

## EX PARTE NO. 346 (SUB-NO. 35)

RAIL GENERAL EXEMPTION AUTHORITY--  
EXEMPTION OF FERROUS RECYCLABLES

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*Decided August 27, 1996*

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This decision: (1) grants the joint Petition for Reconsideration filed by the Association of American Railroads and the Institute of Scrap Recycling Industries, Inc. as set forth; and (2) denies the Petition to Reopen filed by Patrick W. Simmons, for and on behalf of the United Transportation Union, Illinois Legislative Board (Simmons), seeking reconsideration of the Interstate Commerce Commission's decision in this matter, served on May 16, 1995.

BY THE BOARD:<sup>1</sup>

## BACKGROUND

Interstate Commerce Commission (ICC)'s *Prior Decision*. In response to petitioners' joint request, which sought to exempt, under 49 U.S.C. 10505, three Standard Transportation Commodity Code (STCC) commodity groups, the ICC exempted from regulation the rail transportation of two STCC commodity

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10701 *et seq.* Citations are to both the former and current sections of the statute, as appropriate.

1 S.T.B.

groups, identified as ferrous recyclables: (1) iron and steel scrap (STCC Commodity Group No. 40-211); and (2) steel shipping containers (STCC Commodity Group No. 34-912). The ICC declined, at that time, to exempt the third commodity, blast furnace, open hearth, rolling mill or coke oven products, NEC (blast furnace products) (STCC Commodity Group No. 33-119). The ICC observed that commodities in this group, in all of the prior Ex Parte No. 394 recyclables rate compliance and exemption proceedings, had been considered by the ICC, railroads, and shippers to be nonferrous recyclables and therefore should not be exempted in light of special statutory protections at 49 U.S.C. 10710 and 10731 that existed at that time for recyclables other than recyclable or recycled iron or steel. The ICC noted that petitioners offered no justification for a recategorization of the commodities from nonferrous to ferrous.

*Petition for Reconsideration.* On June 5, 1995, petitioners filed a Petition for Reconsideration stating that they did not disagree with the ICC's decision not to exempt the commodities included in the five-digit STCC Commodity Group No. 33-119. They also stated that they had reviewed the commodities in STCC Commodity Group No. 33-119, at the more specific seven-digit STCC code level, and were able to identify some, but not all, as ferrous recyclables. Petitioners thus sought a modification of the ICC's decision to include within the exemption four seven-digit STCC commodities as ferrous recyclables.

*Petition to Reopen.* On June 5, 1995, Simmons filed a Petition to Reopen, principally challenging the exemption of iron and steel scrap (STCC Commodity Group No. 40-211). Simmons focused on the ICC's finding regarding the absence of market abuse. He maintained that the ICC was incorrect in using tonnage, rather than ton-miles, as the proper measure of market abuse. He also argued that, for these commodities, the decline in rail revenue-per-ton-mile has been minimal, that there have been increased lengths-of-haul by rail carriers without a significant decline in rail rate levels of the commodities, and that revenue-to-variable cost (R/VC) ratios have no bearing on the issue of market power abuse.

## DISCUSSION AND CONCLUSIONS

Since the ICC's decision and the parties' petitions in this proceeding, Congress has passed the ICCTA. The ICCTA repealed the special statutory protections for transportation of nonferrous recyclable commodities. Thus, there is no longer a need to distinguish between ferrous and nonferrous recyclables for regulatory purposes. As a consequence, rather than distinguishing between ferrous and nonferrous commodities within STCC Commodity Group No. 33-119, we will exempt the entire five-digit STCC commodity group.

Under 49 U.S.C. 10502 of the new law, we are required to exempt a transaction or service whenever we find that regulation: (1) is not necessary to carry out the transportation policy of 49 U.S.C. 10101; and (2) either (A) the transaction or service is of limited scope; or (B) the application in whole or in part of the pertinent provisions of law is not needed to protect shippers from the abuse of market power.

