21710 SERVICE DATE - MAY 5, 1997
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SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 561[1]

RAIL GENERAL EXEMPTION AUTHORITY--NONFERROUS RECYCLABLES

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The ICC issued a notice of proposed rulemaking (NPR) in Ex Parte No. 346 (Sub-No. 36) on August 23, 1994, to consider whether to exempt partially from regulation the rail transportation of certain nonferrous recyclables. The ICCTA significantly changed the basis for that notice and, consequently, the Surface Transportation Board (STB) is issuing a decision proposing a total exemption from regulation for 29 nonferrous recyclable commodities. We are also announcing a policy for the interim to govern the 11 nonferrous recyclable commodities that were previously partially exempted.

DATES: Any person interested in participating in this proceeding as a party of record by filing and receiving written comments must file a notice of intent to participate within 10 days of publication. We will issue a service list of the parties of record shortly thereafter. Comments and replies must be served on all parties of record. Comments are due 30 days from the date the notice of intent to participate is due, and replies are due 50 days after the due date for the notice of intent to participate.

ADDRESSES: Send notices of intent to participate and pleadings referring to STB Ex Parte No. 561 to: Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423-0001.

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

SUPPLEMENTARY INFORMATION: In a decision served August 23, 1994, and published in the *Federal Register* on August 24, 1994 (59 FR 43529), the ICC issued a notice of proposed rulemaking in this proceeding to partially exempt 28 nonferrous recyclable commodities (1994 NPR).[2] The ICCTA significantly changed the basis for that notice and, consequently, we are announcing a new NPR in this new docket proposing a total exemption from regulation for 29 nonferrous recyclable commodities.[3]

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[1] In *Rail General Exemption Authority--Exemption of Nonferrous Recyclables and Railroad Rates on Recyclable Commodities*, Ex Parte No. 346 (Sub-No. 36) (ICC served Aug. 23, 1994), he Interstate Commerce Commission (ICC or Commission) proposed to exempt partially from regulation the rail transportation of 28 nonferrous recyclable commodities. Subsequently, the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICCTA), significantly changed the basis for the Ex Parte No. 346 (Sub-No. 36) proceeding by eliminating former 49 U.S.C. 10731(e). In a separate decision served today, that proceeding is being discontinued because we are here proposing a broader exemption. The comments in Ex Parte No. 346 (Sub-No. 36) will be incorporated into the record in this proceeding and need not be refiled.

[2] A list of the 28 commodity groups is found in Appendix A.

[3] As discussed *infra*, we are proposing to exempt 26 of the commodities listed in the 1994 NPR, plus another, scrap paper, for which petitioners did not request an exemption in their petition. The remaining two recyclables identified in the 1994 NPR have 7-digit Standard Commodity Classification Codes (STCC) (STCC 2051118, and STCC 4111580). They are not listed in this

(continued...)

BACKGROUND

The 1994 NPR was issued in response to a petition seeking the institution of a rulemaking proceeding filed by the Association of American Railroads, various individual railroads, and the Institute of Scrap Recycling Industries (collectively, petitioners). The ICC proposed to exempt partially from regulation, under former 49 U.S.C. 10505, the rail transportation of 28 nonferrous recyclables commodities.[4] (The commodities include all those listed in Appendix A except scrap paper.) These recyclables would be added to the list of exempt commodities at 49 CFR 1039. The ICC also proposed to adopt at 49 CFR 1145 streamlined procedures for the proceedings conducted on an annual basis to assure that railroads complied with the recyclables rate ceiling set under former 49 U.S.C. 10731(e).[5]

In response to the NPR, comments were filed by Huron Valley Steel Corporation (Huron Valley), Star Recycling, Inc. (Star), Patrick Simmons, for and on behalf of the United Transportation Union, Illinois Legislative Board (UTU) (collectively, opponents), and petitioners. We will consider the comments to the extent they have not been mooted by the ICCTA. Also, in Appendix B, we have discussed and resolved the procedural issues in the record.

THE ICCTA

The ICCTA and related rulemaking proceedings have radically changed the statutory and regulatory framework upon which the 1994 NPR was predicated. Because of these changes, as well as the age of the record, we are issuing a new NPR.

