

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE NO. 704 (Sub-No. 1)

**REVIEW OF COMMODITY, BOXCAR,
AND TOFC/COFC EXEMPTIONS**

**COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

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Norfolk Southern Railway Company (“NS”) files these comments in response to the Notice of Proposed Rulemaking issued by the Surface Transportation Board (“STB”) on March 23, 2016, in a Board initiated proceeding entitled “Review of Commodity, Boxcar, and TOFC/COFC Exemptions” (“NPRM”). NS also joins the comments of the Association of American Railroads.

I. INTRODUCTION

The STB has violated basic administrative law by not providing to the public the materials that it relied on to decide to issue the NPRM, to determine which commodities to include in the NPRM, and to determine whether the deviation from the statutory policy to issue exemptions to the “maximum extent possible” may be justified. The STB’s NPRM states that it considered “oral testimony and written comments, waybill rate data for years 1992 through 2013, and other industry information” in reaching its proposal. NPRM at 3. Yet, it decided to keep much of these materials secret by hiding behind the Freedom of Information Act (“FOIA”) and declined to provide numerous documents both to the AAR and to NS. With the STB having failed to disclose the secret “other agency information” and other data and analysis that it relied

upon in crafting the NPRM, the NPRM is a misguided effort that lacks any evidentiary or economic foundation. In short, it is fatally flawed because the STB has denied NS – and other parties – the opportunity to meaningfully comment.

Based on the paltry amount of information and rationale that NS can see, the NPRM is misguided anyway. There is no discernable principle at play that explains how or why these five commodities were selected for inclusion in the NPRM. Moreover, the NPRM is predicated on dated anecdotal statements, not real evidence, which at most justify the existing process at the STB to consider after the fact petitions to revoke exemptions on a case-by-case basis. The STB relies on statements made by shippers (or shipper associations) that are known to be false – and have been found by the STB to be false in other contexts – without any explanation by the STB as to why it finds such statements credible now.

On the other hand, the STB ignores many of the comments and facts previously presented in this proceeding, including the continuing existence of substantial truck, modal, and other competition for the transportation of the five commodities in the NPRM. There is no finding by the STB that railroads have in any way abused market power with respect to these commodities. The STB previously has expressed concern repeatedly about the reintroduction of regulation unleveling the playing field between trucks and railroads when considering the effect of removing other exemptions, yet the STB did not distinguish or address that concern despite many parties raising it in their comments. Further, the NPRM does not even mention – much less explain away – the very substantial elements of the Rail Transportation Policy (“RTP”) of 49 U.S.C. § 10101 that were found in the past to be advanced and that continue to be advanced by the exemption of these commodities from regulation. In short, the STB has “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs

counter to the evidence before the agency, or is so implausible that it cannot be ascribed to a difference in view or the product of agency expertise,” or, in this case, all three. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

The NPRM is cloaked in economic-sounding terms, but lacks any economic insight into the complex and highly competitive transportation market for the shipment of these commodities. In short, there is no basis for revoking the exemptions for the commodities listed in the NPRM. The Board has ignored the plain language of the statute, has no sound facts on which to base a proposal to revoke any exemptions, and failed to draw “a rational connection between the facts found and the choice made.” *Id.* at 43 (internal quotation marks omitted). Accordingly, the STB should terminate this proceeding and begin one to examine whether there are additional commodities that should be exempted from regulation in accordance with the statutory directive that the agency exempt “to the maximum extent.” 49 U.S.C. § 10502(a).

II. THE STB HAS VIOLATED BASIC ADMINISTRATIVE LAW BY NOT DISCLOSING THE INFORMATION THAT UNDERLIES THE NPRM.

The NPRM and the STB fail to disclose the data and methodology on which the STB relied in formulating this proposal, which has deprived participants of their right to a meaningful opportunity to comment on the rulemaking under § 553 of the Administrative Procedure Act (“APA”). The United States Court of Appeals for the District of Columbia Circuit has resolved this issue: “Under APA notice and comment requirements, ‘[a]mong the information that must be revealed for public evaluation are the ‘technical studies and data’ upon which the agency relies [in its rulemaking].’” *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008). The STB has violated this basic principle by hiding information it relied upon in the NPRM behind FOIA Exception 5. It has thereby rendered meaningless the opportunity for the public to comment.

A regulatory agency has an obligation to release the data and methodology it relies on to formulate a proposed rule. The D.C. Circuit has “held for many years that an agency’s failure to disclose critical material, on which it relies, deprives commenters of a right under § 553 to participate in rulemaking.” *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (internal citations omitted). “Under APA notice and comment requirements, ‘[a]mong the information that must be revealed for public evaluation are the ‘technical studies and data’ upon which the agency relies [in its rulemaking].”’ *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d at 236 (quoting *Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006)).

Construing section 553 of the APA, the court explained long ago that “[i]n order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules.” More particularly, “[d]isclosure of staff reports allows the parties to focus on the information relied on by the agency and to point out where that information is erroneous or where the agency may be drawing improper conclusions from it.”

Id. (internal citations omitted) (emphasis added).

This obligation extends not just to data, but also to the methodology an agency employs in analyzing and interpreting that data. In *National Black Media Coalition v. FCC*, 791 F.2d 1016 (2d Cir. 1986), the Second Circuit struck down a final rule issued by FCC that was supported with maps and internal studies that were not disclosed in the proceeding. The court rejected the FCC’s defense that the studies were based on public data and were corroborated by public comments, therefore providing sufficient opportunity to comment. *Id.* at 1023. Instead, the court explained that “it is ‘the methodology used’ in creating the maps and studies, and ‘the meaning to be inferred’ from them, that should have been a part of the public record. This non-disclosure thus prevented petitioners and perhaps others from making relevant comments.” *Id.* (quoting *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 251 (2d Cir. 1977)).

Enforcing the APA's notice and comment requirements ensures that an agency does not “fail[] to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary” so that “a genuine interchange” occurs rather than “allow[ing] an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs.”

Am. Radio Relay League, Inc. v. FCC, 524 F.3d at 236-37 (emphasis added).¹ A complete disclosure of the methodology is essential because “[p]ublic notice and comment regarding relied-upon technical analysis, then, are ‘[t]he safety valves in the use of . . . sophisticated methodology.’” *Id.* at 236 (quoting *Sierra Club v. Costle*, 657 F.2d 298, 334, 397-98 & n.484 (D.C. Cir. 1981) (citing cases)). The same is true in this case where the methodology seems unsophisticated – if there was a methodology at all.

The STB has failed to meet its legal obligation to disclose the data and methodology on which it relied in this rulemaking. The STB’s NPRM states that it considered “oral testimony and written comments, waybill rate data for years 1992 through 2013, and other industry information” in reaching its proposal. NPRM at 3. Additionally, in concurring, Vice Chairman Miller disclosed that she requested a separate analysis from the STB’s Office of Economics, without which “. . . I would not have felt comfortable voting to approve this decision.” *Id.* at 14 (Vice Chairman Miller, concurring).

The STB’s initial NPRM did not contain any of the waybill data, analyses, or “other industry information” that the STB cited as relying on in its decision. NPRM at 3. As a result, the AAR requested “that the Board release all data, reports, work papers, and other materials that underlie the proposed rule changes.” Petition for Release of Information and Request for

¹ See also *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d at 251 (“Here all the scientific research was collected by the agency, and none of it was disclosed to interested parties as the material upon which the proposed rule would be fashioned. . . . This required it to bear a burden of adducing a reasoned presentation supporting the reliability of its methodology.”) (internal quotation omitted) (emphasis added).

Extension of Time of the AAR, *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, Ex Parte 704 (Sub-No. 1), at 2 (filed Apr. 8, 2016). On the same day, NS filed a FOIA request for information² underlying the Board's NPRM. See Letter to Marilyn R. Levitt, FOIA/Privacy Officer, Re: Docket No. Ex Parte 704 (Sub-No. 1) (Apr. 8, 2016) (which is attached hereto as Exhibit A and made a part hereof) [hereinafter "NS FOIA Letter"]. NS explained that "this information is essential in order for NS to understand the STB's attempts to justify its NPRM and to adequately respond to the NPRM." *Id.*

In response to these requests, the STB belatedly published only two spreadsheets to its website. On May 6, the STB issued a decision releasing "the public work paper that underlies the STB's proposed revocation of the class exemption for, specifically, crushed or broken stone or rip rap, hydraulic cement, coke produced from coal, primary iron or steel products, and iron or steel scrap, wastes or tailings." *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, Ex Parte 704 (Sub-No. 1), slip op. at 2 (STB served May 6, 2016) [such document hereinafter

² Specifically, NS requested that the Board provide:

(1) any and all waybill studies conducted by the Board or Board staff that relate to the issues in Ex Parte 704, regardless of whether such studies are referenced in the NPRM, but not the confidential waybill data; (2) any and all Other Industry Information, including Other Industry Information relied upon by the Board in issuing its NPRM and Other Industry Information compiled or developed that were not referenced in the NPRM; (3) any and all other information considered by the Board or Board staff in researching or developing the NPRM, regardless of whether such studies are referenced in the NPRM; (4) the OE Analysis; (5) the electronic database tracking complaints filed with the Rail Customer and Assistance Program for the Applicable STCCs (it is our understanding that the STB tracks such complaints by STCC). NS expects the STB to redact the name of the railroad, shipper and geographic location to protect the confidentiality of the complaint process; and (6) any and all work papers or studies conducted by or relied on by the Board related to categories (1), (2), (3) and (4) above, or otherwise reviewed, considered, or disregarded in evaluating whether to issue the NPRM or to develop the content of the NPRM.

referred to as the “Public Workpaper”]. Additionally, the STB forwarded AAR’s request to its FOIA’s office, which released “certain preliminary analysis that was created by the Board’s Office of Economics at the request of Vice Chairman Debra Miller and referenced in her concurring opinion in the Exemptions NPRM.” STB Response Letter – FOIA Request No. 16-022, at 2 (May 6, 2016) (which is attached hereto as Exhibit B and made a part hereof) [such document hereinafter referred to as the “Miller Analysis”]. The STB letter cited FOIA Exemption 5 to withhold “29 records that contain other data, analyses, and materials related to the NPRM” and did not release any additional information. *Id.* The STB responded similarly to NS’s FOIA request, although it also identified and withheld 69 related records in the STB’s Rail Customer and Public Assistance database.³ *See* STB Response Letter – FOIA Request No. 16-021, at 2 (May 6, 2016) (which is attached hereto as Exhibit C and made a part hereof). After the AAR appealed the response to its FOIA request, Chairman Elliott released “one additional record in full and two additional records in part,” none of which conveyed any meaningful information or support for the STB’s NPRM. Letter from Chairman Elliott – Appeal of FOIA Request No. 16-022, at 1 (June 14, 2016) (which is attached hereto as Exhibit F and made a part hereof). None of the secret “other industry information” was provided.

As will be explained in these Comments, such disclosures are insufficient to support the STB’s assertion that it relied on “waybill rate data for years 1992 through 2013, and other industry information” in reaching its proposal. NPRM at 3. The STB’s failure to meet its

³ The STB letter confirmed that these 69 documents were not relied on by the STB in formulating the proposed rule and therefore were not the secret “other industry information.” *See* NS Reply to STB Response Letter (May 17, 2016) (which is attached hereto as Exhibit D and made a part hereof); STB Response Letter – FOIA Request No. 16-021 (2nd Response), at 1 (May 26, 2016) (which is attached hereto as Exhibit E and made a part hereof).

obligations is fatal because it has rendered it impossible for NS – as well as other parties – to provide meaningful comments on the NPRM.

First, and most strikingly, the STB has not disclosed any “other industry information.” NS has no way of knowing what that information is, what is its source, what it says, or why the STB found it persuasive. Indeed, NS does not know whether it exists at all. NS asked for data from the STB’s Rail Customer and Assistance Program regarding the number of complaints received regarding the commodities that somehow made the five listed in the NPRM. But the STB does not even claim to have relied on that information. *See* NPRM at 3; STB Response Letter – FOIA Request No. 16-021 (May 26, 2016) (explicitly denying that the complaints received by Rail Customer and Assistance Program were the secret “other industry information”).⁴ In short, NS has had no opportunity to see the secret “other industry information” or to determine “where that [other industry] information is erroneous or where the agency may be drawing improper conclusions.” *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d at 236.

Second, the Public Workpaper contains nothing more than a time series of R/VC data for ten commodities between 1992 and 2013. Notably absent is any industry information or any encompassing analysis of waybill data. The STB also has not disclosed or explained why it reviewed the ten commodities it did. There is simply no explanation (in the decision or any of the materials released by the STB) of the methodology the STB used to select which commodities to include in the Public Workpaper analysis or what threshold of change triggered the proposal to revoke the exemption for these commodities. There is also no discussion or

⁴ Even the data produced regarding the complaints received by the Rail Customer and Assistance Program cannot be the foundation for the NPRM as some of the data is admitted by the STB to be nothing more than a guess. STB Response Letter – FOIA Request No. 16-021, at 4 tbl. (May 6, 2016).

information that would allow NS to determine what methodology the STB used for its waybill-based hunch that the exemptions for these commodities should be revoked or how that data supports revocation of the exemptions for the five commodities included in the NPRM. *National Black Media Coalition v. FCC*, 791 F.2d at 1023 (“ . . . it is ‘the methodology used’ in creating the maps and studies, and ‘the meaning to be inferred’ from them that should have been a part of the public record.”) (internal citations omitted). Even if NS could manipulate the waybill data to produce similar results, there is not even a clue in the record about how the STB culled those data to end up with the five commodities at issue in the NPRM.

Third, the disclosure of the Miller Analysis provides no additional support. The STB specifically disclaims that analysis, saying that that analysis “was not adopted by the Board as a rationale for its decision.” STB Response Letter – FOIA Request No. 16-022, at 2 (May 6, 2016); STB Response Letter – FOIA Request No. 16-021, at 2 (May 6, 2016). Such a position is hard to reconcile with the concurring expression by Vice Chairman Miller that “[w]ithout the analysis . . . I would not have felt comfortable voting to approve this decision.” NPRM at 14 (Vice Chairman Miller, concurring). But given that it expressly disavowed the Miller Analysis, the STB is foreclosed from relying on this study as justification for its NPRM.

Even if the Board had characterized the Miller Analysis as data on which the agency relied, the STB has failed to disclose the methodology used to create the study, giving NS and other participants no opportunity to meaningfully comment or respond. The Miller Analysis consists of a single spreadsheet with over 1100 five-digit Standard Transportation Commodity Codes (STCC). The spreadsheet includes no data for an overwhelming majority of those STCC codes, including crucially all five commodities proposed for exemption in the NPRM. The remaining commodities have varying amounts of data within fields that are neither defined nor

explained. Many of the cells are subject to shades of highlighting, again without explanation or meaning. NS has no way to evaluate or respond to Vice Chairman Miller's statements that she drew conclusions from this analysis, or that "[w]hile I would have included such analyses as part of the decision today, they would not have led me to a different outcome." NPRM at 14 (Vice Chairman Miller, concurring). In short, without any methodological information, NS is forced to "play hunt the peanut." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d at 237.

Fourth, the STB cannot find refuge in FOIA exemptions to protect it from a violation of the APA requirement that parties be given a meaningful opportunity to comment. "[E]ven if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854 (D.C. Cir. Feb. 15, 1980). *Am. Radio Relay League Inc. v. FCC* held similarly that an agency could not hide behind FOIA:

The Commission's other bases for redaction and non-publication do not withstand analysis. The FOIA's deliberative process privilege, invoked by the Commission in responding to the League's FOIA request, "does not authorize an agency to throw a protective blanket over all information Purely factual reports and scientific studies cannot be cloaked in secrecy by an exemption designed to protect only those internal working papers in which opinions are expressed and policies formulated and recommended." By choosing "to adopt or incorporate by reference" the redacted studies, and thereby "us[ing] [them] in its dealings with the public," the Commission ceased treating them as internal working papers. The Commission's reliance on *Vernal Enterprises, Inc. v. FCC*, 359 U.S. App. D.C. 355, 355 F.3d 650, 661 (D.C. Cir. 2004), for the proposition that an agency is not bound by the actions of its staff, is misplaced; unlike the refund rulings in that case, the redacted studies were neither unauthorized staff activities nor binding on the Commission.

524 F.3d at 238-39 (citations omitted). The STB was obligated to provide this information to the public so that the comments submitted on the NPRM could be meaningful. The STB instead has

kept secret many of the materials on which it purports in the NPRM to have relied and accordingly has violated the APA.

In sum, the STB withheld from the public data and methodological information that it relies upon. Therefore, commenters are unable to respond meaningfully to the NPRM. If the STB's decision in fact rests entirely on changes in R/VC ratios and the percentage of traffic moving at an R/VC above 180% included in the Public Workpaper (along with a few anecdotal comments from 2010 and 2011), then perhaps the STB's belated disclosure is sufficient from a notice perspective. Of course, that Public Workpaper standing alone cannot constitute reasoned decision-making, as further explained herein. But, the STB expressly relied on more than that Public Workpaper. *See* NPRM at 3; *id.* at 14 (Vice Chairman Miller, concurring). If the STB later tries to argue that any additional waybill or the secret other "industry information" supports its NPRM, its failure to disclose such information to permit meaningful comment is fatal.

III. THE JUSTIFICATIONS IN THE NPRM FOR WHOLESALE REVOCATION OF THESE EXEMPTIONS RANGE FROM FLIMSY TO BLATANTLY FALSE AND LACK ANY ECONOMIC RIGOR.

Having refused to provide the secret "other industry information" and disavowed the Miller Analysis, there is little left on which the NS and the public reasonably can comment. What is left does not support the conclusion that the STB has engaged in any sort of reasoned analysis. Indeed, it would seem that the STB has engaged in a process that is arbitrary and capricious.

A. Public Workpaper Lacks Any Discernable Methodology

First, the Public Workpaper raises more questions than it answers – especially because the STB has withheld the methodology used to generate and to interpret that workpaper. How did the STB determine which commodities to examine in the Public Workpaper? The Miller

Analysis shows that the STB had information on more than 1100 STCC codes to look at. What distinguished the ten commodities that were selected for inclusion in the Public Workpaper or even the five that are the subject of the NPRM? The STB claims it looked at changes in R/VC ratios over time. The AAR fully addresses why it is improper to examine R/VC's generally, but how much change qualified these commodities for inclusion in the NPRM? Where was the break point? What was the rational basis? Was it as arbitrary as it appears from the Public Workpaper and the Miller Analysis? The STB also claims that it examined the percent of traffic that had an R/VC ratio above 180%, a meaningless measure because an R/VC ratio of 180% lacks any economic significance apart from its statutory role of excluding shipments below that level from the STB's jurisdiction, as explained by AAR in its opening comments. But what was the threshold the STB used? None of these questions can be answered from the Public Workpaper. None are answered in the NPRM. There is no discernable methodology or method to the STB's decision. It appears that Commissioner Begeman was right that the STB has little more than a "hunch" to justify the NPRM. NPRM at 15 (Commissioner Begeman, dissenting). A hunch is not reasoned decision-making.

B. Shipper Testimony Anecdotal and Extremely Limited

Second, the NPRM is not supported by any sort of substantial outcry from a broad base of shippers of these commodities. Basing an NPRM to revoke exemptions wholesale on the anecdotal testimony of a total of one stone shipper, two cement shippers, and one steel shipper (and a cement trade association) is startling – especially when comments from other shippers who supported exemptions, like United States Gypsum Company, are ignored. In 2015, NS alone served over 100 shippers of crushed or broken stone or rip rap; over 30 shippers of coke produced from coal; over 1,000 shippers of primary iron and steel products; over 200 shippers of

steel scrap, wastes, and tailings; and around 20 shippers of hydraulic cement.⁵ Even if the few individual shippers who testified in 2011 each could justify and prevail in a petition to revoke partially the applicable exemption, which as discussed below is the more appropriate way to deal with an individual shipper's concern, such a small sample is insufficient to justify a wholesale revocation of these commodity exemptions and re-regulation of these commodities in contravention of § 10501(a)'s mandate to exempt from regulation "to the maximum extent." 49 U.S.C. § 10501(a).

The reliance on such anecdotes is particularly striking because of the basic dichotomy in the statute regarding exemptions. An important cornerstone of the Staggers Rail Act of 1980 deregulatory goals is the expansive mandate to exempt and the desire to deal after the fact with targeted situations. *Brae Corp. v. United States*, 740 F.2d 1023, 1055 (D.C. Cir. 1984) [hereinafter "*Brae Corp*"] (holding that exemptions were required to achieve Congress's goal "to remove regulatory burdens and to allow the marketplace to influence decisions in the rail industry"). Indeed, when Congress had the chance to reconsider the exemption provision and its role in deregulation, Congress affirmed its use and purpose. *Report of the House Committee on Transportation and Infrastructure*, H.R. Rep. 104-311, at 96 (1995), reprinted in 1995 U.S. Code Cong. & Admin. News 793, 808 (concluding that the Board's mandate to grant exemptions remained a "crucially important delegated power to expand existing statutory deregulation through administrative action").

⁵ See Verified Statement of James R. Schaaf, NS's Group Vice President – Metals and Construction, at 2, 4, 6, 8 (which is attached hereto as Exhibit G and made a part hereof) [hereinafter "*Schaaf V.S.*"]; Verified Statement of Rob N. Zehringer, NS's Group Vice President – Coal Business Group, at 1, (which is attached hereto as Exhibit H and made a part hereof) [hereinafter "*Zehringer V.S.*"].

The ICC/STB and courts have found that Congress was clear that exemptions were to be broadly based and that individual complaints were to be addressed by partial revocation if there were a specific competitive situation that needed to be addressed. *Brae Corp.*, 740 F.2d at 1043 (holding that statutory language *mandates* “deregulation of the entire railroad industry to the maximum extent possible in conformity with the national rail transportation policy”); *Ass’n of Am. R.Rs. v. Surface Transp. Bd.*, 237 F.3d 676, 677, 680 (D.C. Cir. 2001) (“[M]aximum extent possible” language, “so forcefully expressed, manifests a preference for market-based rather than regulatory rate setting,” and that the Board may not simply ignore this “strong language favoring rail deregulation”). The ICC/STB has previously interpreted Section 10502 to require that its “[e]xemption analysis take [] a broad-brush approach to analysis of the competitive environment as a whole and look [] to the remedy of partial revocation to address specific competitive situations should that become necessary.” *Santa Fe S. Pac. Corp.-Control- S. Pac. Transp. Co.*, 2 I.C.C.2d 709, 741 & n.28 (I.C.C. July 24, 1986); *see also Pejepsco Industrial Park, Inc., d/b/a Grimm Industries–Petition for Declaratory Order*, FD 33989, slip op. at 6 n.12 (STB served May 15, 2003) (explaining that the STB will “liberally exempt[] carriers from regulatory requirements and review[] carrier actions after the fact to correct abuses of market power”) (emphasis added). Courts have agreed that specific, after-the-fact review was the proper way to implement the broad deregulatory aims of the Staggers Act:

Further, as to the Commission’s exercise of its exemption authority, the Conference Report states that “the conferees expect that as many as possible of the Commission’s restrictions on changes in prices and services by rail carriers will be removed and that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power.” H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 105 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4110, 4137.

American Trucking Assoc. v. ICC, 656 F.2d 1115, 1119-20 (9th Cir. 1981) (emphasis added).

When there are such isolated concerns, the proper course is a targeted petition by the shipper to revoke partially the exemption – not a wholesale revocation of an exemption in contravention of the statutory policy to exempt to the “maximum extent.” 49 U.S.C. § 10502(a). Yet, the STB offers no explanation in the NPRM for changing this longstanding policy. Moreover, the STB has expressly denied relying on inquiries to the Rail Commission office in formulating the NPRM. *See* STB Response Letter – FOIA Request No. 16-021, at 1 (May 26, 2016).

C. STB Failed To Undertake Any Credible or Comprehensive Analysis of Market Power

Third, the STB’s record in this STB-initiated NPRM is paltry. That record does not show a demonstrated abuse of market power that can be remedied only by re-imposition of regulation on a wholesale basis rather than by use of targeted, individual petitions to revoke an exemption. That record does not show that “regulation is needed to carry out the national transportation policy.” Nor does that record examine “all competitive transportation factors that restrain rail carriers’ actions and that affect the market for transportation of the particular commodity or type of service for which revocation has been requested.” These are precisely the detailed findings that Congress wanted the STB to make before revoking an exemption – after one “has been requested.” H.R. Conf. Rep. 104-422, at 169 (1995) (“When considering a revocation request, the STB should continue to require demonstrated abuse of market power that can be remedied only by re-imposition of regulation or that regulation is needed to carry out the national transportation policy. The Conference expects the STB to examine all competitive transportation factors that restrain rail carriers’ actions and that affect the market for transportation of the particular commodity or type of service for which revocation has been requested.”).

There is almost no discussion about the extent of truck and other modal, transload, product, and geographic competition, which remains pervasive and widespread for these commodities. The NPRM seems to imply that the proper test is whether there are two railroads. *See* NPRM at 5 (“[T]he preponderance of its shipments were captive, as most of its customers were served by one railroad.”). But the exemptions are predicated, as they should be, on the presence of pervasive competition for the transportation of these commodities – in whatever form and from whatever mode. NPRM at 6 and 9 (noting that in Ex Parte 346 (Sub No. 35) the agency found “the transportation of this commodity group to be extremely competitive,” and that in Ex Parte 346 (Sub No. 34) “railroads faced pervasive competition”). Competition in all forms is what determines whether there is market power, which is the basis for regulation. *See* 49 U.S.C. § 10502(a). So, the STB must continue – as it always has with respect to exemptions – to examine all forms of competition.

Competition is still widespread from trucks, and other modes of transportation, transloads, and other forms of competition for the five commodities listed in the NPRM. NS discussed the continuing presence of truck competition in the marketplace and provided data to support that fact. Comments of Norfolk Southern Ry., Ex Parte 704, *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, at 29-33 (Feb. 1, 2011) (which is attached hereto as Exhibit I and made a part hereof). But, the NPRM provides no analysis whatsoever that shows that truck competition is not substantial. *Arizona Pub. Serv. Co. v. United States*, 742 F.2d 644, 653 n.2 (D.C. Cir. 1984) (“[M]ere conjecture and abstract theorizing offered in a vacuum are inadequate to satisfy us that the agency has engaged in reasoned decision-making.”). Indeed, the NPRM did not even address NS’s contention. *Brae Corp.*, 740 F.2d at 1042 (holding that agency “must consider all relevant factors in the comments it receives”).

Comprehensive, independent data continue to demonstrate that truck and other modal competition for these commodities is strong. NS undertook an analysis of the most comprehensive datasets available examining national modal share – the Freight Analysis Framework (“FAF”) and IHS’s Transearch database. The FAF is produced by the Center for Transportation Analysis through a partnership with the Bureau of Transportation Statistics (“BTS”) and the Federal Highway Administration (“FHWA”), starting from the Commodity Flow Survey (“CFS”) data produced by the BTS. *See* Freight Analysis Framework Version 4, <http://faf.ornl.gov/fafweb/> (last accessed July 8, 2016). The FHWA has touted the FAF as “the most comprehensive publicly available data set of freight movement.” New Freight Transportation Data, Press Release FHWA 68-15 (Oct. 20, 2015), *available at* http://www.rita.dot.gov/bts/press_releases/fhwa068_15. Correspondingly, “Transearch data are generally accepted as the most detailed available commodity flow data and are commonly used by states, metropolitan planning organizations (MPO), and FHWA in conducting freight planning activities.” United States Department of Transportation, FHWA, Quick Response Freight Manual II, Section 9.1.1 (Sept. 2007), *available at* <http://ops.fhwa.dot.gov/freight/publications/qrfm2/sect09.htm>. Although the databases do not in all cases perfectly align with the STB’s proposed revocations, both databases provide hard evidence to evaluate the Board’s speculation about modal competition in its NPRM. Indeed, the data are the best available evidence to support any definitive statements about modal competition in the overall markets for these commodities.

Both datasets demonstrate all five commodities subject to the NPRM fall within highly truck competitive categories. As detailed in the Verified Statement of Liesl J. McLemore, NS’s Director – Marketing Research & Economics (which is attached hereto as Exhibit J and made a

part hereof) [hereinafter “McLemore V.S.”], NS first examined the modal share of transportation for the general commodity codes using the FAF from 2012 to 2015. Although the FAF uses its own commodity codes (rather than STCCs) and only provides data at the two-digit level, *see* McLemore V.S. at 2-3, the FAF allows for an unbiased review of actual market data, rather than anecdotal claims by individual shippers. Looking at the FAF data that most closely corresponds to the two-digit STCCs including the five commodities named in the STB’s NPRM, rail transportation is responsible for a small minority of each. Indeed, truck transportation far exceeds rail in every instance, and pipelines are the most utilized form of transportation for the FAF categories most closely corresponding to STCC 29.

