

## EX PARTE NO. 346 (SUB-NO. 34)

RAIL GENERAL EXEMPTION AUTHORITY--EXEMPTION  
OF HYDRAULIC CEMENT

---

*Decided December 4, 1996*

---

The Board exempts rail transportation of hydraulic cement (STCC No. 32-4) from the provisions of 49 U.S.C. Subtitle IV.

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

In *Rail Gen. Exemption Auth.--Exem. Of Hydraulic Cement*, 10 I.C.C.2d 649 (1995), the ICC exempted all rail movements of hydraulic cement from the provisions of 49 U.S.C. Subtitle IV, except shipments from a plant at Rapid City, South Dakota owned by the South Dakota State Cement Plant Commission (Dacotah).<sup>2</sup> The decision also requested comments on whether the Dacotah cement plant is rail-captive and the effect, if any, of the Commission's decision in the Union Pacific/Chicago and North Western control case<sup>3</sup> on this matter.

---

<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC or Commission) 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 and 10502. Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. However, because of the nature of the action in this proceeding--adoption of a class exemption with application to future transportation and related future filings--we have considered both the new and the old law. Citations are to the current sections of the statute, unless otherwise indicated.

<sup>2</sup> The Rapid City plant is located in the far western part of South Dakota and is the only plant of its size in the United States located more than 250 miles from a major metropolitan area.

<sup>3</sup> *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Chicago and North Western Transportation Railway Company*, Finance Docket No. 32133 (ICC served March 7, 1995) (UP/CNW).

Comments and replies were filed jointly by the Association of American Railroads and the Union Pacific Railroad Company (AAR/UP or the Railroads), and by Dacotah.

### BACKGROUND

Hydraulic cement is powdered substance that is the primary binding agent for concrete and masonry. It is produced by burning a mixture of calcareous and argillaceous materials, grinding the resulting product, called "clinker," and mixing it with gypsum. When mixed with sand and gravel, it forms concrete. Most of the hydraulic cement presently in use is portland cement, the remainder being masonry cement used for mortar and stucco.

Hydraulic cement, when hauled by rail, is typically carried in covered hopper cars to distribution terminals located near large metropolitan areas. There, it is stored or delivered to construction sites. In exempting from regulation the rail carriage of hydraulic cement (except for service to the Dacotah plant), the ICC found that the railroads faced pervasive competition from other railroads, barges and, especially, trucks. The ICC pointed out that most cement production facilities are located near the source of raw materials and are usually within 200-250 miles of a market area, a haul short enough to permit trucks to compete effectively. The ICC noted that, except for Dacotah, no shipper of cement had protested the proposed exemption.

When the ICC first sought comment on the proposed exemption of hydraulic cement, nationwide, on October 21, 1993, the Dacotah plant was served by the Chicago and North Western Transportation Company (C&NW). The UP subsequently acquired the C&NW pursuant to ICC authorization in *UP/CNW*. In its July 26, 1995 decision seeking comments on whether the Dacotah plant is rail captive, the ICC also asked whether its decision approving UP's acquisition of C&NW had an impact on the extension of the exemption to encompass the Dacotah facility.

On April 25, 1996, we approved an application filed February 22, 1996, by the Dakota, Minnesota and Eastern Railroad Corporation (DME) to acquire the "Colony Line," the former C&NW (and then UP) line in western South Dakota (as well as northeastern Wyoming and northwestern Nebraska) that served Dacotah's cement plant. *Dakota, Minnesota and Eastern Railroad Corporation--Acquisition and Operation--Colony Line segment of the Union Pacific Railroad*

*Company, Inc.*, STB Finance Docket No. 32864 (STB served April 25, 1996) (*DME Acquisition--Colony Line*). None of the parties has filed additional pleadings in this proceeding in light of the DME application to acquire the line, nor have we received any pleadings since we approved DME's application.

Because the acquisition of the line by DME moots the issue of the effect of UP's acquisition of the C&NW in this proceeding, we will not discuss that matter. However, not having been notified otherwise, in handling this *UP/CNW* proceeding, we must assume that Dacotah continues to object to the exemption of rail carriage of hydraulic cement from the Rapid City plant. In this regard, we note that, although Dacotah had objected to the UP's takeover of the Colony Line on the ground that UP is a large, remote organization, in *DME Acquisition--Colony Line*, Dacotah filed a pleading supporting the sale of the line to DME. DME is a much smaller, more local carrier than the UP. DME cited those advantages in its application to acquire the Colony Line, and we noted them in our decision approving that acquisition. DME appears to be no worse off as a result of the acquisition and indeed may be better off.

