BEFORE THE

SURFACE TRANSPORTATION BOARD

Docket No. Ex Parte No. 711

PETITION FOR RULEMAKING TO ADOPT REVISED COMPETITIVE SWITCHING RULES

REPLY SUBMISSION

of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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The National Industrial Transportation League ("NITL" or "League") hereby submits its Reply to the opening submissions and comments filed on March 1, 2013 with the Surface Transportation Board ("STB" or "Board") in this proceeding to evaluate the Competitive Switching Proposal ("CSP") submitted by the League in a Petition for Rulemaking filed on July 7, 2011. In its decision dated July 25, 2012 ("Decision"), the Board solicited empirical information regarding the potential impact that increased rail competition resulting from adoption of the CSP would have on shippers' rates and service and on the railroad industry's finances and operations.

On March 1, the League submitted its comprehensive Opening Submission addressing each of the questions asked by the Board in its Decision. Included with the League's submission were verified statements from two respected experts in the field of rail transportation, Mr. Henry Julian (Jay) Roman, President, Escalation Consultants, Inc., Gaithersburg, MD ("Roman Opening V.S.") and Mr. Thomas Maville, President, TL Maville & Associates, Inc., Ottawa,

Ontario Canada ("Maville V.S."). Opening comments were submitted by a variety of other government, railroad and shipper interests, including the United States Department of Transportation ("DOT"); the United States Department of Agriculture ("USDA"); the Association of American Railroads ("AAR"); as well as individual comments from several of the AAR's members, including the BNSF Railway Company ("BNSF"), CSX Transportation, Inc. ("CSXT"), the Kansas City Southern Railway Company ("KCS"), the Norfolk Southern Railway Company ("NS"), the Union Pacific Railway Company ("UP"); The National Grain and Feed Association ("NGFA"), the American Chemistry Council ("ACC") and others also submitted comments.

In this Reply, the League responds primarily to the incomplete and erroneous evidence and comments of the AAR, as well as to certain of the individual comments submitted by a number of its Class I railroad members. Supporting the League's Reply are verified statements from two respected experts in the field: (1) Mr. Jay Roman, President, Escalation Consultants, Inc. ("Roman Reply V.S."), who responds to the Verified Statement of AAR witnesses, Michael R. Baranowski and Richard W. Brown of the firm of FTI Consulting, Inc. ("Baranowski/Brown V.S."); and (2) Mr. Walter Schuchmann, of the firm of R.L. Banks and Associates, Inc. ("Schuchmann V.S."), who responds to the Verified Statement of AAR witness William J. Rennicke, of the firm of Oliver Wyman, Inc. ("Rennicke V.S."). Mr. Roman's Reply Verified Statement is attached as Appendix 1 and Mr. Schuchmann's Reply Verified Statement is attached as Appendix 2.

Specifically, the League will show in this Reply that:

- The AAR's estimate of the scope and impact of the League's CSP is simply wrong. In particular, the AAR's methodology and assumptions used to analyze the CSP are fundamentally flawed and, therefore, produce erroneous—and vastly

overstated— results regarding the number of carloads potentially subject to competitive switching under the CSP.

- The AAR never submitted hard evidence on the impact of the CSP on railroad revenue since the AAR never even proposed an assumed access fee or attempted to calculate the impact on railroad revenue. Instead, the AAR's "evidence" was composed of purely speculative statements (e.g., "the effect [of the CSP] on total revenue and contribution *could* be substantial," AAR Comments at 15), which lack any merit in comparison to the comprehensive revenue impacts calculated by the League.

- The well-developed CSP studies submitted by the League, DOT and others demonstrate that the impact of the CSP will be modest. The CSP will result in meaningful competitive benefits to shippers who qualify, while having a limited impact on railroad revenue.

- Contrary to the AAR's arguments, the CSP will not disrupt rail service or railroad operations, nor will it negatively impact shippers who do not qualify for competitive switching under that proposal.

- The Board clearly has the legal authority to issue regulations implementing the League's proposal, which is consistent with the policies and provisions of the statute. The AAR's extensive arguments to the contrary are flatly erroneous.

- The railroads' criticism of the specific terms of the CSP are non-responsive to the Board's request for an impact analysis of the CSP, and involve issues that are most appropriately addressed in the context of any rulemaking on competitive switching. Nevertheless, the League explains herein the rational bases which support the "rail market power" and "reasonable distance" conclusive presumptions included in the CSP, dispelling the carriers' arguments.

- The UP's request for the Board to include "lost contribution" in any future access fee applied to competitive switching would gut the very competitive benefits to be achieved by the CSP, by preventing the competing carrier from offering a total rate package that could actually move the traffic (i.e. a line-haul rate plus the switch fee). Thus, this "lost contribution" model would ensure preservation of the status quo—and the carriers' monopoly profits—and should be rejected by the Board in favor of a "cost-based" fee model.

Based on the glaring shortcomings in the AAR's analysis of the CSP, and the comprehensive and reasonable CSP impact estimates provided by the League, which demonstrate that the CSP is sound, balanced and consistent with the statute, the Board should

issue a formal Notice of Proposed Rulemaking in order to implement the CSP at the earliest possible date.

I. INTRODUCTION

A. THE LEAGUE'S OPENING SUBMISSION CLEARLY DEMONSTRATED THAT THE CSP WOULD INCREASE COMPETITION FOR SOME CAPTIVE SHIPPERS WITHOUT HARMING THE RAILROADS

The League's Opening Submission fully responded to the Board's requests for information on the impact of the CSP. Most importantly, the League's comprehensive analyses of the Board's Waybill data demonstrated that the CSP would inject reasonable competition into the captive freight rail market for the benefit of qualifying shippers, without economically or operationally harming the U.S. Class I railroads. More specifically, the League and its two witnesses, Mr. Roman and Mr. Maville addressed in detail the various tasks outlined by the Board in its July 2012 Decision. The results of the NITL's analyses strongly support action by the Board to implement the CSP.

As a preliminary matter, the League's filing explained both that this Board *can* and *should* issue new competitive switching rules. The League demonstrated that the balanced terms of the CSP, which allow a shipper to establish that it is subject to rail market power by satisfying either of two proposed conclusive presumptions, and which ensure that competitive switching would not undermine efficient and safe rail service, are entirely consistent with the Staggers Act's goal to facilitate rail competition through switching arrangements that are "practicable and in the public interest" or "necessary to provide competitive rail service." 49 U.S.C. § 11102(c); NITL Opening at 5-8. The League's filing further established (and this Reply reaffirms) that the Board has the necessary power under this broad statutory authority to facilitate rail competition under the limited terms of the CSP. *Id.*

The League also explained that the Board is more than justified in taking the steps necessary to implement the CSP, based on the substantial evidence submitted by captive shippers across multiple industries in both this Ex Parte 711 proceeding and the Ex Parte 705, *Competition in the Rail Industry,* proceeding. The evidence submitted to the Board in these proceedings demonstrates that: there has been an extensive loss of competition in the freight rail industry in the aftermath of the mega-rail mergers in the 1990s; there is a strong need to restore rail competition for shippers who are captive to a single class I railroad; and there is a strong preference amongst shippers across multiple industries that competitive switching arrangements be created to allow sole-serviced facilities access to a second rail carrier. NITL Opening at 8-12.

The League also set forth the findings of its analyses. These analyses revealed that the CSP offers a balanced and reasonable solution to address the concerns of those captive shippers who are clearly subject to railroad market power (*i.e*. rail captive movements with R/VC ratios of 240% or more and/or with a rail market share of 75% or more). The League performed thorough analyses of the impact of the CSP on the four major Class I railroads (BNSF, UP, CSXT, and NS) under two scenarios of (i) full competition; and (ii) reduced competition to reflect the realities of the current rail market. The results under both scenarios established that only a very small percentage of traffic will be subject to the CSP. Specifically, the CSP will affect only 4% of all carloads under full competition and even less under reduced competition. NITL Opening at 43; Roman Opening V.S. at 29, 31-32, 38-39.

Further, in order to perform its analyses of the CSP, the League developed an assumed access fee methodology that was reasonably based on the existing Canadian interswitching cost-based methodology, with appropriate adjustments and simplifications. NITL Opening at 30-32; Roman Opening V.S. at 9-14; Maville V.S. at 14-17. The Canadian access fee model was

employed since it is rigorously developed by the Canadian government; is based on railway costs and other information provided by the major Canadian carriers; has not harmed the Canadian railroads, who are also highly profitable; and is familiar to the U.S. railroads. NITL Opening at 32-33.

The League's witness, Mr. Roman, analyzed hundreds of thousands of Waybill records in order to estimate how many rail stations and carloads would be impacted by the CSP, and to estimate the savings that would accrue to shippers who qualify under the CSP. Roman Opening V.S. at 14-38. It was necessary for Mr. Roman to develop a number of assumptions and protocols to complete the analyses in order to address limitations in the Waybill data and to respond to the specific inquiries posed by the Board in its July 2012 Decision. NITL Opening at 35-41; Roman Opening V.S. at 15-23, 24-30. After analyzing the Waybill data and applying its assumptions, protocols, and assumed access fees, the League was able to estimate the savings that would accrue to shippers who qualify under the CSP. Specifically, the League estimated that the revenue reduction that would result for the major Class I carriers would be $1.294 billion, or just 2.4% of those carriers' 2010 gross revenue ($52.9 billion) under the full competition scenario; the impact would be even less, approximately $908 million, under the reduced competition scenario. NITL Opening at 47-53; Roman Opening V.S. at 29, 31-33, 38. The League's evidence also showed that there is a reasonable possibility that at least some of these estimated revenue reductions would be offset by gains in rail traffic that would accrue from more competitive rail rates resulting from implementation of the CSP. NITL Opening at 54-56; Roman Opening V.S. at 39-46.

While the League's evidence established that there are clear competitive benefits that would result from implementation of the CSP, the League also determined that there would be no

meaningful adverse impact on shippers that do not qualify under the CSP. NITL Opening at 56-57. The League explained that, based on the small fractions of impacted carloads and carrier revenue that are estimated to result from the CSP, and the reasonable presumption that rail carriers have already priced their captive traffic to maximize revenues, it is highly unlikely that the railroads would raise rates on captive traffic that does not qualify under the CSP. *Id.* The Union Pacific Railroad supported this very position in its opening comments ("UP already has every incentive to price traffic to maximize contribution"). UP Comments at 66.

Finally, the League and its witness, Mr. Maville, demonstrated that the CSP would not harm the efficiency of the U.S. railroad network. Specifically, the League provided the Board with a detailed review of the long-standing inter-switching rules in Canada, since those rules provide for "automatic switching" and are even broader than the terms of the CSP. NITL Opening at 59; Maville V.S. at 4-7. Thus, the Canadian inter-switching rules provide real insight as to the actual impacts competitive switching would have on railroad operations. As Mr. Maville explained, the experience in Canada reveals that, of the total amount of rail traffic that is eligible for "interswitching" in Canada, only a very small portion of such traffic is actually switched to a competing rail carrier. Specifically, Mr. Maville showed that, although, 40% of all rail traffic in Canada is eligible for interswitching, less than 4% of all rail traffic is actually switched. NITL Opening at 59-60; Maville V.S. at 19-21. Applying the Canadian experience to the U.S., the League's evidence showed that only about 124,000 railcars out of 31 million cars moving on the U.S. rail network in 2010 would likely be switched between rail carriers. NITL Opening at 60. Based on the tiny fraction of rail traffic that could be expected to be switched under the CSP, combined with the fact that all rail traffic eligible for competitive switching cannot reasonably be expected to actually switch in the very first year after adoption of the CSP,

the CSP could hardly be expected to disrupt rail operations across the U.S. Lastly, the League explained that the CSP has the potential to increase network efficiency (NITL Opening at 63); and that the very terms of the CSP allow for a rail carrier to oppose an application for competitive switching based on any local service or safety concerns. NITL Opening at 63-64.

B. THE ANALYSES OF THE CSP SUBMITTED BY U.S. DOT, USDA, AND OTHERS FOLLOWED SIMILAR METHODOLOGIES AND INCLUDED SIMILAR FINDINGS TO THE NITL ANALYSES

1. Summary of U.S. DOT Opening Comments

In its Opening Comments, DOT provided the Board with an analysis of the CSP "to assist the Board in identifying the origin/destination pair (O/D pairs or shipper markets) that could potentially take advantage of the proposal, as well as the rail revenues reflected in those markets." DOT Comments at 2. Like the NITL analysis, DOT chose to perform its study by analyzing the 2010 Waybill movements for the big four Class I railroads. DOT's study also focused on the 240% R/VC presumption included in the NITL proposal rather than the 75% market share test, since neither the Waybill or any other known data source would allow for a firm analysis of the 75% market share test. DOT Comments at 3, fn 2. DOT, however, chose to narrow the scope of its study to only three major commodities "that represented more than 90 percent of both revenues and carloads for shippers that could meet the revenue/variable cost threshold of the NITL proposal." DOT Comments at 2. Specifically, the DOT study was limited to the commodity groups of coal, chemicals, and farm products. DOT Comments at 7. Also similar to the League's analysis, DOT excluded movements that originated or terminated outside the United States, as well as intermodal movements, but included contract traffic. DOT Comments at 4. DOT's study differed from the League to the extent that DOT excluded other exempt traffic. *Id.*

DOT's study analyzed single line moves on the Big Four carriers with R/VC ratios of 240% or more; and then evaluated whether a captive shipper was within 30 "rail route miles" of a working interchange.[1] DOT Comments at 9. Applying the above described methodology, DOT determined that an estimated 360,000 carloads (out of a total 26.8 million) and $1.1 billion in rail revenues (out of total revenue of $51.8 billion) would be potentially impacted by the CSP, with chemical shippers being the most impacted commodity group, followed by coal, and then farm products. DOT Comments at 10-11. These figures represented only a very small percentage of total carloads (1.3%), and total revenue (2.1%). These figures are generally similar to the carload and revenue estimates resulting from the NITL analysis under the full competition scenario: the League estimated that the CSP would impact 4% of total carloads and 2.4 % of total revenue (NITL Opening at 47), especially in light of the fact that the League's analysis applied to all commodity groups, included all exempt traffic except intermodal, and applied to both single-line and joint-line moves.[2]

2. Summary of USDA Comments

USDA also submitted Comments to the Board that included a study of the CSP's impact on grain shippers and the big four Class I railroads. USDA engaged Mr. Jay Roman, President of Escalation Consultants, to perform the CSP analysis, the same consultant used by the League. At the outset, USDA expressed its strong support for having the Board create new rules to facilitate competitive switching in order to fulfill the promise of the Staggers Act and to address the loss of rail competition resulting from the mega-rail mergers:

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[1] DOT determined working interchanges using RAILINC's Centralized Station Master (CSM) file. DOT Comments at 10, fn 7.

[2] The League's analysis also considered the competitive status of each origin and destination for impacted moves, and applied competitive benchmark rates and an assumed access fee to determine its revenue impact figures. NITL Opening at 25-41.

> USDA believes there is substantial evidence and testimony in favor of promoting competitive switching by the Board and agrees with NITL that the Board must abandon its current competitive access rules in Ex Parte 445 (Sub-No. 1) and related precedent in order to do so. Existing rules and precedent governing reciprocal switching have made it all but inaccessible despite that it was expressly written into the Staggers Rail Act in order to provide for the "public interest" or where "necessary to provide competitive rail service."
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> *****
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> USDA believes adequate railroad competition has suffered since the last rounds of mega-mergers…..Although these mergers cannot be undone, the Staggers Rail Act provides for ways, such as competitive switching, to promote competition and help ensure deregulation works as intended.

USDA Comments at 2. USDA then explained to the Board the data and methodologies used to conduct its CSP analysis, and set forth the detailed rules applied by its consultant in an Appendix to its Comments. USDA Comments at 7-9 and Appendix. The League will not repeat those rules here but would note that the rules and methodologies applied by USDA were substantially similar to the rules and methodologies used by the League in its analyses. For example, USDA calculated the impacts of the CSP under two scenarios of "Near Perfect Competition," and "Duopoly Competition" to account for the fact that railroads may not compete as aggressively for switching traffic as compared to traffic subject to direct rail-to-rail competition or intermodal competition.[3] USDA Comments at 8-12. USDA also strongly advocated for an access fee methodology that is "simple, easily calculated, and applied to all switching…." and that results in an access price that is "predictable and fair." USDA at 19. Like NITL, USDA then applied an access fee methodology that was based on an average of the Canadian inter-switching rates from

[3] In calculating the CSP impacts under Duopoly Competition, USDA applied the Lerner Index, just as the League did in its calculations of the CSP impacts under Reduced Competition.

zones 3 and 4, as well as other adjustments and simplifications, for blocks of either fewer than 60 cars ($299/car avg.) and more than 60 cars ($88/car avg.).[4] USDA Comments at 19-20.

There were, however, some differences between the NITL and USDA studies. Not surprisingly, USDA limited its study to eight major agricultural commodities, which "comprise 96 percent of the rail movements of farm products classification," since USDA's sole interest concerns such commodities. USDA Comments at 7. USDA was concerned that the 240% R/VC presumption in the League's proposal would not cover a sufficient number of grain shippers. Thus, in order to expand the universe of eligible grain shippers, USDA determined the impact of the CSP on carloads and revenue by applying the 30 mile test, using rail miles, to movements that satisfied a 180% R/VC threshold, in addition to the 240% R/VC threshold and the RSAM benchmark.[5] USDA Comments at 9-10.

Specifically, USDA determined the impact of the CSP on agricultural commodities would be very small. Under the broadest scenario evaluated by USDA, i.e. the 180% R/VC threshold, only 162,496 carloads were estimated to be impacted, affecting only 2.2% of the big four Class I railroads' gross revenues for grain commodities for Near Perfect Competition, and only 143,000 carloads and 1.3% of gross revenue under Duopoly Competition. USDA Comments at 10. These impacts were even smaller under the 240% R/VC threshold, for which

[4] Although USDA applied the same assumed access fees as the League in its analyses, it recommended using an average of Canadian inter-switching rates across all zones (and not just zones 3 and 4), which decreases the switching fees modestly from $299/car to $279/car for fewer than 60 cars and from $88 to $84 for more than 60 cars. USDA Comments at 20.

[5] Due to its eligibility concerns, USDA opposes adoption of the 240 R/VC or RSAM thresholds, and recommends that "competitive switching should be available for all shipments where the R/VC is above 180 percent." USDA Comments at 20. USDA also recommends a shifting of the burdens of proof from that proposed by the League by establishing a rebuttable presumption that a shipper is entitled to switching relief, "with the burden placed on the railroads to prove otherwise." USDA Comments at 20. USDA's Comments include other recommendations regarding closure of interchanges and market dominance determinations in rate cases. *Id.* at 7.

the CSP was estimated by USDA to affect only 102,000 carloads and 1.5% of the big four's gross grain revenue under Near Perfect Competition, and only 99,000 carloads and 1.0% of the gross grain revenue under Duopoly Competition. USDA Comments at 10-11. The League notes that the tiny estimated impacts for grain shipments correspond to the estimated CSP impacts provided by NITL in its analysis for all major commodity groups. Moreover, USDA concluded in its Comments that "[i]n the context of rapidly increasing rates and record rail income, introducing some limited levels of rail competition through competitive switching is reasonable, necessary and desirable." USDA Comments at 13.

3. Summary of Other Supporting Comments

Other shippers filed comments in support of the League's CSP. The American Chemistry Council ("ACC") expressed strong support for a revision to the Board's regulations in order to allow reciprocal switching to be used in accordance with the statutory mandate. ACC Opening at 2-3. ACC showed that railroad market power has increasingly harmed the domestic chemical industry, with resulting negative effects felt throughout the U.S. economy. ACC Opening at 3-5. ACC also explained that railroads would not be materially harmed by the competitive switching regulations proposed by NITL, yet significant benefits would be felt in the chemical industry and the broader economy. ACC Opening at 5-6.

Combined Opening Comments were filed by Entergy Arkansas, Inc., Kansas City Power & Light Company, Seminole Electric Cooperative, Inc., and Wisconsin Electric Power Company d/b/a WE Energies ("Joint Coal Shippers"). The Joint Coal Shippers requested the Board to clarify that any change in switching regulations would not affect the standards and principles applicable to market dominance determinations under 49 U.S.C. § 10707.

The Chlorine Institute, Inc. ("TCI") filed brief Opening Comments in order to express its agreement with the "intent behind the NITL's proposal" and that the reciprocal switching

regulations should be changed. TCI also stated that the mere availability of reciprocal switching does not necessarily mean that railroads will compete, and the Board should not expect the need for the rate reasonableness process to decrease. TCI Opening at 2.

Joint Opening Comments were filed by the National Grain and Feed Association and eight other agriculture-based organizations ("Ag Shippers"). The Ag Shippers "wholeheartedly agree[d] with NITL" that the Board should revise its existing rules regarding reciprocal switching. Ag Shippers Opening at 4. According to the Ag Shippers, the CSP is a "workable replacement to the existing rules" and represents "long overdue change." Ag Shippers Opening at 4. The Ag Shippers, however, support lowering the R/VC conclusive presumption to 180% and other changes in order to expand the number of Ag Shipper members who could qualify for competitive switching. Ag Shippers Opening at 23-24.

The Alliance for Rail Competition and eleven agricultural shipping organizations ("ARC") filed Opening Comments in which they agreed that the Board should move forward with a rulemaking to implement competitive switching. ARC Opening at 12. ARC stated that granting the NITL petition "would be a good first step" toward addressing the many competitive problems in the rail industry. ARC Opening at 11.

A number of other individual shippers also filed supporting comments, including Diversified CPC International, Inc., Olin Corporation; Glacial Lakes Energy, LLC; and the Roanoke Cement Co. These parties supported the League's effort, and provided information helpful to the Board in evaluating the League's proposal.

C. SUMMARY OF RAILROAD COMMENTS

1. AAR Comments

The AAR submitted extensive Opening Comments to the Board which included an analysis of the CSP performed by three consultants, each of whom criticized the CSP on

different grounds. AAR's witnesses Baranowski and Brown from FTI Consulting, analyzed the Waybill in an attempt to estimate the impacts of the CSP on qualifying shippers and on railroad revenue. However, unlike every other study submitted to the Board, which analyzed the Waybill through application of the 240% R/VC presumption in the CSP, Mssrs. Baranowski and Brown attempted to measure the CSP's 75% market share test, even though it is impossible to determine from the Waybill the total volumes of traffic shipped by a rail customer of a particular commodity, since only rail (and not truck or barge) movements are included in the Waybill. Indeed, AAR itself admitted that "[w]ithout knowing how much traffic moves by a mode other than rail, it is impossible to determine whether 75 percent of the total traffic moves on the incumbent railroad." AAR Comments at 12.

Specifically, AAR witnesses Baranowski and Brown analyzed the impact of the CSP by first determining which rail stations in the Waybill were captive (*i.e.* served by only a single Class I railroad) and that were within 30 air miles of a junction with another railroad; and then by estimating the number of revenue carloads associated with such stations.[6] AAR Comments at 13. Applying this overly-simplistic methodology, Mssrs. Baranowski and Brown estimated that more than 50% of all rail stations are both solely served by a Class I railroad and are located within 30 miles of a junction with another railroad, and that 7.5 million carloads could potentially be subject to competitive switching under the CSP. AAR Comments, Baranowski/Brown V.S. at 9.

AAR's witnesses Mssrs. Eakin and Meitzen of Christensen Associates purported to analyze the impact of the CSP on shippers who would not qualify for competitive switching. Specifically, Mssrs. Eakin and Meitzen claimed that the CSP would "create winners and losers

[6] AAR excluded intermodal traffic and included contract and exempt traffic in its analysis.

among rail shippers" and would adversely impact non-transportation markets. AAR Comments at 16. As to rail shippers who cannot qualify under the CSP, Mssrs. Eakin and Meitzen speculated that some shippers could experience rate increases and declining service, as well as other collateral impacts. AAR Comments at 17. Mssrs. Eakin and Meitzen also opined that rail traffic gains that may result from increased competition would not be sufficient to offset lost contribution from reduced rates and increased infrastructure investments. AAR Comments at 16. Furthermore, Mssrs. Eakin and Meitzen speculated that rail service declines could drive away potential new rail business. *Id*.

AAR's third consultant, William Rennicke from Oliver Wyman, offered an analysis of the impact of the CSP on rail service and network efficiencies. Mr. Rennicke painted a morbid picture based on his concerns that the CSP would undermine efficient single-line rail service and reduce productivity gains by requiring traffic to be interchanged with other railroads. AAR Comments at 18. Mr. Rennicke further contended that the CSP would have sweeping adverse repercussions on local rail operations, causing congestion and service delays, due to "added complexity and reduced predictability of traffic flows." AAR Comments at 19-21.

