

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

)
)
)
)
)
)
)

Ex Parte No. 704 (Sub-No. 1)

241176

**COMMENTS OF THE
STEEL MANUFACTURERS ASSOCIATION AND
AMERICAN IRON AND STEEL INSTITUTE**

ENTERED
Office of Proceedings
July 26, 2016
Part of
Public Record

Peter A. Pfohl
Dan M. Jaffe
Katherine Waring
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for
Steel Manufacturers Association
American Iron and Steel Institute

Dated: July 26, 2016

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

)
)
)
)
)
)
)

Ex Parte No. 704 (Sub-No. 1)

**JOINT COMMENTS OF THE
STEEL MANUFACTURERS ASSOCIATION AND
AMERICAN IRON AND STEEL INSTITUTE**

The Steel Manufacturers Association (“SMA”) and the American Iron and Steel Institute (“AISI”)¹ hereby submit these Joint Comments in support of the Notice of Proposed Rulemaking served by the Board on March 23, 2016 in the above-captioned proceeding (“NPRM”) seeking comments on the revisiting of the Board’s rail service and commodity exemptions, and in particular, the Board’s proposal to remove the exemptions for primary iron or steel products (STCC No. 33-12), iron or steel scrap, wastes, or tailings (STCC No. 40-211), and coke produced from coal (STCC No. 29-914) (collectively, the “steel commodities”).

SUMMARY

In its March 23rd NPRM, the Board invited comment on its proposal to revoke the existing class exemptions for the steel commodities, which the Board has concluded, based on the record in this proceeding, is necessary to carry out the rail

¹ In these Joint Comments, SMA and AISI collectively are sometimes referred to as “Steel Shippers.”

transportation policy of 49 U.S.C. § 10101. SMA/AISI members are major shippers of exempt commodities, with the railroads collecting well over \$3 billion in revenues annually from steel commodity shipments.

SMA/AISI strongly agree with the Board's NPRM that the rationale and need for continuation of the Interstate Commerce Commission's ("ICC") former exemption decisions for steel commodities, issued over two decades ago, no longer exists. Today the railroads are financially robust, and operate today in a changed, lightly regulated environment. Additionally, in many instances, SMA/AISI members lack effective intra- or intermodal competition, as reflected in part by the significant increases in railroad revenue-to-variable cost (R/VC) ratios for steel commodity shipments over the past decade and beyond reflected below.

Given the substantial changes in the competitive and regulatory landscape for transportation shipments that have occurred since the Board adopted the steel commodity exemptions, revocation is fully warranted at this time. Providing steel shippers access to the Board's regulatory oversight and processes, including the ability to obtain common carrier service upon reasonable request, the maintenance of reasonable practices and rates, and the provision of adequate service is clearly necessary and appropriate. Revocation will help facilitate the full and fair participation of steel shippers in current and future regulatory proceedings and minimize regulatory burdens on shippers seeking administrative relief – while not increasing regulatory burdens on carriers.

These Joint Comments are supported by the analysis of James N. Heller of Hellerworx, as reflected below, based on his analysis of the STB's Carload Waybill Sample data from 1988 through 2014 (latest year of data available).

IDENTITY AND INTEREST

SMA is the primary trade association for electric arc furnace steel ("EAF") producers, often referred to as "minimills." SMA's 31 member companies account for over 75 percent of domestic steelmaking capacity. In addition, SMA member companies are the nation's largest recyclers, having recycled more than 70 million tons of steel scrap last year, with approximately 80 percent of that consumed in EAFs.

The AISI serves as the voice of the North American steel industry in the public policy arena. AISI is comprised of 19 producer member companies, including integrated and electric furnace steelmakers, accounting for approximately 70 percent of U.S. steelmaking capacity with facilities located in 41 states, as well as Canada and Mexico.

The member companies of SMA and AISI rely on the railroads to transport inbound movements of raw materials, inter-plant movements of in-process products, and outbound movements of finished products. Especially given the current state of the steel industry in the United States, which is suffering from a dramatic surge in steel commodity imports from a number of countries around the world, much of which is dumped and subsidized, SMA/AISI's members have a significant interest in moving their inbound and outbound materials and products efficiently and cost effectively.

Rail transportation costs are a substantial component of the cost of doing business for SMA/AISI's members. Railroad rates for steel commodities have been steadily increasing in recent years, and many members are without adequate modal competitive options for their shipments. Railroad market power and lack of feasible, competitive options for steel manufacturers in many instances has had an adverse impact on the ability of steel manufacturers to compete in the marketplace, and to obtain adequate service, especially during periods of railroad service problems. SMA and AISI commend the Board for taking an interest in promoting policies that remove barriers to accessing regulatory protection remedies, and are pleased that the Board has proposed to remove the exemptions for steel shipper commodities that are no longer warranted.

I. **BACKGROUND**

The history of the Board's and the ICC's commodity exemption decisions and approach is lengthy, has already been addressed in the prior phases of this proceeding,² and need not be recounted in detail here. In order to put these Comments in proper perspective, however, Steel Shippers offer an overview of the pertinent history and market developments here.

Railroad commodity exemptions, first authorized four decades ago³ were implemented in a substantially different economic era, with railroads in financial decline, and the administrative rate filing requirements potentially hindering flexibility in

² See, e.g., Comments of AK Steel Corp. (filed Jan. 31, 2011) at 5-9.

