

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS

REPLY COMMENTS OF UNION PACIFIC RAILROAD COMPANY

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The Board should withdraw its proposal to re-regulate rail transportation of crushed stone, hydraulic cement, coke, steel, and scrap steel. Despite the Board's invitation in its Notice of Proposed Rulemaking ("NPRM"), proponents of re-regulation failed to improve a record Vice Chairman Miller called "less than robust"¹ and Commissioner Begeman called "a waybill-based hunch."² In contrast, Union Pacific and other railroad parties showed that pervasive intramodal, intermodal, product, and geographic competition protects shippers of the commodities at issue from abuse of market power. Based on the record in this proceeding, the Board cannot find re-regulation "is necessary to carry out the [rail] transportation policy." 49 U.S.C. § 10502(d).

Union Pacific joins in the reply comments of the Association of American Railroads. Our separate comments focus on two issues. *First*, we explain why the transportation market-related claims of parties supporting re-regulation do not establish any need to revoke the commodity exemptions at issue. We also explain why the proponents of instituting a proceeding to revoke the class exemptions applicable to forest and paper products have failed to justify such a step.

¹ NPRM at 15 (Vice Chairman Miller, concurring).

² *Id.* (Commissioner Begeman, dissenting).

Second, we explain why the proponents of re-regulation are wrong when they claim the commodity exemptions are no longer consistent with the Rail Transportation Policy.

I. SHIPPERS CONTINUE TO BENEFIT FROM PERVASIVE COMPETITION FOR TRANSPORTATION OF THE COMMODITIES AT ISSUE.

A. Crushed Stone

According to the most recent available data, 1,430 companies produce crushed stone in the United States.³ Just two producers filed comments supporting re-regulation, Texas Crushed Stone and Graniterock. Their comments do not show revocation of the crushed stone exemption is necessary to carry out the Rail Transportation Policy.

Graniterock complains about high R/VC ratios. *See* Comments of Graniterock at 1. However, as our opening comments explain, Graniterock’s R/VC ratios are misleading because they are calculated using system-average costs, rather than the unusually high costs incurred to maintain the commuter line traversed by most of Graniterock’s traffic. *See* Opening Comments of Union Pacific Railroad, Verified Statement of Brad A. Thrasher (“Thrasher VS”) at 8-9. Graniterock’s comments thus do not show a need for re-regulation. Rather, they further illustrate why “R/VC ratios are not reliable indicia of whether rates are constrained by competition.” *Id.*, Verified Statement of Kevin M. Murphy (“Murphy VS”) at 7 & n.7. In fact, Graniterock’s rates are effectively constrained by truck and water competition. *See* Thrasher VS at 9 (noting that Graniterock’s crushed stone generally moves only 50 to 85 miles); Comments of Graniterock at 1 (noting competition from stone imported from British Columbia).

Texas Crushed Stone (“TCS”) also fails to show a need for re-regulation. TCS claims rail revenues for crushed stone have increased faster than variable costs. *See* Comments of TCS at 6.

³ http://minerals.usgs.gov/minerals/pubs/commodity/stone_crushed/mcs-2016-stonc.pdf.

However, TCS's claims simply repackage the inadequate, unreliable R/VC-based calculations used in the NPRM. *See generally* Murphy VS at 6-7; Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski & Benton V. Fisher; Comments of BNSF Railway; Comments of the U.S. Department of Transportation at 2 (“[A]lthough the NPRM focuses in large part upon changes in the revenue/variable cost ratio for the specified commodities, that measure, while useful, may not be a sufficiently robust indicator of whether revocation of a commodity exemption is warranted.”).

TCS also repeats claims about marketplace conditions that it made in the first phase of this proceeding—claims the Board appeared to accept at face value in issuing the NPRM.⁴ As discussed below, those claims are inconsistent with the facts.

TCS claims rail competition has been reduced through rail mergers. *See* Comments of TCS at 4. However, as our opening comments explain, TCS always had, and continues to have, direct access to two Class I railroads. *See* Thrasher VS at 8.⁵ TCS claims its access to Union Pacific and BNSF does not provide rail competition because most of its customers are served by only one railroad. *See* Comments of TCS at 2. However, “TCS’s customers enjoy competition between Union Pacific and BNSF because they can ship to Union Pacific-served destination yards or nearby BNSF-served destination yards.” Thrasher VS at 8. TCS’s website confirms its customers are not tied to a single distribution yard:

Approximately 30 unit train aggregate yards with capabilities from 40 railcars to over 100 rail cars have already been built in Texas and Louisiana. There are numerous unit train yards in the Houston

⁴ *See* NPRM at 5.

⁵ TCS is physically served by Georgetown Railroad, which connects to both Union Pacific and BNSF. William Snead, TCS’s president, also “holds the majority interest in the Georgetown Railroad.” <http://www.texascrushedstoneco.com/about-us/our-history/>.

area. If you want a unit train of aggregate, call us and we will help you locate a nearby receiving yard.

The relevant page from TCS's website is attached to these reply comments as Exhibit A.⁶

TCS claims railroads have "force[d]" it to accept unit trains, which it asserts are "very inefficient for the construction industry." Comments of TCS at 4, 5. However, it tells a different story when not in litigation mode. On its website, TCS says it "pioneered the movement of aggregate by unit trains" by joining with a Union Pacific predecessor railroad to apply "for the first unit train rates in Texas." See Exhibit A. On the same page, TCS points to faster and more constant transit times as reasons why "[u]nit trains are an efficient way to move rock over a railroad." *Id.*⁷

TCS also claims trucks are not a viable alternative to rail. It says trucks cannot handle all the crushed stone "in [its] rail served market." Comments of TCS at 4. But as the Board has recognized, "[f]or an alternative mode to provide effective competition, it need not necessarily be 'capable of handling substantially all or even a majority of the subject traffic.'"⁸ Moreover,

⁶ TCS's discussion on its website about working with customers to move crushed stone by rail also refutes TCS's false claim that railroads do not want its business, see Comments of TCS at 4, as does TCS's acknowledgement elsewhere in its comments that "access to the two railroads expands our market reach," *id.* at 2.

⁷ TCS's comments refer to the "years prior to Staggers" when "the most popular shipment size was 10 to 20 cars." Comments of TCS at 5. Now, thirty-six years after the Staggers Act, Union Pacific finds our customers overwhelmingly prefer unit train service, though we still move a small amount of crushed stone in manifest service.

