

- (a) Steel Slabs (STCC No. 33-121-40);
 - (b) Steel Sheet (STCC No. 33-123-32);
 - (c) Coke (STCC No. 29-914); and
 - (d) Scrap (STCC No. 40-211).
- (2) That if these exemptions are not eliminated altogether, that appropriate actions be taken to:
- (a) permit a shipper of an exempt commodity to obtain a common carrier rail rate in accordance with 49 U.S.C. §11101(b);
 - (b) permit a shipper of an exempt commodity to bring a case for rate relief before the STB; and
 - (c) if a shipper demonstrates railroad market dominance on a specific movement, the shipper will be entitled automatically to revocation of the commodity or service exemption, that maximum rate relief be available, and that the common carrier service obligation be reinstated for that movement.

IDENTITY AND INTEREST

AK Steel is a major steel producer with approximately 6,500 employees engaged in the production of flat-rolled carbon, stainless and electrical steels, and tubular products at seven major steelmaking and finishing plants in Indiana, Kentucky, Ohio and Pennsylvania. These steels are produced primarily for use in the automotive, infrastructure and manufacturing, and distributors and converters markets, with products sold both domestically and internationally.

AK Steel relies on the railroads to transport the majority of its freight. This freight consists of inbound movements of raw materials, inter-plant movements of in-process products, and outbound movements of finished products. AK Steel's inbound freight used as part of the manufacturing process includes iron ore, coal, coke, chrome, nickel, silicon manganese, zinc, limestone, carbon and stainless steel scrap, and other materials. AK Steel historically ships approximately 6 million tons of steel products annually to numerous customers in the United States and abroad, although steel shipments have been down from those levels recently with the severe decline in overall economic conditions. AK Steel also historically has purchased approximately 500,000 to 700,000 tons annually of its carbon steel slab requirements from other steel producers to supplement the production from its own steelmaking facilities, depending on customer demands. Altogether, 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.

AK Steel has a significant interest in moving its inbound and outbound materials and products efficiently and cost effectively. AK Steel's rail transportation costs remain a very substantial component of its overall cost of doing business. These significant expenses ultimately have a considerable impact on AK Steel's ability to compete in the marketplace.

AK Steel has a substantial interest in this proceeding because many of the commodities it ships to and from its plants have been exempted from regulation pursuant to decisions of the Interstate Commerce Commission (“ICC” or “Commission”) in decisions issued 15+ years ago, which exemptions still remain in place, yet the railroads servicing AK Steel currently have substantial market power over AK Steel. AK Steel in many instances is captive to a single railroad for its transportation requirements, and it is subject to monopoly railroad power and market dominant railroad pricing, even with the exempt commodities it ships. AK Steel has a significant interest in promoting policies that remove barriers to accessing regulatory protection remedies, and it is pleased that the Board is revisiting this important matter.

I.

COMMENTS

In its Notice, the Board recognizes that railroad commodity and service exemptions, which were first authorized 35 years ago as part of the Railroad Revitalization and Regulatory Reform Act of 1976,¹ were the product of a substantially different economic period for the railroad industry (*e.g.*, railroads in financial decline, the movement away from full industry regulation). Notice at 2-3. The Board also acknowledges that 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 “challenges.” *Id.* With respect to railroad exemptions, the

¹ Pub. L. No. 94-210, 90 Stat. 31 (1976).

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. Thus, for shippers such as AK Steel that move substantial amounts of exempt commodities, and that have little or no competitive options for that service, the railroad exemptions have created significant competitive difficulties. As for these movements, the railroads effectively operate as a deregulated monopoly.

**A. The History of the Commodity Exemptions
Applicable to AK Steel**

The STB has the authority to “exempt” transportation from STB regulation. *See* 49 U.S.C. §10502. The STB’s predecessor, the ICC, possessed similar authority. *See former* 49 U.S.C. §10505. In a series of decisions in the 1980s and 1990s, the ICC exerted its authority to exempt transportation of numerous broad commodity groups from ICC rail regulation. This included decisions exempting many of the commodities shipped by AK Steel, including, among others:

| Commodity | STCC No. | Exemption Decision Date |
|------------------|-----------------|---------------------------------|
| Steel Slabs | 33 121 40 | September 17, 1993 ² |
| Steel Sheet | 33 123 32 | November 28, 1989 ³ |
| Coke | 29 914 | September 17, 1993 ² |
| Scrap | 40 211 | April 28, 1995 ⁴ |

Pursuant to then-governing laws, the ICC could exempt transportation from ICC regulation if the Commission concluded that ICC regulation of the involved transportation was not necessary to carry out national transportation policies (codified at *former* 49 U.S.C. §10101a) and either the involved transportation was “limited in scope” or ICC regulation was “not needed to protect shippers from the abuse of market power.” *Former* 49 U.S.C. §10505(a). Prior to the mid-1990s, the ICC utilized this statutory authority to exempt dozens of commodities from regulation. 49 C.F.R. Part 1039 contains a list of commodities that are exempt from regulation.⁵

² *Rail Gen. Exemption Auth. – Pet. of AAR to Exempt Rail Transp. of Selected Commodity Groups*, 9 I.C.C.2d 969, 987 (1993) (“*Iron and Steel Products Exemption*”).

