Congress. Post-Staggers Act mergers of trucking firms and increased demand have reduced shipper transportation alternatives and increased railroad market dominance.

The Staggers Act provided for private contracts, which became the predominant basis for pricing until recent years. Now, having secured unmatched market dominance and leverage, railroads are moving to public pricing with negligible or no service commitments or rate protection (typically only 20 day rate protection). An indication that the time has come to change Staggers is the railroads' ongoing push to move away from contracts and move toward tariff and public pricing methods.

CEMEX understands that substantial additional capital investments are needed in rail infrastructure to support economic growth. As noted above, shippers have already made investments in rail infrastructure. However, current railroad pricing practices do not distinguish, or provide incentive for, efficient shippers versus inefficient shippers, particularly under the

railroads' push to public pricing. The current move by railroads to public pricing creates uncertain and unpredictable freight rates and investment returns, virtually guaranteeing a dramatic deceleration in investments by shippers in rail infrastructure and rail efficiency projects.

The creation of so many captive shippers through rail mergers was neither intended nor foreseen with the passage of the Staggers Act. Railroads euphemistically refer to discriminatory pricing applied to captive shippers as differential pricing, or equally misleading, as demand-based pricing. However, unlike other industries pricing their product to different market segments, the differential pricing employed by railroads is actually access-based pricing, not demand-based pricing. The clearest example can be seen from the largest and fastest growing segment of railroad volume – intermodal traffic. Intermodal traffic facilities have predominantly been constructed as open points, due to the recognition of the importance of rail-to-rail competitive pricing and increased traffic capacity. With the fastest growing segment of rail industry volume coming from non-captive intermodal shippers, captive shippers are increasingly vulnerable to being forced to pay increased subsidies to non-captive shippers as railroads extract higher rates from captive shippers as capacity tightens. Differential pricing should play less of a role in a capacity-constrained environment and the Board should develop a workable rate reasonableness standard where open access is lacking.

Concern over the post-Staggers rail industry has raised interest in other agencies and before Congress. For example, the U.S. Department of Justice recently opened an investigation

of BN and UP's pricing policies in the Powder River Basin.³ Various sources indicate that the carriers' dominance has allowed them to engage in illegal pricing policies, in violation of federal antitrust laws. On the Hill, rail competition has also attracted attention. Congress created the Antitrust Modernization Commission ("AMC") for the purpose of reviewing competition laws in various industries, including rail transportation. Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11051-60, 116 Stat. 1856. In the last six months, the AMC received several comments that complained about the lack of competition between rail carriers and will be conducting hearings to determine whether competition is sufficient in the rail industry.

A particularly glaring failure under Staggers is the unchecked imposition of (non-negotiable) fuel surcharges and accessorial costs. Carriers charge unnecessarily high fuel surcharges, knowing that most shippers have no alternative. Railroad imposed fuel surcharges far exceed the railroad's fuel consumption costs, in effect charging the equivalent of \$71 per barrel of oil when actual oil trades at \$60 per barrel, a 18% premium. With fuel surcharges to date calculated as a percentage of the freight rate, future fuel surcharges will become even more inequitable as capacities tighten and rates increase, thus further increasing fuel surcharges out of relation to railroads' actual fuel costs.

Some railroads claim that the higher than compensatory fuel surcharges are needed to offset other long term freight contracts that do not allow for fuel surcharges. However, the U.S. endured two major oil shortages in the 1970s and crude oil prices have been volatile ever since.

³ Union Pacific Corporation 2004 Annual Report, *Building America*, at 6 (Feb. 25, 2005) (available at: http://www.up.com/investors/annuals/04annual/annual_report_04.pdf) (noting that UP had received a Civil Investigative Demand from the Antitrust Division of the Department of Justice, which seeks information concerning pricing activities for the transportation of coal carried by UPRR from the Southern Powder River Basin); Burlington Northern Santa Fe

Few rail freight contracts have terms exceeding 30 years. Railroads had every opportunity to foresee the need for fuel surcharges since the 1970s. Shippers without the option of long term contracts should not be forced to pay for the railroad's inability to manage fuel risk.

The Staggers Act has also resulted in the elimination of rail alternatives, foremost because rail mergers have reduced the number of carriers. In the early 1980s, there were dozens of Class I railroads offering service to shippers. Today, only seven railroads qualify as Class I carriers, and four of those seven account for the majority of all traffic shipped via rail. This reduction in carrier choice has eliminated nearly all pre-merger routing alternatives and any comparative shipper negotiating power.