⁸ *E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, NOR 42100, slip op. at 4 (STB served June 30, 2008) (quoting *Amstar Corp. v. Great Ala. S. R.R.*, NOR 38293S (ICC served Nov. 10, 1987)); see also *Rail Gen. Exemption Auth.—Exemption of Hydraulic Cement*, EP 346 (Sub-No. 34), slip op. at 4 (STB served Dec. 17, 1996) ("[T]here is effective competition when a carrier will lose 'some or all' traffic to other carriers if it raises rates.") (citing *Market Dominance Determinations*, 1 I.C.C.2d 118, 129 (1981)); *Aluminum Assn., Inc. et al. v. ACY R. Co., et al.*, 367 I.C.C. 475, 483-84 (1983) (finding effective competition where motor carriage accounted for one-third of nationwide aluminum movements), *aff'd sub nom. Aluminum Co. of Am. v. ICC*, 761 F.2d 746 (D.C. Cir. 1985).

“trucks are placing more pressure on railroads than ever.” Thrasher VS at 8. This is especially true in Texas, where “driver availability has increased significantly as drilling operations have declined.” *Id.* Statements on TCS’s website, as well as TCS’s communications with Union Pacific, make clear that trucking crushed stone is an extremely viable alternative. *See id.*; *see also* Exhibit B (TCS website) (“Every day, an average of 40,000 tons of rock is quarried at Texas Crushed Stone. Fifteen hundred trucks and 100 rail cars then ship the rock to construction jobs in Central and East Texas.”).

Finally, TCS claims its ability to petition for partial revocation of the crushed stone exemption is “not a practical solution as it would not address the big picture, and such a request would incur litigation costs with no assurance of success.” Comments of TCS at 6. We do not know what TCS means by the “big picture.” TCS could seek an exception to the exemption that carves out shipments from its facility.⁹ TCS also could pursue a rate case simultaneously with a petition to revoke, if it could show a simultaneous review would conserve resources and expedite the matter.¹⁰ However, TCS is not entitled to any “assurance of success,” especially where it is directly served by two railroads, has truck alternatives, and competes in an intensely competitive marketplace against crushed stone moving from other sources using rail, truck, and water alternatives. *See* Thrasher VS at 3-7.

⁹ *See, e.g., Rail Gen. Exemption Auth.—Exemption of Hydraulic Cement*, EP 346 (Sub-No. 34) (STB served Dec. 17, 1996) (considering whether to include shipments from a plant in Rapid City, South Dakota, within the scope of the hydraulic cement exemption).

¹⁰ *See, e.g., FMC Wyoming Corp. & FMC Corp. v. Union Pacific RR Co.*, 4 S.T.B. 699 (2000) (simultaneous review); *Simplified Standards for Rail Rate Cases*, EP 646 (Sub-No. 1), slip op. at 99 (STB served Sept. 5, 2007) (“[W]e reserve the right to permit a rate case to proceed concurrently with a request for partial revocation where simultaneous review would conserve resources and expedite the matter.”).

Graniterock and TCS may believe they would be better off with regulated rates than market-based rates, but that is not a sufficient reason to re-regulate crushed stone.

B. Hydraulic Cement

No cement shipper filed comments supporting re-regulation. Comments were filed only by the Portland Cement Association (“PCA”), and they merely rehash unsupported claims from the first phase of this proceeding and recycle the same type of inadequate, unreliable R/VC-based calculations used in the NPRM. PCA’s comments do not show revocation of the cement exemption is necessary to carry out the Rail Transportation Policy.

In 1995, the Interstate Commerce Commission (“ICC”) exempted transportation of hydraulic cement from regulation after finding “railroads face pervasive competition in the transportation of hydraulic cement.”¹¹ The ICC explained: “Intermodal and intramodal competition exist in many markets. Trucks are the dominant mode, while barges and alternative rail carriers also compete.”¹² The ICC also recognized “evidence of extensive geographic competition, which inhibits the railroads from exercising market power.”¹³

Railroads continue to face pervasive intermodal, intramodal, and geographic competition. PCA claims railroad mergers reduced intramodal competition. *See* Comments of PCA at 7. However, PCA does not identify a single cement shipper that lost competition in a rail merger. Why not? Because the Board remedied any potential loss of competition by imposing conditions

¹¹ *Rail Gen. Exemption Auth.—Exemption of Hydraulic Cement*, EP 346 (Sub-No. 34), slip op. at 4 (ICC served July 26, 1995).

¹² *Id.* (footnote omitted).

¹³ *Id.*

on mergers.¹⁴ In fact, many cement plants continue to have access to two rail carriers. *See* Thrasher VS at 12 (giving examples of plants with dual access); *see also* Comments of CSX Transportation, Verified Statement of Louis Muldrow (“Muldrow VS”) at 5 (“Many of the larger cement producing plants are dually accessed, either directly or via a shortline.”); Comments of Norfolk Southern Railway, Verified Statement of James R. Schaaf (“Schaaf VS”) at 9 (“A majority of Norfolk Southern’s [cement] traffic has access to multiple railroads.”).

PCA claims “trucking options have become more limited.” Comments of PCA at 7. It says rail “dominates” cement shipments “to terminals.” *Id.* at 6. But trucks compete with rail by moving cement directly to *customers*, avoiding the costs of terminals. *See* Thrasher VS at 10. In fact, rail has a very small share of the market for transporting cement. “Overall, only 20 percent of tonnage leaving cement plants is transported by rail, with truck accounting for 68 percent and water 12 percent.” Murphy VS at 17. And rail has not gained market share: rail’s market share was also 20 percent in 1992.¹⁵ Even if shipments to terminals were the relevant metric, PCA’s claim of rail dominance misses the mark: “rail accounts for less than half of such shipments.” Murphy VS at 17.

PCA claims truck competition has become less effective because the average length of haul for rail movements of cement has increased to 400 miles. *See* Comments of PCA at 6. However, the market share data discussed above contradict claims that truck competition has become less effective. Moreover, an increase in *rail* length of haul does not mean trucks must

¹⁴ *See Central Power & Light Co. v. Southern Pacific et al.*, 1 S.T.B. 1059, 1071 n.18 (1996) (“[W]hen we found potential competitive harm, we mitigated it through our conditioning power.”).