³ *Rail Gen. Exemption Auth. – Misc. Manufactured Commodities*, 6 I.C.C.2d 186, 206 (1989) (“*Miscellaneous Commodities Exemption*”).

⁴ *Rail Gen. Exemption Auth. – Exemption of Ferrous Recyclables*, 1995 WL 294272 (ICC served Apr. 28, 1995) (“*Ferrous Recyclables Exemption*”).

⁵ The category of commodities that have been exempted by the Board is listed by Standard Transportation Commodity Code (“STCC”) number, and include certain agricultural commodities (*e.g.*, butter, wool, fresh products), miscellaneous commodities (*e.g.*, lumber or wood products, clay, stone, sand, gravel, motor vehicles, iron and steel scrap), and boxcar traffic. Intermodal traffic is also exempted from STB regulation. *See* 49 C.F.R. Pt. 1090.

In decisions exempting individual service types/commodities, the ICC generally concluded that effective competition precluded rail carriers from charging unreasonable rates. As the ICC summarized in one of the pertinent exemption decisions: “[w]e are confident that there is effective competition for the transportation of 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 and Steel Products Exemption*, 9 I.C.C.2d at 973-74.

B. The Rationale for the Regulatory Exemptions

In the Commission’s commodity exemption decisions, a principal reason cited by petitioners for seeking individual exemptions was the need for the removal of certain administrative and regulatory burdens, such as the requirement that all tariffs be filed with the ICC, and that contract summaries be filed with the ICC – burdens that the petitioning parties contended were hindering them from effectively competing with other transportation modes (*e.g.*, barges, trucks) that did not have such obligations. For example, the following rationale was provided by petitioners for the granting of the exemption of ferrous recyclable commodity groups:

Railroads can only establish rates for this traffic in one of two ways, either by filing a tariff with the Commission . . . or by entering into a transportation contract with a shipper . . . and filing a contract summary with the Commission. In contrast, petitioners note that barge competitors are generally unregulated, and that less regulated truck carriers have no such contract summary filing requirement and no longer have to file tariffs Petitioners aver that the proposed exemption would enable railroads to quote spot prices when

the market requires. As a result, railroads that cannot always compete effectively because of the *administrative burdens occasioned by rail contract summary and tariff filing requirements* would be better able to meet shippers' needs.

Ferrous Recyclables Exemption, 1995 WL 294272 at *1 (emphasis added)

(internal citations omitted). The Commission's determination in 1995 that the regulation of ferrous recyclables was not necessary to carry out the rail transportation policy of 49 U.S.C. §10101a was largely based on these "unwarranted regulatory restraints," on "improving the speed and flexibility with which [railroads] could respond to competition," and the need to "reduc[e] the administrative costs associated with the filing of tariffs and contract summaries." *Id.* In other words, it was the elimination of these *specific ICC tariff and contract summary regulatory filing burdens* through the granting of exemptions that allowed the Commission to conclude that "by its very nature, an exemption 'minimize[s] the need for Federal regulatory control [10101a(2)].'" *Id.*

Similarly, in its decisions determining whether exemptions were necessary to protect shippers from the abuse of market power, the ICC relied on aggregated data and market share analyses – not customer or movement specific findings – to support its exemption decisions. For example, in its *Iron and Steel Products Exemption* decision, the ICC relied, *inter alia*, upon the following generalized data:

- "broad market share data" submitted by the Association of American Railroads showing rail market shares of 40% and lower, which the ICC concluded was "consistent with a lack of [rail] market power" (9 I.C.C.2d at 979);

- railroad witness testimony that “these commodities generally move between locations served by more than one railroad” (*id.* at 980); and
- trade association testimony that many of these commodity movements were covered by contracts and the “exemption would ‘reduce the administrative burden associated with tariff and contract filing’” (*id.*).