Figure 1: FAF 12 Gravel and Crushed Stone Volumes by Mode 2012-2015

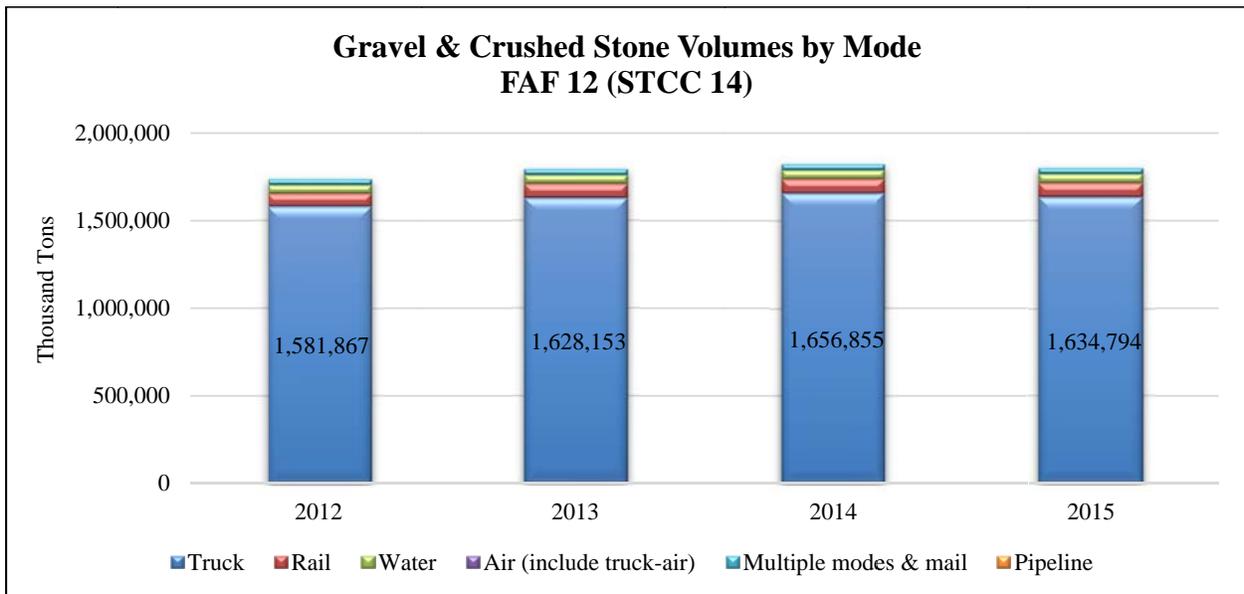


Figure 2: FAF 16, 17, 18, 19 Petroleum, Fuel, and Coal Products Volumes by Mode 2012-2015

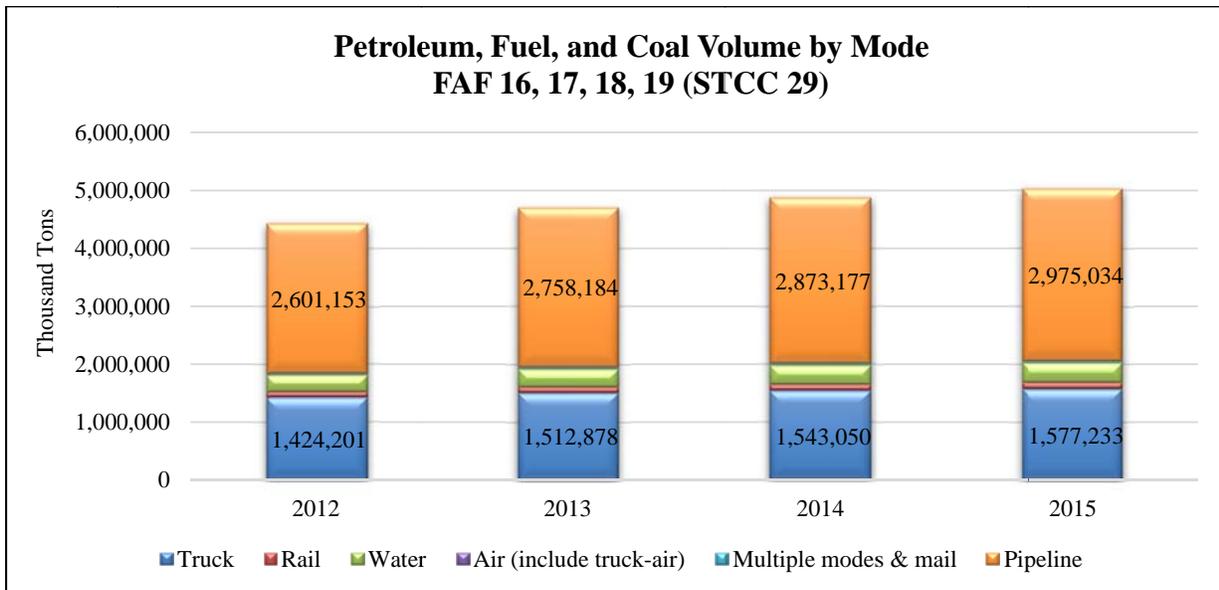


Figure 3: FAF 32, 33 Base Metal Products Volumes by Mode 2012-2015

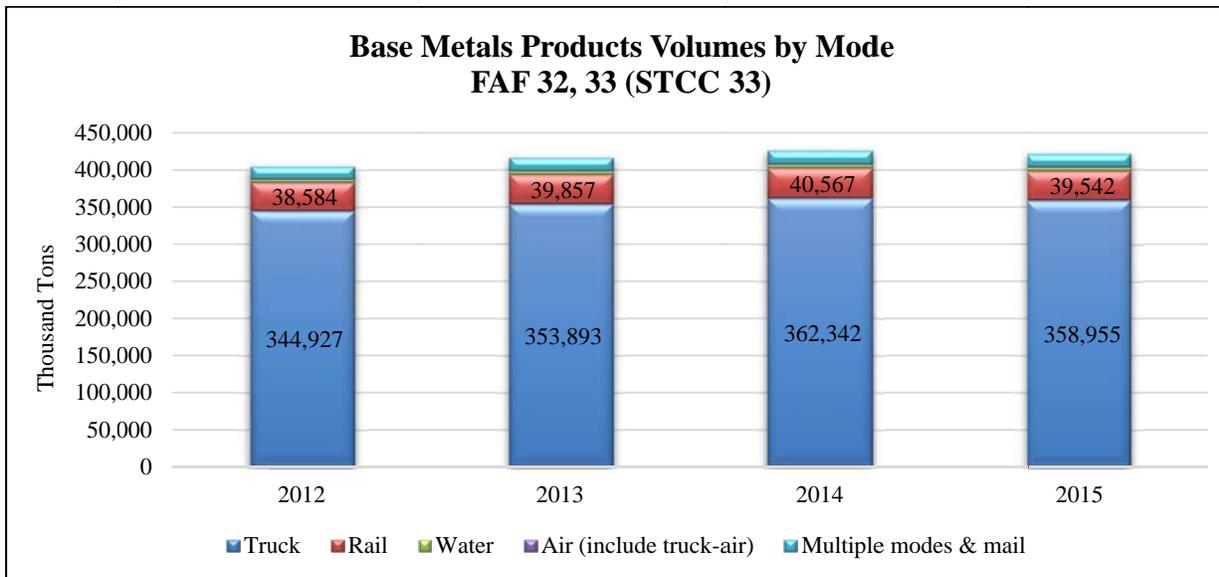
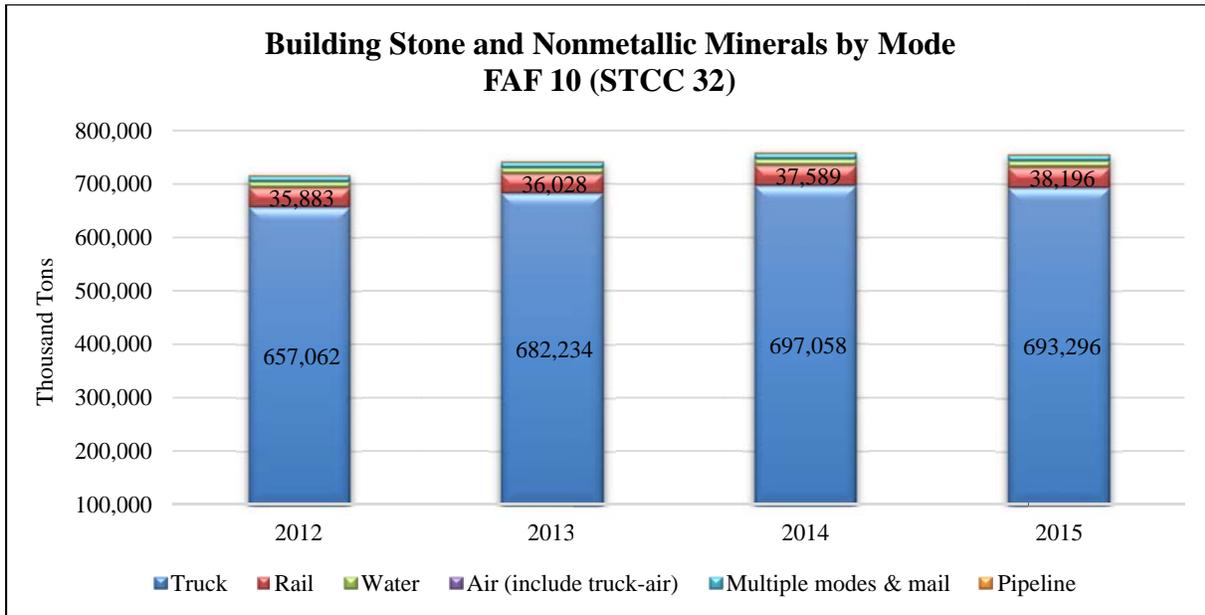


Figure 4: FAF 41 Waste/Scrap Volumes by Mode 2012-2015



Figure 5: FAF 10 Building Stone and Nonmetallic Minerals by Mode 2012-2015



More detailed Transearch data confirm these general trends. NS obtained and reviewed Transearch modal competition data compiled by IHS from 2010, 2012, and 2014. See Letter from Charles W. Clowdis, Jr., Managing Director, IHS Economics (June 15, 2016) (which is attached hereto as Exhibit K and made a part hereof). The Transearch data provides an even

more refined look at the overall modal share in each of the commodities included in the STB's NPRM because it is compiled at the four-digit STCC level. *See* IHS, Transearch 2014 Modeling Methodology Documentation at 5 (Dec. 9, 2015) (which is attached hereto as Exhibit L and made a part hereof) (summarizing Transearch methodology). Generally speaking, trucking data is the most difficult to gather because the market is unregulated; nevertheless, IHS incorporates information from over 70 million individual truck shipments. *Id.* at 11-13. "The sampling rate is about 6% overall, 5% under 500 miles, and 4% under 100 miles." *Id.* at 13. Rail data is pulled from the STB Waybill Sample and supplemented by data exchanged with many Class I railroads. *Id.* at 7-8. Water movement data is gathered through the U.S. Army Corp of Engineers. *Id.* at 10. Transearch and FAF answer similar questions, but overall Transearch samples more data and provides more detailed information. *See id.* at 20-23 (comparing and contrasting FAF and Transearch).

Even at this more granular level, the data again confirm that these commodities face strong modal competition.⁶ For each commodity, trucking was responsible for a greater share of transportation than rail in both 2012 and 2014. Further, in no year did rail transportation even make up a plurality of the movements of any of the commodities. The data also reveal significant amounts of water transportation for all commodities except broken stone and riprap. In particular, these data show that at the more specific STCC level, most coke moves by truck. These data directly contradicts assertions or conclusions that rail transportation exerts market power over most, let alone all, shippers of these commodities.

⁶ For those commodities that the STB identified at the three-digit STCC code level in the NPRM, NS examined the included four-digit STCC tracked by Transearch.

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The STB also asserted in a footnote to its NPRM, without any analysis or support, that “[t]rucking becomes less viable when the length of haul exceeds 500 miles because any transport over that threshold, in many instances, could not be completed in one day.” NPRM at 7, n.12. As an initial matter, the STB did not clarify whether it is making this claim with respect to a particular commodity or all commodities. Either way, the STB provides no data to support this naked assertion about trucking losing viability over 500 miles with respect to any commodity, let alone the specific commodities named in the NPRM. The statement is certainly contrary to what shippers of other commodities tell third parties. For example, a recent Wolfe Research market report, attached hereto as Exhibit M and made a part hereof, detailed that a {{

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Moreover, the STB cited average length of haul data for four of the five commodities (excluding crushed or broken stone or rip rap); however, only one, primary iron or steel products, had even an average length of haul above 500 miles. *See* NPRM at 7-8, 10. Therefore, the assertion in footnote 12 is much ado about nothing for, at minimum, most of the markets for transportation impacted by the NPRM because they are less than 500 miles on average. Indeed, the Board's RSTAC Position Paper on Short Haul Rail defines short-haul movements as those under 500 miles, and reports that trucking captures somewhere between 72% and 94% of those markets. RSTAC, Position Paper on Short Haul Rail; Challenges and Opportunities, at 1 (Nov. 3, 2011), available at <https://www.stb.dot.gov/stb/docs/RSTAC/RSTAC%20Short%20Haul%20Rail%20102911.pdf>; *see id.* at 1 (“Certain commodities, like aggregates, cement, and scrap steel are fundamentally short haul.”) (emphasis added); *id.* at 5 (“While most rail movements face truck competition of some form, truck competition for short haul movements can be especially sharp.”). As a result, if anything, the STB's cited average length of haul data affirmatively demonstrate that railroads do not have market power in the marketplace for scrap, coke, or cement.

Finally, changes in average length of haul are not being driven by increased market power. As explained by NS's Group Vice President of Metals and Construction, the increase in average length of haul for some commodities has been due to changes in market factors, such as the rise of mini-mills resulting in fewer inter-mill shipments of primary iron or steel. *Schaaf V.S.* at 4. For scrap, increased lengths of haul for rail movements are being driven both by shifts that have reduced the amount of short rail movements and by customers using long-haul rail “in a new way to increase competition.” *Id.* at 7-8. These changes have resulted in a bigger

numerator (miles) over a smaller denominator (number of rail moves), which produces an increase in the average length of haul for rail movements.

D. Shippers' Anecdotal Arguments Are Contrary to NS's Experience in the Markets for these Commodities

Fourth, testimony from railroad marketers also reveals the extensive presence of many different forms of competition in the marketplace for transportation of these commodities. These market factors are described in detail in the Verified Statements of James R. Schaaf, NS's Group Vice President of Metals and Construction, and Rob N. Zehringer, NS's Group Vice President of Coal Business Group, summarized below. The competition impacting the different commodities listed in the Board's NPRM, and indeed even distinct markets within those commodities, is varied, but in all cases their descriptions indicate railroads do not hold significant power in these markets. Further evidence of such competition is contained in the appendices to the Schaaf V.S., which contain examples of customers citing trucking prices or other competitive options in negotiating rates for these commodities with NS. *See* Schaaf V.S. Appendix A-D. NS's experience "is contrary to any assertion that rail transportation exerts market power such that the exemptions should be revoked for all movements of these commodities." *Id.* at 2.

Trucking is a strong competitive force for all five commodities identified in the Board's NPRM. "Truck movement of cement is inherently advantageous over rail because virtually all cement is eventually delivered locally by truck." *Id.* at 8. "Scrap is a commodity that has regional pricing, and scrap being consumed locally moves overwhelmingly by truck." *Id.* at 6. With respect to crushed stone, "Norfolk Southern internally estimates that rail transportation is only 5% to 6% of the overall marketplace." *Id.* at 2. Some primary iron or steel "warehouses or processors also own truck fleets that not only provide local just-in-time truck delivery, but also offer long-haul truck options to the steel industry." *Id.* at 5. Trucking is competitive for coke

depending on the origin-destination pair, and “coke breeze” is transported primarily via truck. Zehringer V.S. at 2.

Other modes also exert competitive pressures. Most iron and steel shipments on NS have access to multiple railroads, in part due to the historical creation of “steel railroads” serving major plants that now connect with multiple carriers. Schaaf V.S. at 4. As for coke, “[a]ll but two of the origins, and all of the destinations, served by Norfolk Southern are also served by other railroads.” Zehringer V.S. at 2. Barges and ocean vessels also are competitive options for shippers of coke, crushed stone, primary iron or steel, and cement located along or near waterways or ports. *Id.* at 2; Schaaf V.S. at 2, 9, 5.

Competition is not limited to movements between the same origins and destination. Geographic competition, in which a consumer may source their product from any of a number of different producers and locations, is prevalent for all of these commodities precisely because they are commodities; customers are indifferent as to the producer and instead focused on price. *See, e.g.*, Schaaf V.S. at 9. As Mr. Schaaf explained for crushed stone, “our ability to win a particular piece of business usually does not come down to whether it is more cost effective to ship via rail or truck from a single quarry,” but instead whether it is more cost-effective for a customer to purchase from an NS-served quarry or from somewhere else. *Id.* at 3. “Essentially, for each customer we have to plot all the quarries a customer can source from and price out all of the various transportation options.” *Id.* Similarly, large scrap producers have many yards from which they can source and ship. *Id.* at 7. As for cement, not only can consumers source from different producers, but the same producer can choose between sending cement to a distribution facility (via rail or truck) or instead directly to the consumption point (via truck). “[T]he Portland Cement Association reports that a majority of shipments of portland cement moved

directly from plant to customer every year between 2002 and 2012, and truck share ranged from 96.6% to 98.2% of those movements.” *Id.* at 9. Therefore, even if rail appears to have a significant share of traffic to a specific distribution yard, taking such a narrow view misses a majority of the market, as well as the real competitive choices shippers are making. All of these options constrain rail pricing just as much as direct competition, because if the price to the consumer is more expensive than another option, the movement does not ship.

Finally, consumers of many of these commodities can substitute other products in their process, providing further competitive pressures. For example, pulverized coal injection coal acts as a competitive constraint on coke pricing by allowing “steel producers to inject certain types of coal directly into a blast furnace, reducing the amount of coke necessary.” *Zehringer V.S.* at 2. “Crushed concrete and recycled asphalt millings also can be used in place of some construction stone.” *Schaaf V.S.* at 3-4. Scrap consumers “protect their raw material needs through substitute products, such as pig iron, direct reduced iron (“DRI”), and/or Mesabi Nugget.” *Id.* at 8. In sum, all of these competitive forces exert pressure on NS’s ability to secure transportation of this business and run counter to any assertion that NS exerts widespread market power over these commodities.

E. STB Has No Evidence of Abuse of Market Power

Fifth, there is no finding that railroads have abused any market power, which is not surprising given the continuing high level of truck and other modal competition for the transportation of these commodities. The sole market evidence relied on by the Board is changes in R/VC ratios over time. As the AAR demonstrates, reliance on R/VC ratios over 180% to presume the existence and abuse of market power violates 49 U.S.C. § 10707(d)(2)(A), which expressly says such ratios may not be used to establish such a presumption.

There is no finding in the NPRM that the changes in R/VCs that the STB claims to see are a result of market power. Indeed, there is no discussion of causation at all. In addition to ignoring the statutory directive that certain R/V ratio levels are not an indication of market power, the STB does not even mention the Transportation Research Board and the Christensen Report that the STB commissioned, which both found R/VC ratios are not an indicator of market power. *See* Committee for a Study of Freight Rail Transportation and Regulation, Transportation Research Board, “Modernizing Freight Rail Regulation,” at 2-3 (2015); A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition, Laurits R. Christensen Associates, Vol. 2, (Nov. 2009) [hereinafter “Christensen Report”], Table 11-8. These changes could well be a result of other factors that affect both sides of the R/VC equation, as explained by Professor Robert Willig in his statement to the Board in this original proceeding back in 2011. Statement of Robert Willig, Comments of AAR, Ex Parte 704, *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, at 9-16 (Jan. 31, 2011). The AAR more completely discusses the Board’s failure to even consider such evidence, but suffice it to say that the Board “must consider all relevant factors in the comments it receives.” *Brae Corp.*, 740 F.2d at 1042. The absence of any discussion – much less any substantive findings with regard to the five commodities – of market power in the NPRM stands in stark contrast to the test that applies when the STB evaluates a petition for revocation on a case-by-case basis.

There are many factors that contribute to changes in R/VC ratios over time, as discussed by the AAR and its experts. The STB’s own Christensen Report itself discussed the many factors that have contributed to changes in the R/VC ratios of exempt commodities over the past

two decades – none of which have anything to do with market power. Those factors include changes in the railroads’ cost structure, accounting practices, and traffic mix. Specifically,

- “The increase in railroad rates experienced in recent years is the result of declining productivity growth and increased costs rather than the increased exercise of market power.” (Christensen Report at ES-5);
- “[R]ecent increases in revenue per ton-mile appear to be largely the result of increases in fixed and marginal costs-- related to increases in the railroad industry’s input prices and diminishing productivity growth -- and not due to an increased exercise of market power.” (*Id.* at ES-38);
- “Since 2003 . . . percentage increases in marginal cost have outpaced percentage increases in price.” (*Id.* At ES-22); and
- “Much of the observed increase in rail rates can be explained by examining railroad industry input prices and productivity growth.” (*Id.* at ES-16).

A simple example of this last point is that advances in productivity, including changes in car capacity, affect these ratios and are unrelated to changes in market power. *See* Zehringer V.S. at 3 (discussing larger hopper cars used to transport coke). Surprisingly, the Board completely ignored this study in the NPRM. In sum, the Board has not taken into account its own commissioned study. As the Christensen Report noted, the Board’s interpretation of data in the NPRM is flawed because the Board’s attribution of these gains to carriers’ exerting greater market power on solely-served customers is wrong.

F. STB Failed to Consider NS’s Argument Concerning Impacts of Revocation

Sixth, the STB in the NPRM does not even consider the potential effects in the transportation marketplace from removing wholesale these exemptions, despite NS raising that issue in the prior comments. Congress wanted to remove regulation liberally to allow traffic to benefit from the marketplace of transportation competition (trucks, rail, waterways, transloads, product, geographic, substitution, and other forms of competition) free of regulatory interference.

“Under the exemption, trucks and railroads compete on an equal footing for intermodal traffic, for example, with each competitor capable of adapting readily to changes in the marketplace.” H.R. Conf. Rep. 104-422, at 168 (1995). As decisions by the ICC and later the STB repeatedly concluded, the exemptions (1) reduced costs and enabled railroads to offer more efficient and responsive services; (2) allowed railroads to respond more quickly to market forces; (3) enabled railroads to quote instantly-adjustable spot rates where appropriate; (4) reduced paperwork and other regulatory burdens; and (5) generally positioned railroads to compete more effectively against trucks and other modes.⁷ Given the change in the marketplace that would result from re-regulating rail transportation, the STB has been and should continue to be cautious. “If we revoke the exemption, even partially, the railroads would be restricted in how they can respond to changes, while trucking companies would not. This kind of imbalance could have unintended consequences and upset the competitive balance between railroads and trucks.” *Rail Fuel Surcharges*, Ex Parte 661, slip op. at 6 (STB served Jan. 26, 2007) (emphasis added). NS raised the concern about what would result from the imbalance created in the marketplace from revoking these exemptions wholesale in its prior comments, but the STB ignored this concern altogether in the NPRM. Comments of Norfolk Southern Ry., Ex Parte 704, *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, at 23 (Feb. 1, 2011). The agency “must consider all relevant factors in the comments it receives.” *Brae Corp.*, 740 F.2d at 1042.

⁷ See generally *Rail General Exemption Authority - Miscellaneous Manufactured Commodities*, Ex Parte 346 (Sub-No. 24), 6 I.C.C. 2d 186, 190-91 (1989) (“Our experience with other exemptions we have granted with regard to commodity groups and car types persuades us that this exemption will also result in substantial cost savings for the railroads, thereby increasing their efficiency, especially in the marketing of services.”); see also, e.g., *Rail General Exemption Authority — Grease or Inedible Tallow*, Ex Parte 346 (Sub-No. 31), 10 I.C.C. 2d 453, 459 (1994) (noting that exemptions had enabled carriers to quote spot rates and eliminate costs associated with regulatory paperwork); *Rail General Exemption Authority — Ferrous Recyclables*, Ex Parte 346 (Sub-No. 35), 10 I.C.C. 2d 635, 639-40 (1995) (same); *Rail General Exemption Authority — Hops*, Ex Parte 346 (Sub-No. 10), 365 I.C.C. 701, 702 (1982) (same).

G. STB Failed to Demonstrate Any Connection Between Unsupported Assumptions about Changing Conditions and Railroad Market Power

Seventh, rather than undertaking a rigorous analysis to justify inclusion of certain of the five commodities in the NPRM, the STB relies on a few broad, unsupported assumptions, such as steel production moved to the South, *see* NPRM at 7, or the trucking industry is less competitive, *see id.* at 9, or on vague statements such as “there have been many changes in the railroad industry,” *see id.* at 3. The STB refused to disclose the secret materials that formed the basis for these broad assumptions. But more importantly, the STB has no evidence that if these broad assumptions or vague statements were true that they actually affected the level of competition that the agency previously found to exist in the marketplace for transportation of these commodities. Such “mere conjecture and abstract theorizing offered in a vacuum are inadequate to satisfy us that the agency has engaged in reasoned decision-making.” *Arizona Pub. Serv. Co. v. United States*, 742 at 653 n.2.

H. STB Cites Arguments It Has Previously Discredited Without Explanation

Eighth, some of the actual arguments advanced by the anecdotal shippers are known by the STB to be false, which makes it shocking that the STB would list them as justifications for the NPRM. For example, the NPRM notes that these shippers contend that “intramodal competition has been reduced as a result of rail consolidation.” NPRM at 5 and 9. However, the ICC/STB’s long-standing policy has been clear:

Generally, the Board focuses on preserving competition between two rail carriers; it protects against “2-to-1” reductions in competition, but in minor transactions it does not generally remedy transaction-related reductions of competitive options from three carriers to two carriers absent a showing of specific harm. *See Union Pac. Corp.-Control & Merger-S. Pac. Rail Corp. (UP/SP Merger 1996)*, 1 S.T.B. 233, 351 (STB served Aug. 12, 1996) (stating that the Board has “focused usually on preserving two-railroad competition, not on preserving three-railroad competition”). The Board has not historically acted to increase shippers’ competitive options. *See Burlington N. Inc.-Control & Merger-Santa Fe Pac. Corp.*, (BN/SF Merger 1995) 10 I.C.C.2d 661, 57 (1995). In addition, although a transaction may result in some general changes to

competition for specific shippers, the Board seeks to protect competition overall, not specific competitors. *See, e.g., Canadian Nat'l Ry. Co.,-Control-Ill. Cent. Corp.*, FD No. 33556, slip op. at 20 (STB served May 25, 1999); *Wisc. Cent. Transp. Corp.-Continuance in Control -Fox Valley & W. Ltd.*, (Wisc. Cent/Fox Valley 1992) 9 I.C.C.2d 233, 239-40 (ICC served Dec. 4, 1992).

Norfolk Southern Ry. Co.--Acquisition and Operation--Certain Rail Lines of the Delaware and Hudson Ry. Co., FD 35873, slip op. at 17-18 (STB served May 15, 2015).⁸ Accordingly, not one of these shippers has identified a facility of its own that once was served by two railroads but is now served by one. Without identifying many – much less one – this justification for a complete revocation of the existing exemptions is no justification at all. *New York Cross Harbor R.R. v. Surface Transp. Bd.*, 374 F.3d 1177, 1183 (D.C. Cir. 2004) (“[T]he Board’s brief, generalized statement failed to provide an ‘adequate explanation’ to allow the STB to ignore factors and reasoning it has previously—and consistently—found controlling.”) [hereinafter “*New York Cross Harbor*”].

I. Some Shipper Complaints Irrelevant to Proceeding

Ninth, shippers’ arguments that the “railroad industry’s financial situation has improved markedly since the adoption of the commodity exemptions” is irrelevant to exemption decisions. NPRM at 9. This argument is a non-sequitur because it is not proof of anything regarding the level of competition for transportation of these commodities or of an abuse of market power. *See* 49 U.S.C. § 10502(a). Moreover, that justification could be used to revoke all the commodity

⁸ *See also Keokuk Junction Ry. Co. d/b/a Peoria & Western Ry. - Lease and Operation Exemption - BNSF Ry. Co.*, FD 34974, slip op. at 5 (STB served Dec. 6, 2007) (“Under the RTP, the Board is directed to ‘allow to the maximum extent possible, competition and the demand for services to establish reasonable rates.’ 49 U.S.C. 10101. The Board is also directed to promote ‘effective competition among rail carriers,’ 49 U.S.C. 10101(4), and to avoid ‘undue concentrations of market power,’ 49 U.S.C. 10101(12). In administering these policies, this agency has consistently preserved competition where a sale or lease would otherwise reduce a shipper’s rail service options from two carriers to one, by requiring trackage rights or other conditions for approval that would preserve the shipper’s competitive options.”).

exemptions, the boxcar exemption, and the TOFC/COFC exemption. Simply, it is irrelevant and meaningless to the question of whether an exemption should be revoked.

J. STB Has Not Even Addressed Why Shippers' Ability to File for Partial Revocation Is No Longer Proper or Sufficient Remedy

Finally, exemptions continue to fulfill Congress's broad, unchanged, mandate that rail service be exempted from regulation except to the limited extent necessary to protect shippers from the abuse of market power. 49 U.S.C. § 10502. To the extent that particular shippers (or groups of shippers) of exempt commodities believe that the railroad serving them is abusing its market power, the proper procedure is to file a petition to revoke partially an exemption.⁹

Experience shows that the STB has partially revoked the exemptions when justified¹⁰ and that the STB has not partially revoked when the request to do so was unjustified.¹¹ Ironically, in

⁹ *Pejepscot Industrial Park, Inc., d/b/a Grimmel Industries—Petition for Declaratory Order*, FD 33989 (STB served May 15, 2003) (“This does not mean that a railroad customer is without an avenue of relief in such circumstances. Notwithstanding the findings that the agency has already made that, in most circumstances, regulation is not necessary, Grimmel could come to the agency and seek to have the exemptions revoked, pursuant to 49 U.S.C. 10502(d), at least as to shipments from Topsham.”)

¹⁰ In *Granite State Concrete Co., Inc. & Milford-Bennington R.R. v. Boston & Maine Corp. & Springfield Terminal Ry.*, FD 42083 (STB served Sept. 15, 2003), the Board revoked the applicable commodity exemption (for crushed or broken stone, sand, and gravel) so as to enable it to consider a complaint that one carrier was blocking another's ability to fulfill its common carrier service obligation. The Board did so only after making particularized findings that the shipper “lacks the competitive service options that were the basis for the original class exemption because its excavation permit requires that stone move by railroad, not by truck, to avoid movements through Wilton.” *Id.*

¹¹ See also, e.g., *WTL Rail Corporation Petition for Declaratory Order & Interim Relief*, FD 42092 (STB served Feb. 17, 2006) (declining to revoke the TOFC/COFC exemption because shippers would continue to “have an array of competitive options for obtaining TOFC service and equipment,” which would “effectively constrain the railroads' market power with respect to TOFC service and equipment”); *American Rail Heritage, Ltd., d/b/a Crab Orchard & Egyptian R.R. Transportation Concepts, Inc., & The Grafton & Upton R.R. v. CSX Transportation, Inc.*, ICC Docket No. 40774 (ICC served June 16, 1995) (declining to revoke the TOFC/COFC exemption to require the mandatory interchange of intermodal trailers because the complainant failed to show that over-the-road movement of trailers provided inadequate competition); *Rail General Exemption Authority – Miscellaneous Agricultural Commodities – Petition of G&T Terminal Packaging Co., Inc., to Revoke Conrail Exemption*, 8 I.C.C.2d 674, at *18 (1992)

Granite State Concrete Co., Inc. & Milford-Bennington R.R. v. Boston & Maine Corp. & Springfield Terminal Ry., FD 42083 (STB served Sept. 15, 2003), stone was the commodity at issue in that request to revoke the commodity exemption on an individual basis. In the case of *Granite State*, it was able to show that “its excavation permit requires that stone move by railroad, not by truck, to avoid movements through Wilton” and therefore the broad, general, and accurate assumption that competition for the transportation of stone existed was untrue as to it based on a specific showing that the railroad had market power. *Id.* at 7-8. What defines the case-by-case reviews that the STB has undertaken are explicit findings about railroad market power. With this NPRM, the STB seeks a wholesale lifting of an exemption without any information on market power. In effect, the STB seems to be setting a lower bar for a wholesale revocation than is properly required in a case-by-case review of a petition to revoke.

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In sum, any of these flaws on their own would raise serious questions with the STB’s justification for its decision to propose revoking the five commodities listed in the NPRM. In combination, they are overwhelming. The STB has not carried out any sort of reasoned analysis requisite to support its proposal to revoke wholesale the exemptions for the five commodities

(“Although Conrail has imposed surcharges on petitioners’ traffic, in our view it does not possess enough market power to warrant regulation.”), *aff’d, Mr. Sprout, Inc. v. United States*, 8 F.3d 118 (2d Cir. 1993); *FMC Wyoming Corp. v. Union Pacific Railroad*, 4 S.T.B. 699 (2000) (declining to revoke exemption in stand-alone-cost rate case because railroad lacked market dominance over the movements at issue and therefore Board “could not review the reasonableness of the rates that applied to these coke movements even if [it] were to revoke the exemption”).

The Board has also declined to revoke the commodity exemptions based on its conclusion that the carrier had not abused whatever market power it might have possessed. For example, in *Bolen–Brunson–Bell Lumber Company, Inc. v. CSX Transportation, Inc.*, FD 34236 (STB served May 15, 2003), the Board declined to revoke the lumber and wood products exemption after concluding that, regardless of whether the carrier possessed market power, it had not abused that power “or otherwise acted inappropriately, in initiating and maintaining [an] embargo.” *Id.* at 2.

listed in the NPRM. Nor has the STB even addressed the inadequacy of dealing with these issues through partial revocation proceedings. The Board has not addressed its past policies and statements regarding exemptions. Proceeding on this basis would be the definition of arbitrary and capricious rulemaking.

IV. THE STB IMPERMISSIBLY OMITTS CONSIDERATION OF THE OVERWHELMING MAJORITY OF THE RTP THAT SUPPORT BROAD USE OF EXEMPTIONS.

The omission in the NPRM of any discussion of many relevant factors in the RTP is shocking. NPRM at 4 (discussing RTP). It is particularly shocking because the STB does not even address the many aspects of the RTP that the agency previously found were advanced by the very exemptions it proposes to revoke.

These exemptions in fact advance numerous elements of the RTP:

- They “allow, to the maximum extent possible, competition and demand for services to establish reasonable rates for rail transportation,” 49 U.S.C. § 10101(1);
- By these exemptions’ very nature, they “minimize the need for Federal regulatory control over the rail transportation system,” 49 U.S.C. § 10101(2);
- They “allow rail carriers to earn adequate revenues” by improving the speed and flexibility with which they can respond to competition -- especially allowing them to use spot rate quotations to attract low cost backhaul traffic, 49 U.S.C. § 10101(3) and *Rail General Exemption Authority Exemption of Rock Salt, Salt, Ex Parte 346 (Sub-No. 30)*, 10 I.C.C. 2d 241 (Oct. 6, 1994) [hereinafter “*Salt Exemption*”];
- They help “ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes,” 49 U.S.C. § 10101(4);
- They “foster sound economic conditions in transportation to ensure effective competition and coordination between rail carriers and other modes,” by making it easier for the railroads to compete without regulatory restraint, 49 U.S.C. § 10101(5) and *Salt Exemption*;
- They “encourage honest and efficient management” by enabling rail management to respond more quickly to changing market conditions, 49 U.S.C. § 10101(9) and *Salt Exemption*;
- They enhance the ability of railroads to maintain or attract competitive traffic, which will enable the railroads to continue to provide fair wages and working conditions, 49 U.S.C. § 10101(11) and *Salt Exemption*; and

- The exemptions enable the railroads to attract traffic from trucks, which will encourage energy conservation, 49 U.S.C. § 10101(14) and *Salt Exemption*.¹²

Yet the STB ignores these benefits entirely in the NPRM, despite the fact that NS raised these long-recognized benefits in its comments. Comments of Norfolk Southern Ry., *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, Ex Parte 704, at 23 (Feb. 1, 2011). The agency “must consider all relevant factors in the comments it receives.” *Brae Corp.*, 740 F. 2d at 1042.

Indeed, in a more direct failing, the NPRM does not even address the RTP provisions that were found applicable at the time of the original exemptions – much less include findings that these benefits no longer exist. For example, when the agency exempted hydraulic cement, it found as follows:

Regulation is not necessary to carry out the transportation policy of 49 U.S.C. 10101a. As we have noted, the transportation of hydraulic cement is highly competitive. Therefore, an exemption will promote the goals of sections 10101a(1), (4), and (5), which direct the agency to promote competition and to reduce regulation as to competitive traffic. An exemption would also “minimize the need for federal regulatory control” [section 10101a(2)]; promote “adequate revenues” by improving the speed and flexibility with which carriers can respond to shippers' needs [section 10101a(3)]; and “encourage honest and efficient management” by (i) enabling rail management to respond more quickly to changing market conditions and (ii) eliminating the costs associated with tariff and contract rate establishment and management [section 10101a(10)]. Other provisions of the national transportation policy will not be adversely affected.