The key change has been the elimination of former 49 U.S.C. 10731(e). This section established a cap limiting rail rates on nonferrous recyclable commodities. The section provided that "[n]otwithstanding any other provision of this subtitle or any other law," rates had to be set at or below levels that would permit the rail industry, as a whole, to recover its fully allocated costs.

Section 10731(e) was a dominating factor in determining whether to exempt nonferrous recyclables under former section 10505.[6] The ICC was faced with the issue of whether section 10731(e) barred the Commission from exempting recyclables pursuant to section 10505. In *Exempt. From Regulation - Rail Transp. Of Scrap Paper*, 9 I.C.C.2d 957 (1993) (*Scrap Paper*) and *Railroad Rates on Recyclables--Exemptions*, 9 I.C.C.2d 593 (1993) (*Exemption I*), the

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[3](...continued)
exemption, because they are included in two 5-digit commodity groups (STCC 20511 and STCC 41115) that we are now proposing for a total exemption. Our proposed regulations are in Appendix C.

[4] A partial exemption would have exempted the commodities from all regulation except the maximum rate cap of former 49 U.S.C. 10731(e) discussed *infra*.

[5] The ICC also proposed to modify language at former 49 CFR 1039.14(b)(5). This regulation, which excluded rates on nonferrous recyclables from the exemption of boxcar traffic from rate regulation, was later eliminated in *Exemption from Regulation - Boxcar Traffic*, 1 S.T.B. 42 (1996).

[6] The provisions of former section 10505 directed the Commission to exempt particular services from regulation to the extent it found that (1) regulation was not necessary to carry out the National Transportation Policy or the Rail Transportation Policy, and (2) either the service was of limited scope, or regulation was not needed to protect shippers from the abuse of market power.

Under the ICCTA, 49 U.S.C. 10502 has replaced former section 10505. The substantive provisions of section 10502 and former section 10505 are essentially the same. *See Iron Road Railways, Inc. -- Control Exemption -- Bangor and Aroostook Railroad Company*, STB Finance Docket Nos. 32982 and 32657 (STB served Sept. 12, 1996).

Commission did not definitively resolve this matter, but instead issued a partial exemption exempting carriers from all regulation except the rate cap provision.[7]

The 1994 NPR, following this precedent, proposed a partial exemption.[8] With the elimination of section 10731(e), the Board is no longer restricted to considering a partial exemption, and we may now evaluate whether a full exemption is appropriate.

The elimination of section 10731(e) has mooted another of the issues in the 1994 NPR: streamlining the annual compliance procedures at 49 CFR 1145.[9] Because the section 10731(e) statutory basis for the regulations was repealed, the Board removed the regulations at 49 CFR 1145. *Removal of Obsolete Recyclables Regulations*, 1 S.T.B. 7 (1996) (*Obsolete Regulations*).

Finally, we note that in the new post-ICCTA regulatory environment, the focus of the exemption has shifted in other ways. Initially, the proceeding explored whether an exemption from tariff and contract filing restrictions would allow railroads to respond quickly to changing market conditions. However, the tariff filing requirements formerly applicable to rail carriers, at former 49 U.S.C. 10761 and 10762, have been repealed.[10] The ICCTA also reduced the regulation of rail transportation contracts, limiting oversight to transportation of agricultural products.[11]

In light of these changes, we will issue a new, broader NPR, and clarify our policy for the 11 nonferrous recyclables that were previously exempted.

CLARIFICATION OF EXEMPTION

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[7] The ICC concluded in *Exemption I* (9 I.C.C.2d at 603) that:

> [t]here may be some tension between §§10505 and 10731(e), but the partial exemption that we are adopting here harmonizes the reduced regulation policies of §10505 with the rate cap provision of §10731(e). Accordingly, it is not necessary to assess the various principles of statutory construction that might be implicated were we to grant a full exemption.

[8] We note that opponents of the exemption argued strenuously that even a partial exemption was precluded by section 10731(e). Star argued that the Interstate Commerce Act afforded special status to recyclables. Huron Valley submitted that the plain meaning of section 10731(e) precludes a partial exemption. Both contended that the specific Congressional mandate at former 49 U.S.C. 10731(e) required the Commission to maintain heightened oversight of recyclables. To the extent that there was a conflict between former sections 10505 and 10731(e), Star and Huron argued that section 10731(e) took priority because it was more specific and more recently enacted.

