

## PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

### 1852.210–70, 1852.212–70, and 1852.212–74 [Removed]

- 3. Remove sections 1852.210–70, 1852.212–70, and 1852.212–74.

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## SURFACE TRANSPORTATION BOARD

### 49 CFR Part 1039

[Docket No. EP 704 (Sub-No. 1)]

#### Review of Commodity, Boxcar, and Trailer-on-Flatcar/Container-on-Flatcar (TOFC/COFC) Exemptions

**AGENCY:** Surface Transportation Board.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Surface Transportation Board (Board or STB) seeks public comment on its proposal to revoke the existing class exemptions for crushed or broken stone or rip rap; hydraulic cement; and coke produced from coal, primary iron or steel products, and iron or steel scrap, wastes or tailings. The Board also invites interested parties to file, during the comment period for these proposed rules, comments regarding the possible revocation of other commodity class exemptions.

**DATES:** Comments on the proposed rulemaking are due on or before May 27, 2016; replies are due June 27, 2016.

**ADDRESSES:** Any filings submitted in this proceeding must be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions found at the E-FILING link on the Board's Web site at [www.stb.dot.gov](http://www.stb.dot.gov). Any person submitting a filing in the traditional paper format should send an original and 10 copies and also an electronic version to: Surface Transportation Board, Attn: Docket No. EP 704 (Sub-No. 1), 395 E Street SW., Washington, DC 20423–0001.

**FOR FURTHER INFORMATION CONTACT:** Scott Zimmerman at (202) 245–0386. Assistance for the hearing impaired is available through the Federal Information Relay Services (FIRS) at 1–800–877–8339.

#### SUPPLEMENTARY INFORMATION:

##### Introduction

In 1976, as part of the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94–210, 90 Stat.

31, Congress gave the Board broad authority to exempt rail carriers from regulation when such regulation was not needed to protect against abuses of market power. The Interstate Commerce Commission (ICC or Commission) first exercised its exemption authority in *Rail General Exemption Authority—Fresh Fruits & Vegetables*, 361 I.C.C. 211 (1979), categorically exempting the transportation of certain fresh fruits and vegetables from its regulations.

Congress revised the statutory exemption standard in the Staggers Rail Act of 1980, 94 Stat. 1895, to provide that the agency shall exempt a person, class of persons, or a transaction or service when it finds that the application of a provision of 49 U.S.C. subtitle IV (1) is not necessary to carry out the transportation policy of section 10101a; and (2) either (a) the transaction or service is of limited scope, or (b) the application of the statute is not necessary to protect shippers from the abuse of market power. The exemption provision, which is now codified at 49 U.S.C. 10502,<sup>1</sup> also provides that the agency may revoke an exemption (partially or completely) if the agency later determines that the application of the Interstate Commerce Act is necessary to carry out the Rail Transportation Policy at 49 U.S.C. 10101 (the RTP). See section 10502(d).

Pursuant to its exemption authority, the ICC, and later the Board, exempted from regulation the transportation by rail of numerous other individual commodities, finding that traffic for these individual commodities was sufficiently competitive and that railroads lacked the ability to subject shippers to an abuse of market power.<sup>2</sup> These commodity exemptions are codified at 49 CFR 1039.10 and 1039.11. The Commission also exempted rail (and truck) operations provided in connection with trailer-on-flatcar/container-on-flatcar (TOFC/COFC) services, at 49 CFR pt. 1090,<sup>3</sup> and the

<sup>1</sup> There have been additional changes to the exemption provision since the Staggers Act with regard to the process and timing of exemption proceedings. The substantive standard, however, has remained the same.

<sup>2</sup> See *Rail Gen. Exemption Auth.—Nonferrous Recyclables*, 3 S.T.B. 62 (1998); *Rail Gen. Exemption Auth.—Pet. of AAR to Exempt Rail Transp. of Selected Commodity Groups*, 9 I.C.C.2d 969 (1993); *Exemption from Regulation—Rail Transp. Frozen Food*, 367 I.C.C. 859 (1983); *Liquid Iron Chloride*, 367 I.C.C. 347 (1983); *Rail Gen. Exemption Auth.—Miscellaneous Agric. Commodities*, 367 I.C.C. 298 (1983).

<sup>3</sup> See *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731 (1981); *Improvement of TOFC/COFC Regulations (R.R.-Affiliated Motor Carriers & Other Motor Carriers)*, 3 I.C.C.2d 869 (1987); *Improvement of TOFC/COFC Regulations (Pickup & Delivery)*, 6 I.C.C.2d 208 (1989).

rail transportation of all commodities in single-line boxcar service, at 49 CFR 1039.14.<sup>4</sup>

#### February 2011 Hearing

The agency's exemption decisions were instrumental in the U.S. rail system's transition from a heavily regulated, financially weak component of the economy into a mature, healthy industry that operates with limited oversight. However, more than 30 years have passed since many of the commodity exemptions were adopted, and there have been many changes in the railroad industry over that period. In more recent years, the Board received informal inquiries questioning the relevance or necessity of some of the existing commodity exemptions. The Board, therefore, requested public comment and held a public hearing in February 2011 to explore the continued utility of, and the issues surrounding, the various commodity exemptions under 49 CFR 1039.10 and 1039.11, the boxcar exemption under 49 CFR 1039.14, and the TOFC/COFC exemption under 49 CFR pt. 1090. The Board encouraged interested parties to address the effectiveness of the exemptions in the marketplace, whether the rationale behind any of these exemptions should be revisited, and whether the exemptions should be subject to periodic review.