Rail General Exemption Authority – Exemption of Hydraulic Cement, Ex Parte 346 (Sub-No. 34), 10 I.C.C. 2d 649 (July 26, 1995). Similarly, when the agency exempted crushed or broken

¹² See also e.g. *Rail General Exemption Authority – Misc. Manufactured Commodities*, Ex Parte 346 (Sub-No. 24), (Jan. 29, 1988) (“[S]everal objectives of the Rail Transportation Policy of section 10101a, particularly (1), (2), (3), (4), (5), and (10), which relate to the encouragement of competition and competitively-determined rate levels, the minimization of Federal regulation, the opportunity for adequate returns and sound economic conditions in the industry, and the elimination of noncompensatory rates, would appear to be furthered directly by this exemption.”).

stone or rip rap, coke and primary iron or steel products, it made similarly robust findings regarding the RTP:

Regulation is not necessary to carry out the transportation policy of 49 U.S.C. § 10101a. Because, for the reasons stated below, the transportation of these commodities is competitive, an exemption will promote the goals of §§ 10101a (1), (4), and (5). An exemption would: “minimize the need for federal regulatory control” [§ 10101a(2)]; promote “adequate revenues” by allowing the carriers to use spot rate reductions to attract low-cost, backhaul traffic [§ 10101a(3)]; increase competition between rail carriers and trucks by allowing quick, selective rate changes in response to competition [§ 10101a(5)]; allow more efficient management by (i) allowing pricing changes in response to changing business conditions, and (ii) allowing carriers to reduce costs associated with contract rate establishment and management n8 [§ 10101a(10)]; and encourage energy conservation by attracting traffic from trucks [§ 10101a(15)]. Other provisions of the national transportation policy will not be adversely affected.

Rail General Exemption Authority – Rail General Exemption Authority – Petition of AAR To

Exempt Rail Transportation Of Selected Commodity Groups, Ex Parte 346 (Sub-No. 29), 9

I.C.C. 2d 969 (Sept. 17, 1993). Because the STB did not even mentioned in the NPRM a single one of these RTP elements, there were certainly no findings that these benefits to the RTP no longer exist. *New York Cross Harbor* at 1183. Nor could there be. These substantial benefits have not changed.

V. THE STB SHOULD BE FOCUSED ON DETERMINING WHETHER THERE ARE COMMODITIES THAT SHOULD BE EXEMPTED FROM REGULATION.

Finally, what the STB should be examining prospectively is whether more exemptions should be granted. That effort would both fulfill the STB’s mandate to exempt to the “maximum extent” and would be within the powers it can initiate on its own under Section 10502(b).

Congress started by providing the ICC permissive exemption authority in 1976 in the Railroad Revitalization and Regulatory Reform Act of 1976 (“4-R Act”). With the Staggers Rail Act of 1980 (“Staggers Act”), Congress replaced that permissive authority with an outright command that the agency use its exemption power to eliminate unnecessary regulation. Sixteen years later,

Congress amplified this mandate with new statutory language in the ICCTA requiring that the Board “shall” exempt rail service from regulation to the “maximum extent” possible consistent with applicable law. *See* 49 U.S.C. § 10502(a). Specifically:

[T]he Board to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part - (1) is not necessary to carry out the transportation policy of section 10101 of this title; 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.

Id. (emphasis added).

The STB has consistently recognized that the statutory mandate to exempt traffic from regulation is “framed in very broad terms.” *Exemption from Regulation – Boxcar Traffic*, 367 I.C.C. 424, 428 (1983) (“*Boxcar Exemption Decision*”), *aff’d*, *Brae Corp.*, 740 F.2d 1023, *cert. den.*, *sub nom. ICC v. Brae Corp.*, 471 U.S. 1069 (1985). The exemptions were required to achieve Congress’s goal of “deregulating to remove regulatory burdens and to allow the market place to influence decisions in the rail industry.” *Brae Corp.*, 740 F.2d at 1055, *cert. denied sub nom. ICC v. Brae Corp.*, 471 U.S. 1069 (1985). Accordingly, the statute imposes on the Board an “affirmative duty ... to ‘pursue partial and complete exemptions from remaining regulation,’” *id.* at 431 (emphasis added; quoting Staggers Act legislative history), and “favours exemptions from regulation whenever appropriate.” *WTL Rail Corporation Petition for Declaratory Order & Interim Relief*, FD 42092, slip op. at 3 (STB served Feb. 17, 2006) (emphasis added). Stated succinctly, “[u]nder 49 U.S.C. 10502(a), the Board (like the ICC before it) has been directed to exempt entire categories of traffic from the regulatory provisions of the Interstate Commerce

Act, to the maximum extent consistent with the Act.” *Rail Fuel Surcharges*, Ex Parte 661, slip op. at 12 (STB served Jan. 26, 2007).¹³

Courts have too. In *Brae Corp.*, the United States Court of Appeals for the District of Columbia Circuit held that the statutory language *mandates* the “deregulation of the entire railroad industry to the maximum extent possible in conformity with the national rail transportation policy.” *Brae Corp.*, 740 F.2d at 1043. Years later, that court iterated that the “maximum extent possible” language, “so forcefully expressed, manifests a preference for market-based rather than regulatory rate setting,” and that the Board may not simply ignore this “strong language favoring rail deregulation,” as it has done here. *Ass’n of Am. R.Rs. v. Surface Transp. Bd.*, 237 F.3d 676, 677, 680 (D.C. Cir. 2001).

As it has before, NS submits that the STB was “charged with the responsibility of actively pursuing exemptions for transportation and service that comply with the section’s standards.” *American Trucking Assoc. v. ICC*, 656 F.2d 1115, 1119-20 (9th Cir. 1981) (quoting H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. 60 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978, 4005). To carry out its statutory responsibilities, the STB should actively be pursuing the exemption of additional commodities for which regulation is no longer necessary to protect shippers from the abuse of market power.

NS has identified at least the following commodities that account for meaningful rail volumes and as to which there appears to be no serious question that railroads lack market power, there is substantial truck or other modal competition, or both. Those commodities are:

¹³ See also, e.g., *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731 (1981) (“TOFC/COFC Exemption Decision”) (“We believe that our proposed exemption is consistent with the congressional intent that we vigorously pursue exemptions from economic regulation in the railroad area where regulatory control appears unnecessary to protect against abuses of market power.”) (emphasis added).

- Industrial Sand (1441310);
- Anhydrous Ethyl Alcohol (2818446);
- Specialty Cleaning/Polishing/Sanitation Preparations/Household Bleaches (28442);
- Phosphate Fertilizer Solution (2871450);
- Gasoline or Jet or High Volatile Petroleum Fuels (29111);
- Kerosene Exc. Jet Fuels (29112) and Asphalt (2911610);
- Asphalt or Tar Saturated Felts, Boards or Roofing (29521) and Asphalt Sheathings, Shingles or Sidings (29523).

Transearch modal share data for those commodities from 2010, 2012, and 2014 is found in Exhibit N, attached hereto and made a part hereof. For all of those commodities, trucking market share exceeds rail market share. Indeed, for STCC codes 2871 (including Phosphate Fertilizer Solution) and 2911 (including Gasoline or Jet or High Volatile Petroleum Fuels, Kerosene Exc. Jet Fuels, and Asphalt), rail transportation comes in third in market share behind trucking and water transportation. NS is certain that other regulated commodities exhibit similar market conditions. NS requests that the STB commence a proceeding pursuant to Section 10502(a) to consider exempting additional commodities.

VI. CONCLUSION

In sum, the NPRM is fatally flawed many times over. The STB failed to disclose the materials that it relied on in issuing the NPRM, depriving the public of their chance to meaningfully comment on the rulemaking. The justifications actually found in the NPRM range from anecdotal to those outright prohibited by statute. The STB has provided no credible or comprehensive analysis of market power; indeed, NS's own examination demonstrates that the Board's conclusions are contrary to both comprehensive industry data and NS's own experiences in these markets. Finally, the STB ignored any consideration of a large swath of the RTP, including those provisions it found applicable when instituting the very same exemptions that it

now proposes to revoke. The STB should terminate this proceeding and initiate a new one to examine whether there are additional commodities that should be exempted from regulation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John M. Scheib", is written over a solid horizontal line.

James A. Hixon
John M. Scheib
Greg E. Summy
Garrett Urban
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

*Attorneys for Norfolk Southern Railway
Company*

Dated: July 26, 2016

EXHIBIT LIST

- EXHIBIT A** Letter to Marilyn R. Levitt, FOIA/Privacy Officer, Re: Docket No. Ex Parte 704 (Sub-No. 1) (Apr. 8, 2016)
- EXHIBIT B** STB Response Letter – FOIA Request No. 16-022 (May 6, 2016)
- EXHIBIT C** STB Response Letter – FOIA Request No. 16-021 (May 6, 2016)
- EXHIBIT D** NS Reply to STB Response Letter (May 17, 2016)
- EXHIBIT E** STB Response Letter – FOIA Request No. 16-021 (2nd Response) (May 26, 2016)
- EXHIBIT F** Letter from Chairman Elliott – Appeal of FOIA Request No. 16-022 (June 14, 2016)
- EXHIBIT G** Verified Statement of James R. Schaaf
- EXHIBIT H** Verified Statement of Rob N. Zehringer
- EXHIBIT I** Comments of Norfolk Southern Ry., Ex Parte 704, Review of Commodity, Boxcar, and TOFC/COFC Exemptions (Feb. 1, 2011)
- EXHIBIT J** Verified Statement of Liesl J. McLemore
- EXHIBIT K** Letter from Charles W. Clowdis, Jr., Managing Director, IHS Economics (June 15, 2016)
- EXHIBIT L** IHS, Transearch 2014 Modeling Methodology Documentation (Dec. 9, 2015)
- EXHIBIT M** Wolfe Research Market Report July 1, 2016
- EXHIBIT N** Transearch Modal Data for Other Commodities

EXHIBIT A



Norfolk Southern Railway Company
Law Department
Three Commercial Place
Norfolk, Virginia 23510-2191

John M. Scheib
General Counsel-
Commerce

(757) 629-2831
(757) 533-2607 (Fax)
john.scheib@nscorp.com

April 8, 2016

BY: FACSIMILE AND U.S. MAIL
(202) 245-0460

Marilyn R. Levitt
FOIA/Privacy Officer
Surface Transportation Board
395 E Street, S.W.,
Washington, D.C. 20423-0001

Re: Docket No. Ex Parte 704 (Sub-No.1)

Dear FOIA Officer:

I hereby submit this request on behalf of Norfolk Southern Railway Company (“NS”) pursuant to the Freedom of Information Act, 5 U.S.C. § 552, for certain information referenced in the Board’s Notice of Proposed Rulemaking dated March 23, 2016, in the above captioned matter (the “NPRM”). This NPRM initiates a Notice of Proposed Rulemaking to revoke the commodity exemptions for crushed or broken stone or rip rap 9STCC No. 14-2); hydraulic cement (STCC No. 32-4); coke produced from coal (STCC No. 29-914) primary iron or steel products (plates, pipes, and rods)(STCC No. 33-12), and iron or steel scrap, wastes or tailings (STCC No. 40-211). All of the STCCs described in this paragraph are collectively referred as the “Applicable STCCs”.

Throughout the NPRM, the Board references “waybill rate data for years 1992 through 2013 (the “Waybill Data”) and “other industry information” (the “Other Industry Information”). It is clear that the Board relied extensively on the Waybill Data and Other Industry Information in issuing its NPRM to revoke the commodity exemptions for a very large group of commodities. *See e.g.*, NPRM at 3, n.5, 4, 5, 7, 8, 9 & 10. In addition, Vice Chairman Miller, in her concurring opinion, referred to an analysis that she requested the Board’s Office of Economics to conduct concerning the subject matter of the NPRM (the “OE Analysis”). *See* NPRM at 14-15 (Miller, concurring).

NS hereby requests that the following information be provided to it promptly: (1) any and all waybill studies conducted by the Board or Board staff that relate to the issues in Ex Parte 704, regardless of whether such studies are referenced in the NPRM, but not the confidential waybill data; (2) any and all Other Industry Information, including Other Industry Information relied upon by the Board in issuing its NPRM and Other Industry

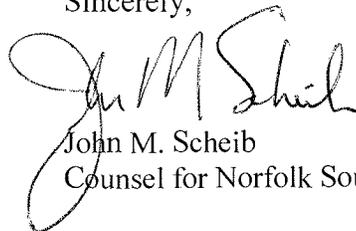
FOIA Officer
April 8, 2016
Page 2

Information compiled or developed that were not referenced in the NPRM; (3) any and all other information considered by the Board or Board staff in researching or developing the NPRM, regardless of whether such studies are referenced in the NPRM; (4) the OE Analysis; (5) the electronic database tracking complaints filed with the Rail Customer and Assistance Program for the Applicable STCCs (it is our understanding that the STB tracks such complaints by STCC). NS expects the STB to redact the name of the railroad, shipper and geographic location to protect the confidentiality of the complaint process; and (6) any and all work papers or studies conducted by or relied on by the Board related to categories (1), (2), (3) and (4) above, or otherwise reviewed, considered, or disregarded in evaluating whether to issue the NPRM or to develop the content of the NPRM.

The information that NS hereby requests clearly influenced the Board's decision to issue the NPRM. Accordingly, this information is essential in order for NS to understand the Board's attempts to justify its NPRM and to adequately respond to the NPRM.

If you have any questions about this request, please do not hesitate to contact me. To the extent fees are involved with this request, please feel free to contact me so that NS can arrange for payment.

Sincerely,

A handwritten signature in black ink, appearing to read "John M. Scheib". The signature is fluid and cursive, with the first name "John" and last name "Scheib" clearly legible.

John M. Scheib
Counsel for Norfolk Southern Railway Co.

EXHIBIT B



Surface Transportation Board
Washington, D.C. 20423-0001

May 6, 2016

Timothy Strafford
Association of American Railroads
425 3rd St., S.W.
Suite 1000
Washington D. C. 20024

Re: STB Response Letter – FOIA Request No. 16-022

Dear Mr. Strafford,

This letter responds to your April 8, 2016, petition on behalf of the Association of American Railroads (AAR) for release of certain records related to the Board's Notice of Proposed Rulemaking in EP 704 (Sub-No. 1), *Review of Commodity, Boxcar, and TOFC/COFC Exemptions* (STB served March 23, 2016) (*Exemptions NPRM*). In your petition, you seek access to all data, reports, workpapers, and other materials that underlie the proposed rules. You also request access to the workpapers and analysis referenced in the concurring opinion, and any other materials related to the NPRM that are not part of the public record. By decision served on May 6, 2016, in response to your petition, the Board's Director of the Office of Proceedings concluded that certain parts of AAR's request for the release of records should be addressed through the Board's Freedom of Information Act (FOIA) procedures. Having reviewed those parts of your request under our FOIA procedures, we are partially granting your request.

After a thorough search of our records, we have located 31 records that are responsive to your request. We are releasing in full (excluding confidential waybill data, which is protected under FOIA Exemption 4) the requested workpaper underlying the Board's decision. We are also releasing certain preliminary analysis referenced in a Board Member's statement concurring with the *Exemptions NRPM*. But we are withholding pre-decisional internal records, as explained below.

Records Released

In a decision dated May 6, 2016, responding to your petition, the Board indicated that it would release a public version of the workpaper that underlies the Board's proposed revocation of the class exemption for, specifically, crushed or broken stone or rip rap; hydraulic cement; coke produced from coal; primary iron or steel products; and iron or steel scrap, waste or tailings. This record will be available on the Board's website at www.stb.dot.gov. On the Board's homepage, select Industry Data/Economic Data/EP 704 (Sub-No. 1). As noted above, the confidential version is protected from disclosure under FOIA Exemption 4.

We are also releasing certain preliminary analysis that was created by the Board's Office of Economics at the request of Vice Chairman Debra Miller and referenced in her concurring opinion in the *Exemptions NPRM*. Because this analysis was not adopted by the Board as a rationale for its decision, it is an internal, pre-decisional, and deliberative record that is protected from disclosure by FOIA Exemption 5. However, the Board is exercising its discretion to release it. This record will be available on the Board's website at the location described above. Again, any confidential data in this analysis is being withheld under Exemption 4.

Records Withheld

We are withholding, as protected from disclosure by FOIA Exemption 5, 29 records that contain other data, analyses, and materials related to the NPRM. These records are internal, pre-decisional, and deliberative. Consistent with the rationale underlying Exemption 5, we believe that release of these records would chill our deliberative process and confuse the public.

Within 30 days of receipt of this letter, you may appeal to the Chairman of the Surface Transportation Board this determination withholding certain records. 5 U.S.C. § 552(a)(6)(A)(i); 49 C.F.R. § 1001.3. Any appeal should be sent to Chairman Daniel R. Elliott III at Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001; or (202) 245-0452 (FAX); or Chairman.Staff@stb.dot.gov.

Sincerely,



Chris Oehrle
Attorney Adviser
Office of the General Counsel
Phone: (202) 245-0271
for
Marilyn Levitt
FOIA/Privacy Officer/Attorney
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EXHIBIT C



Surface Transportation Board
Washington, D.C. 20423-0001

May 6, 2016

John Scheib
General Counsel – Commerce
Law Department
Three Commerical Place
Norfolk, VA 23510-2191

Re: STB FOIA Request No. 16-021 (Response)

Dear Mr. Scheib,

This letter responds to your April 8, 2016, request for certain records related to the Board's Notice of Proposed Rulemaking in EP 704 (Sub-No. 1), *Review of Commodity, Boxcar, and TOFC/COFC Exemptions* (STB served March 23, 2016) (*Exemptions NPRM*). Essentially you seek access to all industry information, studies, and analyses considered by the Board or Board staff in developing the Board's decision, as well as the workpapers referenced in the concurring opinion, and the STB's Rail Customer and Public Assistance (RCPA) database tracking complaints related to the relevant STCC's. We are partially granting your FOIA request.

After a thorough search of our records, we have located 100 records that are responsive to your request. We are releasing in full (excluding confidential waybill data, as consistent with your request) the requested workpapers underlying the Board's decision. We are also releasing certain preliminary analysis referenced in a Board Member's statement concurring with the *Exemptions NPRM*. But we are withholding the records created as part of the Board's RCPA program and pre-decisional internal records, as explained below.

Records Released

In a decision dated May 6, 2016 in the above-referenced docket, in response to a pleading by the Association of American Railroads, the Board indicated that it would release the workpaper that underlies the Board's proposed revocation of the class exemption for, specifically, crushed or broken stone or rip rap; hydraulic cement; coke produced from coal; primary iron or steel products; and iron or steel scrap, waste or tailings. This record will be available on the Board's website at www.stb.dot.gov. On the Board's homepage, select Industry Data/Economic Data/EP 704 (Sub-No. 1).

We are releasing certain preliminary analysis that was created by the Board's Office of Economics at the request of Vice Chairman Debra Miller and referenced in her concurring opinion in the *Exemptions NPRM*. Because this analysis was not adopted by the Board as a rationale for its decision, it is an internal, pre-decisional, and deliberative record that is protected from disclosure by FOIA Exemption 5. However, the Board is exercising its discretion to release it to you. This record will be available on the Board's website at the location described above.

Records Withheld

We are withholding, as protected from disclosure by FOIA Exemption 5, 29 records that contain other analyses and studies that were considered by the Board or Board staff in determining whether to issue the NPRM or in developing the content of the NPRM. These records are internal, pre-decisional and deliberative. Consistent with the rationale underlying Exemption 5, we believe that release of these records would chill our deliberative process and confuse the public.

We are withholding 69 records of complaints that were filed with the Board's RCPA program. After reviewing the applicable law, we have determined that we must deny your request for RCPA records under Exemption 3, which protects records that are exempt from FOIA under other laws. Under 5 U.S.C. § 574(j), Congress has exempted Alternative Dispute Resolution communications, such as these, from disclosure under FOIA. However, the Board is exercising its discretion to provide you with alternative information that may satisfy this part of your request: We are attaching a table that identifies the number of complaints that appear to correspond with the commodities subject to the *Exemption NPRM*.¹

Within 30 days of receipt of this letter, you may appeal to the Chairman of the Surface Transportation Board this determination withholding certain records. 5 U.S.C. § 552(a)(6)(A)(i); 49 C.F.R. § 1001.3. Any appeal should be sent to Chairman Daniel R. Elliott III at Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001; or (202) 245-0452 (FAX); or Chairman.Staff@stb.dot.gov.

¹ The RCPA electronic database does not identify freight by specific STCC code. Therefore, we identified responsive complaints by searching the database using the names of the commodities associated with the relevant STCC codes.

A bill for the cost of processing your request will be emailed separately. Please contact me if you have any questions, referring to FOIA Request No. 16-021.

Sincerely,



Chris Oehrle
Attorney Adviser
Office of the General Counsel
Phone: (202) 245-0271
for
Marilyn Levitt
FOIA/Privacy Officer/Attorney
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Table

**Norfolk Southern Railway
FOIA Request 16-021
RCPA Complaint Records Related to EP 704**

Search Term	RCPA Complaints Potentially Involving EP 704-1 Exempt Commodities
Crushed	1
Crushed stone	0
Broken stone	0
Rip rap	0
Coal coke	0
Coke	2
Steel	20
Iron	11
Steel scrap	4
Iron scrap	0
Trailings	1
Hydraulic cement	0
Cement*	30

* The count of matters is an estimate. Due to problems encountered with the "search" feature in the RCPA Database, a more accurate count cannot be provided at this time.

EXHIBIT D



Norfolk Southern Corporation
Law Department
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Norfolk, Virginia 23510-9241

John M. Scheib
General Counsel- Commerce

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(757) 533-2607 (Fax)
john.scheib@nscorp.com

May 17, 2016

Mr. Chris Oehrle
Attorney Adviser
Office of the General Counsel
Surface Transportation Board
395 E Street, SW
Washington, D. C. 20423-0001

Mr. Oehrle:

On April 8, 2016, Norfolk Southern Railway Company (“NS”) requested certain records, some of which the Surface Transportation Board (“STB”) expressly relied when issuing its Notice of Proposed Rulemaking in EP 704 (Sub-No. 1)(“Rulemaking”), Review of Commodity, Boxcar, and TOFC/COFC Exemptions (STB served March 23, 2016). By letter from you dated, May 6, the agency responded by denying the vast majority of NS’s request. Having found 100 records that were responsive to NS’s request, the STB released just two.

For 69 records, that letter said that “after reviewing the applicable law, we have determined that we must deny your request for RCPA records under Exemption 3, which protects records that are exempt from [Freedom Of Information Act] under other laws. Under 5 U.S.C. § 574(j), Congress has exempted Alternative Dispute Resolution communications, such as these, from disclosure under FOIA.” NS infers from the construction of your letter that these RCPA records were not and will not be relied upon by the STB in the Rulemaking. NS requests that you promptly confirm that this inference is correct. Provided that our understanding is correct, NS will not appeal at this time.

Because, as explained below, not all types of RCPA communications are protected, and because the documents were not released nor even described, NS cannot be sure whether any of the 69 withheld documents properly are subject to Exemption 3.

Exemption 3 provides that the agency is not required to provide information requested under FOIA if that information can or must be withheld under another law. In this instance, the other law invoked is 5 U.S.C. 574(j), which provides that “[a] *dispute resolution communication*

which is between a *neutral* and a *party* and which may not be disclosed under this section.” The highlighted terms are important because they are defined by Section 571.

For example, “neutral” means “an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy.” 5 U.S.C. 571(9). The RCPA and its employees are not “neutrals” with respect to every inquiry they field. The Guide to Confidentiality Under the Federal Alternative Dispute Resolution Act makes clear that there is a difference between a neutral and a facilitator.¹

By contrast, the ADR Act’s definition (and protection) of a “neutral” does not cover some activities of a facilitator—unlike a mediator, who always works to help parties reach resolution of a dispute. Facilitators sometimes moderate or oversee a framework in which participants, instead of resolving issues in controversy, hold a generalized discussion of their problems, seek to improve mutual understanding, or do long range planning.²

NS submits that RCPA is in many instances nothing more than a facilitator. The RCPA has no power to resolve controversy. “Because it is an informal program, staff cannot order a specific resolution or provide official opinions or rulings.”³

In addition, many matters addressed by RCPA are not controversies, which mean that RCPA’s work on those matters is excluded from the definition of “neutral.” As the STB shows in its “Quarterly Reports on Formal and Informal Service Complaints”⁴ there are more than 39 different categories of informal complaints. Most of those categories have nothing to do with an issue in controversy. For example, some of the most common inquiries related to STB jurisdictional questions and STB procedural assistance. The RCPA performs tasks as routine as “a simple answer to a telephone inquiry.” RCPA also “explains the Board’s jurisdiction and procedures and informally answers questions based on the staff’s knowledge and experience.”⁵ These inquiries do not involve an STB staff member performing “functions specifically to aid the parties in resolving the controversy.” 5 U.S.C. 571(9). In these instances, the RCP staff is nothing more than a facilitator and question answerer. They are not “neutrals.”

In addition, many inquiries made to RCPA are not made by a “party” because the definition of that term requires an “agency proceeding.” 5 U.S.C. 571(10)(incorporating 5 U.S.C. 551(3)). According to Section 571(5), a “dispute resolution communication” that is not subject to disclosure must be one made “for the purposes of a dispute resolution proceeding,” which is itself a defined term whose requirements must be met. 5 U.S.C. 571(6).

¹ Available at file:///C:/Users/w9gj9/Downloads/-DR030450-relatedresources-CopyofGuideFinalJul05.pdf.

² *Id.* at 38.

³ http://www.stb.dot.gov/stb/rail/consumer_asst.html

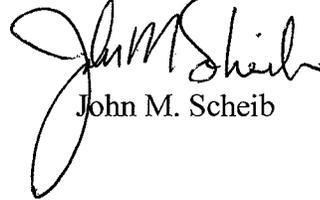
⁴ Report available at:

<http://www.stb.dot.gov/stb/docs/Reauthorization/Quarterly%20Reports/Report%20on%20Formal%20and%20Informal%20Service%20Complaints%2C%20April%201%2C%202016.pdf>

⁵ http://www.stb.dot.gov/stb/rail/consumer_asst.html

Despite these important distinctions, it does not appear from that letter that the STB engaged in a rigorous analysis of each individual document withheld to determine whether it could be withheld under the Alternative Dispute Resolution Act. Instead, the STB's response letter provided only a blanket claim that all records fell under Exemption 3. NS requests that the STB examine each document to determine which are subject to the specific criteria of Exemption 3. NS further requests that the STB republish the table appended to its response to show in which of the STB's 39 or more categories of RCPA inquiries each complaint for each commodity falls.

Respectfully,

A handwritten signature in black ink, appearing to read "John M. Scheib". The signature is written in a cursive style with a large, looping initial "J".

John M. Scheib

cc: Marilyn Levitt, FOIA, Privacy Officer/Attorney, Surface Transportation Board

EXHIBIT E



Surface Transportation Board
Washington, D.C. 20423-0001

May 26, 2016

John Scheib
General Counsel – Commerce
Law Department
Three Commercial Place
Norfolk, VA 23510-2191

Re: STB FOIA Request No. 16-021 (2nd Response)

Dear Mr. Scheib,

Thank you for your letter dated May 17, 2016, in which you seek further clarification concerning the records that we identified as “records of complaints that were filed with the Board’s RCPA program.” You have asked us to confirm your inference that these records were not relied upon by the Board in EP 704 (Sub-No. 1), *Review of Commodity, Boxcar, and TOFC/COFC Exemptions* (STB served March 23, 2016) (*Exemptions NPRM*). I can confirm that you are correct. In reaching its decision in *Exemptions NPRM*, the Board did not reference or rely on any of these 69 records.

In your letter, you also question whether these records were properly withheld under FOIA Exemption 3 and 5 U.S.C. § 574(j). Given your statement that NS would not appeal the FOIA ruling if you were assured that the Board did not rely on the RCPA files in its *Exemptions NPRM*, I will not address your additional arguments at this time.

Please contact me if you have additional questions, referring to FOIA Request No. 16-021.

Sincerely,

Marilyn Levitt
FOIA/Privacy Officer/Attorney
Office of the General Counsel
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001
Phone: (202) 245-0269; Fax: (202) 245-0460
FOIA.privacy@stb.dot.gov
levittm@stb.dot.gov

EXHIBIT F



Office of the Chairman

Surface Transportation Board
Washington, D.C. 20423-0001

June 14, 2016

Mr. Geoffrey Sigler
Ms. Cynthia Richman
Counsel for the Association of
American Railroads
Gibson Dunn
1050 Connecticut Ave., N.W.
Washington, DC 20036

Re: Appeal of FOIA Request No. 16-022

Dear Mr. Sigler and Ms. Richman,

This letter partially grants your Appeal on behalf of the Association of American Railroads (AAR) (dated May 17, 2016) of the Board's FOIA Officer's determination to withhold certain requested records related to the Board's Notice of Proposed Rulemaking in EP 704 (Sub-No. 1), *Review of Commodity, Boxcar, and TOFC/COFC Exemptions* (STB served March 23, 2016) (*Exemptions NPRM*). After a careful review of your Appeal, I have asked staff to release one additional record in full and two additional records in part. Otherwise, your appeal is denied.

Background. In its petition filed with the Board on April 8, 2016, AAR requested that the Board release all data, reports, work papers, and other materials that underlie the proposed rule change. AAR also sought the analyses referenced in Vice Chairman Miller's concurring opinion regarding other commodities (including those where

railroads may have lost market power over commodities that are currently regulated) “and any other work papers or materials related to the [*Exemptions*] NPRM” that are not already publicly available in the record. In an order served on May 6, 2016, the Director of the Office of Proceedings explained that the Board would release the public work paper on which it relied in *Exemptions NPRM*. The Director also noted that, by separate letter, AAR’s request for certain data from the Carload Waybill Sample had been granted, under customary protective orders, so that AAR could have the opportunity to conduct a thorough analysis of the Board’s proposed rules. The Director found, however, that AAR’s request “for the release of all other data, reports, and other materials” related to the NPRM should be properly addressed through the Board’s Freedom of Information Act (FOIA) procedures. Accordingly, AAR’s request was forwarded to the Board’s FOIA office.

As explained in her May 6, 2016, letter, the FOIA Officer found 31 records that are responsive to AAR’s request (FOIA Request 16-022). In addition to posting on its website the public version of the work paper that was relied on by the Board in *Exemptions NPRM*, the agency exercised its discretion to release (by posting) the analysis that was prepared for, and referenced by, Vice Chairman Debra Miller in her concurring opinion in *Exemptions NPRM* (an analysis that, I note, could have been properly withheld under FOIA Exemption 5). However, the FOIA Officer determined that the remaining 29 responsive records should be withheld under FOIA Exemption 5 because they were all “internal, pre-decisional, and deliberative” and their release “would chill our deliberative process and confuse the public.”

Findings and Determination on Appeal. After reviewing your appeal, I have made the following findings and determinations:

- **Number of Responsive Records.** In the course of gathering the responsive records for my review, FOIA staff found that they had failed to include in their count two additional records that had been identified as responsive. They also found that one record included in the original count was a part of a draft decision, and was not responsive to AAR's request. Therefore, the corrected number of records responsive to AAR's request is 32, of which two records have already been made available on the Board's website.
- **Other Records to Be Released.** As you noted in your appeal, FOIA's deliberative process privilege does not apply to purely factual information. An agency that is withholding records pursuant to Exemption 5 is required to review those records and, where reasonably practicable, segregate and release any factual information found within. My review of the responsive records resulted in the identification of one record that is purely factual in nature, and which I will release. I have also identified segregable information of a purely factual nature in two additional records. Those two records will be redacted and released to you. But I will withhold predecisional, deliberative information in those records under Exemption 5.
- **Other Records Withheld under Exemption 5.** In my review of the withheld records, I did not identify any additional records that contained substantive factual

information that should be segregated and released. See Mead Data Center, Inc. v. U.S. Department of the Air Force, 566 F.2d 242, 261 n.55 (D.C. Cir. 1977) (agency not required “to commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content”); Kellerhals v. IRS, No. 2009-90, 2011 WL 4591063, at *7 (D.V.I. Sept. 30, 2011) (allowing withholding of factual material because “[w]hile some of the documents contain factual material, that material is so intertwined with the analysis that any attempt to reveal only factual material would reveal the agency's deliberations”); Hawkins v. U.S. Dep’t of Labor, No. 3:05CV269J32, 2005 WL 2063811, at *3 (M.D. Fla. Aug. 19, 2005) (protecting factual portions of deliberative document that could not be “segregated in a meaningful way” from deliberative sections); Delta Ltd. v. U.S. Customs & Border Prot. Bureau, 384 F. Supp. 2d 138, 151-52 (D.D.C. 2005) (finding that factual portions of records were too closely mixed in with deliberative portions and therefore were not releasable); Tarullo v. DOD, 170 F. Supp. 2d 271, 278 (D. Conn. 2001) (“Although the document does summarize relevant facts, that summary is so intertwined with . . . recommendations and opinions . . . that production of a redacted version would be incomprehensible.”).

With the exception of the records mentioned above, the responsive records (spreadsheets, which contained information taken from the waybill files to which AAR already has access; emails among staff; internal notes/briefing papers; etc.) withheld by the FOIA Officer reflect the Board’s internal, predecisional deliberations regarding what ultimately

became the *Exemptions NPRM*. You argue that the Board is withholding data and materials on which the Board relied, and you assert that such action “deprived the AAR of the opportunity to meaningfully participate in the rulemaking proceedings.” As noted above, however, the agency has already released to you or made available on its website the data upon which the Board did indeed rely in *Exemptions NPRM*.