[9] To implement former section 10731(e), the ICC issued the rules at 49 CFR 1145. Annual compliance proceedings were established that would set multiple rate caps, the maximum lawful rate levels under section 10731(e). The ICC would then determine whether the railroads' actual rates exceeded the caps. *Cost Ratios For Recyclables - Compliance Procedures*, 6 I.C.C.2d 103 (1989), *modified*, 8 I.C.C.2d 182 (1991).

[10] New 49 U.S.C. 11101(b) and (d) require disclosure of rail common carrier rates and service terms. New 49 U.S.C. 11101(c) further requires rail carriers providing common carriage to give advance notice of rate increases to those who have requested such notification. Finally, there are special publication requirements on non-exempted agricultural products and fertilizer. *See Disclosure, Pub. & Notice of Change of Rates - Rail Carriage*, 1 S.T.B. 153 (1996) and 49 CFR 1300.

[11] Moreover, for contracts of agricultural products, only a summary of the contract, and not the actual contract, need to be filed with the Board. *See Railroad Contracts*, __ STB __ (Dec. 30, 1996).

The petition for exemption sought to exempt 28 nonferrous recyclable commodities. We note, however, that 8 of those commodities had already been explicitly exempted, while 2 other commodities are included in commodity groups that had also been exempted . Moreover, the petition did *not* include one commodity, scrap paper,[12] that had also been partially exempted. We are here proposing to grant a total exemption for all 29 commodities, and we are announcing an interim policy for the commodities that had already been partially exempted.

The petition for exemption requested to "add[ ] non[]ferrous recyclables, *other than those already exempted from regulation in other proceedings*, to the list of commodities" in section 1039.[13] Petition at 2 (emphasis supplied). Petitioners noted that STCC 40241, Paper waste or scrap, was not included in their petition because it was the subject of the separate *Scrap Paper* proceeding. In response to the petition, the 1994 NPR proposed that all 28 recyclables identified by petitioners be partially exempted.

Prior to the filing of the petition for exemption, however, the ICC had issued two decisions in Ex Parte No. 394 (Sub-No. 10) partially exempting 10 nonferrous recyclable commodities.[14] In the first decision (*Exemption I*), the ICC exempted 5 commodity groups, 3 of which are listed in the petition for exemption: STCC 22994, Packing or wiping cloths or rags (processed textile wastes); STCC 30311, Reclaimed rubber; and STCC 40261, Rubber or plastic scrap or waste. The other two commodity groups exempted there were STCC 20511, Bread or other bakery products exc. biscuits, crackers, pretzels or other dry bakery products, and STCC 41115, Articles, used, returned for repair or reconditioning. Petitioners seek exemption for two analogous 7-digit STCC code commodities: STCC 2051118, Bakery refuse or sweepings, feed; and STCC 4111580, Old bags for conversion into bale coverings.

In the second decision in Ex Parte No. 394 (Sub-No. 10), *Railroad Rates on Recyclables--Exemptions*, 9 I.C.C.2d 749 (1993) (*Exemption II*), the ICC exempted 5 more commodity groups that are all included in the petition for exemption: STCC 22941, Textile waste processed; STCC 40221, Textile waste, scrap; STCC 42111, Shipping containers (non-revenue); STCC 42112, Shipping devices (non-revenue); and STCC 42311, Shipping containers (returned empty).

We see no redundancy problem from the 8 5-digit commodities being already partially exempted, because the Board is now proposing a total rather than a partial exemption.[15] We also observe that where the ICC had already exempted the relevant 5-digit STCC code, any 7-digit commodities that come under the 5-digit code are also exempt.[16] In *Exemption I*, the ICC stated that "when a 5-digit group is found to return less than its variable costs, our staff will verify that the sampled movements are in fact nonferrous recyclables. If they are, then all of the nonferrous recyclable commodities will be added to a new category of exemptions." 9 I.C.C.2d at 604.

