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October 26, 2016

VIA E-FILING
Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: STB Docket No. EP 711 (Sub-No. 1)
Reciprocal Switching

Dear Ms. Brown:

In accordance with the decisions served July 27, 2016 and September 1, 2016 in the above-referenced proceeding, enclosed are the "Opening Comments And Evidence Of The Kansas City Southern Railway Company" to be submitted as part of the record in this proceeding. If there are any questions concerning this filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,

William A. Mullins

Enclosures

cc: Warren K. Erdman

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. EP 711 (SUB-NO. 1)

RECIPROCAL SWITCHING

OPENING COMMENTS AND EVIDENCE OF
THE KANSAS CITY SOUTHERN RAILWAY COMPANY

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Attorneys for The Kansas City Southern Railway Company

Dated: October 26, 2016

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. EP 711 (SUB-NO. 1)

RECIPROCAL SWITCHING

OPENING COMMENTS AND EVIDENCE OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

SUMMARY OF ARGUMENT

The Board should not adopt the forced switching rules contained in its Notice of Proposed Rulemaking ("NPR") because the proposed rules exceed the Board's authority and will cause more problems than they might solve. The proposal is intended by the Board to regulate rates by creating rail-to-rail competition by regulation, not market forces. The Board has neither the statutory authority nor Congressional direction to restructure the industry through forced switching. When carrier behavior is lawful, there is no public interest or competitive need justifying the Board's proposed remedy.

Rather than promulgate a new, potentially ineffective end run around its existing rate complaint processes, the Board should focus on addressing the efficacy of that process. The solution to the complexity of rate complaints is not a pervasive new switching regime.

Should the Board choose to enact a rule, the rule should be limited only to situations where regulation is necessary to resolve a proven problem. The Board's proposal improperly focuses on only one aspect of the national rail transportation policy of 49 U.S.C. 10101 ("RTP"), while contradicting many other RTP provisions. The proposal is focused exclusively on the RTP provision that speaks to the establishment of reasonable rates for rail transportation and ignores the parts of the RTP that call for the Board to minimize federal regulation over the rail transportation system, to promote rail carriers' revenue adequacy, and to foster sound economic conditions in transportation.

The vagueness of the Board's proposal dramatically increases the potential for unintended consequences to the rail network. Such unintended consequences will be felt more acutely by smaller carriers than by larger carriers. The Board proposes to limit the application of the rule to all Class I carriers without any evidence or principled discussion differentiating Class II and III carriers from smaller Class I's.[1] Smaller Class I's like KCS share many of the characteristics that the American Short Line and Regional Railroad Association ("ASLRRA") advocated in EP 711 as justification for exempting Class II's and III's from the rules. Nevertheless, smaller Class I's are treated under the NPR like the largest Class I carriers, without any reasoned explanation.

If adopted, the rules could have adverse impacts on the smaller Class I's similar to those noted by ASLRRA, making it more difficult for the smaller Class I carriers to achieve revenue adequacy, and increasing the revenue burden on their shippers. That cannot be the intended result. While KCSR agrees with exclusion of Class II and III carriers from the rule, reasoned decision-making requires a factually-supported articulation of the Board's rationale for the decision to exclude Class II's and III's but not smaller Class I's like KCS. The NPR offers no such justification.

For the reasons set forth in these comments, the Board should not adopt the rules as proposed. Instead, it should discontinue this proceeding. If it does not, however, the Board, at a

[1] "The Board is proposing in this decision to limit the availability of reciprocal switching prescriptions to… Class I rail carriers due to the lack of specific information on this matter and the concerns raised by ALSRRA." EP 711 (Sub-No. 1), slip op. at 20-21.

minimum, should clarify the application of the rules in the context of the existing regulatory framework, responsibly targeting the application of the final rules to those situations where competitive access is truly necessary. It should limit the application of the rules to provide more certainty to all parties by –

- Applying the rule only on a movement-specific basis, like other rate remedies.
- Applying the rule only to shipper-owned facilities in terminal areas that do not already have intramodal competition via two-carrier access or reciprocal switching; and by excluding railroad-owned facilities.
- Excluding interline shipments, which are already switched efficiently in the manner agreed to by the origin and destination carriers.
- Clarifying that shipments subject to regulatory exemptions would not qualify for forced switching, unless that exemption is revoked.
- Excluding shipments where the existing rate, or the switching carrier's division, is already below the 180% URCS R/VC ratio or where market dominance otherwise does not exist.
- Requiring the party awarded access to periodically establish that the necessity justifying the remedy remains, rather than shifting the burden to the switching carrier to prove a negative.