¹⁵ *See Rail Gen. Exemption Auth.—Exemption of Hydraulic Cement*, EP 346 (Sub-No. 34), slip op. at 3 (ICC served July 26, 1995).

increase their length of haul to remain competitive. Our experience suggests that rail length of haul increased because railroads are allowing cement producers to compete successfully in more distant markets with local cement delivered by truck. *See Thrasher VS* at 11 (“As with crushed stone, Union Pacific sometimes competes with truck when a cement producer we serve wants to penetrate a market that is too distant for our customer to serve economically using truck.”). CSXT’s testimony confirms that our experience is shared by others. *See Muldrow VS* at 6 (“CSXT has active routes in excess of 1200 miles, demonstrating that rail is underwriting geographical competition in the cement market, by enabling large plants to enter distant markets.”). In other words, increased rail length of haul means competition between truck and rail has increased, not decreased.¹⁶

In any event, PCA provides no support for its claim that truck shipments of cement are not feasible beyond 125 miles. *See Comments of PCA* at 6. By contrast, a CSXT witness testified that CSXT “has tremendous difficulty competing against trucks at distances of less than 500 miles in the cement market” and “has active routes in excess of 1200 miles.” *Muldrow VS* at 6. Norfolk Southern also notes evidence from the Board’s Railroad-Shipper Transportation Advisory Council that trucks provide strong competition for cement movements up to 500 miles. *See Comments of Norfolk Southern Railway* at 27.

Finally, PCA does not address geographic competition. Our opening evidence contains substantial evidence of the extensive geographic competition provided by other railroads, trucks,

¹⁶ Rail length of haul also may have increased as the cement industry has consolidated. *See Comments of PCA* at 6; *Muldrow VS* at 5-6. But manufacturers likely consolidated production at plants with access to multiple railroads, or to rail and barge service—or recognized that existing truck, rail, barge, and geographic competition provide sufficient protection against anticompetitive conduct.

barges, and imports. *See* Thrasher VS at 10-14. CSXT and Norfolk Southern witnesses supply similar evidence. *See* Muldrow VS at 5-6; Schaaf VS at 9.

In sum, PCA provides no evidence other than flawed R/VC-based calculations to substantiate its claims that competition for transporting cement has changed significantly since the ICC exempted hydraulic cement in 1995. By contrast, Union Pacific’s evidence and evidence submitted by other railroad parties demonstrate that railroads continue to face pervasive competition in transporting hydraulic cement.

C. Steel and Scrap Steel

One steel shipper and three trade associations filed comments supporting re-regulation. Those comments do not show revocation of the steel and scrap steel exemptions is necessary to carry out the Rail Transportation Policy.

AK Steel Corporation (“AK Steel”), the shipper that filed comments, says nearly nothing about transportation market conditions for steel and scrap steel, and nothing about how conditions have or have not changed over time. AK Steel says “the majority” of its traffic “must be shipped by rail,” and “[o]n many of these moves, it is captive to a single rail carrier.” Comments of AK Steel at 3. However, AK Steel does not claim its circumstances are different than when the ICC exempted steel in 1993 and scrap steel in 1995. For example, AK Steel does not claim any facility lost rail competition in a merger—nor could it, as explained above. *See supra* pp. 6-7 & n.14.

Similarly, although the Board raised concerns about increases in the average length of haul by rail for steel and steel scrap,¹⁷ AK Steel is conspicuously silent on the issue, suggesting

¹⁷ *See* NPRM at 7.

the Board's concerns are misplaced. In fact, the evidence shows the change in average length of haul by rail likely reflects a decline in shorter, inter-mill shipments and the related rise of mini-mills, not a reduction in rail competition. *See* Thrasher VS at 19; Schaaf VS at 4, 6-7. Moreover, the evidence shows trucks remain competitive even at longer distances. *See* Thrasher VS at 17-19. Abundant rail competition also exists for longer movements of steel products. For example, Canadian National, CSXT, and Norfolk Southern all compete to originate movements from east of the Mississippi River, and BNSF, KCS, and Union Pacific all compete from interchanges with those carriers to the Mexican border. *See* Thrasher VS at 22; Schaaf VS at 4-5; Comments of CSX Transportation, Verified Statement of Michael A. Rutherford on Primary Iron or Steel Products at 6 (nearly 85% of steel mills in CSXT territory are jointly served).

Finally, AK Steel claims the Board's 2007 decision in *Simplified Standards for Rail Rate Cases* made the partial revocation process an "insurmountable barrier" by requiring shippers to litigate the merits of partial revocation before challenging exempt rates. Comments of AK Steel at 7. However, the Board expressly "reserve[d] the right to permit a rate case to proceed concurrently with a request for partial revocation *where simultaneous review would conserve resources and expedite the matter.*"¹⁸ The Board thus properly protected railroads from incurring substantial costs to defend rate cases that likely lack merit while leaving the door open to simultaneous proceedings in appropriate circumstances.

Two trade associations, Steel Manufacturers Association ("SMA") and American Iron and Steel Institute ("AISI"), filed joint comments that rehash material already discussed in the NPRM, including R/VC-based calculations similar to those used in the NPRM. For example,

¹⁸ *Simplified Standards for Rail Rate Cases*, EP 646 (Sub-No. 1), slip op. at 99 (STB served Sept. 5, 2007) (emphasis added).

SMA/AISI echo the Board’s observation that some steel production moved out of the Great Lakes Region with the rise of mini-mills, *see* Comments of SMA/AISI at 13, but they do not address the increased rail, truck, and geographic competition created by the rise of mini-mills, *see* Thrasher VS at 18-19. SMA/AISI also echo the Board’s observation that the average length of haul by rail has increased, *see* Comments of SMA/AISI at 15-16, but the evidence shows this is likely just the mathematical consequence of fewer short hauls by rail, *see* Thrasher VS at 19; Schaaf VS at 4, 6-7. Moreover, as discussed above, the evidence in the record shows truck and rail competition remains strong even at longer distances. *See* Thrasher VS at 17-19, 22; Schaaf VS at 4-7.

SMA/AISI also claim driver shortages have created trucking availability problems. *See* Comments of SMA/AISI at 14-15. However, the most current evidence shows truck competition remains intense. *See* Thrasher VS at 16-20; Schaaf VS at 5, 6-7.¹⁹ In fact, trucks are maintaining or increasing their share of steel and scrap steel movements. *See* Comments of Norfolk Southern Railway, Verified Statement of Liesl J. McLemore at 4-5 (Figures 4 & 5). Finally, SMA/AISI note the “dramatic surge in steel commodity imports.” Comments of SMA/AISI at 3. However, they fail to appreciate that evidence of surging imports cuts against arguments for re-regulation: foreign imports play a powerful role in constraining rail rates for domestic steel and scrap steel. *See* Thrasher VS at 22-23; Schaaf VS at 5.