The Board received written comment from numerous parties representing a diverse group of stakeholders including railroads, shippers, and the U.S. Department of Transportation. Twenty-one individuals testified at the hearing. The Board has considered those written comments and the oral testimony in developing the proposal discussed below.

#### Proposed Rule

As discussed above, pursuant to 49 U.S.C. 10502(d), the Board may revoke an exemption, in whole or in part, when it finds that regulation is necessary to carry out the RTP. After considering the oral testimony and written comments, waybill rate data for years 1992 through 2013,<sup>5</sup> and other industry information, the Board now proposes to revoke the commodity exemptions for the following Standard Transportation Commodity Code (STCC) groups: STCC

<sup>4</sup> See *Exemption from Regulation—Boxcar Traffic*, 367 I.C.C. 425 (1983); *Exemption from Regulation—Boxcar Traffic*, 367 I.C.C. 747 (1983); *Exemption from Regulation—Boxcar Traffic*, 3 I.C.C.2d 23 (1986). See also *Brae Corp. v. United States*, 740 F.2d 1023 (D.C. Cir. 1984).

<sup>5</sup> The Board reviewed a 22-year period of confidential waybill data, beginning with information filed in 1992 and ending with data filed in 2013, the most recent on file with the Board.

No. 14–2, crushed or broken stone or rip rap; STCC No. 29–914, coke produced from coal; STCC No. 33–12, primary iron or steel products (plates, pipes, and rods); STCC No. 32–4, hydraulic cement; and STCC No. 40–211, iron or steel scrap, wastes or tailings.<sup>6</sup>

With regard to each of these commodity groups, the dynamics of the particular transportation markets appear to have changed so significantly since the exemptions were first promulgated as to warrant the application of the Interstate Commerce Act in order to carry out the Rail Transportation Policy. As discussed below, these changes point toward an increased likelihood of railroad market power for each of these specific commodity groups. This conclusion is also supported by the fact that railroad waybill rate data for these commodities shows a substantial increase in revenue from potentially captive traffic (*i.e.*, traffic with a revenue-to-variable cost (R/VC) ratio of more than 180%) over the last 22 years.<sup>7</sup> Thus, with respect to these commodities, the Board believes that reestablishing regulatory oversight is necessary to foster sound economic conditions in transportation, 49 U.S.C. 10101(5), maintain reasonable rates where there is an absence of effective competition, section 10101(6), and prohibit predatory pricing and practices, avoid undue concentrations of market power, and prohibit unlawful discrimination, section 10101(12).

The purpose of this proposal is to restore shippers' access to the Board's regulatory oversight and processes—in particular, shippers of those commodities where evidence indicates that the competitive landscape has changed significantly enough to indicate that renewed regulation is needed to carry out the RTP. The Board is committed to ensuring that stakeholders have an appropriate, meaningful path to the Board, and the proposal here is an important step towards that goal. The Board also welcomes interested parties

<sup>6</sup> The Standard Transportation Commodity Code is a numerical code used to identify commodities and groupings of commodities. The initial two digits represent a broad commodity grouping; subsequent numbers indicate smaller sub-groupings or individual commodities. See *Rail Gen. Exemption Auth.—Pet. of AAR to Exempt Rail Transp. of Selected Commodity Groups*, 9 I.C.C.2d 969 n.2 (1993).

<sup>7</sup> R/VC ratios in excess of the market dominance threshold of 180% do not, standing alone, establish market power or an abuse of such power. Thus, the Board bases its proposal to revoke these commodity class exemptions on a variety of marketplace changes described in this notice of proposed rulemaking. However, R/VC ratios have long been used by the Board as one indication of market power, and it is appropriate to rely on this data as supporting evidence.

to file comments regarding the possible revocation of other commodity class exemptions; such comments should address any marketplace changes comparable to the ones described below.

#### 1. STCC Nos. 14–2, Crushed or Broken Stone or Rip Rap

In *Rail General Exemption Authority—Petition of AAR to Exempt Rail Transportation of Selected Commodity Groups (Petition of AAR)* 9 I.C.C.2d 969 (1993), the Commission exempted from its regulation the railroad transportation of several commodities, including crushed or broken stone or rip rap (crushed stone).<sup>8</sup> After reviewing broad, market-share data, the Commission found that the rail transportation of crushed stone consisted of short hauls and was characterized by declining or stagnant revenue per unit of service—market characteristics not consistent with a finding of market power. *Id.* at 974. Thus, the Commission concluded that regulation of this commodity was not necessary to carry out the transportation policy of section 10101 because transportation was competitive, and an exemption would, among other things, minimize the need for federal regulatory control; increase competition between rail carriers and trucks by allowing quick, selective rate changes in response to competition; and allow more efficient management by allowing pricing changes in response to changing business conditions. *Id.* at 973.

In its February 2011 hearing comments, Texas Crushed Stone (TCS), a limestone quarry operator, argued that the Board should consider revoking the class exemption for crushed stone or aggregates. (TCS Comments 8.) TCS stated that the business landscape of the railroad industry had changed since the Staggers Rail Act of 1980 was enacted. (*Id.* at 4.) TCS also claimed that intramodal competition had been reduced as a result of railroad consolidation and asserted that some railroads had abused their market power by aggressively increasing rail transportation rates. (*Id.* at 8.) TCS maintained that trucking was not a practical check on railroad market power as there are not enough trucks or drivers to handle the volumes it had shipped in the past. (*Id.* at 5.) TCS also asserted that the preponderance of its shipments were captive, as most of its customers were served by one railroad. (*Id.* at 5.) Accordingly, TCS requested that the Board revoke the exemptions

<sup>8</sup> In that decision, the Commission exempted the railroad transportation of 16 other classes of commodities as well.

for crushed stone so that TCS can seek regulatory relief from unfair rates and unreasonable practices. (*Id.* at 6.)