I agree with the FOIA Officer’s determination that release of these records would chill the free and frank expression of comments, opinions, recommendations, and analyses that are essential to agency decision making. In addition, I share her concern that release of these records, which reflect staff’s internal, predecisional deliberations that may differ from the reasoning that underlies the Board’s final decision, could confuse the public’s understanding of the Board’s final decision. These are the dual concerns that underlie Exemption 5. See NLRB v. Sears Roebuck & Co., 421 U.S. 132, 150 (1975); Schell v. HHS, 843 F.2d 933, 942 (6th Cir. 1988) (“It is the free flow of advice, rather than the value of any particular piece of information, that Exemption 5 seeks to protect.”); Lewis-Bey v. DOJ, 595 F. Supp. 2d, 120, 133 (D.D.C. 2009) (protecting documents where release ““would have the effect of inhibiting the free flow of recommendations and opinions””) (internal citation omitted); Russell v. Dep’t of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (citing Jordan v. United States Dept. of Justice, 591 F.2d 753, 772-3 (D.C.Cir.1978)) (en banc) (asserting that Exemption 5, among other things, protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon). Therefore, I conclude that the agency should withhold 27 records in full, and two records in part, as

protected under FOIA Exemption 5. I would also note that information derived from the confidential waybill sample would be protected under Exemption 4, although, as mentioned above, AAR already has access to this data through the Board's waybill-access procedures (which themselves protect confidentiality).

Should you disagree with this determination, you may be able to resolve your concerns through mediation. The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services is free and does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services

National Archives and Records Administration

8601 Adelphi Road - OGIS

College Park, MD 20740-6001 E-mail: ogis@nara.gov

Web: <https://ogis.archives.gov>

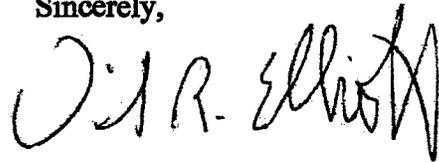
Telephone: 202-741-5770

Fax: 202-741-5769

Toll-free: 1-877-684-6448

Finally, you have the right to appeal my determination, within six years from the date of this determination, by filing a suit in a Federal district court in any of the following places: (1) where you reside, (2) where you have your principal place of business (if any), or (3) in the District of Columbia.

Sincerely,

A handwritten signature in black ink, appearing to read "D. R. Elliott III". The signature is written in a cursive, somewhat stylized font.

Daniel R. Elliott III
Chairman

cc: Marilyn Levitt, STB FOIA Officer

EXHIBIT G

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE 704 (Sub-No. 1)

**REVIEW OF COMMODITY, BOXCAR,
AND TOFC/COFC EXEMPTIONS**

VERIFIED STATEMENT OF JAMES R. SCHAAF

My name is James R. Schaaf. I am employed by Norfolk Southern Corporation (“Norfolk Southern”) in the capacity of Group Vice President – Metals and Construction. My office is in Norfolk, Virginia. I have been employed by Norfolk Southern, and before that Conrail, since 1987 and have occupied my present position since 2007. I earned my Bachelor of Science degree in Marketing from Pennsylvania State University in 1987 and my MBA from Drexel University in 1997. I completed the General Management Program at Harvard Business School in 2013. The responsibilities of my present position include overseeing marketing and sales activities for the transportation services Norfolk Southern provides for the metal and construction industries.

Within Norfolk Southern’s Marketing department, my responsibilities include four of the commodities named by the Surface Transportation Board (“STB”) in its Notice of Proposed Rulemaking (“NPRM”): crushed or broken stone or rip rap; primary iron or steel products; iron or steel scrap; and hydraulic cement. My team and I were very surprised that the STB would choose to propose revoking the exemptions for these commodities. These commodities are all characterized by persistent and pervasive competition, both from trucking and other modes and from other sources or products. The emails appended to this Verified Statement provide direct evidence of that competition. Crushed stone, scrap, and cement in particular are among the lowest rated commodities within my group. As detailed below, Norfolk Southern’s experience

with all four commodities is contrary to any assertion that rail transportation exerts market power such that the exemptions should be revoked for all movements of these commodities.

STCC 14-2 Crushed or Broken Stone or Rip Rap

Norfolk Southern transported approximately 167,000 carloads under STCC 14-2 in 2015. A majority of those shipments moved in manifest (carload) service, with about 40 percent moving via unit trains. Norfolk Southern serves at least two distinct markets within STCC 14-2. Around 88% of Norfolk Southern's business is construction, ballast, and road stone shipping into the destination markets where it is used. The remaining 12% of Norfolk Southern's business is high calcium limestone, which is transported to electric utilities for use as scrubber stone to remove sulfur dioxide from exhaust emissions. That business has seen increased demand at several points over the last two decades as environmental regulation increased, particularly starting around 2005, although more recent regulations have begun to require even more stringent methods of emission control.

Norfolk Southern's 2015 shipments represented more than 100 different customers. However, the shipments are heavily concentrated among twelve construction stone shippers: Vulcan, Martin Marietta, Aggregates USA, Hanson Aggregates, Shelly Materials, MGQ, Birdsboro Materials, Junction City Mining, Pennsy Supply, Carmeuse, Dyer Quarry, and Pounding Mill Quarry.

Although many quarries are only accessed by one railroad, these shipments face intense modal competition from truck, barge, and vessel. Norfolk Southern internally estimates that rail transportation is only 5% to 6% of the overall marketplace. I understand that this estimate is in line with the Transearch data indicating rail transportation made up 6% of the movements within STCC 1421 (broken stone or riprap) in 2012 and 2014.

Source (or geographic) competition also is a major factor in these movements.

Transportation costs can equal as much as two to three times the cost of the underlying stone, making it a primary factor in the customer's transportation decision. As a result, our ability to win a particular piece of business usually does not come down to whether it is more cost effective to ship via rail or truck from a single quarry. Instead, a customer weighs whether it is cheaper to purchase and transport via rail from a Norfolk Southern-served quarry or instead to purchase from any number of other quarries that are often closer to the customer and therefore reachable via a shorter length of haul and other modes. Trucks are also able to triangulate for reloads and backhauls of other commodities, further reducing their effective costs. Barges compete on inland waterways such as to Pittsburgh, Pennsylvania; Memphis, Tennessee; Norfolk, Virginia; and Mobile, Alabama. In addition to domestic quarries, imports via ocean vessel from Canada, the Bahamas, and Mexico can be competitive to Atlantic and Gulf Coast ports. Essentially, for each customer we have to plot all the quarries a customer can source from and price out all of the various transportation options. As a result, our pricing on longer lengths of haul may be just as constrained as it is on shorter moves. Appendix A contains some exemplary emails of customers citing their competitive options in negotiating rates or explaining Norfolk Southern's loss of particular pieces of business.

Finally, product competition is a factor for certain markets. For example, customers can sometimes substitute cheaper limestone in their processes if the cost of higher quality limestone or granite gets too high. Crushed concrete and recycled asphalt millings also can be used in place of some construction stone. Norfolk Southern must take into account all of these considerations when competing for this business.

STCC 33-12 Primary Iron or Steel Products

Norfolk Southern has the largest steel franchise of the Class I railroads. Norfolk Southern serves all but one of the major integrated steel makers. Integrated steel makers produce steel from inputs of iron ore, limestone, and coke, which are combined in a blast furnace to create liquid iron. Norfolk Southern has a smaller presence among mini-mills, which are those steel producers that use electric arc furnaces to produce steel from scrap. In total, Norfolk Southern served over 1,400 different customer parent companies in 2015.

STCC 33-12 covers the majority of semi-finished iron and steel movements. Norfolk Southern transported approximately 237,000 carloads in 2015, of which roughly 164,000 carloads were coil and the remainder were other iron and steel products. Norfolk Southern handles a number of inter-mill shipments, meaning Norfolk Southern often will move the same product multiple times before final consumption. Mini-mills have eroded a lot of integrated steel out of the markets and now comprise about 65% of steel production. The rise in mini-mills has resulted in a decline of inter-mill shipments. Such shipments typically are for very short distances, which impacts our average length of haul. Removing a number of shorter hauls from that calculation has a smaller impact on the numerator (the total miles hauled) than the denominator (total shipments), resulting in a longer average length of haul. The industry has also seen major consolidation.

Most iron and steel shipments have access to multiple railroads. The steel industry (mostly on integrated side) early on created “steel railroads”; basically, steel companies created “in-house” railroads to serve their plants. These steel roads receive revenue from the Class I railroads for originating and delivering movements, while also providing access to multiple railroads. Many mini-mills are also on short lines that provide multiple rail options. In some

cases, short lines and regional carriers also work with other modes (truck and barge) to create competitive options that can bypass Class I rail carriers.

In many markets, steel companies are not shipping directly to end-users, but to warehouses and/or steel processors that provide just-in-time delivery of steel to the end users. The presence of those warehouses and processors in the supply chain provides the steel industry with more competitive options. A good example is the Michigan coil market. The majority of steel for the automotive industry moves into Wayne Industries, Dearborn Steel Center, or Regional Steel Distribution Center (“RSDC”). Wayne and Dearborn have access to two Class I carriers (NS and CSX) and RSDC has access to three (NS, CSX and CN) through the short line that directly serves RSDC. In addition, some warehouses or processors also own truck fleets that not only provide local just-in-time truck delivery, but also offer long-haul truck options to the steel industry. Chicago, Cleveland, and St Louis also are examples of areas that have large steel markets with multiple options for steel processing and warehousing. Appendix B contains recent examples of the exact sort of communications my marketing team regularly receives. Customers such as {{ }} email Norfolk Southern with details about the potential movement and the trucking (or other modal) price we need to beat. These examples reflect the functioning of a competitive market.

Source competition also can be a significant factor. For example, {{

}}

Additionally, consolidations, acquisitions, and mergers among steel customers have created opportunities for geographical or source competition that did not previously exist. For example, AK Steel acquired Dearborn Works in 2014. {{

}} All of these factors contribute to a competitive market for iron and steel products.

STCC 40-211 Iron or Steel Scrap

Norfolk Southern transported approximately 86,000 carloads of scrap in 2015. Two customers, OmniSource Corp. (“OminSource”) and the David J. Joseph Company (“DJ Joseph”), accounted for {{ }} of those shipments, but Norfolk Southern served more than 200 different customers in 2015.

The modal competition facing rail scrap moves is heavily influenced by the structure of the marketplace. Scrap is a commodity that has regional pricing, and scrap being consumed locally moves overwhelmingly by truck. Scrap being sold into a market via rail tends to be sold away from local consumption. Therefore, the rail movement must compete against a local truck rate, even though the rail movement is a further distance. Additionally, scrap trades on a monthly basis, meaning transportation rates that work one month may not the next month based on how prices fluctuate from month-to-month and region-to-region.

Moreover, changes in the marketplace have increased geographic competition for rail shipments. The proliferation of shredding facilities (“shredders”) from around 200 in 1998 to over 300 in 2012 has shortened the average distance between scrap producers and scrap consumers. The increase in the number of steel mini-mills, which are large consumers of scrap, has shrunk this distance even further. Because locally consumed scrap moves primarily via truck, this reduction in distance has resulted in more truck competition and, conversely, fewer rail

moves of shorter distances. The displacement of rail moves with below-average length of hauls increases the average length of haul calculation for the remaining rail traffic.

{{

}}

These impacts are evident in our interactions with our customers. Appendix C contains many examples of scrap customers citing trucking and barge rates that Norfolk Southern must beat to win the traffic, or pointing to other modes as the reason Norfolk Southern's volumes have decreased.

Some competitors have responded by using rail to enter new markets. {{

}} These moves have lengthened Norfolk Southern's average length of haul but are evidence of a customer using rail in a new way to increase competition.

Scrap is increasingly subject to product competition as well, which constrains rail rates. The industry has experienced vertical integration, such that Nucor Corporation now owns DJ Joseph and Steel Dynamics, Inc. purchased OmniSource. These steel companies have looked to

protect their raw material needs through substitute products, such as pig iron, direct reduced iron (“DRI”), and/or Mesabi Nugget. Both companies have built plants that allow them to produce substitutes to supplement scrap in their steel-making processes.

Finally, other factors also put competitive pressure on the transportation of scrap. The export market results in about 20 million tons of export annually. Turkey and China are major consumption points, as well as other Asian countries. These movements are very sensitive to the strength of U.S. currency. Additionally, intermodal shipments are becoming more common, wherein containers are stuffed with scrap for transport. This trend is true domestically but even more so internationally. Overall, Norfolk Southern’s experience in the scrap market shows that competition is pervasive.

STCC 32-4 Hydraulic Cement

Norfolk Southern transported approximately 38,000 carloads of hydraulic cement and served approximately 20 customers in 2015. The market has seen significant consolidation in recent times, maximizing the use of more efficient plants in response to regulations on emissions and air quality.

The primary consideration when Norfolk Southern competes for this business is truck competition. Truck movement of cement is inherently advantageous over rail because virtually all cement is eventually delivered locally by truck. Thus, the choice of rail transportation requires cement to move through a distribution yard and eventually to transfer to a truck for delivery to the consumption point. Of course, trucking can compete directly for a move between the origin and distribution yard. But unlike rail transportation, truck delivery from a cement plant does not need to go through a distribution yard and can serve the consumption point directly. Direct service eliminates the time, logistics, and expense of those extra processes. Unsurprisingly, the Portland

Cement Association reports that a majority of shipments of portland cement moved directly from plant to customer every year between 2002 and 2012, and truck share ranged from 96.6% to 98.2% of those movements. Portland Cement Association, 2014 U.S. Cement Industry Annual Yearbook, at 42 tbl. 42 (2014), *available at* [http://www2.cement.org/econ/pdf/PCAAnnual_Yearbook_2014jc .pdf](http://www2.cement.org/econ/pdf/PCAAnnual_Yearbook_2014jc.pdf). Appendix D contains a couple examples of cement customers explaining how they will continue to use truck over rail due to transportation costs.

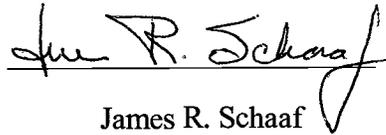
Other modes also compete for cement transportation moving from plants to distribution terminals. A majority of Norfolk Southern's traffic has access to multiple railroads. Barges are viable transportation options for movements close to navigable waterways. Cement is also imported via ocean vessels to locations near the coast.

Cement is also a commodity, meaning customers can source from any producer accessible by any of these forms of transportation. Other railroads, water transportation, or trucking may or may not be able to compete for movements to the same distribution site, but so long as they move to a distribution site in the area, they can serve the same ultimate consumption point equally well via truck. Further, producers themselves sometimes will enter product swaps with other producers, whereby one produces cement at one of its plants on behalf of another producer in exchange for using cement from that producer's plant in another location. This allows each producer to avoid a significant portion of transportation that would otherwise be required.

Verification

I, James R. Schaaf, verify under penalty of perjury that I am Group Vice President – Metals and Construction of Norfolk Southern Corporation, that I have read the foregoing document and know its contents, and that the same is true and correct to the best of my knowledge and belief.

Executed on July 26, 2016


James R. Schaaf

Appendix A
Marketing Emails Regarding Crushed Stone

{{

}}

Appendix B

Marketing Emails Regarding Primary Iron or Steel Products

{{

}}

Appendix C

Marketing Emails Regarding Iron or Steel Scrap

{{

}}

Appendix D
Marketing Emails Regarding Concrete

{{

}}

EXHIBIT H

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE 704 (Sub-No. 1)

**REVIEW OF COMMODITY, BOXCAR,
AND TOFC/COFC EXEMPTIONS**

VERIFIED STATEMENT OF ROB N. ZEHRINGER

My name is Rob N. Zehringer. I am employed by Norfolk Southern Corporation (“Norfolk Southern”) in the capacity of Group Vice President – Coal Business Group. My office is in Norfolk, Virginia. I have been employed by Norfolk Southern since 1983, and while I have occupied my present position since 2012, I have been involved in the coal market since 2001. I hold a Bachelor of Science degree with a concentration in Accounting from Bowling Green State University and a MBA from Virginia Polytechnic Institute and State University. The responsibilities of my present position include all marketing and sales functions within the coal industry which includes steam coal, metallurgical coal, metallurgical coke, and anthracite.

I understand that the Surface Transportation Board (“STB”) has proposed in its Notice of Proposed Rulemaking (“NPRM”) to revoke wholesale the exemption from regulation for coke produced from coal. As detailed below, Norfolk Southern’s experience with coke transportation is marked by strong rail competition – all of the destinations served by Norfolk Southern have access to other railroads, along with all but two of origins. Trucking and barge provide additional modal competition. In short, competitive forces disprove any assertion that Norfolk Southern widely exerts market power over transportation of coke produced from coal.

STCC 29-914, Coke Produced from Coal

Norfolk Southern transported approximately 3.64 million tons of coke produced from coal to 34 receivers in 2015. Norfolk Southern's customers can be divided between integrated coke producers, which are affiliated or owned by a steel manufacturer, and merchant producers that produce coke to be sold on the open market.

Norfolk Southern's coke business is defined by strong modal competition. All but two of the origins, and all of the destinations, served by Norfolk Southern are also served by other railroads. Barge is a viable option for transport up the Mississippi River into Ohio or Missouri. Indeed, one of those two origins local to Norfolk Southern, is in close proximity to the Ohio River. Trucking is also a competitive option depending on the origin and destination pair. Distance is not the primary issue – for example, coke is competitively trucked from Alabama to New Jersey. Instead, the volume of the movement often influences modal decisions. Coke is also amenable to transload movements. Truck to water transportation is a strong competitive option for facilities located within 150 miles of a lake or river transloading facility.

Modal competition is even more prevalent in certain markets. STCC 29-914 includes coke breeze, which is a fine powder derived from metallurgical coal that can be burned in blast furnaces during iron processing and also is used as an aggregate material in concrete. Norfolk Southern's experience is that coke breeze is transported primarily via truck. For example, both origins local to Norfolk Southern truck out their coke breeze.

Domestic coke consumers have responded to a changing coke market in recent years, including increased foreign demand, by looking to substitute products. For example, pulverized coal injection ("PCI") allows steel producers to inject certain types of coal directly into a blast

furnace, reducing the amount of coke necessary. PCI coal thus acts as a competitive constraint when the price of coke rises.

Finally, Norfolk Southern has made certain innovations in its fleet over the last fifteen years that impact coke transportation. Norfolk Southern now owns close to 600 “High Top” hoppers, which have been extended an additional three feet at the top of the car. These High Tops are able to carry an extra 20 to 22 tons of coke per car compared to a typical hopper. As a result, Norfolk Southern’s coke shipments have experienced increased productivity on a per car basis compared to shipments moving around or before the year 2000.

Verification

I, Rob N. Zehringer, verify under penalty of perjury that I am Group Vice President – Coal Business Group of Norfolk Southern Corporation, that I have read the foregoing document and know its contents, and that the same is true and correct to the best of my knowledge and belief.

Executed on 7/26/16

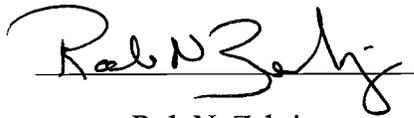

Rob N. Zehringer

EXHIBIT I

MORRISON | FOERSTER

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WASHINGTON, D.C.
20006-1888

TELEPHONE: 202.887.1500
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January 31, 2011

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VIA ELECTRONIC FILING

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Surface Transportation Board
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Office of Proceedings

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Re: STB Ex Parte No. 704

Dear Ms. Brown:

Attached for electronic filing in the above-referenced docket are the Comments of Norfolk Southern Railway Company in response to the Board's Corrected Notice served October 25, 2010 in this docket.

Also attached is a written summary of testimony to be offered by David Lawson, Norfolk Southern's Vice President, Industrial Products, at the hearing scheduled for February 24, 2011 in this docket. Norfolk Southern requests that Mr. Lawson be given ten minutes to present his testimony at the February 24 hearing.

Thank you for your assistance.

Sincerely,



David L. Meyer

Attachments

cc (with attachments): John M. Scheib, Esq.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE NO. 704

**REVIEW OF COMMODITY, BOXCAR,
AND TOFC/COFC EXEMPTIONS**

**COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

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Dated: January 31, 2011

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE NO. 704

**REVIEW OF COMMODITY, BOXCAR,
AND TOFC/COFC EXEMPTIONS**

**COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

Norfolk Southern Railway Company (“NS”) submits these Comments in response to the Board’s Corrected Notice served October 25, 2010 (“Corrected Notice”), and its decision served November 19, 2010.

INTRODUCTION

The Board’s Notice states that the Board’s decision to hold a hearing was prompted by “informal inquiries questioning the relevance and/or necessity” of certain of the exemptions established by the Board and its predecessor pursuant to 49 U.S.C. § 10502.¹ The Board seeks comments on three issues concerning the Commodity, Boxcar and TOFC/COFC exemptions (which for convenience we refer to herein as the “exemptions” or the “commodity exemptions”): “the effectiveness of the exemptions in the marketplace; whether the rationale behind any of the exemptions should be revisited; and whether the exemptions should be subject to periodic review.”²

¹ Corrected Notice, at 3.

² *Id.*

As we explain in these Comments, NS believes there is no good reason for this hearing. The exemptions continue to fulfill Congress's broad and enduring mandate that rail service be exempted from regulation except to the limited extent necessary to protect shippers from the abuse of market power. As the Department of Transportation explained before the Board in 2006, "Congress directed that the exemption authority contained in the Staggers Rail Act be used whenever continued regulation is not necessary. That command remains intact today."³ Against this statutory backdrop, further proceedings to revisit the existing exemptions are unwarranted.

Moreover, there is no reason for the Board to be concerned that the exemptions inhibit shippers from seeking regulatory protection when needed. To the extent that particular shippers (or groups of shippers) of exempt commodities believe that the railroad serving them is abusing its market power, there is no obstacle to their invoking the Board's revocation power to secure available regulatory protections. Experience shows that the Board has partially revoked the exemptions when justified.

That experience also confirms, however, that railroads continue to face competition for exempted transportation services that is no less pervasive than when the Board and its predecessor granted the exemptions. Indeed, competition is more robust than ever, partly as a result of the investments and efficiencies made possible by Congress's and the Board's deregulatory efforts. At bottom, there simply is no problem in need of a solution.

³ Comments of the United States Department of Transportation, Ex Parte No. 661, *Rail Fuel Surcharges*, (Oct. 2, 2006), at 4-5 (citations omitted).

It is curious that the Board would consider revoking exemptions and reinstating regulation – in direct conflict with the governing statutes and Congressional intent – at the same time as the President of the United States is asking regulatory agencies to pursue the opposite course. On January 18, 2010, President Barack Obama issued an Executive Order requiring regulatory agencies to adhere to several “basic tenets,” including the obligation “to consider . . . how best to *reduce burdens for American businesses* and consumers,” “to seek . . . the *least burdensome approaches*,” and “to review old regulations so that *rules which are no longer needed can be modified and withdrawn*.”⁴ President Obama explains that his goal was to “remove outdated regulations that stifle job creation and make our economy less competitive.”⁵ The President’s clear message is for agencies to remove regulatory burdens wherever possible, and not to expand regulation unnecessarily.

NS submits that the Board’s Notice (which indirectly questions “the relevance and/or necessity” of existing exemptions) approaches the issue of commodity exemptions from the wrong end of the telescope. To carry out its statutory responsibilities, the Board should be actively pursuing the exemption of additional commodities for which regulation is no longer necessary to protect shippers from the abuse of market power. NS has identified four such commodities that, notwithstanding the good efforts of the Board

⁴ “Regulatory Strategy,” White House Blog (Jan. 18, 2011), *available at* <http://www.whitehouse.gov/blog/2011/01/18/regulatory-strategy> (last visited Jan. 25, 2011) (emphasis added).

⁵ Barack Obama, “Toward a 21st-Century Regulatory System,” *The Wall Street Journal*, Jan. 18, 2011 at A17 (Obama Op. Ed). In the Order itself, the President commanded that “each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.” Executive Order No. 13,563, Jan. 18, 2011.

and the ICC before it in granting a series of commodity exemptions, unnecessarily remain subject to the full array of Board-administered regulation. NS requests that the Board commence proceedings pursuant to Section 10502(a) to review the appropriateness of exempting these additional commodities from regulation.

I. THE STATUTORY FRAMEWORK EXPRESSED CONGRESS'S DEREGULATORY MANDATE

The ICC and Board adopted the exemptions in response to Congress's mandate that the agency free the railroads of unnecessary regulatory burdens. Congress began in 1976 by providing the ICC permissive exemption authority in the Railroad Revitalization and Regulatory Reform Act ("4-R Act"). With the Staggers Rail Act of 1980 ("Staggers Act"), Congress replaced that permissive authority with an outright command that the agency use its exemption power to eliminate unnecessary regulation. Sixteen years later, Congress amplified this mandate with new statutory language in the Interstate Commerce Commission Termination Act ("ICCTA") requiring the Board to exempt rail service from regulation to the "maximum extent" possible consistent with applicable law.⁶ This steady progression resulted in the statutory framework that remains in place today and precludes the Board from materially altering its longstanding deregulatory approach.

A. The Statutory Framework Encourages Extensive Deregulation of Rail Transportation

The statutory scheme in place since the Staggers Act heavily favors deregulation. As set forth in 49 U.S.C. § 10502(a), Congress has directed the Board to liberally grant exemptions from regulation. Specifically:

⁶ See 49 U.S.C. § 10502(a).

[T]he Board *to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part - (1) is not necessary to carry out the transportation policy of section 10101 of this title; 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.*

(emphasis added).

The Board has consistently recognized that the statutory mandate to exempt traffic from regulation is “framed in very broad terms.”⁷ The exemptions were required to achieve Congress’s goal “to remove regulatory burdens and to allow the marketplace to influence decisions in the rail industry.”⁸ Accordingly, the statute imposes on the Board an “*affirmative duty . . . to ‘pursue partial and complete exemptions from remaining regulation,’*”⁹ and “*favours exemptions from regulation whenever appropriate.*”¹⁰ Stated succinctly, “[u]nder 49 U.S.C. 10502(a), the Board (like the ICC before it) has been directed to exempt entire categories of traffic from the regulatory provisions of the Interstate Commerce Act, to the maximum extent consistent with the Act.”¹¹

⁷ *Exemption from Regulation – Boxcar Traffic*, 367 I.C.C. 424, 428 (1983) (“*Boxcar Exemption Decision*”), *aff’d sub nom. Brae Corp. v. United States*, 740 F.2d 1023 (D.C. Cir. 1984) (“*Brae v. U.S.*”), *cert. denied*, 471 U.S. 1069 (1985).

⁸ *Brae v. U.S.*, 740 F.2d at 1055.

⁹ *Boxcar Exemption Decision*, 367 I.C.C. at 428 (emphasis added; quoting H.R. Rep. No. 96-1430, at 105 (1980)).

¹⁰ *WTL Rail Corporation Petition for Declaratory Order & Interim Relief*, STB Docket No. 42092 (served Feb. 17, 2006), at 3 (emphasis added).

¹¹ *Rail Fuel Surcharges*, STB Ex Parte No. 661 (served Jan. 26, 2007), at 12. *See also, e.g., Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731, 732 (1981) (“*TOFC/COFC Exemption Decision*”) (“We believe that our proposed exemption is consistent with the congressional intent

(footnote continued on next page ...)

This mandate implements critical elements of the Rail Transportation Policy. It “allow[s], to the maximum extent possible, competition and demand for services to establish reasonable rates for rail transportation,” 49 U.S.C. § 10101(1); it “minimize[s] the need for Federal regulatory control over the rail transportation system,” *id.* § 10101(2); it helps “ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes,” *id.* § 10101(4); and it “foster[s] sound economic conditions in transportation to ensure effective competition and coordination between rail carriers and other modes,” *id.* § 10101(5).

B. Congress’s Ratification and Amplification of the Exemption Mandate in Enacting ICCTA Precludes the Board from Changing Course Towards Reregulation

The evolution of the current statutory language and exemption regime confirms that the Board has been given a broad mandate to exempt – regardless of the economic health of the railroads or the effects or benefits of the exemption – and afforded much narrower authority to revoke such exemptions.

When Congress enacted ICCTA in 1996, it had before it 16 years of deregulatory experience under the Staggers Act – including the many commodity exemptions the ICC had granted in response to Congress’s deregulatory mandate. Drawing on that experience, Congress chose to expand the fundamental deregulatory command of Section 10505 of the Staggers Act. A close examination of what ICCTA did and did not change leaves no doubt that the statutory mandate favoring deregulation is stronger than ever.

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that we *vigorously pursue exemptions* from economic regulation in the railroad area where regulatory control appears unnecessary to protect against abuses of market power” (emphasis added).).

During the 16 years between the Staggers Act and ICCTA, railroads had taken advantage of their new commercial freedoms: they had become much more efficient, they had invested heavily in improved service offerings, and many of them had made some progress towards revenue adequacy. The improvement in the railroads' financial condition was a crucial measure – and indeed sine qua non – of the success of the deregulatory scheme, which was designed to benefit railroads and their customers. As the Department of Transportation aptly summarized in its testimony before Congress in 1995:

As a result of the Staggers Act reforms, the health of the industry has improved significantly: for the 12 months ending September 30, 1994, the railroad industry earned an average 8.4 percent return on its net investment base, doubling its return of 1980 while maintaining its market share of about 38 percent. Carriers have invested approximately \$190 billion in infrastructure and equipment since 1980, allowing much needed rehabilitation and modernization of the nationwide rail system.

Best of all, the rail industry's transformation has not been at the expense of shippers. Overall real (inflation-adjusted) freight rates have dropped 1.6 percent per year since 1980 – over 33 percent overall. Coal rates have declined 1.8 percent per year; grain and chemicals 1.2 percent; rates for miscellaneous mixed shipments – a key component of intermodal traffic – have dropped 2.2 percent annually. Clearly, a wide cross-section of rail shippers – including some thought to be captive – have benefited from Staggers Act reforms.

The rail industry is now relatively healthy, *and the critical freedoms of the Staggers Act must be maintained if it is to remain financially successful. . . .*¹²

¹² Testimony of Joseph Canny, Deputy Assistant Secretary for Transportation Policy, U.S. Department of Transportation, before the Subcommittee on Railroads of the House Transportation and Infrastructure Committee (Feb. 22, 1995) (“DOT ICCTA Testimony”), at 212 (emphasis added).

(footnote continued on next page ...)

The positive feedback that Congress received regarding the success of the Staggers Act reforms and the ICC's aggressive pursuit of additional deregulation via its exemption authority left no doubt that Congress should press forward with further deregulation when it shifted regulatory responsibility to the Board. Based on the record of deregulatory success, both DOT and the ICC opined that deregulation was working and recommended that the responsible regulatory agency – now the Board – continue to have the administrative authority to remove unnecessary regulatory burdens and continue to make aggressive use of that authority.¹³ Congress shared this view, concluding that the Board's mandate to grant exemptions remained a "*crucially important* delegated power to expand existing statutory deregulation through administrative action."¹⁴

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DOT reaffirmed this view even more strongly ten years later, during the Board's 2005 review of experience with deregulation on the 25th anniversary of the Staggers Act:

The Department of Transportation considers the Act a resounding success. We do so because in sum the statute did what it was designed to do. It revitalized the railroad industry and by so doing benefitted shippers and consumers throughout the economy. Twenty-five years ago this was an industry, as you have said, marked by decline in all major respects: high rates, low returns on investment, eroding demand, low modal traffic share and excess capacity.

The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead, STB Ex Parte No. 658, Transcript of Hearing (Oct. 19, 2005), pp. 14-15.

¹³ DOT recommended to Congress that the "authority to lift regulatory requirements administratively should be retained, and used aggressively" because "[t]he exemption provision has proven to be one of the Staggers Act's most significant innovations." DOT ICCTA Testimony, at 217. Likewise, the ICC's 1994 "Study of Interstate Commerce Commission Regulatory Responsibilities" recommended that the ICC "continue to push its exemption authority aggressively." 1994 ICC Study (Oct. 25, 1994), at 7.

¹⁴ Report of the House Committee on Transportation and Infrastructure, H.R. Rep. 104-311, at 96 (1995), reprinted in 1995 U.S. Code Cong. & Admin. News 793, 808 ("ICCTA House Report") (emphasis added).

Reflecting this conclusion, new Section 10502 preserved the basic framework of the Staggers Act's exemption mandate (previously codified at 49 U.S.C. § 10505), leaving intact both the requirement that the Board "*shall*" grant exemptions, as well as the Board's authority to revoke an exemption only to the extent that some regulation proved "necessary." This structure alone confirms that Congress did not regard changes over the preceding 16 years as calling into question the desirability of continued deregulation.¹⁵

But Congress went further, making three substantive changes to the statute that amplified its policy that the Board grant exemptions liberally and revoke them only upon a showing of necessity.

First, ICCTA *heightened* the Board's obligation to exempt rail service from regulation by commanding that the Board not only "*shall*" grant exemptions, but that it shall do so "*to the maximum extent consistent with this part.*"¹⁶ Congress wanted to leave no doubt that exemptions were desirable and so made "it an explicit part of the agency's statutory duty to utilize exemptions to the maximum extent permissible under the law."¹⁷

¹⁵ See, e.g., *United States v. G. Falk & Brother*, 204 U.S. 143 (1907) (reenactment of statute in face of longstanding agency policy constitutes adoption of that policy).

¹⁶ 49 U.S.C. § 10502(a) (emphasis added).