The Commission’s practice of using of broad, aggregated data applied across many commodities was not without controversy, with Commissioners in individual proceedings complaining about the “broad and sweeping approach to the exercise, or rather nonexercise, of our regulatory authority” because “aggregating hundreds of commodities into a few broad categories . . . makes it impossible to identify which commodities can or should be exempted,” and ultimately leaving “errors [to] be corrected through the time-consuming process of revocation,” and potentially causing “serious deleterious effects” on shippers. *Miscellaneous Commodities Exemption*, 6 I.C.C.2d at 200 (Commissioner Simmons, dissenting).

C. The Board’s Exemptions Create Substantial Competitive Harm and Unfair Barriers to Regulatory Relief

As the Board acknowledges in its Notice, because the granting of commodity and service exemptions “excuse[] carriers from virtually all aspects of regulation” (*id.* at 3), rail customers of exempt commodities such as AK Steel are impacted in several respects. First, while railroads have a statutorily imposed common carrier obligation to provide “transportation or service on reasonable request” (49 U.S.C.

§ 11101(a)), the Board has held that the exemption of a commodity “excuses” railroads from the obligation that a railroad must furnish rates and provide service on reasonable request pursuant to those rates. *Pejepscot Industrial 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 Transportation of Contracts Under 49 U.S.C. 10709*, STB Ex Parte No. 676 (STB served Jan. 22, 2010) at 4.

Second, in order to obtain a common carrier rate from an unwilling carrier, and then challenge a rate (or practice), a shipper of an exempt commodity must seek to revoke the exemption. Under current law, the STB has the authority to revoke an exemption when it finds that regulation is necessary to carry out the rail transportation policy. See 49 U.S.C. §10502(a). The STB has clarified that “the extent of railroad market power is an essential issue” in exemption revocation proceedings. *WTL Rail Corp. Petition for Declaratory Order and Interim Relief*, STB Docket No. 42092 *et al.* (STB served Feb. 17, 2006) at 3.

While the Board has provided that a rate complaint and a related revocation petition may be heard simultaneously,⁶ and without the need for bifurcated proceedings,⁷ this practice is not absolute, and under the Board’s simplified rail rate guidelines, the Board has clarified that complainant shippers challenging exempt commodity rail rates

⁶ See *Rail General Exemption Authority – Nonferrous Recyclables*, STB Ex Parte No. 561 (STB served Apr. 21, 1998) at 7.

⁷ See, e.g., *FMC Wyoming Corp. and FMC Corp. v. Union Pac. R.R. Co.*, STB Docket No. 42022 (STB served Aug. 31, 1998) at 2-3.

“will need to file a separate request for revocation” and that “[t]he Board will generally consider the revocation request before permitting a rate challenge,” with the procedural schedule in the rate case to “generally be stayed automatically pending the outcome of the request for revocation.” *Simplified Standards for Rail Rate Cases*, STB Docket No. 646 (Sub-No. 1) (STB served Sept. 5, 2007), (“*Simplified Standards*”) *aff’d sub nom. CSX Transp., Inc. v. STB*, 568 F.3d 236 (D.C. Cir. 2009), and vacated in part on other grounds on reh’g, *CSX Transp., Inc. v. STB*, No. 07-1369 *et al.* (D.C. Cir. Oct. 23, 2009).

The bottom line impact of these decisions for an exempt commodity shipper is that in order to obtain a common carrier rate or challenge a common carrier rate, it is faced with the prospect of having to bring a revocation action at the Board. And even if the shipper can obtain a common carrier rate voluntarily from a carrier, at least if a complaint is filed under the Board’s *Simplified Standards*, the Board’s policy is to generally stay the proceeding automatically pending the outcome of the request for revocation. This means, at a minimum, substantial and unnecessary administrative delay for a shipper seeking to obtain regulatory relief. *See, e.g., CF Industries, Inc. v. Koch Pipeline Co.*, STB Docket No. 41685 (STB served May 14, 1997) at 5 (the “[Board’s] experience in the rail area has shown that bifurcation of the market power and rate reasonableness phases can unnecessarily prolong a proceeding”).