When the Commission first exempted the rail transportation of this commodity group, testimony provided by witnesses on behalf of individual rail carriers indicated that this commodity group was subject to motor carrier competition because movements were often short haul in nature. *Petition of AAR*, 9 I.C.C.2d at 975. The Commission also found, based on data provided by AAR, that the rail market share of this commodity group was 5.4% in 1975, 4.8% in 1980, 4.0% in 1985, and 4.6% in 1990, evidencing a lack of railroad market dominance. *Id.* at 974. Recent information suggests that certain market dynamics may have changed significantly.

While it appears that railroads still have a relatively small modal market share of the overall commodity group, TCS's testimony suggests that trucking does not effectively limit railroad market power with respect to this commodity group. Moreover, waybill data analysis demonstrates that the average R/VC ratio for potentially captive traffic for this commodity group increased from 232.2% in 1992 to 254.9% in 2013. Similarly, the percentage of potentially captive traffic by revenue for this commodity group increased from 14.8% in 1992 to 62.0% in 2013. These significant changes indicate that revocation of the exemption may be necessary to carry out the RTP provisions discussed above with regard to crushed or broken stone or rip rap.

#### 2. STCC Nos. 29–914, Coke Produced From Coal; 33–12, Primary Iron or Steel Products (Plates, Pipes, and Rods); and 40–211, Iron or Steel Scrap, Wastes, or Tailings

In *Petition of AAR*, 9 I.C.C.2d at 978, the Commission also exempted from its regulation the railroad transportation of coke produced from coal, as well as primary iron or steel products. With regard to coke produced from coal, the Commission observed that there was, overall, a significant railroad market share for this commodity.<sup>9</sup> *Id.* Nevertheless, based on other evidence, the ICC determined that there was product competition, intramodal competition, and depressed prices for coke. *Id.* For example, the ICC concluded that the average revenue per

<sup>9</sup> The Board considered combined market share data for coke produced from coal and petroleum coke. AAR subsequently withdrew its request for the exemption of petroleum coke.

ton-mile for coke had increased at rates below inflation. Also, the American Iron and Steel Institute supported the exemption and asserted, among other things, that an exemption would reduce the administrative burden associated with tariff and contract filing. Viewing the testimony from a trade association of shippers to be especially probative, the Commission exempted the rail transportation for coke produced from coal. *Id.*

In determining whether to exempt the rail transportation of primary iron or steel products, the Commission reviewed modal market share data for this commodity group. 9 I.C.C.2d at 979. The agency concluded that fluctuating railroad market shares over the course of 15 years (*i.e.*, 40.4% (1975), 39.2% (1980), 29.7% (1985), and 37.8% (1990)) was consistent with a lack of market power. The Commission also noted that much of this traffic moved under contract. After considering the data, along with the testimony submitted from witnesses of individual railroads and a statement from the American Iron and Steel Institute supporting the exemption, the Commission exempted this class of commodities.

A few years later, in *Rail General Exemption Authority—Exemption of Ferrous Recyclables*, Docket No. EP 346 (Sub-No. 35) (ICC served May 16, 1995), the Commission exempted from regulation the railroad transportation of iron or steel scrap, wastes and tailings (STCC No. 40–211). The Commission found the transportation of this commodity group to be extremely competitive. Specifically, the ICC found that intramodal competition with other railroads and intermodal competition with trucks and barges existed in many markets. *Id.* at 3. Also, the Commission determined that there was exceptionally strong geographic competition for this commodity group, which would further inhibit railroads from exercising market power. *Id.* Further, the Commission found the iron and steel scrap traffic average R/VC ratios of 139.5% in 1991 and 138.6% in 1992, more than 40 percentage points less than the Commission's statutory 180% R/VC rate threshold. *Id.* at 4. Accordingly, the Commission concluded that it was reasonable to assume that the majority of the individual carload R/VC ratios were also below the jurisdictional threshold. *Id.*

Several changes relating to the transportation of these commodity groups suggest that railroads have greater market power today than they did when the ICC issued its exemption decisions. First, as a general matter, in the last several decades, the United

States has been generating more scrap and requiring less traditional steel production in general, which has led the steelmaking industry to shift away from traditional blast furnaces towards electric arc furnaces (EAF) to convert scrap into new steel.<sup>10</sup> This trend towards the utilization of EAFs has resulted in the movement of steel production away from the Great Lakes region to the South.<sup>11</sup> When steel production was located primarily in the Great Lakes region, water carriage was an option for transportation—*e.g.*, over the Great Lakes themselves—but is now less so after the migration to the South. With respect to trucking, a review of confidential waybill data for 1992 and 2013 demonstrates that the average length of haul (weighted by tons) for primary iron or steel products and iron or steel scrap has increased for non-intermodal and non-boxcar movements. For primary iron or steel products, the average length of haul has increased by 74 miles, from 652 miles to 726. Similarly, the average length of haul for iron or steel scrap has increased 114 miles, from 306 miles in 1992, to 420 miles in 2013. Although it is unknown what specific factors have contributed to such increases, this data is one indication of trucking being less competitive in today's marketplace.<sup>12</sup> For these reasons, railroads may be enjoying more market power now than in the early 1990's over shippers in the iron and steel industry.<sup>13</sup> We note that the submission of modal market share data over time (between railroads, trucks and barge) with regard to these

<sup>10</sup> John W. Miller, *Times Have Changed: New Plan for a Century-Old U.S. Steel Mill*, Wall Street Journal (Jan. 28, 2014), <http://blogs.wsj.com/corporate-intelligence/2014/01/28/times-have-changed-new-plan-for-a-century-old-u-s-steel-mill/>.

