

BEFORE THE
SURFACE TRANSPORTATION BOARD

REVIEW OF COMODITY, BOXCAR, AND
TOFC/COFC EXEMPTIONS

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

**REPLY COMMENTS OF THE
PORTLAND CEMENT ASSOCIATION**

The Portland Cement Association (“PCA”) submits the following Reply Comments in further support of the Surface Transportation Board’s (“Board”) notice of proposed rulemaking to remove the existing class exemption for hydraulic cement (STCC No. 32-4) under 49 C.F.R. Part 1039.11. *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704 (Sub-No. 1) (Board served Mar. 23, 2016) (“Proposal”).

PREFACE AND SUMMARY

PCA emphasized in its Opening Comments, and in its January 31, 2011 comments,¹ that the Board’s Proposal to repeal the commodity exemption for hydraulic cement is sound, justified, and necessary to carry out the national rail transportation policy. PCA highlighted the compelling changed circumstances supporting revocation. This included the fact that prior burdensome and costly tariff and contract summary regulatory requirements that were relied upon as a principal basis for the exemption have long been eliminated. PCA Comments at 2. Additionally, the agency’s prior 20+ year old findings of “pervasive competition” in the transportation of hydraulic cement supporting exemption, no longer hold true and rates now frequently exceed the agency’s jurisdictional threshold for rate reasonableness. *Id.* at 2-13.

In addition to PCA, other parties and groups representing the interests of other non-cement shippers submitted opening comments in this proceeding, also supporting the Board’s Proposal.² To varying degrees, each of these parties concurred in PCA’s assessment of the

¹ PCA Comments in *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, STB EP No. 704 (filed Jan. 31, 2011).

² See Comments of the American Forest & Paper Association; Comments of the Institute of Scrap Recycling Industries, Inc.; Comments of the Steel Manufacturers Association and American Iron and Steel Institute; Comments of AK Steel Corporation; Comments of Texas

changed circumstances and need for the Board to revoke the discrete, individual commodity exemptions as proposed, and the factors and rate methodology relied upon. None of their positions conflict with those of PCA.

In stark contrast, the Comments submitted by the Association of American Railroads (“AAR”) and its individual members³ ask the Board to ignore the significant regulatory and competitive/economic changes warranting revocation of hydraulic cement’s exemption and to “abandon [its] proposal.” The railroads mischaracterize the Board’s proposal to revoke the exemptions for five limited commodity groups as “sweeping reregulation.” They even request the Board to expand the exemptions much further to cover other new commodities. The railroads go so far as to say that the substantial increases in rail rates for cement and other commodities since the exemptions were granted are “precisely what we would expect under well-functioning market forces” (AAR Comments at 9).

These Reply Comments respond to the principal arguments advanced by the railroads, none of which are meritorious, and all of which should be rejected by the Board. First, the railroads misconstrue the governing exemption revocation standards and appear to suggest a test for revocation under which no shipper of any commodity could prevail, including all existing “regulated” traffic. Second, the railroads unjustifiably attack the STB’s Uniform Rail Costing System (“URCS”) model, long-relied on and broadly used by the Board and stakeholders for various regulatory purposes, to develop railroad variable costs, and in granting regulatory exemptions, and required by Congress to be used for regulatory costing purposes. Third, the railroads insist that “case-by-case remedies” should be used to address revocation, but those clearly do not represent a reasonable alternative and impose undue burdens on shippers that would defeat the purpose of revoking the exemption. Finally, the Board’s Proposal is fully justified by the record and follows appropriate rulemaking procedures.

Crushed Stone Company; Comments of Wisconsin Central Group; Comments of the Freight Rail Customer Alliance; Comments of the Rail Customer Coalition.

³ Individual comments were filed by CSX Transportation, Inc. (“CSXT”); Norfolk Southern Railway Company (“NS”); Union Pacific Railroad Company (“UP”); BNSF Railway Company (“BNSF”); Kansas City Southern (“KCS”); and the American Short Line and Regional Railroad Association (“ASLRRA”).

A. The Board's Proposal Complies with Statutory Requirements

The railroads argue that the Board's Proposal for revocation of the hydraulic cement exemption fails to comply with the statute. They wrongly claim that the statute requires the Board to find that railroads have "abused" their market power over a commodity, and that the Proposal contradicts directives mandating the "deregulation of the entire railroad industry to the maximum extent possible." *See, e.g.,* AAR Comments at 17-22; *accord* NS Comments at 17. The railroads' insistence for significantly heightened revocation standards to be applied is misplaced.

As the Board properly noted in its Proposal (at 2-3), and as fully explained in PCA's Opening Comments (at 5), the Board may revoke an exemption if it finds that (1) the Board's authority to oversee rates and practices is not necessary to carry out Rail Transportation Policy under 49 U.S.C. §10101, and (2) either (a) the "transaction or service is of limited scope" or (b) "the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power."⁴ Similarly, the Board may revoke an exemption "when it finds that application *in whole or part* of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of [49 U.S.C. §10101]."⁵

The Board has significant discretion to make revocation determinations. *See Ass'n of Am. R.Rs. v. STB*, 161 F.3d 58, 64 (D.C. Cir. 1998) ("we conclude that significant discretion has been granted to the agency to determine how much deregulation is appropriate under Section 10502 *Cf. Coal Exporters Ass'n of U.S. v. United States*, 745 F.2d 76, 82 (D.C.Cir.1984) (interpreting predecessor provision)."). Here, based on a full review of the relevant testimony, data, and facts, including an independent analysis by the Board of the relevant waybill rate data, the Proposal properly found that changes in market conditions support a finding that application of the Board's oversight authority for hydraulic cement is necessary to carry out Rail Transportation Policy and to protect shippers from abuse of carrier market power. Proposal at 9-10; PCA Comments at 5-13.