³ Pub. L. No. 94-210, 90 Stat. 31 (1976).

ratemaking and the provision of competitive rates by railroads. Meanwhile, as the Board acknowledged when first initiating this proceeding in 2010, the “transition from a heavily regulated, financially weak component of the economy into a mature, relatively healthy industry that operates with only minimal oversight,” has caused certain consumer protection “challenges.” Board Notice (STB served Oct. 21, 2010) at 3. The challenge recognized by the Board is that “an exemption under [49 U.S.C.] §10502 excuses carriers from virtually all aspects of regulation . . . [including] any common law cause of action regarding common carrier duties.” *Id.* at 3.

Domestic steel shippers are facing a serious global crisis, and have been adversely impacted commercially as a result of the unfair dumping and subsidization benefitting unfairly traded imports.⁴ The steel commodity exemptions are only adding to their difficulties because many steel shippers today are without intra- or intermodal competitive transportation options and are thus susceptible to railroad market power abuse.

Shippers of the steel commodities simply do not have access to basic regulatory backstop protections addressing railroad service, rates, and practice matters for what is an essential service, and for one of the highest cost components of their businesses.

⁴ See, e.g., *Hearing on Evaluating the Fin. Risks of China Before the S. Comm. on Banking, Hous. & Urban Affairs*, 114th Cong. (July 14, 2016) (testimony of Thomas J. Gibson, President and CEO, AISI); *Public Hearing Concerning Policy Recommendations on the Global Steel Indus. Situation & Impact on U.S. Steel Indus. & Market, before the U.S. Trade Representative*, Docket USTR-2016-001 (Apr. 13, 2006) (testimony of Philip K. Bell, President, SMA) (testimony of Thomas J. Gibson, President and CEO, AISI).

A. The Basis for the Steel Commodity Exemptions

In a series of decisions, the ICC used its authority to exempt the steel commodities,⁵ along with a number of other commodities. As with other exemptions, the central rationale for the regulatory exemptions was twofold: (1) the need to eliminate tariff and contract regulatory filing requirements that carriers claimed were inhibiting them from growing market share and effectively competing against other carriers and providing shippers with lower competitive rates;⁶ and (2) effective and pervasive intra- and intermodal market competition for the commodities meant that no regulatory protections were necessary to protect any steel shippers against possible market power abuses.

⁵ See *Rail Gen. Exemption Auth. – Exemption of Ferrous Recyclables*, 1995 WL 294272 (ICC served Apr. 28, 1995) (iron or steel scrap, wastes, or tailings) (“*Ferrous Recyclables Exemption*”); *Rail Gen. Exemption Auth. – Pet. of AAR to Exempt Rail Transp. of Selected Commodity Groups*, 9 I.C.C.2d 969, 987 (1993) (coke produced from coal, primary iron or steel products) (“*Coke & Iron & Steel Prods. Exemption*”); *Rail Gen. Exemption Auth. – Misc. Manufactured Commodities*, 6 I.C.C.2d 186, 206 (1989) (primary iron or steel products) (“*Miscellaneous Commodities Exemption*”). (Collectively “Steel Commodity Exemption Decisions”).

⁶ Prior 49 U.S.C. § 10713, added to the statute by section 208 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1908–1910, required railroads to file with the ICC private contracts along with a summary of non-confidential contract information. The ICC eliminated contract-filing requirements for non-agricultural commodities in 1992, but still required that carriers file contract summaries. *R.R. Transp. Contracts*, 8 I.C.C.2d 730 (1992). Tariffs were also required to be filed with the ICC. See former 49 U.S.C. §§ 10761 and 10762. Under prior 49 U.S.C. §§ 10707, and 11701, newly filed tariff rates were also subject to suspension and investigation.

1. Eliminating Regulatory Filing Burdens

The elimination of administrative tariff and contract filing burdens were presented as key factors in the petitions supporting the requested steel commodity exemptions:

The exemption sought here would increase competition . . . because it would free the railroads of administrative and regulatory burdens that hinder and often prevent them from competing effectively with other carriers for the traffic.

. . . .

If a railroad relies on tariffs, rates cannot be changed unless a new tariff is filed, which is a costly and time-consuming process. The filing delays cause railroads to lose potential business.

Section 10713 contracts have indisputably given the railroads greater flexibility in ratemaking. However, if a railroad wishes to make an immediate agreement with a shipper or to quote a rate to a shipper for a single shipment (or a limited number of shipments), a section 10713 contract, like a tariff, is a costly and administratively cumbersome means of determining the rate. In contrast, a motor carrier may use its contract carrier authority to agree to move scrap for a shipper at a stated price and to move it without having to file the contract with the Commission. As a result, railroads restricted to tariffs and contracts have missed opportunities to transport single shipments or a limited number of shipments for a shipper due to their inability to make a spot quote at the time the shipper desired service. This, in turn, has reduced the competitive alternatives available to shippers.

By contrast, the proposed exemption would enable railroads to quote spot prices when the market requires. Railroads that previously could not compete effectively because of the administrative burdens occasioned by contract equations would be better able to meet shippers' needs, and shippers will have greater alternatives, including the provision of special services not previously available such as on-the-spot contracting for a particular movement. Moreover, the railroads will realize substantial cost savings from the elimination of tariff and contract filing requirements; as a result, their costs will decrease, and efficiency will be enhanced.

In short, the proposed exemption of ferrous recyclables would substantially promote the goals of the NRTP. By reducing administrative costs and increasing railroad ratemaking flexibility, the exemption would result in even more competition for the subject traffic. This in turn would lead to improved service, increased efficiency, more competitive rates and greater financial stability for the railroads. Given such results, continued regulation is not necessary to carry out the National Rail Transportation Policy.