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[12] The ICC and the parties have sometimes used shortened commodity descriptions in decisions and pleadings. We have also done this in parts of this decision. We note, however, that we have used the full commodity descriptions found in the STCC code in our proposed rules in Appendix C.

[13] Petitioners originally sought that the partial exemption for the 28 commodities be placed in part 1039. In their comments, however, they asked that the nonferrous exemptions be put in part 1145, which listed all the nonferrous commodities that were partially exempted. Because we are proposing a total exemption, we do not believe that a special section is needed for nonferrous recyclables, and we are thus proposing that the 29 commodities be listed in part 1039.

[14] The exemptions for the 10 commodities were codified at 49 CFR 1145.9(a).

[15] Also, as discussed *infra*, there is technically no overlap because the regulations at former 49 CFR 1145.9 have been eliminated.

[16] Accordingly, our proposal (Appendix C) contains the 5-digit recyclables that were already partially exempted instead of the 7-digit commodity groups included in those recyclables.

Finally, as indicated above, in *Obsolete Regulations* we eliminated the rules at 49 CFR 1145 that mainly concern the now-obsolete annual compliance proceedings. Part of those regulations (section 1145.9), however, lists the 10 nonferrous commodities partially exempted in *Exemption I* and Exemption II as well as an eleventh commodity, scrap paper, exempted in *Scrap Paper*. The regulation at former section 1145.9(a) indicated that the 10 commodities were "exempt from regulation, except that they will continue to be subject to the statutory provision prohibiting railroads from increasing individual rates that are already above the cap."[17]

Our removal of the language listing the commodity exemptions in *Obsolete Regulations* was inadvertent. In a sense, however, section 1145.9 was also obsolete, because the exemption was limited by the now-eliminated rate cap of former section 10731(e). The removal of section 1145.9, however, was not meant to signify that these commodities were no longer partially exempt, or, alternatively, that those commodities were now totally exempt because the only limitation in the regulation was based on an obsolete statute. Either of these options would have required an affirmative Board ruling. We believe the result that best reconciles the new statute with the former regulations during this interim comment period is to announce a policy that would treat the 11 commodities identified as partially exempt in former section 1145.9 as exempt from all regulation except the maximum rate provisions of 49 U.S.C. 10701 *et seq*.

DISCUSSION AS TO THE OVERALL EXEMPTION

Section 10502 requires us to grant an exemption when we find that: (1) regulation is not necessary to carry out the national rail transportation policy of 49 U.S.C. 10101 (NRTP); 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. The record that has been developed in this proceeding is over two years old, was predicated on the issue of a partial exemption, and was compiled before the passage of the ICCTA. Nevertheless, that record supports the original justification for an NPR, and in light of the ICCTA, we are proposing a total rather than a partial exemption.[18] It appears that regulation of the 29 commodity groups is not necessary to advance the NRTP or to protect shippers from abuses of market power.[19]

Petitioners contend that the exemption would result in even more vigorous competition for the presently highly competitive recyclables traffic by reducing administrative costs and increasing railroad ratemaking flexibility. This, in turn, would allegedly lead to increased efficiency, improved service, more competitive rates and greater revenues for the carriers.

Petitioners submit that nonferrous recyclables traffic comprises only 0.3% of total U.S. rail tonnage terminated.[20] They assert that the revenue to variable cost (R/VC) ratios are well below the

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[17] Similar language pertaining to scrap paper was found in former section 1145.9(b).

[18] We note that the record does not address the issue of scrap paper (STCC 40241) and bread or other bakery products (STCC 20511) and used articles returned for repair or reconditioning (STCC 41115). All three commodity groups, however, had already been partially exempted. Moreover, for the latter two commodity groups, petitioners provided data on the analogous 7-digit recyclables. The parties can submit information concerning these commodities in their comments.

[19] We noted in the 1994 NPR petitioners' claim that this exemption was of limited scope because it affected only a relatively small amount of traffic, and shippers had access to alternative transportation modes. *1994 NPR* at 2. Parties submitted comments on this issue. Given our finding regarding the probable effect of the exemption on market power, we do not need to determine whether the exemption is of limited scope.

