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DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1039

[STB Ex Parte No. 561]

Rail General Exemption Authority--Nonferrous Recyclables

AGENCY: Surface Transportation Board.

ACTION: Final Rules.

SUMMARY: The Surface Transportation Board (Board) is exempting from regulation 29 nonferrous recyclable commodity groups.

EFFECTIVE DATE: These rules are effective May 21, 1998.

FOR FURTHER INFORMATION CONTACT: Beryl Gordon, (202) 565-1600. [TDD for the hearing impaired: (202) 565-1695.]

SUPPLEMENTARY INFORMATION: In a notice of proposed rulemaking served May 5, 1997, and published in the Federal Register on May 16, 1997 (62 FR 27003) ('97 NPR), we sought comments on whether to exempt from regulatory oversight rail transportation of 29 nonferrous recyclable commodity groups listed in the final rules in the appendix to this decision. Comments were filed by the Association of American Railroads (AAR), the American Forest and Paper Association (AF&PA), the Institute of Scrap Recycling Industries, Inc. (ISRI), and Joseph C. Szabo, for and on behalf of United Transportation Union-Illinois Legislative Board (UTU-IL). Replies were filed by the AAR and UTU-IL.

Based on the record, we conclude that the proposed exemption is warranted.

BACKGROUND

In Rail General Exemption Authority--Exemption of Nonferrous Recyclables and Railroad Rates on Recyclable Commodities, Ex Parte No. 346 (Sub-No. 36), served August 23, 1994, and published in the Federal Register on August 24, 1994 (59 FR 43529) ('94 NPR), the Interstate Commerce Commission proposed to exempt, from all regulation except the special maximum rate cap of former 49 U.S.C. 10731(e),¹ the rail transportation of 28 nonferrous recyclable commodity groups. The '94 NPR was issued in response to an April 1994 petition filed by the AAR, various individual railroads, and ISRI.

Petitioners argued that, by freeing carriers from regulatory requirements, an exemption would “reduc[e] administrative costs and increas[e] railroad ratemaking flexibility.” Before the rulemaking was concluded, however, the ICC Termination Act of 1995 (ICCTA) repealed the special recyclables rate cap provision of former section 10731(e).

With the repeal of former section 10731(e), there was no need to consider only a partial exemption. Thus, we instituted this proceeding² and solicited comments on a full

¹ Former section 10731(e) provided that “[n]otwithstanding any other provision of this subtitle or any other law,” including the agency’s exemption authority, rates for the transportation of nonferrous recyclable or recycled materials had to be set at or below levels that would permit the rail industry to recover its fully allocated costs.

² In a decision served May 5, 1997, and published in the Federal Register on May 16, 1997 (62 FR 27002), the Ex Parte No. 346 (Sub-No. 36) proceeding was discontinued and the comments filed in that proceeding were incorporated into the record of this proceeding.

exemption for 29 recyclable commodity groups.³ We also observed that, in Removal of Obsolete Recyclables Regulations, 1 S.T.B. 7 (1996), in which we had repealed the regulations at former 49 CFR 1145 designed to implement former 49 U.S.C. 10731(e), we had inadvertently removed from the Code of Federal Regulations the list of 11 of the 29 recyclables under consideration here (at 49 CFR 1145.9) that previously had been partially exempted from regulation. We explained that, during the pendency of this proceeding, these commodity groups would be exempt from all regulation except the maximum rate provisions of 49 U.S.C. 10701 et seq.

POSITIONS OF THE PARTIES

The AAR contends that the market for transportation of recyclables is highly competitive and characterized by declining rates, shrinking market shares, and low revenue-to-variable cost (r/vc) percentages. It notes that, based on revenues per ton-mile (r/tm), there has been a long-term decline in average recyclable rail rates. On average, r/tm in current dollars has fallen from 3.9 cents in 1981 to 3.1 cents in 1995. AAR also computes the 1995 market share for 18 of the recyclable commodity groups under consideration here.⁴ With

³ As discussed in detail in the '97 NPR at 4-5, in proposing to exempt 29 commodity groups, we retained 26 of the 28 commodity groups included in the '94 NPR, expanded two commodity groups to a broader Standard Transportation Commodity Code (STCC) classification (STCCs 20511 and 41115), and added a 29th commodity (STCC 40241 scrap paper).

⁴ Total tonnage figures used to compute market shares were not available for the other 11 commodity groups.

one exception,⁵ the railroads' market share for those commodity groups ranged from 0.7% to 25.1%. Finally, AAR points out that the 1995 composite r/vc percentages for the 29 recyclable commodity groups was 98.9%, well below the 180% level at which our jurisdiction to evaluate the reasonableness of rail rates begins.