A third trade association, the Institute of Scrap Recycling Industries (“ISRI”), also filed comments that do not provide any meaningful evidence about changes in transportation market

¹⁹ *See also* Loretta Chao, *Freight Rates Push Lower as Truck Capacity Outweighs Demand*, Wall Street Journal, June 7, 2016 (“Shippers are using greater leverage in a weak U.S. trucking market to drive down freight rates.”), <http://www.wsj.com/articles/freight-rates-push-lower-as-truck-capacity-outweighs-demand-1465329126>.

conditions. ISRI claims rail mergers “increased substantially the number of iron or steel scrap movements that are captive to only one railroad at either origin or destination.” Comments of ISRI at 6. However, ISRI does not, and could not, identify a single facility that lost rail competition in a merger. *See supra* pp. 6-7 & n.14. ISRI also claims trucks cannot completely displace rail for most members because “a portion of their traffic is rail dependent.” Comments of ISRI at 7. But ISRI does not explain how that reflects changed conditions, much less a change that prevents trucks from providing effective competition. *See supra* p. 4 & n.8 (explaining that an alternative mode can provide effective competition without handling all or even a majority of the subject traffic). Finally, ISRI makes vague, unsubstantiated claims that its members have concerns about railroad refusals to negotiate contracts and equipment supply. *See* Comments of ISRI at 7. On Union Pacific, a substantial portion of our scrap steel traffic moves under contract. Equipment supply can be challenging, but the challenge grows out of the nature of the scrap steel industry, in which customers buy from different sources each month and place the vast majority of car orders on short notice in the same week of the month. This not only makes equipment planning and distribution particularly challenging, it also leads to poor car utilization and lower return on investment on railroad-owned cars. If these equipment issues reveal anything about railroad market power, they reveal a lack of market power: we conform to the industry’s way of doing business, even though it is highly inefficient from our perspective.²⁰

In sum, proponents of revoking the steel and scrap steel exemptions provide no evidence that remotely justifies re-regulation. The evidence in the record shows steel and scrap steel

²⁰ *See also* Comments of CSX Transportation, Verified Statement of Michael A. Rutherford on Iron or Steel Scrap at 3 (“Competition is so significant that, under current conditions, the return profile on CSXT’s fleet of gondolas does not justify reinvestment.”).

movements are subject to pervasive rail, truck, barge, and geographic competition. *See, e.g.*, Thrasher VS at 15-23; Schaaf VS at 4-8; Comments of CSX Transportation, Verified Statement of Michael A. Rutherford on Iron or Steel Scrap at 4-5; *id.*, Verified Statement of Michael A. Rutherford on Primary Iron or Steel Products at 5-6.

D. Forest Products

The Board should reject the request of the American Forest & Paper Association (“AF&PA”) to commence a proceeding to revoke the class exemptions applicable to forest and paper products (“forest products”).²¹ AF&PA’s evidence supporting revocation consists almost entirely of the same type of inadequate, unreliable R/VC-based calculations used in the NPRM.²²

AF&PA claims marketplace conditions have changed as a result of rail mergers, but like other shipper parties in this proceeding, it does not, and could not, identify a single facility that lost rail competition in a merger. *See supra* pp. 6-7 & n.14. AF&PA says mergers reduced geographic competition. It claims the Board no longer considers geographic competition in rate cases after concluding that such competition is “less relevant in light of the rapid consolidation in the rail industry.” Comments of AF&PA at 7. That claim is patently false. In *Market Dominance Determinations*, 3 S.T.B. 937 (1998), the Board explained it was eliminating consideration of product and geographic competition to expedite rate cases and reduce burdens on parties and the

²¹ We are not addressing the forest products-related comments filed on behalf of the Wisconsin Central Group, which relate solely to service provided by railroads other than Union Pacific.

²² Union Pacific’s review of AF&PA’s R/VC-related claims identified a problem with relying on R/VC-based calculations that was not discussed in the opening comments of railroad witnesses; namely, the Board’s R/VC calculations rely on assumptions about routes of movements that can be inconsistent with actual routes. If the Board’s routing model understates the actual length of a movement, it will understate the variable costs, and thus overstate the R/VC ratio. Moreover, the impact of such inconsistencies will vary from year to year based on changing traffic patterns and the waybill sampling process.

agency, but stated that it had “no doubt that in certain circumstances product and geographic competition effectively limit railroad pricing, as the ICC in fact found in several cases.”²³ The Board also observed that “[m]any shippers acknowledge that product and/or geographic competition can effectively constrain a railroad’s rates.”²⁴

Moreover, AF&PA’s witness presents flawed evidence to support his claim that rail mergers led to higher freight rates. *See* Comments of AF&PA, Verified Statement of Henry Julian Roman (“Roman VS”) at 7-8. First, he incorrectly says the last Class I merger occurred in 2001, when it actually occurred in 1999.²⁵ Second, he purports to quantify changes in rail rates by examining changes in average revenue per car (“ARC”). But increases in ARC are not the same as rate increases. ARC increases when shippers benefit from pro-competitive, efficient, single-line service that mergers create to move their products over longer distances without interchanges between railroads.²⁶ Likewise, ARC will increase if larger capacity cars replace smaller capacity cars, even if a railroad induces shippers to use larger capacity cars by offering them a lower rate per ton. Accordingly, any measure of changes in rail rates over time should employ a metric that accounts for changes in weight and distance, *i.e.*, revenue per-ton-mile. In fact, throughout the entire period of rail industry consolidation, and for years afterwards, the Board’s own study determined that rail rates measured by revenue per ton-mile *declined*.²⁷

²³ *Id.* at 946 n.49.

²⁴ *Id.* at 944.

²⁵ *See Canadian National, et al.—Control—Illinois Central, et al.*, 4 S.T.B. 122 (1999).

²⁶ For example, if two railroads each charge \$500 per car for an interline route and then merge, under Mr. Roman’s logic the merged entity’s \$1000 per car charge would represent a doubling of the rate when in fact the shipper does not pay a penny more.

²⁷ *See* Surface Transportation Board, *Study of Rail Rates: 1985-2007* (Jan. 16, 2009).

AF&PA also claims trucks are experiencing a capacity shortage. *See* Comments of AF&PA at 8. However, AF&PA's own data show truck rates have merely increased along with inflation, which suggests there is not a capacity shortage. *See* Roman VS at 9; *see also supra* p. 11 n.19 (Wall Street Journal article stating that truck capacity outweighs demand).