[20] The record in this proceeding contains two verified statements of Paul S. Posey analyzing the commodities for which exemptions are sought. The first verified statement, attached to the petition

(continued...)

jurisdictional threshold of 180%,[21] with individual R/VC ratios ranging from 39.5% to 167.6% and the overall R/VC ratio of 121.4%.[22] They also argue that competition for moving nonferrous recyclables can be seen in declining rail rates. The average revenue per ton-mile (R/TM) on a constant (inflation adjusted) basis fell from 6.3 cents in 1981 to 3.2 cents in 1992, a decline of 51%.

Petitioners also submitted a market share analysis based on the rail tonnage handled for a commodity divided by the total tonnage of the commodity available for shipment by all modes. The total tonnage figures were not available for 13 of the 28 commodities. However, for the commodities that did have total tonnage information,[23] the market share for rail ranged from 0.4% to 29.1%, except for one commodity, tin scrap, which had a market share of +100%.[24]

UTU, Star, and Huron Valley opposed the partial exemption proposed in the 1994 NPR, arguing that the exemption criteria had not been met. UTU criticized the proposal as it relates to all commodities, while the other two parties focused on specific commodities - Star on municipal solid waste (MSW) (STCC No. 4029114) and Huron Valley on automobile shredder residue (ASR) (STCC No. 4029176) and nonferrous scrap metal (NFSM) (STCC No. 33398). We have considered these comments, also filed in 1994 prior to the ICCTA, and believe that an NPR is warranted to consider exempting all 29 commodities.

UTU argues that the market share analysis was done on faulty data because it was based on tonnage, not ton-miles. UTU contends that between 1981 and 1991, the drop in ton-miles was minor, from 3.4 billion ton-miles to 3.0 billion ton-miles.[25] UTU also questions the rail revenue comparison. According to petitioners, rail revenue, adjusted for inflation, declined from $213.7 million in 1981 to $107.2 million in 1992. UTU claims that this comparison is faulty because an inflation adjustment is inappropriate where specific commodities are involved.[26]

In *Railroad General Exemption Authority--Exemption of Ferrous Recyclables*, Ex Parte No. 346 (Sub-No. 35) (ICC served May 16, 1995) (*Ferrous Recyclables I*), the ICC found that market share based on tonnage was appropriate. There, the ICC noted, while ton-miles may be used

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[20](...continued)
for exemption, used 1981 and 1991 waybill data. The second verified statement was attached to petitioners' comments and used 1981 and 1992 waybill data. We are applying the information in the second verified statement, which contains the most recent data in the record. Opponents of the exemption based their comments on the first verified statement. Where indicated, we have changed the opponents' figures to reflect information in the second verified statement.

[21] Under former 49 U.S.C. 10709(d)(2), the R/VC threshold percentage was calculated annually, but was not to exceed 180% (or go below 170%). In practice, the 180% threshold was consistently applied. The ICCTA sets the percentage at 180, eliminating the annual computation. 49 U.S.C. 10707(d)(1)(A). *See West Texas Utilities v. Burlington Northern R.R.*, Docket No. 41191 (STB served May 3, 1996).

[22] Five commodities had R/VC ratios of 0%, apparently due to insufficient data.

[23] Some of these commodities were grouped. Aluminum residue and aluminum scrap, for example, were combined as Total Aluminum.

[24] According to petitioners, this figure "means that not all the possible tin scrap tonnage is included in the total tin tonnage available for shipment." V.S. Posey (Comments) at 11.

[25] We note that when the 1992 figure is used, the drop is even smaller: 3.3 billion ton-miles in 1992 compared with 3.4 billion ton-miles in 1981.

[26] UTU contends that this exemption involves significant rail movements - 4.4 million tons and 74,992 cars in 1992 under our restatement. This argument basically relates to the limited scope analysis, an issue we do not reach.

to measure market share, such analysis is subject to misinterpretation because ton-miles can be affected by changes in a commodity's distribution pattern.[27] We also believe that it is appropriate to adjust the 1981 dollars to constant terms to reflect the impact of inflation during this period. *See Id.* at 7, n. 25. Nevertheless, we will ask that petitioners also submit in their comments data in terms of real dollars (i.e., non-inflation adjusted).