<sup>11</sup> AMM Staff, *Electric Arc Furnace Production Keeps Moving South*, American Metal Market (Aug. 27, 2015, 4:12 p.m.), <http://www.amm.com/Article/3483752/Electric-arc-furnace-production-keeps-moving-south.html>.

<sup>12</sup> Trucking becomes less viable when the length of haul exceeds 500 miles because any transport over that threshold, in many instances, could not be completed in one day. Increases in the average length of haul for the above mentioned commodities is one possible indicator that there are more movements exceeding the 500-mile threshold—thereby contributing to less competitive pressure from trucking.

<sup>13</sup> During the Board's February 2011 proceeding, AK Steel Corporation (AK Steel), a steel producer with seven steelmaking and finishing plants in the United States, filed comments arguing that the rationale underlying many of the exemptions no longer exists or is otherwise inapplicable in today's market. According to AK Steel, due to the characteristics of its particular freight, it must ship via rail because other modes, such as truck, are not viable options. (AK Steel Comments 3.) AK Steel further notes that, in many instances, its facilities are captive to a single railroad and are subject to monopoly railroad power and market dominant pricing. (*Id.* at 5.)

commodity groups will be helpful in assessing the degree to which the geographic migration may have affected intermodal competition.

Similar arguments with regard to EAFs are also applicable to coke produced from coal (STCC No. 29–914). Years ago, blast furnaces in Pennsylvania, for instance, were not located far from coke sources in that same area. These short-haul distances potentially allowed for a significant volume of coke to be shipped to blast furnaces on trucks for use in the steelmaking process. However, a review of the Board's confidential waybill rate data indicates that the average length of haul for non-intermodal, non-boxcar coke produced from coal has increased by 39 miles, from 372 miles in 1992, to 411 in 2013. A 39-mile increase in the average length of haul is consistent with more transportation movements exceeding 500 miles in 2013 than in 1992, which supports the Board's concern that there is less competition from the trucking industry to transport this commodity.

We are aware that, in one rate reasonableness case, the complaining shipper requested that the exemption for coke be partially revoked. *See FMC Wyo. Corp. v. Union Pac. R.R.*, NOR 42022 et al., slip op. at 13 n.17 (STB served May 12, 2000). Although the Board found that there was not sufficient evidence to revoke the exemption for coke at that time, more recent quantitative findings, discussed below, lend support to the idea that the transportation market for that commodity might have changed significantly since then.

Second, analysis of the Board's confidential waybill data further supports a conclusion that each of these commodity groups may be subject to increased market power from railroads. With regard to primary iron or steel products (STCC No. 33–12), from 1992 to 2013, the percentage of revenue that was potentially captive for primary iron or steel products doubled from 18.8% to 37.6%. Similarly, for iron and steel scrap (STCC No. 40–211), the percentage of revenue that was potentially captive doubled from 22.1% to 44.0% during this same time frame. Also, for primary iron or steel products, the average R/VC ratio for potentially captive traffic increased during the 22-year period, from 219.1% in 1992 to 236.6% in 2013. For 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%. Thus, the Board observes that the traffic for both primary iron or steel products and iron

or steel scrap appears to be increasingly potentially captive to railroads, and that this potentially captive traffic is being charged higher R/VC ratios over time. This data suggests that railroads may be exerting increased market power over shippers of these commodities.

Likewise, the Board's confidential waybill data for coke produced from coal indicates that the percentage of revenue that was potentially captive almost tripled from 1992 to 2013. In 1992, 20.1% of revenue was potentially captive compared to 58.9% in 2013. During that same time period, the average R/VC ratio for potentially captive coke traffic increased by approximately 23 points from 225.0% to 248.2%. Thus, it appears that coke produced from coal is becoming increasingly captive to railroads, and that the captive traffic is being charged higher R/VC ratios over time. These findings are consistent with increased market power.

### 3. STCC No. 32–4, Hydraulic Cement

In *Rail General Exemption Authority—Exemption of Hydraulic Cement*, EP 346 (Sub-No. 34) (ICC served July 26, 1995), the Commission exempted from its regulation the rail transportation of hydraulic cement. The ICC found that movements of hydraulic cement were predominantly short-haul in nature, and that railroads therefore faced pervasive competition from other railroads, from barges, and especially from trucks. *Id.*, slip op. at 4. The Commission, consequently, determined that regulation was not necessary to carry out the RTP and that an exemption would not permit railroads to abuse market power.

Several shippers of exempted construction commodities and a shipper organization filed comments and/or testified at the Board's February 2011 hearing.<sup>14</sup> The Cement Shippers urged the Board to reexamine or revoke the exemptions that applied specifically to cement and construction materials. They asserted that the competitive landscape had changed significantly and that the railroad industry's financial situation had improved markedly since the adoption of the commodity exemptions. They also asserted that railroad consolidation had resulted in

<sup>14</sup> These included CEMEX, Inc. (CEMEX); Holcim (US), Inc. (Holcim); and the Portland Cement Association (PCA). CEMEX requested that the Board revoke the exemption for construction materials. Similarly, Holcim requested revoking the exemption for hydraulic cement and the materials used in the manufacture of cement. PCA requested that the Board revoke the exemption for construction materials, and more specifically, cement and fly ash. These shippers are collectively referred to as "Cement Shippers."

carriers having increased market power, enabling railroads to impose steep rate increases, and that the competitive situation was made worse by declining competition from the motor carrier industry, due to fuel prices, a shortage of drivers, and increased congestion on highways and roads.