Petition to Exempt from Regulation the Rail Transp. of Ferrous Recyclables, ICC Ex Parte No. 346 (Sub-No. 35) (filed Apr. 25, 1994) at 12-15 (internal citations omitted).

When the ICC granted the exemptions, the Commission relied in substantial part on these administrative cost and burden factors in determining that regulation was not necessary to carry out the rail transportation policy of former 49 U.S.C. §10101a:

[Exemption] would encourage effective competition (10101a(4) and (5)) by making it easier for the railroads to compete without unwarranted regulatory restraint. Moreover, it would “allow rail carriers to earn adequate revenues” (10101a(3)) by improving the speed and flexibility with which they could respond to competition—especially by enabling them to quote spot prices as changes in the market may require. Further, the exemption would “encourage honest and efficient management of railroads” (10101a(10)) by enabling rail management to respond more quickly to changing market conditions, and by reducing the administrative costs associated with the filing of tariffs and contract summaries. Finally, to the extent that an exemption would enable the railroads to attract traffic from motor carriers, it would encourage energy conservation (10101a(15)).

Ferrous Recyclables Exemption, 1995 WL 294272 at *3.

2. Lack of Market Power Findings

In its decisions exempting the steel commodities, the ICC generally concluded that effective competition precluded rail carriers from charging unreasonable

rates. In making its market power determinations in these proceedings, the Commission largely relied on aggregated data, broad market share analyses, and generalized railroad witness testimony as to possible competitive options – and not customer specific findings – to support its decisions. As the ICC simply summarized in one of the pertinent exemption decisions: “we are also confident that there is effective competition for the transportation of the commodities we are exempting and that the exemption will not subject shippers to an abuse of market power.” *Miscellaneous Commodities Exemption*, 6 I.C.C.2d at 190; *accord Iron & Steel Prods. Exemption*, 9 I.C.C.2d at 973-74.

As part of its analysis, the ICC found “iron and steel scrap traffic R/VC ratios of 139.5% for 1991 and 138.6% for 1992,” and concluded that these R/VC ratio levels reflected a competitive market for the commodities. *Ferrous Recyclables Exemption*, 1995 WL 294272 at *4. It also found that “[r]ates for ferrous recyclables traffic [had] decreased from 1981 to 1991, demonstrating competitive pricing pressure” favoring revocation.⁷

Also, in the steel commodity exemption proceedings, the Commission stated that in making a revocation determination, “a significant consideration is whether the participating shippers actually seeking transportation are concerned about an abuse of market power.” *Coke & Iron & Steel Prods. Exemption*, 9 I.C.C.2d at 973. Finding no such concerns that had been expressed by shippers, along with “especially probative”

⁷ *Id.* See also *Coke & Iron & Steel Prods. Exemption*, 9 I.C.C.2d at 980-81 (finding that rates had decreased for certain steel commodities, rates had declined by 12% over the past five years, and that with other steel commodities the railroad had been unable to increase rates, even with inflation).

testimony from AISI “that an exemption would ‘reduce the administrative burden associated with tariff and contract filing,’” the ICC found a lack of abuse of market power concerns supporting revocation. *Id.* at 978.

II.

COMMENTS

A. **Revocation of the Steel Commodity Exemptions is Warranted and Necessary**

The Board’s NPRM determination that, based on changing market conditions, the exemption for the steel commodities should be removed, is well reasoned. Based on the Board’s own analysis, and as confirmed through the SMA/AISI’s independent analysis, significant changes in the competitive landscape for the steel commodities demonstrate that exemption revocation is needed to carry out the national rail transportation policy. In addition, the Board’s decision is supported based on a review of the changing regulatory environment.

1. **Elimination of the Former Administrative Tariff and Contract Filing Requirements Warrant Revocation of the Steel Commodity Exemptions**

As discussed, the steel commodity exemptions were justified in substantial part based on administrative costs and burdens associated with tariff and contract filing (and contract summary filing) requirements. *See Ferrous Recyclables Exemption*, 1995 WL 294272 at *3; *Coke & Iron & Steel Prods. Exemption*, 9 I.C.C.2d at 973, 978; *Miscellaneous Commodities Exemption*, 6 I.C.C.2d 186 at 187-88, 190-91.

However, the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (“ICC Termination Act”), eliminated carrier tariff filing requirements for the provision of common carrier rates and service for the steel commodities (and other commodities). *See* former 49 U.S.C. §§ 10761 and 10762. While carriers must disclose their common carrier rates under 49 U.S.C. §§ 11101(b) and (c), tariffs previously filed with the ICC were no longer effective as of January 1, 1996. Additionally, the prior ICC regulations governing the filing of rates, at 49 C.F.R. Part 1314, were repealed. *See Removal of Obsolete Rail Tariff Regulations*, 1 S.T.B. 4, 5 (1996) (“Carriers no longer have to file or maintain tariffs. We are therefore removing the now obsolete part 1314 regulations.”)