ISRI, which had joined in the 1994 petition to partially exempt recyclables from regulation, filed separate comments in response to the '97 NPR. ISRI notes that ICCTA's elimination of the tariff filing requirements and reduction of rail contract regulation relieve carriers of most pre-ICCTA regulatory burdens. Although it does not oppose the exemption, ISRI expresses concern that the ongoing restructuring of the rail industry may, in the future, require the Board to reconsider the exemption and to resume regulatory oversight to protect shippers and receivers of nonferrous recyclables.

UTU-IL opposes the exemption, arguing that it would be harmful both to the public interest and to railroad employees. It contends that deregulation would allow carriers not to compete for business, and that there is no evidence that regulation has unduly restricted the movement of nonferrous recyclables. It also submits that the value of this proceeding is questionable because of the significant changes brought about by the ICCTA.

⁵ Based on a limited sample, the railroads appeared to have a 91.9% market share for tin scrap. However, AAR notes that tin scrap was sparsely sampled in the 1995 waybill, with only seven waybills representing 280 expanded carloads, and therefore the market share calculation could be inaccurate. In any event, the 1995 r/vc percentage for tin scrap is only 106.4%. Furthermore, all of the tin scrap traffic sampled moved less than 600 miles, a length of haul where movements are generally vulnerable to truck competition. V.S. Posey at 11-12.

AF&PA limited its comments to the issue of exempting scrap paper. It supports a total exemption for that commodity.

DISCUSSION AND CONCLUSIONS

Section 10502 requires that an exemption be granted when (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101 (RTP) and (2) either (a) the transaction or service is of limited scope, or (b) application of the provision in whole or in part is not needed to protect shippers from an abuse of market power. We find that regulation of rail transportation of the 29 commodity groups under consideration is not necessary to advance the RTP or to protect shippers from abuse of market power, and we accordingly grant the exemption.⁶ In reaching this conclusion, we have considered the provisions of the RTP that bear on the appropriateness of this exemption.⁷ See Illinois Commerce Com'n v. ICC, 787 F.2d 616, 627 (D.C. Cir. 1986).

The transportation of nonferrous recyclables is very competitive, as evidenced by the overall r/vc percentage of 98.9 in 1995, the decline in r/tm from 3.9 cents in 1981 to 3.1 cents in 1995, and the general decline in rail market shares. The record also indicates that motor carriers play a significant role in the transportation of these commodity groups. Generally, motor carriers possess advantages of access and speed, and they have become

⁶ Because we are satisfied that the continued regulation of the transportation of these 29 commodity groups is not necessary to carry out the RTP or to protect shippers from abuse of market power, we need not determine whether the transportation of these commodity groups is of limited scope.

⁷ Sections 10101(1), (2), (4), (5), (6), (9), and (14) are the RTP provisions that are particularly relevant to our analysis here.

more cost effective as motor trailer capacities have grown. Under these circumstances, we find no evidence that rail carriers possess sufficient market power to abuse shippers and, indeed, must operate efficiently to compete for this traffic. Thus, current transportation of these commodity groups is consistent with 49 U.S.C. 10101(1), (4), (5) and (9), which favor reliance on competition in the marketplace and encourage efficiency in rail operations.

Furthermore, because of the highly competitive nature of the recyclables transportation market and the overall low level of rates, regulation is not needed to carry out the policy of section 10101(6) (protecting shippers from unreasonable rates). Indeed, we do not have jurisdiction to evaluate the reasonableness of a rate that results in a revenue-variable cost percentage of less than 180.⁸ Moreover, these same factors suggest that recyclables moving by rail are being effectively transported and that regulation is not necessary to carry out the policy of section 10101(14) (energy conservation). Finally, given this evidence of a heavily competitive environment, we find that the goal of section 10101(2) of minimizing regulatory control over rail transportation is best met by granting the exemption.

We note that ISRI, while not opposing the exemption, has asked us to “be receptive to petitions to revoke the exemption.” Under 49 U.S.C. 10502(d), the Board can revoke an exemption if it finds that application of a statutory provision is necessary to carry out the RTP. As has been our practice, we will carefully consider any revocation request. The main effect of our exemption is to suspend our jurisdiction to examine the reasonableness of a rate,

⁸ 49 U.S.C. 10707.

jurisdiction we believe is unnecessary given the overall low level of rates. However, a particular shipper paying a rate that is more than 180% of the railroad's variable costs that believes that its rate is unreasonable may file a petition for revocation of the exemption and a rate complaint simultaneously. If we conclude that the carrier is market dominant, we will revoke the exemption as it relates to the complaining shipper's movements and evaluate the reasonableness of the rate.