D. The Board's Exemption Decisions Applicable to AK Steel Should Be Reversed, and, at a Minimum, a Shipper of an Exempt Commodity Should Be Permitted to Obtain a Common Carrier Rate and Seek and Obtain Rate Relief

AK Steel encourages the STB to be proactive in requiring railroads to provide needed transportation service at reasonable prices, including for exempt traffic. AK Steel respectfully submits that because the rationale and need for continuation of the ICC's former exemption decisions no longer exists, these decisions should be reconsidered and summarily reversed for the following commodities: (i) Steel Slabs (STCC No. 33 121 40); (ii) Steel Sheet (STCC No. 33 123 32); (iii) Coke (STCC No. 29 914); and (iv) Scrap (STCC No. 40 211). The reason for the elimination of these exemptions is that first, a major rationale for exemptions, regulatory burdens, is gone. With the passage of the ICC Termination Act of 1995, Public Law No. 104-88, 109 Stat. 803 ("ICCTA"), railroads no longer have agency tariff or contract summary filing requirements. It is for this reason, in part, that the Board has refused to grant any new exemptions in recent years, such as its refusal in 1998 to exempt certain paint commodities:

The 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 paint appears to offer small benefit to rail carriers post-ICCTA, we will not exempt the rail carriage of paint from regulation under the ICCTA at this time.

Rail General Exemption Authority – Exemption of Paints, Enamels, Lacquers, Shellacs, Etc., STB Ex Parte No. 346 (Sub-No. 33) (STB served Apr. 20, 1998) at 6.

Second, in order to obtain relief from any abusive carrier rates or practices, an exempt commodity shipper is left with the daunting prospect of seeking a revocation of the class exemption (or a partial revocation as applies to the individual shipper) in order to perfect STB remedies (*e.g.*, STB maximum rate regulation). The STB's rate remedy provisions are already hard enough for shippers to navigate.⁸ The delay, uncertainty, and expense of bringing a separate revocation action, in combination with a rate case, creates serious barriers to access of the Board's regulatory relief provisions for shippers such as AK Steel, and they frankly discourage shippers of exempt commodities from even trying to seek relief.

While AK Steel strongly encourages the elimination of its commodity exemptions, if the Board ultimately determines that these exemptions should not be eliminated altogether, at a minimum, the Board should take appropriate actions to: (i) permit a shipper of an exempt commodity to obtain a common carrier rail rate in accordance with 49 U.S.C. §11101(b); (ii) permit a shipper of an exempt commodity to bring a case for rate relief before the STB; and (iii) if a shipper demonstrates railroad market dominance on a specific movement, the shipper will be entitled automatically to revocation of the commodity or service exemption, that maximum rate relief be available,

⁸ *See, e.g.*, United States Government Accountability Office, *Freight Railroads: Industry Health Has Improved, But Concerns About Competition and Capacity Should Be Addressed*, GAO-07-94 (Oct. 2006) at 41 ("Despite STB's efforts, there is widespread agreement that STB's standard rate relief process is inaccessible to most shippers and does not provide for expeditious handling and resolution of complaints. The process remains expensive, time consuming, and complex.").

and that the common carrier service obligation be reinstated for that movement.

Fundamental fairness necessitates a change in policy to allow exempt shippers to obtain a common carrier rail rate and if that shipper is subject to railroad market dominance it should be entitled to bring a maximum reasonable rate complaint (like any other captive shipper) and obtain relief.

Of course, removing an exemption or providing the other relief requested by AK Steel does not equate to actual new regulation, and as noted above, such action would actually streamline and minimize regulatory burdens on shippers seeking administrative relief. Also, any railroad claim that exemption removal will increase regulatory burdens on carriers is without merit. AK Steel is not seeking to overturn ICCTA and force railroads to once again file tariff or contract summaries with the Agency. Also, as part of the Board's "quantitative" market dominance test, the STB cannot make a market dominance determination unless the challenged rate exceeds 180% of the defendant railroad's service costs. *Id.* at §10707(d)(1)(A). This effectively means that the *minimum* rate that the STB can prescribe is 180% of costs – and ensures that no traffic with effective competition would be subject to regulation.⁹

⁹ As with any rail traffic, the STB would not have the authority to set rates on exempt traffic on its own, absent a complaint. Rail carriers are free to initiate and implement rates, and, the STB has the authority to begin a rate case proceeding only upon complaint. *See* 49 U.S.C. §10704(b). Additionally, the STB possesses the authority to set maximum rates only on market dominant common carrier rail traffic. *See id.* at §10701(d)(1).

CONCLUSION

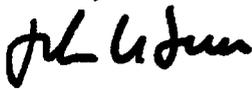
The ability of captive shippers to seek rate reasonableness relief from the Board from unreasonable pricing should not be undermined just because a shipper moves an exempt commodity. For the reasons set forth above, the exemptions being explored by the Board in this proceeding should be reevaluated and reversed in the manner proposed by AK Steel because these exemptions no longer serve a useful purpose and reversal will lower barriers to regulatory access and promote regulatory efficiencies.

Respectfully submitted,

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

By:

John H. LeSeur 
Peter A. Pfohl
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Dated: January 31, 2011

Attorneys for
AK Steel Corporation