In addition to the arguments of its witnesses, the AAR also contended that the CSP should not be adopted by the Board for various legal and policy reasons. AAR contended that the Board lacks the authority to adopt the CSP; that the CSP would result in "open routing;" and that it is contrary to the public interest. AAR Comments at 22-35. Finally, AAR expressed concerns with the terms of the CSP.

2. Summary of Individual Class I Railroad Comments

BNSF filed brief Opening Comments asserting that switching remedies should be limited to those instances where a railroad has abused its market power (p. 2-3); that the CSP would raise rates for some shippers (p. 3-5); and that the 240% conclusive presumption proposed by the

NITL is inappropriate (p. 5-6). Finally, BNSF contended that the CSP should not apply to exempt or contract traffic. *Id*. at 6.

In its Opening Comments, UP asserted that the CSP would defeat the efforts of the ICC and the Board to promote single-line rail service. UP Opening at 8-21. UP claimed that the CSP would cause rail service problems and congestion. *Id*. at 22-57. UP made some effort to respond to several of the questions posed by the Board in the Decision (UP Opening at 57-67), though UP claimed that CSP is "too ill-defined" to enable development of empirical data as requested by the Board. *Id*. at 58. Finally, UP asserted that CSP would cause railroads to reduce capital investment in their rail networks. *Id*. at 67-72.

NS criticized the NITL Petition as too "vague" to enable any meaningful answers to the questions posed by the Board. NS Opening at 17-21 and 34-56. NS also asserted that the CSP is unlawful and beyond the Board's authority because Congress has "ratified" the competitive access rules. *Id*. at 21-34. NS argued that the CSP would cause litigation and increased government intervention in the rail industry. *Id*. at 56-59. Finally, NS asserted that rail service problems and inefficiencies would result from implementation of CSP. *Id*. at 59-80.

KCS contended that the justifications provided for CSP "are really about regulating rates," and that, consequently, CSP is unnecessary and the focus should be on reforming the rate complaint process. KCS Opening at 3-14. KCS asserted that the CSP will cause inefficiencies and fluidity problems in the rail network. *Id*. at 14-16. Like NS, KCS argued that CSP will cause greater government intervention in the rail industry, not less, and generate confusion about whether it applies to both single-line and joint-line rail movements. *Id*. at 17-25. KCS asserted that CSP would be unlawful and beyond the authority of the Board. *Id*. at 26- 41. Finally, KCS claimed that CSP is contrary to antitrust theory and certain ICC decisions. *Id*. at 41-49.

CSXT in its Opening Comments argued that the Board is powerless to revise its reciprocal switching regulations. CSXT claimed that NITL's concern is really about rates, that reciprocal switching does not truly increase competition, and that the existing competitive access rules were "ratified" by Congress in the passage of the Interstate Commerce Commission Termination Act. CSXT Opening at 4-21. CSXT argued that CSP would undermine investments and operating practices that have led to improvements in rail service and reliability. *Id*. at 24-48. Finally, CSXT expressed its worries that reciprocal switching cases would be complicated, raise difficult questions, and increase regulatory intervention. *Id*. at 48-57.

II. THE AAR'S ESTIMATE AND ANALYSIS OF THE SCOPE AND IMPACT OF THE LEAGUE'S PROPOSAL IS WRONG

A. THE AAR'S CALCULATION OF THE SCOPE OF THE CSP IS DEEPLY FLAWED

1. The Baranowski/Brown Analysis Adopts Absurd Assumptions and Fails to Consider Numerous Factors in Calculating the Number of Carloads and Stations Potentially Affected by the CSP

In its Opening Comments, the AAR claims, through its witnesses Baranowski and Brown, that "over one-third of the rail industry's non-intermodal carloads could become subject to mandatory switching orders . . .", a total of about 7.5 million carloads or over 37% of the 20 million total non-intermodal carloads carried by the nation's railroads. In fact, the AAR claims that this analysis "understates the number of stations that could be affected by the NITL proposal," because its witnesses Baranowski and Brown could not estimate the number of shippers at competitive stations whose facilities were nevertheless captive to a single carrier. AAR Comments at 3, 13.[7] The AAR also claims that the Baranowski/Brown analysis shows that

[7] The League would note that, unlike the AAR's witnesses Baranowski and Brown, its witness Roman did provide an estimate of the number of carloads originating or terminating at facilities at "competitive" stations that nevertheless might be captive to a single railroad. The procedures used by witness Roman to identify such movements are detailed in the Roman Opening V.S. at 22-23.

the League's proposal "could affect movements that originate or terminate at approximately 40 percent of the Nation's rail-served stations," that is, 3,419 stations out of a national total of 6,749 stations. AAR Comments at 4, 13.

The AAR's estimates are absurd. The AAR's numbers result from the adoption of an initial ridiculous "default assumption" by their witnesses Baranowski and Brown, compounded by the failure of those witnesses to consider numerous factors that reduce the number of carloads and stations potentially affected by the League's proposal. The AAR's numbers are "outliers" when compared to the other CSP studies submitted to the Board. In the League's Opening Submission, its witness Roman calculated that less than 1.24 million carloads carried by the "Big Four" would potentially qualify under the 240% R/VC presumption, or less than 4% of the total carload count of these carriers.[8] Roman Opening V.S. at 29. At the same time, DOT looked at three major commodities carried by the nation's railroads, and estimated that only 360,000 carloads would be potentially affected by the NITL's proposal, or just 1.3% of the total carloads of these commodities. DOT's carload figure is consistent with Mr. Roman's analysis of a broader range of commodities. DOT Comments at 10-11.[9]

In his Reply Verified Statement, Mr. Roman discusses in detail the flaws in the Baranowski/Brown analysis. The Baranowski/Brown analysis attempted to estimate the number of stations and carloads that potentially would qualify for competitive switching under the League's 75% "market share" presumption and the 30-mile "reasonable distance" presumption,

[8] Mr. Roman's calculations also showed a potential impact on only 1,670 rail stations. Roman Opening V.S. at 29.

[9] USDA estimated that only about 162,000 carloads were likely to be impacted by the CSP (USDA Comments at 10), a figure consistent with the League's estimate for these commodities and with DOT's estimate of carloads affected for Farm Products (72,086 carloads, *see* DOT Comments at 11). AAR's estimate, on the other hand, was that 658,329 carloads of Farm Products were likely to be impacted by the CSP – an estimate that was over nine times higher than DOT's estimate and over four times greater than that of USDA.

even though the AAR itself admitted that "[w]ithout knowing how much traffic moves by a mode other than rail, it is impossible to determine whether 75 percent of the total traffic moves on the incumbent railroad." AAR Comments at 12. Rather than analyzing the CSP's 240% R/VC conclusive presumption, which can be readily determined from data in the Waybill, the Baranowski/Brown analysis begins with the fundamentally flawed "default assumption" that "at stations served by a single Class I rail carrier, the serving carrier is handling 75% or more of the total shipper volumes."[10] Baranowski/Brown V.S. at 3. As Mr. Roman notes, this "default assumption" conveniently assumes away the entire trucking, inland waterway and pipeline industries and thus vastly overstates the number of carloads that might be potentially impacted by the CSP. *Id*. at 7, 10. Furthermore, this erroneous assumption is directly contradicted on multiple fronts by publicly available information regarding railroad market share of transportation in the United States; the railroad industry's claims over the years that other transportation industries provide strong competition to the railroad industry; Board precedent; common experience; and just plain common sense. Roman Reply V.S. at 7.

Mr. Roman also explains that the Baranowski/Brown analysis lacks credibility because it failed to consider numerous movement-specific factors that must be applied to reduce the number of carloads potentially affected by the NITL's proposal. *Id*. at 7-9. Mr. Roman refers to these factors as "screens" or "sieves." For example, if there is a single-line movement from a

[10] The League would note that the Baranowski/Brown "default assumption" does not even correctly characterize the NITL 75% market share presumption. Specifically, Baranowski/Brown assume that, at stations served by a single rail carrier, the serving carrier is handling 75% or more of "total shipper volumes." But the NITL 75% market share presumption does not apply to "total shipper volumes" from a particular facility, but rather focuses on individual "movements" for which competitive switching is sought. That is, the 75% market share presumption is on a movement basis, *i.e.*, does the carrier handle 75% or more of the movement from a particular origin to a particular destination. *See* NITL Petition, July 7, 2011, at 67.

Captive Origin to a Captive Destination, and the Captive Origin is within thirty miles of a working interchange but the Captive Destination is not, then even if the origin becomes "competitive" under the CSP, the CSP will not result in any competitive impact, since the Board has long recognized that a single-line carrier solely serving the origin or the destination will determine the rate, regardless of any competition at the other end of the movement. *See, e.g., Union Pacific Corporation, Pacific Rail System, Inc. and Union Pacific Railroad Company – Control – Missouri Pacific Corporation and Missouri Pacific Railroad Company,* 366 I.C.C. 459, 538, 539 (1982). The Baranowski/Brown analysis ignores this and many other factors that must be considered before a movement can be regarded as potentially impacted by the NITL's proposal. Roman Reply V.S. at 7-9.

Finally, Mr. Roman shows that the Baranowski/Brown analysis ignores the issue of price and revenue, further causing an overstatement of impacted carloads. Specifically, a carload might formally change from "captive" to "competitive" status at both ends of a movement; however, if the existing revenue from that carload is low (because, for example, it is subject to potential motor carrier competition), that carload will not be impacted by the CSP because a competing railroad will not be able to offer a rate that would be any lower, especially after payment of the access fee. The Baranowski/Brown analysis ignores this obvious revenue factor in estimating the number of carloads that might potentially be affected by the NITL's proposal. *Id*. at 9-10.

In other words, the Baranowski/Brown analysis starts with a "default assumption" that vastly increases the number of carloads potentially subject to the CSP, and then ignores other critical factors that would serve to reduce that artificially-inflated number. The result is an

"estimate" of the scope of the NITL proposal that wildly overstates the number of potentially-affected carloads and stations.

In his Reply Verified Statement, Mr. Roman undertakes to correct Baranowski and Brown's failure to apply the necessary "screens" or "sieves" and their failure to consider current revenue. In doing so, Mr. Roman estimates that no more than about 1.85 million carloads, across the entire range of R/VC ratios for traffic (i.e., not just those movements with an R/VC ratio greater than 240%) of all commodities carried by the nation's rail carriers at all captive stations within 30 miles of a competitive interchange, are potentially subject to the NITL's proposal. Roman Reply V.S. at 11-13. For illustrative purposes, Mr. Roman's calculation essentially adopts the false Baranowski/Brown assumption that all traffic at single-served stations within 30 miles of an interchange will meet the NITL 75% market share test, but corrects for Baranowski and Brown's failure to consider the other factors discussed above. But even considering that absurd assumption, this 1.85 million carload figure is, as Mr. Roman notes, a "far cry" from the 7.5 million potentially-affected carloads calculated by AAR witnesses Baranowski and Brown. *Id*. at 13.

However, this 1.85 million carload number still does not represent a realistic number for the impact of the League's proposal: that figure is still significantly overstated because, as discussed above, it is absurd to assume, as Mssrs Baranowski and Brown do, that a single Class I rail carrier that solely serves a rail station is handling 75% or more of the total volume of traffic transported at that facility. More reasonable assumptions are required to estimate the impact of the CSP's 75% market share presumption, an issue to which we now turn.

2. Correcting the Overstatements in the AAR Analysis and Making Reasonable Assumptions Regarding the Number of Carloads That Would Qualify Under the 75% Market Share Presumption Results in a Substantially Reduced Impact for That Presumption

In his Reply Verified Statement, Mr. Roman notes that it is not possible to directly measure the potential scope of the League's 75% market share presumption, since it is not possible to determine from the Waybill or any other publicly-available data whether a rail carrier handles 75% or more of the total transported volumes from a specific origin to a specific destination. *Id*. at 13-14. However, Mr. Roman notes that it is possible to make more reasonable assumptions regarding the impact of the 75% market share presumption than the absurd "default assumption" adopted by AAR witnesses Baranowski and Brown.

In order to evaluate the 75% market share test, Mr. Roman reviewed the Commodity Flow Surveys (CFS) jointly published by the Bureau of Transportation Statistics and the U.S. Census Bureau. These surveys show the modal market share of 40 different commodities transported in the United States. Roman Reply V.S. at 14-15. Mr. Roman notes that, of these 40 commodities, railroads have a market share (as measured by tons carried) of greater than 25% for just four commodities – coal, metallic ores, cereal grains, and basic chemicals. For all other commodities, the railroad market share is less than 25%. Based on this market share data, Mr. Roman determined that these four commodities are most likely to meet the 75% "market share" presumption in an individual-origin-to-individual-destination situation, since it would not be reasonable to assume that commodities with less than a 25% rail market share overall would be likely to meet the 75% market share test. Using the Waybill, Mr. Roman then analyzed the movement of these commodities at a range of R/VC levels between 180% and 239%,[11] since this

[11] Mr. Roman notes that he did not need to look at the movements of these commodities with R/VC ratios at 240% or above, since these movements were already included in his estimate of

R/VC range would indicate some degree of railroad market power and a concomitant likelihood that the railroad market share is high. Moreover, as Mr. Roman notes, for movements at rate levels with an R/VC below 180%, it is far less likely that any new competing rail carrier would be able to "beat" the rate of the incumbent, especially in light of the need to pay the access fee. Therefore, the potential effect of the CSP would be very small. *Id*. at 15.

Using the same detailed procedures set forth in his Opening Verified Statement, Mr. Roman then calculated the number of carloads of these four commodities that would qualify under the NITL's 75% market share presumption but which had not already been included in his estimate of the impact of the 240% R/VC presumption, using the same two assumptions regarding the level of the competitive rate applied in his opening analysis. Applying these more reasonable assumptions, Mr. Roman estimated the effect of the League's 75% market share presumption and determined that it would add less than 200,000 carloads to his March 1 estimate of the effect of the 240% R/VC presumption under conditions of full competition; and less than 123,000 carloads under conditions of reduced competition. Roman Reply V.S. at 16. Thus, the total potential impact of both the 240% R/VC presumption and the 75% market share presumption for the "Big Four" Class I carriers would be 1,438,563 carloads under conditions of full competition,[12] and would be 1,201,584 carloads under conditions of reduced competition.[13] *Id*. at 17. These numbers are still a small fraction – less than 4.7% – of the 31 million total

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the effect of the 240% R/VC presumption set forth in his Opening Verified Statement. *See* Roman Reply V.S. at 14.

[12] 1,239,297 (Roman Opening V.S. at 29) plus 199,266 (Roman Reply V.S. at 16) equals 1,438,653. *See* Roman Reply V.S. at 17.

[13] 1,078,622 (Roman Opening V.S. at 38) plus 122,922 (Roman Reply V.S. at 16) equals 1,201,584. *See* Roman Reply V.S. at 17.

carloads carried by these railroads in the 2010 Waybill. *See* Roman Opening V.S. at 29; Roman Reply V.S. at 17.

Thus, contrary to the "scare tactics" used by the AAR in its Comments to vastly inflate the number of potentially affected carloads and stations, a proper calculation of carloads, stations, and affected and reduced revenue shows that the CSP is a moderate proposal that will not have a deleterious effect on railroad finances.

B. THE AAR REFUSED TO SUBMIT EMPIRICAL EVIDENCE ON THE CSP'S IMPACT ON RAIL RATES AND REVENUE, AND ITS GENERAL ARGUMENTS REGARDING THE CSP'S FINANCIAL IMPACT ARE UNSUPPORTED AND WRONG

One of the most important issues included in the Board's July 2012 Decision concerns the agency's request for information regarding the impact of the CSP on railroad rates and revenue. July 2012 Decision at 6-7. Although the AAR plainly recognized that "[t]he Board's question on likely rate reductions recognizes that the impact of mandated switching depends to a large extent on the compensation that would be paid to the incumbent railroad for providing the mandated switch," it refused to even opine on a reasonable access fee. AAR Comments at 14.

In its Comments, the AAR notes that "the statute leaves determination of compensation for reciprocal switching to the involved railroads in the first instance," citing 49 U.S.C. Section 11102(c)(1). The AAR then states that it "takes no position on the outcome of private negotiations among railroads for compensation for access . . ." AAR Comments at 14. But the Board asked the parties to estimate the effect of various access fees because it is obvious that assessing the impact of the proposal was not possible unless some attempt was made to estimate an access fee, even over a range. *See* Decision at 7-8. Moreover, the AAR well knows that there is publicly available data from its own members' websites regarding the "outcome of private negotiations among railroads for compensation for access." *See* NITL Opening Comments at 19-22. The AAR's refusal to answer the Board's question is simply an ill-disguised attempt to

avoid providing an answer that would undermine its own position that the CSP would broadly impact railroad revenue.

Moreover, by failing to respond to the Board's specific request to develop an "assumed access fee" for the limited purpose of conducting the CSP analysis, AAR could only provide the Board with speculative and conclusory statements: "[W]hile it is not possible to predict the level of rail rates or precise amount of lost revenues, the magnitude of traffic at issue *suggests* that the effect on total revenue and contribution *could* be substantial." AAR Comments at 15 (emphasis added). However, this statement is meaningless not only because it is lacking any support in data, but also because it is based on AAR's erroneous 7.5 million carload estimate, which has already been shown above to be completely false. Based on the railroads' failure to provide any supportable rate or revenue estimates, the Board should rely exclusively on the estimates provided by the League, DOT, and other non-railroad parties.

AAR also claims that railroad finances would be adversely impacted by the CSP because it would increase the cost of providing transportation services. AAR Comments at 15. However, this contention is based on the verified statement of AAR's witness Rennicke, in which Mr. Rennicke claims that reduced efficiencies and new infrastructure needs would result from the CSP and drive up operating costs. *Id.* However, as explained below and by the League's Reply witness, Mr. Schuchmann, Mr. Rennicke's conclusions are based on the faulty assumption that 25 percent of the 7.5 million carloads estimated by AAR witnesses Baranowski and Brown to be impacted by the CSP would actually be switched from the incumbent carrier; and are also incorrect for a host of other reasons. Because Mr. Rennicke's statement is based on a huge overstatement of the number of cars that will switch to an alternative carrier, his cost concerns are also overblown. Additionally, AAR provides only generalized statements that costs will rise,

without providing any cost estimates with underlying supporting data that would allow the Board to measure the significance of those concerns.

In response to the Board's inquiry, the AAR also contends, based on the joint verified statement by Mssrs. Eakin and Meitzen ("Eakin/Meitzen V.S."), that it would not be reasonable to expect that some amount of the revenue reduction that would occur under competitive switching arrangements would be offset by revenue generated from new rail traffic that results from reduced rail rates. AAR Comments at 15. First, the AAR attempts to dodge this issue altogether by arguing that lost contribution rather than reduced revenue should be the focus of the Board. *Id.* at 16; Eakin/Meitzen V.S. at 10. But even after avoiding the Board's specific question, the AAR still admits that there could be traffic gains: "If rates were, in fact, driven down substantially, as NITL hopes, *any new traffic* might generate little or no additional contribution. . . . Moreover, whatever *additional gross revenue the new traffic* might generate could be offset by the costs for new infrastructure investments….." AAR Comments at 16 (emphasis added); *see also*, Eakin/Meitzen V.S. at 10. In evaluating whether a shipper would be likely to tender more traffic to a rail carrier, the Board should be persuaded by the comments from actual shippers and their representatives who have expressed to the Board that it is entirely reasonable to expect that at least some of the carriers' reduction in revenue would be offset by increased traffic. NITL Opening at 54-56; USDA Comments at 18; ACC Opening at 5.

After admitting that rail traffic gains are possible, the AAR seeks to undermine this CSP benefit by claiming that traffic gains could be offset by negative impacts on service and other rail operations. AAR at 16; Eakin/Meitzen V.S. at 12-13. However, AAR offers nothing more than conjecture: its statements are riddled with the propositions of "if", "might" and "could"—once again failing to offer the Board any definitive or measurable CSP impacts. Additionally, Mssrs.

Eakin and Meitzen seek to reduce the potential for rail traffic gains to questions of rail service, costs and profit. Eakin/Meitzen V.S. at 11-13. However, as explained throughout this Reply, the AAR's concerns that the CSP will adversely impact such factors are entirely overblown because they are based on an erroneous estimate of the number of carloads that would be impacted by the CSP. Moreover, the statement from Mssrs. Eakin and Meitzen focuses on theoretical cost increases that could potentially offset revenue increases (Eakin/Meitzen V.S. at 15-16), but these witnesses never once consider or account for the benefits of competition that would result from the CSP. Finally, the claim by Mssrs. Eakin and Meitzen that the railroads have not voluntarily engaged in a greater number of competitive switching arrangements "is an economic indication that railroads could not be better off under the proposal ….." (Eakin/Meitzen V.S. at 17) is absurd, since such a proposition assumes that a monopolist would voluntarily decide to reduce its monopoly profits.

C. THE AAR IS WRONG THAT THE CSP WOULD HAVE A NEGATIVE EFFECT ON SHIPPERS WHO COULD NOT QUALIFY

The AAR argues that the CSP would result in a group of "favored shippers" and that other shippers would experience deleterious effects. AAR Comments at 16-17**;** Eakin/Meitzen V.S. at 3. However, the entire AAR submission is designed to ensure that there are no shipper winners, since it is obvious that the AAR's chief objective in this proceeding is to prevent the Board from making any changes to the existing competitive access regulations, which have been shown in individual cases to strongly favor the railroads.

First, the AAR claims that shippers who cannot benefit from the CSP "could" experience rate increases. AAR Comments at 17. However, once again, the AAR and its witnesses base this claim on nothing more than pure speculation: "The ability of railroads to raise rates of the rate-disadvantaged shippers beyond existing levels is unclear, therefore the extent of the

redistribution impact is difficult to evaluate." Eakin/Meitzen V.S. at 4. More importantly, the AAR's claim that rates would increase on shippers who do not qualify under the CSP was directly contradicted by the UP in its Opening Comments: "UP believes widespread rate increases would be unlikely, and rate increases would not make up for the contribution that railroads would lose if access prices were artificially low….UP already has every incentive to price traffic to maximize contribution." UP Opening at 66.

The AAR's claim that railroads could raise rates on non-qualifying shippers is also entirely inconsistent with the experience of Canadian shippers under the inter-switching rules in Canada. As explained by the League in its Opening Comments, the Canadian switching rules have existed for over 100 years and there is no evidence that shippers in Canada who do not benefit from inter-switching are suffering from increased rates. Indeed, in its Opening Submission, the League provided the Board with an extensive overview of the history and operation of the Canadian inter-switching regime, as well as the significant involvement of the Canadian government in overseeing and reviewing this regime. NITL Opening, Maville V.S., Exhibit 2. However, rather than restricting or narrowing the scope of inter-switching because it is harmful to "non-covered" shippers, the Canadian government *expanded* inter-switching because of the important benefits to be derived from increased competition: "The government policy initiatives in respect of interswitching are clear. In expanding the previous interswitching limit of four track miles to the current 30 kilometre radius limitation, the legislators demonstrated a desire to provide for greater access to competitive service for captive shippers . . . . ." NITL Opening, Maville V.S. at 12 (citing to the National Transportation Agency of Canada Decision No. 269-R-1988, Aug. 18, 1988, p. 2). The CSP is founded upon this very

same principle—the benefits of competition in the marketplace. Yet, these benefits are completely ignored by the AAR.

Additionally, the AAR's concern that some shippers who benefit from the CSP would experience more competitive rail rates than other shippers who do not qualify for competitive switching is a phenomenon that already exists today, since not all shippers or shipper facilities are captive to a single class I railroad. Thus, there is no merit whatsoever to the AAR's "rate fairness" argument, which is transparently designed to divert the Board's attention away from the important benefits that would be derived from the CSP as a result of promoting increased competition—one of the prime policies of the Staggers Act.

Next, the AAR contends that the CSP would harm the rail service of non-qualifying shippers, and that these service problems will result in cost increases for railroads which will be passed on to both qualifying and non-qualifying shippers under the CSP. AAR Comments at 17; Eakin/Meitzen V.S. at 6-7. However, the foundation for these claims is derived from the AAR's witness, William Rennicke, and as the League demonstrates in this Reply, Mr. Rennicke has vastly overstated the impacts of the CSP on rail service. *See* subsection D. below. Because Mr. Rennicke's CSP service impacts are erroneous, the claims by Mssrs. Eakin and Meitzen that such service problems will result in infrastructure cost increases are likewise without merit.