Additionally, while the ICC had previously eliminated contract filing requirements for non-agricultural commodities, *Railroad Transportation Contracts*, 8 I.C.C.2d 730 (1992), the ICC Termination Act repealed the provisions for filing of contracts summaries at former 49 U.S.C. 10713(b)(1), replacing it with current 49 U.S.C. § 10709, which “eliminate[d] any regulation of non-agricultural contracts,” including eliminating all former contract summary filing requirements for the steel commodities. *Removal of Obsolete Regulations Concerning R.R. Contracts*, 1 S.T.B. 71, 72 (1996). Because of these changes, the transportation policy findings found by the Board in the Steel Commodity Exemption Decisions with respect to administrative tariff and contract filing requirements are all no longer valid:

- Exemption is no longer necessary to “allow[] rail carriers to earn adequate revenues” by improving the speed and flexibility with which they can respond to competition or quote rates as the market may require (49 U.S.C. § 10101(3));
- Exemption is no longer necessary “to encourage honest and efficient management of railroads” (49 U.S.C. § 10101(9)) by enabling rail management to respond more quickly to changing market conditions, and by reducing the administrative costs associated with the filing of tariffs and contract summaries;
- Exemption is no longer necessary to help enable the railroads to attract traffic from motor carriers, in order “to encourage and promote energy conservation” (49 U.S.C. § 10101(14)).

Further, the ICC Termination Act, removed former 49 U.S.C. §§ 10707 and 10713 granting the ICC authority to investigate and suspend new rates. As a result, “Congress further facilitated railroads’ rate-making initiative by repealing the rate suspension procedures under which rate[s] . . . were sometimes prohibited from taking effect without first being investigated.” *Ariz. Pub. Serv. Co. & Pacificorp v. Burlington N. & Santa Fe Ry. Co.*, 7 S.T.B. 76, 81 (2003).

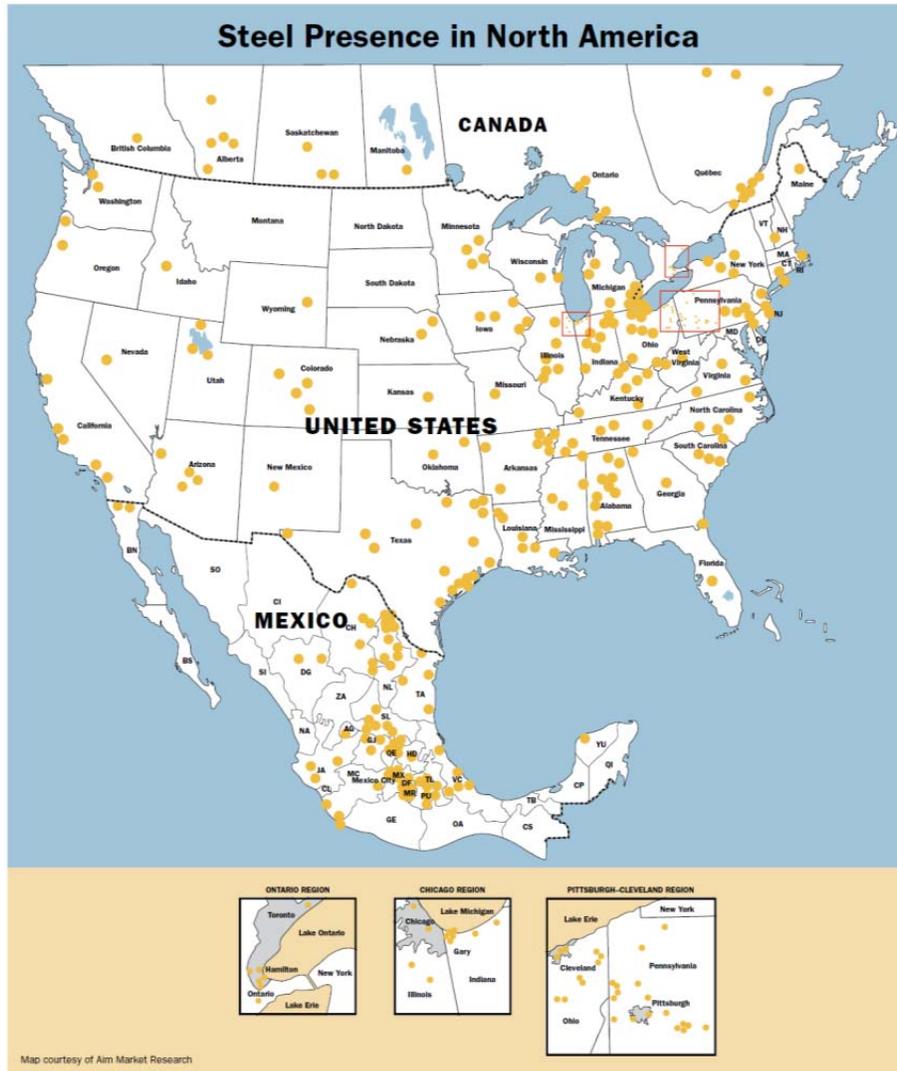
In summary, following the ICC Termination Act, and agency implementing decisions, there are no longer agency tariff filing requirements, contract filing requirements, or contract summary filing requirements potentially inhibiting carrier ratemaking freedoms. Nor are there any investigation or suspension remedies available to potentially hinder carrier ratemaking freedoms. Instead, railroads have full flexibility today to provide expeditious rates and service terms to all shippers, whether through tariff or contract, and to expeditiously respond to competition without any regulatory filing requirements or ratemaking encumbrances. Accordingly, a substantial basis behind the Steel Commodity Exemption Decisions, that the exemptions were necessary to avoid

competition stifling agency tariff and contract filing burdens, has been rendered moot through Congressional and Administrative action.⁸