¹⁷ ICCTA House Report, at 96. See also Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 104-422, at 169 (1995), reprinted in 1995 U.S. Code Cong. & Admin. News 850, 853 ("ICCTA Conference Report").

Second, Congress removed “restrictions on use of the exemption power in matters relating to intermodal ownership.”¹⁸ This change stemmed from Congress’s judgment that “other modes of transportation are sufficiently competitive (as is the rail industry) as to make the former categorical immunization of intermodal ownership from administrative exemption obsolete and unnecessary.”¹⁹

Third, Congress *diminished* the Board’s authority to revoke those exemptions by revising the procedural mechanism for initiating a revocation proceeding. The previous provision had not specified how a revocation proceeding could be commenced, and thus suggested that one could be commenced “on [the agency’s] own initiative.”²⁰ ICCTA added language specifying that a revocation proceeding could be commenced only upon “a request for revocation.”²¹ In explaining the new revocation provision, Congress made clear that it did not want the Board to relax the strict standards for revoking exemptions.

To the contrary:

When considering a revocation request, the Board should continue to require demonstrated abuse of market power that can be remedied only by reimposition of regulation or that regulation is needed to carry out the national transportation policy. The Conference expects the Board to examine all competitive transportation factors that restrain rail carriers’ actions and that affect the market for transportation of the particular commodity or type of service for which revocation has been requested.²²

¹⁸ ICCTA House Report, at 96.

¹⁹ *Id.*

²⁰ See former 49 U.S.C. § 10505(b), (d).

²¹ 49 U.S.C. § 10502(d).

²² ICCTA Conference Report, at 169.

The statutory framework that Congress amplified and strengthened in 1996 remains in place today²³ and constrains any action the Board might consider taking with regard to existing exemptions.

C. The Dichotomy Between the Expansive Power to Exempt and the Limited Power to Revoke an Exemption Reinforces the Deregulatory Preference in the Statutory Regime

In contrast to the express language of the statute mandating exemptions to the “maximum extent,” the statute narrowly bounds the Board’s discretion to reconsider or revoke exemptions it has previously granted. The narrow scope of the Board’s revocation authority flows directly from Congress’s desire that rail transportation be deregulated to the maximum extent possible.

The Board’s discretion is limited both substantively and procedurally to prevent an undermining of the broad preference for exemptions.

- *First*, the Board may re-regulate exempt conduct only upon a determination that “application in whole or in part of a provision of this part to the person, class, or transportation is *necessary* to carry out the transportation policy of section 10101 of this title.”²⁴
- *Second*, Congress did not empower the Board to conduct any periodic review or general reconsideration of previously-granted rail exemptions, despite mandating such reviews with respect to other aspects of the Board’s regulatory portfolio.²⁵

²³ Indeed, legislation was introduced in the 111th Congress that would have revised the statutory scheme regarding exemptions. *See* S. 2889, 111th Cong. (2010). The failure of that legislation constitutes endorsement of the manner in which the Board has implemented the existing regime. *See Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (Congress endorses regulatory policy when it knows of statutory interpretation and declines to change statute).

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

²⁵ *See, e.g.*, 49 U.S.C. § 13703(c)(2) (mandating Board proceedings to conduct periodic reviews of approved motor carrier rate agreements).

- *Third*, the statute provides that whereas the Board may begin a proceeding to exempt transportation “on its own initiative,” it may consider revoking exemptions only upon “receipt of a request for revocation.”²⁶

Thus, Congress plainly intended that exemptions be the rule, and regulation (or reregulation) the exception. It follows that the agency’s role in revoking exemptions is confined to a review of specific facts and circumstances through a case-by-case review, upon receipt of a formal request, to determine whether application of some aspect of the regulatory regime is *necessary*, notwithstanding the generally-applicable market conditions that justified the exemption.²⁷

As the court of appeals explained, this basic dichotomy between the expansive mandate to exempt and narrowly-confined discretion to revoke was “an ‘important cornerstone’” of the Staggers Act:

Further, as to the Commission’s exercise of its exemption authority, the Conference Report states that “the conferees expect that as many as possible of the Commission’s restrictions on changes in prices and services by rail carriers will be removed and that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power.” H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 105 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4110, 4137.²⁸

²⁶ 49 U.S.C. § 10502 (b), § 10502(d). *See also* 49 U.S.C. § 11701(a) (Board may act only upon complaint unless otherwise specified).

²⁷ As stressed by the ICC, a party seeking revocation must overcome the agency’s original finding of competition: “We also wish to emphasize that a revocation petition focuses on traffic that has previously been exempted from Commission regulation on the basis of this agency’s conclusion that the marketplace itself is sufficiently competitive so as not to require continued government regulation. Thus, a party [seeking revocation] has a burden of showing that our prior findings supporting the initial exemption were clearly wrong, or that changed circumstances require us to revisit them.” *Rail General Exemption Authority – Miscellaneous Agricultural Commodities – Petition of G&T Terminal Packaging Co., Inc., to Revoke Conrail Exemption*, 8 I.C.C.2d 674, 677 (1992) (declining petition for revocation), *aff’d sub nom. Mr. Sprout, Inc. v. United States*, 8 F.3d 118 (2d Cir. 1993).

²⁸ *American Trucking Assoc. v. ICC*, 656 F.2d 1115, 1119-20 (9th Cir. 1981).

The Board has similarly noted this dichotomy when it has explained that it will “liberally exempt[] carriers from regulatory requirements and review[] carrier actions after the fact to correct abuses of market power.”²⁹

D. The Bar for Proving That Revocation is Warranted Is High and Requires a Particularized Showing that Regulation is Necessary to Remedy the Abuse of Market Power

Because the goal of the statute is to deregulate to the maximum extent, Congress has repeatedly made clear that the bar to revoke an exemption is a high one:

When considering a revocation request, the Board should continue to require *demonstrated abuse of market power that can be remedied only by re-imposition of regulation* or that regulation is needed to carry out the national transportation policy. The Conference *expects the Board to examine all competitive transportation factors that restrain rail carriers’ actions and that affect the market for transportation of the particular commodity or type of service* for which revocation has been requested.³⁰

Accordingly, the Board and the courts have consistently held that revocation is appropriate only in those specific instances where a shipper is able to demonstrate that application of a particular regulatory requirement is necessary to protect the shipper from an abuse of market power.³¹ The Board has ruled that, “[i]n considering whether to

²⁹ *Pejepscot Industrial Park, Inc., d/b/a Grimm Industries—Petition for Declaratory Order*, STB Finance Docket No. 33989 (served May 15, 2003), at 6 n.12.

³⁰ ICCTA Conference Report, at 168 (emphasis added). In enacting the Staggers Act, Congress similarly observed that it “expect[ed] that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power.” H.R. Rep. No. 96-1430, at 105 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 4110, 4137.

³¹ The focus on market power makes sense in the context of the rail transportation policies implicated by the commodity exemptions. Although the statute conditions issuance of an exemption on a finding that regulation is “not necessary to carry out the transportation policy of section 10101,” all of the pertinent elements of the rail transportation policy point in the direction of deregulating except to the extent necessary to correct abuses that might arise in the absence of effective competition. Deregulation is the affirmative aim of Sections 10101(2) and (7). Sections 10101(1), (4), (5) and (6) seek to have market forces (competition and the demand for services),

(footnote continued on next page ...)

revoke an exemption, 'the first thing we look at . . . is whether the carrier possesses substantial market power. If it does not, then there is generally no basis for revoking an exemption.'"³² Only if market power is present does the Board then proceed to "focus on whether regulation is necessary to protect against carrier abuse of shippers as a result of such market power."³³

In the three decades since the Staggers Act, the Board and its predecessor have consistently adhered to this approach, allowing shippers to invoke regulatory protections by seeking revocation, but demanding a particularized showing regarding their *need* for protection from a carrier's abuse of market power. Shippers have shown no reluctance to bring before the Board complaints about railroad rates and practices involving exempt transportation, and the Board has shown itself open to considering those complaints so long as the shipper can clear the hurdle of presenting particularized evidence demonstrating the need for reregulation to address the potential abuse of market power.

The Board has treated each case on its own merits. On the one hand, the Board revoked the applicable commodity exemption (for crushed or broken stone, sand, and gravel) in response to a complaint that one carrier was blocking another's ability to fulfill its common carrier service obligation.³⁴ The Board did so only after making

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rather than regulation, establish reasonable rates for transportation by rail. And Section 10101(3) seeks to ensure that carriers are able to earn adequate revenues.

³² *Rail Fuel Surcharges*, STB Ex Parte No. 661 (served Jan. 26, 2007), at 12 (quoting *Rail Exemption Misc. Agricultural Commodities*, 8 I.C.C.2d 674, 682 (1992)).

³³ *Id.*

³⁴ *Granite State Concrete Co., Inc. & Milford-Bennington R.R. v. Boston & Maine Corp. & Springfield Terminal Ry.*, STB Docket No. 42083 (served Sept. 15, 2003).

particularized findings that the shipper “lacks the competitive service options that were the basis for the original class exemption.”³⁵ On the other hand, in cases where shippers (or others) have sought revocation of a commodity exemption, the Board (or the ICC) has declined to revoke the applicable exemption when there had not been the requisite particularized showing that regulation was necessary to protect against the abuse of market power. In *WTL Rail Corporation Petition for Declaratory Order & Interim Relief*,³⁶ for example, the Board declined to revoke the TOFC/COFC exemption because shippers would continue to “have an array of competitive options for obtaining TOFC service and equipment,” which in turn would “effectively constrain the railroads’ market power with respect to TOFC service and equipment.”³⁷

³⁵ *Id.* at 7. As the Board explained in a subsequent decision, the “record of [the carrier’s] conduct show[ed] that Granite State [merited] immediate access to the Board’s processes to protect the shipper from the risk of market power abuse.” *Granite State Concrete Co., Inc. & Milford-Bennington R.R. v. Boston & Maine Corp. & Springfield Terminal Ry.*, STB Docket No. 42083 (served Sept. 24, 2004), at 5.

³⁶ STB Docket No. 42092 (served Feb. 17, 2006).

³⁷ See also, e.g., *American Rail Heritage, Ltd., d/b/a Crab Orchard & Egyptian R.R. Transportation Concepts, Inc., & The Grafton & Upton R.R. v. CSX Transportation, Inc.*, ICC Docket No. 40774 (served June 16, 1995) (declining to revoke the TOFC/COFC exemption to require the mandatory interchange of intermodal trailers because the complainant failed to show that over-the-road movement of trailers provided inadequate competition); *Rail General Exemption Authority – Miscellaneous Agricultural Commodities – Petition of G&T Terminal Packaging Co., Inc., to Revoke Conrail Exemption*, 8 I.C.C.2d 674, 682 (1992) (“Although Conrail has imposed surcharges on petitioners’ traffic, in our view it does not possess enough market power to warrant regulation.”), *aff’d sub nom., Mr. Sprout, Inc. v. United States*, 8 F.3d 118 (2d Cir. 1993); *FMC Wyoming Corp. & FMC Corp. v. Union Pacific R.R.*, 4 S.T.B. 699, 711 n.18 (2000) (declining to revoke exemption in stand-alone-cost rate case because railroad lacked market dominance over the movements at issue and therefore Board “could not review the reasonableness of the rates that applied to these coke movements even if [it] were to revoke the exemption”).

The Board has also declined to revoke the commodity exemptions based on its conclusion that the carrier had not abused whatever market power it might have possessed. For example, in *Bolen-Brunson-Bell Lumber Company, Inc. v. CSX Transportation, Inc.*, STB Finance Docket No. 34236 (served May 15, 2003), the Board declined to revoke the lumber and

(footnote continued on next page ...)

II. THE COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS HAVE BEEN EFFECTIVE AT FURTHERING CONGRESS'S STATUTORY MANDATE AND RAIL TRANSPORTATION POLICY OBJECTIVES

The Board's Notice asks whether the exemptions have been "effective."

Although effectiveness is not the standard for revocation, the answer is nonetheless resoundingly in the affirmative. In fact, the exemptions continue to play an important role in the transportation marketplace.

A. Although the Statute Does Not Demand That Exemptions Bring Affirmative "Benefits," They Have Been and Remain Beneficial

The potential for affirmative benefits has never been the touchstone for evaluating the appropriateness of exempting particular traffic, since exemption is mandatory unless regulation is essential. The ICC has long recognized this basic principle. In granting its *Boxcar Exemption*, for example, the ICC emphasized that it had "focused on claims of negative effects of [an] exemption, since [the statute] requires [it] to find continued regulation necessary" in order to reject an exemption.³⁸ Nonetheless, the exemptions under review in this proceeding have generated considerable affirmative benefits and continue to be important in today's marketplace.

First and foremost, the exemptions have advanced the Rail Transportation Policy by (1) allowing market forces rather than regulation to govern the railroads' provision of exempted services; (2) minimizing the need for regulation; and (3) ensuring effective

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wood products exemption after concluding that, regardless of whether the carrier possessed market power, it had not abused that power "or otherwise acted inappropriately, in initiating and maintaining [an] embargo." *Id.* at 2.

³⁸ 364 I.C.C. at 445-46.

competition between railroads and other modes.³⁹ The benefits of the Staggers Act deregulatory reforms have been extensively treated in other forums and we need not review that success story in detail here. For example, a substantial record was recently developed in Ex Parte 658,⁴⁰ on the occasion of the 25th anniversary of the Staggers Act. The Department of Transportation's testimony in that docket perhaps most succinctly summarizes the record:

The Department of Transportation considers the Act a resounding success. We do so because in sum the statute did what it was designed to do. It revitalized the railroad industry and by so doing benefitted shippers and consumers throughout the economy.⁴¹

The Board's Notice in this docket also appropriately acknowledges the role that deregulation played in advancing Congress's transportation policy goals: "These agency exemption decisions were instrumental in the U.S. rail system's transition from a heavily regulated, financially weak component of the economy into a mature, relatively healthy industry that operates with only minimal oversight."⁴²

Second, by freeing the railroads from unnecessary regulation, the exemptions have benefitted both carriers and shippers in more concrete ways. As decisions by the ICC and later the Board concluded, the exemptions (1) reduced costs and enabled railroads to offer more efficient and responsive services; (2) allowed railroads to respond

³⁹ 49 U.S.C. § 11101(1-2, 4-5).

⁴⁰ See generally *The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead*, STB Ex Parte 658, NS Comments (Oct. 19, 2005); *Id.*, AAR Comments (Oct. 12, 2005).

⁴¹ *The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead*, STB Ex Parte No. 658, Transcript of Hearing (Oct. 19, 2005), pp. 14-15 (remarks of Paul Samuel Smith).

⁴² Corrected Notice, at 3.

more quickly to market forces; (3) enabled railroads to quote instantly-adjustable spot rates where appropriate; (4) reduced paperwork and other regulatory burdens; and (5) generally positioned railroads to compete more effectively against trucks and other modes.⁴³ Those findings were based on testimony by railroads and shippers alike, as well as on studies conducted by ICC staff in the late 1980s that examined the “impact of prior exemptions” and that “attest[ed] to numerous positive benefits to shippers and railroads.”⁴⁴

The Department of Transportation has twice ratified the benefits of exemptions. During Congress’s consideration of ICCTA, DOT testified in favor of retaining the exemption authority and mandating its continued aggressive use by the Board, noting that “traffic exemptions have allowed railroads to retain or increase market share and meet competition by offering innovative rates and services without regulatory lag.”⁴⁵ Ten years later, when the Board proposed a partial revocation of the commodity exemptions to permit regulation of fuel surcharges on exempt traffic, DOT reconfirmed these views.

⁴³ See generally *Rail General Exemption Authority – Miscellaneous Manufactured Commodities, Ex Parte No. 346 (Sub-No. 24)*, 6 I.C.C. 2d 186, 190-91 (1989) (“Our experience with other exemptions we have granted with regard to commodity groups and car types persuades us that this exemption will also result in substantial cost savings for the railroads, thereby increasing their efficiency, especially in the marketing of services.”); see also, e.g., *Rail General Exemption Authority – Grease or Inedible Tallow*, ICC Ex Parte No. 346 (Sub-No. 31), 10 I.C.C.2d 453, 459 (1994) (noting that exemptions had enabled carriers to quote spot rates and eliminate costs associated with regulatory paperwork); *Rail General Exemption Authority – Ferrous Recyclables*, ICC Ex Parte No. 346 (Sub-No. 35), 10 I.C.C. 2d 635, 639–640 (1995) (same); *Rail General Exemption Authority – Hops*, Ex Parte No. 346 (Sub-No. 10), 365 I.C.C. 701, 702 (1982) (same).

⁴⁴ *Miscellaneous Manufactured Commodities Exemption Decision*, 6 I.C.C.2d at 191 n.8.

⁴⁵ DOT ICCTA Testimony, at 217.

Reregulation would “unnecessarily and significantly cabin railroad discretion” and give unregulated truckers an unwarranted competitive advantage.⁴⁶

In view of this record, it is not surprising that the Board has recently reiterated the conclusion that the exemptions have proven beneficial, and that unwinding them would have unpredictable and potentially harmful consequences:

The exemptions permit the traffic involved (including intermodal traffic) to benefit from a competitive marketplace free of regulatory interference. Under the exemption, trucks and railroads compete on an equal footing for intermodal traffic, for example, with each competitor capable of adapting readily to changes in the marketplace. If we revoke the exemption, even partially, the railroads would be restricted in how they can respond to changes, while trucking companies would not. This kind of imbalance could have unintended consequences and upset the competitive balance between railroads and trucks.⁴⁷

B. The Exemptions Continue to Be Important

Railroads continue to face far more extensive economic regulation than trucks and other transportation modes. The broad commodity exemptions granted by the Board and its predecessor therefore remain important even in today’s less-regulated environment.

To offer just a few examples:

- The commodity exemptions tend to level the competitive playing field with trucks and other modes. Unlike railroads, those modes do not face potential claims under ICCTA by shippers contending that their rates or practices are unreasonable. The need to guard against such claims and defend against them when they are brought – even when they lack merit – can impose significant costs and disruptions.⁴⁸ The commodity

⁴⁶ DOT Comments in Ex Parte No. 661, at 6-7.

⁴⁷ *Rail Fuel Surcharges*, STB Ex Parte No. 661 (served Jan. 26, 2007), at 6.

⁴⁸ In the railroad rate-reasonableness setting, shipper claims are particularly costly because the Board generally does not render its market dominance determination until the end of a rate case, after the parties have spent substantial amounts of time and money to litigate the entire case.

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exemptions free the railroads from some of these burdens, while preserving the ability of shippers with truly meritorious claims to seek revocation and ultimately prevail.

- By freeing railroads, with respect to exempt services, from the common carrier obligation of Section 11101(a), the commodity exemptions give railroads the freedom to structure their service networks efficiently and make better use of scarce capacity by allowing them to decide when, whether and where to accept exempt traffic without an overhanging statutory obligation to do so.⁴⁹
- By releasing railroads, with respect to exempt services, from the rate adjustment limitations of Section 11101(c), the commodity exemptions give railroads the same freedoms possessed by other transportation providers to adjust their rates (including surcharges, accessorial charges and the like) instantly in response to changing conditions.
- By exempting railroads, with respect to exempt services, from the car supply obligation of Section 11121(a), the exemptions allow railroads to focus their investments in areas of greater need and to manage more efficiently the equipment that otherwise would (if the exemptions were revoked) be needed to respond to potential demands for service.⁵⁰ For example, NS has made the decision not to invest in refrigerated cars for exempt perishables service.

There is no serious question that the exemptions have been and remain effective and important. The reduced regulation that results from the liberal granting of exemptions comports with Congress's mandate and furthers Congress's rail transportation policy objectives, by permitting railroads to compete with trucks, other

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See Gov't of the Territory of Guam v. Sea-Land Service, Inc., STB Docket No. WCC-101 (served Feb. 2, 2007), at 6.

⁴⁹ The Board has explained that the boxcar exemption does not exempt railroads from their common carrier obligations. *See Battaglia Distributing Co., Inc. v. Burlington Northern R.R.*, 2 S.T.B. 323, 329 n.13 (1997).

⁵⁰ The boxcar exception does not exempt railroads from their car supply obligations. 49 C.F.R. § 1039.14(a)(4)

modes, and one another, unburdened by the yoke of regulation that is no longer essential in the modern transportation environment.

III. THERE IS NO BASIS FOR RECONSIDERING THE EXEMPTIONS

Even if the Board had the power to revoke an exemption without a formal complaint, there is no conceivable basis upon which it could conclude that a wide-ranging revocation of the commodity exemptions – or any one of them – is warranted. There has not been any fundamental change in the competitive environment in which railroads operate that would establish any need for new regulation: railroads continue to face the same pervasive modal, intermodal, geographic and product competition that supported granting the exemptions.

A. The Exemptions Were Predicated on Findings of Pervasive Competition

Each of the exemptions was founded on extensive evidence establishing that regulation was not necessary to protect shippers from the abuse of market power.⁵¹ As the Department of Transportation explained in 2006:

[T]he fundamental premise for every exercise of this authority was that competition – intramodal, intermodal, product, and geographic – for the traffic in question was pervasive, rendering regulation

⁵¹ Certain of the commodity exemptions were granted on the basis that the service at issue was “of limited scope.” See, e.g., *Rail General Exemption Authority—Liquid Iron Chloride*, Ex Parte No. 346 (Sub-No. 9A), 367 I.C.C. 347, 350–51 (1983) (“The comments show not only that relatively small quantities of liquid iron chloride are produced but also that the volume transported by rail is very limited. . . . Accordingly, we find, and the comments support, that transportation of liquid iron chloride is of limited scope.”). The rail movement of these commodities is of equally “limited scope” today, and even if such traffic increased in importance, revocation would not be warranted absent a need to protect shippers from the abuse of market power. See *Rail General Exemption Authority—Fresh Fruits and Vegetables*, Ex Parte No. 346 (Sub-No. 1), 361 I.C.C. 211, 214 (1979) (“[T]he fact that in this case evidence of low market share has established the ‘limited scope’ requirement does not mean that the exemption would be revoked merely because rail participation in the exempted commodities might increase. Indeed, the ‘limited scope’ language does not appear in the statutory criteria for revoking exemptions.”).

unnecessary to carry out national rail transportation policy and protect against abuse of market power. That premise was validated separately for each commodity or equipment type, and only after a careful examination of all the relevant facts.⁵²

Even a cursory review of the decisions granting these exemptions, and the court of appeals decisions consistently affirming them, reveals the various indicia of competition that justified the exemptions. In case after case, the agency and the courts relied on the presence of pervasive competition from other modes, especially trucks, as well as competition among railroads,⁵³ geographic and source competition,⁵⁴ or some

⁵² DOT Comments in Ex Parte No. 661, at 4-5.

⁵³ See, e.g., *Boxcar Exemption Decision*, 367 I.C.C. at 433 (“Shippers will not have to rely on truck competition alone to control boxcar rates. Alternate routes over different railroads are often available, especially over longer routes, giving shippers the benefit of intramodal price competition.”); *Rail General Exemption Authority—Used Motor Vehicles*, Ex Parte No. 346 (Sub-No. 27A), 9 I.C.C. 2d 884, 886 (“There is also intense rail-to-rail and geographic competition because shippers have numerous options in selecting origin and destination points for used motor vehicle traffic and thus need not limit rail transportation to only one carrier.”).

⁵⁴ See, e.g., *Rail General Exemption Authority—Exemption of Hydraulic Cement*, STB Ex Parte No. 346 (Sub-No. 34) (served Dec. 17, 1996), at 4 (“Dacotah’s relatively unfavorable geographic location (usually the most distant supplier in the market it supplies) puts it at a natural disadvantage vis-a-vis its competitors. The carrier serving Dacotah must establish rates that overcome this disadvantage in order to handle Dacotah’s hydraulic traffic. If the rate is too high, the producer does not participate in the market and the carrier does not participate in its transportation to that market.”); *Rail General Exemption Authority—Ferrous Recyclables*, Ex Parte No. 346 (Sub-No. 35), 10 I.C.C. 2d 635, 641 (1995) (“Exceptionally strong geographic competition also exists, which further inhibits the railroads from dominating market power. Geographic competition occurs because these commodities, particularly iron and steel scrap, are produced and consumed throughout the United States.”); *Rail General Exemption Authority—Carbon Dioxide*, Ex Parte No. 346 (Sub-No. 32), 10 I.C.C. 2d 359, 363 (1994) (“AAR and Carbonic have also submitted evidence of extensive geographic competition, which inhibits the railroads from exercising market power.”); *Rail General Exemption Authority—Scrap Paper*, Ex Parte No. 346 (Sub-No. 12), 9 I.C.C. 2d 957, 960 (1993) (“Geographic competition occurs because scrap paper is generated throughout the Nation.”); *Rail General Exemption Authority—Lumber or Wood Products*, Ex Parte No. 346 (Sub-No. 25), 7 I.C.C. 2d 673, 681 (1991) (“Geographic competition is particularly relevant for this lumber traffic because any attempt by a rail carrier to abuse market power by refusing to enter competitive joint rates or reciprocal switching agreements with other rail carriers would leave that carrier vulnerable to competition from other regions.”).

combination of two or more of these. That competition was manifested in such factors as railroads' low share of traffic flows, railroads' relatively low margins, and the shipping characteristics of the commodities themselves, which at times reflected shippers' intrinsic transport options.⁵⁵ The agency's reliance on one or more of these factors was consistent with Congress's expectation that the Board would "examine all competitive transportation factors that restrain rail carriers' actions and that affect the market for transportation of the particular commodity or type of service" when considering whether particular traffic should be exempt from regulation.⁵⁶

To be sure, the agency's decision to grant these exemptions did not reflect a conclusion that the abuse of market power was impossible in each and every conceivable set of circumstances within the scope of a commodity exemption. Withholding an exemption until "every shadow of a doubt" had been removed would have been inconsistent with the standard that Congress established.⁵⁷ Instead, the agency granted exemptions based on evidence of *generally-applicable* competitive conditions,

⁵⁵ See, e.g., *Rail General Exemption Authority – Liquid Iron Chloride*, Ex Parte No. 346 (Sub-No. 9A), 367 I.C.C. 347, 349 (1983) ("The comments indicate that effective competition exists for the purchase and movement of liquid iron chloride, and that a substantial amount of that commodity moves via truck. The low and declining rail market share (27 percent in 1979; 10 percent in 1980), substantiates this claim."); *Rail General Exemption Authority – Hops*, Ex Parte No. 346 (Sub-No. 10), 365 I.C.C. 701, 702 (1982) ("In addition, abuses of market power are very unlikely to occur. As stated in our prior notice, the rail market share has been declining (from 38 percent in 1971 to 28 percent in 1980), and hops appear easily divertable to motor carriage, since they are moved in one-car lots (an average of 25.5 tons)."); *Rail General Exemption Authority – Scrap Paper*, Ex Parte No. 346 (Sub-No. 12), 9 I.C.C. 2d 957, 960 (1993) ("[T]he railroads' revenue-to-variable cost ratios for scrap paper range from 0.95 to 1.084. This indicates that many of the movements of this traffic produce relatively little, if any, net revenue and that the traffic thus is generally subject to significant competition. The presence of significant competition negates the potential for an abuse of market power.").

⁵⁶ See ICCTA Conference Report, at 169.

⁵⁷ *Boxcar Exemption Decision*, 367 I.C.C. at 440–41.

recognizing that it could deal with isolated pockets of market power using its revocation authority when those situations were brought to its attention by complaining shippers in need of protection.⁵⁸ This focus is reflected in the kinds of evidence of competition that figured most prominently in the decisions by the ICC and Board to grant the exemptions: *general* shipping characteristics; *widespread* availability of other modes of transportation providing both direct alternatives and indirect disciplining force (in the form of geographic and product competition); *aggregate* data on the percentage of shipments handled by railroad and other modes; and data on the *average* profitability of rail traffic.

There is no reason to believe that any of these general conditions has changed materially. To the contrary, the competitive forces relied upon by the ICC and Board to grant the exemptions remain as powerful today as they were 10, 20 or 30 years ago.

B. The Competition Relied on By the ICC and the Board in Granting the Exemptions Has Not Diminished

Given the continued prevalence of competition in the pertinent transportation markets, revoking the exemptions is not necessary to prevent the abuse of market power. In fact, absent a particularized showing of some "specific problem" that confronts a shipper or group of shippers with the threat of market power abuse, any revocation would be inconsistent with the evidence relied upon by the agency in granting the exemptions.

⁵⁸ See, e.g., *id.* (recognizing that there could "exist[] a specific commodity that for some reason can be transported only by boxcar and on which the rate levels, being uncontrolled by intramodal competition or other market forces would rise to very high levels in the absence of regulation," but concluding that such "specific problems" should be dealt with "'after the fact,' not on a priori possibilities").

1. *Indirect Evidence of Pervasive Competition*

The decisions granting the commodity exemptions relied heavily on two types of evidence demonstrating that railroads faced pervasive competitive constraints for the commodities under review: (i) the railroads' typically small market share for such transportation and (ii) the railroads' relatively low profit margins, as reflected in average revenue-to-variable cost ratios.

These same metrics point in the same direction today. As a general matter, though railroads have worked hard to compete against trucks, they have not dramatically increased their market share of the exempt commodities, and – at least in NS's experience – rates for those commodities generally remain below the jurisdictional threshold. This evidence, NS submits, would support granting the exemptions all over again today. More importantly for present purposes, any movement towards a revocation of the exemptions could not be squared with the agency's reliance on such evidence in granting the exemptions.

At the most general level, railroads' share of the overall transportation marketplace has not grown in the last quarter-century. As DOT explained when it released its 2002 Commodity Flow Survey:

Trucking continued its dominance of our nation's freight transportation system. In 2002, trucks hauled about 64 percent of the value, 58 percent of the tonnage, and 32 percent of the ton-miles of total shipments . . . , a slightly lower percentage of the value than in 1993, but more of the tons and ton-miles.⁵⁹

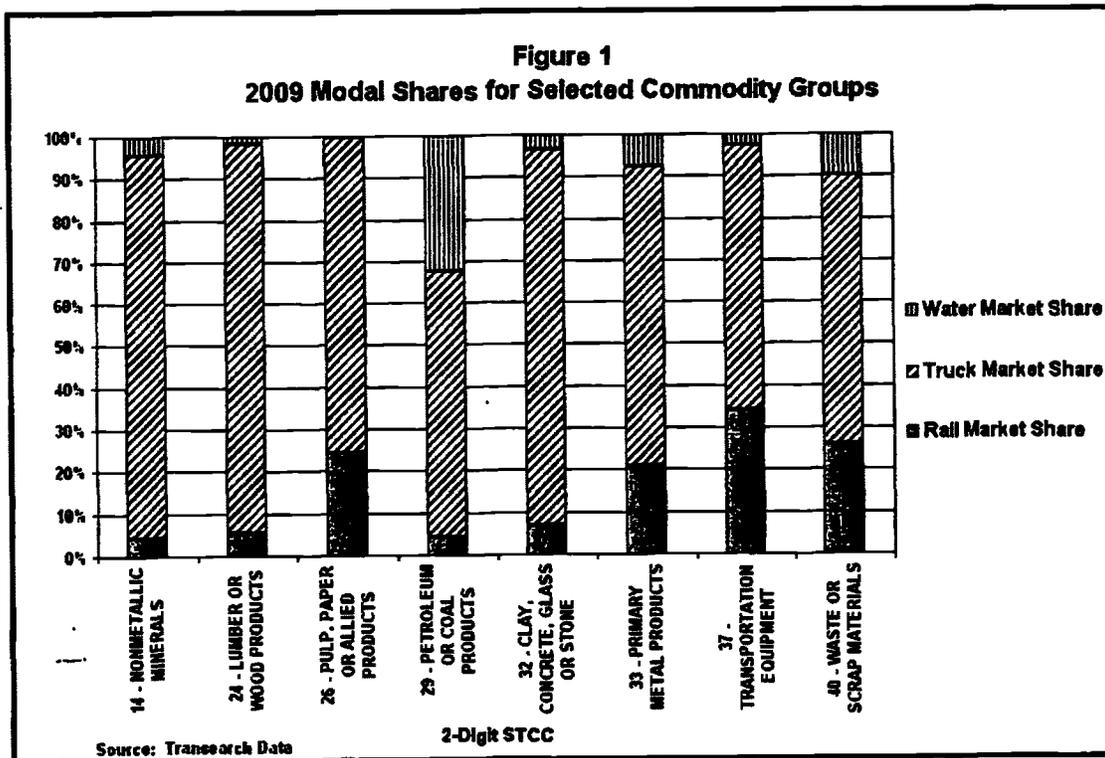
⁵⁹ Bureau of Transportation Statistics, U.S. Department of Transportation, *Freight Shipments in America: Preliminary Highlights from the 2002 Commodity Flow Survey 10* (2004).

Since then, despite challenges posed by higher fuel costs, driver shortages, and additional safety restrictions, trucks handled 11 percent more tons in 2007 than in 2002, while the tonnage handled by railroads actually declined slightly over the same period.⁶⁰

This broad trend is reflected in more recent data concerning movements of the exempt commodities. NS examined data for several of the commodity groups (at the 2-digit STCC level) for which a substantial portion of the individual commodities are exempt under Board regulations. Specifically, NS examined STCCs 14 (Nonmetallic Minerals); 24 (Lumber/Wood Products); 26 (Pulp/Paper); 29 (Petroleum/Coal Products); 32 (Clay/Concrete/Glass/Stone); 33 (Primary Metal Products); 37 (Transportation Equipment); 40 (Waste or Scrap).⁶¹ For each of these commodity groups, railroads account for only a small minority of such shipments, as shown in Figure 1 below (and in the data set forth in Appendix Table 1).