Last, but not least, any final rules adopted by the Board should adopt an access pricing methodology that is most consistent with the entire RTP. Neither of the two methods proposed by the Board consider a rail carrier's ability to achieve revenue adequacy. Instead, the Board should endorse a methodology that preserves the incumbent carrier's lost contribution from its chosen routing of the traffic, to both encourage efficient competition and preserve the incumbent carrier's ability to attain revenue adequacy. Failing to promote these goals will result in carrier-to-shipper and carrier-to-carrier revenue transfers, which are not in the public interest. Failure to preserve the incumbent carrier's full contribution would also be constitutionally deficient.

ARGUMENT

I. COMPETITIVE ACCESS IS NOT THE APPROPRIATE VEHICLE TO ADDRESS THE RATE COMPLAINT PROCESS

For over a decade, the Board has periodically revisited the state of competition in the rail industry, to sharpen its regulatory focus and improve its processes. During these efforts, shippers consistently raised one concern above all - rate levels. The Board's proposal is attempt to resolve those concerns. However, its attempt to co-opt a competitive access mechanism as way of regulating rates and addressing rate levels is contrary to the statute.

A. The Records In EP 705 and 711 Predominantly Reflect Shipper Concerns Over Rates, Not Switching

The Board's proposed rules grew out of shipper concerns about rail rates. In 2011, the Board held a hearing to consider the state of competition in the railroad industry. See Competition in the Railroad Industry, EP 705, (hearing held June 22-23, 2011). While some commenters in that proceeding addressed switching under 49 U.S.C. § 11102(c), most shipper commenters wanted a more effective rate complaint system.

In response to Ex Parte 705, the National Industrial Transportation League ("NITL") filed a petition proposing changes to the Board's reciprocal switching rules. Petition For Rulemaking To Adopt Revised Competitive Switching Rules, EP No. 711 (filed July 7, 2011). In 2012, the Board opened a proceeding in response to NITL's petition and sought comments on NITL's forced switching proposal. See Petition For Rulemaking To Adopt Revised Competitive Switching Rules, EP 711 (STB served July 25, 2012). The vast majority of shippers' comments discussed the need for an easier method to challenge unreasonable rates and practices, not for more rail-to-rail access. Rather than directly addressing those rate process concerns, the Board opened this proceeding and proposed these forced switching rules, heading off in a new, untested regulatory direction, in an attempt to circumvent the rate complaint process.

The Board's current proposal will create more problems than it is meant to solve. The vast majority of shippers' comments in the 705 and 711 proceedings were more concerned about having effective avenues to challenge rates and practices, not rail-to-rail access. In EP 705, many stated that forced switching would provide little rate relief, if any, and that it was more important to focus on fixing the rate complaint process. See EP 705, Oxychem Supplemental Testimony;[2] Initial Comments of Consumers United for Rail Equity at 15 and June 22, 2011 hearing; M&G Notice of Intent to Participate; Opening Testimony of Total Petrochemicals USA, Inc., at 1-5. Even the Alliance for Rail Competition ("ARC") stated that shippers "are more likely to benefit from increased protection against unreasonable rail rates and charges and unreasonable railroad practices than from increased competitive remedies, such as improved access, increased switching, reopening of the Bottleneck Decisions,[3] or actions on paper barriers." EP 705, ARC Supplemental Testimony at 2.

These same views were carried forward in the EP 711 proceeding. There, the Chlorine Institute ("CI"), many of whose members have separately participated in prior Board proceedings, expressed concern that the STB might be viewing the NITL Proposal as a "cure-all" for shippers where the real focus should be on regulating rates. EP 711, Opening Comments of The Chlorine Institute, Inc., at 2. The Joint Coal Shippers ("JCS"), a consortium of coal

[2] The Oxychem facility was already open to reciprocal switching – the very same remedy the proposal now seeks to impose on the entire industry. Nevertheless, Oxychem still claimed that its rail rates were too high.