Furthermore, in its Opening Submission, the League demonstrated that the revenue impact on the U.S. Class I railroads would be small (just 2.4% of their gross revenue), and that the operational impact on network efficiency would likewise be insignificant, since the CSP would only affect 4% of total carloads, and based on the Canadian experience, only 124,000 carloads are likely to be switched. NITL Opening at 43, 60; Roman V.S. at 33. Accordingly, based on the NITL's analysis of the CSP, the Board need not be concerned that there would be

harmful ripple effects on shippers that would not qualify for competitive switching, since the very modest impact of the CSP would not cause the speculative harms conjured up by the AAR.

D. THE AAR'S ARGUMENTS REGARDING THE EFFECT OF THE CSP ON RAILROAD SERVICE AND EFFICIENCY IGNORES KEY FACTORS AND IS WRONG

In its Opening Comments, AAR argues that the CSP would "put at risk the efficiency gains of the past three decades . . ." AAR Comments at 18. The AAR bases this assertion on information submitted in the Verified Statement of Mr. Rennicke. In turn, the AAR explains that Mr. Rennicke bases this assertion on the grounds that these efficiency gains were the result of the "elimination of unnecessary interchanges with other railroads and the accompanying reduction in switching and car handling activity," which the CSP would reverse. *Id*. at 18-19. AAR then asserts that the "adverse consequences" of the CSP would be "widespread," based on a variety of hypothetical examples posited by Mr. Rennicke, *id*. at 19-21. The AAR concludes that the CSP would "turn[] back the clock on years of progress in creating a highly efficient and shipper-responsive rail network," basing this assertion on a "hypothetical 25% diversion" posited by Mr. Rennicke "of the estimated 7.5 million carloads to which mandatory switching may apply." *Id*. at 21-22.

AAR could not be more wrong. As shown in detail in the Reply Verified Statement of witness Schuchmann, Mr. Rennicke's analysis is flawed because it: (1) overstates the impact of the CSP for a wide variety of reasons, and ignores all other bases for productivity improvements in the rail industry over the past several decades; (2) ignores the inherent flexibility and abilities of the U.S. freight rail system to effectively deal with the modest impacts of the CSP, which are in fact smaller than the traffic swings experienced on a daily basis by the nation's freight railroads; (3) ignores the benefits of competition to the rail transportation system; and (4) overlooks the willingness of freight railroads to create new interchanges, such as in the case of

the spin-off of short lines, the NS/CSX Shared Assets Areas and a host of other examples, in order to develop new business.

At the outset, the AAR's analysis is flawed because it is based on the overstated estimate of 7.5 million potentially affected carloads hypothesized by Messrs. Baranowski and Brown, which flaws are exposed above and in the Reply Verified Statement of Mr. Roman. Mr. Schuchmann then discusses how Mr. Rennicke's assumption that 25% of the estimated 7.5 million impacted carloads will be diverted is based on no actual data or experience whatsoever and is also unrealistic, given the Canadian experience. Schuchmann V.S. at 3, 5-6. Mr. Schuchmann explains the advantages that the incumbent carrier will have and the likelihood that diversions to the new carrier would be gradual, thus giving the carriers time to adjust operations. *Id*. at 6-7. Mr. Schuchmann further determined that, while Mr. Rennicke calculates that there will be an astounding 38.6% increase in the number of interchanges per load (the key metric used by Mr. Rennicke), which is based on the Baranowski/Brown estimate of 7.5 million cars potentially affected and Mr. Rennicke's assumed 25% of cars diverted. A more realistic estimate of the number of interchanges per load, based on more realistic assumptions, would result in only a tiny 1.1% increase in the number of interchanges per load. Schuchmann V.S. at 8-9.

Moreover, Mr. Schuchmann notes that the number of interchange switches is much less than the number of cars interchanged, because many cars move in blocks, so that a single switch can divert many cars. *Id*. at 9. Mr. Schuchmann also notes that the 124,000 cars diverted estimated in the League's Opening Submission produces just 40,000 new interchange events. *Id*. at 9-10. Finally, Mr. Schuchmann explains that these new interchanges represent only incremental activity – the involved railroads already have personnel and equipment at the

locations, and the CSP will merely result in the addition or subtraction of cars at existing locations. *Id*. at 12.

Mr. Schuchmann also discusses how Mr. Rennicke's examples "of the impact of cars diverted under the CSP assume the worst" and are overstated, because they assume diversions in individual situations that are highly unlikely. For example, one of Mr. Rennicke's illustrations assumes a 90-car-per day diversion in a hypothetical 200-car-per-day yard as a result of the implementation of the CSP. But that seemingly-innocent example is highly unlikely: Mr. Schuchmann shows that using Mr. Rennicke's own overstated figures for cars impacted and cars diverted, that the number of 90 diversions per day in that single, small yard would be more than four times the average number of diversions expected and nearly two percent of all diversions nationally. Schuchmann V.S. at 10-12. Even using the League's more realistic figures, those 90 diversions per day in that one small yard would account for more than a quarter of all diversions nationally in that year. *Id*. Mr. Rennicke's examples are not credible.

Mr. Schuchmann also discusses a variety of other flaws in the Rennicke analysis. Mr. Rennicke claims that the improvements in rail productivity experienced over the years have been largely a function of the reduced frequency of interchanges. But Mr. Schuchmann explains that is not true. Increases in railroad productivity have come from a wide variety of sources, and the modest interchange increases resulting from the CSP will not adversely affect current railroad productivity. *Id*. at 12-14. Mr. Schuchmann notes that interchanges are a daily occurrence in the rail industry – they happened 5.4 million times in 2010 – and the changes induced by the CSP will be incremental. *Id*. at 14-15. Mr. Schuchmann describes how rail traffic constantly changes, and how the gains or losses in just single lines of business, such as the huge increase in the rail transportation of crude oil, are greater than the projected changes resulting from the CSP.

Id. at 15, 20-22. Indeed, Mr. Schuchmann notes that the increase in only crude oil traffic by just a single carrier (BNSF) in a single year (from 2011 to 2012) is greater than the projected diverted carloads nationwide resulting from the CSP. *Id*. at 15, 21.

Moreover, Mr. Schuchmann shows how the railroad industry has and uses modern routing tools – some touted by Mr. Rennicke's own firm – that enable it to quickly respond to changes in carloads and shipping patterns. *Id*. at 21-23.

Mr. Schuchmann also explains that competition creates benefits, which are entirely overlooked by Mr. Rennicke. As Mr. Schuchmann notes,

> as consumers we want different combinations of goods or services, quality, reliability and price and we recognize that competition is the way to achieve those different offerings. And we also recognize that the presence of a competitor in a market will tend to cause the incumbent to improve its product and not necessarily at any reduction in margin. Similarly, shippers and end consumers benefit from competition in transportation services, potentially in terms of price, service and quality.

Schuchmann V.S. at 24.

Indeed, carriers themselves create new interchanges when it is to their benefit. NS and CSX created the Conrail Shared Asset area, even though every carload handled by Conrail in that area involves an interchange. Schuchmann V.S. at 25, 27. UP invested in the CNW to get into the Powder River Basin, even though its joint-line, interchanged service would have to compete with BNSF single line service out of the Basin. *Id*. at 27. Yet, consumers wanted that competition, and that competition has spawned substantial benefits for not only the carriers involved but for the nation as a whole. And, Class I carriers have spun off hundreds of short line carriers, even though new interchanges are created when they have done so. *Id.* at 27-29. In other words, carriers have willingly created new interchanges when it is in their benefit to do so. However, when it is to the benefit of the nation's shippers, and to the nation as a whole, then new

interchanges "put at risk efficiency gains of the past three decades," "reverse years of progress," would be "inappropriate and could well become unmanageable," would create "widespread" "adverse consequences," and would "severely impact railroads' ability to manage their yard operations efficiently." AAR Comments at 18, 19, 20. The AAR's and the individual railroads' arguments are self-serving at best, and utterly wrong.

E. THE CSP IS NOT "VAGUE," AS THE AAR ARGUES, AND REASONABLE ASSUMPTIONS AND DETERMINATIONS CAN BE MADE REGARDING THE POTENTIAL EFFECT OF THE CSP'S TERMS

In its Opening Comments, the AAR argues that the League's Competitive Switching Proposal is "little more than a general concept," is "vague and unclear in many respects," with "many of the critical details about scope and implementation to be developed." AAR Comments at 9. The AAR's charge is spurious: the CSP is not "vague" at all. Its elements and standards are clear and straightforward, and the conclusive presumptions in the CSP are designed to expedite competitive switching applications in order to reduce complex and costly administrative litigations before the Board. The CSP also is flexible and designed to permit individual circumstances to be considered, especially where safety and operational efficiency are involved. In its Petition for Rulemaking, the League described in great detail the elements of its proposal, and even offered regulatory language that could be adopted by the Board to implement the proposal. Indeed, the AAR's arguments are contradictory: at the same time that it argues that some aspects of the NITL proposal are "vague and unclear," the AAR also argues that the conclusive presumptions in the NITL proposal are "arbitrary" and do not allow individualized inquiry. *See* AAR Comments at 37-43.

First, the AAR complains that the NITL CSP "does not attempt to define 'terminal' or identify terminal locations . . ." AAR Comments at 10. The CSP includes a conclusive presumption that the facilities of one or more shippers or receivers are within a "reasonable

distance" of a "working interchange" between a Class I carrier and another carrier if the shipper's facilities are within the "geographic boundaries of a terminal established" by that Class I rail carrier as of the date of the League's original Petition or in the future. *See* July 7, 2011 League Petition in Ex Parte No. 711, Appendix B, proposed CFR Section 1145(c). Although the proposed regulation does not define a "terminal," the AAR itself recognizes that the agency has determined the existence and properties of "terminals" in decisions for many years (*see* AAR Opening Comments at 11, fn. 2 and at 44).[14] Additionally, this issue could be readily addressed by the Board in a Notice of Proposed Rulemaking, if the agency determined that bright-line rules to identify existing and future "terminals" of Class I rail carriers are desirable.

Next, the AAR complains that the proposal is "vague as to what might be considered a 'working' interchange." AAR Comments at 11. Under the CSP, a party seeking competitive switching must show that there is or can be a "working interchange" between the Class I rail carrier serving the shipper or receiver's facilities and another carrier. However, the League's proposal provides for two conclusive presumptions regarding the existence of a "working interchange" and, if an applicant for competitive switching did not meet either of the two

[14] The Board and its predecessor have in fact established, through decisions over the years, a well-developed set of factors used in evaluating the existence or non-existence of a "terminal." The most recent comprehensive discussion of what is a terminal area seems to be in STB Docket No. 41550, *Golden Cat Division of Ralston Purina Company v. St. Louis Southwestern Railway Company*, 1996 STB Lexis 132 (served April 25, 1996). The factors mentioned in that decision were: use of track; location of railroad yard limits; boundaries of cohesive commercial area; presence of team tracks, freight houses or assembly facilities. *Id*. at *15-16. In *Midtec*, the ICC used a similar formulation. In that case, the ICC stated that "[t]he questions of what is a terminal area and what is switching are factual ones requiring consideration of all the circumstances surrounding a particular case." 3 I.C.C.2d 171, 179 (1986). Hence, the ICC did not provide a specific list of factors in *Midtec*. However, the narrative of the ICC over several paragraphs reveals that the ICC considered the following facts: the type of service performed on the track (i.e., the use of the track); the extent of rail yard limits; the existence of a "cohesive commercial area"; distance; and the location of railroad stations. *See*, 3 I.C.C.2d at 179-180. *See also, CSX Corp. – Control – Chessie and Seaboard Coast Line*, 363 I.C.C. 518, 585 (1980).

conclusive presumptions, it was still possible and appropriate for the Board to grant the application based on an individualized inquiry in light of the applicant's relevant facts and circumstances. Moreover, it is notable that the AAR's witnesses Baranowski and Brown were able to readily identify working interchanges from the Centralized Station Master list and the Junction Interchange File in developing their CSP carload analysis. *See* Baranowski/Brown V.S. at 3, 8. Additionally, Mr. Roman utilized the Station Master List published by Railinc to identify the location of Working Interchanges, as did DOT. Roman Opening V.S. at 16; DOT Comments at 10. Thus, it appears that the identification of "working interchanges" would not pose a major problem to potential applicants or defendants involved in competitive switching proceeding.

The AAR notes that the League's proposal would provide for a conclusive presumption that a shipper/receiver facility is within a "reasonable distance" if those facilities are within 30 air-miles of a working interchange. AAR Comments at 11. Yet, at least one AAR member, the NS, complains that the determination of the 30-mile distance is "ambiguous and unclear." NS Comments at 51. The CSP indicates that the facilities of the shipper or receiver must be "within a radius of 30 miles of an interchange" for the conclusive presumption to apply. *See* July 7, 2011 League Petition in Ex Parte No. 711, Appendix B, proposed CFR Section 1145(c).

In developing its proposal, the League believed that the use of a radial measure of distance would be easiest to determine; however, the League understands that the use of a radial measure for its 30-mile conclusive presumption might be problematic in some circumstances, such as those noted in the League's Opening Submission. Thus, in its Opening Comments, the League's expert opted to use rail miles to calculate the distance from a captive station to a working interchange, to avoid for the purposes of this analysis anomalies that would occur

through the use of air miles. *See* Roman Opening V.S. at 16. While the League believes that radial distance is a superior measure, it is open to considering the use of a linear measure, or a combination of linear and radial measures such as exists in Canada, in any Notice of Proposed Rulemaking issued by the Board.[15] Any questions surrounding the mechanism for measuring the 30 mile distance can be appropriately vetted and addressed in the context of a rulemaking proceeding.

The AAR also complains that the League's proposal would appear to "apply to contract and exempt traffic even though the Board does not have jurisdiction over those movements." AAR Comments at 12. The League is well aware that, if a contract binds a shipper to use a particular carrier for some or all of its transportation, the shipper could not use a competitive carrier for the traffic covered by the contract until the contract ends. Of course, contracts do eventually end.

The League's proposal contemplates that a shipper could apply for competitive switching before the end of a contract, to be effective upon the termination of the contract, which would allow for the bidding of the traffic between the incumbent and the new competitor – just as shippers with competitive rail service do today.[16]

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[15] The League notes that Canada uses a mix of radial and linear distances in its inter-switching regulations: inter-switching is available to any shipper within a radial distance of 30 kilometers; however, linear distance is used to determine in which "zone" the shipper is located and thus the access fee that the shipper pays; and shippers located within the 30-kilometer radial distance but more than 40 linear kilometers from the junction pay a set fee per kilometer for the extra distance. *See* Maville V.S. at 13 and Roman Opening V.S. at 11.

[16] The League contemplates that the 240% R/VC presumption could apply against a contract rate in order to determine if the shipper met the 240% R/VC presumption to qualify for competitive switching under the CSP. However, that presumption does not subject the contract itself to regulation: only when the contract ends could the shipper avail itself of competitive switching for that traffic.

With respect to exempt traffic, the League does not believe that its CSP regulations could override the statute and the Board's exemption decisions. However, the League would note that the statute does provide for the possibility of revocation of an exemption.[17] Moreover, most of the Board's exemptions provide that the exemption does not apply to transportation that the Board has determined to be "market dominant." See, *e.g.*, 49 C.F.R. 1039.1(a). The League believes that a shipper could file an application for competitive switching along with a petition seeking a finding that specified exempt traffic should be determined to be market dominant. The League as well as the AAR and the USDA included exempt traffic in their analyses in an effort to show the widest possible impact of the CSP, *i.e.,* all traffic that would qualify under its terms even though some of that traffic might be presently exempt.

Finally, the AAR complains that the "temporal scope of a mandated switching order is not addressed in the NITL proposal." AAR Comments at 12. The League believes that the temporal length of a competitive switching order is a matter that could and should be addressed in a Notice of Proposed Rulemaking. However, the League notes that the time should be long enough to provide a reasonable incentive to the competing carrier, especially because that carrier might have to make investments to handle the traffic. The League believes that at least a seven-year time period, subject to renewal if the presumptions continue to be satisfied, would be an appropriate timeframe.

F. THE LEAGUE'S PROPOSAL DOES NOT "RESTRUCTURE THE INDUSTRY," AS THE AAR CHARGES; IT IS A MODERATE AND BALANCED PROPOSAL TO BRING THE BENEFITS OF COMPETITION TO MORE OF THE NATION'S SHIPPERS

The AAR tries to portray the League's proposal as a radical attempt to "restructure[e] the commercial relationships in the railroad industry . . .," contemplating a "fundamental change" in

[17] 49 U.S.C. 10502(d)

the Board's regulation of railroads, and one which will potentially affect a "large amount" of railroads traffic. AAR Comments at 1, 2, 3, and *see also* pp. 5, 6, 13, 15, 16, 22, 23, 26, 27, 29, 30, 31, 35, 36, 47. It is as if, by using the terms "restructuring the industry," "fundamental change" and "large impact" often enough in discussing the CSP, the AAR by fiat could make it so. But it is not so.

The thinness of the AAR's analysis of the potential effect of the League's proposal and the vitriolic and repetitive nature of the AAR's comments suggest at the outset that the AAR's position is rhetoric unsupported by substance. Further, the League has already shown above that the AAR's methodology for analyzing the CSP was fundamentally flawed and drastically overstates its impact. In contrast, the depth of the League's analysis, and the fact that the League's analysis is consistent with the DOT and USDA analyses showing only a small impact on railroad traffic and revenue, should give the Board comfort that the League's proposal is moderate and balanced. The CSP would redeem the pro-competitive promises of the Staggers Act without undermining the success of that legislation in reversing the financial decline of the railroad industry.

In its Opening Comments, the League's analysis shows that its proposal would potentially affect less than 4% of the carloads of the Big Four Class I carriers, comprising only about 5.5% of those carriers' gross revenue. The implementation of the League's proposal could reduce those carriers' net revenue, over time, at the most between six and nine percent. Moreover, it is highly unlikely that all qualifying shippers will choose to obtain competitive switching: for example, a shipper with just a few carloads is not likely to take the time and trouble to apply to the Board and bid the traffic. Thus, the estimated effects noted above are likely overstated. *See* NITL Opening at 42-43, 47-49, and 53. Moreover, the Board can also

take comfort in the Canadian experience, just to our north and involving railroads that operate in the United States under similar circumstances, that a far more comprehensive competitive switching arrangement has had no deleterious effect on rail operations or revenues. The fact of the matter is that the League's proposal is a balanced, moderate change, fully within the bounds of the Board's statutory authority and discretion.

III. THE BOARD CLEARLY HAS THE LEGAL AUTHORITY TO ISSUE REGULATIONS IMPLEMENTING THE LEAGUE'S PROPOSAL, WHICH IS CONSISTENT WITH THE POLICIES AND PROVISIONS OF THE STATUTE

A. CONGRESS CLEARLY INTENDED TO PROVIDE A BROADENED AND EFFECTIVE REGIME FOR COMPETITIVE SWITCHING AND GAVE THE BOARD WIDE DISCRETION TO IMPLEMENT A NEW COMPETITIVE SWITCHING REGIME

AAR asserts that the CSP is inconsistent with governing law. *See, e.g*. AAR Opening at 6-7 and 22-35. Similarly, KCS contends that "the proposal is inconsistent with the statute" (KCS Opening at 26) and NS asserts that "Congress…did not intend Section 11102(c) to be used broadly to create artificial competition" (NS Opening at 33). In support of their assertions, AAR and others claim that "the ICC and the courts have already concluded that Congress did not give the Board…authority" to implement measures like those in the CSP. AAR Opening at 6. *See also* NS Opening at 21-26. AAR and NS also assert that the existing competitive switching rules,[18] as applied and affirmed by the courts,[19] form the correct interpretation of the switching statute and cannot be changed by the Board. AAR Opening at 25-27; NS Opening at 23-28. AAR believes that anticompetitive railroad behavior must be proven by a petitioner before the Board is permitted to order carriers to enter a competitive switching agreement. *See, e.g.*, AAR Opening at 22-23; *see also* NS Opening at 23.

[18] As adopted in *Intramodal Rail Competition*, 1 I.C.C.2d 822 (1985).

[19] *Baltimore Gas & Electric Company v. United States*, 817 F.2d 108, 113 (D.C. Cir. 1987).

The railroad parties' assertions have no basis in the governing statute. The plain language of 49 U.S.C. § 11102(c)(1) shows that Congress used the broad and permissive word "may" to define the Board's authority and authorized switching arrangements that are determined by the Board to be practicable and in the public interest, on the one hand, or that would foster competitive rail service, on the other. Congress did not prohibit competitive switching in any particular set of circumstances; similarly, Congress did not demand that competitive switching be implemented in any specific situation. Instead, Congress gave the Board the authority to act within a broad range of possibilities, subject only to the use of reasoned discretion in line with traditional rulemaking principles. *Cf. Zemel v. Rusk*, 381 U.S. 1, 8 (1965) (where the statute said the Secretary of State "may" grant passports under rules established by the President, the authority was "surely broad enough" to enable the Secretary to create area restrictions that prohibit passports from being used for Cuba travel).

The discretionary authority given to the Board in § 11102(c) contrasts with other authority given to the Board by Congress in other areas. For example, the Board's authority to order changes in railroad rates, classifications, rules, and practices requires, first, that the Board find a violation of 49 U.S.C., Subtitle IV, Part A. *See* 49 U.S.C. § 10704(a)(1). Similarly, the Board's authority to order a sale of a rail line under the feeder line statute requires five specific findings to be made, including the incumbent railroad's refusal to provide adequate service. *See* 49 U.S.C. § 10907(c)(1). In contrast, competitive switching requires only the Board's evaluation of the public interest and practicability or whether competitive rail service is needed. Congress obviously knows how to restrict the Board's authority to specific circumstances, and it is telling that § 11102(c) does not include any of the restrictions asserted by AAR and the other railroad parties. *Cf. Law Motor Freight, Inc. v. Civil Aeronautics Board*, 364 F.2d 139, 144 (1st Cir.

1966) (internal citations omitted) ("With such a statutory configuration, the clear indication is that the legislative omission was significant.").

B. THE ADDITION OF COMPETITIVE SWITCHING UNDER THE STAGGERS ACT

1. The Statutory Language and the Policy Behind the Change

In its Petition, NITL explained the legislative history of the switching statute, the policy reasons behind Congress' adoption of the statute, and the application of the statute to specific cases. NITL Petition at 10-16. The railroad parties have not disputed this chronology, other than to contend that the 1985 competitive switching rules are the (only) correct interpretation of § 11102(c), and that the Board is powerless to interpret the statute in any other way. *See, e.g.*, AAR Opening at 25-27; NS Opening at 23-28. NITL responds to these contentions below in Sections III.B.2, III.B.3, and III.B.4.

2. A Finding of Competitive Abuse, As Required By the Board's Current Switching Rules, Is Not Required By the Statute, and Can Be Changed By the Board In Its Discretion

AAR asserts that the CSP is improper because it "requires no showing of a problem with service provided to a particular shipper" AAR Opening at 7. AAR further claims that Congress "intended for the agency to use its authority to regulate competitive access to address specific instances of railroad misconduct." AAR Opening at 22. Individual railroads made similar assertions in their opening comments in this proceeding. *See, e.g.*, NS Opening at 28 ("[t]he NITL proposal would represent a radical shift from a regime predicated on remedying demonstrably anticompetitive conduct").

The railroads' assertions on this point are directly contrary to the statutory language, and must be rejected. The plain language of 49 U.S.C. § 11102(c) never mentions service problems, railroad misconduct, or any similar concepts. Congress only stated that the Board could require carriers to enter a switching agreement "where it finds such agreements to be practicable and in

the public interest, or where such agreements are necessary to provide competitive rail service." 49 U.S.C. § 11102(c). Hence, contrary to the railroads' claims, the Board can order a competitive switching arrangement to be established solely to facilitate competitive rail service.

The railroads' unsupported assertion that Congress "intended" to require a showing of railroad misconduct must be rejected. If Congress had "intended" such a meaning, Congress would have included it in the statutory language. The Board should apply the statute as written. "[I]n interpreting a statute a court should always turn to one cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254 (1992). As Congress clearly stated, the Board "may" order carriers to enter a switching agreement solely to foster competition. Thus, Congress clearly provided the Board with discretion to facilitate competition using switching arrangements. Resort to strained attempts to divine Congress' alleged unexpressed "intent" is unnecessary because the statutory language is abundantly clear. "When the words of a statute are unambiguous, then…'judicial inquiry is complete.'" *Connecticut National Bank*, 503 U.S. at 254 (internal citation omitted).