Through mergers and acquisitions, the Big Four (UP, BN, CSX and NS) have divided territory and allocated customers. The larger railroads have forged unresponsive, slow to adapt cultures, resulting in a failure to handle even single digit growth. The result is a drag on the economy, jobs, and millions of dollars of lost value from their customers. If unchecked, the current Class I traffic mix will further erode the common carrier obligations, to a degree where they become meaningless.

Finally, a positive aspect of Staggers has been the successful financial revitalization of the railroad industry. However, railroads highlight the reduction in constant-dollar revenue since Staggers, as if their industry were somehow unique in this regard. The AAR touts the revenue reduction in their ubiquitous graph of Railroad Performance since Staggers. American Association of Railroads, *Railroads: A Historical Perspective*, at 6, attached hereto as Exhibit A (available at: http://www.aar.org/GetFile.asp?File_ID=140). Reduced per unit revenue is in fact common to many industries, including rail shippers, since the 1980s. Rail shippers of bulk

Corporation, *Form 10-Q*, at 34 (July 20, 2005) (available at: http://www.bnsf.com/investors/secfilings/10Q_Corp_2Q_2005.pdf) (same).

products with LVW ratios have been especially subject to falling per unit revenue. For example, a bushel of grain today sells for less than in the 1980s when adjusted for inflation. The AAR's graph is as instructive for what is not shown, as for what is shown. The AAR does not list on the graph the profits or costs of the rail industry. Rail industry costs have decreased faster than revenue decreased. Railroad profits have risen dramatically. Rail industry profits are demonstrated by how well Class I railroad stocks have fared on Wall Street since Staggers (except for certain periods after mergers or too frequent service crises). For example, BNSF common stock has produced a 17% return since Staggers was enacted.

The use of railroad industry financial fitness measures such as Revenue Adequacy and Cost of Capital are misleading and not useful. Even under the historically low interest rates of this decade, the Board calculated that the cost of capital for railroads exceeds 9%. Using the Board-calculated cost of capital, the AAR points out that the rail industry as a whole has never, and few individual railroads ever, have been revenue adequate under the Board's definition since before 1940.⁴ This cannot be true by any practical definition, because otherwise railroads would have been driven out of business by now. In fact, railroads can and do raise capital in the financial markets at rates well below the Board-calculated cost of capital, as acknowledged on Wall Street.

These concerns support a post-Staggers review of competition issues in the rail industry. Importantly, the Board should evaluate various deregulation practices, including scrutiny of whether commodities exemptions are still necessary.

⁴ It is interesting that reports have surfaced that the railroads are expected to achieve revenue adequacy in the near future.

IV. THE COMMODITY EXEMPTION FOR AGGREGATES CONSTRUCTION MATERIALS SHOULD BE REVISITED

The Board's exemption power is two-fold. The STB has a statutory obligation to actively review and grant commodity exemptions. In conjunction with granting the STB the power to exempt certain aspects of rail transportation from regulation, Congress has also charged the STB with actively reviewing the effects of commodity exemptions for evidence of carrier abuse of market power. H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 105 (1980) (Conference Report for the Staggers Rail Act of 1980).⁵

The original post-Staggers exemptions cases involved careful analysis and reflected solid decision making, in compliance with Congress' dual mandate. For example, in *Rail General Exemption Authority—Miscellaneous Manufactured Commodities*, Ex Parte No. 346 (Sub-No. 24), 6 I.C.C. 2d 186 (1989), the ICC reviewed a petition for exemption of numerous manufactured commodities. The ICC noted its Congressional mandate to enhance competition by reducing regulation and "that the Commission will adopt a policy of reviewing carriers [sic] actions after the fact to correct abuses of market power." 6 I.C.C. 2d at 187. The ICC was able to comply with this mandate because it conducted a thorough analysis, performed preliminary

⁵ This dual-approach was discussed in the first exemption decision, *Supplementary Information – Rail General Exemption Authority*, Ex Parte No. 346 (ICC served Dec. 6, 1978) ("Ex Parte No. 346"), where the Commission heeded Congress' mandate that "...the Commission will not act in such a manner as to contravene its Congressional mandate to regulate interstate commerce." *Ex Parte No. 346*, citing S. REP. NO. 94-499, 94th Cong., 1st Sess. 53 (1975). The Commission further stated:

[T]here may be instances where the particular competitive circumstances are not sufficient to protect against the establishment of unreasonably high or unduly inflationary rate increases, unjust discrimination, undue preference or prejudice, absent regulatory protection for the benefit of shippers. An exemption under these circumstances would contravene the national transportation policy and would not be authorized by section 10505.

Ex Parte No. 346, Slip op. at 2 (emphasis added).

research, and conducted an in-depth review of facts relating to competitive alternatives for non-rail shipments of those commodities – including transportation data from the U.S. Census Board. Not convinced it had collected enough information, the Commission reviewed additional evidence, including comment from 32 shippers, rail associations, and the Department of Transportation. 6 I.C.C. 2d at 187-88.