Finally, AF&PA notes that rail shipments of forest products have declined over the years. *See* Comments of AF&PA at 17-18. Union Pacific would certainly prefer to be handling greater volumes of forest products, as long as rates are sufficient to support reinvestment in the assets used to provide the service. While residential construction has not fully recovered from the recession that followed the housing boom and devastated underlying demand,²⁸ we have made substantial investments to provide service to forest products shippers. Since 2011, we increased our centerbeam fleet by 47%, and our fleets of 50-foot and 60-foot boxcars by 10%. We have also ordered 400 additional 60-foot boxcars to be delivered in 2016-2017.

Union Pacific described the intensely competitive marketplace for transportation of forest products in comments we filed in the earlier phase of this proceeding. The relevant portions of those comments are attached to these comments as Exhibit C. What we said then remains true today. The market for transporting forest products is highly truck competitive. Indeed, trucks dominate the market. Rail competition is also intense, and shippers whose facilities are served exclusively by Union Pacific can readily transload their products to obtain service from BNSF. Finally, geographic competition is a major factor: shippers can send forest products to a variety of destinations, and receivers can obtain forest products from a variety of sources, which creates opportunities for trucks and other railroads to move the traffic instead of Union Pacific.

²⁸ *See* <http://www.census.gov/briefm/esbr/www/esbr020.html>.

In sum, there is no evidence of market power abuse that justifies revisiting the forest products exemptions.

II. THE COMMODITY EXEMPTIONS CONTINUE TO ADVANCE CONGRESS'S PROCOMPETITIVE DEREGULATORY POLICIES.

The Board may revoke an exemption only if regulation is shown necessary to address demonstrated abuse of market power or otherwise to carry out the Rail Transportation Policy. *See* 49 U.S.C. § 10502(d); H.R. Rep. 104-422, at 169 (1995). The proponents of re-regulation cannot make the required showing, so they offer alternative justifications, all of which are deficient as a matter of law and policy.

First, several shipper parties say the major rationale for exemptions disappeared once railroads no longer faced the regulatory burden of filing tariffs. *See, e.g.*, Comments of AK Steel at 4; Comments of SMA/AISI at 10-12; Comments of AF&PA at 13-14. However, as discussed in our opening comments, if Congress cared only about reducing the burdens of tariff filings, it would have removed its deregulatory mandate when it eliminated tariff filings in the Interstate Commerce Commission Termination Act in 1995. Instead, Congress strengthened its mandate by *requiring* the Board to exempt rail service from regulation to the “maximum extent” possible. *See* Opening Comments of Union Pacific Railroad at 13-14.

Second, several shipper parties say the Board should eliminate exemptions because the rail industry is financially stronger than when the commodities at issue were exempted from regulation. *See, e.g.*, Comments of AK Steel at 7; Comments of ISRI at 10; Comments of AF&PA at 9-13. However, as Dr. Murphy explained on opening, “[e]xperience in the rail industry and elsewhere teaches that relying on competitive markets forces produces better economic outcomes than reliance on regulation.” Murphy VS at 3. Congress’s deregulatory mandate was not a temporary measure designed to improve the health of the rail industry before

re-imposing regulation; rather, it reflects fundamental confidence in our market-based economy and a broader policy of allowing market forces to establish railroad rate and service terms absent an affirmative showing that regulation is necessary to advance a specific policy. *See* 49 U.S.C. § 10502(d); *id.* §§ 10101(1), (2).

Finally, SMA/AISI say re-regulation is warranted as a matter of “fundamental fairness” because deregulation eliminates certain regulatory obligations that would otherwise be imposed on railroads. *See* Comments of SMA/AISI at 20-22. However, eliminating regulatory obligations was the very point of deregulation. Congress understood it is best to treat as many shippers as possible like the vast majority of other companies in our national economy for whom price and service terms are determined by the forces of supply and demand rather than by government regulators. Wholesale revocation of exemptions is unwarranted. Shippers actually subject to market power abuse can obtain partial revocation of exemptions, ensuring that the Board can regulate to the extent regulation is necessary to carry out the Rail Transportation Policy, *see* 49 U.S.C. § 10502(d), while still minimizing regulatory control over the rail transportation system, *see id.* § 10101(2).²⁹ As we explained on opening, the commodity exemptions continue to play an important role in minimizing regulatory control over railroad rates, service, and investment where shippers are well protected by marketplace competition. *See* Comments of Union Pacific Railroad at 13-16.

²⁹ *See, e.g., Pyco Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd. Co.*, FD 34802, slip op. at 4 (STB served June 21, 2006) (“We view SAW’s rail service as having been so inadequate as to amount to an abuse of market power. Therefore, to remove any doubt, we can and will revoke the exemptions, to the extent required to provide for alternative rail service.”); *Granite State Concrete Co. v. Boston & Maine Corp.*, NOR 42083, slip op. at 7-8 (STB served Sept. 15, 2003) (revoking class exemption to the extent necessary to allow the Board to consider service complaint).

III. CONCLUSION

The Board should withdraw its proposal to re-regulate rail transportation of crushed stone, hydraulic cement, coke, steel, and scrap steel. The evidence in the record demonstrates that pervasive rail, truck, water, product, and geographic competition for transporting the commodities at issue protect shippers from abuse of market power. The Board should likewise reject AF&PA's request to commence a proceeding to revoke class exemptions applicable to forest products.

Respectfully submitted,

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August 26, 2016

UNIT TRAINS

TODAY MOST AGGREGATES THAT MOVE BY RAILROAD MOVE IN UNIT TRAINS.



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SE HABLA
ESPANOL

WHAT IS AN AGGREGATE UNIT TRAIN?

Today most aggregates that move by railroad move in unit trains. Unit trains are groups of railcars (usually from 40 to 120 rail cars) that move as a solid train from a quarry to a unit train receiving yard. The unit train will be powered by dedicated locomotives and crews. These trains typically move from the quarry to the receiving yard in 24 to 48 hours and will make a round trip in slightly less than a week.



WHY ARE UNIT TRAINS EFFICIENT?

Unit trains are an efficient way to move rock over a railroad for several reasons:

- First, switching of railcars in intermediate yards is eliminated.
- Second, the turn around time from origin to destination and return is usually about one half the times of cars in manifest service (shipments of less than 40 cars).
- Third, the time from origin to destination is usually more constant than manifest service.
- Fourth, not having to switch railcars reduces rail yard congestion. Fifth, the cost of unit train service is easier to calculate than manifest service.

HISTORY OF AGGREGATE UNIT TRAINS IN TEXAS

Texas Crushed Stone and Georgetown Railroad pioneered the movement of aggregate by unit trains. In 1976 Texas Crushed Stone joined the MKT Railroad and applied for the first unit train rates in Texas. This application was opposed by other Texas Railroads and the rate application was denied.