Star, a shipper of MSW, argues that petitioners have failed to show that an exemption is warranted for that commodity. Star disputes the claim that recyclables traffic is highly competitive, arguing that rail carriers in New York wield largely unchecked power over MSW transportation. Star challenges the revenue data of petitioners, contending that the revenue per ton-mile data lack credibility, i.e., under our restatement, the 1981 revenue per ton-mile figure of $1.83 (in 1992 dollars) is unrealistic, particularly when compared with the 1992 amount of only 2.9 cents. Moreover, even if the revenue data are assumed to be correct, they provide an R/VC ratio of 1.674, which greatly exceeded the 1991 national recyclables cap of 1.423. Star also argues that petitioner's data tend to understate the profitability of the movements, because the financial data have not been adjusted to reflect productivity gains.

Star argues that between 1975 and 1992, MSW tonnage increased significantly. As we have restated the figures, the increase was about 7700% (10,000 tons in 1975 and 780,638 tons in 1992). Moreover, Star claims that there are other factors that indicate the market power of the carriers: the industry is developing a greater reliance on longer hauls, the railroads have at various times refused to ship MSW or to furnish necessary equipment, and there is inelasticity of demand for the transportation of MSW from areas such as New York.[28]

While petitioners acknowledge that there was a great increase in MSW between 1990 and 1992, it is allegedly only a small fraction of all MSW available for movement. Petitioners contend that because of sparse sample sizes before 1990, it is probably not meaningful to compare pre-1990 and post-1990 traffic. In any event, petitioners claim that the 1992 revenue to ton-mile value for MSW is 2.9 cents, which is less than the overall average for nonferrous recyclables of 3.2 cents.

Star's productivity adjustment argument is unclear. In any event, the Board does not adjust R/VC ratios for such gains, because the costs already reflect any productivity gains realized by carriers for a particular year. On the other hand, the 1981 MSW revenue per ton-mile data submitted by petitioners of $1.79 and $1.83 in 1991 and 1992 dollars, respectively, seem unreasonably high in comparison with the figures submitted for 1992. We do note, however, that the R/VC ratio declined in 1992 to 142.4%[29] and that the rail tonnage of MSW of 780,638 is only

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[27] The ICC stated in *Ferrous Recyclables I* at 6, n. 20:

> For example, 10 tons moving 10 miles in Year 1 yields 100 ton-miles, as does 1 ton moving 100 miles in Year 2; yet, the market share in Year 2 has decreased significantly. Therefore, tons transported have been considered an appropriate measure of market share in previous rail proceedings, and continue to be so.

The market share/ton-mile issue was again raised in a petition to reopen *Ferrous Recyclables I*. The Board stated that it saw "no new merit in [UTU's] rehash of [its] argument, rejected by the ICC, that the ton-miles, rather than tonnage, ought to be used here to measure market share." *Rail Gen. Exem. Auth.--Exem. of Ferrous Recyclables*, 1 I.C.C.2d 173, 175-76 (1996) (*Ferrous Recyclables II*).

[28] Star also claims that petitioners have largely ignored the national policy to encourage and promote energy conservation. Former 49 U.S.C. 10101a(15). Parties may address this issue in their comments in light of the elimination of former section 10731(e).

[29] We have stated "that R/VC ratios are useful in analyzing the degree of market power by the (continued...)

about 0.4% of the total projected MSW tonnage of over 200,000,000 tons for 1992. Accordingly, we will again propose MSW for exemption, and we will determine whether an exemption for this commodity is warranted upon the close of the record.

Huron Valley also claims that the proposal does not satisfy the statutory exemption criteria, arguing that its traffic is not subject to the constraints in a competitive market. Huron Valley ships two of the commodities proposed for exemption, ASR and NFSM. It contends that the decline in real revenue per car and market share is meaningless because specific origin/destination pairs, not market averages, are important in reviewing marketplace competition. Many of the shredders, Huron Valley alleges, from which it purchases ASR are served by only one railroad. It argues that most of the NFSM moving in the eastern part of the nation moves between Anniston, AL, and Belleville, MI, with Norfolk Southern being the only carrier to serve both plants. Finally, Huron Valley submits that in its experience, long distance movements move 100% by rail.