The evidence in the Ex Parte 705 record and the other sources previously cited by the League also clearly demonstrate that the Board should exercise its discretion to change its current switching rules and policy based on the tremendous changes that have occurred in the rail industry since 1985. NITL Petition at 22-25. *Cf. Allied Local and Regional Manufacturers Caucus v. U.S. EPA*, 215 F.3d 61, 72-73 (D.C. Cir. 2000) ("we must be particularly deferential in a case like this, where Congress – by instructing EPA to set priorities using multiple, nondeterminative criteria – has necessarily indicated an intention to delegate substantial discretion to the agency") (citation omitted).

3. Congress Has Not "Ratified" The Board's Current Rules, Such That They Cannot Be Changed Without a Statutory Amendment

NS and CSXT rely extensively upon the concept of ratification to support their view that the Board is powerless to alter its existing regulations. NS Opening at 23-28; CSXT Opening at 11-21. NS contends that "only Congress" can modify the competitive access rules and, consequently, that the Board "lacks the authority" to do so. NS Opening at 25 and 28. The ratification theory is based on the passage of the Interstate Commerce Commission Termination Act ("ICCTA") in 1995. According to NS and CSXT, the fact that Congress re-enacted the switching statute at 49 U.S.C. § 11102(c) without material change from the 1980 Staggers Act language means that Congress effectively "ratified" the ICC's 1985 competitive switching rules.

Although it does not use the term ratification, the AAR similarly argues that the 1985 competitive switching rules prohibit the Board from adopting the CSP. AAR Opening at 25-27. Because the ICC found, in the words of the AAR, that "[a]ccess remedies…should be limited to specific instances where a competitive failure had been identified," AAR implies that the Board may not revise its interpretation of § 11102(c). AAR Opening at 26.

These assertions are nonsense. In developing their ratification position, NS and CSXT make a fatal error; they ignore the fact that Congress granted the Board broad discretion in which to promulgate reciprocal switching standards. Although the 1985 competitive access rules have been found to be one permissible exercise of that discretion, they are not the only permissible exercise. The conclusion suggested by AAR's Opening at pages 25-27 is based upon a similar error. Adoption of one interpretation of the broad authority given in § 11102(c) does not preclude later, different interpretations. *Hinson v. NTSB*, 57 F.3d 1144, 1149-1150 (D.C. Cir. 1995) (an agency is not "irrevocably bound to its own precedents, so long as it gives a reasoned explanation for its departure") (internal citation omitted); *Grace Petroleum Corporation v.*

FERC, 815 F.2d 589, 591 (10th Cir. 1987) (recognizing that an agency may "chang[e] its course" if it supplies "a reasoned analysis indicating that prior policies and standards are being deliberately changed and not casually ignored").

Congress' failure to change § 11102(c) in ICCTA indicates nothing more than Congress' view that the 1985 competitive access rules were within the realm of permissible uses of ICC reciprocal switching discretion. To the extent that there was any "ratification," it was to ratify the very discretion that Congress gave the Board in the statute's original iteration. There is nothing in either the Staggers Act or ICCTA to indicate that the existing competitive access rules are the only possible use of that discretion. Indeed, if Congress had intended only one possible use of that discretion (as NS and CSXT suggest), then there would have been no reason to state that the agency "may" require reciprocal switching agreements after an evaluation of indistinct concepts such as practicability and the public interest. *Cf. Securities and Exchange Commission v. Chenery Corporation*, 318 U.S. 80, 90 (1943) ("*SEC v. Chenery 1943*")(where a statute gave the SEC the authority to determine if an action was detrimental to the public interest, it "confer[red] upon the Commission broad powers for the protection of the public"); *Fidelity Federal Savings & Loan Association v. De La Cuesta*, 458 U.S. 141, 153-54 (1982) ("Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily.").

Even competition itself can be a fuzzy concept. *See, e.g., Arizona Public Service Company v. United States*, 742 F.2d 644, 650-651 (D.C. Cir. 1984). If there was only one possible use of the agency's discretion under § 11102(c), the language of the statute would have required a finding of anticompetitive railroad conduct – but Congress did not take this step. At

most, the passage of ICCTA means that Congress found the 1985 rules to be within the bounds of the discretion given to the agency.

Upon scrutiny, invocation of the "ratification" doctrine necessarily collapses because the view of both NS and CSXT (that there is only one permissible use of the Congressionally-given discretion in § 11102) runs afoul of standard statutory interpretation rules. If Congress had intended to require anticompetitive conduct prior to a grant of competitive switching, then Congress would have included such a provision in the statute. *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). The position of NS and CSXT also impermissibly renders Congress' inclusion of the various factors in § 11102(c) as surplusage. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("We are thus reluctant to treat statutory terms as surplusage in any setting.") (quotation omitted).

There would be no reason for Congress to give the agency discretion to order competitive switching based on the agency's evaluation of various factors if Congress only intended the discretion to be used in a single specific manner. The 1985 competitive access rules may be one permissible interpretation of § 11102(c), but they are not the only permissible interpretation.

Combined, NS and CSXT cite to twenty-three different court decisions in support of their ratification theory (NS Opening at 23-27; CSXT Opening at 11-21), but none of them stand for the proposition that discretion given to an agency in a statute can be eliminated by a later re-enactment of the same statutory language.

Of those decisions, twelve of them concern agency interpretation of specific terms in statutes. These twelve decisions do not address a situation where Congress used the word "may" and gave the agency discretion to act within a broad range of possible outcomes based on various

factors, nor do these decisions concern the boundaries of a broad permissive grant of authority to an agency. The twelve decisions in this category are: *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121, 126 (1985) (definition of "waters of the U.S." and "navigable waters" in Clean Water Act); *United States v. Rutherford*, 442 U.S. 544, 546-547 (1979) (definition of "new drug" and "safe and effective" in Federal Food, Drug, and Cosmetic Act); *NLRB v. Bell Aerospace Company*, 416 U.S. 267, 274 (definition of "employee" and "supervisor" in the National Labor Relations Act) ; *Federal Deposit Insurance Corporation v. Philadelphia Gear Corporation*, 476 U.S. 426, 427 (1986) (definition of "deposit" in the Federal Deposit Insurance Act); *United States v. G. Falk & Brother*, 204 U.S. 143, 148 and 150 (1907) (definition of "entry" in Tariff Act of 1897); *United States v. Cerecedo Hermanos y Compania*, 209 U.S. 337, 339 (1908) (interpretation of wine duty tariff*); United States v. Board of Commissioners of Sheffield, AL*, 435 U.S. 110, 116 (1978) (definition of "political subdivision" in Voting Rights Act); *National Lead Company v. United States*, 252 U.S. 140, 144 (1920) (interpretation of "equal in amount to the duties paid on the materials used" in import duty case); *Commissioner of Internal Revenue v. Estate of Noel*, 380 U.S. 678, 681 (1965) (interpretation of "policies on the life of the decedent" in Internal Revenue Code); *AAR v. ICC*, 564 F.2d 486, 487 (D.C. Cir. 1977) (meaning of "custom of the trade" in Interstate Commerce Act); *United States v. Leslie Salt Company*, 350 U.S. 383, 385 (1956) (definition of "debenture" in Internal Revenue Code); *United States v. Correll*, 389 U.S. 299, 304-305 (1967) (interpretation of "meals and lodging…away from home" in Internal Revenue Code).

Four other decisions cited by the railroads considered simple yes-or-no questions arising from statutory interpretation. Again, these four decisions do not address a situation where Congress used the word "may" and gave the agency discretion to act within a broad range of

possible outcomes based on various factors, nor do these decisions concern the boundaries of a broad permissive grant of authority to an agency. These four decisions are: *Lindahl v. Office of Personnel Management*, 470 U.S. 768 (1985) (whether a statute that precluded certain judicial review of Merit Systems Protection Board dependency and disability decisions meant to preclude all possible judicial review, or only judicial review of factual matters)[20]; *Lorillard v. Pons*, 434 U.S. 575, 576 (1978) (whether there is a right to jury trial under the Age Discrimination in Employment Act); *Society of Plastics Industry, Inc. v. ICC*, 955 F.2d 722, 724 (D.C. Cir. 1992) (whether a Multiple Independent Factor Through Rate is a joint rate under the Interstate Commerce Act); *Issacs v. Bowen*, 865, F.2d 468, 471-472 (2nd Cir. 1989) (whether a fair hearing was required before an ALJ hearing for certain claims under Medicare Act).

Two decisions found that ratification did not apply. These two decisions are: *Ward v. Commissioner of Internal Revenue Service*, 784 F.2d 1424, 1430 (9th Cir. 1986); *Brown v. Gardner*, 513 U.S. 115, 121 (1994).

The remaining five decisions actually support the Board's authority to implement the CSP. In the first case, the relevant statute stated that the Secretary of State "may" issue passports under rules established by the President, and, pursuant to this authority, the Secretary removed Cuba from the list of countries for which no passport was required and also created an "area restriction" stating that U.S. passports were not valid for travel to Cuba. *Zemel v. Rusk*, 381 U.S. 1, 3 and 8 (1965). When the Secretary's authority to create area restrictions was challenged, the

[20] The relevant statutory phrase interpreted by the Court was 5 U.S.C. § 8347(c), which read: "The Office shall determine questions of disability and dependency arising under this subchapter. Except to the extent provided under subsection (d) of this section, the decisions of the Office concerning these matters are final and conclusive and are not subject to review." *Lindahl*, 470 U.S. at 800 (cited by dissent). Moreover, a special "clear and convincing" standard was applied by the Court because the issue involved preclusion of judicial review; the Court called this standard a "presumption" favoring judicial review. *Lindahl*, 470 U.S. at 778.

Court determined that Congress had given the Secretary broad discretionary authority due to the use of "may" in the statute and the grant of authority to issue passports under rules established by the President. 381 U.S. at 8-9. The Court also noted that the State Department had imposed area restrictions since 1926, and that Congress passed new passport legislation in 1952 without changing the broad statutory authority given to the Secretary. 381 U.S. at 12.

The *Zemel* decision supports the League's interpretation of 49 U.S.C. § 11102(c). If NS, CSXT, and the other railroad parties had emulated the petitioner in *Zemel*, they would have questioned whether the broad grant of authority to the Board in § 11102(c) is broad enough to encompass the CSP. However, this is not the position advocated by the railroad parties. NS and CSXT contend that there is only one narrow manner in which § 11102(c) can be applied. If the petitioner in *Zemel* had followed the logic of NS and CSXT, he would have argued that the Secretary of State was barred in 1965 from refusing to allow passports to be used for Cuba travel because the Cuba area restriction did not exist in 1952 – the year that Congress passed new passport legislation. Of course, this was not his position.

In fact, if the *Zemel* petitioner had fully followed the position of NS and CSXT, he would have argued that the Secretary was barred from even requiring passports for travel to Cuba, again because no requirement existed in 1952 when Congress enacted new legislation relating to passports. Obviously, these positions would be equally fanciful and unsound, just as is NS's and CSXT's position regarding "ratification" of § 11102(c) interpretation, because they completely disregard Congress' use of the word "may" and the broad discretionary authority given by Congress. The ratification contention is wrong, and must be rejected.

In the second case, broad statutory authority was given to courts to grant "appropriate" relief. *Forest Grove School District v. T.A.*, 129 S.Ct. 2484, 2490-2491 (2009). The Court

found that, because there was no recent limitation by Congress, "we will continue to read" the statute "to authorize the relief respondent seeks." *Id*. at 2492. Just like the broad discretionary authority given to the Board in 49 U.S.C. § 11102(c), the authority given to courts in the Individuals with Disabilities Education Act was found to be broad enough to encompass petitioner's desired action.[21]

In a third case, the National Labor Relations Board was given broad discretion to effectuate the policies of the National Labor Relations Act. *NLRB v. Gullett Gin Company*, 340 U.S. 361, 362 (1951). Again, the Court found that the NLRB was within its discretionary authority to refuse to deduct unemployment compensation payments from back pay. *Id*. at 364. In so holding, the Court stated that its review was necessarily narrow:

> There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.

Id. at 363, quoting *Phelps Dodge Corporation v. Labor Board*, 313 U.S. 177, 194 (1941). Just like the situation in *Gullett Gin*, the proper question regarding the League's Petition is whether CSP is within the broad discretionary authority given to the Board in 49 U.S.C. § 11102(c). As NITL has shown, the answer is "Yes."

[21] NS and CSXT have not cited to any decision where broad discretionary authority was narrowed as a result of ratification.

In another labor-related case, a statute used "may" and gave the courts discretion to award backpay. *Albemarle Paper Company v. Moody*, 422 U.S. 405, 415-416 (1975). The question here was whether courts were prohibited from awarding backpay to class action members who had not exhausted administrative remedies. The Court found no prohibition existed because no such limitation was in the statute. 422 U.S. at 415 (n. 8). The import for CSP is clear: there is no statutory requirement for anti-competitive railroad behavior in 49 U.S.C. § 11102(c), and, consequently, CSP is within the Board's broad discretionary authority.

Finally, the last decision dealt with a provision of the Securities Exchange Act that used the word "may" and allowed the SEC to permanently censure a person for engaging in unethical or improper professional conduct, or for lacking in character or integrity. *Altman v. SEC*, 666 F.3d 1322, 1326 (D.C. Cir. 2011). The petitioner argued that censure for violating New York state bar rules was not within the SEC's authority under the Act, but the court disagreed. *Id*. at 1326-1327. The court noted that the proper question was "whether the Commission's interpretation of the statute to allow it to apply State Bar disciplinary rules to define the proscribed conduct is permissible." *Id*. at 1326. Again, the court's statement properly encapsulates the proper legal question facing the NITL Petition: whether it is permissible for the Board to use its authority under § 11102(c) to implement CSP.

4. Judicial Decisions Regarding the Board's Open Routing, Bottleneck, and Switching Rules Do Not Eliminate the Agency's Discretion To Implement New Switching Rules If the Board Believes That Such a Change Would Be In the Public Interest

AAR contends that the CSP is barred by judicially-affirmed agency decisions regarding the competitive access rules, through route prescription, and bottleneck situations. AAR Opening at 24-29. This contention is misguided and misconstrues the fundamental relationship between Congress, administrative agencies, and the courts. As stated by the Supreme Court:

> [A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

Securities and Exchange Commission v. Chenery Corporation, 332 U.S. 194, 196 (1947) ("*SEC v. Chenery 1947*"). Where Congress has given authority to an agency, "[t]he function of judicial review of agency action is to determine the authority of the agency, compliance by the agency with the appropriate procedural requirements, and to review any claim that agency action is arbitrary, capricious, or an abuse of discretion." *Acadian Gas Pipeline System v. FERC*, 878 F.2d 865, 868 (5th Cir. 1989) (citation omitted). *See also California Metro Mobile Communications v. FCC*, 365 F.3d 38, 43 (D.C. Cir. 2004) ("We defer to the Commission's interpretation of the Communications Act so long as the Congress has not unambiguously forbidden it and it is otherwise permissible."). The court does not substitute its own judgment for that of the agency. *California Metro*, 365 F.3d at 43 ("[w]e do not prefer our judgment to that of the Commission").

AAR's assertion that "open routing" will result from implementation of the CSP is groundless. AAR Opening at 24. The CSP is carefully crafted to only apply in limited situations; a petitioner seeking competitive switching will have to make four separate showings in order to be entitled to access a competing rail carrier: (1) service only by one Class I railroad; (2) no effective intermodal or intramodal competition; (3) there is an interchange within a reasonable distance; and (4) such interchange is "working." NITL Petition at 8. Moreover, the incumbent railroad would be able to defeat competitive switching if it shows only one of the following: that the proposed switching (1) is not feasible; (2) is unsafe; or (3) would unduly

hamper existing rail operations. NITL Petition at 8. If all these various requirements are met, the Board would be more than justified in ordering carriers to enter into a switching agreement under the criteria set forth in § 11102(c). *Allied Local and Regional Manufacturers Caucus v. U.S. EPA*, 215 F.3d 61, 72-73 (D.C. Cir. 2000) ("we must be particularly deferential in a case like this, where Congress – by instructing EPA to set priorities using multiple, nondeterminative criteria – has necessarily indicated an intention to delegate substantial discretion to the agency") (citation omitted).

It is simply a fantasy to compare this proposal to a situation where "through routes were created on practically all possible combinations of railroad tracks between two points." AAR Opening at 24, quoting *Baltimore Gas & Electric Company v. United States*, 817 F.2d 108, 110 (D.C. Cir. 1987). The CSP would only apply within 30 miles of an origin or a destination. It would not allow "shippers to route traffic over routes and gateways of their choice," as the AAR contends. AAR Opening at 25. Competitive switching would foster rail service based on efficiency and "market forces." AAR Opening at 25, quoting *Traffic Protective Conditions*, 366 ICC 112, 130 (1982). It would not require carriers to open their routings to shippers, much less open them at the exact same rates without regard to the actual cost of providing the service. *Compare, Baltimore Gas and Electric Company v. United States*, 817 F.2d 108, 110 (D.C. Cir. 1987). It would not prevent market forces from efficiently allocating railroad resources. *Compare, Traffic Protective Conditions*, 366 I.C.C. 112, 119 (1982).

The Bottleneck doctrine also does not prevent the Board from implementing the CSP. AAR Opening at 27-29 and KCS Opening at 33-34 (both citing to Bottleneck). The Bottleneck cases found that shippers were not entitled to separate local rates where the incumbent railroad could provide full origin-to-destination service on its own or where the serving carriers decided

to use a joint rate. *See, e.g., Central Power & Light Company v. Southern Pacific Transportation Company*, 2 S.T.B. 235, 236-238 (1997). As such, the Bottleneck rule is clearly distinct from the CSP, under which the Board would merely order carriers to enter into a competitive switching agreement in certain limited situations if a shipper could meet the multi-factor test described at page 8 of the NITL Petition. According to the AAR, the Board, in establishing the Bottleneck rule, "clearly recognized that granting shippers the ability to force open bottlenecks would be a species of open access." AAR Opening at 28. However, as described in the immediately preceding paragraph, the specter of "open routing" is a straw man devised by AAR but completely inapplicable to the CSP.

AAR, NS, and UP also emphasize that the CSP is different from the existing competitive access rules which were adopted by the ICC in *Intramodal Rail Competition*, 1 I.C.C.2d 822 (1985). AAR Opening at 25-27; NS Opening at 23-28; and UP Opening at 7. As the League explains in this Reply and as previously explained in the Petition (pages 49-58), the Board is permitted to revise its interpretation of § 11102(c). As currently configured, the competitive access rules do require a showing of anti-competitive railroad conduct. *See*, 49 C.F.R. § 1144.2(a)(1). This requirement has been upheld as a permissible use of the Board's discretion. *Midtec Paper Corporation v. United States*, 857 F.2d 1487, 1507 (D.C. Cir. 1988) ("the Commission was not unreasonable in adopting the policy of reserving its authority to order competitive access for situations where it is 'necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. § 10101a or is otherwise anticompetitive.'").

However, the current rules, affirmed on appeal, are not the only permissible interpretation of the governing statute – in the words of the *Midtec* court quoted just above, other policies could be "not unreasonable" as well. Indeed, the statutory language plainly requires use of the Board's

discretion in addressing the possibility of reciprocal switching; Congress used the term "may" and broad concepts such as "competition" and "public interest" in 49 U.S.C. § 11102(c). As such, the Board has wide latitude in implementing the statute. *Cf. Securities and Exchange Commission v. Chenery Corporation*, 318 U.S. 80, 90 (1943) ("*SEC v. Chenery 1943*")(where a statute gave the SEC the authority to determine if an action was detrimental to the public interest, it "confer[red] upon the Commission broad powers for the protection of the public").

The fact that the CSP differs from the current regulations in implementation of the statute does not bar the Board from adopting the CSP. "An agency's view of what is in the public interest may change, either with or without a change of circumstances" as long as a "reasoned analysis" is given. *Greater Boston Television Corporation v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (citations omitted). Affirmance of the existing competitive access rules by the courts in *Midtec* and *BG&E* does not change the analysis. *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 51-52 (1983) (stating that NHTSA may revoke an existing vehicle safety standard "if supported by the record and reasonably explained").

Where, as in the case of § 11102(c), an agency action "rests upon an administrative determination – an exercise of judgment in an area which Congress has entrusted to the agency – of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so." *SEC v. Chenery (1943),* 318 U.S. at 94. Instead, "[t]he function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues." *Greater Boston*, 444 F.2d at 851.

Indeed, if an agency could never modify or change its implementation of a statute, then the pro-competition, pre-1985 interpretation of the reciprocal switching statute would still be in

force. *Delaware and Hudson Railway Company v. Consolidated Rail Corporation – Reciprocal Switching Agreement*, 367 I.C.C. 718 (1983). *See also* NITL Petition at 11-12.

Finally, the AAR position rests upon a faulty and distorted view of the CSP. The League has not proposed blanket "open routing" in violation of 49 U.S.C. § 10705, nor is the League asking the Board to cede routing control to shippers or require bottleneck contracts for all possible route segments. *See* AAR Opening at 23-25 and 27-29. The CSP proposal is carefully tailored to require a petitioner in a separate Board proceeding to make several showings before the Board would order carriers to enter a reciprocal switching agreement. NITL Petition at 8. Even if the petitioner made the required showings, a railroad could prevent a Board order by establishing that the switching would be unsafe, infeasible, or would unduly hamper existing rail service. NITL Petition at 8. The CSP is worlds away from a blanket rule that would require open routing or bottleneck segment contracts in all situations at all times.

5. A New Regime For Competitive Switching Is Not an "Alternate Means Of Obtaining Rate Relief," As the AAR Argues; It Is an Independent Remedy Founded On a Specific Statutory Provision

AAR asserts that the CSP is an impermissible method of "back-door rate relief." AAR Opening at 6-7 and 29-33. UP and CSXT make similar assertions. UP Opening at 6; CSXT Opening at 5-8. NITL does not dispute that the Board "already has a fully developed set" of rate reasonableness standards (AAR Opening at 30), but the key fact ignored by the AAR and other railroad parties is that the CSP proposal does not mandate or require any particular rate if competitive switching is ordered by the Board. As NITL explained at length in its Petition, the purpose of the CSP is to foster rail competition in accord with both the National Transportation Policy of 49 U.S.C. §§ 10101(1), (4), and (5) and the current circumstances in the rail industry. *See, e.g.,* NITL Petition at 10-16 and 24-33. The only aspect of the CSP that even mentions rates

is the proposal that effective competition be presumed not to exist if the relevant movement has an R/VC of 240% or more. NITL Petition at 8.

Even if competitive switching affects rates in particular situations, this does not mean that the CSP infringes upon the Board's existing rate reasonableness standards. AAR, UP, and CSXT are oblivious to the simple truism that many, if not most, of the Board's statutory authorities affect rates and fees paid by shippers in some manner. When a feeder application is granted (§ 10907) or conditions are attached to a merger (§ 11324), rates are affected. When a switch connection is ordered (§ 11103) or a railroad practice is upheld (§ 10702), rates are affected. Indeed, any time that the Board authorizes an abandonment, a grant of trackage rights, an acquisition, a merger, or any other railroad transaction, rail rates can be affected through lowering or raising railroads' costs of operations or by permitting changes to the competitive situation. The simple fact that a rate change may indirectly result from application of the CSP does not justify ignoring the direct benefits of the CSP – a more competitive rail environment as directed by Congress in both 49 U.S.C. §§ 10101 and 11102(c).

The fact that rates are affected, or that shippers would like lower rates, as a result of a Board proceeding does not transform every such proceeding into a rate case, nor can this fact trump the statutory language of § 11102(c). The railroad parties' fixation on the rate case process is simply a straw man that is irrelevant to competitive switching under § 11102(c).

6. The CSP Does Not Repudiate Differential Pricing: It Permits It, Subject To a More Competitive Marketplace

AAR states that the CSP would be a "repudiation" of differential pricing (*see, e.g.*, AAR Opening at 31-32 and 36), and NS similarly expresses concern for the effects of the CSP on differential pricing (*see* NS Opening at 32). These fears are unfounded because the CSP does not prohibit or prevent differential pricing. Unlike a rate reasonableness case, the CSP does not

mandate or prescribe any particular rate; any affected railroads would still maintain complete pricing discretion.

It is true that implementation of the CSP is designed to create more competition for a qualifying movement, but the affected railroad may still price its services on a differential basis depending upon relative demand elasticities. Differential pricing is based on elasticity of demand, which represents a sliding scale continuum, not an "either-or" scenario. *See*, *e.g.*, *Guidelines*, 1 I.C.C.2d at 533 (noting the "varying degrees of elasticity" among captive shippers). Moreover, differential pricing requires consideration of a carrier's entire traffic base at one time; an isolated view of a single rate says nothing about differential pricing. If competition for a particular shipper's movement increases due to competitive switching, that shipper's demand elasticity may change, but it will still exist at some place within the continuum. There still remains a price at which the shipper would continue to use the incumbent railroad for service, just as there still remains a price at which the shipper would not use such railroad. The affected railroad can still price all of its services to all shippers differentially, even though the affected shipper may have moved in the demand elasticity continuum. *See, e.g.*, *Guidelines*, 1 I.C.C.2d at 526-527 ("Under Ramsey pricing…[t]he unattributable costs are allocated among the purchasers or users in inverse relation to their demand elasticity.").