Heeding concerns regarding potentially overbroad effects, the ICC scaled back the specific commodities to be exempted. The ICC's rationale for excluding certain items was based on the lack of established intermodal competition for those commodities. Specifically, the ICC "carefully narrowed the exemption to include only commodities for which there are adequate intermodal alternatives to assure competitive transportation." 6 I.C.C. 2d at 191. As such, this case sets the standard for the STB's evaluation of commodities exemptions and continuing obligation to review those exemptions.

By reviewing outdated exemptions, the Board would fulfill its obligation to promote competition and enhance shipper confidence in the Board as a viable forum for complaints about reduced competition among carriers. The ICC's exemption of construction materials did not follow precedent, and should be reviewed by the Board. *Rail General Exemption Authority—Petition of AAR to Exempt Rail Transportation of Selected Commodity Groups*, 9 I.C.C. 2d 969, 970 (1993) ("Aggregates"). Importantly, the factual analysis in the *Aggregates* exemption was insufficient. The ICC did not enthusiastically embrace this petition for exemption, based on the large number of commodities lumped into a single proceeding and lack of resources to adequately evaluate the proposed exemptions.⁶ The ICC conducted almost no meaningful

⁶ The exemption was not uniformly approved by the Board. Vice Chairman Simmons vehemently dissented from the decision, noting that a "shopping list" of proposals and dearth of facts were "shallow evidence" and an insufficient basis for granting an exemption. 9 I.C.C.2d at 983-84.

analysis of competition for transportation of the proposed commodities. Only carriers presented evidence; and the rationale for a lack of independent evaluation by the ICC was that there had been "no opposition" to exempting aggregates (including some construction materials) from regulation. When compared with its Congressional mandate, the *Aggregates* decision fails to meet the Congressional mandate to conduct a proper evaluation.

As noted above, there have been significant changes in the rail industry that warrant a re-examination of commodity exemptions generally and of specific aggregate and related commodities exemptions. First, there has been severe market concentration. Consolidation in Class I carriers has declined from 42 to 7, and the four largest of them move the vast majority of the total traffic. Also, even though branch lines have been sold to short line railroads, paper and steel barriers have preserved monopolies over particular plants. In addition, trucking alternatives, perhaps the biggest justification for granting commodity exemptions, are not as viable. Moreover, Class I carriers' market share of aggregates (and other construction materials) has improved by 29.6% in the past year.⁷ Finally, current opinions have increasingly questioned the continued usefulness of exempted commodities in a rail industry that has become highly concentrated into a few market players. STB member Mulvey voiced such concerns in a recent hearing on stand-alone cost and small rate case procedures. *Rail Rate Challenges Under the Stand-Alone Cost Methodology*, STB Ex Parte No. 657 (STB served 24, 2005). Recent articles in the trade press and public comments to other agencies have also criticized the continued use of commodity

⁷ Association of American Railroads, "Rail Freight Traffic Up From A Year Ago," Press Release (Sept. 15, 2005).

exemptions when the original purpose of creating such exemptions (*i.e.*, presumption of competitive options) is no longer present.⁸

In light of the post-Staggers Act empowerment of large rail carriers, the Board should demonstrate its support for rail customer interests. Specifically, the Board should consider reviewing whether the broad commodity exemptions authorized in the early 1990s are still justified and consistent with the intent of Congress. In addition, the Board should clarify that any commodity exemptions found to still be proper are nevertheless limited to shielding railroads from challenges to the rates charged, not all aspects of the common carrier obligation.⁹ Finally, the Board should begin evaluating and accepting comment upon the lopsided exemption standard.

V. THE STB SHOULD IMPLEMENT THE PRO-COMPETITIVE PROVISIONS OF THE STAGGERS ACT

The dual intent of the Staggers Act was to provide financial revitalization to, and foster competition among, rail carriers. These goals have been codified in numerous provisions of the Act. First and foremost, the rail transportation policy (codified as 49 U.S.C. § 10101) mandates

⁸ Kahn, Fritz "Short Sighted Exemptions," 28 ATLLP Association Highlights No. 4, pp. 26-27 (May-June 2005); Carstensen, Peter "Comments to the Antitrust Modernization Commission on Regulated Industries," Public Comments filed with the Antitrust Modernization Commission (submitted July 15, 2005). Professor Carstensen highlights the problem with continued exemption protection for carriers. After recognizing that "without exception" deregulation has allowed businesses greater flexibility in competing and the resulting industry efficiencies – specifically railroads – have been "substantial." However, Prof. Carstensen also states that "aspects of [these] industries have significant monopoly characteristics or have the potential for strategic conduct that can exclude competition and exploit customers." Comments, at 2.