[3] Central Power & Light Co. v. Southern Pacific et al., 1 S.T.B. 1059 (1996) (Bottleneck I), clarified, 2 S.T.B. 235 (1997) (Bottleneck II), aff'd sub nom. MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999)("Bottleneck Decisions").

consumers, noted that forced switching, aimed at increasing rail-to-rail competition, may fail to "provide any meaningful market-based rate relief." EP 711, Opening Submission of Entergy Arkansas, Inc., Kansas City Power and Light Company, Seminole Electric Cooperative, Inc., and Wisconsin Electric Power Company d/b/a WE Energies, at 8. In Olin Corporation's view, it is the ability to utilize the rate complaint process that will provide the incentive for railroads to compete. The "logical result is that the NITL proposal will not promote more rail-to-rail competition," Olin said. STB Docket No. EP 711, Initial Comments of Olin Corporation, at 7.

Agricultural shippers and related industries, such as the fertilizer industry, specifically noted in EP 705 and 711 that they were too concerned about rates, and that the forced switching proposals would do little, if anything to resolve their concerns. In its opening comments in EP 705, the Fertilizer Institute expressed concern about increasing rail rates and the need to have an effective means by which to challenge those rates. EP 705, Opening Comments of the Fertilizer Institute, at 3. The Fertilizer Institute also suggested that increasing access via the various forced switching proposals was of limited value. Id. at 10. The National Grain and Feed Association ("NGFA") stated in its EP 711 comments that forced switching relief for agricultural shippers would be "minimal." EP 711, Interested Agricultural Parties' Opening Comments, at 23. According to NGFA, if NITL's forced switching proposal was broken down into winners and losers, the agriculture parties would fall under the losers' category. Id. at 7. Likewise, the U.S. Department of Agriculture ("USDA") claimed that the proposal "would benefit too few grain and oilseed shippers." EP 711, USDA's Opening Comments, at 5.

Previous reciprocal switching cases also show that most requests for forced switching were driven by the desire to obtain rate relief. See Midtec, 857 F.2d at 1508, ("Midtec's claim is really nothing more than a grievance that the C&NW's rates are too high."); Central States, 780

F.2d at 669 (the shipper sought reciprocal switching because "it could save approximately $948 in shipping charges per three car unit."); Vista Chem. Co. v. Atchison T. & S.F. Ry., 5 I.C.C.2d 331, 332 (1989)(shipper sought reciprocal switching because the incumbent railroad was using "its market power to maintain a high local rate for traffic moving between Vista's plant and Santa Fe's closest interchange points."); and Western Fuels Service Corporation v. The Burlington Northern And Santa Fe Railway Company, et. al., NOR's 41987, 33321, 27579 and 29066, 1997 STB LEXIS 166, *21 (STB served Jul. 28, 1997)("To a significant degree, Western's complaint can be read as based essentially only on the right of the captive North Gillette Line mines to rate relief through forced access by a second carrier over the relevant BNSF track, and complainant's claimed right to provide that service upon the BNSF's refusal to allow Western access to those 'essential facilities.'").

In short, most of the shippers in EP 705 and 711, like those who filed prior forced access cases, had one thing in common: they wanted lower rates and/or a revision in the existing rate complaint methodologies to make it easier for them to obtain rate reductions. Most were not focused on increasing rail-to-rail competition. Most believed that increasing rail-to-rail competition through forced switching would have little impact on rates.[4] Yet, in spite of these comments, the Board has proposed these rules. The Board should, instead, continue to focus on its rate complaint process.

[4] The Board's statement that "[m]ost shippers who commented support NITL's general proposal that the Board should revise its reciprocal switching regulations in order to make it more widely available," NPR at 6, grossly exaggerates the level of shipper support. While NITL and ACC, who represent large shippers that would benefit the most from forced switching, support the proposal, most other shippers, especially coal and agriculture shippers, did not believe the proposal, even if adopted, would resolve their concerns or provide any meaningful impact on rates. See NPR at 7.

In the past fifteen years, and particularly since the EP 705 hearing, the Board has instituted a multitude of proceedings to resolve concerns over the rate complaint process.[5] It has performed an assessment of the stand alone cost process aimed at improving the existing process. It commissioned an independent study to validate whether the economic underpinnings of the rate complaint processes were sound. On October 25, 2016, it held a roundtable of prominent railroad economists discussing methods and means to improve the rate complaint process[6] and it is planning to hold further public hearings on how to improve the rate complaint process. The Board should continue with its processes and discussions about the rate complaint process. It should not forge off in an entirely new direction hoping to have an indirect impact on rates, while causing substantial collateral damage.