Moreover, to the extent that competitive switching affects demand elasticities and the level of railroad rates, the Board's statutory mandate extends far beyond simply preserving the existing structure of differential pricing at all costs. Congress has given the Board a number of sometimes-conflicting transportation policies to implement, including fostering competition, 49 U.S.C. §§ 10101(1), (4), and (5), with the discretion to balance them as appropriate. *Cf. MidAmerican Energy Company v. Surface Transportation Board*, 169 F.3d 1099, 1109 (8th Cir.

1999) (recognizing that the Board must reconcile "competing policies"); *Association of American Railroads v. Surface Transportation Board*, 306 F.3d 1008, 1111 (D.C. Cir. 2002) ("it is up to the Board to arrive at a reasonable accommodation of the conflicting policies set out in the Staggers Act").

As indicated in NITL's Petition, the dramatic changes in the railroad marketplace over the last two decades, including industry consolidation, record railroad profits, and steadily increasing rates (*see* NITL Petition at 22-25), indicate that the CSP is a reasonable accommodation of the numerous statutory policies that the Board must implement.

IV. THE TERMS OF THE LEAGUE'S PROPOSAL ARE SOUND AND CONSISTENT WITH THE STATUTE

A. THE LEAGUE'S MARKET POWER PRESUMPTIONS ARE FULLY SUPPORTABLE AND WORKABLE, AND THE AAR'S ARGUMENTS TO THE CONTRARY ARE WRONG

1. The Existence Of Market Dominance Is Not Required For the Board To Order Switching Under the Statute

The AAR and other railroad parties repeatedly conflate the CSP proposal with the Board's rate reasonableness authority over market dominant railroads under 49 U.S.C. §§ 10701, 10704, and 10707. *See, e.g.*, AAR Opening at 36 ("Nothing in the governing statute suggests that the mere existence of market dominance entitles a shipper to regulatory intervention."). *See also* NS Opening at 30-31; KCS Opening at 37; CSXT Opening at 5-8. The AAR and others use this comparison to complain that the CSP is not identical to the rate case process, and/or simply to create confusion. The simple truth, however, is that § 11102(c) has no requirement of market dominance. Congress included a reference to § 10707 in the rate reasonableness statute, § 10701(d), but did not do so with respect to reciprocal switching in § 11102(c). The railroads repeatedly ignore this crucial distinction, and thereby ignore the clearly-expressed intent of Congress. "Where Congress includes particular language in one section of a statute but omits it

in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted). Finally, the fact that the League inserted an "effective competition" factor in the CSP reveals the conservative nature of the CSP, and ensures that the optional Board finding regarding "competitive rail service" in § 11102(c) would always be met.

2. The 240% R/VC Presumption Is Rational And Supported By Precedent, And Is Not Inconsistent With the Statute

As part of the CSP, NITL has proposed that there be a conclusive presumption that no effective competition exists when the current transportation rate has an R/VC ratio of 240% or more. NITL Petition at 46-50. Several railroad parties oppose this presumption. AAR contends that "[t]here is no meaningful connection between the proposed R/VC threshold and the existence or lack of effective competition." AAR Opening at 37. But the League's Petition showed that courts have often considered the ability to charge monopoly prices as a strong indication of market power and the lack of effective competition. *See*, NITL Petition at 47, *citing e.g., United States v. Microsoft Corp*. 253 F.3d 34, 51 (D.C. Cir. 2001). In its Petition the League also noted that the Board itself has noted that the ability of a carrier to charge rates "substantially above cost" is a factor that it "typically consider[s]" in determining whether effective competition exists. *See, e.g., E.I du Pont de Nemours & Co. v. CSX Transp. Inc.,* STB Docket No. 42101, slip op. at 6 (served June 30, 2008). AAR's contention also glosses over the fact that the League supported the 240% figure with reference to the Board-calculated R/VC>180 figure for the seven Class I railroads in the U.S. NITL Petition at 47-48. Since the date of the NITL Petition, three additional years of Board-calculated data are available, and this new data confirms that the proposed 240% figure is reasonable. In the Petition, NITL stated that the simple average of the railroads' 4-year average R/VC>180 figures was 242.4 percent. NITL

Petition at 48. Now, three years later, the average has barely moved – despite the fact that three of the four years in the railroads' four-year average R/VC>180 figure have been replaced. The current simple average is 245.7 percent, showing yet again that the proposed 240% presumption is reasonable. *See Simplified Standards for Rail Rate Cases – 2011 RSAM and R/VC>180 Calculations*, STB Ex Parte No. 689 (Sub-No. 4) (served Feb. 11, 2013).

AAR contends that "[a] particular shipper may well have an effective transportation alternative whose costs permit the incumbent railroad to charge rates that generate R/VC ratios above the average R/VC ratio for other shippers." AAR Opening at 37. However, AAR forgets that, even if a high-priced alternative is physically possible, it is not necessarily effective competition. *See, e.g., Petition of the Association of American Railroads to Institute a Rulemaking Proceeding to Reintroduce Indirect Competition as a Factor Considered in Market Dominance Determinations for Coal Transported to Utility Generation Facilities*, STB Ex Parte No. 717 , slip op. at 8 (served Mar. 19, 2013) ("This agency has long recognized that the mere existence of a competitive alternative does not in itself constrain the railroads from charging rates far in excess of just and reasonable levels.").

The other objections raised by the railroad parties can be easily countered. First, AAR claims that "R/VC ratios [are] an unreliable indicator of market power." AAR Opening at 38. NS similarly asserts that R/VC ratios are irrelevant because "many factors contribute to a transportation rate" (NS Opening at 43), and BNSF states that the relationship between rates and costs "says nothing about BNSF's market power" (BNSF Opening at 5). The railroad parties conveniently forget that Congress itself has developed a rate-based indication of market power; there is a conclusive presumption that no market power exists when the R/VC is below 180%. *See* 49 U.S.C. § 10707(d)(1)(A). The Board, too, has relied on rates in evaluating market power.

See, e.g., Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pacific Railroad Company, Missouri & Northern Arkansas Railroad Company, Inc., and BNSF Railway Company, STB Docket No. 42104, slip op. at 8 and 15 (served Mar. 15, 2011). In other proceedings, AAR has asserted that R/VC ratios do reveal whether "competitive traffic" exists. *See, e.g., Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), Rebuttal Comments of AAR at 10 (filed Jan. 11, 2007).

AAR also contends that certain costs are not reflected in the Board's URCS calculations of variable costs and, consequently, basing relief on an R/VC ratio would lead to under-recovery of railroad costs. AAR Opening at 38-39. But if AAR believes that URCS does not accurately reflect railroad costs, then AAR can petition the Board to modify URCS. *See, e.g., Review of the General Purpose Costing System*, STB Ex Parte No. 431 (Sub-No. 4) (served Feb. 4, 2013) (Board issues Notice of Proposed Rulemaking to modify URCS).[22]

Finally, AAR claims that use of an R/VC ratio for the purposes of eligibility for reciprocal switching is "inconsistent with the statute." AAR Opening at 39. NS makes a similar argument. NS Opening at 43. NS even goes so far as to invoke the Board's market dominance findings in a recent rate reasonableness case. NS Opening at 44; *see also* KCS Opening at 36-37. The "statute" referenced by AAR, 49 U.S.C. § 10707, addresses Board jurisdiction in rate reasonableness cases. This statute and the concept of market dominance are inapplicable to the Board's authority to order carriers to enter a competitive switching agreement, which is under § 11102(c). Market dominance in the case cited by NS involved quantitative and qualitative factors, plus a new Limit Price methodology used for the first time by the Board. *See M&G Polymers USA, LLC v. CSX Transportation, Inc.*, STB Docket No. 42123 (served Sept. 27,

[22] Any changes to URCS may require a change in the level of the proposed 240% threshold.

2012). In comparison, the CSP only includes a simple presumption based on a 240% R/VC ratio. NS implies that the market dominance result in the *M&G* rate reasonableness case under § 10707 should be identical to the eligibility for reciprocal switching under the CSP and § 11102. (NS Opening at 44), but there is no reason that this should be the case. Different statutes are involved, different standards are applied, and Congress would have referenced § 10707 within § 11102(c) if Congress had wanted to make the results identical. The repeated efforts of AAR and the other railroad parties to conflate the CSP with a rate reasonableness case should be rejected.

The League recognizes that the Board has suggested a possible alternative R/VC figure to use as a presumption – that of the incumbent railroad's RSAM. *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, STB Ex Parte No. 711, slip op. at 10 (served July 25, 2012). In its Opening Submission, the League has provided the Board with information regarding the impact of the use of the RSAM in place of the 240% presumption suggested by the League. *See* NITL Opening Submission at 54 and Roman Opening V.S. at 35. For the reasons stated in its Opening Submission, the League does not support use of the RSAM as an indicator for granting competitive switching arrangements, based on the current rail costing system used by the Board.

In response to the Board's RSAM suggestion, AAR expresses opposition because "RSAM would become the primary constraint on rates." AAR Opening at 40. AAR's statement reflects, again, the continuing effort by several of the railroad parties to conflate the CSP proposal with the Board's rate reasonableness authority. If implemented, CSP would not control, regulate, or mandate transportation rates. It would only provide additional competitive options. AAR repeatedly contends, either explicitly or implicitly, that eligibility for reciprocal switching

is "rate relief." If AAR's contention is true, then virtually any dispute at the Board is also about "rate relief," because parties usually only litigate issues when a financial impact is at stake. Most railroads and shippers are businesses (many of which are publicly traded and have fiduciary duties to their shareholders) and would be unlikely to expend the resources to participate in a Board proceeding unless some potential monetary impact is involved.

3. The 75% Market Share Presumption Is Rational and Supported By Precedent, and Is Not Inconsistent With the Statute

The railroad parties also object to the second conclusive presumption in the CSP. As NITL showed in its Petition, market share has long been used by the Board, the ICC, other agencies, and the courts as an indicator of market power. *See* NITL Petition at 50-52. In response, AAR asserts that the 75% presumption "makes no sense" and "would be subject to manipulation." AAR Opening at 40. Similarly, NS contends that the 75% presumption is "indefensible" because (1) it is difficult to define the relevant market and (2) the ICC previously rejected market share rebuttable presumptions in its rate case market dominance analysis. NS Opening at 45-46, citing to *Market Dominance Determinations*, 365 I.C.C. 118, 123 (1981); *see also* KCS Opening at 37. The objections of the railroad parties do not preclude the Board from adopting the conclusive presumption proposed by NITL.

The CSP applies the 75% test to the transportation for "any movement for which such switching is sought," as measured by the "freight volume" transported for that "movement." Thus, under the CSP, if a shipper sought competitive switching for a movement from Origin A to Destination B, it would have to show that the rail carrier transported at least 75% of the movement of the commodity from that origin to that destination "for the twelve month period prior to the petition seeking such switching." If the shipper also sought competitive switching for a "movement" from Origin A to Destination C, it would also have to show that the rail carrier

handled at least 75% of the transportation between those two points in the previous twelve months. There is no "relevant market" problem here. This point-to-point analysis is how the Board currently evaluates market dominance and the CSP, like the Board's current rules, would ignore the complexities of product and geographic competition. As the League's Petition noted, both the courts and administrative agencies – including this Board and its predecessor – have long used market share as an important factor in determining monopoly power. NITL Petition at 50. Indeed, it is notable that the AAR itself has used market share in presenting evidence as to whether railroad market power exists in exemption cases – using precisely the same measure proposed by the League, *i.e.,* the amount of the commodity transported by rail versus the amount transported by other modes. *See* NITL Petition at 51, n. 138.

Moreover, the use of the 75% figure in the NITL Petition is well-supported. As the NITL Petition discussed in detail, the 75% figure would be evidence of a highly concentrated market using the DOJ's Herfindahl/Herschman Index, and courts have often held that a market share in excess of 70% establishes a prima facie case of market power. *See*, NITL Petition at 51-52, citing numerous cases. The AAR's arguments do not even address that precedent.

The rate reasonableness comparison is not apt. Despite the fact that different statutes are involved, the railroad parties continue to conflate the concept of market dominance for rate reasonableness purposes with the Board's authority to order carriers to enter a competitive switching agreement. The fact that the Board does not use a rebuttable presumption in the market dominance phase of rate reasonableness cases does not affect the Board's ability to use a presumption for purposes of competitive switching. Moreover, even in evaluation of market dominance, the Board has not rejected the relevance of market share; as NS itself recognizes,

"the Board continues to look at market share as one factor for evaluating market dominance." NS Opening at 46.

AAR complains that under the NITL proposal, a shipper "would be entitled to mandated switching regardless of how high or low a rate it is paying." AAR Opening at 42. AAR appears to be concerned about shippers seeking reciprocal switching despite paying rates below 180% R/VC, but such a concern is without merit. If the rate being charged to the shipper is low, the shipper will have no reason to come to the Board to obtain a second competitor; more importantly, even if the shipper applies for and obtains competitive switching, the new competitor is unlikely to offer a rate – plus the access fee – that is lower than that which the shipper is already paying, unless the new competitor offers a much more efficient route than the incumbent, in which case there is both a public and a private benefit to the competitive switching.

Finally, AAR faults NITL for excluding product and geographic competition (AAR Opening at 41-42), but this is hardly noteworthy. Fifteen years ago, the Board decided that evaluation of product and geographic competition unnecessarily complicated and delayed rate reasonableness proceedings. *Market Dominance Determinations – Product and Geographic Competition*, STB Ex Parte No. 627 (served Dec. 21, 1998). This decision was upheld by the D.C. Circuit. *AAR v. STB*, 237 F.3d 676 (D.C. Cir. 2001). The Board recently re-affirmed its 1998 decision. *Petition of the Association of American Railroads to Institute a Rulemaking Proceeding to Reintroduce Indirect Competition as a Factor Considered in Market Dominance Determinations for Coal Transported to Utility Generation Facilities*, STB Ex Parte No. 717, slip op. at 9-10 (served Mar. 19, 2013).

In its Opening, the AAR asserted that a railroad's market share may simply reflect the "comparative advantage" of rail transportation (AAR Opening at 41), which is simply a complicated way to say that some railroads are not faced with any effective competition. AAR also stated that "NITL's proposal would appear to allow shippers to obtain mandated switching on movements for which the Board would have no authority to prescribe rates." AAR Opening at 42. But AAR and the other railroad parties repeatedly gloss over the fact that the Board's discretion to order reciprocal switching is distinct from the Board's rate reasonableness authority. Unlike the rate reasonableness authority of 49 U.S.C. § 10701 and 10704, Congress did not limit the reciprocal switching statute of 49 U.S.C. § 11102(c) by the market dominance standard of § 10707.

At bottom, the AAR Opening evinces a remarkable lack of faith in the marketplace. In other proceedings, railroad parties repeatedly assert that the market is best to determine rates, but those proceedings generally concern captive shippers. *See, e.g., Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), AAR Reply Comments at p. 6 (filed Nov. 30, 2006) ("the Board must exercise great care not to adopt rules that would interfere with the workings of efficient market forces.") and p. 8 ("[t]he Board should not…ignore[ ] the statutory directives to allow market forces to determine rates whenever possible"). As soon as actual competition is possible, the railroads suddenly develop a strong belief that the market cannot result in a proper rate. Following Congressional intent, the CSP relies upon the competitive marketplace to set rates rather than barriers to entry. *See, e.g.,* H.Rep. 96-1430 at 89 (1980) (Congress wants to "allow[ ] the forces of the marketplace to regulate railroad rates wherever possible.").

B. THE CSP'S "REASONABLE DISTANCE" PRESUMPTIONS ARE PROPER, AND THE BOARD'S AUTHORITY TO PRESCRIBE COMPETITIVE SWITCHING IS NOT LIMITED TO TERMINAL AREAS

AAR contends that § 11102(c) is inherently limited to terminal areas because § 11102 is titled "Use of Terminal Facilities." AAR Opening at 43-44. However, the plain language of § 11102(c) does not support such an interpretation. Congress obviously knows how to limit a statutory authority to terminal areas, because it did so in 49 U.S.C. §§ 11102(a) and (b). If, as AAR contends, the title of § 11102 inevitably limits each authority given to the Board within that statute, then there would be no reason for Congress to include the terminal facility limitation language in §§ 11102(a) and (b). Yet, this is exactly what Congress did. AAR's interpretation of § 11102(c) is incorrect because it renders the terminal facility language of §§ 11102(a) and (b) as surplusage. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("[w]e are reluctant to treat statutory terms as surplusage in any setting") (internal citations and quotation omitted). Moreover, standard canons of statutory construction indicate that titles to sections of legislation should not be used to override the plain meaning of a text. *See, Intel Corporation v. Advanced Micro Devices, Inc*., 542 U.S. 241, 256 (2004), quoting *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Company*, 331 U. S. 519, 529 (1947) ("The caption of a statute, this Court has cautioned, cannot undo or limit that which the [statute's] text makes plain."); *United States v. Carrillo-Colmenero*, 523 F.2d 1279, 1283 (5th Cir. 1975) (where "the text of the statute is plain and unambiguous, there is no call to resort to its heading to aid in construing it."); *see also Harrigill v. U.S.*, 410 F.3d 786, 792 (5th Cir. 2005) ("we need not turn to the statute's heading because the text is unambiguous") and *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998). This principle was recently applied in a case where the court stated that a party's attempt to invoke the statute's heading "run[s] contrary to the express

language of the statute." *County of Clinton v. Warehouse at Van Buren Street*, No. 8:12-cv-1636 (GLS) (N.D.N.Y. May 15, 2013); *see also id*. at n. 1.

AAR notes that, in developing the switching statute as part of the Staggers Act, the Senate considered, but did not adopt, a provision that would have required competitive switching in all standard metropolitan areas. AAR Opening at 45. AAR claims that the failure to include this language means that Congress "intended" competitive switching to have a "more limited geographic scope." AAR Opening at 45.

Even a modicum of scrutiny reveals that this assertion is groundless. As the legislative history of the Staggers Act makes clear, a provision requiring reciprocal switching was included as part of S. 796, a bill introduced at the request of the Carter administration on March 27, 1979. *See* Report No. 96-470, of the Senate Committee on Commerce, Science and Transportation, 96th Cong. 1st Sess., p. 6 ("1979 Senate Committee Report.") After hearings, the Senate Committee determined that substantial changes were needed to the bill, and in October 1979, several Senators introduced S. 1946, *id*. at 6-7. The 1979 Senate Committee Report indicates that S. 1946 "provides simply that the Commission may require the railroads to enter into reciprocal switching agreements where it finds such agreements to be practical and in the public interest."

There is no indication in this legislative history that the Congress wished to impose a geographical limitation on reciprocal switching arrangements, and as noted above, the plain language of the provision contains no such limitation. In fact, it is hard to see, as the AAR argues, how the deletion of a provision that would have required switching in standard metropolitan areas means that Congress intended to forbid switching in any place other than a "terminal area" especially where the language of the statute includes no such limitation.

The fact of the matter is that the switching provision actually adopted by Congress has no geographic limitation – it is bounded only by the Board's evaluation of the public interest and practicability, on the one hand, or whether competitive rail service would be fostered, on the other. 49 U.S.C. § 11102(c).

KCS also believes the Board's authority under § 11102(c) is limited to terminal areas, but for the slightly different reason that the term "reciprocal switching" allegedly always means "an activity occurring within a terminal or switching district." KCS Opening at 28-29. KCS cites to a number of cases in support of its position, but other precedent indicates that use of the term "reciprocal switching" does not conclusively limit the discussion to terminal areas. In the one case in which a reciprocal switching agreement was ordered under § 11102(c), it occurred outside a terminal area. *Delaware & Hudson Railway v. Consolidated Rail Corporation*, 367 I.C.C. 718 (1983). Even after adopting the new competitive access rules in 1985, the ICC stated only that "[i]t is not clear whether reciprocal switching can be required outside a terminal facility." *Midtec Paper Corporation v. Chicago & North Western Transportation Company*, 3 I.C.C.2d 171, 178 (n. 17).

Other precedent similarly suggests that reciprocal switching can occur outside terminal areas. *See, e.g, Port Terminal Railroad Association v. United States*, 551 F.2d 1336, 1337 (n. 2) (5th Cir. 1977) (stating that inter-terminal and intra-terminal switching "includes cars switched from a point of origin to a point of destination within the same terminal area, as distinguished from reciprocal switching which is a movement to or from a connecting linehaul carrier."); *Shaw*

Warehouse Company v. Southern Railway Company, 288 F.2d 759, 763 (5th Cir. 1961) (referring to a "reciprocal switching district").[23]

KCS also contends that the switching statute is intended to "be less far-reaching in scope than the terminal trackage rights provision." KCS Opening at 28. KCS justifies this contention by reference to legislative history where the Senate stated that reciprocal switching is a "more limited action" than ordering terminal trackage rights. KCS Opening at 28. *See also* S.Rep. 96-470 at p. 42 (1979). KCS apparently interprets this Senate statement to mean that reciprocal switching is meant to be "more limited" in physical scope (i.e., land area) than terminal trackage rights. However, a more plausible interpretation is that reciprocal switching is "more limited" because each railroad continues to use its own track, which contrasts significantly with terminal trackage rights, where one railroad is forced to let another use its track.

In any event, resort to legislative history is unnecessary because the statutory language is abundantly clear. "When the words of a statute are unambiguous, then…'judicial inquiry is complete.'" *Connecticut National Bank*, 503 U.S. at 254 (internal citation omitted). The statute's clear language does not require competitive switching to be in a terminal area. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to

[23] Even if reciprocal switching is limited to terminal areas, the CSP proposal remains tenable. As several railroad parties have recognized, the definition of a terminal area is necessarily fact-specific. AAR Opening at 43; NS Opening at 50. *See also Midtec Paper Corporation v. Chicago and North Western Transportation Company*, 3 I.C.C.2d 171, 179 (1985) ("The questions of what is a terminal area and what is switching are factual ones requiring consideration of all the circumstances surrounding a particular case."). Hence, the Board could reasonably determine in an individual petition for reciprocal switching under the CSP that a terminal area existed where the factors in the NITL proposal were met, namely (1) working interchange; (2) reasonable distance; (3) feasible; (4) not unsafe; and (5) no unduly hampering of other rail service. *See* NITL Petition at 8.

its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). To interpret the statute in a way that ignores the plain meaning would be unreasonable. *Shays v. FEC*, 337 F.Supp.2d 28, 51 (D.C. Cir. 2004). *See also Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

C. THERE IS NO INCONSISTENCY BETWEEN THE BOARD'S COMPETITIVE SWITCHING AUTHORITY UNDER THE LEAGUE'S PROPOSAL AND ITS AUTHORITY TO PRESCRIBE A THROUGH ROUTE

Due to the 30-mile presumption proposed by NITL, AAR contends that the CSP "fails to provide a valid basis for distinguishing between the prescription of a reciprocal switch and the prescription of a through route." AAR Opening at 46. *See also* KCS Opening at 32-34. Consequently, according to AAR, the CSP is faulty because it could potentially apply to certain situations where 49 U.S.C. § 10705, the through route statute, is also applicable. The Board's authority to prescribe a through route under § 10705 is not a reason to reject the CSP.

AAR has ignored a key fact in rushing to explain its concern about "distinguishing" between Board action under § 10705 and § 11102(c). Congress has already recognized that there is some overlap between prescription of a through route and ordering railroads to enter into competitive switching agreements. Under § 10705(a)(2), Congress stated that the Board "may require a rail carrier to include in a through route substantially less than the entire length of its railroad…only when…required under section…11102." In recognizing that an overlap exists, Congress obviously realizes that there may be situations where it is impossible to "distinguish" between through routes and competitive switching because both would apply. The Board should reject AAR's suggestion that the CSP is faulty because there is no clear-cut distinction between competitive switching and through route prescription.