Additionally, despite the railroads' contentions to the contrary, Congress passed the Staggers Rail Act of 1980 not only to promote the financial well-being of railroads, through

⁴ 49 U.S.C. §10502(a).

⁵ 49 U.S.C. §10502(d) (emphasis added).

deregulation, rate freedoms, and other means, but also to “provide a regulatory process that balances the needs of carriers, shippers, and the public.” Pub. L. 96-448, 94 Stat. 1897. As recognized by the courts, exemptions under section 10502 are inherently experimental. *American Trucking Ass’ns v. ICC*, 656 F.2d 1115, 1127 (5th Cir. 1981). When the Board exempts a transaction or service from its regulation, it retains jurisdiction under the Act to revisit the issue, and may reassert jurisdiction should its regulation later become necessary. *G&T, Terminal Packaging Co. v. Consolidated Rail Corp.*, 830 F.2d 1230 (3rd Cir. 1987). “Thus, the revocation power is a central feature of section 10502.” *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board*, 2 S.T.B. 564, 567 (1997).

Applicable precedent further confirms that, in the area of exemptions: “[w]e do not find in Section 10502 a clear expression of congressional intent to create a one-way ratchet, permitting deregulation only, without subsequent adjustment.” *Ass’n of Am. R.Rs.*, 161 F.3d at 64 (D.C. Cir. 1998). More specifically, the courts have recognized:

[i]nherent within the power to create exemptions from the regulatory scheme is the power to limit the scope of those exemptions. We agree that the STB may not create new regulations in the guise of deregulation. However, it may, consistent with Section 10502, amend its original scheme of deregulation if it finds that the transportation policies so require. *See, e.g., Illinois Commerce Commission v. ICC*, 787 F.2d 616, 632–33 (D.C. Cir. 1986) (discussing with approval reconsidering and then restricting the scope of an initial grant of eligibility for exemption).

Id.

The Board’s Proposal does not create new regulations, and revocation of the cement commodity exemption will not result in any new burdensome regulatory requirements. In fact, in its Proposal, the Board found that “regulation would not impose new reporting requirements directly or indirectly . . . 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.” *Id.* at 12. As part of its Proposal, the Board asked for further comment on these findings. *Id.* In its Opening Comments, PCA discussed this issue noting that a major basis for the Board’s 1995 decision to exempt hydraulic cement,⁶ was the need to eliminate burdensome

⁶ *Rail General Exemption Authority – Exemption of Hydraulic Cement*, Ex Parte No. 346 (Sub-No. 34) (ICC served July 26, 1995), 1995 WL 438371 at *4 (“*Hydraulic Cement Exemption Decision*”).

agency tariff filing requirements (as well as contract summary requirements), however, those administrative requirements have long been eliminated and are no longer any constriction on the provision of railroad rates and service. No railroad party, or any other commenter, filed any comments contradicting these findings – likely because the Proposal contains no new direct regulatory burdens on railroads, and the railroads will continue to operate in a very lightly regulated environment if the hydraulic cement exemption is revoked.

B. The Board’s Economic and Market Findings Supporting Hydraulic Cement Commodity Revocation Are Fully Justified and Correct

As PCA discussed in its Opening Comments, the Board’s proposed revocation of the exemption for hydraulic cement is supported by significantly changed competitive and market conditions. PCA Comments at 5-13. Cement manufacturers are shipping cement longer distances, from fewer plants, and competition among railroads and alternative shipping options has shrunk. *Id.* Shipping costs and the railroad companies’ revenue to long run variable cost (“R/VC”) ratios for hydraulic cement have increased significantly, as verified by PCA’s independent analysis. *Id.* Average R/VC ratios for cement traffic have grown by 49 percentage points between 1992 and 2014 to 191%. *Id.* While the ICC’s 1995 decision adopting the exemption for hydraulic cement found that “[a] very small percentage of all current cement shipments are actually moving within reach of the Commission’s rate reasonableness jurisdiction,” today the percentage of potentially captive cement traffic has reached 60%, and that universe has been growing significantly. *Id.*

In their opening comments, the railroad parties do not generally dispute the above compelling changed circumstances. Instead, they contend that “R/VC is not a reliable indicator of market power,” and, in doing so, they expend considerable effort attempting to discredit the Board’s URCS model long-relied on by the agency, the railroads, and all stakeholders to evaluate railroad variable costs and for other crucial regulatory purposes. AAR Comments at 22-29; NS Comments at 30-32; BNSF Comments at 2-15; UP Comments at 11-13. The railroads then assert that highly complex and indirect product and geographic competition factors favor preserving the exemptions (AAR Comments at 29-31; UP Comments at 12-13) – factors that the Board has long shunned for use in regulatory proceedings because of their hypothetical nature and the high costs and extensive delays arising in litigating and assessing such indirect

competition claims. *Market Dominance Determinations – Product and Geographic Competition*, STB Ex Parte No. 627 (STB served July 2, 1999).