The essence of Dacotah's objection to the exemption was that Dacotah was located far from its markets and was served by only one railroad. That has not changed since DME's acquisition of the line from UP. Dacotah states that its single plant operation, located at the extreme western side of South Dakota, is directly served by only one railroad, and that all rail freight leaving Dacotah's plant must leave via the Colony Line. According to Dacotah, the carrier serving its plant controls the rates, car supply, pick-up, switching, train assembly, and movement of all cement shipments leaving the Dacotah plant by rail. Regulation is necessary, according to Dacotah, to guard against a potential abuse of market power.

#### DISCUSSION AND CONCLUSIONS

Section 10502 directs the Board to exempt a transaction or service whenever continued regulation (1) is not necessary to carry out the transportation policy of section 10101 and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not needed to protect shippers from the abuse of market power. We find that exemption of the rail transportation of hydraulic cement, including that originating at the Dacotah plant in Rapid City, SD, satisfies the standards of section 10502.

The Commission already determined that regulation of hydraulic cement is not necessary to carry out the national transportation policy, with the possible exception of transportation of hydraulic cement from the Dacotah plant in Rapid City, SD. The Board reaffirms that determination and extends it to the Dacotah plant. The revision to the exemption at 49 CFR part 1039 is appended to this decision.

That the Dacotah plant is physically served by only one carrier does not necessarily mean that there is an absence of effective competition. First, Dacotah recognizes that truck competition is a viable alternative for movements of less than 250 miles. Thus, the basic question is whether there is effective competition not only for the short hauls, but also for the longer hauls. We find that there is. Indeed, by Dacotah's own admission, the origin carrier at Rapid City--then UP--transported only 43% of Dacotah's traffic in 1994. The other 57% moved by alternative modes or combinations of alternative modes.

As the Railroads note, Dacotah has a transload facility on the Burlington Northern Railroad Company (BN) line at Moorcroft, Wyoming, which provides rail competition for substantially all of Dacotah's cement movements. Moorcroft is approximately 117 highway miles from Dacotah's Rapid City plant. Dacotah receives coal to fire its kilns from the Powder River Basin of Wyoming in specially constructed bulk trucks. Once the coal is unloaded at Rapid City, the trucks are reloaded with cement for the backhaul movement to Moorcroft.

Dacotah points out that the Moorcroft facility can not handle all of Dacotah's produce, and that it is only a threat to the extent that coal is trucked to Moorcroft. Yet, the evidence indicates that BN handles large amounts of Dacotah's traffic (1,527 carloads out of a total of 4,972 carloads in 1994), and that it clearly posed a competitive threat to the UP, when it owned the Colony Line. Even if BN can not handle all of Dacotah's traffic, there is effective competition when a carrier will lose "some or all" traffic to other carriers if it raises rates. *Market Dominance Determinations*, 1 I.C.C. 2d 118, 129 (1981); *Aluminum Assn., et al. v. ACY R. Co., et al.*, 367 I.C.C. 475, 485, 489, *aff'd*, *Aluminum Co. v. ICC*, 761 F. 2d 746, 750-51 (D.C. Cir. 1985) (effective product or geographic competition does not require all or even a majority of traffic to be at competitive risk; 28% share subject to product competition was found sufficient).

As the Railroads also note, there is competition from other producers that inhibits the ability of the railroad serving Dacotah's cement plant to increase rates. Dacotah's relatively unfavorable geographic location (usually the most distant supplier in the market it supplies) puts it at a natural disadvantage vis-a-vis its competitors. The carrier serving Dacotah must establish rates that overcome this disadvantage in order to handle Dacotah's hydraulic traffic. If the rate is too high, the producer does not participate in the market and the carrier does not participate in its transportation to that market.