D. THE ACCESS FEE APPLICABLE TO COMPETITIVE SWITCHING SHOULD BE COST-BASED AND SHOULD NOT INCLUDE LOST CONTRIBUTION

Although the Board specifically asked interested parties to develop an "assumed" access fee methodology for the purpose of determining the impact of the CSP on railroad revenue (Decision at 2, 7, 10), all of the railroad parties failed to respond to this request. The AAR and NS refused to develop a possible access fee because they claim that the statute permits the rail carriers involved in a competitive switching arrangement to set the compensation via a private negotiation, and the Board may become involved in setting the access fee only if those negotiations are unsuccessful. AAR Comments at 14; NS Comments at 36-38. UP took a similar position but also elaborated on the principles that it believes should guide the Board in situations where the agency is required to establish switching compensation: "the access price should compensate the railroad serving the shipper for (i) the railroad's loss of contribution to its fixed costs from the shipper's traffic, and (ii) the railroad's cost of providing the switching service, including the cost of any new investment needed to provide the service or offset the impacts on other customers."[24] UP Opening Comments at 61. UP essentially argues that any access fee established by the Board for a competitive switching arrangement must leave the incumbent carrier no worse off than a "revenue neutral" position.[25] *Id.*

However, UP's desire for the Board to include recovery of switching costs plus "lost contribution" in any access fee the agency establishes would ensure that such fees are set very

[24] UP also weaves throughout its access fee arguments its position that regulatory intervention to award competitive switching should only occur if the serving railroad is engaged in anticompetitive conduct and that, without covering lost contribution, competitive switching is simply a run around the Board's rate reasonableness procedures, but the League addresses those arguments elsewhere in Sections III.B.2. and III.B.5. of this Reply. UP Comments at 62.

[25] UP assumes that the incumbent carrier would never be able to recover the joint and common costs of its network but ignores the potential for the incumbent to gain rail traffic from the shipper were it to offer more competitive rail rates in response to an alternative switching arrangement.

high and, thus, would gut the very benefits to be derived from competitive switching. In other words, UP's proposed principle for the access fee is intentionally designed to preserve the status quo and prevent the actual implementation of competitive switching arrangements by ensuring that the total price offered by the competing switch carrier (line-haul plus the access fee) would be higher than the incumbent's current price. Accordingly, the League strongly opposes the UP's access fee principle and urges the Board to reject it.

Instead of establishing access fees that discourage the very benefits of competitive switching, the Board should establish access pricing guidelines that would encourage the use of switching arrangements to facilitate competition. Presumably, it the Board is engaged to set an access fee it has already determined that the statutory switching standards have been met and increased competition via a switching arrangement is warranted. It would be nonsensical for the Board to subsequently develop access fees that are so high that they would prevent the switching of rail traffic to an alternative carrier from ever occurring.

Moreover, as explained in detail in its Opening, the League supports the setting of access fees in a manner that is similar to the Canadian interswitching rates. NITL Opening, Exh. 2, Maville V.S. at 14-19. In Canada, interswitching rates must be "commercially fair and reasonable" to all parties (not just the railroads as advocated by UP) and the Canadian Transportation Agency has recently ruled that a contribution of 20.5% over variable costs represents an appropriate compensation. *Id.;* Maville V.S. at 15, 18. The League submits that an approach to setting access fees in the United States should follow along similar lines to the variable-cost-plus-reasonable-contribution model applied in Canada.

V. CONCLUSION

For the foregoing reasons the League respectfully requests the Board should issue a formal Notice of Proposed Rulemaking in order to implement the CSP at the earliest possible date.

Respectfully submitted,

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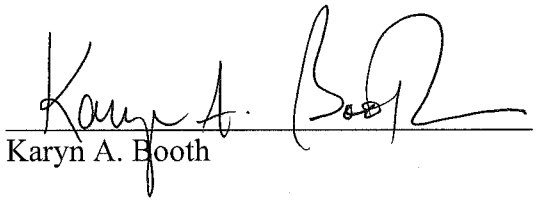
May 30, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May 2013, I served a copy of The National Industrial Transportation League's Reply Submission by first-class mail, postage prepaid, on all parties of record.



Karyn A. Booth

APPENDIX 1

Ex Parte No. 711

PETITION FOR RULEMAKING TO ADOPT REVISED COMPETITIVE SWITCHING RULES

REPLY VERIFIED STATEMENT

of

HENRY JULIAN ROMAN

May 30, 2013

Ex Parte No. 711

PETITION FOR RULEMAKING TO ADOPT REVISED

COMPETITIVE SWITCHING RULES

REPLY VERIFIED STATEMENT

of

HENRY JULIAN ROMAN

I. INTRODUCTION

My name is Henry Julian Roman. I am the same Henry Julian Roman who submitted a Verified Statement on March 1, 2013 in this proceeding ("Roman V.S."). My identification and witness qualifications were included in my initial statement and will not be repeated in this Reply Verified Statement. In the March 1 Verified Statement, I estimated the effect of the Competitive Switching Proposal ("CSP") developed by The National Industrial Transportation League ("NITL" or "League") on both shippers and railroads using the 2010 Confidential Waybill Sample ("Waybill"), as requested by the Surface Transportation Board ("STB" or "Board") in its July 25, 2012 decision. Specifically, I described in detail seven tasks requested by the Board and my findings associated with each task.

Under the NITL's CSP, the Board would be required to find that competitive switching meets the terms of the governing statute if: (a) the shipper is served by a single Class I rail carrier; (b) there is no effective inter- or intra-modal competition; (c) there is or can be a working interchange within a reasonable distance of the shipper's facilities; and, (d) the rail carrier fails to show that the proposed switching is infeasible, unsafe, or would hamper the ability of either carrier to serve its shippers. Certain conclusive presumptions would apply to the second and

third requirements. Specifically, there would be a conclusive presumption that there is "no effective inter- or intra-modal competition" if the shipper shows that the R/VC of its movement(s) is 240% or more, or that the rail carrier transports at least 75% of the shipper's traffic for specific movements between the origin and a destination. There would also be a conclusive presumption that there is a "working interchange within a reasonable distance of the shipper's facilities" if the shipper shows that its facility is within an established switching district, or if its facility is within 30 miles of a point at which cars are "regularly switched."

The purpose of this Reply Verified Statement is to respond to the assertions and conclusions set forth in the Verified Statement of Michael R. Baranowski and Richard W. Brown of FTI Consulting, Inc. ("Baranowski/Brown V.S."), submitted as part of the Opening Comments of the Association of American Railroads ("AAR") dated March 1, 2013. In their Verified Statement, Messrs. Baranowski and Brown indicate that they had been asked by the AAR to develop responses to certain of the inquiries posed by the Board in its July 25, 2012 decision using the Waybill and other publicly available data. Baranowski/Brown V.S., p. 1. The stated purpose of the Baranowski/Brown analysis was to determine the number of stations and carloads that would be potentially affected by the NITL proposal, focusing on the 75% market share presumption and the 30-mile distance presumption noted above. This reply testimony will:

1. Show that the Baranowski/Brown analysis is fundamentally flawed and results in completely erroneous conclusions as to the number of stations and carloads potentially affected by the NITL CSP, since the AAR witnesses failed to consider the competitive status of each movement, failed to evaluate the revenue to variable cost ratios of each movement, and failed to evaluate the revenue effect of the CSP, in attempting to demonstrate the impact of the NITL CSP. These flaws in the

Baranowski/Brown analysis create results that vastly overstate the impact of the NITL CSP and are simply out of touch with reality; and,

2. Provide a more reasonable assessment than that produced by Messrs. Baranowski and Brown of the impact of the League's 75% rail market share presumption in order to determine whether a movement might qualify for competitive switching under the CSP.

II. OVERVIEW OF THE BARANOWSKI/BROWN ANALYSIS

In their Verified Statement, Messrs. Baranowski and Brown first note that the CSP would conclusively presume that a shipper meets the "no effective competition" requirement if a Class I rail carrier transports at least 75% of the shipper's traffic between an origin and a destination; and would conclusively presume that a shipper meets the "reasonable distance" requirement if its facility was within 30 miles of a point at which cars are regularly switched. Baranowksi/Brown V.S., p. 2. Their analysis then focuses exclusively on the 75% market share presumption and the 30-mile distance presumption, and ignores the 240% revenue to variable cost presumption in the CSP.

Baranowski and Brown note that it is not possible, due to data limitations, to carry out a shipper-specific or terminal-specific analysis of the League's CSP; rather, the analysis must be carried out on a movement-specific basis. Id. Baranowski and Brown then proceed through a limited series of steps in order to estimate answers to two of the questions posed by the Board: (1) the number of existing terminals and shippers located within the boundaries of those terminals; and, (2) how many shippers and what amount of revenues earned by the incumbent Class I rail carrier from those shippers would be subject to competitive switching under the NITL's CSP. Id., pp. 2-9. These steps are as follows:

1. Baranowski and Brown concede that the Waybill "cannot be used to determine whether a carrier handles 75% or more of the transported volumes from a specific shipper's facilities," but they nevertheless adopt an erroneous "default assumption that at stations served by a single Class I rail carrier, the serving carrier is handling 75% or more of total shipper volumes." Id., p. 3.

2. After assuming that any Class I rail carrier that solely serves a rail station is transporting 75% or more of the total traffic to all destinations from that facility, without even considering other modes, Baranowski and Brown then used the Waybill to identify Standard Point Location Codes (SPLCs) served by a single Class I rail carrier. Id., p. 4-5. They assumed that all shippers within a station served by a single Class I rail carrier were closed (i.e., captive). Id., p. 6. As a first cut, closed stations were identified as those where only a single Class I carrier or one Class I and one non-Class I carrier reported originating or terminating carloads. Id., pp. 5-6. Baronowski/Brown then excluded stations served by one Class I carrier and one non-Class I carrier if the non-Class I carrier interchanged with multiple Class I carriers. Id., p. 6. This resulted in an estimate of 6,749 "closed" stations. They then eliminated 74 railroad-owned, special facilities. Id., pp. 6-7. Following this approach, Baranowski/Brown identified 6,675 "closed" stations as "potentially affected by the NITL proposal." Id., p. 7.

3. After estimating that there are 6,675 "closed" (captive) stations, Baranowski and Brown then focused on the 30-mile distance presumption in the CSP. Specifically, they used the Centralized Station Master ("CSM") and the Junction Interchange File ("JI") to identify potential combinations of carriers, stations and junctions. Id., pp. 3, 8. They calculated whether a "closed" station was within 30 miles of a junction by using radial ("as the crow flies") miles determined by the SAD GEODIST function. Id., p. 8. They concluded that 3,419 of the

identified "closed" stations "would be candidates for opening" under the NITL proposal, because they were within 30 radial miles of a junction. Id., pp. 8-9.

4. Baranowski/Brown next determined, from the Waybill, that 7.5 million carloads would be "potentially subject to the NITL proposal," by analyzing the number of cars served at these 3,419 stations. Id., p. 9. This car count excluded intermodal containers. Id.

III. RESPONSE TO BARANOWSKI/BROWN'S STATION AND CARLOAD ANALYSES

The flaws in the Baranowski/Brown analysis are almost too numerous to mention. At the outset, Baranowski/Brown's primary assumption that a rail carrier which solely serves a station is transporting 75% or more of the total volumes moving between the applicable origins and destinations for every shipper served at the station is fundamentally flawed. This presumption assumes away the entire trucking, inland waterway and pipeline industries.

In addition, as explained further below, the Baranowski/Brown analysis completely ignores numerous other factors that must be considered to determine if a carload is potentially impacted by the CSP, and this failure results in a very large overstatement of the number of carloads impacted. Finally, the Baranowski/Brown analysis never even considers how the existing revenue and R/VC ratio of current movements affects their potential to be impacted under the NITL CSP.

As noted above, Baranowski and Brown concede that the Waybill "cannot be used" to determine "whether a carrier handles 75% or more of the transported volumes from a particular facility." Id., p. 3.[1] However, Messrs. Baranowski and Brown nevertheless adopt the

[1] It should be noted that, even in this respect, the Baranowski/Brown analysis misrepresents the NITL proposal, which specifies that the 75% market share test is not measured by the transported volume "from" a particular facility, but rather focuses on the "movements" for which competitive switching is sought. That is, the 75% market share presumption is on a movement basis, i.e, does the carrier handle 75% of the movements from a particular origin to a particular destination. See, NITL Petition, July 11, 2011, p. 67.

remarkable assumption that the rail carrier serving a captive station is handling 75% or more of the total shipper volumes for the movements from or to that facility. There is simply no basis for this assumption, which flies in the face of other publicly available information (further discussed below); the railroad industry's claims over the years that other transportation industries provide strong competition; Board precedent; common experience; and just plain common sense. Baranowski and Brown's estimated impacts of the CSP have no credibility since their key assumption appears to have been pulled out of thin air. The AAR witnesses completely fail to provide any statistical foundation or other data that supports their analysis of the 75% market share presumption or justifies their ignoring the very realistic likelihood that a shipper served by a captive rail station would also route a portion of its traffic using trucks, barges, or pipelines, if possible. Baranowski and Brown's analysis would require the Board to accept the unrealistic notion that every shipper served at a captive rail station will never use trucks, barges, or pipelines to transport more than 25% of their volumes; or where a shipper does use trucks, barges or pipelines for 26% or more of its transportation from a facility also served by a single railroad, it never uses rail carriage at all, despite having its railway connection. Both propositions are flatly at odds with reality.

The remarkable overstatement of the impact of the CSP resulting from the Baranowski/Brown analysis of the 75% market share presumption in the CSP is also starkly revealed by the Commodity Flow Survey (CFS) published jointly by the Bureau of Transportation Statistics of the U.S. Department of Transportation and the Commerce Department's Census Bureau. A review of the currently available CFS data shows that railroad

market share (as measured by tons carried) is less than 50% for all commodities save coal.[2] Thus, public data from USDOT and the Commerce Department directly contradicts the Baranowski/Brown analysis.

There are other significant flaws in the Baranowski/Brown analysis. Baranowski and Brown over-simplified their analysis of the CSP by focusing on only two factors to determine whether a station or a carload is impacted by the NITL's CSP. These factors included the closed or "captive" status of stations and the miles to an interchange from a captive station. But many more factors must be considered to develop a reasonable estimate of the impact of the CSP, and the analysis must be performed on a movement-by-movement basis to determine more accurately the carloads and movements that might be potentially impacted by the NITL proposal.

For example, if there is a single-line movement from a Captive Origin to a Captive Destination, and the Captive Origin of that movement is within thirty miles of an interchange but the Captive Destination is not, then even if the origin becomes "competitive" under the NITL's CSP, the CSP will not result in any competitive impact, since the carrier solely serving the destination will determine the rate, despite any new competition at origin.

In my March 1 Verified Statement, I describe in detail all of the identifications and adjustments – the "sieves" or "screens" -- that must be applied in order for a movement to be potentially impacted. See Roman V.S., pp. 15-27. These include:

- Identification of captive and competitive stations;
- Identification of working interchanges

[2] See 2007 Commodity Flow Survey, United States Department of Commerce, Economic and Statistics Administration, U.S. Census Bureau and U.S. Department of Transportation, Research and Administrative Technology Administration, Bureau of Transport Statistics,, Table 7 for various commodities (single mode, tons carried), at:

http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/commodity_flow_survey/final_tables_december_2009/pdf/entire.pdf

- Exclusions for intermodal and certain other movements
- Exclusions for non-U.S. rail movements
- Adjustment for known paper barriers
- Identification of 30-rail-mile distance to working interchanges
- Identification of captive movements, including captive movements at competitive stations
- Identification of movements with R/VC ratio of 240% or more (to determine effect of 240% R/VC presumption)
- Adjustment for single line movements based on origin and/or destination moving from captive to competitive status under the CSP
- Adjustment for joint-line single factor rate movements based on origin and/or destination moving from captive to competitive status under the CSP

Baranowski and Brown completely ignore a number of these factors – what I will call "non-revenue screens" -- in their analysis.

But there are further serious flaws in the Baranowski/Brown analysis. Specifically, in order to be potentially impacted under the NITL proposal, the revenue effect and the revenue to variable cost ratios ("R/VCs") of particular movements must also be considered. Specifically, even if a carload might formally change from a "captive" to a "competitive" status at both ends of the movement, if the existing revenue and R/VC ratio from that carload is low, there will be no effect on the railroads from the NITL proposal, since it will be very difficult for a competing railroad to offer service (after the payment of the access fee) that would be any lower than the rate currently charged by the incumbent carrier. Again, the Baranowski/Brown analysis ignores this obvious factor – what I will call the "revenue screen" --in determining the number of carloads that might be potentially affected by the NITL's proposal.

It should be noted that the effect of application of the "revenue screen" on a particular carload moving from a captive to a competitive status will depend upon the assumptions used to

calculate the reduction in revenue from the change from a captive to a competitive status. Specifically, if one assumes that a change from a captive to competitive status under the NITL's CSP will result in a rate equal to all other competitive rates, then more carloads will be affected, compared to an assumption that the result of changing from a captive to competitive status under the NITL's CSP will result in a more modest revenue reduction. This is because lower-rated shipments might not obtain much if any benefit at all, if the potential rate from a newly-competitive carrier plus the access fee is not lower than the existing rate. In my March 1, Verified Statement, I calculated the effect of the revenue screen under two scenarios: first, where the resulting competitive rate equals the average competitive rate for that commodity, at that distance, for that carrier; and, second, where the resulting competitive rate equals the rate calculated under the Lerner Index, which accounts for less-than-fully-competitive markets. See Roman V.S., pp. 30-32 and 36-39.

Thus, even ignoring the 75% assumption adopted by Messrs. Baranowski and Brown (which vastly and incorrectly inflates the number of carloads potentially affected under the NITL CSP), Baranowski and Brown also ignore most of the non-revenue and revenue factors – the non-revenue and revenue "screens" -- that must be applied to more reasonably estimate the impact of the CSP and, once applied, significantly reduce the number of potentially affected carloads. Therefore, the resulting carload estimate produced from the Baranowksi/Brown analysis is substantially inflated, and grossly misrepresents the impact of the NITL's CSP.

Additionally, as noted above, Messrs. Baranowski and Brown calculated that 7.5 million carloads would be potentially affected by the NITL's proposal. These 7.5 million carloads cover all rail shipments from all "closed" stations within 30 miles of a junction at all R/VC levels, regardless of most of the factors discussed above. Thus, Baranowski and Brown never even

attempted to evaluate the 240% R/VC presumption in the CSP which could be accomplished much more readily and accurately than the 75% market share presumption using the Waybill data.

In my March 1 Verified Statement, I explained how I applied all of the necessary routing, revenue and cost factors and how I also evaluated the CSP's 240% R/VC presumption by determining which of those movements impacted by the described factors also had an R/VC ratio of 240% or more. In performing this analysis, I calculated that 1,239,297 carloads would be potentially impacted by the NITL's proposal. Roman V.S, p. 29.[3]

In order to further illustrate the magnitude of the overstatement in the Baranowski and Brown analysis, I have applied my methodology to calculate the carloads potentially impacted by the NITL CSP across every R/VC ratio level. I present these calculations in Table 1 below, which clearly demonstrate that proper application of the various non-revenue and revenue screens to movements at every R/VC ratio level (and not just movements with an R/VC ratio of 240% or more) still produces impacted carload calculations that are not even close to the 7.5 million carloads calculated by Baranowski and Brown. My calculations took into account all of the non-revenue and revenue screens (using the procedures described in my March 1 Verified Statement) since these screens are essential to calculating a more accurate estimate of impacted carloads, and also evaluated movements at all R/VC ratio levels (not just those with an R/VC of 240% or more) in order to get an indication of the number of potentially impacted carloads across all R/VC ratios.

The columns in Table 1 present two sets of figures for each R/VC range: one column that presents carload totals resulting from application of just the "non-revenue screens," and a second

[3] I would note that Messrs. Baranowski and Brown indicate that this 7.5 million carload number should be even higher, because they assert that they could not calculate carloads at stations served by multiple railroads but where an individual shipper facility might still be captive to a single rail carrier. My figures account for that situation. See, Roman V.S., pp. 22-23.

column that presents carload totals resulting from application of both the "non-revenue screens" and the "revenue screen," each described above. These figures are also presented on two bases: one by applying the "full competition" revenue screen presented in my March 1 Verified Statement at pp. 30-32; and the other by applying the "reduced competition" revenue screen presented in my March 1 Verified Statement at pp. 36-39:

TABLE 1

(1)	(2) R/VC Range	(3) Number of Cars After Applying Non-Revenue Screens	(4) Number of Cars After Applying Both Revenue and Non-Revenue Screens *	(5) Percent of Cars After Applying Revenue Screen (column 4 / column 3)
Full Competition [Competitive Benchmark R/VCs]	<149	1,726,718	45,336	2.6%
	150-179	831,186	180,110	21.7%
	180-209	529,809	210,176	39.7%
	210-239	327,813	191,956	58.6%
	240-299	752,524	461,815	61.4%
	300-399	543,078	444,986	81.9%
	400-499	179,394	167,902	93.6%
	500<	138,035	124,239	90.0%
	Totals	5,028,557	1,826,520	36.3%
Reduced Competition [Lerner Index R/VCs]	<149	1,716,718	240	0.0%
	150-179	831,186	17,389	2.1%
	180-209	529,809	110,804	20.9%
	210-239	327,813	130,630	39.8%
	240-299	752,524	383,473	51.0%
	300-399	543,078	417,812	76.9%
	400-499	179,394	117,431	65.5%
	500<	138,035	122,671	88.9%
	Totals	5,028,557	1,300,450	25.9%

* The figures in this column for the totals for carloads at R/VC ratios of 240% and above are slightly different from the total figure submitted in my March 1 Verified Statement on page 29 (1,239,297 carloads in my March 1 statement versus 1,198,942 in the table above), because this table is based on a total physical carload count, whereas the 1,239,297 figure in my March 1 Verified Statement was based on a summary totaled by railroad. A summary totaled by railroad counts a carload two times if the origin

railroad is different than the terminating railroad and both the origin and termination for a movement are impacted by the CSP, because one carload is impacted on the originating railroad and one carload is impacted on the terminating railroad. In contrast, an impacted physical carload summary (used in the table above) only counts a carload one time regardless of the number of railroads in a move or the number of stations impacted by the CSP.

As Table 1 demonstrates, even when the number of impacted cars is calculated across all R/VC ranges (not just for cars with an R/VC of 240% and above) using the proper non-revenue and revenue screens, the total number of impacted cars is still only 1.83 million using the highest revenue reduction assumption (i.e. the "competitive benchmark R/VC," explained in my March 1 testimony at pages 30-32). This 1.83 million car figure is a far cry from the 7.5 million cars calculated by Messrs. Baranowski and Brown. Moreover, the above figures show clearly that, as existing movements with lower R/VC ratios are considered, the percentage of movements potentially affected by the NITL CSP decreases. This is to be expected, since as movements with lower rates are considered, the possibility of gains from the NITL CSP decline, because at lower R/VC levels any newly-competitive rail carrier is less likely to offer a better rate than the existing rate from the incumbent carrier, especially when the access fee expense is considered. Finally, when smaller revenue reductions from new competition are assumed and accounted for by application of the "Lerner index" (See Roman V.S. at pp. 36-39), the number of potentially impacted carloads across all R/VC ranges decreases further, to 1.30 million. At the lowest R/VC levels (below 150), hardly any cars are potentially impacted by the NITL's proposal. Again, this logical result is utterly ignored in the Baranowski/Brown analysis.

IV. THE EFFECT OF THE 75% MARKET SHARE PRESUMPTION PROPERLY CALCULATED

In my March 1 Verified Statement, I calculated the potential impact of the NITL's CSP under the 240% R/VC conclusive presumption. I did not calculate the potential effect of the 75% "market share" presumption, because it is not possible to directly determine from the

Waybill or any other public data source of which I am aware whether a rail carrier handles 75% or more of the total transported volumes from an origin to a destination. I would note that my approach was also used by the U.S. Department of Transportation, for exactly the same reason. See Opening Comments of the United States Department of Transportation, p. 3, fn. 2. I would also note that AAR witnesses Baranowski and Brown conceded the same fact, but inexplicably this did not deter them from adopting the erroneous assumption that a rail carrier serving a captive station is deemed to be handling 75% or more of all total shipper volumes moving from or to such station.

While it is not possible to measure the effect of the 75% market share presumption directly from any existing data, after considering this matter further in light of the information provided in this proceeding, I believe that it is possible to make some reasonable assumptions and to perform calculations using the Waybill that may generally approximate the impact of the 75% presumption. Thus, I have undertaken such an analysis in order to provide the Board with a more reasonable estimate of the 75% market share test based on several considerations.

First, in my March 1 Verified Statement, I have already calculated the effect of the NITL CSP on all movements that would meet the 240% R/VC presumption. Therefore, those calculations already account for the effect of the 75% market share presumption on all movements with an R/VC of 240% or more. In other words, if a movement would meet the 75% market share presumption and the 240% R/VC presumption, it is already included in my March 1 analysis. Thus, in order to calculate the impact of the 75% market share presumption alone, I have focused only on movements with an R/VC of 239% or less.