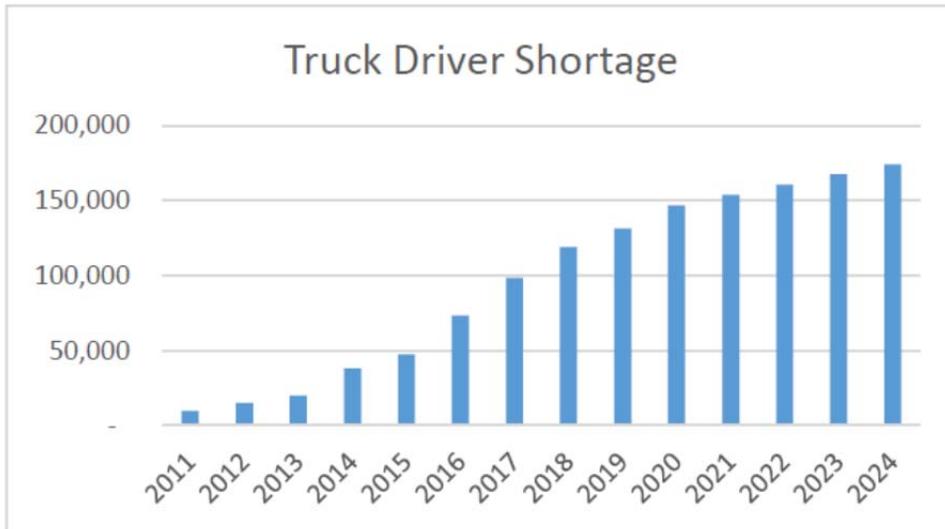
2. The Changed Competitive Market and Economic Conditions Warrant Revocation of the Steel Commodities Exemptions

In its NPRM, the Board references significant changes in the markets and competitive circumstances for the steel commodities in the two plus decades since the Commission adopted the exemptions. The Board correctly notes that, with the industry shift towards electric arc furnaces, production has shifted away from the Great Lakes region, with many producers landlocked, and without alternative water delivery options to rail service. This is further reflected in the below AISI profile:

⁸ It is for this reason, in principal part, the Board has refused to grant any new exemptions in recent years. *See Rail Gen. Exemption Auth. – Exemption of Paints, Enamels, Lacquers, Shellacs, Etc.*, STB Ex Parte No. 346 (Sub-No. 33) (STB served Apr. 20, 1998) at 6 (“[T]he chief burden imposed by regulation was the requirement that tariffs be filed. With that requirement eliminated, the principal obligation imposed on the railroads has been removed. . . . [E]specially since the removal of regulation of rail transportation of [the commodity] appears to offer small benefit to rail carriers post-ICCTA, we will not exempt the rail carriage of [the commodity] from regulation under the ICCTA at this time.”)



Additionally, trucking companies have found it difficult to satisfy steel shipper demand. Part of the trucking availability problems are attributable to a severe shortage of truck drivers, which shortfall could grow to as much as 174,500 by 2024 if not addressed, according to the American Trucking Associations:



Am. Trucking Ass'ns, Truck Driver Shortage Analysis (Oct. 2015) at 6 (“In 2015, we expect the shortage to increase to 47,500, the highest level ever recorded. Looking ahead to 2016, if the economy picks up slightly, like we expect, the shortage could quickly jump by 26,000 to 73,500.”). The problem has been exacerbated by the Federal Motor Carrier Safety Administration’s (“FMCSA”) Compliance, Safety, Accountability initiative, as well as changes to FMCSA’s trucking hours of service rules. The rule changes have made it more difficult to bring new drivers into the trucking industry and have also created burdens for small carriers forced to comply with demanding recordkeeping requirements.

As the industry has changed and consolidated, the average length of haul by rail for the steel commodities has increased. For iron or steel scrap, the average length of haul by rail has increased from 300 miles in 1992 to 419 miles in 2014.⁹ For primary iron or steel products, the average length of haul has increased from 639 miles in 1992 to

⁹ Hellerworx analysis of STB Carload Waybill Sample, STCC 40-211.

700 miles in 2014.¹⁰ For coke produced from coal, the average length of haul by rail has increased from 369 miles in 1992 to 380 miles in 2014.¹¹ At these haulage distances, with the higher volumes required, and the large load sizes, alternate trucking availability often becomes a very limited option, and even where there is availability, trucking becomes uneconomic for many haulage lanes.¹²

a. Waybill Data Analysis

The change in market conditions since the enactment of the steel commodity exemptions and the lack of effective competition is further reflected in the pertinent railroad waybill data over the period. This is confirmed in the Board’s waybill data analysis of the R/VC ratios for the steel commodities. *See* STB “EP 704-1 STB Public Workpaper(7).xlsx,” <http://www.stb.dot.gov/stb/rail/Exemption.html>.

On behalf of SMA/AISI, Mr. James N. Heller of Hellerworx has undertaken a review of the Board’s Carload Waybill Sample data, for the years 1988