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[5] Procedures To Expedite Resolution Of Rail Rate Challenges To Be Considered Under The Stand Alone Cost Methodology, Docket No. EP 638 (STB served April 3, 2003)(streamlining the process for resolving stand alone cost ("SAC") cases brought under the Coal Rate Guidelines standard); Major Issues in Rail Rate Cases, Docket No. EP 657 (Sub-No. 1) (STB served October 30, 2006)(adopting several procedural and substantive changes to the SAC test); and Simplified Standards for Rail Rate Cases ("Simplified Standards"), Docket No. EP 646 (Sub-No. 1) (STB served September 5, 2007)(adopting new methodologies for assessing the reasonableness of rates involving small shipments and small shippers); Rate Regulation Reforms, STB Docket No. EP 715 (STB served July 25, 2012); Review of the General Purpose Costing System, STB Docket No. EP 431 (Sub-No. 4) (STB served Feb. 4, 2013); Procedures To Expedite Resolution Of Rail Rate Challenges To Be Considered Under The Stand Alone Cost Methodology, Docket No. EP 733 (STB served June 15, 2016); Rail Transp. of Grain, Rate Regulation Review, EP 665 (Sub-No. 1)(STB served Aug. 31, 2016); Review of the Gen. Purpose Costing Sys., EP 431 (Sub-No. 4) (STB served Aug. 4, 2016); Railroad Revenue Adequacy, EP 722; Petition of the Western Coal Traffic League to Institute a Rulemaking Proceeding to Abolish the Use of the Multi-Stage Discounted Cash Flow Model in Determining the Railroad Industry's Cost of Equity Capital, EP 664 (Sub-No. 2); and Revisions to Arbitration Procedures, EP 730 (STB served Sept. 30, 2016)(corrected)(Oct. 10, 2016).

[6] It is important to note that not one economist at the roundtable suggested that the best method of dealing with high rail rates or rate complaints was to adopt a forced switching scheme. One economist, the noted Department of Justice economist, Dr. Russell Pittman, acknowledged that a forced switching regime would result in little relief to shippers much like the rarely invoked interswitching remedy in Canada, because the duopolists (his words) in the West and in the East did not desire to compete against each other.

B. The Board's Proposal Attempts To Regulate Rates Through Non-Market-Based Rail-to-Rail Competition

Despite shippers' concerns being overwhelmingly focused on the rate complaint process, the Board has proposed rules focused not on the rate process, but rather creating an entirely new remedy of artificial, forced access. Meanwhile, the Board continues to implement a multitude of rate case changes. The Board even admits that its forced access proposal is to put downward pressure on rates. NPR at 14-15 and 33. In so doing, the Board's solution jettisons the judicially-approved Midtec standard, eliminates any reference to anticompetitive or otherwise unlawful conduct, and proposes vague criteria that effectively defy any attempt to define the impact of the proposal.

The Board even went further than NITL and broadened NITL's previous proposal for one purpose - to make the remedy available to even more shippers:

> [W]e are concerned that reciprocal switching based on the proposed conclusive presumptions could have adverse effects on categories of shippers not eligible under NITL's proposal. If NITL's proposal places downward pressure on the rates of those shippers who are eligible, then there may be an incentive for railroads that cannot make up any shortfall to raise the rates of ineligible shippers or degrade service in an effort to cut costs. . . . . . For these reasons, the Board prefers a reciprocal switching standard that makes the remedy more equally available to all shippers, rather than a limited subset of shippers.

It is clear, the Board seeks to create a remedy available to as many shippers as possible in the hope that downward pressure on rates will be widespread. Yet, while aimed at lowering rail rates, the Board offers no analysis of whether its proposal will achieve that goal.[7]

[7] "We have no idea how the proposed rule would or even could be utilized. We don't know its potential impact on the shippers.... We also don't know the proposal's potential impact on the rail carriers.... I firmly believe that what we do here, ultimately, could cause greater harm than good." NPR at 36, Begeman partial dissent.

C. The Board Is Not Statutorily Authorized To Utilize Section 11102 As A Means Of Regulating Rates

The Board's approach to create artificial competition as a means of addressing rate concerns is contrary to the RTP and the Act's structure. The RTP mandates that rates are to be set as much as possible through market forces, 49 U.S.C. §10101(1), and directs the Board to minimize its regulatory involvement and control over the rail transportation system. 49 U.S.C. §10101(2). The Board's proposal does precisely the opposite. It increases the Board's regulatory role and interferes in the market structure to artificially create competition.