Second, in order to estimate the impact of the 75% market share presumption, I believe that one should look at certain specific rail-dependent commodities. For example, if the rail

market share of a commodity nationally is only 1%, it is highly unlikely that the rail market share of that commodity moving from a specific location is 75% or more as required by the NITL CSP. Moreover, there is data on the market shares of various modes used to transport particular commodities. Specifically, the Bureau of Transportattion Statistics of the U.S. Department of Transportation and the Commerce Department's U.S. Census Bureau jointly publish the Commodity Flow Survey (CFS), which shows the modal market share of 40 different commodities transported in the United States.[4] The CFS data shows that, of the 40 commodities that the CFS lists, railroads have a market share (as measured by tons carried) of greater than 25% for only four commodities: coal, metallic ores, cereal grains, and basic chemicals. For all other commodities, railroads have a market share of less than 25%. Thus, my estimate of the effect of the 75% market share presumption (which requires a railroad to carry at least 75% of a commodity between an origin and a destination) is based on the Waybill data for these four commodities, in which the rail market share is at least 25% nationally. My analysis assumes that these four commodities are the ones most likely to meet the 75% market share presumption in an individual situation.[5]

Finally, my estimate of the effect of the 75% market share presumption focuses on the movements of these four commodities where the R/VCs are between 180% and 239%. These are movements in which one can expect some degree of rail market power, based on the statutory threshold of a 180% R/VC used for rail market dominance determinations, and which implies some degree of captivity. Moreover, as we have seen above, the NITL's CSP will have relatively little revenue effect in the case of movements with an R/VC of less than about 180%.

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[4] See footnote 2 above.

[5] I would note that the U.S. Department of Transportation, in analyzing the effect of the 240% R/VC presumption of the NITL's CSP, chose to limit its analysis to just three commodities, coal, chemical or allied products and farm products, since they were the "major commodities groups that could potentially be affected by the NITL proposal." DOT Opening Comments, p. 7-8.

The tables below show the potentially affected carloads, the revenue before and after the impact of the NITL's CSP, and the number of impacted stations for these four commodities. I determined these calculations using the Waybill and the same procedures described in my March 1 Verified Statement, except that I have included movements of these commodities at R/VC ratios of 180% to 239%, instead of 240% and above.[6]

TABLE 2

Coal, Metallic Ores, Farm Products and Chemicals at 30 Miles, R/VC from 180% to 239% - Conditions of Full Competition

	Impacted Carloads	Revenue Before Impact	Revenue After Impact	Change in Revenue	Average Change in Rate	Average Percent Change	Number of Impacted Stations
Big 4 total	199,266	$581,923,748	$467,230,945	$114,692,803	$576	19.7	426

TABLE 3

Coal, Metallic Ores, Farm Products and Chemicals at 30 Miles, R/VC from 180% to 239% - Conditions of Reduced Competition (Lerner Index)

	Impacted Carloads	Revenue Before Impact	Revenue After Impact	Change in Revenue	Average Change in Rate	Average Percent Change	Number of Impacted Stations
Big 4 total	122,922	$399,295,513	$361,585,958	$37,709,555	$307	9.4	288

Several conclusions can be derived from this data. First, it is clear that the addition of these four commodities at R/VC ratios from 180% to 239% adds a relatively small number of carloads to the total number of impacted carloads – less than 200,000 are added even under conditions of full competition. The reduction in revenue is also modest – less than $115 million

[6] I would note that I have used the broader Waybill category of Farm Products rather than just the category of Grain as used in the CFS, and have used the broader Waybill category of Chemicals, rather than the category of Basic Chemicals as used in the CFS.

for the entire industry under full competition but reduced to only $37.7 million under conditions of reduced competition. Both of these results are not unexpected, since as R/VC ratios decrease, there will be a smaller and smaller effect from the NITL CSP, because the competing carrier must pay an access fee to capture the movement, and that access fee will make it uneconomic for the shipper to change carriers when rates are already relatively low.

Thus, the total potential impact of both the 240% R/VC presumption (which I calculated in my March 1 Verified Statement) and the 75% market share presumption for the "Big Four" Class I carriers[7] would be 1,438,563 carloads under conditions of full competition (see my March 1 Verified Statement, p. 29, where I calculate that 1,239,297 carloads will be potentially affected under the 240% R/VC presumption under conditions of full competition, plus the 199,266 carloads noted above to be added for an estimate of added carloads under the 75% market share presumption under conditions of full competition, for a total of 1,438,563 carloads); and 1,201,584 carloads under conditions of reduced competition (see my March 1 Verified Statement, p. 38, where I calculate that 1,078,662 carloads will be potentially affected under the 240% R/VC presumption under conditions of reduced competition, plus the 122,922 carloads noted above to be added for an estimate of added carloads under the 75% market share presumption under conditions of reduced competition, for a total of 1,201,584 carloads)

Thus, my analysis indicates that, even when some reasonable inferences are drawn to estimate the added effect of the 75% market share presumption to my March 1 analysis, the potential effect of the NITL's CSP is not appreciably different from the results shown in my March 1 analysis.

[7] BNSF, CSXT, NS and UP

VERIFICATION

I, Henry Julian Roman, verify under penalty of perjury that I have read this Reply Verified Statement, that I know the contents thereof, and that the same are true and correct based on my knowledge, information and belief. Further, I certify that I am qualified and authorized to file this Statement.

Henry Julian Roman

Executed on 05/22/2013

APPENDIX 2

Ex Parte No. 711

PETITION FOR RULEMAKING TO ADOPT REVISED COMPETITIVE SWITCHING RULES

REPLY VERIFIED STATEMENT

of

WALTER H. SCHUCHMANN

May 30, 2013

Ex Parte No. 711

PETITION FOR RULEMAKING TO ADOPT REVISED

COMPETITIVE SWITCHING RULES

REPLY VERIFIED STATEMENT

of

WALTER H. SCHUCHMANN

I. Introduction and Conclusions

I am Walter H. Schuchmann, Vice President, Operations Planning, at the railroad consulting firm, R.L. Banks & Associates, Inc. (RLBA). The firm has specialized in railroad service planning, economics and engineering for nearly 60 years. Our clients have included every current Class I or a recent predecessor and hundreds of regional and shortline railroads, dozens of banks and other financial institutions, hundreds of state and local governments, numerous transportation agencies and dozens of rail shippers or suppliers to the railroad industry.

I have been with RLBA for 25 years. I have managed the firm's involvement in, and/or participated in, analyzing operations and viability of numerous railroads on behalf of carriers, major financial institutions and government agencies. I have participated in coal and bulk commodity transportation studies, stand-alone cost development and rail service, switching and rate studies. I have advised numerous clients with respect to train operations, scheduling and blocking and merger impacts. I have contributed to evaluations of applicable intermodal technologies and existing and potential intermodal services, as well as intermodal terminal

configuration and operations and waste-by-rail movements. I have examined existing and prospective passenger rail services and participated in several new commuter rail implementations. I also have advised counsel and clients in legal proceedings in which railroad safety procedures and violations were at issue.

Prior to joining RLBA I was an operations and safety officer with Norfolk & Western and Norfolk Southern Railways. I worked in road and terminal management and oversaw yard switching, interchange and customer service activities. I served four years active duty as a U.S. Army Transportation Corps officer. I earned a B.S. in Industrial Management from Purdue University and an M.B.A. with concentrations in economics and transportation from Indiana University. I am a Certified Member of the American Society of Transportation and Logistics and a member of the National Defense Transportation Association and the Association of American Railroad Superintendents.

I was asked by the NITL to review the testimony of William J. Rennicke with respect to potential impacts upon the U.S. rail industry of adoption of the Competitive Switching Proposal (CSP) which is the subject of this proceeding. My overall findings are that Mr. Rennicke:

- Overstates the likely impacts of the CSP at several different stages of his argument:
  - The number of carloads that will be eligible under the CSP is overstated. NITL has provided a better estimate of eligible carloads.
  - The percentage of eligible cars that is likely to actually be diverted is too high. While no one has a crystal ball, the Canadian experience with what is known there as "interswitching" provides the best available indicator of the likely order of magnitude of diversions should the CSP be adopted.
  - The number of new interchange events, which is based on estimated diverted carloads, also is overstated.
  - Mr. Rennicke also improperly theorized that productivity will be affected strictly proportional to the increase in interchanges per car, ignoring all other factors that have contributed to rail productivity improvement.

- Understates or ignores the ability of the finest freight rail system in the world to deal with the relatively modest amount of traffic pattern changes associated with the CSP.

Rail traffic patterns change constantly. For example, crude oil traffic is growing rapidly, Powder River Basin coal is declining at this time, and vehicle and lumber traffic plummeted during the recent recession and are rebounding at different rates. Likely CSP-related changes will be modest in size compared to those traffic swings. Railroads have sophisticated computer programs, such as those marketed by Mr. Rennicke's company, to manage car and train routing in this ever-changing environment. Impacts upon the rail network as a result of competitive switching will be modest, will occur over time, and will be controllable.

- Ignores the benefits of competition, a hallmark of our free market system. Mr. Rennicke's arguments focus solely on the efficiency of the rail network but he inappropriately overlooks the benefits of competition to shippers and end consumers.

- Overlooks the willingness of Class I railroads to interchange and switch rail traffic, *when they want to.* Railroads engage voluntarily in reciprocal switching when they find it to be in their interests. Class I railroads have spun off new shortlines and tout the benefits of their service relationships even though every car handled by a shortline represents an interchange.

Overall, I believe that the carloads that might be diverted to new competitive routes under the CSP will be of a modest volume and will not cause harm to the rail network, which has constantly improving tools to manage car and train flows.

II. Mr. Rennicke Overstates the Impacts of the CSP

Mr. Rennicke overstates the impacts of the CSP by overstating the number of carloads that will be eligible under the CSP; applying too high a diversion percentage to the universe of eligible carloads; and, attributing all improvements realized in railroad productivity to reductions in the average number of interchanges experienced per carload. He also presents examples of supposedly inefficient interchange movements which might be experienced under CSP; but these inefficiencies are existing, not new, and are blown out of proportion by their implied frequency or by the hypothetical numbers used in his examples.

A. Mr. Rennicke's Universe of Eligible Carloads is Overstated

Mr. Rennicke overstates the number carloads likely to be rerouted, first, by overstating the potential universe of eligible traffic. NITL offered into evidence its own estimate of

impacted carloads in its Opening Submission. NITL stated that its expert witness, Jay Roman, "calculated that slightly less than 1.24 million carloads carried by BNSF, UP, CSXT, and NS (the "Big Four") would potentially qualify under the CSP, out of a total carload count for these carriers of about 31 million." (NITL Opening Submission, p. 43).

B. Mr. Rennicke's Proportion of Likely Diversions Also Is Overstated

Not only is the universe of eligible traffic overstated, but Mr. Rennicke overestimates the likely portion of that universe that would actually be diverted to another carrier under competitive switching arrangements established by the CSP. Experience with interswitching of rail traffic in Canada, the best available indicator, demonstrates that less than ten percent of eligible traffic actually is switched to a new competitive route by means of interswitching (NITL Opening Submission, p. 60.) This is far below the unsubstantiated estimate of 25 percent applied by Mr. Rennicke.

Overstatement of both the eligible cars and the likely percentage of cars that will be diverted under the CSP leads to an estimate of total traffic that would be diverted under the CSP that is disproportionately high. Table 1 compares Mr. Rennicke's estimates with the more likely and reasonable estimates included in NITL's opening evidence. Following Table 1 is a discussion of many factors which indicate that shippers will approach use of new routes made possible under CSP gradually and with caution.

Table 1

Unrealistic and Realistic Carload Diversion Estimates

	Rennicke	NITL – Full Competition	NITL - Reduced Competition
Universe of Potential Carloads Subject to CSP	7,500,000	1,240,000	1,080,000
Rennicke Hypothetical Diversion Assumption	25%		
Canadian Actual Diversion Experience		10%	10%
Diverted Carloads Hypothesized (Rennicke)	1,875,000		
Diverted Carloads Estimated Based on Canadian Experience (NITL)		124,000	108,000
NITL Estimated, Diverted Carloads as a Percent of Rennicke Hypothesized, Diverted Carloads		6.6%	5.8%

Sources: Rennicke VS, NITL Opening Submission.

Regardless of the carrier involved, the incumbent railroad will hold many advantages that will assist it in retaining traffic, if the CSP is approved. Those advantages include:

- single-line service, the sine qua non per Mr. Rennicke
- no reciprocal switch fee assessed against the movement
- customary shipping patterns
- established customer relationships

If the alternative railroad's cost-driven rate (including the reciprocal switch fee) is too high under the CSP, the incumbent need only be competitive in its rate and service package to retain the traffic. The only time the alternative railroad will enjoy an advantage is if it operates at lower costs and/or along a more efficient route, or if it offers better service, in which case the CSP would be economically desirable, both benefitting the national economy and the shipper.

Contrary to the impression provided throughout Mr. Rennicke's Verified Statement, shippers will be cautious about changing line haul carriers under the CSP and the process will be gradual, not instantaneous. First, much traffic only will be eligible as contracts expire. "According to the STB, approximately one-third of all traffic on a revenue basis moves under

contract."[1] Second, but even more important, consider the perspective of a shipper's Transportation Manager. His or her primary concern is getting materials or products to the right place at the right time. He/she logically would use alternate routes only when convinced that the company's production (and the Manager's job) will not be imperiled. Also, he/she is likely to send some test shipments via the alternative carrier before shifting larger volumes, unless he/she is completely dissatisfied with current rail service and/or rates. All of this will take time, giving the railroads plenty of opportunity to improve their service, lower their rates or adapt to changing traffic patterns.

Contrary to his general theme, Mr. Rennicke presents evidence that diversions will not reach the level he estimates. He says at page 63 "…shippers value reliability above all other service attributes." Yet, he projects in Exhibit VI-I5 that "the probability of successfully meeting a trip plan declines when interchange service is substituted for single-line service." If he is correct, why would shippers rush to use routes that he argues are less reliable than existing single-line service and which rates must include recovery of a competitive switch charge? This argument advanced by Mr. Rennicke actually supports NITL's position and is but one indicator of why the proportion of eligible traffic that actually moves via CSP is likely to be closer to the Canadian experience of ten percent than to his unsupported 25 percent figure.

But, for the sake of argument, if some of the negative impacts foreseen by Mr. Rennicke on service, transit time and car requirements actually were to occur, shippers surely will choose to use the switching routes only if the prior route manifested such extreme disadvantages in terms of service or rates as to make the new switched route somehow more attractive. Or, stated

[1] IMPACT OF THE STAGGERS RAIL ACT OF 1980, Office of Rail Policy and Development, Federal Railroad Administration, March 2011.

differently, if single-line service is so great, customers will not choose to participate in competitive switching.

C. Mr. Rennicke's Attributed Impacts upon the Rail Network Are Overblown

The increased number of interchanges that Mr. Rennicke attributes to the effect of granting the CSP, expressed in terms of average interchanges per carload, is used by Mr. Rennicke to hypothesize and illustrate negative impacts upon railroad productivity. I examine that issue, using more realistic estimates of the universe of eligible loads and the likely diversion percentages, which establish that interchanges per carload will increase no more than 1.1 percent as displayed in the right column of Table 2. The impact on ever-improving productivity will be negligible.

Table 2

Estimated Change in Number of Interchanges per Carload

RENNICKE				**NITL**
SOURCE	**VALUE**	**MEASURE**	**VALUE**	**SOURCE**
Rennicke, p. 97	7,500,000	Eligible Loads	1,240,000	NITL
Rennicke, p. 97	25%	Diversion Percent	10%	NITL
	1,875,000	***Diverted Loads***	***124,000***	***Calculated***
Exhibit VII-4	**5,370,000**	***Current Interchanged Loads (Pre-CSP)***	***5,370,000***	***Rennicke Ex. VII-4***
Exhibit VII-4	7,530,000	***Interchanged Loads (Post–CSP)***	***5,494,000***	***Calculated***
Exhibit VII-4	19,400,000	Total Loads	19,400,000	Rennicke Ex. VII-4
Exhibit VII-4	***0.280***	***Interchanges Per Load Now (Pre-CSP)***	***0.280***	***Exhibit VII-4***
Exhibit VII-4	0.388	***Interchanges Per Load Post-CSP***	***0.283***	***Calculated***
Calculated	38.6%	***Increase in Interchanges Per Load Post-CSP***	***1.1%***	***Calculated***

Sources: Rennicke VS; NITL Opening Submission; RLBA calculations.

NITL's estimate of 124,000 Diverted Loads (Tables 1 and 2) is only about seven percent of Mr. Rennicke's 1.9 million Diverted Loads. Adding the 124,000 Diverted Loads to Current Interchanged Loads (Pre-CSP) yields an estimate of 5,494,000 Interchanged Loads (Post-CSP) and an average Interchanges Per Load (Post-CSP) of 0.283. Hence the key metric advanced and

harped on continuously by Mr. Rennicke, average Interchanges Per Load, increases by just 1.1 percent, from 0.280 Interchanges Per Load (Pre-CSP) to 0.283 Interchanges Per Load (Post-CSP). This very small percentage change in average interchanges per load is not enough to adversely impact the ever-improving and increasingly robust US freight rail system.

Therefore, it follows that the impact on productivity of this miniscule change also necessarily will be miniscule and even smaller in light of the factors other than interchanges which have driven productivity gains as pointed out below.

Finally, it should also be noted that the number of interchange "switches" is much less than the number of cars interchanged, as many times cars are interchanged in blocks that require only a single handling whether the block consists of two or one hundred cars. Table 3 below shows that many cars impacted or diverted under the CSP move in blocks, dramatically reducing the number of incremental interchange events. Note that column f, "Number of Interchange Events at Minimum Block Size," reflects the very conservative assumption for the purpose of calculation that movement blocks occur at the minimum of their grouping. This means that the 50 and over block does not incorporate any 90 or 100-car movement blocks. As a result, the calculated number of potential interchange events is vastly overstated. Even so, note that 124,000 expected diverted carloads produce less than 40,000 interchange events.. Mr. Rennicke's estimates of affected and likely diverted cars, which I do not accept, also could be expected to include similar proportions of cars moving in blocks or solid trains, thus making the number of interchange switches less than his assumed number of cars diverted.

Table 3

Number of Cars in a Movement,
Impacted and Likely Diverted Carloads

A	*B*	*C*	*D*	*E*	*F*
Cars per Movement Block	Impacted Cars	Percent of Total	Expected Diverted Carloads	Expected Diverted Cars by Movement Block (Columns C*D)	Number of Interchange Events at Minimum Block Size (Column E * Lowest Value in Column A)
>49	775,634	64.7%		80,220	1,604
49 - 10	62,456	5.2%		6,459	646
9 - 1	360,852	30.1%		37,321	37,321
Total	1,198,942		124,000		39,571

Source: NITL witness Roman; RLBA calculations.

D. Mr. Rennicke's Examples Assume the Worst and Are Overstated

Mr. Rennicke assumes a Goldilocks national rail network where, magically, every yard is optimally sized at this very point in our freight railroad system's history, but yet is so fragile that the CSP either would cause traffic to exceed interchange yard and track capacities where traffic is gained or strand assets where traffic is lost. While it cannot be stated categorically that none of his examples would come to pass, they are highly speculative and even he assesses no frequency or probability to their likely occurrence.

Also, I examine below one of Mr. Rennicke's yard examples to determine whether its consideration is even warranted. At page 45 of Mr. Rennicke's statement, in Example 1, he conjures up a 200-car per day Hypothetical Yard. On page 47, he suggests that each day 90 of those cars might be re-routed. While I recognize that diversions will not occur evenly at all points, examining the seemingly innocent 90-car assumption discloses that it represents an

extremely unrealistic figure that undermines the argument and conclusions of his ensuing example.

Table 4

Diverted Cars at Example Yard

Rennicke	Measure	NITL
19,400,000	Total National Carloads	19,400,000
7,500,000	Total Impacted Carloads	1,240,000
25%	Likely Percentage Actually Diverted	10%
1,875,000	Diverted Carloads	124,000
9.7%	Percent of National Carloads Expected to Be Diverted	0.6%
200	Cars Per Day at Hypothetical Yard	200
9.7%	Percent of Carloads Expected to Be Diverted Based on National Average	0.6%
19.3	Expected Diverted Cars at Hypothetical Yard	1.3
90	Cars Per Day at Example Yard Diverted From Single Line Service, Hypothesized per Mr. Rennicke	90
466%	Percent of Expected Rennicke Diverted Cars Represented by His Hypothetical 90 Cars Per Day	
	Percent of Expected NITL Diverted Cars Represented by Rennicke's Hypothetical 90 Cars Per Day	7040%
	What Percentage of Total National Diverted Cars Goes Through This 200 Car-Per-Day Yard?	
90	Diverted Cars Per Day, This Yard	90
365	Days	365
32,850	Cars at One Location Diverted From Single Line Service/Year	32,850
1,875,000	Diverted Carloads	124,000
1.8%	Portion of Total U.S. Diverted Cars Flowing Through this Hypothetical Yard	26.5%

Sources: Rennicke VS; RLBA calculations.

Table 4 shows that, according to Mr. Rennicke's figures, one would expect on average only 19.3 Expected Diverted Cars at Hypothetical Yard, so his made-up 90 cars represent *466 percent of Expected Diverted Cars at Hypothetical Yard per his own, unsubstantiated assumptions.* Using the more likely number of expected diversions demonstrated in Table 2, Mr. Rennicke's 90-car assumption represents 7,040 percent of Expected Diverted Cars at Hypothetical Yard. This is quite an outlier, especially when posited by Rennicke as a useful

example to assist the STB in understanding and ruling on the CSP. Another way of looking at the same number of assumed, diverted cars is that, according to Mr. Rennicke's example, *this modest 200-car yard would be handling 1.8 percent of all expected diverted cars across the entire national rail network and, based on NITL estimates, that same humble yard would host over one-fourth of diverted cars nationally.* This hypothesized example is so unrealistically disproportionate and so atypical, that it is difficult to put any credence into the impacts that he attributes to the CSP in the balance of his example.

E. CSP Car Interchanges Represent Only Incremental Activity

Since the CSP applies only to existing, working interchanges, no new operational patterns will be established. The impacts will be incremental because the involved railroads already have personnel and equipment performing many of the required operations, with the granting of the CSP resulting merely in the addition or subtraction of some cars from existing trains. If the existing patterns are cumbersome, it is hardly due to the CSP. It is because the railroads have found it more expedient to live with the impacts of cumbersome arrangements than to make infrastructure modifications or operational changes. As many (or few) challenges as those cumbersome arrangements may present to the efficient and cost-effective delivery of rail shipments to railroad customers today, the CSP initiative does not seek to alter those arrangements whatsoever.

F. Gains in Rail Productivity Are <u>Not</u> Wholly Attributable to Reduced Interchanges

Perhaps the most egregious claim made by Mr. Rennicke is his oft-repeated implication that <u>all improvements in railroad productivity are attributable to reduced frequency of interchange</u> and that a change in the average number of interchanges per car, such as will occur if the CSP is granted, will drive rail freight industry productivity back to the level experienced

historically when interchanges per car were at the level he hypothesizes they will reach under CSP. (Rennicke, p. 104, states, "The productivity measures are then rolled back to an average value for 1996 through 1998, which is the time frame when the railroads saw a similar number of interchanges per car…"). Mr. Rennicke makes two mistakes in this area of his argument. The first mistake is attributing all change in productivity to a change in interchanges per car. His second mistake, addressed previously in Table 2, is projecting an unrealistically high increase in interchanges per car. The compounded effect of his two mistakes negates the significance of his conclusions.

It is widely recognized that rail industry productivity gains, which have been realized and should be both recognized and celebrated, are related to a number of factors. These include, at least:

- Mergers, particularly insofar as they allowed the combined railroads to concentrate traffic on shorter routes, routes with lower ruling grades or pair track to improve train flows;
- Improved locomotives that feature higher tractive effort, better fuel economy and increased reliability;
- Distributed power, which improves train handling, reduces rail wear and allows larger trains;
- Higher capacity trains. Gross tons per merchandise train for example increased from 4,500 to 7,500 between 1980 and 2006.[2]
- Staffing reductions and locomotive remote control;
- Reduced number of standard, interchange locations;
- Length of Haul. There was a steady increase in the length of haul from 503 ton-miles/ton in 1965 to 615 in 1980 to 843 in 1995 to 919 in 2008.[3]
- Improved track maintenance procedures and equipment;
- Improved rail and track materials and
- Better operations management and car and train routing software (addressed later in this testimony).

It is simply absurd to posit that changing the number of interchanges per car alone will wipe out the beneficial impacts of all of these factors.