1. The Railroads' R/VC Ratio Arguments Lack Merit

The railroads' contention that R/VC ratios do not establish a *presumption* of railroad market dominance completely misses the point. Neither the Board nor cement shippers have contended that quantitative R/VC ratios for hydraulic cement would establish market dominance in a rate reasonableness case, which requires a quantitative and qualitative finding of "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. § 10707(a). Instead, the Board and cement shippers' analysis shows that much of the traffic is fully subject to captive pricing, rates have been increasing significantly in recent years, and far above costs – reflecting the lack of effective competition for many cement shippers.

The railroads assert that "R/VC is not a reliable indicator of competition or market power." AAR Comments, *Israel/Orszag V.S.* at 16. However, this claim conflicts with statutory directives and Board precedent. Congress has instructed that "[v]ariable costs for a rail carrier shall be determined only by using such carrier's unadjusted costs calculated using the Uniform Rail Costing System cost finding methodology." 49 U.S.C. §10707(d)(1)(B). The Board has found that "URCS is an accepted measure of movement profitability and revenue contribution for the rail industry." *Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004, 1024 (1996). It is also an accepted measure used to demonstrate the presence and robustness of modal competition. *See Mr. Sprout, Inc. v. U.S.*, 8 F.3d 118, 124 (2nd Cir. 1993) (use of R/VC ratios is "a valid and reliable measure of market power in the rail industry," and "we are satisfied that the ICC's use of [railroad's] 117 percent ratio as one compelling sign of the carrier's lack of market power was neither unwarranted, nor arbitrary and capricious").

In fact, R/VC ratios were relied on by the railroads in their petition seeking the exemption of hydraulic cement, and by the Board in its decision to exempt hydraulic cement. *Hydraulic Cement Exemption Decision*, 1995 WL 438371 at *3 ("The AAR's examination of the Commission's Costed Waybill Sample disclosed that the revenue to variable cost (R/VC) ratio

for this commodity is under 135%”).⁷ If it were true that R/VC ratios are unreliable indicators of market power as the railroads now claim, which is incorrect, then their past testimony and analysis relying on the same URCS-derived R/VC ratios in seeking the exemption for hydraulic cement were also unreliable, and the Board’s *Hydraulic Cement Exemption Decision* relying on these ratios in finding a lack of market power must be overturned and pronounced as void *ab initio* for relying upon an unreliable and misleading analysis.⁸

It is easy to see why the railroads now seek to reverse course and avoid use of R/VC ratios as an indicator of competitive power over hydraulic cement shippers. The railroads’ economists have previously testified that competitive rail traffic, including traffic that faces head-to-head origin to destination competition from other rail carriers, yields average R/VC ratios of about 106 percent. *Central Power & Light Co. v. S. Pac. Transp. Co.* (STB Docket No. 41242), AAR Comments (filed Oct. 15, 1996), Verified Statement of Craig F. Rockey and John C. Klick at 8; *see generally* Mr. Sprout, 8 F.3d at 124 (noting that competitive traffic tends to be priced “at levels much closer to variable costs”). As discussed, average R/VC ratios for hydraulic cement are 191% for the latest data year available (2014) and have been growing. PCA Comments at 7-13. Approximately 60% of cement shippers are potentially captive (year 2014), and the average R/VC ratios for this potentially captive traffic have grown significantly to 244% (year 2014). *Id.* These very high cost ratios easily flunk the railroads’ R/VC competition test, are nowhere near costs, and reflect a dramatic change in competitive circumstances warranting exemption revocation for hydraulic cement.

⁷ Additionally, none of the railroads participating in this proceeding has attempted to utilize actual carrier costing data to refute the Board’s R/VC market findings for hydraulic cement. In the past, the railroads and the Board have eschewed using such internal carrier costing data, as opposed to URCS data, in regulatory proceedings. *See, e.g., Total Petrochemicals USA*, at 3 (denying shipper request for railroad internal costing information on grounds that “[t]here is no irreparable harm or undue prejudice given that [complainant] may use URCS, just as the Board does, for any costing determinations in this proceeding”).

⁸ *See SF&L Ry., Inc. – Acquisition and Operation Exemption – Toledo, Peoria & W. Ry. Co. Line Between Rochester and Argos, IN*, STB Finance Docket No. 32162 (STB served Jan. 30, 1998); *The St. Louis Sw. Ry. Co. – Abandonment Exemption – in Gasconade, Maries, Osage, Miller, Cole, Morgan, Benton, Pettis, Henry, Johnson, Cass, and Jackson Counties, MO*, Docket No. AB-39 (Sub-No. 18X) (ICC served Apr. 1, 1994).

a. The Railroads' Collateral Attacks on the Board's Costing System Are Improper and Beyond the Scope of This Proceeding

Having relied on URCS and conceded many times that URCS and R/VC ratios derived from URCS may be relied upon for determining the competitive circumstances of commodity shipments, the railroads nonetheless dedicate extensive argument and opinions attacking URCS. AAR Comments, *Baranowski/Fisher V.S.*; UP Comments, *Murphy V.S.* The railroads' proposal to change the Board's established, and Congressionally mandated criteria and methodology for determining railroad costs is improper and should be rejected. AAR's contention that use of R/VC ratios are unreliable because of "failure of URCS to keep pace with industry-wide changes" (*Baranowski/Fisher V.S.* at 5) is simply an unsubstantiated collateral attack on the Board's long-standing costing system, and Congress's directive that URCS be used in regulatory proceedings.