In 1979 the unit train rates were approved in a second rate application. Shortly after the unit train rates were approved for Texas Crushed Stone, Georgetown Railroad and MKT Railroad rates were deregulated.

The movement of unit trains of aggregates has been a common practice in Texas for the past thirty years. Starting in 2002 the Union Pacific started a program of "Rocktimization" in which incentive rates were placed in effect to encourage unit trains.



TCS Eureka Yard Houston, TX 1980's

WHAT FACILITIES ARE NECESSARY TO SHIP AND RECEIVE UNIT TRAIN?

In most cases, a unit train must be able to be picked up by the Class I rail carrier and moved to the destination without switching. To make such a move, the Class I carriers must have passing tracks that will hold the unit train. In addition, the destination receiving the unit train should have enough trackage to receive the whole train without switching. This will require more than 5500 feet of open track at the destination. Class I carriers prefer that unit train receiving yards have two switches and a loop track.



Hopper Car



Gondola Car

WHAT ROLE CAN TEXAS CRUSHED STONE AND GEORGETOWN RAILROAD PLAY IN LAUNCHING A UNIT TRAIN?

Texas Crushed Stone, working in cooperation with the Georgetown Railroad, has the material, railcars (both hoppers and gondolas) and the necessary trackage to launch multiple unit trains of any size on a single day. All that is required to launch an aggregate unit train from TCS/GRR is a phone call. Our facilities are in place and waiting for your call.



Because the Georgetown Railroad connects with both The Union Pacific Railroad (UP) and The Burlington Northern Santa Fe (BNSF); it is economical to ship unit trains to destinations on either railroad.

HOW UNIT TRAINS ARE TYPICALLY UNLOADED?

Aggregate unit trains can be made up of either bottom dump hoppers or gondola cars. Hopper railcars must be moved over an unloading hopper or unloading trestle. Moving the train over the unloading point requires almost twice the trackage than a yard designed to receive gondola cars.



TCS Eureka Yard Unloading Trestle 1980's

In recent years it has become very popular to unload gondola unit trains with hydraulic excavators which operate on top of the gondola cars. Several companies, such as Gulf Coast Limestone, have made a business of “contract unloading” of aggregate unit trains with top unload hydraulic excavators.



HOW MANY FACILITIES ARE HERE IN TEXAS AND LOUISIANA TO RECEIVE AGGREGATE UNIT TRAINS?

Approximately 30 unit train aggregate yards with capacities from 40 railcars to over 100 rail cars have already been built in Texas and Louisiana. There are numerous unit train yards in the Houston area.

If you want a unit train of aggregate, call us and we will help you locate a nearby receiving yard.

WHAT ARE THE TYPICAL FREIGHT CHARGES FOR AGGREGATES MOVING IN UNIT TRAIN SERVICE?

On a typical unit train move, the freight rate will depend on the number of railcars in the unit train. Unit train pricing for both the Union Pacific and Burlington Northern Santa Fe can be found on their website.

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MAP & DIRECTIONS

LOCATED AT GEORGETOWN, TEXAS, JUST 30 MILES NORTH OF AUSTIN, THE TEXAS CRUSHED STONE QUARRY IS DIRECTLY ADJACENT TO INTERSTATE HIGHWAY 35 PROVIDING EXCELLENT ACCESS FOR TRUCKS.



CONTACT
INFORMATION

MAP & DIRECTIONS

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A WORLD CLASS QUARRY

The quarry spans about 7,500 acres in Georgetown and Round Rock and is the state's largest. In addition, the quarry is served by the Georgetown Railroad Company, a short line carrier that connects with both the Union Pacific and Burlington Northern Santa Fe Railroads. Every day, an average of 40,000 tons of rock is quarried at Texas Crushed Stone. Fifteen hundred trucks and 100 rail cars then ship the rock to construction jobs in Central and East Texas.

TEXAS CRUSHED STONE COMPANY

5300 South IH-35
P.O. Box 1000
Georgetown, Texas 78627

I-35 Exits:

Office Exit #259
Georgetown Scale House Exit #257
Round Rock Scale House 2 miles west of S. IH-35 on 1431

Hours of Operation:

6AM – 4PM Monday – Friday

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 704

REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS

WRITTEN TESTIMONY OF
UNION PACIFIC RAILROAD COMPANY

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Date of Submission: January 31, 2011
Date of Public Hearing: February 24, 2011