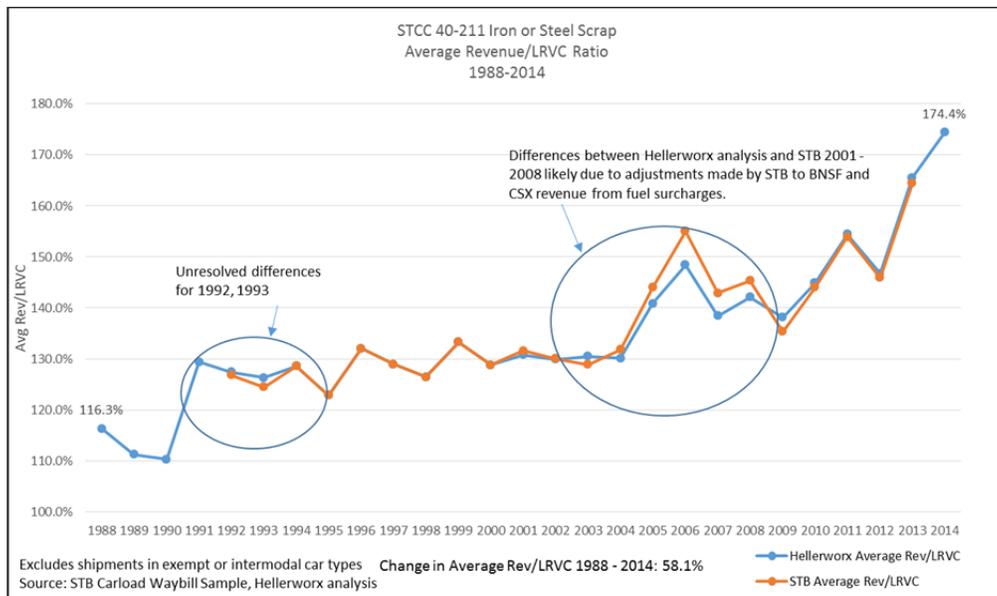
¹⁰ Hellerworx analysis of STB Carload Waybill Sample, STCC No. 33-12.

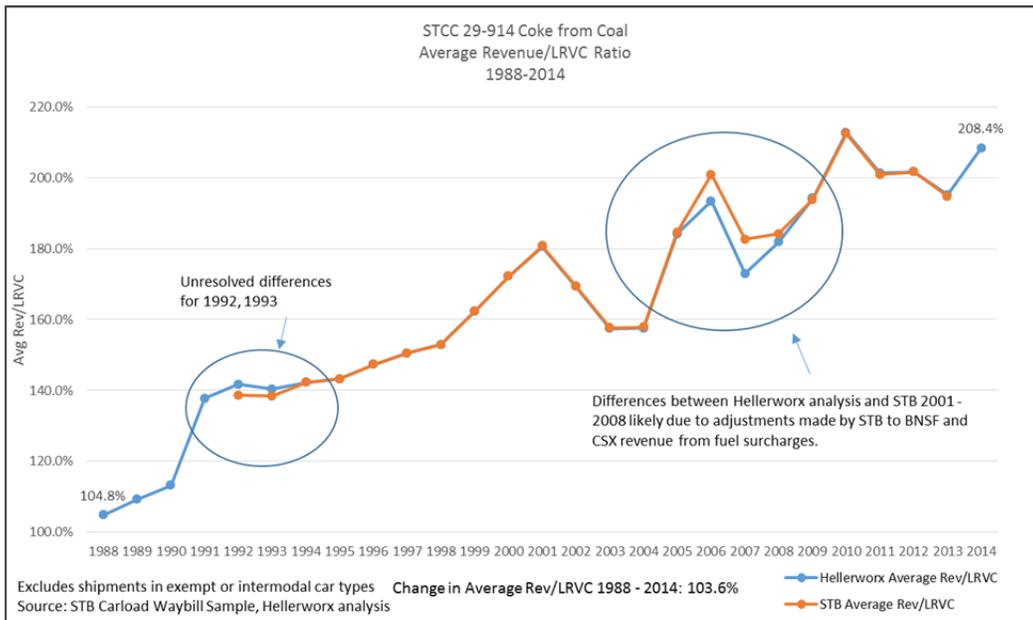
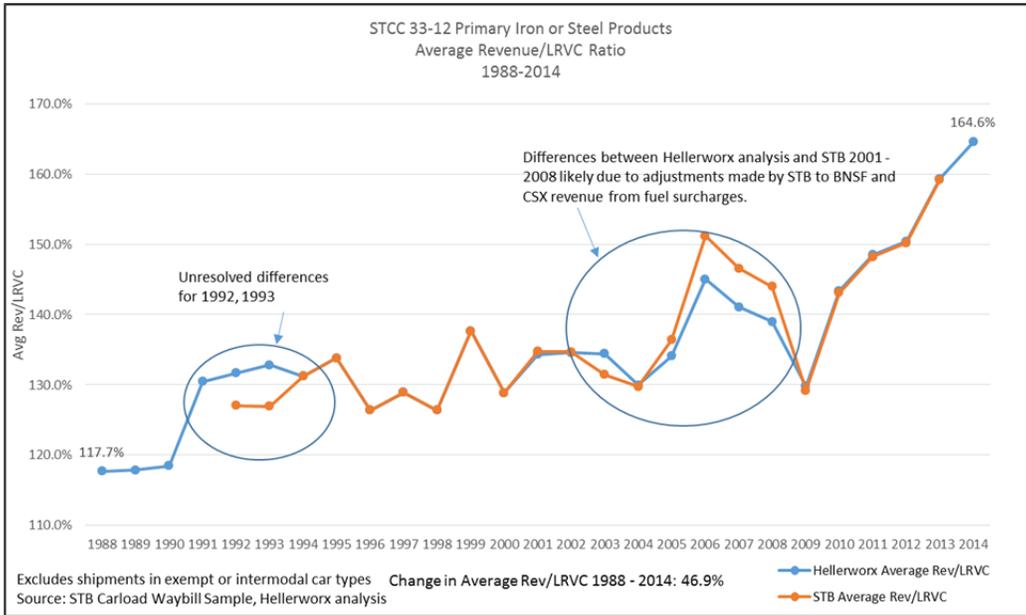
¹¹ Hellerworx analysis of STB Carload Waybill Sample, STCC 29-914.