⁶⁰ Compare Bureau of Transportation Statistics, U.S. Department of Transportation 2002 Commodity Flow Survey Table 1a (2004) with Bureau of Transportation Statistics, U.S. Department of Transportation et. al., 2007 Commodity Flow Survey, Table 1c (2010).

⁶¹ Approximately 80% of NS's exempt traffic is in one of these eight commodity groups.



As the ICC and Board have long observed, relatively low railroad margins is another indicator of the presence of pervasive competitive constraints, precluding the exercise (much less abuse) of market power. Based on NS's experience handling exempt traffic, the vast majority of such traffic continues to move at rate levels well below 180 percent of variable cost.⁶²

⁶² Of course, these metrics do not prove definitively that no railroad possesses market power with respect to any exempt traffic – any more than the same kinds of data established that fact when the exemptions were granted. Such an analysis could only be made based on particularized evidence in a revocation proceeding. It is telling, however, that shippers have not brought many such challenges, and nearly all of those they have brought have resulted in a conclusion that competition justifies applying the exemption to their circumstances. *Miscellaneous Manufactured Commodities Exemption Decision*, 6 I.C.C.2d at 191 n.8 (commenting that as of late 1989 the ICC was aware of “fewer than a handful of petitions for revocation”).

2. Trucks Remain Omnipresent Competitors

Another theme of many of the decisions granting the exemptions is the ready access of most shippers to efficient truck transportation.⁶³ In the years since the exemptions were granted, railroads have become more efficient and improved their service, but trucks have kept pace. Trucks today offer the same transportation options that they did when the exemptions were first established.

Motor carriers are physically able to serve each and every shipper facility that has rail access, whereas rail carriers are not able to serve directly many of the shipper locations reached by motor carriers. When shippers choose among alternative transportation providers, the characteristics that steer many of them to truck transportation are well known. Sometimes trucks may appear more expensive, but offer perceived service or other advantages that offset the rate differential and yield higher value.⁶⁴ On the other hand, sometimes rail may provide the best economic proposition. In all of these circumstances, however, attempts by railroads to raise rates or otherwise exploit shippers' preferences for rail movement would change the shippers' calculus and risk diversion of rail traffic to truck.⁶⁵ The vibrant competition that trucks offer thus is

⁶³ See, e.g., *Boxcar Exemption Decision*, 367 I.C.C. at 433 ("The fundamental premise underlying the proposal for a boxcar exemption is that truck competition for the transportation of boxcar commodities is pervasive and limits the railroads' pricing freedom. . . .").

⁶⁴ See, e.g., Brian A. Weatherford, et al., *The State of U.S. Railroads: A Review of Capacity and Performance Data*, RAND Supply Chain Policy Center 59 (2008) ("Despite the direct cost advantage of long-haul rail over long-haul truck, it is clear from the prevalence of national trucking firms that many companies find trucking to be more competitive or reliable."); see also AASHTO, *Freight-Rail Bottom Line Report*, pp. 13-14.

⁶⁵ As the Board explained in the *Boxcar Exemption Decision*: "Virtually anything that can be transported in a boxcar can be transported in a truck. Motor carriage tends to be faster, more accessible, more convenient, and sometimes less damaging to freight than rail service, *meaning that boxcar transportation generally must be priced to reflect these service differences to compete*

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not fully reflected in a static view of trucks' share of transportation flows, or even in a comparison of the relative cost of rail and truck transportation.⁶⁶

Trucks offer especially attractive economics for shorter hauls, which in many cases account for the lion's share of all movements of exempt commodities. Trucks can compete effectively for various long-haul movements as well.⁶⁷ Even when trucks are not the preferred option for a given shipment, the widespread availability of truck transportation for other shippers of the same commodity disciplines rail transportation rates even for those shipments that would most naturally move by rail.

One railroad success story of the past several decades has been the growth in intermodal traffic, which has overtaken coal as the number one source of railroad revenue.⁶⁸ Needless to say, all exempt intermodal traffic moves via rail. However, railroads have tapped only a tiny fraction of the over-the-road transportation marketplace with their intermodal offerings. Over-the-road movement remains a viable (and often dominant) competitive option for both shorter and longer hauls:

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successfully. Thus, the market itself places an effective ceiling on rail rates for boxcar transportation, and regulation is unnecessary to assure that boxcar rates do not rise to unreasonably high levels." 367 I.C.C. at 433 (emphasis added).

⁶⁶ As highlighted in the Comments in this proceeding of the Washington State Potato Commission (filed Jan. 14, 2011), potato shippers in Washington ship 93% of their potatoes by truck despite the fact that rail rates are supposedly lower than truck rates. They presumably make this choice because of other perceived advantages that trucks offer. In any event, these statistics confirm that rail has no market power that could be abused.

⁶⁷ See, e.g., National Cooperative Highway Research Program, No. 586, Rail Freight Solutions to Roadway Congestion – Final Report & Guidebook 7 (2007) ("There is no hard-and-fast distance that demarcates rail and trucking zones. Trucks provide some transcontinental service, while rail provides some local and regional services.").

⁶⁸ See *id.* at G-40.

For shorter hauls, all-truck movements tend to have cost advantages over intermodal movements, despite relatively high per-mile costs for trucks, as all-truck movements avoid “drayage” costs associated with hauling the container or trailer to and from railroad terminals, as well as the costs of loading and unloading the railroad flat cars. For longer hauls, truck shipments may have more desirable service qualities despite higher costs, although railroads have developed and expanded higher-speed and scheduled services in competition with trucking.⁶⁹

In sum, the widespread and fierce truck competition that justified the exemptions originally remains a powerful constraint that prevents railroads from attaining or abusing market power.

3. *Railroad Competition*

For certain of the exempt commodities – including TOFC/COFC service, finished automobiles, and others – another critical factor in the grant of broad commodity-based exemptions was the existence of pervasive competition between railroads (both direct and via transloading). That competition is stronger than ever.⁷⁰

Some critics of the Board’s regulatory policies have suggested that modal competition has diminished as a result of the numerous major mergers approved by the Board and ICC in past decades. It is true that there are now fewer Class I carriers,⁷¹ but it is not true that competition is less effective. Railroad consolidation in fact enhanced

⁶⁹ Laurits R. Christensen Assoc., Inc., *A Study of Competition in the U.S. Freight R.R. Indus. and Analysis of Proposals that Might Enhance Competition*, Prepared for the Surface Transportation Board, 15-1 (Nov. 2009) (“Christensen Study”).

⁷⁰ See, e.g., Lawrence H. Kaufman, “Competition is alive and well,” *Journal of Commerce*, May 21, 2007, at 27 (“Not only are railroads competing with trucks, they are competing vigorously with each other. Competition is alive and well.”).

⁷¹ Although there are fewer Class I railroads than when the Staggers Act was passed, “the total number of railroads has *increased* from about 490 in the mid-1980s to the current 559.” Christensen Study, ES-8 (emphasis added).

competition by reducing railroad costs and enabling new and improved single-line and other services. These enhancements were among the many benefits underlying the Board's conclusions that the proposed transactions, as conditioned to preserve competition, were in the public interest. The benefits of these transactions have been validated by neutral retrospective analysis.⁷²

And contrary to urban legend, these mergers did not extinguish rail shipping options. As the Department of Transportation explained to the Board in late 2005, "although there certainly ha[s] been a large, large number of mergers," in each merger case the agency imposed conditions that "sought to ensure that no rail shipper that was [served by] at least two carriers received less than that." As a result, DOT was "not aware of any merger related gain in the number of captive shippers."⁷³

4. Product and Geographic Competition

As Congress intended, the STB and ICC have also granted several exemptions based on evidence that robust product and geographic competition would protect shippers from the exercise of railroad market power.⁷⁴ The Board's analyses took account of the

⁷² Even the most controversial of the mergers approved by the Board achieved meaningful benefits. See FTC Bureau of Economics, Working Paper No. 269, "*The Union Pacific/Southern Pacific Rail Merger: A Retrospective on Merger Benefits*," Denis A. Breen (Mar. 11, 2004) (published in *Review of Network Economics*) (concluding, *inter alia*, that "the rate reduction data submitted by UP during the course of the oversight proceedings, and the rate study conducted by STB staff were generally consistent with the UP/SP merger having a pro-competitive effect and meeting even a consumer welfare standard" and that "available evidence indicates that UP has documented the realization of substantial merger efficiencies of the types claimed"), available at <http://www.ftc.gov/be/workpapers/wp269.pdf>.

⁷³ *The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead*. STB Ex Parte No. 658, Transcript of Hearing (Oct. 19, 2005), pp. 22-23 (remarks of Paul Samuel Smith).

⁷⁴ See note 53, above.

fact that, although certain shippers served by only a single rail carrier may not have viable transportation alternatives for certain shipments, competing producers (or receivers) of the same or substitute commodities often do have transportation options that make it impossible for the sole-serving rail carrier to exercise any market power.⁷⁵

Product and geographic competition is no less robust today for many commodities, and – depending on the specific circumstances – would pose an obstacle to any shipper’s assertion in a revocation proceeding that reregulation was needed to protect it from an abuse of market power.

C. No Other Developments Over the Past 30 Years Are Relevant to the Continued Vitality of the Exemptions

While there have been a variety of other changes in the railroad landscape over the three decades since enactment of the Staggers Act, none calls into question the soundness of the exemptions, much less undermines Congress’s determination that those exemptions continue to play a vital role in the ongoing deregulation of the railroad industry.

1. Trend Towards Reduced Regulatory Burdens

One notable change, of course, has been the trend toward reduced regulatory burdens facing railroads, even for non-exempt commodities. The Staggers Act gave railroads a wide array of new rate-setting freedoms, and ICCTA continued that trend by, among other things, eliminating most tariff filing requirements.⁷⁶ To view this trend as

⁷⁵ See, e.g., *Rail General Exemption Authority – Exemption of Hydraulic Cement*, STB Ex Parte No. 346 (Sub-No. 34) (served Dec. 17, 1996), at 4.

⁷⁶ ICCTA “eliminated the requirement that rail carriers file with the government tariffs containing the specific rates charges (or the basis for calculating them) for their common carriage
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calling into question the continued vitality of the commodity exemptions would turn Congress's deregulatory objectives upside down.

Congress affirmatively desired that the Board's exemption authority be used to *supplement* Congress's own ongoing deregulatory changes in the statutory framework. Congress viewed the Board's exemption authority as a "crucially important" means of "*expanding* existing statutory deregulation,"⁷⁷ not as an accordion that should be contracted as other regulatory burdens were relaxed. The fact that Congress directed the Board to exercise its exemption authority to the "maximum extent" while simultaneously removing some of the remaining day-to-day regulatory burdens facing the railroads – such as the tariff filing requirement – precludes the Board from altering course based on changes in the regulatory landscape. Congress did not want the Board to *re-regulate* while Congress continued to deregulate.

Moreover, the ICC long ago considered and rejected the argument that reductions in generally-applicable regulatory burdens diminish the importance of exempting traffic from regulation. Prior to the Staggers Act, the ICC could not grant an exemption without finding that "regulation was unduly burdensome and served no useful purpose."⁷⁸ The Staggers Act "eliminate[d] the test of burdensomeness" and instead *required* the ICC to grant exemptions "whenever continued regulation is unnecessary."⁷⁹ The same mandate

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transportation services." See *Disclosure, Publication, & Notice of Change of Rates & Other Service Terms for Rail Common Carriage*, Ex Parte No. 528, 1 S.T.B. 153, 153 (1996).

⁷⁷ ICCTA House Report, at 96 (emphasis added).

⁷⁸ *Boxcar Exemption Decision*, 367 I.C.C. at 428.

⁷⁹ *Id.*

remains in place today. To revoke an exemption on the basis of generally reduced regulatory burdens would “fundamentally misconceive[]” Congress’s mandate:

Congress has directed that the Commission *shall* grant exemptions wherever it finds that continued regulation is *not necessary*. The ultimate issue is not whether regulation is harmless, but only whether it *must* be retained to carry out the rail transportation policy and protect shippers from market power abuse. If regulation is not necessary under these criteria, our instructions are to grant the exemption.⁸⁰

Because the statutory scheme demands that revocation turn solely on the question whether regulation is necessary to prevent the abuse of market power, the fact that the railroads may face a lower regulatory burden than in the past does not – and can not – justify revocation.⁸¹

2. *Improvements in the Industry’s Financial Health*

Some shippers have from time to time suggested that the increasing financial health of railroads warrants heightened regulation of railroad activities. This view is inconsistent with both Congress’s rail transportation policy and the law in general. Progress towards revenue adequacy – and other indicia of the industry’s improving health – was an affirmative *goal* of deregulation, not a basis for re-regulation. It bears remembering, moreover, that railroads had already made significant strides in improving their financial position by the time Congress decided to continue and re-invigorate its de-

⁸⁰ *Id.* (emphasis in original).

⁸¹ NS respectfully submits that the Board’s consideration in *Rail General Exemption Authority— Exemption of Paints, Enamels, Lacquers, Shellacs, etc.*, Ex Parte No. 346 (Sub-No. 33) (served Apr. 20, 1998), at 6, of the relative benefit of the proposed exemption post-ICCTA cannot be reconciled with the statutory scheme. NS therefore understands the Board’s decision to have rested instead principally on evidence “suggest[ing] that the railroads possess sufficient market power to justify continuing to provide shippers with recourse to challenge the rates charged for the transport of this traffic.” *See id.* at 5.

regulatory thrust by enacting ICCTA. At every step in the evolution of today's legal and regulatory regime, that progress has been hailed as the crowning achievement of the regulatory reforms that began with the Staggers Act.⁸² The exemptions were and remain a critical part of those reforms, and their success cannot support a return to regulation.

IV. THE BOARD SHOULD PROCEED TO EXAMINE THE APPROPRIATENESS OF EXEMPTING FROM REGULATION THE TRANSPORTATION OF ADDITIONAL COMMODITIES

NS submits that the Board's Notice (which indirectly questions "the relevance and/or necessity" of *existing* exemptions⁸³) has it backwards. The Board should be asking if it has exempted *enough* of the railroads' traffic "[T]he Commission [was] charged with the responsibility of *actively pursuing exemptions* for transportation and service that comply with the section's standards."⁸⁴ To carry out its statutory responsibilities, the Board thus should *actively* be pursuing the exemption of *additional commodities* for which regulation is no longer necessary to protect shippers from the abuse of market power.

NS has identified four commodities that account for meaningful rail volumes and as to which there appears to be no serious question that railroads lack market power.

⁸² See discussion at pages 11-13, above.

⁸³ Corrected Notice, at 3.

⁸⁴ *American Trucking Assoc. v. ICC*, 656 F.2d 1115, 1119-20 (9th Cir. 1981) (quoting H.R. Rep. No. 96-1035, at 60 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978, 4005) (emphasis added).

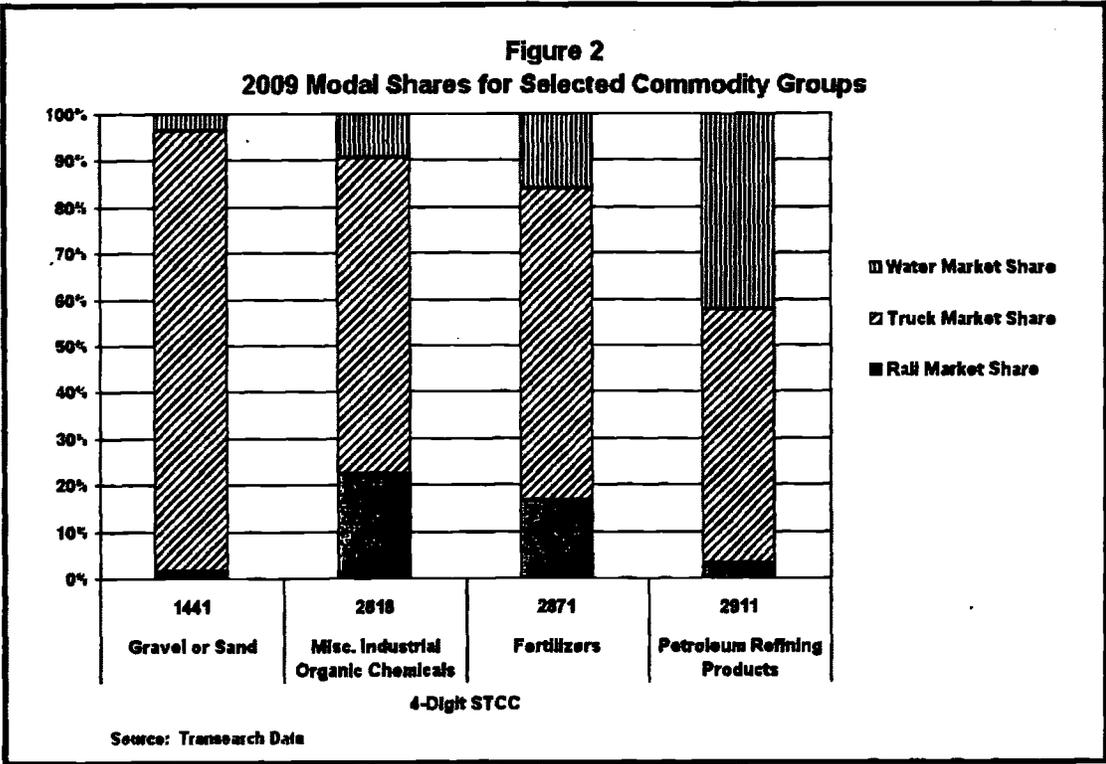
At the seven-digit STCC level, those commodities are:

- Industrial Sand (1441310);
- Anhydrous Ethyl Alcohol (2818446);
- Phosphate Fertilizer Solution (2871450); and
- Asphalt (2911610).⁸⁵

NS requests that the Board commence a proceeding pursuant to Section 10502(a) to review the appropriateness of granting additional exemptions covering these commodities.

In such a proceeding, NS would be prepared to provide evidence regarding the shipping characteristics of these commodities and the many competitive and other factors that preclude NS (and other railroads) from possessing, much less exercising, market power with respect to their transportation. For each of these commodities, railroads transport a small percentage of the total tons moved and face intense competition from trucks and other modes, as shown in Figure 2 below and Appendix Table 2. In addition, NS is confident that the Board would find that railroads earn low margins on the movement of these commodities, charging rates that on average yield revenue-variable cost ratios below the 180-percent jurisdictional floor.

⁸⁵ NS believes that the Board has not previously considered exempting the transportation of Industrial Sand. The Board declined to exempt the other three commodities in *Misc. Manufactured Commodities*, Ex Parte No. 346 (Sub-No. 24), 6 I.C.C.2d 186 (1989), but that decision was not based on any finding that continued regulation was necessary to protect shippers from the abuse of market power. Instead, these commodities were not included within the scope of this exemption based on the inadequacy of the evidence submitted at that time to support their exemption.



In these circumstances, NS submits that there is no realistic prospect that railroads could abuse any market power with respect to the transportation of any of these commodities, and they should therefore be exempted from regulation. The Board would necessarily retain its authority to remedy any future potential for market power abuse using its case-by-case revocation power. The Board accordingly should commence proceedings seeking comment on the proposed exemption of these additional commodities.

CONCLUSION

The Commodity, Boxcar and TOFC/COFC exemptions properly implement Congress's mandate to exempt rail traffic from regulation to the maximum extent consistent with the aim of protecting shippers from the abuse of market power. The Board should confirm the continued vitality of those exemptions, but remain open to

case-by-case consideration of particularized evidence demonstrating the need for the application of some Board-enforced regulation to protect particular shippers or groups of shippers from market power abuse.⁸⁶

At the same time, in furtherance of Congress's mandate to exempt traffic from regulation to the maximum extent possible, the Board should commence proceedings to address the exemption of additional commodities as to which regulation is not needed to protect shippers from the abuse of market power.

Respectfully submitted,



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Dated: January 31, 2011

⁸⁶ In the course of any such review, of course, the Board would be bound to honor Congress's expectation that it will "examine all competitive transportation factors that restrain rail carriers' actions and that affect the market for transportation of the particular commodity or type of service for which revocation has been requested." ICCTA Conference Report at 169.

**APPENDIX
TABLE 1**

2009 MODAL SHARES*

STCC	Commodity	Total Tons	Tons by Rail		Tons by Truck		Tons by Water		Truck Share	Water Share
			Tons	%	Tons	%	Tons	%		
14	NONMETALLIC MINERALS	2,782,108,564	119,173,608	4%	2,539,711,314	91%	123,223,642	4%	91%	4%
24	LUMBER OR WOOD PRODUCTS	429,783,910	23,335,135	5%	398,424,123	93%	8,024,652	2%	93%	2%
26	PULP, PAPER OR ALLIED PRODUCTS	129,582,609	31,656,183	24%	97,656,660	75%	269,766	0%	75%	0%
29	PETROLEUM OR COAL PRODUCTS	915,805,888	39,096,763	4%	580,762,834	63%	295,946,291	32%	63%	32%
32	CLAY, CONCRETE, GLASS OR STONE	523,630,595	36,171,484	7%	469,308,930	90%	18,150,182	3%	90%	3%
33	PRIMARY METAL PRODUCTS	140,178,631	29,550,083	21%	100,170,071	71%	10,458,477	7%	71%	7%
37	TRANSPORTATION EQUIPMENT	88,239,120	30,200,776	34%	55,733,837	63%	2,304,506	3%	63%	3%
40	WASTE OR SCRAP MATERIALS	148,025,235	38,342,711	26%	94,982,181	64%	14,700,344	10%	64%	10%
TOTAL		5,157,354,552	347,526,743	7%	4,336,749,951	84%	473,077,858	9%	84%	9%

* - Source: TranSearch Data

APPENDIX
TABLE 2

2009 MODAL SHARES*

STCC	Commodity	Tons by			Tons by			Tons by			
		Total Tons	Rail	Truck	Total Tons	Water	Truck	Total Tons	Rail	Truck	Water
1441	Gravel Or Sand	1,227,604,874	18,606,696	1,163,548,653	45,449,525	2%	95%	4%			
2818	Misc Industrial Organic Chemicals	202,055,942	45,237,408	137,927,757	18,890,777	22%	68%	9%			
2871	Fertilizers	85,576,371	14,302,802	57,417,250	13,856,319	17%	67%	16%			
2911	Petroleum Refining Products	572,872,516	17,258,648	313,376,011	242,237,857	3%	55%	42%			
TOTAL		2,088,109,703	95,405,554	1,672,269,672	320,434,477	5%	80%	15%			

* - Source: TranSearch Data

SUMMARY OF TESTIMONY

OF

DAVID LAWSON

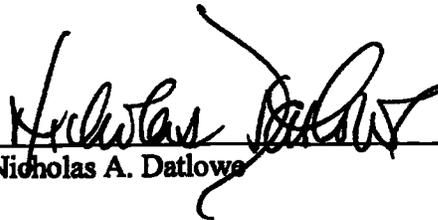
- **My name is David Lawson, Vice President - Industrial Products for Norfolk Southern Railway Company. I have 23 years experience marketing rail service for both exempt and non-exempt commodities.**
- **Despite having met with hundreds of various customers, large and small and in a wide range of industries, in my 23 years, I have never once heard a single customer mention, much less complain about, the existence of any of the commodity exemptions or class of equipment/service exemptions (collectively, the “commodity exemptions” or “exempt commodities”).**
- **I defer to the Comments submitted by Norfolk Southern’s counsel regarding the legal standards applicable to commodity exemptions.**
- **What I can say based on my experience is that there certainly is no general need for regulation of any kind to prevent the abuse of market power by railroads with respect to the exempt commodities.**
 - **There are pervasive transportation options available to shippers for movement of the exempt commodities, including rail, trucks and other modes, as well as product and geographic competition.**
 - **These options discipline rail rates and service even in situations where a specific movement might be most effectively handled by rail.**
 - **I know from NS’s experience that the rates for transportation of these commodities do not reflect the presence of any power that the railroads could abuse because rates are generally well below 180% of RCS variable costs.**
- **Any proceeding that the Board might commence to reevaluate of any of the exemptions on an across-the-board basis – not specifically focused on claims by a particular shipper or group of shippers concerning the potential, in their particular circumstances, for a serving railroad to abuse market power – would be both unwarranted and quite burdensome.**
- **Were the Board to go even further and *revoke* any of the exemptions in whole or in part, the effect would be even more disruptive and burdensome. To cite just a few examples:**
 - **As a general matter, NS’s approach to exempt commodities – including rate setting, tariff rules, car supply and every other aspect of railroading – has for decades been dictated by the need to**

compete (especially with trucks) rather than the need to comply with Board-administered regulation.

- **Re-regulation of the exempt commodities would (again) un-level the playing field with trucks, which do not face the potential for burdensome and unmeritorious claims by shippers that particular rates or practices are “unreasonable,” which are able to alter rates in response to market conditions, and which have no obligation to provide service when it does not fit their network efficiently. In the exempt commodity transportation markets, shippers can and will make decisions based upon competition in the marketplace.**
- **Re-imposition of the common carrier and car supply obligations for exempt traffic could interfere with railroads’ need to make efficient capacity-expanding investments in their networks, for example by inhibiting the deployment of capital to areas of greatest need. Requiring capital expenditures in order to handle previously-exempt traffic that has ample other transportation alternatives is unnecessary and a waste of resources.**
- **Norfolk Southern respectfully suggests that the proper course for the Board to take as a result of these hearings would be to commence proceedings to exempt additional commodities from unnecessary regulation, as suggested in Norfolk Southern’s Comments.**

CERTIFICATE OF SERVICE

I, Nicholas A. Datlowe, certify that on this date a copy of the Comments of Norfolk Southern Railway Company and Summary of Testimony of David Lawson, filed on January 31, 2011, were served by email and by first-class mail, postage prepaid, on all parties of record.



Nicholas A. Datlowe

Dated: January 31, 2011

EXHIBIT J

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE 704 (Sub-No. 1)

**REVIEW OF COMMODITY, BOXCAR,
AND TOFC/COFC EXEMPTIONS**

VERIFIED STATEMENT OF LIESL J. MCLEMORE

My name is Liesl J. McLemore. I am employed by Norfolk Southern Corporation (“Norfolk Southern”) in the capacity of Director – Marketing Research & Economics. My office is in Norfolk, Virginia. I have been employed by Norfolk Southern since 1995 and have occupied my present position since 2015. I hold a Bachelor of Science degree in Accounting from Virginia Tech. The responsibilities of my present position includes Forecasting, Marketing Reporting, the annual Customer Survey, monitoring division goals, marketing research studies, pricing, and other analytical undertakings. Prior to assuming my present position, I was in the Finance Division as the Director of Costs.

Under my direction, my team performed the following analysis of modal competition related to the five commodities included in the Surface Transportation Board’s (“STB’s”) Notice of Proposed Rulemaking (“NPRM”) in this proceeding using the Freight Analysis Framework (“FAF”). The FAF is publicly available and produced by the Center for Transportation Analysis through a partnership with the Bureau of Transportation Statistics and the Federal Highway Administration. *See* Freight Analysis Framework Version 4, Center for Transportation Analysis, <http://faf.ornl.gov/faf4/Default.aspx> (last accessed June 12, 2016).

The [FAF] . . . integrates data from a variety of sources to create a comprehensive picture of freight movement among states and major metropolitan areas by all modes of transportation. Starting with data from the 2012 Commodity Flow

Survey (CFS) and international trade data from the Census Bureau, FAF incorporates data from agriculture, extraction, utility, construction, service, and other sectors.

Id. More specifically, my team used FAF version 4, which provides estimates for tonnage and value by regions of origin and destination, commodity type, and mode based on actual data from 2012 through 2015. *Id.*

In performing this analysis, my team used the FAF data covering domestic flows moved between domestic origins and destinations. No foreign trade flow is included. The mode of transportation reported for each movement is the mode used between and within domestic states or regions. There are nine modes of transportation defined by the FAF:

- **Truck:** includes private and for-hire truck; does not include truck that is part of Multiple Modes and Mail or truck moves in conjunction with domestic air cargo.
- **Rail:** includes any common carrier or private railroad; does not include rail that is part of Multiple Modes and Mail.
- **Water:** includes shallow draft, deep draft, Great Lakes and intra-port shipments; does not include water that is part of Multiple Modes and Mail.
- **Air:** includes shipments moved by air or a combination of truck and air in commercial or private aircraft. It also includes air freight and air express. In the case of imports and exports by air, domestic moves by ground to and from the port of entry or exit are categorized with Truck.
- **Multiple Modes and Mail:** includes shipments by multiple modes and by parcel delivery services, U.S. Postal Service, or couriers (capped at 150 pounds). This category is not limited to containerized or trailer-on-flatcar shipments.
- **Pipeline:** includes crude petroleum, natural gas, and product pipelines. Does include flows from offshore wells to land which are counted as Water moves by the U.S. Army Corps of Engineers. It also does not include pipeline that is part of Multiple Modes and Mail.
- **Other and Unknown:** includes movements not elsewhere classified such as flyaway aircraft, and shipments for which the mode cannot be determined.
- **No Domestic Mode:** includes shipments that have an international mode, but no domestic mode and is limited to import shipments of crude petroleum transferred directly from inbound ships to a U.S. refinery at the zone of entry. This is done to ensure a proper accounting of import flows, while avoiding assigning flows to the domestic transportation network that do not use it.

The FAF data is defined at a two-digit commodity code level. However, FAF commodity codes do not align exactly with the Standard Transportation Commodity Code (“STCC”)

categories. My team examined the two-digit FAF categories that best aligned with the two-digit STCCs that encompass the five commodities specified in the STB’s NPRM, as detailed in the chart below.