Under the statute, a lack of effective competition authorizes the Board to intervene by regulating the reasonableness of the rate through the rate complaint process, not through the application of §11102. See 49 U.S.C. §10101(6)(the Board is to maintain reasonable rates in those instances where there is a lack of effective competition; i.e., where market dominance exists) and 49 U.S.C. §10701 (establishing a rate complaint process) and §10707(a)(saying the Board can only regulate rates where a railroad is market dominant, meaning there is a lack of effective competition and the rate is above 180 R/VC).[8] The Board is not authorized by law to use forced switching to put downward pressure on lawful rates.

The Board itself reiterated this principle in 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. NOR 42104, slip op. at 15 (STB served March 15, 2011)("Entergy"). There, the Board said:

> [A]s we stated in CP&L, the competitive access rules were promulgated not to provide shippers with an alternative form of rate relief, but to offer a competitive remedy where a bottleneck carrier has exploited its market power.... [footnote

[8] To the extent the Board's proposal would apply to a rate (or division) below 180 R/VC, the Board's proposal violates §10707.

> omitted] Thus, the proper inquiry is whether we have before us a monopolist, indifferent to the needs of its shipper, who is exploiting its market power by charging abusive rates (or providing poor service).[9]

The NPR does not address this statement or explain why it is no longer valid.

Courts, like the Board, have said that Section §11102 is not an alternative source of rate relief. As the D.C. Circuit in Midtec succinctly pointed out:

> If the Commission were authorized . . . to prescribe reciprocal switching . . . whenever such an order could enhance competition between rail carriers, it could radically restructure the railroad industry. *We have not found even the slightest indication that Congress intended the Commission in this way to conform the industry more closely to a model of perfect competition.*

Midtec, 857 F.2d at 1507 (emphasis added.); see also Balt. Gas & Elec., 817 F.2d at 115 ("We see not the slightest indication that Congress intended to mandate a radical restructuring of the railroad regulatory scheme so as to parallel telecommunications regulation"). The proposed rules fly directly in the face of these clear statutory directives and Congressional findings that forced switching is not to be used as a means of regulating rates.

Former Chairman Linda Morgan herself testified many times that the Board was not empowered to change its forced switching precedents to remove the need to show anticompetitive actions as an indirect means to regulate rates, at least not without Congressional action to change Section 11102. See *The Surface Transportation Board's New Merger Rules, Hearing Before The Senate Commerce Committee, Subcommittee on Surface Transportation and Merchant Marine*, S. Hrg. 107-1031 at 67 (June 28, 2001)(Testimony of Chairman Linda Morgan)(noting that the Staggers Rail Act of 1980 was not an open access statute and that to change Midtec would require Congressional action); *Oversight Hearing On Freight Rail*

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[9] Accord, Cent. Power & Light Co. v. S. Pac. Transp. Co., NOR 41242, et al., slip op. at 8 (STB served Dec. 31, 1996) ("Congress chose not to provide for the open routing that shippers seek here.").

Competition Issues, Hearing Before The Senate Appropriations Committee, Subcommittee on Transportation, Hearing On Appropriations, at 672-673 (September 12, 2000)(Testimony of Chairman Linda Morgan)(noting that changing Midtec would require a change in the Congressional statute); and *Nomination Hearing of Linda J. Morgan, To Be A Member Of The Surface Transportation Board, Hearing Before The Senate Commerce Committee,* S. Hrg. 106-1050 at 52 (September 28, 1999)(Testimony of Linda J. Morgan)(noting that various legislative proposals to require forced switching would be a fundamental change in the statute that the STB administers and that Congress would have to change to statute to encourage more competition through switching).

Because the Board's proposal seeks to regulate rates without the forced switcher having committed any illegal or inappropriate act, the proposal can only be characterized as an unauthorized attempt to restructure the industry and an improper rate remedy. As the D.C. Circuit said in upholding the ICC's Midtec decision, "We have not found even the slightest indication that Congress intended the Commission in this way to conform the industry more closely to a model of perfect competition." Importantly, the court went beyond judging the reasonableness of the ICC's decision, instead finding that Congress itself had not intended to allow the agency to restructure the rail system by forced switching. Yet, that is exactly what the NPR seeks to do. By doing so, the Board ignores its own prior precedents, its own former Chairman, and its prior court decisions, all in effort to artificially create competition to pressure carriers to lower lawful rates. This the Board cannot legally do.