¹² *See, e.g.,* Comments of Nucor Corp., STB Ex Parte No. 724, *U.S. Rail Serv. Issues* (filed Apr. 24, 2014) at 1 (Nucor’s more than 200 facilities that “transport tens of thousands of railcar loads containing millions of tons of scrap steel and other raw materials into our steel mills, and finished products back out to market. . . . Most Nucor facilities are ‘captive’ shippers in that they only have access to a single rail carrier and thus pay a premium to move their products because of the lack of rail competition.”); Comments of AK Steel Corp., STB Ex Parte No. 704, *Review of Commodity, Boxcar, & TOFC/COFC Exemptions* (filed Feb. 1, 2011) at 3 (“AK Steel historically ships over 15 million tons of raw, in-process, and finished materials and products annually. Due to the size, weight, and other characteristics of AK Steel’s freight, the majority of AK Steel’s traffic must be shipped by rail as it is not amenable to shipment by motor carrier or other transportation modes.”).

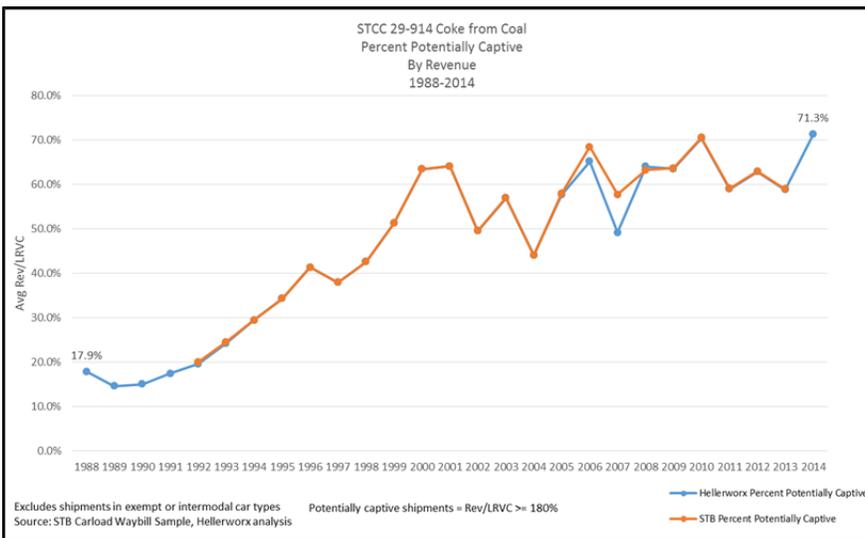
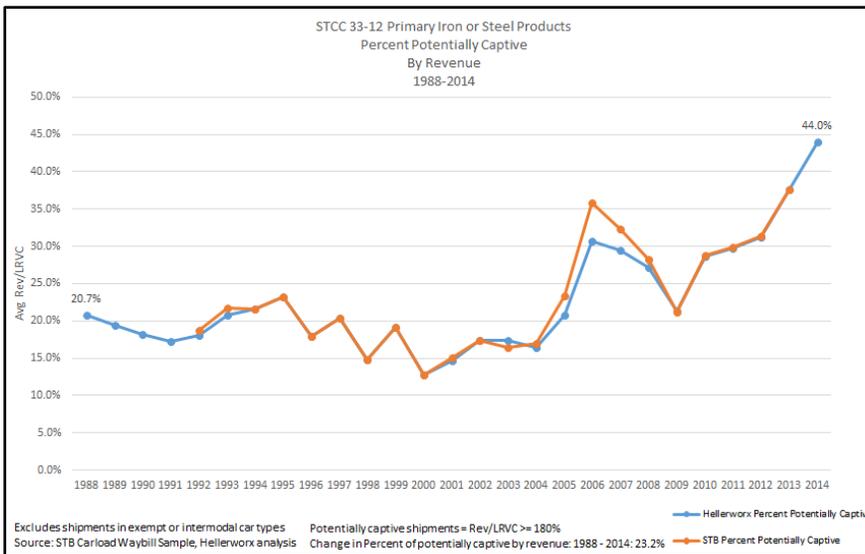
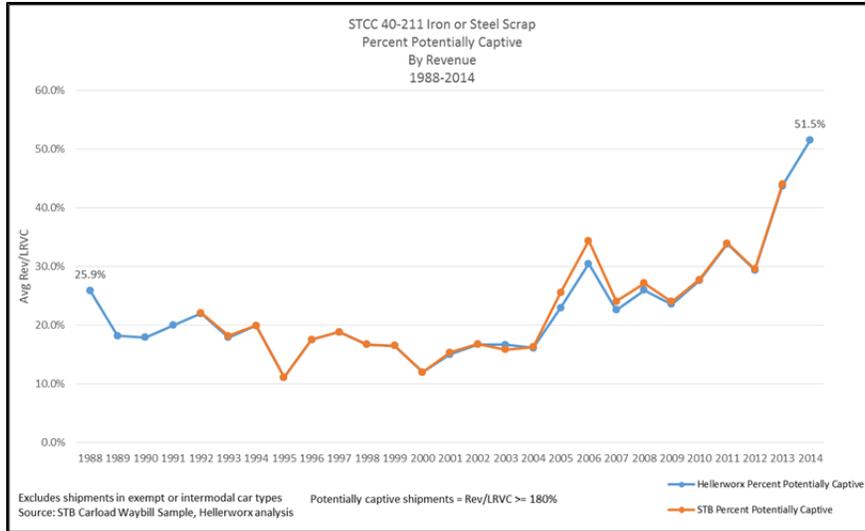
through 2014, for primary iron or steel products (STCC No. 33-12), iron or steel scrap, wastes, or tailings (STCC No. 40-211), and coke produced from coal (STCC No. 29-914). Mr. Heller’s analysis is reflected in the charts below, and is outlined against the Board’s analysis. Mr. Heller’s analysis verifies the Board’s results and confirms that the steel commodities traffic is operating at nowhere near fully competitive R/VC ratios. These R/VC ratios are no longer declining, and instead are increasing significantly along with the universe of potentially captive traffic – resulting in a substantial portion of the steel commodities traffic becoming potentially captive and subject to railroad market power abuse.