When the ICC first exempted the rail transportation of hydraulic cement, the Commission found that railroads faced pervasive competition. The ICC concluded that intermodal and intramodal competition for hydraulic cement existed in many regions—trucking was dominant, and barges and other rail carriers also competed in the marketplace. *See Rail Gen. Exemption Auth.—Exemption of Hydraulic Cement*, EP 346 (Sub-No. 34), slip op. at 4. However, changes in the rail and cement industries appear to have significantly reduced the effectiveness of competitive transportation alternatives. According to PCA, over the course of 30 years, the number of cement manufacturing plants has fallen from 179 to fewer than 100, while plant capacity, on average, has doubled. (PCA Comments 10.) Consequently, cement shippers are shipping greater distances, where trucking is not economically feasible. (*Id.*) On average, according to PCA, cement shipments now range between 250 to 300 miles, yet truck transportation is not an economical mode of transport beyond 100 to 125 miles. (*Id.* at 2) The Cement Shippers state that over 80% of cement shipments in the United States are served by a single railroad. (*Id.*)

The Board's analysis of waybill data for years 1992 through 2013 reveals that R/VC ratios for hydraulic cement have trended upwards over the course of 22 years. In 1992, the R/VC ratio for potentially captive cement traffic was 208.3%, compared to 239.6% in 2013. Also, the percentage of potentially captive traffic by revenue increased from 18.9% in 1992 to 54.6% in 2013. The Board finds that increases in both the R/VC ratio for potentially captive traffic and the percentage of potentially captive traffic by revenue are possible indicators of increased railroad market power sufficient to warrant regulatory oversight. This data further supports the Board's proposal to revoke the exemption for hydraulic cement.

### Conclusion

For the foregoing reasons, the Board proposes to revoke the exemptions, in whole, of STCC No. 14–2, crushed or broken stone or rip rap; STCC No. 29–914, coke produced from coal; STCC No. 33–12, primary iron or steel products (plates, pipes, and rods); STCC No. 40–

211, iron or steel scrap, wastes or tailings; and STCC No. 32–4, hydraulic cement, because regulation of these commodities is necessary to carry out the RTP.

The Board seeks public comment on whether the exemptions should be revoked.<sup>15</sup> Commenters are invited to include any relevant data in support of their comments, including, but not limited to, the types of data (for example, modal market share, among other things), upon which the ICC relied in first promulgating the class exemptions now proposed to be revoked.<sup>16</sup> The Board also invites parties to address how market conditions today differ from those that existed when the exemptions were granted and to reflect upon whether or how those changes should affect the Board's evaluation of those data sources upon which the ICC relied. Finally, as noted, the Board welcomes interested parties to file further comments regarding the possible revocation of other commodity class exemptions.

### Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) Assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. Sections 601–604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, section 603(a), or certify that the proposed rule would not have a "significant impact on a substantial number of small entities," section 605(b).

Because the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on

<sup>15</sup> We note that additional commenters addressed certain of these commodity exemptions in the February 2011 hearing proceeding. In commenting in this proceeding, parties may incorporate and supplement prior comments as appropriate.

<sup>16</sup> *See Rail Gen. Exemption Auth.—Pet. of AAR to Exempt Rail Transp. of Selected Commodity Groups*, 9 I.C.C.2d 969 (1993); *Rail Gen. Exemption Auth.—Exemption of Ferrous Recyclables*, EP 346 (Sub-No. 35) (ICC served May 16, 1995); and *Rail Gen. Exemption Auth.—Exemption of Hydraulic Cement*, EP 346 (Sub-No. 34) (ICC served July 26, 1995).

small entities “whose conduct is circumscribed or mandated” by the proposed rule. *White Eagle Coop. Ass’n v. Conner*, 553 F.3d 467, 480 (7th Cir. 2009).

The rules proposed here would potentially have a significant economic impact on a substantial number of small entities. Thus, we encourage comment on any information relevant to a significant burden, if any, the proposed rules would have on small rail carriers.

*Description of the Reasons That Action by the Agency Is Being Considered*

The Board held a public hearing in February 2011 to explore the continued utility of, and the issues surrounding, exemptions under section 10502, specifically the various commodity exemptions under 49 CFR 1039.10 and 1039.11, the boxcar exemption under 49 CFR 1039.14, and the TOFC/COFC exemption under 49 CFR pt. 1090. The Board held the hearing because it had been many years (and, in some cases, decades) since the agency promulgated many of these commodity exemptions, and the Board had received various informal inquiries questioning the relevance and/or necessity of some of the existing commodity exemptions, given the changes in the competitive landscape and the railroad industry that have occurred in the intervening years. A more detailed description of the agency’s historical deregulation of the aforementioned commodities, and the Board’s reasons for considering the proposed rules are set forth above in this NPRM.

*Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule*

The objective of the proposed rule is to restore shippers’ access to the Board’s regulatory oversight and processes—in particular, shippers of those commodities where evidence indicates that the competitive landscape has changed significantly enough to indicate that renewed regulation is needed to carry out the national RTP. Specifically, the Board has concluded, based on the record in this proceeding, that renewed regulation is needed with respect to the rail transportation of (1) crushed or broken stone or rip rap; (2) hydraulic cement; and (3) coke produced from coal, primary iron or steel products, and iron or steel scrap, wastes or tailings. The legal basis for the proposed rule is 49 U.S.C. 10502(d), which gives the Board authority to revoke an exemption, in whole or in part, when it finds that regulation is necessary to carry out the RTP of 49 U.S.C. 10101.