D. The NPR Is Also Directly Contrary To Congress's Directive To The Board To Improve Its Processes For Rate And Unreasonable Practice Disputes

The STB Reauthorization Act of 2015[10] and corresponding report language require the Board to focus on improving the rate reasonableness process, including arbitration and other procedural improvements. The STB Reauthorization Act did not include any statutory changes nor any report language[11] changing Board policy or precedent with respect to Section 11102. Rather, Congress focused on rate issues and processes.

After discussing the numerous service and capacity issues and concerns over rates, the Senate Report did not conclude that increasing rail-to-rail competition through forced switching was the solution. Rather, it found that the best means by which to address these issues was to eliminate certain inefficiencies at the Board, increase public transparency and rail reporting requirements, and improve on the Board's processes. S. Rep. at 7-8. With respect to rates, the Senate Report, in discussing Section 11 of the underlying bill, noted that the bill was intended to require changes and simplifications in the rate complaint process. Id. at 12. Section 13 was also directed at improving the rate process. Id. at 13.

Congress was fully aware of EP 705 and EP 711 when it passed the STB Reauthorization Act. That Congress directed the STB to focus on issues other than EP 711, and in fact didn't even mention it and did not include any provision or report language calling for changes in the Board's implementation of Section 11102(c), speaks volumes about what the Board should be focusing on; i.e., not EP 711 (Sub-No. 1). Given Congress' awareness of EP 711 and Congress's decision in the STB Reauthorization Act to re-authorize ICCTA, and its refusal to revise Section

[10] STB Reauthorization Act of 2015, Pub. L. No. 114-110, 129 Stat. 2228 (2015)("STB Reauthorization Act").

[11] S. REP. NO. 114-52 (2015)("Senate Report").

11102, refutes the Board's notion that forced switching is the way to resolve the shippers' concerns. It also strongly supports the view that the Board's pre-EP 711 approach to forced switching was correct. Federal Deposit Ins. Corp. v. Philadelphia Gear Corp., 476 U.S. 426, 437 (1986) ("When the statute giving rise to the longstanding interpretation has been reenacted without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress."' (quoting NLRB v. Bell Aerospace, 416 U.S. 267, 275 (1974)); Zemel v. Rusk, 381 U.S. 1, 11-12 (1965); United States v. G. Falk & Brothers, 204 U.S. 143, 151 (1907).[12]

E. The NPR Is Contrary To The Most Recent Study Commissioned By The Board Affirming The Appropriateness of Its Rate Tests and Directing Focus to The Rate Complaint Process

The NPR is being proposed as a means to bring downward pressure on rates. Such an approach, however, is contrary to a recent Board-commissioned study, which encouraged the Board to continue to focus on improving the rate relief process rather than adopt a forced switching regime. In 2014, the Board requested InterVISTAS Consulting Inc. ("InterVISTAS") to examine alternatives to the Board's existing methodologies for railroad rate regulation. While not specifically directed at examining the impacts of forced competitive switching, the Board asked InterVISTAS to examine "the possibility of providing an additional path to potentially lower rates through competitive access." Id. at vi.

[12] A similar argument can be made with respect to ICCTA and its refusal to change Board precedent. See EP 711, Opening Comments of CSX Transportation, Inc., at 11-21 (filed Mar. 1, 2013) and Comments Of Norfolk Southern Railway at 23-27 (filed Mar. 1, 2013). The NPR addressed this argument (NPR at 11-12), but only with respect to whether ICCTA ratified the Midtec policy. The Board's rejection of Congress ratification of the Midtec policy is legally insufficient. See AAR's Opening Comments in this proceeding, which KCS adopts and incorporates herein. The STB Reauthorization Act, like ICCTA, refused to alter the Board's forced switching statute and precedent, contradicting the direction taken by the Board in the NPR. The Board cannot ignore Congress's reaffirmation of the Board's pre-EP-711 policy and its refusal to call for changes in the Board's approach to forced switching.