UTU-IL was the only party opposing the exemption. Without offering any explanation or support for that assertion, UTU-IL baldly asserts that the exemption will allow railroads not to compete for business. We do not expect the railroads to discourage movement of this traffic. Indeed, UTU-IL acknowledges that rail movements of nonferrous recyclables increased substantially during the 1992-95 period when revenue per ton declined from \$24.64 to \$22.92.⁹

Finally, we reject UTU-IL's remaining arguments. The nonparticipation of Huron Valley and Star (which responded in opposition to the '94 NPR) in this rulemaking suggests that shipper opposition has lessened. We have examined Huron Valley's and Star's comments filed in response to the '94 NPR and have found that the concerns raised there have been mooted by the passage of the ICCTA or do not demonstrate that regulation is

⁹ UTU-IL contends that r/tm does not measure rail rates because rail rates taper downward with distance and that average length of haul for all rail traffic rose from 615.8 miles in 1980 to 842.6 miles in 1995. UTU-IL's argument is misplaced because the average length of haul for nonferrous recyclables declined from 1992 to 1995 while the r/tm also declined from 3.9 cents in 1981 to 3.1 cents in 1995. UTU-IL's argument that the average length of haul increased from 1980 to 1995 is based on all rail traffic, rather than on only nonferrous recyclables.

needed to protect shippers from the abuse of market power by the railroads.¹⁰ UTU-IL, moreover, does not specify how the exemption would be harmful to the public interest or railroad employees. Under these circumstances, and given the fact that, consistent with 49 U.S.C. 10502, regulation is not needed to carry out the RTP or to protect shippers from abuse of market power, the record supports exempting the 29 commodity groups.

Our final rules are shown in the appendix.¹¹

Environmental and Energy Considerations.

We conclude that granting this exemption will not significantly affect either the quality of the human environment or the conservation of energy resources.

¹⁰ In their 1994 comments, both Star and Huron Valley argued that, because of the special status accorded recyclables under former section 10731, an exemption should not be issued. These arguments are now moot. Further, both parties contended that they lacked effective competitive alternatives and that continued regulation was needed to protect them from an abuse of market power. However, Star's comments indicated that its recyclable commodity group (municipal solid waste) moved at rates that produce revenue-variable cost percentages below 180. Likewise, the rates Huron Valley had been assessed for moving its automobile shredder residue produced r/vc percentages below 180. Huron Valley Steel Co. v. CSX Transp., Inc., No. 40385 (ICC served Oct. 6, 1992). While former section 10731 limited recyclables rates to levels significantly less than 180% of variable cost, the current statute precludes a finding of an abuse of market power for traffic moving at r/vc percentages below the 180% level.

¹¹ In addition to adding the 29 commodity groups to the list of exempted commodity groups in 49 CFR 1039.11(a), we have revised the first sentence of paragraph (a) to eliminate specific reference to recyclables because there is no longer any prohibition to a full exemption for these commodity groups. Furthermore, we have eliminated as unnecessary the language that suggests that a commodity group cannot qualify for more than one exemption. We see no reason why a commodity group could not qualify for more than one exemption. However, we have retained the language that the exemption is not applicable to any movement where a finding of market dominance previously has been made.

Regulatory Flexibility Analysis.

Pursuant to 5 U.S.C. 605(b), we conclude that this exemption will not have a significant economic impact on a substantial number of small entities. No new regulatory requirements are imposed, directly or indirectly, on such entities. The impact, if any, will be to reduce the amount of paperwork and regulation. This exemption is based, at least in part, on a finding that regulation of this transportation is not necessary to protect shippers (including small shippers) from abuse of market power. See 49 U.S.C. 10502. Such a finding indicates that a substantial number of small entities will not be significantly affected by a lifting of regulation.

List of Subjects in 49 CFR Part 1039

Agricultural Commodities, Intermodal transportation, Manufactured commodities, Railroads.

Decided: April 10, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams

Secretary

Appendix

For the reasons set forth in the preamble, Title 49, Chapter X, Part 1039 of the Code of Federal Regulations is amended as follows:

PART 1039 -- EXEMPTIONS

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

Authority: 5 U.S.C. 553; and 49 U.S.C. 10502.

2. In §1039.11, paragraph (a) is amended by adding the following entries in numerical order to the table and by revising the first sentence to the text following the table to read as follows:

§1039.11 Miscellaneous commodities exemptions.

(a) * * *

<u>STCC No.</u>	<u>STCC tariff</u>	<u>Commodity</u>
* * * * *		
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.

Excluded from this exemption are any movements for which a finding of market dominance has been made.

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