*Description of and, Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply*

In general, revoking the exemptions for the commodities listed above would impose on all of the nation’s approximately 562 small rail carriers<sup>17</sup> the obligation to, among other things, provide common carrier rail transportation of those commodities upon reasonable request.

*Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record*

Under the Board’s proposed rules, the revocation of exemption for STCC No. 14–2, crushed or broken stone or rip rap; STCC No. 29–914, coke produced from coal; STCC No. 33–12, primary iron or steel products (plates, pipes, and rods); STCC No. 32–4, hydraulic cement; and STCC No. 40–211, iron or steel scrap, wastes would now require a carrier to comply with the Board’s statutes and regulations regarding the provision of common carrier service upon reasonable request, maintenance of reasonable practices and rates, and provision of adequate service. However, regulation would not impose new reporting requirements directly or indirectly on small entities—ICCTA removed regulatory paperwork burdens (with limited exceptions) on rail carriers to file tariffs or contract summary filings for rail shipments, exempt or non-exempt. Nevertheless, the Board seeks further comment on any recordkeeping or other compliance requirements, if any, needed to conform to the proposed rules.

*Identification, to the Extent Practicable, of all Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule*

The Board is unaware of any duplicative, overlapping, or conflicting federal rules. The Board seeks comments and information about any such rules.

<sup>17</sup> The Small Business Administration’s Office of Size Standards has established a size standard for rail transportation, pursuant to which a “line-haul railroad” is considered small if its number of employees is 1,500 or less, and a “short line railroad” is considered small if its number of employees is 500 or less. 13 CFR 121.201 (industry subsector 482).

*Description of any Significant Alternatives to the Proposed Rule That Accomplish the Stated Objectives of Applicable Statutes and That Minimize any Significant Economic Impact of the Proposed Rule on Small Entities, Including Alternatives Considered, Such as: (1) Establishment of Differing Compliance or Reporting Requirements or Timetables That Take Into Account the Resources Available to Small Entities; (2) Clarification, Consolidation, or Simplification of Compliance and Reporting Requirements Under the Rule for Such Small Entities; (3) use of Performance Rather Than Design Standards; (4) any Exemption From Coverage of the Rule, or any Part Thereof, for Such Small Entities*

Under the proposed rule, rail carriers would be required to comply with the Board’s statutes and regulations regarding the provision of common carrier service upon reasonable request, maintenance of reasonable practices and rates, and provision of adequate service. One alternative to the proposed rule would be to exempt certain or all small carriers from coverage or compliance with the rule, in whole or in part (that is, to revoke the commodity class exemptions at issue for larger carriers but keep the exemptions in place for some or all small carriers). Another alternative would be to take no action—thereby implementing no changes to the current regulatory regime. However, neither alternative would accomplish the proposed rules’ objective of restoring the rail transportation of the commodities at issue to the Board’s statutory and regulatory regime. Commenters should, if they advance these or any other alternatives in their comments, address how such alternatives would be consistent or inconsistent with the goals envisioned by the proposed rules.

**Authority:** 49 U.S.C. 10502 and 13301.

**List of Subjects in 49 CFR Part 1039**

Agricultural commodities, Intermodal transportation, Railroads.

Decided: March 23, 2016.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman. Vice Chairman Miller concurred with a separate expression. Commissioner Begeman dissented with a separate expression.

**Jeffrey Herzig,**  
Clearance Clerk.

**VICE CHAIRMAN MILLER, concurring:**

I am pleased that the Board is taking action on this long delayed matter and, in general, I agree with the outcome to

institute a Notice of Proposed Rulemaking (NPRM) to revoke the commodity exemptions listed in the decision. However, I write separately to express my frustration at the lengthy delay by the Board to take any action on this matter, and the narrow analysis that was used to reach this result.

It has been over five years since the Board first held a hearing to examine whether any commodity exemptions should be revoked. For these five years, our stakeholders have been left in the dark as to if or when the Board would act. My hope was that, given the long wait, the Board would at least conduct a thorough and wide-ranging analysis, but as today's decision makes clear, that was not the case.

In order to demonstrate that the commodity exemptions here warrant revocation, the Board mainly relies on two pieces of data: the change in R/VC ratios over the last two decades and the percentage of traffic moved by rail that is "potentially captive" (*i.e.*, above 180% R/VC). While not the strongest foundation on which to propose new rules, I believe it provides a sufficient basis to move forward, which is why I support today's decision. However, I would have liked the Board to go further and provide an analysis of all other commodities that are currently exempt from regulation. Instead, the scope of the decision here is limited to just those commodities that shippers identified at the 2010 hearing (and, even then, not all of them). I see no reason why the Board could not have analyzed other commodities, even if they were not presented at the 2010 hearing.

By the same token, the Board—without explanation—provides no analysis regarding whether commodities that are currently regulated should now be exempted. Instead, the Board chooses to look only at commodities that are already exempt. In fact, the Board's decision ignores the request from Norfolk Southern Railway (NSR) for the Board to examine four commodities that NSR claims no longer require Board regulation. After keeping our stakeholders waiting for years, a broader analysis is the least I would expect.

As I was unsatisfied with this limited analysis, I requested the Board's Office of Economics (OE) to conduct such analyses and provide me with the results. While I would have included such analyses as part of the decision today, they would not have led me to a different outcome. In particular, based on the conclusions I have drawn from the analyses, I believe that the railroads have likely not increased market power for any exempt commodities other than those addressed in this decision.