Table 1: Corresponding STCC and FAF Two-Digit Codes

STCC	STCC Description	FAF Code	FAF Code Description
14	Nonmetallic minerals	FAF 12	Gravel and crushed stone
29	Petroleum and coal products	FAF 16, 17, 18, 19	Crude petroleum; gasoline, aviation turbine fuel and ethanol; fuel oils; other coal and petroleum products not elsewhere classified
33	Primary metal products	FAF 32, 33	Base metal in primary or semi-finished forms and in finished basic shapes; articles of base metal
40	Waste and scrap materials	FAF 41	Waste and scrap
32	Stone, clay, glass, concrete products	FAF 10	Building stone and nonmetallic minerals

The graphs below show the domestically transported tons of each commodity category from 2012 to 2015 based on the FAF data, broken down by mode of transportation:

Figure 1: FAF 12 Gravel and Crushed Stone Volumes by Mode 2012-2015

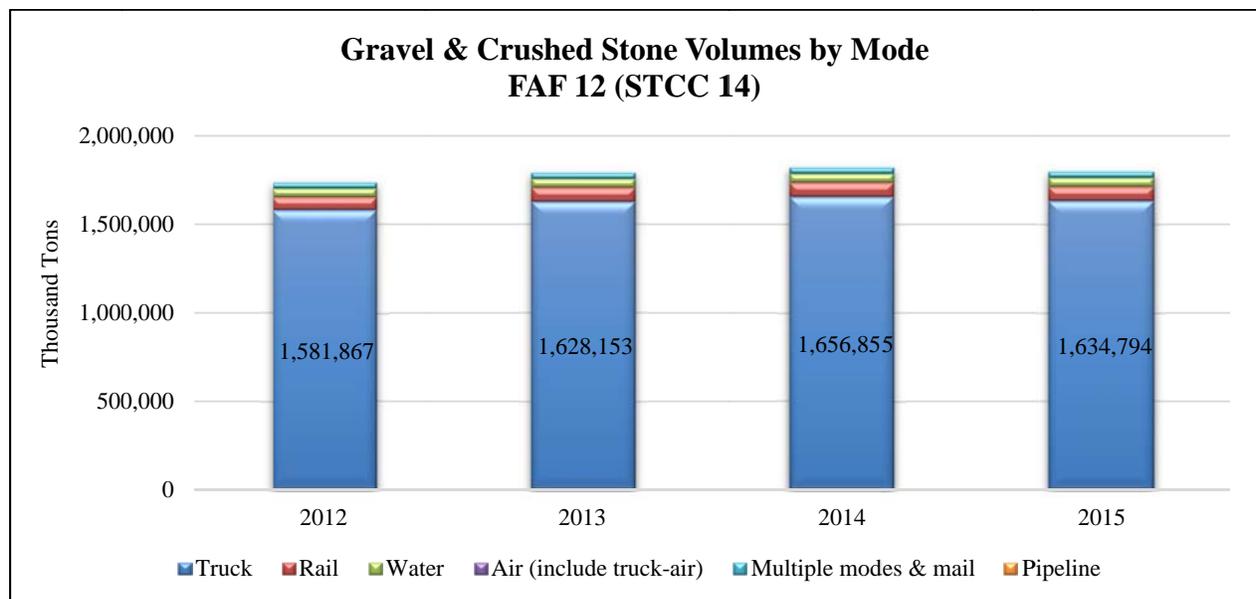


Figure 2: FAF 16, 17, 18, 19 Petroleum, Fuel, and Coal Products Volumes by Mode 2012-2015

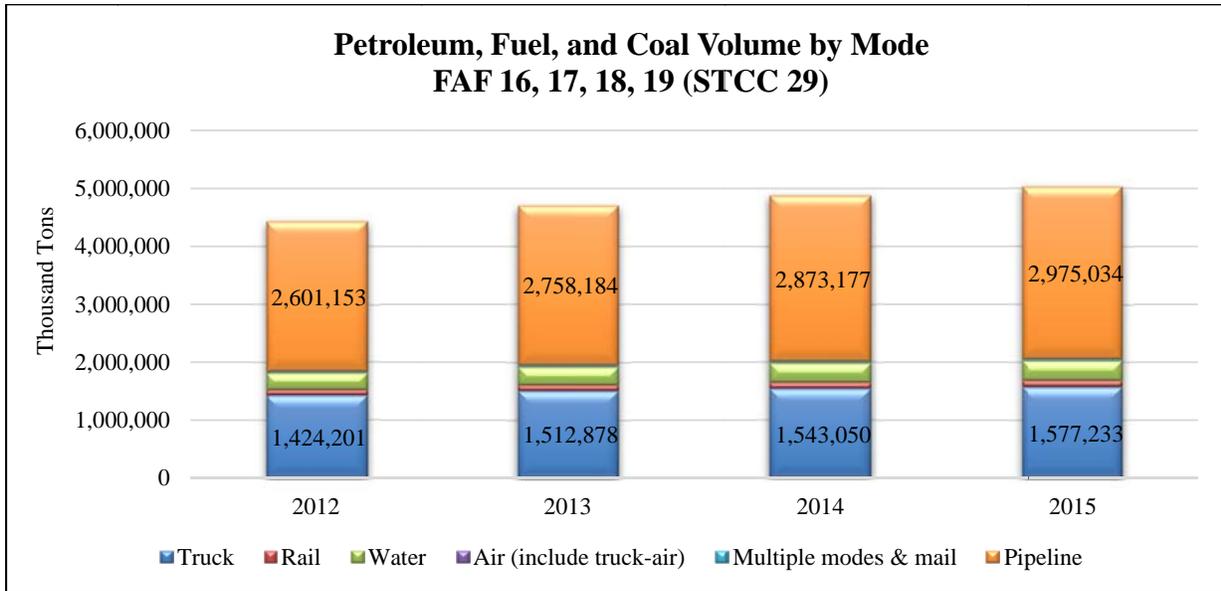


Figure 3: FAF 32, 33 Base Metal Products Volumes by Mode 2012-2015

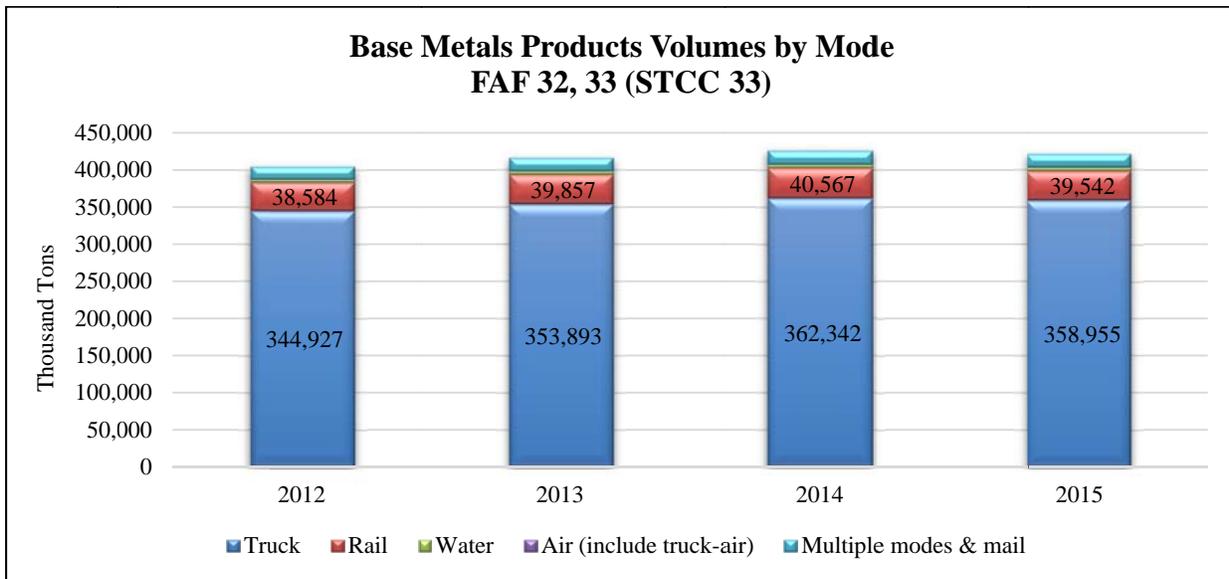


Figure 4: FAF 41 Waste/Scrap Volumes by Mode 2012-2015

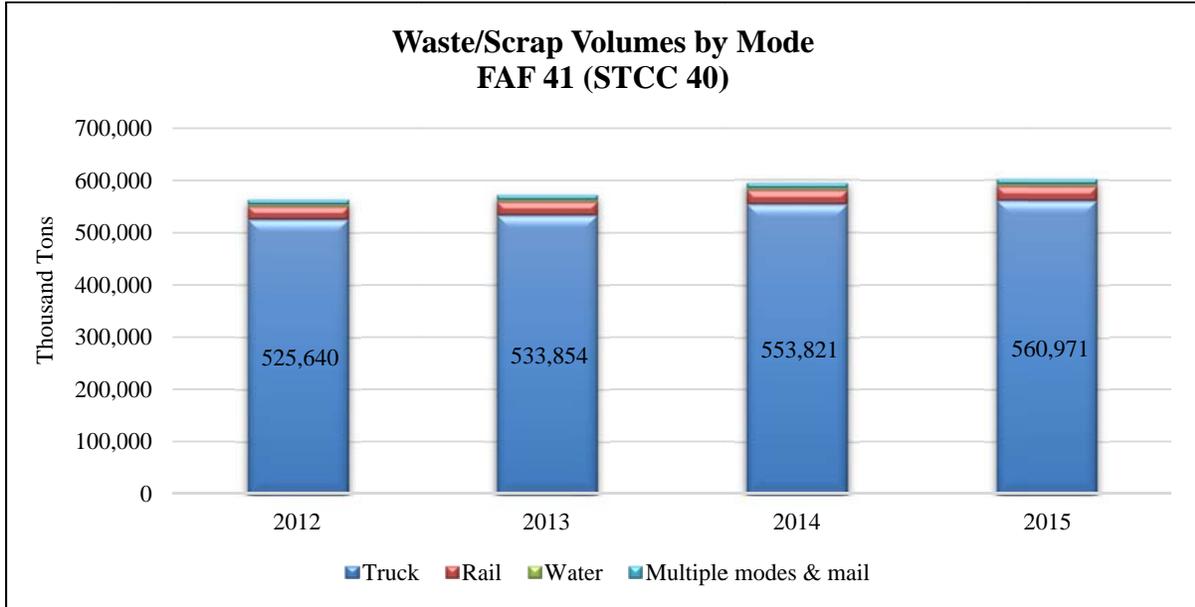
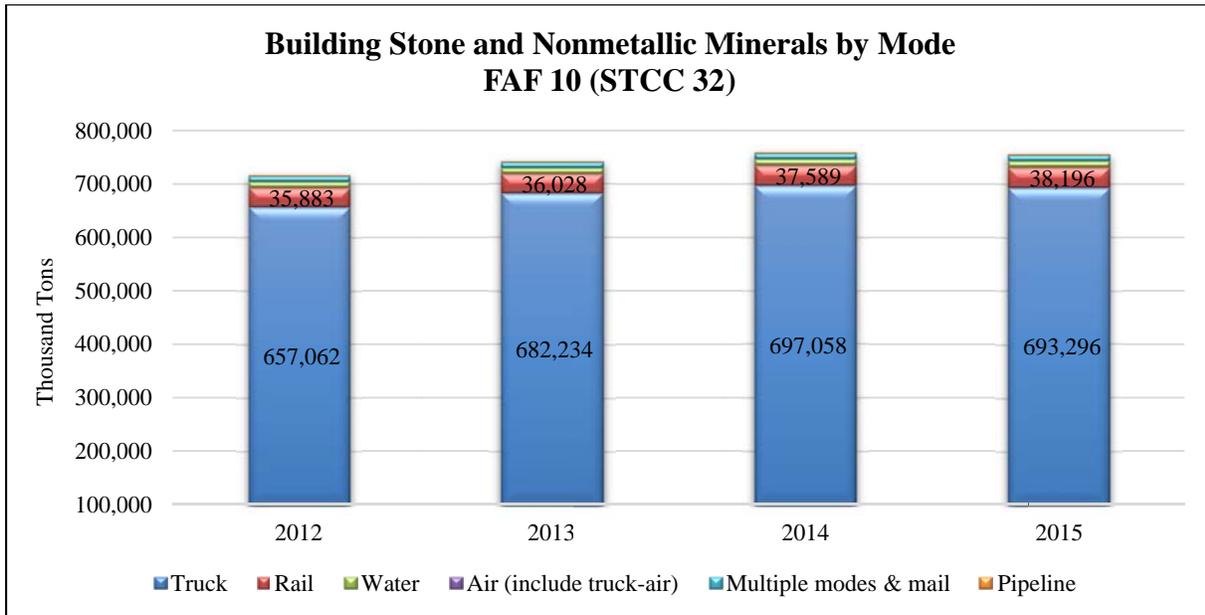


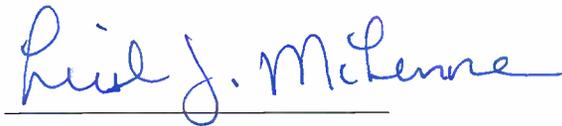
Figure 5: FAF 10 Building Stone and Nonmetallic Minerals by Mode 2012-2015



Verification

I, Liesl J. McLemore, verify under penalty of perjury that I am Director – Marketing Research & Economics of Norfolk Southern Corporation, that I have read the foregoing document and know its contents, and that the same is true and correct to the best of my knowledge and belief.

Executed on 7/26/16

A handwritten signature in blue ink that reads "Liesl J. McLemore". The signature is written in a cursive style and is positioned above a horizontal line.

Liesl J. McLemore

EXHIBIT K

Memorandum

To Whom It May Concern

June 15, 2016

From Charles W. Clowdis, Jr.

Managing Director

IHS Economics

RE: Attached information/analysis performed for Norfolk Southern Corporation

The analysis attached was performed by our staff at the request of Norfolk Southern Corp. using data sourced from IHS Transearch©, 2014 release as well as historical data from the 2012 and 2010 Transearch© releases.

A description of IHS Transearch and the methodology employed to produce this annual research project and information on how the methodology has changed over the past four releases is also attached. Transearch has been a continuous production of Reebie Associates, creating company, and its successors Global Insight, Inc. and since September 2008, IHS.

IHS is a publically-traded, NYSE corporation with corporate headquarters in Englewood, CO. We provide insight and data on a wide range of topics and tailored research for specific business decision making. www.ihs.com

Any questions should be directed to me at charles.clowdis@ihs.com of +1 781.301.9020.

Signed and attested to this 15th Day of June, 2016



Managing Director-Transportation IHS Economics

EXHIBIT L



Transearch 2014 Modeling Methodology Documentation

IHS Inc.
24 Hartwell Avenue
Lexington, MA 02421
www.ih.com
Dec 09, 2015





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I. Transearch: An Introduction

Transearch® is a unique planning tool that helps strategic transportation planners, transportation providers, and government agencies analyze current and future freight flows by origin, destination, commodity, and transport mode. Over the last three decades, Transearch has been used extensively across the United States to power decision-making.

Designed to meet the complex information and critical insight needs of the freight transportation marketplace, Transearch is a crucial research tool for building strategic marketing, operational, and investment plans. Transearch helps users to:

- Prioritize investments
- Improve competitive positioning
- Anticipate economic shifts and market changes
- Track and anticipate freight flows across the United States at the national, state, BEA Economic Area (BEA), and county levels
- Benchmark individual performance relative to the market and determine future market potential
- Understand transportation demand by commodity, location, and mode

Drawing from the highly regarded economic, trade, and industry forecasting models of IHS Economics, Transearch provides a forecast of freight movement that enables the sizing of future freight markets over a 30-year time horizon.

A. Overview

Transearch, an annual database of U.S. county-level freight movement data used for freight modeling and forecasting, is produced by the Trade & Transportation consulting practice within IHS Consulting. (Global Insight, which had been producing Transearch since acquiring Reebie Associates, became part of IHS in 2008 and now is part of IHS Economics & Country Risk.)

Transearch includes market-to-market flow data for more than 500 individual commodities and seven modes of transportation:

- For-hire truckload
- For-hire less-than-truckload
- Private truck
- Conventional rail carload
- Rail/highway intermodal
- Air
- Water

Volume is the primary measurement of the commodity flows, and is presented in terms of annual short tons. The short tons can be converted to other measures, such as

- Units (such as truck counts)
- Dollar Value



- Vehicle-miles traveled (VMT)
- Ton-miles

For each county market, traffic coverage includes flows that are intra-market (internal), inbound (external-to-internal), outbound (internal-to-external), and overhead or through (external-to- external).

The Transearch capability combines primary shipment data obtained from many of the nation’s largest rail and truck freight carriers with information from public, commercial, and proprietary sources to generate a base year estimate of freight flows at the county level. Once the base year is completed, a separate model is used to produce a 30-year forecast of freight flows. These projections are driven primarily by IHS Economics’ long-term U.S. Macroeconomic and Business Markets Insights forecasts. Data from the Transearch model have been used by Federal government agencies, more than thirty U.S. states, a multitude of local governments, freight carriers of all modes, and is continually used in consulting engagements.

B. Evolution

Transearch, which was first created more than 30 years ago, has been subject to on-going research and development activity that has significantly enhanced its scope and level of detail. A chart highlighting these improvements appears below.

Figure 1: Evolution of Transearch 1995 to 2014

Generation	Vintage	Enhanced Features
1 st	1995/96	<ul style="list-style-type: none"> ▪ Distribution Center/Wholesale Traffic shipments included ▪ 3-digit Zip Motor Carrier Data Exchange inputs utilized ▪ County-level market coverage developed for the Intermodal Freight Visual Database ▪ County-level markets disaggregated from State-level
2 nd	1998	<ul style="list-style-type: none"> ▪ First Freight Analysis Framework created for FHWA ▪ Ores/Minerals & Drayage Traffic coverage included ▪ NAFTA Gateways, LATTs-aided Inland Marine flows included ▪ County-Based Construction
3 rd	2000/01	<ul style="list-style-type: none"> ▪ Expanded coverage of Agriculture Traffic ▪ 5-digit Zip Motor Carrier Data Exchange & Rail Data Exchange adopted ▪ Global Insight Production Drivers utilized ▪ MPO Research (Goods & Services, Staging) included
4 th	2003/04	<ul style="list-style-type: none"> ▪ Empty Truck Traffic coverage added ▪ 2nd Generation Agriculture & Minerals-enhanced detailed coverage ▪ Global Insight Integration: Business Sectors & Transactions data adoption



5 th	2008/09	<ul style="list-style-type: none">▪ Import/Export Identification on final records▪ Full Industry I/O Consumption Quantification▪ IHSGII Source Data Integration & QC Process▪ 2nd Generation NAFTA Gateways & DC/Wholesale Traffic improvements
6 th	2009/10	<ul style="list-style-type: none">▪ Refinement of the Transearch model▪ Expansion of IHS Source Data Integration & QC Process▪ Expansion of Supply Chain Structures modeling▪ Integration of appropriate forecasts from other units within
7 th	2010/11	<ul style="list-style-type: none">▪ Ongoing refinement of the Transearch model▪ 2nd Generation Import/Export Identification▪ 3rd Generation NAFTA Gateways
8 th	2012	<ul style="list-style-type: none">▪ 2nd Generation Gravity Model for Truck flows▪ Additional processing at STCC5 level for select commodities▪ Air flow model refinement
9 th	2013	<ul style="list-style-type: none">▪ 3rd Generation Gravity Model for Truck flows▪ Air flow model refinement▪ Integration of R. L. Polk motor vehicle data

C. Commodity Groupings

Standard Transportation Commodity Codes (STCC) are used in the Transearch development process to organize and present commodity information for a variety of reasons, including:

- The suitability of STCC to transportation and their general adequacy of nested detail;
- The comparability to codes used in production and consumption data;
- Convertibility from international codes;
- Continuity with historical information; and
- Use in the STB Waybill data.

A table of 2-digit STCCs and their descriptions is presented in an Appendix.

STCCs up to the 4-digit level of detail are employed in Transearch. Thus, in the general category of Transportation Equipment, transportation of new motor vehicles (code 3711) is distinguished from auto parts (code 3714). In some cases, we are able to carry 5-digit STCC detail on a custom basis; for example, we process corn (code 01132) differently than wheat (code 01137).

In those cases where commodity detail at the 4-digit level cannot be determined, three or two digit STCCs will be used.

Commodity codes 42 and above (chiefly describing miscellaneous categories) appear in domestic data but not in international; this is because the customs



documentation that serves as the primary international information source routinely requires specific commodity identification, in order to apply appropriate duties.

IHS also maintains translation tables allowing the data to be presented by other commodity coding systems, such as Standard Classification of Transported Goods (SCTG) system or the North American Industry Classification System (NAICS).

D. Exclusions

The following types of movements are not captured in Transearch:

- Drayage for inland waterways, pipelines, international air, and rail carload transfers.
- Non-manufactured goods - primary (raw) products from fisheries and logging camps, and waste.
- Small package and mail shipments moved entirely over-the-road.
- Military and other government trucks.
- Household goods and local service trucks (such as utility repair vehicles).
- Domestic pipeline flows (although some cross-border pipeline flows are included).

II. Transearch Base Year Development

Production of each annual version of the Transearch database begins by establishing market-specific output volumes by industry or commodity. For the majority of commodities, including most manufactured goods, this information is drawn from IHS Economics' Business Markets Insights (BMI) database, supplemented by trade association and industry reports and U.S. government-collected data.

- BMI contains a consistent set of historical statistical estimates and forecasts by industry sector at the county level of geographic detail.
- The statistics include the number of business establishments, employees, and sales by industry at the 6-digit NAICS (North American Industrial Classification System) code level.

Information from the Input/Output (I/O) tables that are produced by the Bureau of Economic Analysis (BEA) is another key input to the process of estimating production and consumption volumes.

- The I/O tables contain information on the amount of raw materials that are needed to produce each industry's output. These tables provide simultaneous information on the amount of commodities that are demanded by each industry, as well as the amount of output generated by each industry.
- As of Transearch 2012, the application of the I/O information includes all individually reported NAICS industries. Earlier iterations of Transearch used this detailed information only for the manufacturing sector, but relied on a much more aggregate level of detail for non-manufacturing establishments.



For the purpose of building Transearch, the BMI county-level sales information is used in conjunction with the BEA I/O tables to estimate the value of production and consumption for each commodity at the county level. The NAICS commodities are converted to 4-digit Standard Transportation Commodity Codes (STCCs); for each STCC, there is a price per ton, which is used to translate each commodity from nominal dollars into tonnage.

Commodities for which production volumes are not taken from BMI include:

- Agricultural products and livestock (sourced from the U.S. Department of Agriculture)
- Coal and petroleum products (sourced from U.S. Energy Information Administration)
- Automobiles (sourced from other IHS in-house databases)
- Selected chemicals (sourced from IHS Chemical group)
- Minerals (sourced from the U.S. Geological Survey).

Using port-level census data, we identify the volume of commodities that are domestically produced and exported along with quantities of commodities that are imported and used for domestic production and consumption. Therefore, final county-level production and consumption numbers include imports and exports.

Additional sources of demand include the public sector, households, and the financial sector. This demand is accounted for by using factors to include state and local tax revenues, wages and salary disbursements (as a proxy for household disposable income), and investments.

Once the county-level production and consumption volumes are established, tonnages moving by rail, water, air, and pipeline are netted from the totals (which serve as control totals). These modal volumes are well-defined and reported by government agency data sources. The remaining freight volumes are then allocated to truck distribution patterns. Separate data sources are used to develop NAFTA (activity moving between the United States and Canada or Mexico) goods movement patterns, and are included with the U.S. data set.

III. Development of Domestic County-to-County Modal Freight Flows

A. Railroad Traffic Activities

To best serve the needs of a diverse group of Transearch users, the database offers two different versions of rail information.

- Clients from the public sector, who are authorized by the Surface Transportation Board (STB) to access the Detailed Carload Waybill Sample, have the option of receiving detailed county-level market flow data and associated rail network routing assignments.
- Other customers receive market flow data at the BEA level based on the Public Use Version of the STB Waybill Sample, which is supplemented by the IHS innovative data exchange partnership with many of the Class I railroads.



STB Confidential Carload Waybill Sample

For users with authorization from the STB, Transearch rail traffic is taken from the fully detailed (and confidential) version of the agency's annual Carload Waybill Sample. The Waybill Sample is a statistically based stratified sample of shipments terminated by U.S. rail carriers. The full Waybill Sample file contains detailed information on the origin, destination, commodity and volume of each sampled movement. All carriers terminating 4,500 or more carloads per year are required to report, resulting in data capture from all Class I and II railroads, plus the more prominent short lines. (Carriers moving fewer than 4,500 annual loads may be sampled when they act as haulage agents for larger railroads, and the latter appears as the carrier of record on a shipment.)

Rail Industry Data Exchange

Through a unique partnership with four of the five major Class I railroads, IHS is able to incorporate state and BEA level data for STCC commodity flows by rail into Transearch. Data for the non-participating railroad is estimated at the BEA level from the public-use version of the Surface Transportation Board's annual Waybill Sample.

The proprietary traffic data that the railroads share with IHS is used to sharpen the netting process by which initial estimates of truck activity are derived. The proprietary sources create three advantages for the database. First, they give a more precise picture of rail activity in county markets than public editions of the Waybill Sample allow. Second, they enable the data to be corrected for the so-called "re-bill" problem, through which the carrier recording process for interchanged shipments can mask the true origins and destinations of some rail freight. Finally, the proprietary data is more up-to-date than that available through the Waybill Sample.

For NAFTA traffic, international rail volumes and border crossing points have been incorporated. The STB Sample currently has full coverage of flows between the United States and Canada in both directions. For traffic moving between Mexico and the United States, information is taken from BTS border crossing statistics and from routings suggested in the Waybill, interpreted with a rail network routing model.

B. Intermodal Movements, Including Drayage

Throughout the development process, carload and intermodal trailer-on-flat-car/container-on-flat-car (TOFC/COFC) traffic are maintained as separate modal volumes. (Note that the separation of carload from intermodal traffic is not possible for U.S./Mexico freight, due to limitations in the source data.) The identification of shipments using TOFC/COFC services is based on intermodal record flags in the waybill file. As illustrated in Figure 2, intermodal freight movements consist of both truck and rail portions. For the long-haul portion of the trip, the goods are carried by rail. The shorter, drayage, portion of the trip occurs on truck.

Figure 2: Intermodal Freight Movement



Traffic that is classified as the mode “Intermodal” represents the rail portion of a truck-rail shipment. The origin corresponds to the point at which the shipment is put on a rail car, and the destination is the point at which a shipment is taken off the rail car. The commodities carried on rail are identified by a STCC (Standard Transportation Commodity Code); while the STCC normally corresponds to a specific product, for much of the intermodal traffic the commodity is identified only by the general classification FAK (Freight All Kinds) in the primary source data (the STB Waybill Sample). This is indicated by STCC 4611.

Transearch also captures the drayage portion of rail-truck intermodal shipments. This traffic is shown in the “truckload” mode and is identified by STCC 5021 when flowing from the ultimate origin (producing) point toward the originating railhead and STCC 5022 when moving from the end of the rail portion of the trip to the ultimate destination point.

On a tonnage basis, each intermodal shipment appears in the data set as three separate records, first as a “Truckload” mode movement from the true origin to the railhead, then as an “Intermodal” mode movement from one railhead to another, and finally as an additional “Truckload” mode movement from the terminating railhead to



the final destination point. When modal volumes are totaled by tons, the separate segments will cause the shipment in a sense to be “triple counted.” However, when volumes are totaled on a ton-mile basis, the miles in each truck or rail segment appear just once, so the total shipment in ton-mile terms is counted accurately.

C. Waterborne Commerce Activities

The U.S. Army Corps of Engineers (Corps) annually collects information on all shipments moving on the nation's waterways to support its management and planning activities. Transearch uses various components of the data issued by the Corps to develop its waterborne flow data.

Although the raw information collected by the Corps is comprehensive, the data released to the public are summarized in ways that mask the details of traffic flows. Consequently, the Transearch data development process aims to reestablish some of this detail.

For freight moving by water, the primary data set used for Transearch is the annual Corps file of waterborne commerce, which provides state-to-state and region-to-region annual flows of broad commodity groupings. In addition, the Corps provides data on originating and terminating volumes by port and more specific commodity type. The less detailed state-to-state flow data are disaggregated to the port level using the more detailed origination and termination information, supplemented by in-house research on public and private port facilities. (Note that drayage for import and export traffic moving through ports is captured in Transearch. Drayage for waterway movements with both domestic origins and destinations is not always captured as a standard part of the database but is available on a custom basis.)

Thus for example, the general flow of goods from Pennsylvania to Louisiana is refined to show the flow of steel products from Pittsburgh-area counties to counties in South Louisiana by comparison of sources. Commodity descriptions adopted by the Corps are transformed to STCCs through data bridges developed and maintained by IHS.

D. Air Cargo Activities

Air cargo represents by far the smallest portion of the Transearch database in terms of tonnage. Air activity is constructed using Airport Activity Statistics available through the Bureau of Transportation Statistics (BTS). The BTS T-100 data set reports airport-to-airport flow volumes. The data are then translated from airports to counties, based on airport location information maintained by the Federal Aviation Administration (FAA). Because the data are meant to portray domestic freight flowing between origin and destination markets, only cargo that is drayed to or from the airport is quantified. Enplaned or deplaned volumes that are attributable to a transloading at an airport are not included in the database.

Major transloading hubs are identified for each air carrier, based on airline and airport information, plus a review of reported enplanement & deplanement volumes in the FAA and BTS T100 data. Adjustments for transloading volumes are made specific to each carrier - based on individual monthly enplanement & deplanement statistics. Originating volumes moving into the hub are linked with destination



volumes moving out of the hub; the monthly results are aggregated to the annual level.

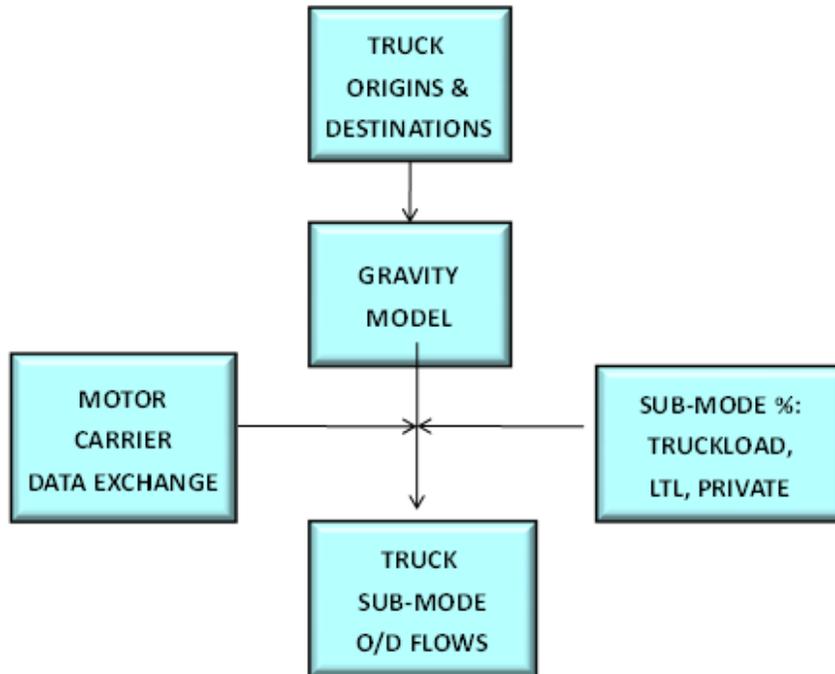
For FedEx and UPS, the split between overnight letter-type packages and traditional freight- specific commodities is derived from volume information in their annual reports.

The air cargo data do not specify the commodities moved between airports; therefore, information from the Freight Analysis Framework (FAF) is used to introduce broad commodity identification for air cargo. Using IHS expertise and knowledge of production and consumption by county, we assign specific commodity codes to the air cargo data. In some cases the air commodity data will be presented at a two or three digit STCC level where more detailed commodity information cannot be determined.

E. Truck Flow Activities

Truck traffic flows remain the most complex to estimate because of their broader market coverage and lack of unified data sources. At this point in the production process, total production and consumption volumes are defined at the county level, as well as paired origin/destination commodity flows for freight movements by air, rail, and water. IHS then subtracts the known modal pairings from total production and consumption by county - origin volumes are subtracted from production totals; destination volumes are subtracted from consumption totals. What remains are the production and consumption volumes that must be paired into flows moving by truck.

Figure 3: Processing Truck Origins and Destination into Flows



From publicly available sources, IHS gathers information on the typical distances each commodity is hauled (e.g., less than 100 miles, 100-200 miles, etc.). The distribution by distance for each commodity is fed into a gravity model to determine origin/destination paired flows. IHS verifies the origin/destination pairings through a comparison with actual commodity flow data collected from major freight carriers.

The tonnage for each STCC is allocated between the for-hire and private sectors of the industry based on relative volumes reported in the Commodity Flow Survey (CFS). The for-hire segment is then split between truckload and less-than-truckload (LTL) components using the actual freight carrier industry data on the level of LTL shipments, as well as prior Transearch patterns.

Motor carriers that participate in the exchange of their actual flow pattern data submit a summary of their annual volumes that includes identification of origin and destination markets, plus tonnage or truckloads. Commodity indications are captured through equipment types where available or imputed using the available production and consumption data. Traffic is reported by zip code which is converted to county as part of the database preparation process. All of this information is provided on an origin-to-destination basis.

There is some variation in the sample achieved each year through this program, but in recent years it has included about 70 million individual truck shipments, covering both the truckload and LTL segments of the industry. (As a point of comparison, the 1997 CFS sampled 6 million shipments and the 2002 CFS sampled 3 million shipments; in both cases, these samples were addressed to all of the modes, not just to truck.) Participating carriers are primarily large truckload and LTL operators with



average lengths of haul over 500 miles. However, the sample also includes owner-operator business, portions of private carriage and dray activity, and significant amounts of regional (under 500-mile) traffic. The sampling rate is about 6% overall, 5% under 500 miles, and 4% under 100 miles. (As another point of comparison, the STB Waybill Sample runs 2.8% of shipments, but it is a stratified random sample and thus includes 22.5% of tonnage.)

Because the program depends on cooperation and carriers' business interests, it does not create a stratified random sample; to offset this, coverage is pursued and obtained for a broad cross section of the trucking market, including diverse industrial and geographic segments.

To supplement the information obtained through the Data Exchange, IHS draws on proprietary data sets providing information on the specific locations of manufacturing and distribution facilities, along with profiles of their industrial output, employment and sales level. This information, in conjunction with that gathered through the Motor Carrier Data Exchange, guides the establishment of origination volumes at the county level, and is particularly useful in markets where the Data Exchange sample is small.

Just as business establishment information is used to supplement origination data, it is used similarly in conjunction with the BEA Industrial I/O tables to enhance the destination or consumption volumes by county. Based on the production volumes by industry derived from such data, the I/O relationships are analyzed to develop necessary input commodities and volumes that would be needed to satisfy production demands.

An initial screening and analysis of the Data Exchange information adjusts and eliminates any discrepancies in reporting formats or procedures by various participants. Summary results are also tabulated, and a variety of statistics are derived to judge the reasonableness of the data.

Specialized Truck Flows: Secondary Shipments, Agricultural Products, Coal, Chemicals and Empty Movements

Commodities for which production volumes are not taken from BMI include agricultural products and livestock (sourced from the U.S. Department of Agriculture); coal (sources from the U.S. Department of Energy, chemicals and automobiles (sourced from other IHS in-house databases); and minerals (sourced from the U.S. Geological Survey).

Different approaches are necessary for the following classes of truck traffic included in Transearch: secondary shipments, agricultural products, coal, chemical and empty movements.

Secondary Shipments

Secondary shipments, as opposed to primary shipments, are movements in the distribution chain that originate from warehouse, distribution centers, or other facilities where they were not actually produced.



- In the Transearch database, primary moves may be thought of as shipments originating at locations where goods are produced or assembled and receive their Industrial Classification (NAICS or SIC) number. The terminations of these shipments are where the product or commodity comes to rest, either to be consumed or subjected to further processing.
- If the product moves instead to a staging point, where it is mixed with other products and then reshipped or stored for future distribution, the move qualifies as a secondary movement from a data source perspective. Typically this is relatively short-haul truck activity, but there are some longer-haul secondary movements.

Transearch will show the destination of a secondary movement as the ultimate destination for the shipment, such as a manufacturing plant for raw materials, or a supermarket or department store for consumer goods. In some instances, however, these secondary movements may actually move through a series of regional distribution centers or warehouses, and Transearch does not show each segment of the journey as a separate movement. Sufficient source data are not available to accurately distinguish the individual legs of this type of journey.