URCS, established 27 years ago as a means of providing consistent and comparable information on the variable costs of performing rail services, is utilized and relied on by the Board and stakeholders in a variety of proceedings for essential regulatory costing purposes. *Adoption of Uniform R.R. Costing Sys. as a Gen. Purpose Costing Sys. for All Regulatory Costing Purposes*, 5 I.C.C.2d 894 (1989); see also *Total Petrochemicals USA, Inc. v. CSX Transp., Inc. et al.*, STB Docket No. NOR 42121 (STB served Dec. 23, 2010) at 3 ("*Total Petrochemicals USA*") ("for regulatory purposes, including rate reasonableness cases, costs are determined by URCS"). The waybill data is sourced by the railroads and AAR has been the administrator of the Board's waybill sample (under a contract with the STB).

The railroads' experts suggest highly selective and one-sided, controversial adjustments to the URCS model. The carriers' criticisms and proposed URCS methodology changes are unwarranted, and also do not reflect or factor in other countervailing adjustments to URCS that other stakeholders have suggested to the Board elsewhere in the ongoing pending URCS proceedings. In any event, this proceeding clearly is not the proper forum for parties to propose such dramatic changes to the Board's established costing methodology.

Indeed, some of the railroads' criticisms and/or proposals for carload shipments have been previously raised, but have not been adopted by the Board. In *Review of the General Purpose Costing System*, (STB Docket No. EP 431 (Sub-No. 4), the Board has instituted a

Notice of Proposed Rulemaking proposing adjustments to URCS and railroad data reporting requirements. The railroads are participating in the EP 431 (Sub-No. 4) proceeding, where they seek some of the same adjustments to URCS, while other stakeholders seek other countervailing URCS adjustments. *See* AAR Reply Comments, STB Docket No. EP 431 (Sub-No. 4) (filed Sept. 5, 2013) at 5-6 (arguing that “the information contained on waybills does not always reflect how the traffic moves operationally for some types of traffic, such as intermodal”); AAR Comments, STB Docket No. EP 431 (Sub-No. 4) (filed June 20, 2013).

The Board should continue to apply its established URCS methodology unless and until it decides in the EP 431 (Sub-No. 4) proceeding or any other future proceeding to make changes to its methodology. “It is settled administrative law that an agency need not, and as a matter of sound procedure should not, permit parties to relitigate generic rules in individual proceedings that apply those rules.” *R.R. Cost of Capital – 2008*, STB EP 558 (Sub-No. 12) at 2 (STB served Sept. 25, 2009); *see also Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998) (same). Additionally, the Board has been reviewing and updating URCS for years, and will continue to do so going forward. In so doing, the Board has not, nor should it here, hold in abeyance the orderly processing of individual proceedings relying on URCS. Nor would it be prudent to do so here – especially where the railroads’ propounded “defect” claims have yet to be fully developed or presented on the record, or subjected to proper review and scrutiny by the agency and other stakeholders.⁹

Also, the Board has an obligation to supply a reasoned basis for departing from its current rules regarding URCS, and the railroads have not provided any such reasoned basis for departing from use of the Congressionally-directed use of URCS. The EP 431 (Sub-No. 4) proceedings provide the railroads full opportunity to air any and all of their URCS grievances in a proceeding affording all stakeholders an opportunity to comment on any proposed adjustments or

⁹ *See, e.g., ICC v. Jersey City*, 322 U.S. 503, 514 (1944):

If . . . the litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated

Accord Illinois Commerce Comm’n v. United States, 292 U.S. 474, 480 (1934) (ICC did not abuse its discretion in refusing a request for a new study as a basis for rate-making).

methodological changes. The Board should not allow the railroads to end run that process in this proceeding.¹⁰

b. The Railroads' County-Level Analysis Is Flawed

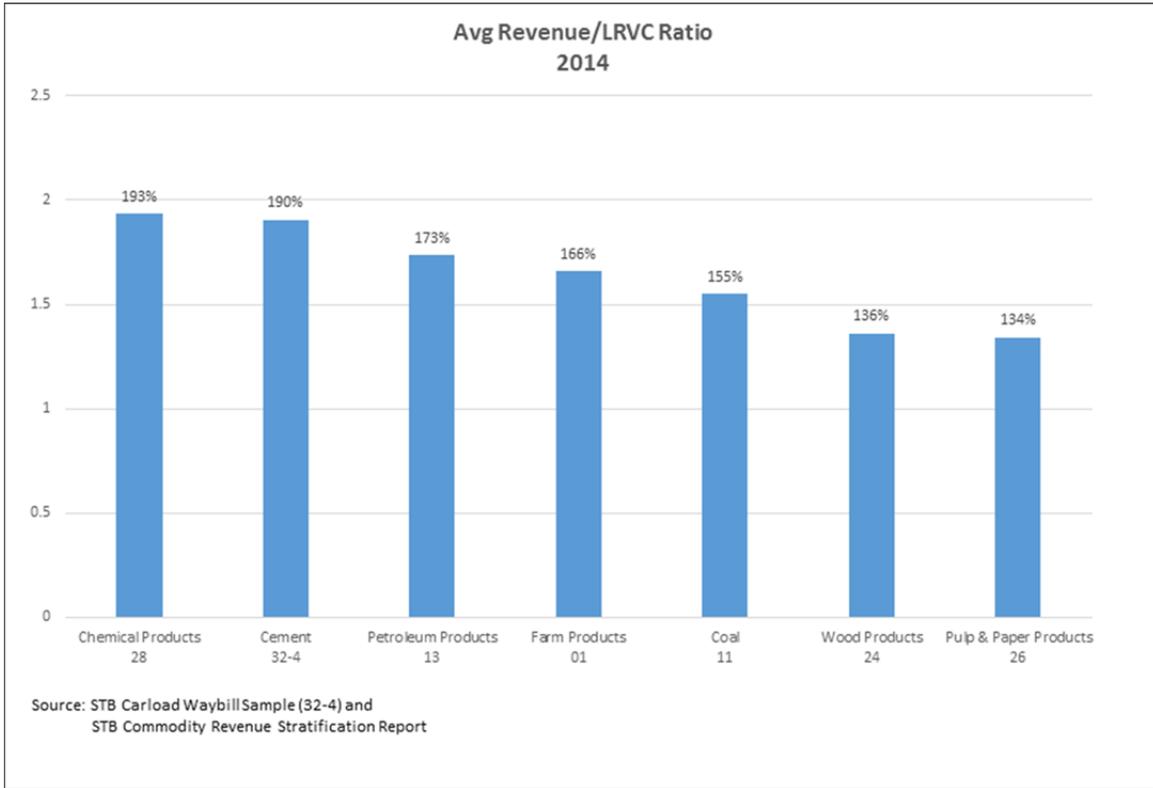
In their opening comments, the railroads undertake a county-level R/VC analysis as a further basis to complain about the use of average metrics in this proceeding. AAR Comments, Israel/Orzag V.S. However, as discussed above, the railroads themselves have regularly relied on average rates elsewhere, including as a basis for seeking exemptions, and for assessing competition and market power issues – as has the Board. Additionally, the railroads' county-level R/VC analysis likewise relies on generated county-level *average* R/VC data, even though a review of waybill data indicates that there is significant variation in rates for shipments even within the same zip code. This is unsurprising, and no generalization or conclusion can be made at the county-level as to whether or how the R/VC data they reference varies by location.