Huron Valley's argument that specific origin/destination pairs offer a more appropriate analysis of competitive options than do "market totals" may be valid, at least in determining whether certain movements of a commodity, rather than the commodity as a whole, should not be exempt. *Cf. Rail General Exemption Authority--Exemption of Hydraulic Cement*, Ex Parte No. 346 (Sub-No. 34) (ICC served July 14, 1995). Huron Valley, however, has not submitted appropriate evidence supporting its position. In the absence of persuasive evidence quantifying that certain movements differ from the whole and thus do not qualify for an exemption, we are left with the evidence in this record. It indicates that ASR traffic is competitive. The R/VC ratio for ASR is 140.3% based on 1992 waybill data, and its current dollar revenue per ton-mile fell from 6.7 cents in 1981 to 3.8 cents a 1992, a 43% decline. Petitioners' data show for NFSM that rail tonnage dropped more than 81% between 1975 and 1992, and constant dollar revenue per ton-mile dropped from 6.4 cents in 1981 to 3.5 cents in 1992. Accordingly, we will propose these two commodities for exemption.

Our proposed rules are shown in Appendix C.[30]

Environmental and Energy Considerations.

We preliminarily conclude that, if an exemption is granted, it will not significantly affect either the quality of the human environment or the conservation of energy resources. We invite comments in this area.

Initial Regulatory Flexibility Analysis.

Pursuant to 5 U.S.C. 605(b), we preliminarily conclude that an exemption would not have a significant economic impact on a substantial number of small entities. No new regulatory requirements would be imposed, directly or indirectly, on such entities. The impact, if any, would be to reduce the amount of paperwork and regulation. If an exemption were granted, it would be based partly 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, if

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[29](...continued)
railroad industry in connection with transportation of particular commodity groups." *Ferrous Recyclables II*, 9 I.C.C.2d at 175-76.

[30] We note that, in new section 1039.11, we are not changing the reference to "Commission" in this regulation to "Board" or "Commission and Board" because it appears that the exception was limited to specific movements found to be market dominant at the time the exemption was promulgated. *See Rail Exemption - Misc. Manufactured Commodities*, 6 I.C.C.2d 189, 194-95 (1989). The Commission noted that "[s]hould there be isolated instances in which regulation remains appropriate, parties may apply to us for partial revocation of the exemption as it relates to those movements." *Id.* at 195.

made, would indicate that a substantial number of small entities would not be significantly affected. We invite comments as to this issue.

List of Subjects in 49 CFR Part 1039

Agricultural Commodities, Intermodal transportation, Manufactured commodities, Railroads.

Decided: April 24, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

Appendix A

NONFERROUS RECYCLABLES

STCC NUMBER	COMMODITY DESCRIPTION
2051118	Bakery waste or sweepings: feed
22941	Textile waste: garnetted, processed or recovered
22973	Textile fibres, noils, nubs for spinning
22994	Packing cloths or rags: processed textile wastes
24293	Shaving or sawdust
30311	Reclaimed rubber
3229924	Cullet (broken glass)
33312	Copper matte, flue dust, or residues: skimmings, tailings, scale
33322	Lead matte, flue dust, slag skimmings, etc.
33332	Zinc dross, residue, ashes, skimmings
33342	Aluminum residue: ashes, skimmings, slag, smelting residues
33398	Misc. nonferrous residue, inc. solder skimmings, type metal dross, tin, nickel dross
40112	Ashes: fly ash, coal cinders, photo silver ash, incinerator ash, metal bearing
40212	Brass, bronze, copper, or alloy scrap, tailings, or wastes
40213	Lead, zinc, or alloy scrap: lead borings, zinc castings
40214	Aluminum scrap: borings, grindings, turnings, foil scrap
4021960	Tin scrap: metallic tin, clippings, drippings, shavings, for remelting
40221	Textile waste: waste cotton, rope, rags, nec.
40231	Wood scrap: woodpulp waste, spent wood, waste bark
40251	Chemical or petroleum waste: spent acid, lubricating grease, waste oil
40261	Rubber or plastic scrap, clippings or trimmings
4029114	Municipal garbage waste, solid, digested and ground
4029176	Auto shredder residue
4111434	Bags, old: burlap, gunny, jute, or nec.
4111580	Old bags for conversion into bale coverings