Agriculture

County-to-county truck flows of domestic agricultural products are a vital component of transportation requirements in many parts of the nation. The process for truck shipments of agriculture commences with county production figures by type of crop, product or livestock obtained from the U.S. Department of Agriculture, and from state sources for major agricultural states. Conversion tables are applied to translate output measurements such as bushels and heads of cattle into standard tonnage measurements. County consumption volumes are based on industry-level factors for relevant facilities, including grain elevators, processing businesses, and rail and water transfer points, and reflect output portrayed elsewhere in Transearch. Distribution is estimated based on historic patterns, incorporating information on travel distances by use, product, and body type.

Coal

Truck movements of coal are developed using information from the U.S. Department of Energy's Energy Information Administration (EIA). The processing approach is very similar in concept to the approach used for waterborne traffic in Transearch. The EIA data provides a robust accounting of truck volumes on a state-to-state basis and more detailed reports on specific production and consumption locations. The state origins are assigned to counties based on mine production reports. The destination state volumes are assigned to counties based on the allocation of consumption across reported consuming industries (power generation, manufacturing, residential) and their relative predominance in the counties.

Chemicals

Chemical flows in Transearch are classified in STCC 28. Production and consumption source volume data for STCCs 2811-2821 (except Ethanol, STCC 28184) are developed



in conjunction with data from the IHS Chemical Group, which compiles chemical production volumes from its clients and plant specific data. This data is available for specific sub-4 digit commodity types as well as company-specific plant locations. As of Transearch 2011, the methodology for determining these chemical flows was modified to reflect these freight moves, resulting in a significant increase in accuracy:

- Intra-plant consumption volumes were netted from production and consumption levels and not carried through into Transearch flow volumes.
- Intra-company movements were estimated from the company location information before the standard production/consumption netting and gravity modeling process.
- STCC 2814 - (Crude Products of coal, gas & petroleum) was adjusted to reflect pipeline movements.

Empties

Movements of trucks between the termination of one payload and the origination of the next constitute a significant portion of local activity. Motor carriers strive to minimize the distance over which such movements occurs, and the repositioning of empty equipment is strongly affected by the range and class of operation for a truck fleet, and the trailer types employed. All of these elements are observed in the processing of empty movements for Transearch, which begins with county imbalances of inbound and outbound loads, by category of trailer on a nationwide basis. A process of the same type used for the processing of agricultural product flows is adopted to resolve imbalances, drawing on historical patterns of empty mileage factors, and checking results against industry factors and market conditions. Empty truck activity is reported in Transearch under STCC 4221, with volumes displayed in numbers of trucks with no associated tonnage.

Exceptions

There are some prominent coverage gaps in truck shipments of non-manufactured goods that are not filled in the standard Transearch data set. These gaps, which include primary (raw) products of forests and fisheries, household goods, and haulage of waste and scrap, can be developed for clients on a custom basis.

IV. Development of Domestic Flows of International Movements

Transearch flow volumes capture the movement of all import and export traffic moving through seaports, and all cross-border activity with Mexico and Canada. Overseas trade movements will show the U.S. port as the origin point for import shipments, and the destination for exports. For the NAFTA trade, provincial and metropolitan markets in Canada are identified, and states are shown in Mexico. Volumes also are assigned at the gateways into Canada and Mexico.

Inland trade activity is the portion of international shipments traveling within the United States, to and from U.S. seaports. Substantial volumes move by rail, truck or the inland waterway system, and this tonnage is contained within Transearch. Truck



movements of import volume are handled in Transearch as outbound flows from the seaport, based on foreign trade data.

A. Mexico/United States Surface Freight Movements

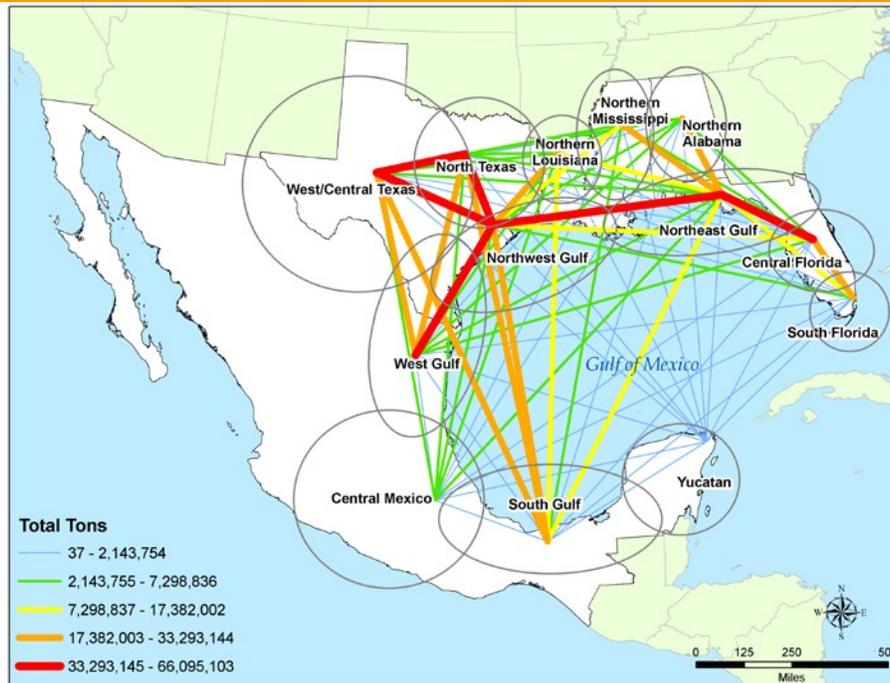
The Transearch United States/Mexico cross-border data derives from transborder statistics produced by the U.S. Census Bureau, directly and through the U.S. Department of Transportation Bureau of Transportation Statistics. This source provides information on cross border shipments by truck, rail and pipeline, in terms of declared value (in U.S. dollars) at customs inspection points on the border. Information on southbound shipments includes U.S. state of origin, crossing point, and Mexican state of destination and (separately) U.S. origin, commodity and Mexican destination. For northbound shipments, U.S. state of destination and the crossing point are shown, but origins are displayed simply as Mexico; however, physical volume (tons) is reported for these shipments, along with their value. Commodities are classified based on the international Harmonized Commodity Coding and Classification System, as set by the United States International Trade Commission and the World Customs Organization.

For southbound movements, the origin-crossing-destination and origin-commodity-destination datasets are combined with the crossing-level commodity data from U.S. Customs to estimate the complete flow. Note that in a small number of cases, the source data contains crossings that do not correspond to physical border crossings but are the point where the movement cleared customs. In those cases, Transearch retains the crossing from the source data for the sake of consistency.

For northbound movements, processing the data additionally involves allocating the northbound traffic to Mexican State of origin. This is done primarily using the latest Mexico Economic Census as conducted by the Instituto Nacional de Estadística y Geografía (INEGI) which is made current using internal IHS Mexican intelligence and cross border Data Exchange information. In addition, the data are converted using a translation table relating the Harmonized Code to STCC commodity codes and from volume units (dollars) into tons. After a review, some additional checks are made during the process of converting volume units from dollars to tons. Where possible, this conversion relies on the unit counts of imports and exports. For commodities where unit weight varies widely, this conversion relies on a table of product values; however, adjustments are made in some instances where a dollar value is deemed more appropriate for import/export trade in a given commodity. Unit counts are added for truck and rail using averages from data exchange or commodity specific defaults.

U.S. and Mexican origins and destinations are adjusted for flows where data exchange provides additional information of actual flows. This includes cases where flows are transshipped before reaching ultimate endpoints to show the modal endpoint (to be consistent with other Transearch flows).

Figure 4: Mexico Trade Across the Gulf



The database includes U.S./Mexico water movements across the Gulf of Mexico and along the Pacific coast. Once again, the source for the U.S. port of entry/departure is the transborder data produced by the U.S. Census Bureau. In contrast to the overland moves, the source data provides weight in tons as well as dollar value for seaborne vessel movements. On the Mexican side of the movement, the source of the data is the Mexican Secretaría de Comunicaciones y Transportes (SCT) which publishes annual port level statistics for each Mexican port by commodity, Mexican port and country of origin/destination. For Transearch, these data are aggregated at the Mexican state level and the commodities are converted to be compatible with the U.S. data. The state-level Mexican data are then matched with the port-level U.S. data using an iterative 'best fit' process that assigns the flow based on such criteria as commodity, coast and containerization. In the event that the U.S. Census and SCT data disagree, the process is biased toward the U.S. data.

Transearch for U.S./Mexico is further allocated down to the BEA or county-level. This procedure uses domestic U.S. production and consumption levels within counties, by specific commodity types. The relative weighting of each county's inbound and outbound volumes, as a percent of a state's total volumes by specific commodity type, are used to create disaggregation factors, which are then applied to Mexican traffic flows. Primary source information from the Transearch Data Exchange, which includes material volumes of United States/Mexico truck traffic, is further employed as a check against flow patterns at the state and the county level.

Even so, caution should be exercised, as allocation to the county level is undertaken chiefly for the purpose of developing flow routing assignments. This level of allocation has limited reliability as a localized picture of traffic between Mexico and the United States. Also, in counties with multiple border crossings, the database does not distinguish volumes among the individual gateways. When applied to flow



maps, the traffic movements through these multiple border crossings within the same county are routed based upon the shortest flow, not necessarily through the specific gateway facility.

B. Canada/United States Freight Movements

Similar to the U.S./Mexico data, the Transearch United States/Canada data draws primarily from customs data obtained from the U.S. Department of Transportation Bureau of Transportation Statistics. As with the BTS data for Mexico, data are separately provided as origin-crossing-destination totals by value and origin-commodity-destination totals by value. In this source, however, all origins and destinations are defined as U.S. states or Canadian provinces in both directions of trade. Commodities are coded in accordance with the Harmonized Commodity Description and Coding System (HS) which, for the purpose of Transearch, are translated into equivalent four-digit STCC definitions.

Five separate modes are reported: truck, rail, water, air, and pipeline. In addition, where the mode of transport is unknown or not clearly specified on the customs documents, the shipment is included in an “other” grouping. Note that the Canadian and Mexican cross-border data is the only part of Transearch that contains pipeline data, which are overwhelmingly dominated by shipments of crude petroleum and natural gas. These data are processed in a similar manner to the Mexican data, where origin-crossing-destination totals and origin-commodity-destination totals provided by BTS are combined with crossing level commodity totals from U.S. Customs to generate a complete flow from origin province to border crossing to destination state by commodity and vice versa.

For U.S. origins and destinations, domestic traffic volumes at the county level are used to allocate the international origins and destinations. (This step is unnecessary for rail traffic based on the STB Waybill, since granular geographic information is available in the sample.) This process uses the same U.S. domestic data and processing techniques that are used with the Mexican data, although the greater dispersion of Canadian shipping activity renders the resulting patterns more robust. Canadian origins and destinations are disaggregated to the metropolitan market level based on patterns of Canadian domestic truck traffic, reported by Statistics Canada. Reports identify commodities and Canadian Metropolitan Areas (CMAs); still, significant portions of traffic appear in non-CMA, “remainder of Province” territories, and these residual geographic classifications also are carried forward into the international data set.

V. How Freight Flows Are Routed

Once the linkages between production and transportation flows are developed, they are mapped across geocoded modal networks for determination of through traffic, and for GIS display.

A. Trucks

The highway network was developed by the Oak Ridge National Laboratory (ORNL),



and adapted by them for the county market structure of the Transearch database. Highway routes are determined by an algorithm that selects a single, lowest impedance path between any pair of counties. One consequence of using the county unit is that artificial connections are used at origin and destination, to link county centroids to the nearest network point. This causes the routes for intra-county traffic, and for traffic originating and terminating between adjacent counties, to be of less practical value.

Impedances reflect distance, class of highway, travel speed, and tolls. The algorithm follows the same principles that guide the dispatch software used by motor carriers. The resulting routes are a practical representation of the path favored by trucks operating in any given county-to-county lane. The traffic captured in the database is U.S. domestic and international volume. Highway and rail traffic between points in Canada can use U.S. infrastructure, traffic between Canada and Mexico will; neither appears in the data. This process differs from an assignment program, in that it is not attempting to distribute a trip table according to counts on competing routes; rather, it shows the central tendency of truck flows in a given corridor, which can be refined in a local assignment process.

B. Rail

Rail routes are established by an IHS routing model that incorporates carrier and junction information contained in the waybill traffic data. Routes contain both regional and short line, as well as Class I railroad track, in its network. Segment impedance levels are based on line ownership, trackage and haulage rights, track types, and the operating preferences of railroads for dispatching particular classes of traffic. The routing for a given county pair may follow a variety of rail paths, each with specific, associated commodity volumes.

C. Inland Marine

Routing of inland waterway traffic is not supplied with most deliveries of Transearch, although it can be furnished for clients upon request. Waterway routes are applied according to patterns established in a network table, prepared by IHS for a waterway service and costing model supplied to the US Army Corps of Engineers. Because the waterway network has few path alternatives, a least-miles routing is adequate. (The most significant alternative route is the Tennessee-Tombigbee Waterway (Tenn-Tom), but using this typically is a high-cost operation. Normally for Transearch, only points physically located along the Tenn-Tom system are assigned that route.) Mileposts in the table are associated with counties to create alignment with the traffic database, but only one path is used for any pair of counties for highway and waterway flows.

D. Air

Because the data reflect travel between origin and destination markets, flows can be represented as straight-line county-to-county connections in GIS displays. However, the use of hubs in air travel is not captured in this way, so the GIS would not depict operating routes for volumes that are subject to intermediate re-handling.



VI. Differences between Transearch and the Freight Analysis Framework (FAF)

Both Transearch and the Freight Analysis Framework (FAF) provide a quantification - measuring tons, ton-miles, and value - of freight activity moving by truck. Due to differences in construction methodology and the presentation format of the results, however, comparing the traffic measures captured in the two data sets is difficult.

FAF version 3 is based on the 2007 CFS. Two-thirds of the total national tonnage reported in FAF comes from the CFS. FAF adjusts this volume to 2011 levels based on production factors. Significantly, Transearch is built from the ground-up each year, starting from county and industry-specific production levels. Quantifying the variance created by this difference in methodology is very difficult, and beyond the scope of this analysis, but a five to ten percent difference in volumes would seem to be a reasonable expectation due to these differences.

There are two distinct differences to be addressed:

- The scope of the industries or commodities captured
- Variance between tons and ton-miles

A. Differences in Scope

FAF provides more complete coverage of Logs, Crude Petroleum, Live Fish, and Waste. There is also a significant difference and Warehouse/Distribution Center truck traffic than Transearch.

Transearch does not include full coverage of Logs, Crude Petroleum, Live Fish, or Waste, due to the lack of a uniform, geographically-detailed, nationwide set of source information. FAF makes estimations of these volumes, generally by taking a national production value, and allocating to specific market areas based on employment levels. Details of the FAF methodology can be found at: <http://faf.ornl.gov/fafweb/Data/FAF3ODDoc611.pdf>

Transearch does provide some limited coverage of marine products and non-municipal waste activity. Accounting for this difference in coverage, in aggregate FAF captures the following additional volumes:

Figure 5: FAF Truck Volumes Excluded from Transearch

Commodity	Tons	Ton-Miles
Logs	16,093,101	1,322,526,90
Crude petroleum	47,244	27,231,30
Live Animals/Fish	3,088,375	1,282,250,74
Waste/scrap	41,296,620	8,601,909,12

With this activity removed from the comparison, Transearch captures 48% of the FAF tonnage, and 75% of the FAF ton-mileage.



The foundation for FAF is the 2007 Commodity Flow Survey. Due to this methodology, there is a notable difference in how Transearch and FAF address shipments that originate in warehouses and distribution centers. Since the CFS is based on a survey of shipping establishments, an item that moves through multiple facilities as it passes through the supply chain may be captured as individual shipments from each of the intermediate points. For example, if a manufacturer moves a product from the factory assembly line into a warehouse, and from the warehouse the item is shipped to the buyers warehouse, and from the buyers warehouse the shipment moves through a regional distribution center before finally being shipped into a store, Transearch would capture this activity as two movements, while CFS/FAF would show four distinct movements:

- Both capture a movement from the factory to the initial warehouse location, by product-specific code.
- Transearch would then show one move, coded as secondary traffic, from the warehouse to the store.
- CFS/FAF would show three commodity-specific moves:
 - From the first warehouse to the second warehouse
 - From the second warehouse to the regional distribution center
 - From the regional distribution center to the store

The discrepancy between these two comparisons can be explained because for many industry segments, the FAF identifies multiple movements of the same item, essentially “double counting” the tons.

B. Tons vs Ton-Miles

As illustrated by the secondary traffic example, Transearch and FAF may show different tonnages, but similar ton-miles, due to differences in how each captures intermediate shipping activity.

This difference is further compounded by FAF’s efforts to incorporate additional shipping activity from non-manufacturing industries. The construction, retail, services and household & business moves sectors provide the clearest examples. The products most impacted by this approach include:

- Gravel and Crushed Stone
- Nonmetallic Mineral Products
- Sand
- Machinery
- Articles of Base Metal
- Fertilizers
- Natural Gas and Petroleum
- Agricultural Products
- Wood Products
- Waste and Scrap
- Prepared Foodstuffs
- Logs



- Electronic Equipment
- Furniture

For many of these items, Transearch and FAF report reasonably similar ton-miles, despite a much greater difference in tonnage. For example:

- Ton-miles for Nonmetallic mineral products differ by only 4%, although Transearch only captures one-third of the tonnage
- Ton-miles for Agriculture and Food products vary by less than 10%, while Transearch only shows half the tonnage

Direct comparisons of many commodities are difficult, however. While the SCTG (FAF) and STCC (Transearch) systems have many similarities, the 2-digit level detail of the FAF data inhibits accurate assessments. For example, the SCTG codes for agriculture and food products sometimes group the agricultural good with foods that are produced from them, whereas the STCC maintains distinction between agricultural crops and the resulting manufactured food product.

C. Comparison of Transearch and FAF

Transearch is built from the ground up each and every year, using new production, consumption and flow data information. FAF is updated each year based only on production drivers. A new FAF is created only every five years, based on the new Commodity Flow Survey. This difference is particularly significant during periods, as have recently been experienced, of significant economic contraction, or substantial economic growth.

Transearch forecasts are also fully-updated each year with the latest production, consumption and foreign trade projections. FAF forecasts are not updated annually, which is quite significant in turbulent economic times.

Transearch provides county-level geographic market identification. FAF provides information on states and selected metropolitan areas.

Transearch is built using an annual sample of approximately 75 million individual truck shipments reported by nationwide and regional motor carriers each year. The core of FAF, the Commodity Flow Survey, is built from a sample of 6 million shipments spread across all of the transport modes.

Transearch utilizes a data collection program with most of the Class I rail roads and supplements this with the STB Carload Waybill Sample to fill in any gaps.

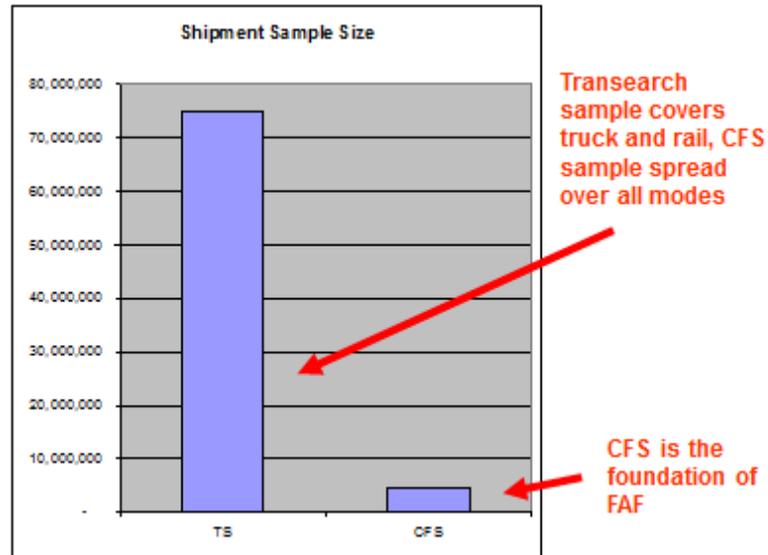
Transearch has used a consistent, market-tested, core development methodology, subject to enhancements and refinements, for over thirty years.

Transearch distinguishes truckload and less-than-truckload for-hire freight movements, which is very significant due to the different operational characteristics of each of these industry sectors. FAF only provides the for-hire categorization.

Transearch distinguishes traffic originating at primary manufacturing points from traffic moving out of warehouses and distribution centers. FAF does not explicitly identify shipments from warehouses and distribution centers.

Transearch distinguishes each modal leg of rail highway intermodal activity, the truck drayage of air freight, and other mixed mode flows. FAF data does not differentiate these segments.

Figure 6: Shipment Sampling -- Transearch vs FAF





VII. Development of Forecasts

The foundation of the approach to freight forecasting is grounded in the disciplined consistency incorporated in IHS Economics' Macro, Regional, Inter-industry, and Intrastate forecast modeling capabilities. This provides a level of comprehensiveness, consistency, and detail that is unique in the transportation information marketplace. Most importantly, all of the detailed freight flow forecasts are derived in a manner that is consistent with the overall path of the economy at a national, regional, and sub-state level. The development of the tonnage forecasts are tied to IHS Economics' long-term baseline macroeconomic forecast for the U.S. economy.

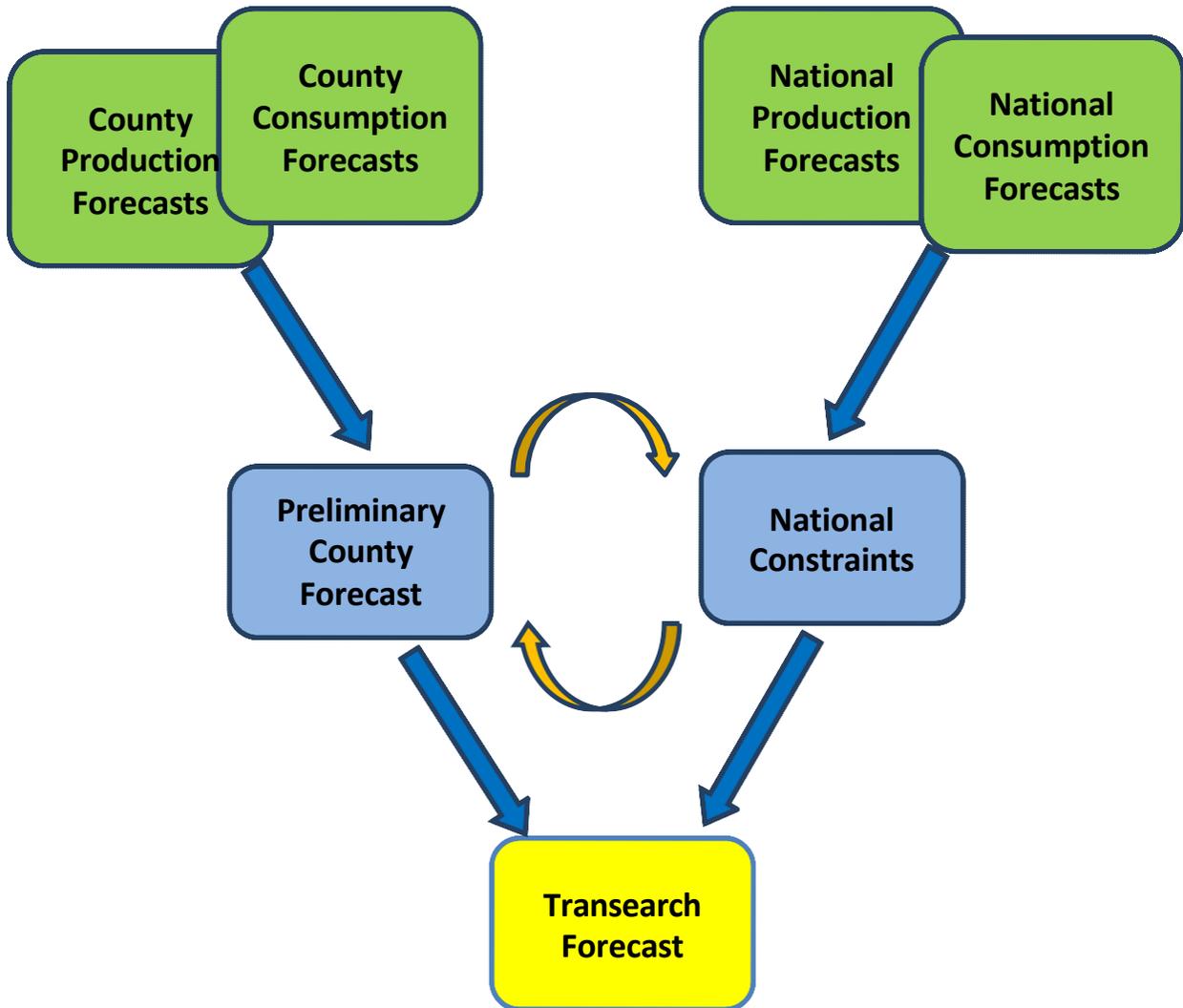
A. Development of Baseline Forecast

To evaluate future flows, IHS produces a 30-year forecast using supply- and demand-side factors including employment, output, and purchases by industry and county. The Transearch forecast focuses on freight volumes. A value forecast also is produced, which simply holds the base year price as fixed.

County-to-county commodity shipments are forecast at the four-digit STCC commodity code level by leveraging proprietary services from within IHS: U.S. Macroeconomic Service, U.S. Agricultural Service, Energy Service, Automotive Service, World Trade Service, Business Transactions Matrix (BTM contains forecasts of the BEA's I/O tables), and Business Markets Insights provide key inputs into the forecast process. This integrated approach to freight flow forecasting ensures that the Transearch forecast is completely consistent with the construction of the base year, and, most importantly, with the IHS outlook for the U.S. and global economies.

The general process for forecasting freight flows is to produce projections of supply (originating flows) and demand (destination flows) by county and 4-digit STCC. Those flows are then constrained to a national total.

Figure 7: Transearch Forecast Process



International flows are additionally forecast based on information from the World Trade Service. This includes NAFTA flows to and from Canada and Mexico as well as forecasts of imports and exports through U.S. seaports.

Appendix: Table of 2-Digit STCC

STCC	DESCRIPTION	STCC	DESCRIPTION
01	Agricultural Production & Livestock	32	Clay, Concrete, Glass or Stone
08	Primary Forest Products	33	Primary Metal Products
09	Fresh Fish or Marine Products	34	Fabricated Metal Products
10	Metallic Ores	35	Machinery
11	Coal	36	Electrical Equipment
13	Crude Petroleum or Natural Gas	37	Transportation Equipment
14	Nonmetallic Minerals	38	Instruments, Photo Equip, Optical Eq
19	Ordnance or Accessories	39	Miscellaneous Manufacturing Products
20	Food or Kindred Products	40	Waste or Scrap Materials
21	Tobacco Products	41	Miscellaneous Freight Shipments
22	Textile Mill Products	42	Shipping Trailers/Containers
23	Apparel or Related Products	43	Mail or Contract Traffic
24	Lumber or Wood Products	44	Freight Forwarder Traffic
25	Furniture or Fixtures	45	Shipper Association Traffic
26	Pulp, Paper or Allied Products	46	Miscellaneous Mixed Shipments
27	Printed Matter	47	Small Packaged Freight Shipments
28	Chemicals or Allied Products	48	Waste Hazardous Materials
29	Petroleum or Coal Products	49	Hazardous Materials or Substances
30	Rubber or Miscellaneous Plastics	50	Secondary Traffic ¹
31	Leather or Leather Products		

Note: STCC codes higher than 41 are not used in international freight flow data.

¹ IHS specific codes, not part of STCC standard



Appendix: 1995 BEA Economic Areas (BEAs)

<u>Number</u>	<u>Description</u>	<u>Number</u>	<u>Description</u>
1	Bangor, ME	35	Tallahassee, FL
2	Portland, ME	36	Dothan, AL
3	Boston, MA	37	Albany, GA
4	Burlington, VT	38	Macon, GA
5	Albany, NY	39	Columbus, GA
6	Syracuse, NY	40	Atlanta, GA
7	Rochester, NY	41	Greenville, SC
8	Buffalo, NY	42	Asheville, NC
9	State College, PA	43	Chattanooga, TN
10	New York, NY	44	Knoxville, TN
11	Harrisburg, PA	45	Johnson City, TN
12	Philadelphia, PA	46	Hickory, NC
13	Washington, DC	47	Lexington, KY
14	Salisbury, MD	48	Charleston, WV
15	Richmond, VA	49	Cincinnati, OH
16	Staunton, VA	50	Dayton, OH
17	Roanoke, VA	51	Columbus, OH
18	Greensboro, NC	52	Wheeling, WV
19	Raleigh, NC	53	Pittsburgh, PA
20	Norfolk, VA	54	Erie, PA
21	Greenville, NC	55	Cleveland, OH
22	Fayetteville, NC	56	Toledo, OH
23	Charlotte, NC	57	Detroit, MI
24	Columbia, SC	58	Northern Michigan, MI
25	Wilmington, NC	59	Green Bay, WI
26	Charleston, SC	60	Appleton, WI
27	Augusta, GA	61	Traverse City, MI
28	Savannah, GA	62	Grand Rapids, MI
29	Jacksonville, FL	63	Milwaukee, WI
30	Orlando, FL	64	Chicago, IL
31	Miami, FL	65	Elkhart, IN
32	Fort Myers, FL	66	Fort Wayne, IN
33	Sarasota, FL	67	Indianapolis, IN
34	Tampa, FL	68	Champaign, IL



<u>Number</u>	<u>Description</u>	<u>Number</u>	<u>Description</u>
69	Evansville, IN	106	Rochester, MN
70	Louisville, KY	107	Minneapolis, MN
71	Nashville, TN	108	Wausau, WI
72	Paducah, KY	109	Duluth, MN
73	Memphis, TN	110	Grand Forks, ND
74	Huntsville, AL	111	Minot, ND
75	Tupelo, MS	112	Bismarck, ND
76	Greenville, MS	113	Fargo, ND
77	Jackson, MS	114	Aberdeen, SD
78	Birmingham, AL	115	Rapid, City, SD
79	Montgomery, AL	116	Sioux Falls, SD
80	Mobile, AL	117	Sioux City, IA
81	Pensacola, FL	118	Omaha, NE
82	Biloxi, MS	119	Lincoln, NE
83	New Orleans, LA	120	Grand Island, NE
84	Baton Rouge, LA	121	North Platte, NE
85	Lafayette, LA	122	Wichita, KS
86	Lake Charles, LA	123	Topeka, KS
87	Beaumont, TX	124	Tulsa, OK
88	Shreveport, LA	125	Oklahoma City, OK
89	Monroe, LA	126	Western Oklahoma, OK
90	Little Rock, AR	127	Dallas, TX
91	Fort Smith, AR	128	Abilene, TX
92	Fayetteville, AR	129	San Angelo, TX
93	Joplin, MO	130	Austin, TX
94	Springfield, MO	131	Houston, TX
95	Jonesboro, AR	132	Corpus Christi, TX
96	St. Louis, MO	133	McAllen, TX
97	Springfield, IL	134	San Antonio, TX
98	Columbia, MO	135	Odessa, TX
99	Kansas City, MO	136	Hobbs, NM
100	Des Moines, IA	137	Lubbock, TX
101	Peoria, IL	138	Amarillo, TX
102	Davenport, IA	139	Santa Fe, NM
103	Cedar Rapids, IA	140	Pueblo, CO
104	Madison, WI	141	Denver, CO
105	La Crosse, WI	142	Scottsbluff, NE



<u>Number</u>	<u>Description</u>	<u>Number</u>	<u>Description</u>
143	Casper, WY	158	Phoenix, AZ
144	Billings, MT	159	Tucson, AZ
145	Great Falls, MT	160	Los Angeles, CA
146	Missoula, MT	161	San Diego, CA
147	Spokane, WA	162	Fresno, CA
148	Idaho, Falls, ID	163	San Francisco, CA
149	Twin Falls, ID	164	Sacramento, CA
150	Boise City, ID	165	Redding, CA
151	Reno, NV	166	Eugene, OR
152	Salt Lake City, UT	167	Portland, OR
153	Las Vegas, NV	168	Pendleton, OR
154	Flagstaff, AZ	169	Richland, WA
155	Farmington, NM	170	Seattle, WA
156	Albuquerque, NM	171	Anchorage, AK
157	El Paso, TX	172	Honolulu, HI

EXHIBIT M

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EXHIBIT N

Transearch Modal Share Data for Commodities for Possible Exemption

- Industrial Sand (1441310); {{

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- Anhydrous Ethyl Alcohol (2818446); {{

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- Specialty Cleaning/Polishing/Sanitation Preparations/Household Bleaches (28442); {{

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- Phosphate Fertilizer Solution (2871450); {{

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- Gasoline or Jet or High Volatile Petroleum Fuels (29111);
- Kerosene Exc. Jet Fuels (29112) and Asphalt (2911610); {{

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- Asphalt or Tar Saturated Felts, Boards or Roofing (29521) and Asphalt Sheathings, Shingles or Sidings (29523). {{

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