In addition, I requested that OE look at available data to assess whether it appears that the railroads have lost market power over any commodities that are currently regulated, including the commodities that NSR identified in its comments as part of the 2010 hearing. Based on this analysis, only a handful of commodities showed a potential loss of market power by the railroads, but they all involved too minimal an amount of traffic to warrant revising the regulations.

For reasons I do not understand, the Board has chosen not to include this analysis as part of the decision, though in my view its inclusion would strengthen it. Based on the results of the analysis, I would not have advocated for any further revocations of commodity exemptions other than the ones listed here, nor to exempt any commodities that are currently regulated. Without the analysis though, I would not have known that was the case and I would not have felt comfortable voting to approve this decision.

That being said, I agree with Commissioner Begeman that the record on which we are basing this decision is less than robust and could benefit from additional information. Accordingly, I understand Commissioner Begeman's concern about proceeding directly to a NPRM. However, I believe that even without additional information, there is enough of a foundation on the record that we can move forward with an NPRM. Given that our stakeholders have waited for five years for the Board to take action, I am reluctant to proceed in a fashion that will add even more time to get to a final rule. As the Board will still receive comments from stakeholders, and because we can still make changes through a supplemental NPRM if the comments indicate our conclusions were wrong, I feel that this is a better course of action than the alternatives, such as starting with an Advanced Notice of Proposed Rulemaking. I will remain open to the idea of initiating an additional NPRM or a supplemental NPRM if we receive evidence that indicates that our conclusions with regard any commodities proposed for revocation are incorrect.

COMMISSIONER BEGEMAN,  
dissenting:

This record was created over half a decade ago, before two of the three current Board members were even appointed (and my five-year term since expired). For this Board to take informed action *now*, we should first ask interested stakeholders to update

the docket, and then propose whatever changes are necessary. And, importantly, we should commit to completing final action by a timely date certain.

Although I appreciate the Board staff's recent review of waybill rate data from 1992 through 2013, I am not convinced that analysis sufficiently supports altering the exemption landscape. The "record" the majority is relying on to support its proposed changes is a waybill-based hunch using limited information on these commodities. Today's decision also begs the question: if waybill data are sufficient basis for a proposed rule, then why didn't the Board act years ago? Nothing in this decision suggests that the case for action has markedly changed since 2011.

The proposed rule also fails to account for the present. Considerable and important events have taken place since the February 2011 hearing and the 2013 waybill cutoff, including the 2014 rail service crisis that impacted shippers and carriers across the country and the significant shifts in service demand for coal, oil, and other important commodities. Fuel prices have also changed dramatically. Unfortunately, today's proposed rule is completely uninformed by any of these or other current market considerations.

The law directs the Board to exercise its exemption authority broadly, and that directive was unchanged with passage of the recent STB Reauthorization Act, P.L. 114–110. Therefore, we shouldn't narrow or revoke exemptions granted under that authority absent compelling circumstances. Instead, the majority is proposing changes without really knowing whether the revocations are justified.

Even if a commodity is exempt, however, the Board is not uninterested. We still conduct broad oversight of exempt commodities and take action when we deem it necessary. For example, when the Board directed the carriers to provide weekly service reporting, we included reporting on intermodal and automobiles, which are exempt. The Board's Rail Shipper Transportation Advisory Council has included shippers of exempt commodities who also provide the Board with key rail service demand information. The Board's Rail Customer and Public Assistance Program also helps resolve the questions and problems of exempt commodity shippers whenever possible.

Clearly, stakeholders have waited far too long for Board action on this docket. But we should be asking the parties to update the record so that the Board can

propose an informed rule based on up-to-date information. Instead, the majority appears to be taking the path of least resistance to close a languishing docket. I dissent.

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend 49 CFR part 1039 as follows:

**PART 1039—EXEMPTIONS**

■ 1. The authority citation for part 1039 continues to read as follows:

Authority: 49 U.S.C. 10502, 13301.

■ 2. Section 1039.11 is revised to read as follows:

**§ 1039.11 Miscellaneous commodities exemptions.**

(a) *Commodities exempted.* (1) Except as indicated in paragraph (b) of this

section, the rail transportation of the commodities listed below is exempt from the provisions of 49 U.S.C. subtitle IV. The Standard Transportation Commodity Code (STCC) numbers that identify the exempted commodities are those in effect on the effective date of the tariff cited, and shall embrace all commodities assigned additional digits.