A look at several markets reflects the fact that Dacotah and the rail carriers serving it share competitive pressures and constraints. The Denver market is served by many cement suppliers. To participate in Dacotah's move to Denver, a rail carrier not only must match BN's longhaul rates from Moorcroft, but also must charge rates that will allow Dacotah to compete with Colorado, Wyoming, and Texas suppliers whose service involves much shorter hauls. And according to the Railroads, movements to the east from the Rapid City plant compete with two producers at Mason City, Iowa; there is also a producer at Louisville, Nebraska, served by BN, UP, and many trucking firms. Any carrier serving Dacotah would lose the traffic if it does not work with Dacotah to make it price-competitive.<sup>4</sup>

The evidence in the record indicates that the Moorcroft facility and the other price constraints we have addressed have in fact held down railroad pricing. All of the UP traffic moved under contract rates rather than the higher tariff rates, which indicates that the railroad discounted its rates. It would have done so only if it were facing competition.

Dacotah states that it hired a consultant to compare its rates to national averages, and that its rates are equal to or above national average rates. Dacotah provides no support for this statement, however. Dacotah did not identify the consultant, nor describe the data used, the time period examined, or the methods applied. Under these circumstances, we are unable to accord significant weight to these conclusions.

---

<sup>4</sup> The Railroads cite a recent bid lost by UP on an eastbound movement from Dacotah to Omaha, Nebraska, that was won by BN, noting that Dacotah was actually using Moorcroft to ship via BN to a UP-served facility.

In an attempt to shed some light on this issue, we have undertaken our own analysis. We have reviewed the ICC's 1993 and 1994 waybills.<sup>5</sup> We have determined Dacotah's revenue-to-variable cost (R/VC) ratios for hydraulic cement, and compared them to the national average R/VC ratios for hydraulic cement. The revenues we used were shown on the waybills; we applied the Uniform Railroad Costing System (URCS) methodology to develop "system average costs" for the service to the Dacotah plant and for rail service nationally. We found that the R/VC ratios for the carriage of hydraulic cement nationally were 154.3% in 1993 and 157.6% in 1994. We also found that the R/VC ratio for service to the Dacotah plant was below those figures.<sup>6</sup> All of those ratios, we note, are well below the 180% R/VC ratio that the Board must show before asserting jurisdiction over railroad rates.

#### SUMMARY

Dacotah's traffic will be included in the exemption because there is effective competition for Dacotah's traffic from trucks, other railroads and geographic alternatives; the average R/VC ratios for Dacotah's shipments are well below the Board's jurisdictional level of 180%; and Dacotah's rail traffic is transported under contract rates that are provided in response to competitive pressures and are outside the Board's jurisdiction. It is in DME's best interest to establish rates that allow Dacotah to compete with other suppliers, even though DME will be the sole rail carrier physically serving the Dacotah plant. We find that regulation is not necessary to protect Dacotah from an abuse of market power because there is no market power to abuse. In the circumstances of this case, Dacotah's fear that its serving railroad might drive its own traffic away is not a valid reason for continued regulation.

---

<sup>5</sup> The ICC collected (and the Board now collects) a sample of all waybills--the documents that record each movement of each shipment by rail--issued by the railroads. The waybills show the revenue collected for each shipment, the commodity involved, and the original destination of the movement.

<sup>6</sup> We will not reveal the specific R/VC ratios for Dacotah because this traffic moved under contract rates, which are confidential.

### ENVIRONMENTAL AND ENERGY CONSIDERATIONS

We affirm the ICC's preliminary finding that the exemption will not significantly affect either the quality of the human environment or the conservation of energy resources.

### REGULATORY FLEXIBILITY ANALYSIS

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.

*It is ordered:*

1. The rail transportation of hydraulic cement (STCC No. 32-4) is exempted from the provisions of 49 U.S.C. Subtitle IV, including shipments from the Dacotah Cement Plant at Rapid City, SD.
2. Notice will be published in the *Federal Register* on December 17, 1996, and 49 CFR 1039.11 will be amended to delete the exception for shipments of this commodity from the Dacotah Cement Plant in Rapid City, SD.
3. This decision will become effective on January 16, 1997.

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

## APPENDIX

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 continues to read as follows:

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

2. In §1039.11, the table in paragraph (a) is amended by revising the entry for STCC No. 32-4 to read as follows:

§1039.11 *Miscellaneous commodities exemptions.*

(a) \* \* \*

STCC No.	STCC tariff	Commodity
* * * * *		
32-4	do	Hydraulic cement.
* * * * *		

\* \* \* \* \*