Mr. Heller’s waybill data analysis, updated through 2014, charted against the Board’s analysis, reflects average R/VC ratios for each of the steel commodities that have grown significantly (up to 208.4% for coke from coal) for the latest year of available data (2014):





Mr. Heller’s analysis of percentage of potentially captive traffic for the steel commodities, again plotted against the Board’s analysis (by revenue, with similar results when reported by carloads or by tons) also reflects significant increases in captivity:



Additionally, Mr. Heller's analysis reflects that, in 2014, the average R/VC ratio for potentially captive traffic of the steel commodities is 244.9% for primary iron or steel products (STCC No. 33-12), is 244% for iron or steel scrap, wastes, or tailings (STCC No. 40-211), and is 296.9% for coke produced from coal (STCC No. 29-914).

These high *average* R/VC ratios for the steel commodities and the significant increases in potential captivity confirm and validate the Board results, and further demonstrate that the competitive landscape for rail service has changed substantially enough to support revocation of each of the steel commodity exemptions.

3. The Support of Steel Shipper Stakeholders and Fundamental Fairness Warrants Revocation of the Exemption for the Steel Commodities

As explained above, in making a revocation determination, "a significant consideration is whether the participating shippers actually seeking transportation are concerned about an abuse of market power." *Coke & Iron & Steel Prods. Exemption*, 9 I.C.C.2d at 973. Here, support for revocation is being made by SMA, representing 31 rail shippers accounting for over 75 percent of domestic steelmaking capacity – and constituting the nation's largest recyclers. Support is also being made by AISI's 19 member companies who account for approximately 70 percent of U.S. steelmaking capacity and are also major users of rail. These SMA/AISI members are concerned about railroad market power and have shown that there is a strong need and basis for the Board's proposed revocation of the exemption for the steel commodities at this time.

The significant marketplace changes that have been experienced by the railroads in the four decades since exemptions were brought about to assist the railroad industry in a dramatically different economic era and regulatory regime that no longer exists also warrant revocation of the steel commodity exemptions. As the Transportation Research Board has concluded:

The Staggers Rail Act itself was passed 35 years ago. In the interval, the railroad industry has been transformed, essentially modernized in step with the other transportation industries that were deregulated at about the same time. The railroad industry was in a fundamentally different position at the time of its deregulation—on the edge of bankruptcy, despite its considerable potential market power, and in need of specialized regulatory reforms that took its financial distress into account. . . . The economic regulations that remain should be suited to the financially sound railroad industry of today, not to the foundering one that required rescue 35 years ago.

Transp. Research Bd., Special Report 318, Modernizing Freight Rail Regulation (2015) at 218-19 (“TRB Report”), <http://onlinepubs.trb.org/onlinepubs/sr/sr318.pdf>.

Fundamental fairness also warrants revocation reversal. While railroads have a common carrier obligation to provide “transportation or service on reasonable request” (49 U.S.C. § 11101(a)), the exemption of a commodity has been held to “excuse” railroads from the obligation that a railroad must furnish rates and provide service on reasonable request pursuant to those rates. *Pejepscot Indus. Park, Inc. d/b/a Grimmel Indus. – Petition for Declaratory Order*, STB Finance Docket No. 33989 (STB served May 15, 2003) at 6; *accord Rail Transp. Contracts Under 49 U.S.C. 10709*, STB Ex Parte No. 676 (STB served Jan. 22, 2010) at 4. There is no valid reason to excuse carriers from providing common carrier rates upon reasonable request to steel shippers,

and from providing service under those rates. Fundamental fairness also necessitates that the railroads maintain reasonable practices and rates, and that they provide adequate rail service for steel commodity shippers.¹³ Lastly, fairness requires that steel commodity shippers be able to participate as full stakeholders in any current or future agency proceeding.

Of course, exemption removal as proposed by the Board will not equate to actual new regulation, and in fact, such action would actually streamline and minimize regulatory burdens on shippers seeking administrative relief. Also, any claim that exemption removal will increase regulatory burdens on carriers is without merit. The Steel Shippers are not seeking, nor would exemption revocation overturn the STB Reauthorization Act and force railroads to once again file tariff or contract summaries with the Agency, remove carrier rate-setting prerogatives, subject railroads to renewed rate suspension and investigation activities, or otherwise engage in any new agency reporting requirements.

CONCLUSION

For the reasons set forth above, SMA/AISI respectfully submit that the Board should adopt its proposed removal of each of the steel commodity exemptions. The rationale and need for continuation of the ICC's steel commodity exemption decisions no longer exists, and these decisions should be reconsidered and reversed.

¹³ *See, e.g.*, Transp. Research Bd., Special Report 318, Modernizing Freight Rail Regulation (2015) at 6, <http://onlinepubs.trb.org/onlinepubs/sr/sr318.pdf> (“many shippers have not been able to avail themselves of the rate relief process. The result has been large and prolonged inequalities in shipper access to the law’s maximum rate protections.”).

Respectfully submitted,

/s/ Peter A. Pfohl
Dan M. Jaffe
Katherine Waring
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for
Steel Manufacturers Association
American Iron and Steel Institute

Dated: July 26, 2016