STCC No.	STCC Tariff	Commodity
14 1	6001-T, eff. 1-1-92	Dimension stone, quarry.
14 411	.....do	Sand (aggregate or ballast).
14 412	.....do	Gravel (aggregate or ballast).
20	.....do	Food or kindred products except: 20 143 Grease or inedible tallow. 20 32 Canned specialties. 20 33 Canned fruits, jams, jellies, preserves or vegetables. 20 4 Grain mill products. 20 6 Sugar, beet or cane. 20 8 Beverages or flavoring extracts. 20 911 Cottonseed oil, crude or refined. 20 914 Cottonseed cake or meal or by-products. 20 92 Soybean oil or by-products. 20 93 Nut or vegetable oils or by-products.
22	.....do	Textile mill products.
23	.....do	Apparel or other finished textile products or knit apparel.
24	.....do	Lumber or wood products.
25	.....do	Furniture or fixtures.
26	.....do	Pulp, paper or allied products except: 26 1 Pulp or pulp mill products. 26 211 Newsprint. 26 212 Ground wood paper, uncoated. 26 213 Printing paper, coated or uncoated, etc. 26 214 Wrapping paper, wrappers or coarse paper. 26 218 Sanitary tissue stock. 26 471 Sanitary tissues or health products. 26 6 Building paper or building board except: 26 613 Wallboard.
27	.....do	Printed matter.
28 195 22-23	.....do	Iron chloride, liquid.
28 195 27-30	.....do	Iron sulphate.
28 195 68-69	.....do	Ferrous sulphate.
29 915	.....do	Distillate or residual fuel oil from coal refining.
30	.....do	Rubber or miscellaneous plastics products except: 30 111 Rubber pneumatic tires or parts.
31	.....do	Leather or leather products.
32	.....do	Clay, concrete, glass or stone products except: 32 4 Hydraulic cement. 32 741 Lime or lime plaster. 32 95 Nonmetallic earths or minerals, ground or treated in any other manner except: 32 952 15 Cinders, clay, shale expanded shale), slate or volcanic (not pumice stone), or haydrite.
33	.....do	Primary metal products, including galvanized, except: 33 12 Primary Iron or Steel Products.
34	.....do	Fabricated metal products except: 34 6 Metal stampings. 34 919 40 Radioactive material shipping containers, etc.
35	.....do	Machinery except: 35 11 Steam engines, turbines, turbine generator sets, or parts. 35 85 Refrigerators or refrigeration machinery or complete air-conditioning units.
36	.....do	Electrical machinery, equipment or supplies except: 36 12 Power, distribution or specialty transformers. 36 21 Motors or generators.
3711	.....do	Motor vehicles.
3714	.....do	Motor vehicle parts or accessories.
38	.....do	Instruments, photographic goods, optical goods, watches or clocks.
39	.....do	Miscellaneous products of manufacturing.
41 118	6001-U, eff. 1-1-93	Used vehicles.
14 715	6001-V, eff. 1-1-94	Rock salt.

STCC No.	STCC Tariff	Commodity
20 143	.....do	Grease or Inedible Tallow.
28 133	.....do	Carbon dioxide.
28 991	.....do	Salt.
34 912	6001-W, eff. 1-1-95	Steel shipping containers.
33 119	6001-X, eff. 1-11-96	Blast furnace, open hearth, rolling mill or coke oven products, NEC.
20511	6001-X, eff., 1-1-96	Bread or other bakery products exc. biscuits, crackers, pretzels or other dry bakery products. See 20521-20529.
22941	.....do	Textile waste, garnetted, processed, or recovered or recovered fibres or flock exc. packing or wiping cloths or rags. See 22994.
22973	.....do	Textile fibres, laps, noils, nubs, roving, sliver or slubs, prepared for spinning, combed or converted.
22994	.....do	Packing or wiping cloths or rags (processed textile wastes).
24293	.....do	Shavings or sawdust.
30311	.....do	Reclaimed rubber.
3229924	.....do	Cullet (broken glass).
33312	.....do	Copper matte, speiss, flue dust, or residues, etc.
33322	.....do	Lead matte, speiss, flue dust, dross, slag, skimmings, etc.
33332	.....do	Zinc dross, residues, ashes, etc.
33342	.....do	Aluminum residues, etc.
33398	.....do	Misc. nonferrous metal residues, including solder babbitt or type metal residues.
40112	.....do	Ashes.
40212	.....do	Brass, bronze, copper or alloy scrap, tailings, or wastes.
40213	.....do	Lead, zinc, or alloy scrap, tailings or wastes.
40214	.....do	Aluminum or alloy scrap, tailings or wastes.
4021960	.....do	Tin scrap, consisting of scraps or pieces of metallic tin, clippings, drippings, shavings, turnings, or old worn-out block tin pipe having value for remelting purposes only.
40221	.....do	Textile waste, scrap or sweepings.
40231	.....do	Wood scrap or waste.
40241	.....do	Paper waste or scrap.
40251	.....do	Chemical or petroleum waste, including spent.
40261	.....do	Rubber or plastic scrap or waste.
4029114	.....do	Municipal garbage waste, solid, digested and ground, other than sewage waste or fertilizer.
4029176	.....do	Automobile shredder residue.
4111434	.....do	Bags, old, burlap, gunny, istle (ixtle), jute, or sisal, NEC.
41115	.....do	Articles, used, returned for repair or reconditioning.
42111	.....do	Nonrevenue movement of containers, bags, barrels, bottles, boxes, crates, cores, drums, kegs, reels, tubes, or carriers, NEC, empty, returning in reverse of route used in loaded movement, and so certified.
42112	.....do	Nonrevenue movement of shipping devices, consisting of blocking, bolsters, cradles, pallets, racks, skids, etc., empty, returning in reverse of route used in loaded movement, and so certified.
42311	.....do	Revenue movement of containers, bags, barrels, bottles, boxes, crates, cores, drums, kegs, reels, tubes, or carriers, NEC, empty, returning in reverse of route used in loaded movement and so certified.

(2) Also excepted from this exemption are those recyclable products specifically identified by the Board at 356 I.C.C. 445-447, those commodities previously exempt, and any transportation service regarding which the Board has made a finding of market dominance. However, this exemption shall not be construed as affecting in any way the existing regulations, agreements, prescriptions, conditions, allowances or levels of compensation

regarding the use of equipment, whether shipper or railroad owned or leased, including car hire, per diem and mileage allowances, and also including exemption from the anti-trust laws necessary to negotiate car service regulations or mandatory interchange of equipment or to maintain and execute such agreements. Nor shall this exemption be construed to affect existing Class III railroad "protections" in the case of boxcars.

(b) *Conditions.* Carriers must continue to comply with Board accounting and reporting requirements. All railroad tariffs pertaining to the transportation of these miscellaneous commodities will no longer apply. This exemption shall remain in effect, unless modified or revoked by a subsequent order of this Board.

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