[2] Productivity Improvements in the U.S. Rail Freight Industry 1980-2010, Carl D. Martland.
[3] Ibid

G. Mr. Rennicke Vastly Overstates the Impacts of the Interchanges that Could be Attributed to the CSP

Interchange is not the productivity-killer that Mr. Rennicke suggests either in terms of operating practice, facility requirements or magnitude of the increased frequency. Interchange is a routine, daily occurrence, with 5.4 million carloads interchanged in 2010 according to Mr. Rennicke's Exhibit VII-4. In my experience, many interchanges are conducted efficiently by crews transferring cars between yards of the involved carriers or to well-positioned interchange tracks. Railroads have had over a century to develop interchange facilities and procedures and the awkward but hypothetical movements conjured up by Mr. Rennicke to elicit shock value are exceptions rather than the norm.

Cars diverted under the CSP will be interchanged at existing interchange locations. Many will simply represent one or two more cars added to existing interchange crews, which will boost the measured productivity of those crews. The incremental nature of the change in interchange activities is best understood by noting that the highest reasonable estimate of new interchanged loads of 124,000 (Table 2) represents approximately 2.3 percent of Mr. Rennicke's reported 5,432,000 existing interchanged loads (Rennicke Exhibit VII-4).

Mr. Rennicke points out that the overall number of interchange events has been declining (Exhibit VII-4). However, railroad tracks and yards can be reduced only in a stepwise manner, i.e., a yard or track seldom can be reduced slightly just because cars using the yard drop by a few percent. This would suggest that capacity exists at many interchange facilities and yards to handle the very modest percentage increase represented by any reasonable estimate of new interchanges that might occur were the CSP granted.

As will be documented below, the annual number of cars diverted nationwide as developed by NITL, which is likely to occur over several years, as discussed above, is smaller than the net change in just one line of business in one year by one railroad (referring to growth of BNSF crude oil traffic*)*. Thus, the amount of change in total U.S. rail network operations is well within the scope of changes that occur on a constant and ongoing basis.

H. The Specter of Past Railroad Merger Failures is not Relevant

In the closing part of his VS, Mr. Rennicke attempts to intimidate the Board and its staff by reminding them of the service meltdowns that embarrassed their predecessors when Union Pacific took over Southern Pacific and Norfolk Southern acquired the majority portion of Conrail and not so subtly suggesting that the granting of the CSP could put their employment at risk. Those service failures resulted primarily from mistakes made by these normally well-managed railroads. Those failures are well known in the industry and both involved and non-involved railroads have taken them to heart and learned from them. Mr. Rennicke fails to recognize the role of poor managerial decisions in these merger meltdowns.

With respect to the UP takeover of SP, one commentary said:

> Southern Pacific should have benefited enormously from a union with UP. Blame for why the merger went so badly has been laid on everything but plague and swarming locusts. Computer problems. Bizarre labor rules. Inept federal regulators. Weather. Mexico. An intimidating CEO with subordinates reluctant to deliver bad news. Surging grain traffic. A booming petrochemical industry. But mostly the problem was arrogance. Union Pacific refused to accept suggestions from Southern Pacific employees who knew how to run their ailing railroad with chewing gum and baling wire. When UP tried to impose its way of doing things on the very fragile Southern Pacific, service went haywire.[4]

Respected industry analyst, Fred Frailey, put it this way:

[4] "The Wreck of the Union Pacific", Brian O"Reilly, Fortune, March 30, 1998.

> Then the UP tried to push the plan, most notably by closing Strang Yard, southeast of Houston, and transferring its work to Englewood Yard in the city. Englewood wasn't up to that challenge and nobody took heroic countermeasures to undo the damage in time. Dominoes fell until practically all of Union Pacific reached semi-paralysis.[5]

The Union Pacific meltdown resulted from tough circumstances and poor decision-making, not from the change of routing of a small portion of its traffic as is the issue in this proceeding. Mr. Rennicke concedes as much in recognizing many of these factors at page 110 of his statement.

However, the matter at hand does not involve a prospective merger. The CSP initiative will not result in the absorption of new facilities and personnel, integration of data systems, or massive turnover in local or headquarters managements. And, as explained below, traffic changes that may occur under the CSP are likely to happen much more gradually than the "Day One" cutover changes inherent in a merger.

Mr. Rennicke goes into great detail about the operational consequences of UP's botched takeover of SP. However, Rennicke's comparison of the gradual diversion of a modest portion of traffic as could happen under the CSP with the very different and more challenging management ordeal faced by UP as it attempted to integrate a weak and failing railroad is comparing "apples and oranges." One only can conclude that Mr. Rennicke wants to scare the Board and staff about the potential consequences of the CSP and its potential impact on their job security.

UP faced a different service crisis in 2004 that did not involve a merger or major change in traffic patterns. "UP Executive Vice President-Marketing and Sales Jack Koraleski stated to the NITL and STB that UP had underestimated the economy's growth and traffic on UP lines,

[5] "Phoenix on a Winged Shield", Fred W. Frailey, Trains, February 2005.

underestimated employee retirement rates, had no practical mechanism to limit volume growth, and suffered from bad weather."[6] So we must look farther than traffic routing to understand occasional operating crises.

Turning to Conrail integration issues, Norfolk Southern Vice President of Strategic Planning, Jim McClellan, did not blame NS's problems on shippers changing their shipping patterns. He said "… with the exception of NS's well-documented information technology problems, the cause of problems in the Conrail acquisition had more to do with poor planning at NS 10 years before the merger was conceived."[7] He went on to say, "Conrail ran a very tightly scheduled railroad, and they were very good at it. We took a scheduled railroad that was very predictable and made an unscheduled railroad work very unpredictably." No one disputes that merger planning and implementation is difficult but no one should infer that the problems that have accompanied some mergers will occur under the CSP just because a limited subset of shippers may enjoy new, competitive shipping options. The situations are not comparable, period.

Indications are that UP and NS (and their competitors) have both learned the value of building prudent resilience into their networks and have taken steps to bolster them. Along with improved management tools (addressed below), there is reason to take comfort that the modest impacts CSP may produce will be handled in stride by the major railroads.

I. Mr. Rennicke Has Overstated Other Concerns

Other areas of concern, including routing, car supply and impacts upon shipments that do not change routes following implementation of the CSP, are overstated both in terms of the cause

[6] "Union Pacific Still Fighting to Beat Congestion", Trains, August 2004.
[7] "Humbling Times", John Gallagher, Traffic World, November 1, 1999.

and effect of the CSP and the specific concern and in terms of the number of involved shipments, as discussed previously.

The benefits of railroad control over routings are touted repeatedly by Mr. Rennicke who asserts that "… the key to achieving efficient railroad transportation is to give railroads control over routing of traffic." (Rennicke VS, page 19, emphasis added.) By implication, the CSP will undermine this rather dramatically overstated "key." Yet the railroads have had the three decades of freedom since the Staggers Act to eliminate inefficient gateways and interchanges. The CSP does not include the reopening of even a single, closed interchange. The CSP merely opens the door to some incremental additional use of existing interchanges that the railroads have chosen to continue to operate even as they have streamlined their networks and improved operations. Nor would the CSP give shippers the ability to specify the line-haul routing of their shipments; again, the only change would be to utilize an existing interchange channel near origin or destination. An unstated (by Mr. Rennicke) possibility is that the CSP will permit use of direct or efficient routes of a competitor instead of circuitous or inefficient routes over the incumbent carrier.

Mr. Rennicke raises the theoretical possibility that the car fleet will have to be expanded as a result of CSP. But the parties responsible for supplying most of the nation's fleet apparently do not share his concern. Class I railroads have supplied only 17 percent of new freight cars added to the fleet over the past ten years. "Others," predominantly shippers and firms that lease cars (mostly to shippers), have supplied an overwhelming 83 percent of new cars.[8] Car

[8] New cars installed over the period 2002-2011 totaled 448,919 of which Class I railroads contributed 76,851 and "Others" supplied 372,068. Source: Progressive Railroading, July 2012. "Others" include shippers, leasing companies, TTX Company and non-Class I railroads.

companies and shippers own approximately 63 percent of all U.S. railcars in service today.[9] It is indeed ironic that the witness in this proceeding representing the minority supplier of freight cars – the Class I railroads – that have purposely been systematically withdrawing from investing in freight cars all of a sudden are expressing concerns about the fleet implications of the CSP. Many "others," supporters of this initiative, prefer competition.

Although Mr. Rennicke asserts that even shippers who do not exercise their rights under the CSP will be impacted negatively (Rennicke VS, page 101), he does not effectively make the case. His reasoning with respect to diverted shipments is that the additional handlings will degrade service. But shipments that are not diverted will not experience additional handlings and should continue to move as they do currently. Further, as demonstrated above, realistic projections of carloads likely to be diverted and additional interchange events on the national system are far less than Mr. Rennicke hypothesizes and, thus, resulting effects upon network fluidity will be small to negligible. The changes in interchange and switching related to shipments potentially diverted under the CSP are well within the ability and flexibility of the U.S. freight rail network to handle, as will be addressed in the next section.

III. The U.S. Rail System is Quite Capable of Managing the Impacts of the CSP

A. Traffic Patterns are Constantly Changing

Railroad traffic composition is constantly changing and the railroads can adjust readily to handle the CSP traffic. Railroads adjust to changing traffic volumes all the time, whether it is competitive business, new business, or changing shipping patterns.

The huge surge in Powder River Basin coal has turned into a double-digit decline. Intermodal volumes keep rising but traffic patterns are shifting as domestic traffic is now the

[9] Railroad Facts, 2012 Edition published by the Association of American Railroads.

fastest growing segment, and East Coast ports are increasing container traffic and positioning themselves to capture even greater increases when Panama Canal improvements become operational. Automotive traffic surges and wanes with the economy. Table 5 shows how traffic volumes of motor vehicles and lumber have risen and fallen in recent years and reiterates that changes in traffic flows are not unique. This table further shows that the railroad industry has proven to be more than capable of dealing with volume changes much greater than those likely to result from introducing a patina of competition into the freight rail industry.

Table 5
Variability in Key Railroad Traffic Segments

Year	Motor Vehicles and Equipment	Motor Vehicles and Equipment Variance from 2003	Percent Variance from 2003	Lumber and Wood Products	Lumber and Wood Products Variance from 2003	Lumber and Wood Products Variance from 2003
2003	1,681,000		0%	612,000		0%
2004	1,730,000	49,000	3%	616,000	4,000	1%
2005	1,787,000	106,000	6%	611,000	(1,000)	0%
2006	1,714,000	33,000	2%	548,000	(64,000)	-10%
2007	1,639,000	(42,000)	-2%	456,000	(156,000)	-25%
2008	1,322,000	(359,000)	-21%	392,000	(220,000)	-36%
2009	912,000	(769,000)	-46%	285,000	(327,000)	-53%
2010	1,128,000	(553,000)	-33%	317,000	(295,000)	-48%
2011	1,245,000	(436,000)	-26%	325,000	(287,000)	-47%

Source: Railroad Facts, various years, Association of American Railroads;
RLBA calculations.

Looking at the change in just one commodity, crude oil, exemplifies that the railroads are capable of handling a bountiful harvest of new business that has added traffic to both heavily and lightly used portions of the network.

BNSF realized petroleum activity growth from 203,735 carloads in 2011 to 353,738 in 2012, a gain of 73.6 percent. Moreover, the annualized rate in the fourth quarter was 443,000 units, a 25 percent increase over the 2012 volume but BNSF has stated publicly that its planned volumetric increase in 2013 will be more like 40 percent.[10] The 150,003 carload increase in crude oil traffic between 2011 and 2012 of one railroad, BNSF, is greater than the projected annual diverted carloads nationwide under the CSP. Note also the changes in other commodity volumes in Table 5 above.

Similarly, Union Pacific (UP) indicated that it moved 2,000 - 5,000 carloads of crude oil in 2011 and approached 50,000 units last year.[11]

Despite the ongoing change in traffic and operating patterns, railroads continue to become more profitable. Clearly there is capacity, resilience and flexibility in the U.S. railroad freight network. Moreover, railroads are used to adapting and investing as needed to deal with significant traffic changes. Accordingly, the railroads should be able to cope easily with the modest shifts in traffic which may result from the granting of the CSP.

B. Railroads Enjoy Excellent, Modern Routing Tools to Manage Traffic Flows

Excellent modern routing tools are available to aid railroad managers in optimizing the handling of ever-changing traffic patterns. "Increasingly sophisticated network planning designed to reduce work events has been an important driver of increased railroad network efficiency and reliability."[12] "MultiRail, which was developed by Oliver Wyman partners, was among the first software packages for rail operational planning. MultiRail and software tools like

[10] Musings from the Oil Patch, Allen Brooks, January 29, 2013, accessed at http://energy-musings.com/node/310.
[11] Ibid.
[12] Rennicke VS, page 67.

it allow railroads to build their operating plans based on infrastructure and demand."[13] These quotes from Mr. Rennicke document the ever-improving network planning tools available to railroad management. But Mr. Rennicke attempts to create the impression that changes under the CSP would be difficult to accommodate because historical traffic patterns might change and it is "complex" to change the operating plan.

It seems he doth protest too much. As noted above, rail traffic composition is changing all the time and that is why car blocking and train routing software such as that marketed by his firm are so valuable. But to be valuable, they have to be capable of being flexible and of accommodating traffic that shifts in response to market forces, as noted in Table 5 above.

State of the art blocking tools helped managers craft train operations plans to address falling traffic volumes during the recent recession. "Multirail (now owned by consulting company Oliver Wyman) and related software helped CSX quickly reconfigure ONE Plan schedules when the recession savaged its business. "Railroads were doing this daily during the recession, as business went down" said Rod Case, Van Dyke's lieutenant at Oliver Wyman." (Emphasis added.)[14]

Recession or not, CSP or not, making changes to the operating plan is a routine event, as witnessed by the following quotes, with emphasis added. A presentation titled "Next Generation Car Routing System at NS" described the ABC (Algorithmic Blocking and Classification) program used by NS as follows:

> "Facilitates easy, quickly reversible, changes to the operating plan
> - _ Normal plan tweaks
> - _ Derailments
> - _ Disasters

[13] Ibid
[14] Trains, November 2010.

- _ Major Events."[15]

In a presentation titled "Operating Systems," Fred Ehlers, Norfolk Southern Vice President Customer Service, describes the ABC Next Generation, under development at NS, as:

- "Facilitates easy changes to the operating plan
- Allows for quick, temporary "in and out" alterations in traffic flows with simple logic adjustments:
  - derailments,
  - disasters,
  - major events."[16]

IV. Mr. Rennicke Overlooks the Benefits of Competition

An overarching theme proffered repeatedly by Mr. Rennicke is that single-line service is the most efficient operationally but he ignores the benefits of increased competition. In fact, he attempts to frame the issue as "What is in the best interest of the rail network? " instead of "What is best for the overall economy?"

In that context, Mr. Rennicke suggests that service is inefficient unless it is single line. But Class I railroads frequently cooperate to operate pre-blocked run-through trains that are not switched at interchange gateways but operate through to a major classification yard on a second railroad's system. This virtually replicates single-line service.

Cooperation by two or more railroads to compete with single line carriers is not a new concept. Roughly 80 years ago, the Baltimore & Ohio, New York Central and Pennsylvania railroads all offered single-line service between the East Coast and the Midwest. But six smaller

[15] Accessed at http://www.google.com/#q=norfolk+southern+algorithmic+blocking+normal&spell=1&sa=X&ei=AfCcUcmcBuSViALevoGwAw&sqi=2&ved=0CCkQvwUoAA&bav=on.2,or.r_qf.&bvm=bv.46751780,d.cGE&fp=8526038e809b8fdf&biw=1280&bih=853

[16] Accessed at http://www.sec.gov/Archives/edgar/data/702165/000070216507000154/ehlers11.htm

railroads, dubbed "The Alphabet Route," collaborated to deliver unrivaled, seamless service between those same points."[17]

Also, if single-line service is such an ideal as to be unassailable, why do so many shippers – the parties most able to assess railroad service and rates – want the option of CSP?

Mr. Rennicke strives to defend and retain single-line service because he says he finds it more efficient. Many economists would disagree with the implication that the low cost supplier should automatically prevail. Just because a firm (or combination of firms) is not the lowest cost supplier does not mean that it cannot compete on the basis of quality and reliability. If cost was the driver Mr. Rennicke claims it is, how would he explain the ability of first, Blackberry, and now, Apple, to sell their phones and devices at premium prices? The reason is consumer choice derived from the well-known concept called "competition." And it is just such competition that keeps the low cost provider from becoming too sloppy and unresponsive to its customers about the quality of its products and service offerings.

Extending the argument of Mr. Rennicke further, why don't we all drive cars of one color produced by a single manufacturer? Or all shop at a single chain store? Surely that would be more efficient. But as consumers we want different combinations of goods or services, quality, reliability and price and we recognize that competition is the way to achieve those different offerings. We also recognize that the presence of a competitor in a market will tend to cause the incumbent to improve its product and not necessarily at any reduction in margin. Similarly, shippers and end consumers benefit from competition in transportation services, potentially in terms of price, service and quality. Optimizing the benefit realized by transportation providers is not the same thing as optimizing the benefit realized by overall economy or consumers.

[17] "Why Railroads Really Merge", Frank N. Wilner, Journal of Commerce, February 27, 1998.

There are examples of how important competition can be in the rail industry. Shippers actively seek competition by locating new plants where they can be served by two or more railroads (witness most new auto plants built in recent decades). Also, in the coal-fired, electric utility industry, some utilities have constructed "build-ins" to coal-fired generating plants to bring a second railroad to the plant to compete with the incumbent. In many such circumstances, second carriers and incumbents have competed, regardless of which enjoyed the lower cost structure.

Industries other than the railroads, even some that are heavily regulated, routinely manifest the benefits of competition and prove that the supplying industry's efficiency is not and should not be the only consideration. In the airline industry, a carrier which can offer direct flights clearly may enjoy the lowest cost alternative but other airlines often compete using connecting flights or even with one leg of a trip on each of two carriers. Why do they do so? Because the market places sufficient value on the combination of price, service, time of day, amenities and airports to sufficiently fill the flights of the otherwise disadvantaged carrier(s).

A. Conrail Shared Assets

To achieve something that they wanted, i.e. STB approval of a transaction through which they would absorb Conrail, NS and CSX established three locations where what remains of Conrail, now a terminal railroad, serves customers and connects with its owners, NS and CSX. Every single car handled by the jointly operated terminal railroad requires an incremental interchange of rail traffic and represents competition between NS and CSX, regardless of efficiency or cost structure. The two Class I carriers voluntarily crafted a solution which resulted in additional interchanges, switching and competition at limited locations to achieve the regulatory approval they were seeking.

B. Protecting the Franchise

In this proceeding, Class I railroads are using the smokescreen of exaggerated claims of unproductive (but existing) post-CSP movements to protect their franchises, or in other words to preserve their monopoly over on-line traffic. Frank Wilner, former Assistant Vice President of the Association of American Railroads, wrote "Since rail carrier deregulation in 1980, carriers have aggressively cancelled joint routes and rates – effectively blunting competition while encouraging still more mergers as other railroads seek similar results."[18] Mr. Rennicke's defense of single carrier service must be viewed in the context of the railroad industry's desire to maintain the status quo with respect to their solely-served customers. Wouldn't you if you were in their very comfortable shoes? Perhaps it really is not network efficiency that is the key concern of Class I railroads.

V. Class I Railroads Are Quite Capable of Performing Switching and Interchange When They Want To

Ample evidence demonstrates that Class I railroads can and do perform interchange and switching efficiently and that they embrace new business that is interline and requires interchange. It is clear that the interchange activity that Mr. Rennicke claims will drive the railroad freight industry backward is something that occurs routinely.

A. Existing Reciprocal Switching

Reciprocal switching in particular and interchange in general, are activities that railroads can and do perform … when they want to. Both parties recognize this. Mr. Rennicke states "…reciprocal switching is a mutually beneficial arrangement that allows each of the railroads that are party to it to expand their commercial reach in markets in which they do not compete." (Rennicke VS, p.24) "Section 1 of BNSF Switching Book 8005-C names over 750 shippers'

[18] Ibid.

facilities in over 120 individual cities and communities across the entire western United States as BNSF-served 'open industries.'" (NITL Opening Submission, p. 20)

B. Conrail Shared Assets

Again, we turn to the creation of Conrail Shared Assets. Each car handled by Conrail[19] in the three Shared Assets areas requires an incremental interchange that would not be necessary in the event of single-line service and potentially additional switching. In structuring Conrail as a terminal railroad, the two Class I carriers voluntarily accepted the additional interchanges (and a degree of competition).

C. Interchange Does Not Deter Developing New Business

UP provided financial backing to the Chicago and North Western Railway (CNW) to support its entry into the Powder River Basin because UP wanted to participate in handling coal traffic to be originated by CNW and interchanged to UP. UP was not deterred by the fact that this new traffic required interchange with CNW and the partnership lasted for over ten years before UP eventually acquired CNW. Similarly, many of the recently developed flows of ethanol and crude oil (such as crude oil originated by Canadian Pacific in the Bakken field) are interline movements requiring interchange but that has not dampened the rail industry's enthusiasm about the new traffic. Indeed, the 5.37 million carloads interchanged annually demonstrate that railroads can interchange and switch, when they want to.

D. Class I Railroads Embrace Shortline Connections, Despite Interchange

On their own initiative, Class I railroads through the spinoff and creation of shortlines, have added millions of annual interchange events. Shortlines handle one-fifth to one-quarter of

[19] CSX and NS handle some cars directly to/from customers in the Conrail territories with no handling by Conrail.

US Class I annual carload traffic.[20] In February, 2013, the latest month for which data is published, shortline and regional railroads handled 23.1 percent of total U.S. carloads (335,067 of 1,448,910 cars).[21]

Class I railroads tout the role of shortlines but each carload handled by a shortline and a Class I requires at least one interchange. Each interchange requires a change of possession, transfer of data and often an additional switching event and inspection.

Class I Railroads value the services performed by shortlines despite any additional interchanges or switches entailed. "We look at shortlines as an extension of us" said Rob Robinson, Norfolk Southern.[22] Dick Ebel, BNSF Assistant Vice President, Shortline Development, said "Short lines can play a critical role in our franchise's long-term strategy."[23] The article also stated "About 200 short lines are involved in 45 percent of Industrial Products' and 35 percent of Agricultural Commodities' moves" according to Dean Wise, BNSF Vice President, Network Strategy, who also was quoted as saying "Together, BNSF and short lines must take care of customers by providing excellent service."

Class I railroads deliberately created those additional interchanges when they spun-off shortlines. Clearly other advantages outweigh the additional interchange activity notwithstanding Mr. Rennicke's belief that additional interchanges will drive the freight railroad industry back to the Stone Age. In a CSP scenario, the incumbent is in the role of the shortline.

To reiterate, Class I railroads welcome, value and promote service that involves shortlines, despite the fact that each car moved in conjunction with a shortline requires an

[20] Progressive Railroading, August 2012.
[21] Railway Age, April 2013.
[22] Progressive Railroading, August 2012
[23] "Shortline connection a long-term BNSF Strategy" in Railway (BNSF employee magazine), Winter 2013.

interchange with a shortline often created in recent years out of the now-connecting Class I railroad. In a CSP world, the same interchange activity would be required with the incumbent in the role of the shortline.

Also, railroads conduct reciprocal switching at many locations and serve many customers where the railroads find it in their interest to do so. Again, interchange clearly is something that Class I railroads can and do perform routinely when they want to, without killing productivity or shutting down the national network.

VI. Conclusion

As I stated in my Introduction, Mr. Rennicke overstates possible impacts of the CSP on the U.S. rail network by (i) hypothesizing, without support, a high estimate of potentially affected carloads, (ii) applying a purely hypothetical and overstated estimate of the likely percent of traffic that would be diverted under CSP, and (iii) by attributing all improvement in railroad industry productivity to reductions in interchanges per carload, overlooking other well documented, contributing factors. He ignores the ability of the finest freight rail system in the world to deal with potential traffic flow changes which are demonstrated to be modest in comparison to normal ebbs and surges. He ignores the benefits of competition, a bedrock of our free market system. Finally, Mr. Rennicke overlooks the willingness of Class I railroads to interchange and switch, *when they want to.*

I conclude that the impacts of CSP upon the U.S. rail network will be very small and the greatest freight railroad system in the world will handle them in stride.

VERIFICATION

I, Walter H. Schuchmann, verify under penalty of perjury that I have read this Verified Statement, that I know the contents thereof, and that the same are true and correct based on my knowledge, information and belief. Further, I certify that I am qualified and authorized to file this Statement.

Walter H. Schuchmann

Executed on May 29, 2013