VERIFIED STATEMENT

OF

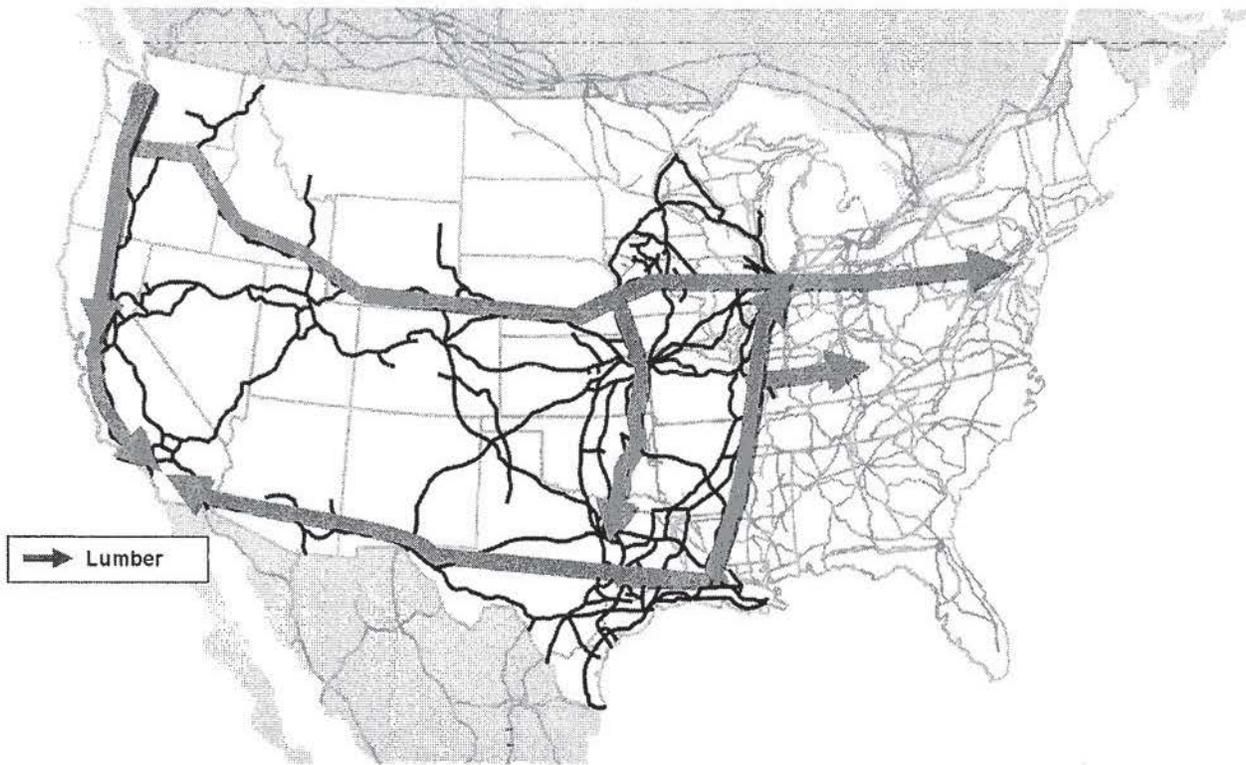
ERIC BUTLER

My name is Eric Butler. I am Vice President and General Manager - Industrial Products for Union Pacific Railroad Company ("Union Pacific"). I was appointed to my present position in April 2005. Since joining Union Pacific in 1986, I have held a variety of positions, including Vice President - Automotive, Vice President - Supply, Vice President - Planning & Analysis, and Director of Corporate Compensation.

As Vice President & General Manager - Industrial Products, I am responsible for managing Union Pacific's Industrial Products business unit. Union Pacific's Industrial Products business involves shipments of hundreds of commodities between thousands of shippers and receivers throughout North America. A very large portion – approximately 89% – of Union Pacific's Industrial Products business is exempt from regulation as a result of either a commodity exemption or the boxcar exemption or both, and exempt Industrial Products traffic comprised approximately 18% of exempt business that moved on Union Pacific in 2009. The great diversity of the exempt traffic that we handle makes it impractical to address all of our exempt Industrial Products traffic in detail. Accordingly, my statement focuses on several of the largest segments of the business; namely, lumber and wood products; paper products; steel and scrap; and crushed stone, sand, and gravel. However, Union Pacific's experience in the marketplace with these commodities is entirely consistent with our experience with the other exempt Industrial Products traffic: the traffic is subject to pervasive competition from trucks and other

I. LUMBER AND WOOD PRODUCTS

Union Pacific's lumber and wood products traffic includes shipments of lumber, panel, plywood, and oriented strand board – products used in new home construction and repair and remodeling. Our shipments originate primarily in the Pacific Northwest and Canada, but also in the Southeast. Lumber and wood products are exempt commodities. In addition, panel, plywood, and oriented strand board move by boxcar, so shipments are subject to the boxcar exemption.



Union Pacific faces intense competition for movements of lumber and wood products. Trucks dominate the market and are competitive with rail over long distances. Rail competition is also intense. Shippers whose facilities are served exclusively by Union Pacific can readily transload their products to obtain service from BNSF Railway. Geographic competition is also a significant market factor: products from the Pacific Northwest and Western Canada must compete with products from the Southeast United States and from Eastern Canada.

All these factors combine to limit Union Pacific's participation in the marketplace and constrain the rates we can charge.

Truck Competition. Union Pacific faces intense competition from trucks. Trucks offer shippers advantages in terms of cycle time and speed that railroads cannot match. Shippers can use trucks to get their product to market the day after receiving an order -- generally in less time than it would take a railroad to position an empty car for loading at a shipper's facility. In addition, trucks carry about 25% of what a single rail car carries, making truck more economical for smaller shipments, and providing shippers a competitive option for larger orders. In the marketplace for transporting lumber and wood products, trucks frequently offer service and pricing that we simply cannot match.

Trucks are a dominant force not only for shorter distance moves, but also for longer distance moves, where railroads are often thought to have an advantage. Trucks have captured a significant share of this traffic moving from the Pacific Northwest into Northern and Southern California. Last year, Union Pacific reduced our rates from the Pacific Northwest and Northern California to the Las Vegas area in an effort to recapture business that we had lost to truck. Union Pacific does have an advantage over trucks for certain long-distance movements, particularly movements from the Pacific Northwest to the Northeast, but as we discuss next, that business is subject to fierce competition from BNSF. Our rates are also constrained by geographic competition that could move by truck or other railroads from Eastern Canada or the Southeast to receivers in the Northeast.

Rail Competition. Even when Union Pacific has an advantage over trucks, we are subject to intense competition from other railroads, primarily BNSF. In the Pacific Northwest, BNSF has access to a substantial number of the rail-served lumber and wood products shippers.

Even when Union Pacific and BNSF are not competing head-to-head at a particular shipper's facility, we must provide rates that allow our customers to compete with shippers that BNSF serves. If our rates are too high, our customers will be forced to charge higher rates for their products. They will lose business to shippers who are paying lower rates to BNSF, and thus can afford to charge lower rates to their customers. Union Pacific, in turn, would lose that business as well.

Union Pacific's rates are also constrained by our customers' ability to transload their products to BNSF. The costs of transloading are low in relation to the delivered cost of a carload of lumber or wood products. This means that transloading to BNSF is a viable option for shippers that are solely served by Union Pacific. Shippers remind us of this option when they are not satisfied with our proposed rates or service terms. In fact, one of our largest customers recently told us that we had lost more than 150 railcars a month, in part because BNSF had quoted rates from an Oregon transload to destinations in Phoenix, Chicago, and Texas that were lower than our rates directly from the customer's facility.

Union Pacific is subject to the same types of competitive forces when dealing with customers that originate lumber and wood products in the Southeast. Union Pacific and BNSF have similar abilities to this traffic in the Southeast. We must also compete with BNSF for traffic that originates on eastern carriers and moves to the West.