Continued regulation is not necessary to carry out the national railroad transportation policy (RTP) of 49 U.S.C. 10101, and, in fact, this exemption will significantly advance several of the RTP objectives. Because the railroads face extensive competition in the transportation of these commodities, the proposed exemption will promote the goals of section 10101(1), (2), (3), (4), (5), (9), and (14).

We note first that, by its very nature, an exemption "minimizes[s] the need for Federal regulatory control" [10101(2)]. In addition, the exemption would "allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates" [10101(1)]; and would encourage effective competition [10101(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" [10101(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"

by permitting railroads to respond more quickly to changing market conditions [10101(9)]. Finally, to the extent that an exemption would enable the railroads to attract traffic from motor carriers, it would encourage energy conservation [10101(14)]. The remaining provisions of the RTP will not be adversely affected.

Additionally, we find that regulation is not necessary to protect shippers of blast furnace, open hearth, rolling mill or coke oven products, NEC, from the abuse of market power. Waybill data for 1991 for blast furnace products (STCC Commodity Group No. 33-119) show an average R/VC ratio of 153.7%, with a mean length of haul of 451 miles and 18% of total tonnage moving at R/VC ratios below 100%. Similar data for 1992 show an average R/VC ratio of 158.2%, with a mean length of haul of 381 miles and 6% of total tonnage moving at R/VC ratios under 100%. These data, coupled with the lack of any shipper opposition to the proposed exemption of blast furnace products, adequately support a finding that regulation of the rail transportation of these commodities is not needed to protect shippers from abuse of market power.

Simmons' contentions do not support his request for reopening. We continue to believe that R /VC ratios are useful in analyzing the degree of market power by the railroad industry in connection with transportation of particular commodity groups. Nor do we find Simmons' assertion that rail carriers' lengths-of-haul for these commodities have increased while rate levels have not significantly declined to be convincing, especially in light of the absence of any shipper opposition. Finally, we see no new merit in Simmons' rehash of his argument, rejected by the ICC, that the ton-miles, rather than tonnage, ought to be used here to measure market share.

#### REGULATORY FLEXIBILITY ACT

The Board certifies that this exemption will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. This exemption will reduce regulation; it imposes no new reporting or other requirements directly or indirectly on small entities.

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## ENVIRONMENT AND ENERGY

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

*It is ordered:*

1. Pursuant to 49 U.S.C. 10502, the rail transportation of blast furnace, open hearth, rolling mill or coke oven products, NEC (STCC Commodity Group No. 33-119) is exempted from the provisions of 49 U.S.C. Subtitle IV.
2. Notice will be published in the *Federal Register* on September 9, 1996, and 49 CFR 1039.11 will be amended by adding blast furnace, open hearth, rolling mill or coke oven products, NEC (STCC Commodity Group No. 33-119) to the list of exempt commodities already contained therein, at the appropriate places, as set forth in the appendix to this decision.
3. The Petition for Reconsideration filed by the Association of American Railroads and the Institute of Scrap Recycling Industries, Inc. is granted to the extent it is consistent with this decision.
4. The Petition to Reopen filed by Patrick W. Simmons, for and on behalf of the United Transportation Union, Illinois Legislative Board, is denied.
5. This decision is effective on October 9, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

## APPENDIX

For the reasons set forth in the decision, title 49, chapter X, part 1039 of the Code of Federal Regulations is amended as follows:

## Part 1039-EXEMPTIONS

1. The authority citation for part 1039 is revised to read as follows:

Authority: 5 U.S.C. 553; 49 U.S.C. 10502 and 13301.

2. Section 1039.11, paragraph (a), is amended by adding the following new entry to the end of the table:

§ 1039.11 *Miscellaneous commodities exemptions.*

(a) \* \* \*

STCC No.	STCC tariff	Commodity
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33 119	6001-X, eff. 1-11-96	Blast furnace, open hearth, rolling mill or coke oven products, NEC.

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