In the end, it is readily apparent that under the railroads' test for commodity revocation, *all* traffic shipments must be shown to be subject to market abuse before commodity exemption revocation can occur. However, as discussed above, that is not the proper test for revocation. Such a standard is also an unwinnable test for any individual commodity, including all currently regulated traffic. For example, clearly not all regulated railroad traffic is market dominant traffic. However, 60% of cement shippers are now potentially captive, and the average R/VC ratios for potentially captive traffic has grown to 244% in 2014. PCA Comments at 9-13. The average R/VC ratios for hydraulic cement are 191% for the latest data year available (2014), meaning that one-half of the volume of shipments is above that level. *Id.*

As reflected in the below Reply *Figure 1* of James N. Heller of Hellerworx, the average R/VC ratios for hydraulic cement exceed the levels of other traffic that is fully subject to regulation such as coal, grain, and petroleum products, and is close to levels for chemicals. It is much higher than for some other exempted products such as wood products and pulp & paper:

¹⁰ On August 3, 2016, the Board served a Supplemental Notice of Proposed Rulemaking in EP 431 (Sub-No. 4). The AAR has already sought and obtained access to the Board's workpapers and waybill data accompanying that decision for purposes of its participation in the proceeding. *See Letter from William Huneke, Director/Chief Economist, STB Office of Economics to Timothy J. Stafford, Esq.* (dated Aug. 12, 2016) (entered on the public record Aug. 19, 2016).

Reply Figure 1



As stated above, the ICC’s 1995 decision adopting the exemption for hydraulic cement was based on a finding that “[a] very small percentage” of hydraulic cement shipments are “within reach of the Commission’s rate reasonableness jurisdiction.”¹¹ That clearly is no longer the case, and now a very large percentage of all current cement shipments are actually moving “within reach” of the Board’s rate reasonableness jurisdiction, and are at rate levels that are even higher than other regulated traffic.

c. The Railroads Indirect Competition Assertions

The railroads further assert that highly complex antitrust-type litigation considerations must be factored into the Board’s revocation analysis, and offer anecdotal evidence that product and geographic competition constrains railroad pricing. AAR Comments at 29-31; UP Comments at 12-13.

The railroads provide no new compelling evidence of actual product or geographic competition for hydraulic cement shippers, or for the Board to reconsider previously rejected

¹¹ *Hydraulic Cement Exemption Decision*, 1995 WL 438371 at *4.