⁹ For an example of overextended expansion of the commodities exemption, see *Pejepscot Industrial Park, Inc., d/b/a/ Grimmel Industries—Petition for Declaratory Order*, STB Finance Docket No. 33989 (STB served May 15, 2003) ("Grimmel"). In *Grimmel*, the Board rejected shipper complaints about a carrier's refusal to meet basic common carrier obligations to provide service – despite evidence that the respondent had intentionally let the line fall into disrepair and had refused to provide service – because the commodity at issue was exempted. This case moved beyond mere rate deregulation and fully exempted the carrier from any meaningful duties to uphold the RTP.

that the Board seek out competitive means for carriers to provide service. Some examples include:

- Allowing competition and demand to establish reasonable rates;
- Ensuring effective competition and coordination between rail carriers and other modes;
- To maintain reasonable rates where there is an absence of effective competition;
- To reduce exit barriers to entry into and exit from the industry;
- To encourage honest and efficient management of railroads;
- To require individual rate increases; and
- To prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination.

49 U.S.C. § 10101(1)-(11). *See also, Chesapeake and Ohio Ry. Co. v. United States*, 704 F.2d 373 (7th Cir. 1983).

Second, the Board is required to promote competition where a party seeks access through construction or extension of a railroad line, so long as the activities are not inconsistent with the public convenience and necessity. 49 U.S.C. § 10901(c). Moreover, the incumbent rail carrier may not block any construction or extension authorized by the Board without a demonstration that the construction would be unreasonable, materially interfere with operations, and would not provide for reasonable compensation to the incumbent carrier. 49 U.S.C. § 10901(d). This includes a party seeking to cross over the incumbent's tracks to access shippers which are seeking competitive service. *Id.*

Third, the Board has the authority to require carriers to allow other carriers to use the incumbent's terminal facilities, so long as the requesting carrier can show that the use is practicable and in the public interest. 49 U.S.C. § 11102. If the incumbent refuses to permit use of the terminal facilities, then the Board may order access and establish the conditions of, and

compensation for, use by the requesting carrier. *Florida East Coast Ry. Co. v. United States*, 256 F.Supp. 986 (M.D. Fla. 1966), *aff'd*, 386 U.S. 8 (1967).

In addition, the rail merger provisions for the merger of at least two Class I railroads requires the Board to consider "whether the proposed transaction would have an adverse effect on competition." 49 U.S.C. § 11324(b)(5). As noted, however, rail mergers since the passage of the Staggers Act have resulted in basically four remaining railroads. Two in the West and two in the East. The resulting duopolies have had a significant anti-competitive impact on the national rail system.

Despite the statutory mandates to enhance competition, post-Staggers decisions by the ICC and the Board have systematically incapacitated important pro-competitive provisions. Another example is the insertion of paper barriers in branch line sales. This practice has stymied short-line railroads' ability to compete against large carriers. When offloading rail lines, Class I carriers frequently add provisions to the rail line sale or lease agreement that prevents or discourages the acquiring short line carrier from interchanging traffic with carriers other than the selling/leasing railroad. While these clauses may be accepted to avoid the higher priced carriers demand in exchange for barrier-free agreements, the overall effect restricts competition between the carriers by hindering new carriers from access to the selling/leasing railroad's customers.

The result of these actions is that, to many shippers, the Board is not a forum for relief. As noted above, shippers have begun to seek relief from other fora (e.g., Congress, the Department of Justice, the federal courts, and the Antitrust Modernization Commission). Absent a change in the status quo, the Board provides no meaningful public service to numerous shippers. If the pro-competitive provisions of the Staggers Act are not restored, then it may be time to disband the Board, eliminate antitrust immunities for railroads, and completely

deregulate the rail industry. This would allow a free market to create a level playing field to generate profits for additional rail infrastructure.

VI. CONCLUSION

For the reasons stated above, CEMEX urges the Board to (a) review the effect of the aggregates (construction materials) exemption promulgated under the Staggers Act, and (b) begin more aggressively implementing the pro-competitive provisions of the Staggers Act for the benefit of shippers. CEMEX appreciates the opportunity to review these matters with the Board. CEMEX also looks forward to working with the Board and other parties towards improving the Board's regulation of exempted commodities.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on this 12th day of October, 2005, I caused the foregoing "Comments of CEMEX, Inc." in the Ex Parte No. 658 proceeding to be served upon counsel for all known parties of record by first class mail, postage prepaid, or by more expeditious means.


Christine J. Sommer