42111	Non-revenue mvmt. of containers moving in reverse of loaded direction
42112	Non-revenue mvmt. of shipping devices moving in reverse of loaded direction
42311	Revenue mvmt. of containers moving in reverse of loaded direction

Appendix B

PROCEDURAL ISSUES

The ICC noted in the 1994 NPR that Huron Valley and Star had filed pleadings in opposition to the petition for exemption. Star had asked that the petition be dismissed, while Huron Valley filed a reply requesting that the petition be denied.[31] The ICC withheld final determination on these requests, and invited comment on Huron Valley's and Star's contentions. 1994 NPR at 3. Star's petition was based exclusively, and Huron Valley's was based predominately, on the proposition that the proposed exemption would undermine the ICC's ability to fulfill its statutory responsibilities over recyclables rate levels pursuant to former 49 U.S.C. 10731(e). Because section 10731(e) has been repealed by the ICCTA, we see no reason to withhold a determination on these petitions, and we will deny Star's petition to dismiss and Huron Valley's request that the exemption petition be denied.

Conrail filed a petition to strike certain testimony and statements contained in Star's comments to the 1994 NPR. Conrail contends that Star's claim of a lack of competition for municipal solid waste (MSW) transportation moving from Star's New York facilities is contradicted by statements made to Conrail in private negotiations.[32] Conrail also asks that judicial notice be taken that other railroads serve New York and that the subject of the negotiation between Conrail and Star was not a recyclable. In the alternative, Conrail asks that attached verified statements be admitted for showing the alleged inconsistent statements. Star, in reply, contends that there is no precedent for Conrail's petition to strike and, in any event, the use of confidential statements would violate fundamental ICC policies, citing *Sandusky County, et al. - Feeder Line Appl. - Conrail*, 6 I.C.C.2d 568, 582 (1990) (*Sandusky*). Star claims, moreover, that Conrail does exercise monopoly power over MSW from New York to distant landfills, and that its commodity is a recyclable.

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[31] As noted, while the Board has discontinued the Ex Parte No. 346 (Sub-No. 36) proceeding, the comments filed there have been made a part of the record in this proceeding. Thus, we will consider the requests for dismissal and denial of the petition as pertaining to STB Ex Parte No. 561.

[32] Conrail claims that, under the *Federal Rules of Evidence*, Rule 801(d)(2), testimony of a witness's prior inconsistent statements is admissible to impeach the credibility of the witness.

We will deny the motion to strike, because Conrail's objections go more to the weight to be accorded the evidence than to its admissibility. In the interest of developing a complete record, we will allow the introduction of Conrail's verified statements and Star's reply. We believe that the introduction of Conrail's verified statements should not be prohibited. The *Sandusky* case cited by Star involved an interpretation of Rule 408 of the Federal Rules of Evidence, which prohibits introduction of evidence of compromise negotiations "to prove liability for or invalidity of the claim or its amount." Here, the information is being used in a rulemaking proceeding not to prove a liability or amount, and we will accept it, along with any other evidence relevant to this issue.

UTU complains that, under the procedures of the 1994 NPR (comment but no reply), it was unable to reply to the "substantial additional information and arguments" in the petitioners' comments. UTU requests that petitioners should put their entire justification for the exemption in the petition, and it requests the opportunity to file a response to petitioners' arguments.

Under the Board's new exemption procedures at 49 CFR 1121, the party seeking an exemption must file its case-in-chief and supporting evidence in its petition. We see no need to make petitioners refile their exemption request, particularly since the record now includes petitioners' entire pre-ICCTA case. In any event, to develop as complete a record as possible, we will provide the opportunity to file replies to comments.

Appendix C

For the reasons set forth in the preamble, Title 49, Chapter X, Parts 1039 and 1145 of the Code of Federal Regulations are proposed to be amended as follows:

PART 1039 -- EXEMPTIONS

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

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

2. In § 1039.11, paragraph (a) is proposed to be 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) * * *

STCC No.	STCC tariff	Commodity
* * * * *		
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.

Also excepted from this exemption are those commodities previously exempt, and any transportation service regarding which the Commission has made a finding of market dominance.