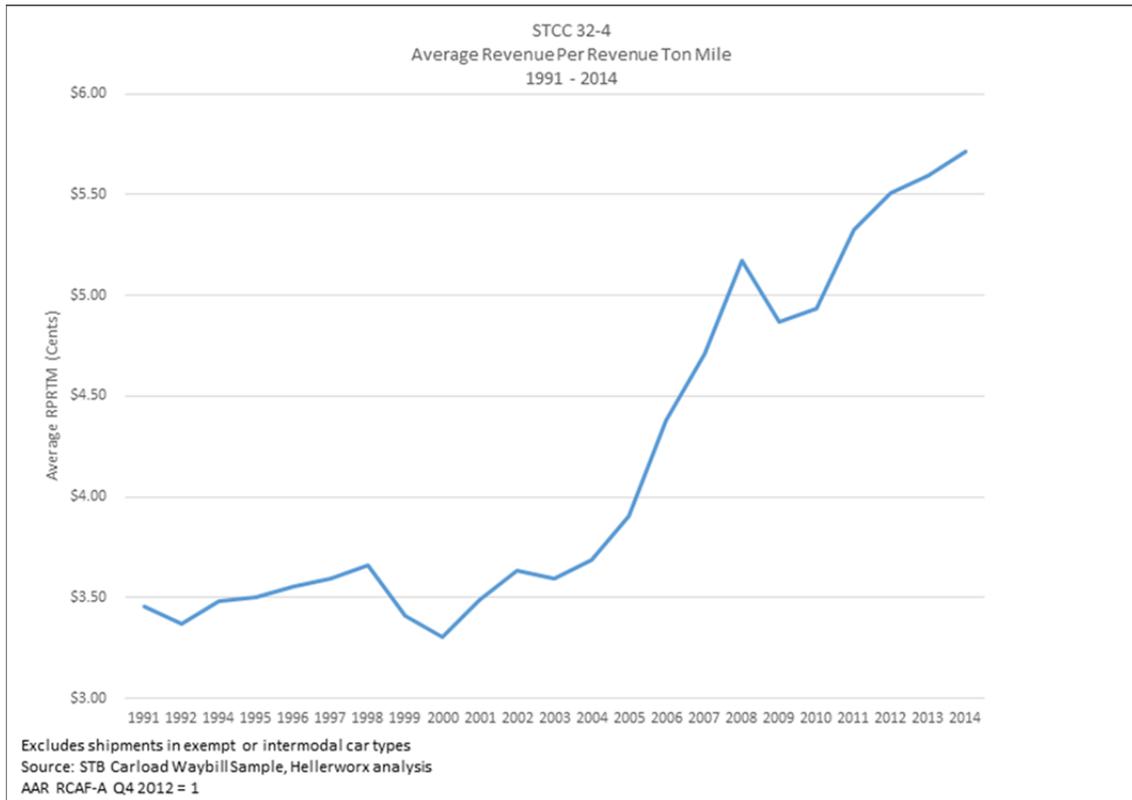
issues of product and geographic competition. *Market Dominance Determinations – Product & Geographic Competition*, STB Ex Parte No. 627 (STB served Dec. 21, 1998). Such considerations have been wisely rejected by the Board for use in determining effective competition in individual rate cases, in part, because in almost all instances they were never found to present effective competition and resulted in significant case delays due to complications associated with litigating such indirect competition issues. *Id.* at 13.

2. Additional Analysis Using Railroad Preferred Metrics Lends Further Support for the Board’s Proposal

Even though the Board’s proposed revocation of the hydraulic cement exemption is well-reasoned and justified, including on the basis of significant changes in R/VC ratios, other metrics also clearly justify revocation. For example, the railroads often promote the use of the rail revenue per ton-mile (“RPTM”) metric as being directly correlative of rail rates and market competition. *See, e.g.*, AAR Comments, *Rail Transportation of Grain, Rate Regulation Review*, STB EP 665 (Sub-No. 1) (filed June 26, 2014) at 12 (“Rail revenue per ton-mile . . . is a useful surrogate for rail rates). The railroads have also alleged that evidence of rail rate competition may be measured by tracking RPTM for the commodity against increases in railroad costs, as reflected by the Rail Cost Adjustment Factor (“RCAF”), because “increases in rail rates over the years have closely tracked increases in the costs of inputs to rail operations.” *Id.* at 12-13.

Using the Board’s Carload Waybill Sample data, PCA has undertaken an additional analysis for hydraulic cement (STCC 32-4), using the railroads’ preferred RPTM metric, and further measured it against the RCAF. This analysis was undertaken by Mr. Heller. Reply *Figure 2* below reflects RPTM for hydraulic cement from 1992 to the present:

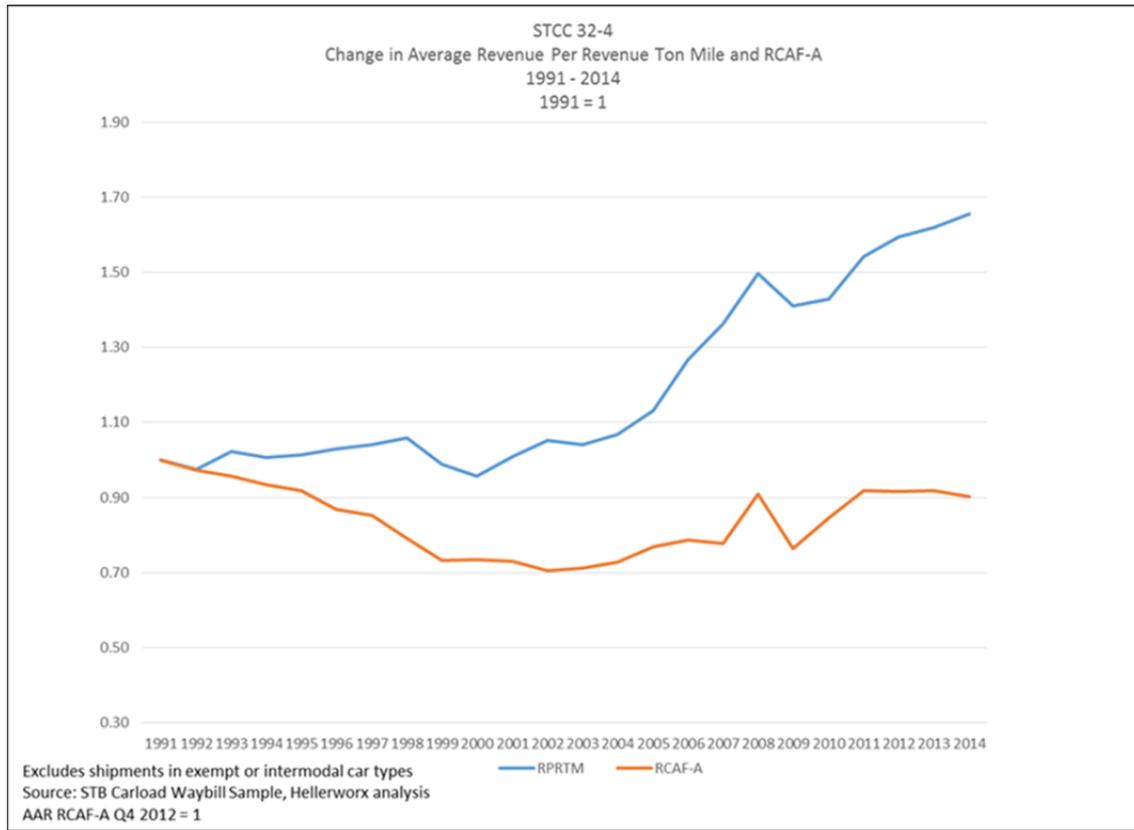
Reply Figure 2



Just as with the R/VC analysis, this RPTM analysis reveals significant increases in railroad rates for hydraulic cement. Hydraulic cement RPTM rates were 65 percent higher in 2014 than in 1992. Additionally, as PCA noted in its Opening Comments, hydraulic cement shipments by rail, on average have increased to over 400 miles (2014 data) from 200-250 miles in 1995. PCA Comments at 6. All things being equal, an increase in ton miles should result in a decline in the RPTM, but that clearly was not the case for hydraulic cement.

Reply *Figure 3* below reflects RPTM for hydraulic cement over the same period measured against the RCAF, adjusted for railroad productivity:

Reply Figure 3



As shown in Reply Figure 3, rail rates, as measured on a RPTM basis, have risen far more rapidly than rail input costs for hydraulic cement shipments, showing significant upward changes in railroad market power.

C. Case-By-Case Revocation Is An Insufficient Alternative That Creates Competitive Harm and Unfair Barriers to Regulatory Relief

The “case-by-case remedies” proposed by the rail industry (*see* AAR Comments at 39), do not represent a reasonable alternative and would defeat the purpose of revoking the exemption. As the Board acknowledged in its October 25, 2010 Notice in STB EP No. 704, because the granting of commodity and service exemptions “excuse[] carriers from virtually all aspects of regulation,” (Notice at 3) hydraulic cement shippers are impacted adversely in several ways. First, under Board precedent, the common carrier obligation to provide “transportation or

service on reasonable request” (49 U.S.C. § 11101(a)), does not apply to exempt commodities.¹² Thus, in order to obtain a common carrier rate and receive service under that rate, a hydraulic cement shipper is faced with the daunting prospect of having to bring a revocation action at the Board.

Second, under the Board’s simplified rail rate guidelines, the Board has clarified that complainant shippers challenging exempt commodity rail rates “will need to file a separate request for revocation” and that “[t]he Board will generally consider the revocation request before permitting a rate challenge,” with the procedural schedule in the rate case to “generally be stayed automatically pending the outcome of the request for revocation.” *Simplified Standards for Rail Rate Cases*, STB Docket No. 646 (Sub-No. 1) (STB served Sept. 5, 2007). This means substantial and unnecessary administrative delay for a shipper seeking to obtain regulatory relief. *See, e.g., CF Industries, Inc. v. Koch Pipeline Co.*, STB Docket No. 41685 (STB served May 14, 1997) at 5 (the “[Board’s] experience in the rail area has shown that bifurcation of the market power and rate reasonableness phases can unnecessarily prolong a proceeding”).

The STB’s rate remedy provisions are already extremely difficult for shippers to navigate.¹³ The delay, uncertainty, and expense of bringing a separate revocation action, in combination with a rate case, creates serious barriers to access of the Board’s regulatory relief

¹² *See Pejepscot Indus. Park, Inc. d/b/a Grimmel Indus. – Petition for Declaratory Order*, STB Finance Docket No. 33989 (STB served May 15, 2003) at 6; *accord Rail Transp. of Contracts Under 49 U.S.C. 10709*, STB Ex Parte No. 676 (STB served Jan. 22, 2010) at 4.

¹³ *See, e.g.,* Transp. Research Bd., Special Report 318, *Modernizing Freight Rail Regulation* (2015) at 218-19140-41 (“TRB Report”), <http://onlinepubs.trb.org/onlinepubs/sr/sr318.pdf> at 6-7 (“The standards and procedures used by the ICC and STB for ruling on the reasonableness of challenged rates have proved to be slow, costly, and inappropriate for many shippers’ circumstances over three decades. Thus, they prevent shippers from having equal and effective access to the law’s maximum rate protections. Efforts to streamline and expedite the process through the use of simplified procedures have not overcome these deficiencies and in some respects have made matters worse.”); United States Government Accountability Office, *Freight Railroads: Industry Health Has Improved, But Concerns About Competition and Capacity Should Be Addressed*, GAO-07-94 (Oct. 2006), <http://www.gao.gov/assets/260/252473.pdf> at 41 (“Despite STB’s efforts, there is widespread agreement that STB’s standard rate relief process is inaccessible to most shippers and does not provide for expeditious handling and resolution of complaints. The process remains expensive, time consuming, and complex.”).

provisions for hydraulic cement shippers, and unfairly discourages shippers of exempt commodities from even trying to seek relief.