The Board recently released the report of InterVISTAS entitled "An Examination of the STB's Approach to Freight Rail Rate Regulation And Options for Simplification." ("InterVISTAS Report").[13] In conducting its examination, InterVISTAS analyzed the Canadian switching regime and the rate methodologies associated with it, which are somewhat akin to what is proposed in the NPR. InterVISTAS approvingly cited the findings of the Canada Transportation Act Review Panel ("Panel") with respect to forced switching. The Panel, which was set up to review Canada's railroad structure and regime, described the interswitching provisions as "an anomaly" and recommended against any extension of interswitching provisions. In the Panel's view, extending the interswitching limits would "worsen the market distorting aspects of the interswitching rate regime and would be a step backward." InterVISTAS Report at 77, citing Transport Canada, Vision and Balance at 63. Clearly, those that have studied forced switching regimes have concluded that such regimes can distort the market, are regulatorily cumbersome, and can fail to provide adequate compensation to carriers who are forced to provide a switch at non-market based rates. The Board should heed these studies and warnings.

The Board should directly address shippers' concerns and continue to focus its limited resources on the efficiency and accuracy of its rate complaint processes, rather than pursue untested and unsupported indirect remedies. Shippers in EP 705 and 711 repeatedly complained about rate levels, repeatedly called for changes to the rate complaint process, and repeatedly said that access to multiple carriers did not resolve their rate concerns. The appropriate response to these concerns is not to create a new regulatory switching regime. The Board should withdraw its proposal.

[13] INTERVISTAS CONSULTING INC., *AN EXAMINATION OF THE STB'S APPROACH TO FREIGHT RAIL RATE REGULATION* (Surface Transp. Bd. Project FY14-STB-157, September 14, 2016).

II. THE BOARD'S DECISION DOES NOT ADDRESS OR RESOLVE THE CONSEQUENCES OF FORCED SWITCHING RAISED IN EP 711

A. The Proposal Is Inconsistent With The RTP.

The national rail transportation policy is set forth in the RTP (49 U.S.C. 10101). The RTP is a list of policy directives that the Board must consider when exercising its regulatory authority. The Board's proposal focuses solely on the aspect of the RTP that speaks to the establishment of reasonable rates for rail transportation. However, the proposal ignores the parts of the RTP that call for the Board to minimize Federal regulation over the rail transportation system, to promote rail carriers' revenue adequacy, and to foster sound economic conditions in transportation. The Board's proposal should serve the entire RTP, not just one aspect.

B. The Proposal Ignores the Evidence of Operating Inefficiencies And Risks of Service Failures Presented in EP 711; By Broadening the NITL Proposal, the NPR Could Make Those Problems Even Worse; A Case-by-Case Approach Does Not Remedy These Problems.

In EP 711, extensive evidence was submitted showing the operational inefficiencies that the NITL proposal could cause. Rather than seeking to contain those impacts, or even quantify them, the NPR doubles down by broadening the NITL proposal and adopting a case-by-case approach. The Board's case-by-case approach will not prevent the harms shown in the EP 711 record. Rather, by broadening NITL's proposal and casting its proposal in vague terms, the Board has increased the potential damage from the rule. This dramatically increases the potential for unintended consequences for the rail transportation industry.

The problems with a case-by-case approach are succinctly and rightly set forth by Commissioner Begeman: "How can the Board provide fair and consistent switching judgments on a case-by-case basis without creating complexity and cost impacts on the one hand, and not introducing more unpredictability to the rail network on the other?" NPR, Begeman dissent, slip op. at 35. What Commissioner Begeman recognizes, and the majority seems to avoid, is that the rail network is just that – a network. When a non-market based action is forced upon the network through government regulation, even on a case-by-case basis, there are consequences to the rest of the network. Even the small stone may create large ripples throughout the pond. Add three or four other "case by case" small stones and these ripple effects are magnified. By failing to analyze and consider the cumulative impacts of its proposal on the rail network as a whole, the Board failed to perform reasoned decision-making.

This is not just theoretical. There will be adverse unintended operational consequences on the network, as well as on individual railroads, even under a case-by-case approach. In EP 711, KCS presented the testimony about two real life examples of operational inefficiencies forced switching could create.[14] One involved a potential interchange between KCS and UP in Sallisaw, OK where there are two KCS singly-served shippers[15] located along the KCS main line. The other location involved KCS-served shippers in the general vicinity of West Monroe, Louisiana where a small interchange track along the nearby UP line connects to a small and busy six-track yard lying parallel to a KCS jointly-owned line.