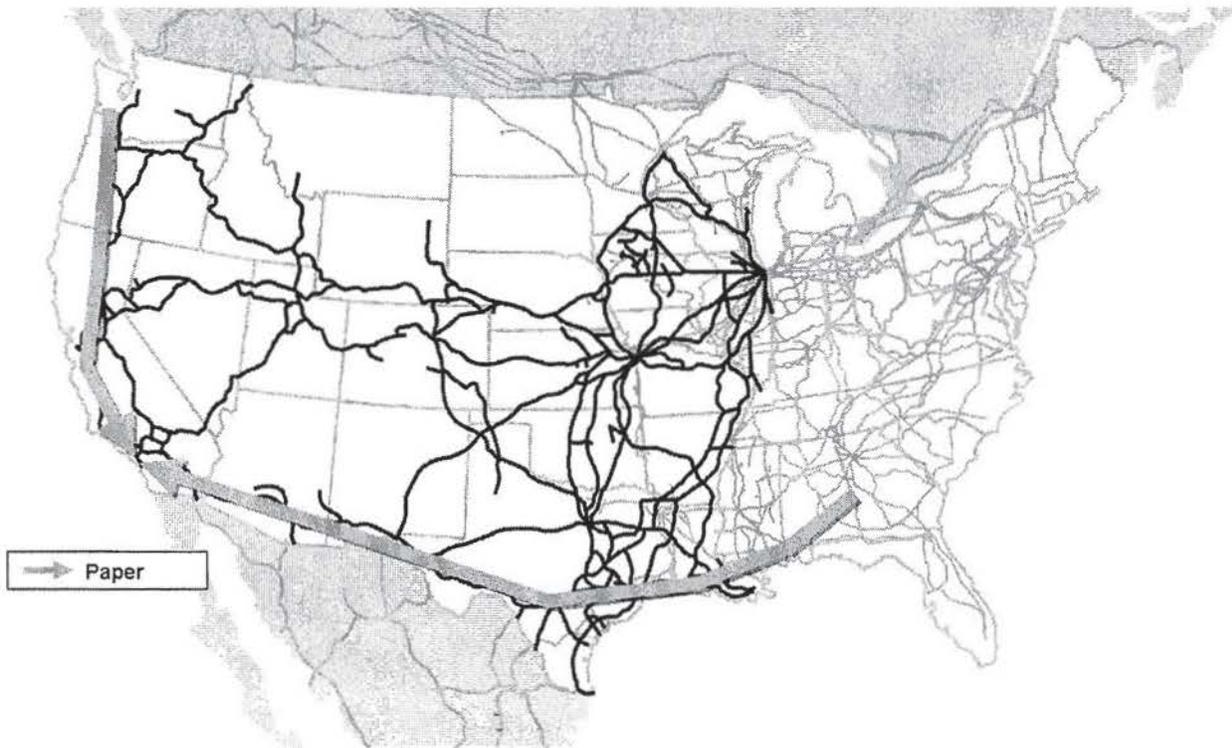
Geographic/Product Competition. Finally, Union Pacific's rates for lumber and wood products are constrained by receivers' ability to obtain these products from a variety of sources. This creates opportunities for trucks and other railroads to move the traffic instead. Our rates for long-haul movements of traffic originating in the Pacific Northwest are thus constrained

by rates for lumber and wood products that other carriers originate in the Southeast or Eastern Canada, and byproducts arriving in East Coast ports from Europe.

I understand that when the Interstate Commerce Commission was considering whether to exempt lumber and wood products, shippers testified that the substantial intermodal, intramodal, and geographic competition for their products made regulation unnecessary. In my experience, the marketplace remains extremely competitive. Union Pacific must compete with trucks and other rail carriers to maintain a foothold in the marketplace, and shippers have benefited and continue to benefit from this highly competitive environment.

II. PAPER PRODUCTS

Union Pacific's paper traffic includes many different specific products; the most significant is packaging paper. These large rolls of brown paper are used to make cardboard boxes. As shown in the map below, much of Union Pacific's paper traffic originates in the Southeast and the Pacific Northwest, for delivery to Southern California.



Approximately 50% of our paper traffic originates on eastern railroads. Most paper products are exempt commodities, and they all move either in boxcars or, as is increasingly the case, in intermodal service.

Union Pacific faces intense competition for movements of paper products. Trucks carry almost all of the short-haul business, and in recent years they have taken a larger and larger share of the traffic moving between 500 and 1,000 miles. For traffic still moving by rail, Union Pacific faces significant competition from BNSF. BNSF is equally well suited to receive paper traffic originating on eastern railroads. BNSF also has access either directly or via transloads to most of the traffic that Union Pacific can originate in the Pacific Northwest and Southeast. These factors combine to limit our participation in the paper business and constrain the rates we can charge.

Truck Competition. Trucks dominate the short-haul business, as they always have. They are also increasingly capturing traffic in lanes where railroads previously had an advantage. For example, traffic that once moved by boxcar from Washington and Oregon to Northern and Central California, and from Arkansas and Louisiana to Texas, is now moving by truck. Often, we simply cannot match the rates and service that our customers tell us they receive from trucks in these lanes.

Nonetheless, Union Pacific is continually trying to recapture business that was lost to truck and win new business that otherwise would move by truck. For example, we reduced rates for traffic moving from Toledo, Oregon, to Sacramento, California, to recapture 400 carloads. We also reduced rates to win 300 carloads from Mulford, Texas, to Fort Smith, Arkansas. And we have offered a rate reduction as part of an effort with Canadian National to

capture traffic that currently moves 430 miles by truck from Ferguson, Mississippi, to Galveston, Texas.

Rail Competition. Even in lanes where Union Pacific still has an advantage over trucks – primarily between the Southeast and California – shippers benefit from strong competition between Union Pacific and BNSF. BNSF competes with Union Pacific for most of the western paper destinations by accessing shipper facilities directly or interchanging traffic that originates on eastern carriers. In addition, Union Pacific and BNSF do not need direct access to shipper or receiver facilities to compete: paper products can readily be transloaded at one or even both ends of a movement. For example, after losing to truck some boxcar business from Oregon to Los Angeles, we then lost the remainder of the business to a BNSF transload.

In fact, as I mentioned above, a significant trend in the marketplace is the movement of paper products in intermodal containers. Union Pacific and BNSF move large volumes of containerized imports from California into the Southeast, which means that a large number of containers must be moved back to California. Union Pacific and BNSF offer low back-haul rates to shippers willing to transport goods in these containers, which would otherwise have to move empty. Paper shippers in the Southeast are increasingly shifting traffic away from boxcars and to those containers to take advantage of these low rates. Shippers have told us that when they are placing business up for bid, we are competing against rail, truck, and intermodal alternatives. All of this makes for an extremely competitive marketplace.

III. STEEL AND SCRAP STEEL

Union Pacific's steel and scrap steel business includes shipments of steel plate, sheet, and coil; shipments of manufactured steel products for the automotive, appliance, pipeline, and construction industries; and shipments of scrap to mini-mills that produce steel. As shown in the map below, most of Union Pacific's steel shipments originate on other carriers. Those