Third, there is no legitimate reason to block hydraulic cement shippers from accessing backstop regulatory protections of the Board, including the maintenance of reasonable practices and rates and the provision of adequate service, absent the bringing of an individual revocation action. For example, in the middle-2000s, the railroad industry repeatedly, and unsuccessfully, attempted to block the STB's review of its unlawful fuel surcharge practices. The Board, however, did so in response to outrage expressed by Members of Congress and rail shippers that railroads were engaged in abusive fuel surcharge tactics, including misrepresenting their fuel surcharges as recovering only incremental fuel cost increases when in fact the railroads were manipulating the surcharges to recover large profits. *Rail Fuel Surcharges*, STB EP No. 661 (STB served Jan. 26, 2007) at 2. Shippers asked the Board to take affirmative steps to end all such abusive practices, which the Board did. *Id.* at 2-3. The Board explained, if a carrier was using a fuel surcharge as "a broader revenue enhancement measure," it was engaged in a "misleading and ultimately unreasonable practice." *Id.* at 6-7.

The Board concluded that it could and did exercise its regulatory authority over rail practices to stop these deceptive carrier actions because its "authority to proscribe unreasonable practices embraces misrepresentations or misleading conduct by the carriers." *Id.* at 7. However, as part of its decision, the Board declined to apply its unreasonable practice determination to the traffic of exempt shippers. The result was that the carriers could and did continue to apply a Board determined unreasonable and deceptive practice to exempt commodity shippers, such as hydraulic cement, that it was precluded from applying to "regulated" traffic. The only remedy for an individually affected hydraulic cement shipper was to bring a full-blown revocation proceeding, which based on the Board's decision, would clearly not have been an easy prospect given the agency's refusal to apply its decision to exempt commodity shippers in the first place.

Under the statute, railroads have a fundamental obligation to engage in reasonable rules and practices. 49 U.S.C. §10702(2). Allowing carriers to continue to engage in unreasonable practices with regard to cement shippers is unfair and discriminatory, and runs counter to the Rail Transportation Policy objectives of "encourag[ing] honest and efficient management of

railroads” (49 U.S.C. §10101(9)) and “to avoid undue concentrations of market power, and to prohibit unlawful discrimination” (*id.* at §10101(12)). PCA respectfully submits that fundamental fairness necessitates that the railroads maintain such reasonable practices and rates, and that they provide adequate rail service for hydraulic cement shippers, without having to first litigate and prevail in a full blown individual revocation proceeding.

The “case-by-case remedies” proposed by the rail industry do not represent a reasonable alternative and would defeat the purpose of revoking the exemption. A case-by-case remedy would also require a significant amount of Board resources, and would be extremely costly and inefficient. Because revocation of the hydraulic cement exemption should have no or little effect on a railroad’s ability to set rates, especially in a competitive environment (Rail Transportation Policy (“RPT”) § 10101(1)), and should significantly advance the equally important goals of expediting cases and access to regulatory relief (the goals of RPT §§ 10101(2), 10101(15), and 10101(6)), revoking the exemption best balances and accommodates all the relevant statutory policy objectives.

D. The Board Has Followed Reasonable Rulemaking Procedures

The railroads assert that the Board has failed to follow reasonable rulemaking procedures (*see* AAR Comments at 39-42), but that certainly is not the case. The Board’s Proposal is fully justified by the record. Board decisions will be set aside only if found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).¹⁴ This standard is easily met here as the record is complete. The facts, data, and the Board’s analysis of those facts and data justify the Proposal with respect to hydraulic cement.

The railroads also assert that the record is “stale.” However, the NPRM specifically addresses and considers waybill rate data from 1992-2013.¹⁵ Additionally, the waybill data made available by the STB upon request by parties to this proceeding extends to 2014, which represents the most recent data available. Average R/VC ratios for hydraulic cement increased

¹⁴ *See BNSF Ry. Co. v. STB*, 526 F.3d 770, 774 (D.C. Cir. 2008) (holding that Board did not act in arbitrary or capricious manner in rulemaking). Agency orders will be upheld where there is a “rational connection between the facts found and the choices made.” *AEP Texas N. Co. v. STB*, 609 F.3d 432, 438 (D.C. Cir. 2010).

¹⁵ *See* Proposal at 3. The Board is clearly entitled to rely on its own expertise and analysis in this proceeding.

from 183% in 2013 to 191% in 2014, and have grown significantly, by over 21 percentage points over the last four years of available data (2010 to 2014) since the Board instituted this proceeding, with the percentage of potentially captive cement traffic now reaching 60%. PCA Comments at 7-13. This updated information further reflects and confirms that the NPRM is fully justified.

Conclusion

For the reasons set forth above, in PCA's Opening Comments, and in its January 2011 comments, PCA respectfully requests that that the Board adopt its Proposal to remove the existing class exemption for hydraulic cement.

Respectfully submitted,

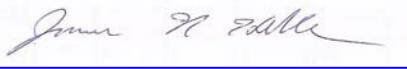
/s/ Michael Schon

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VERIFICATION

I am James N. Heller, founder and president of Hellerworx, Inc., with offices at 4803 Falstone Avenue, Chevy Chase, Maryland, 20815. Hellerworx provides strategic and economic consulting services to shippers, receivers, and transportation companies. I have prepared the analysis contained in the Opening and Reply Evidence of the Portland Cement Association in STB Docket No. EP 704 (Sub-No. 1) where I am identified as having performed the analysis.

I verify under penalty of perjury that I have read the specific portions of the Opening and Reply Evidence of the Portland Cement Association in this proceeding that I have prepared, as described in the foregoing paragraph, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

A handwritten signature in cursive script, appearing to read "James N. Heller", is written in black ink on a light blue horizontal line.

James N. Heller

Executed on: August 24__, 2016