Under the NPR, KCS could certainly present evidence why forced switching at Sallisaw or West Monroe would be impracticable and would hamper other service. But at either of these locations, forced switching would also add inefficiency, extra mileage, extra switching, extra costs, and extra delay. The NPR is so vague with respect to operational interference that it provides no guidance at all to the Board's decision-making on these issues.

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[14] See EP 711, KCS Reply Comments, Exhibit A, pages 54-61.

[15] One is a coal-fired power plant that receives unit trains of Powder River Basin coal. The other is a carload shipper receiving inbound traffic that currently originates on UP.

Likewise, AAR and the Class I's presented extensive evidence in EP 711 about localized and network harms that NITL's proposal would have. See, e.g., Verified Statements of William J. Rennicke in AAR's Opening and Reply Comments; Oral Argument Exhibits of AAR, Norfolk Southern (Rush Bailey), Union Pacific (Tom Haley), and CSX (Cressie Brown).[16] Yet the Board's proposal gives no indication how the agency would prevent the problems these witnesses describe.

Neither does the Board's proposal attempt to assess the expansion of these problems due to the Board's broadening of the NITL proposal. The Board acknowledges that it "prefers a reciprocal switching standard that makes the remedy more equally available to all shippers" than the NITL proposal. NPR at 15. Yet the Board makes no attempt to quantify or remedy the broader disruptive effects of a proposed broader remedy. Rather, the Board's only answer is that it will adopt a case-by-case approach.

Merely saying that the Board will use a case-by-case approach does not remedy this problem. The NPR pays lip service to the concept that operational congestion, weather, and government mandated forced switching can cause operational inefficiencies and local and national service failures. NPR, slip op. at 17. It even notes "that local congestion can turn quickly into regional and national backlogs, affecting shippers of all commodities." Id. It then sweeps these types of concerns and the evidence of EP 711 aside, saying that case-by-case review will allow the Board to "exercise a greater degree of precision when mandating reciprocal

[16] As the video on the AAR website explains, a typical operation to build a single train requires a car to be switched six times. Ordering the incumbent carrier to switch that car to another carrier increases those steps from six to 24, impeding the fluidity of the network while adding costs and complexity. https://youtu.be/7T_puHLF6Uo

switching, thus mitigating the chance of operational challenges in a given area." NPR at 17. But why? This is not explained.

Even if it were true that a case-by-case approach would allow the Board to resolve operational and network issues as each case is presented, all that would lead to is a 'rush to the courthouse.' With no guidance how the Board will consider operational harms or about when the Board will say that the cumulative effects are too much and no more switching will be ordered, shippers seeking additional access will rush to be first in line to avoid being foreclosed by the harms resulting from relief accorded to an earlier filer.

C. <u>The Proposal Also Negatively Affects Infrastructure Investment Decisions</u>

The statute requires the Board to adopt policies that will allow the railroads to become revenue adequate and obtain revenues sufficient "to support prudent capital outlays" and "permit the raising of needed equity capital." 49 U.S.C. § 10704(a)(2). Congress recently reaffirmed these goals when it added language requiring that adequate revenues must cover "the infrastructure and investment needed to meet the present and future demand for rail services."[17] The Board's proposal will have the opposite effect, adversely impacting current and future investments in yard capacity and creating incentives against investment.

Mr. Rennicke's statement in AAR's comments in EP 711 explained why mandated switching would deprive railroads of revenue that would otherwise have been reinvested in the network. He also discussed how existing investments have been made in reliance on rules that have been in place for more than 30 years and why forced switching could change traffic flows that would strand those investments and lead to an inability to earn expected or appropriate

[17] The language was added to section 10704(a)(2) by the STB Reauthorization Act of 2015, Pub. L. No. 114–110, § 16, 129 Stat. 2228, 2238 (2015).

returns on existing assets. With respect to future investments, he explained how the uncertainty about whether incumbent railroads will be able to retain full use of the facilities in which they invest will discourage investment.

The uncertainty created with respect to investment decisions is exacerbated, not alleviated, by the vague, broadened rules that adopt a case-by-case approach. When it comes to future investment and infrastructure, especially with respect to yards, the Board's proposal will result in less investment, not more. When making decisions on where to invest scarce capital dollars, the rate of return on that investment, and how that return will be obtained, is a principal concern. As described by Mr. Jeff Songer, Chief Operating Officer of KCS, in his attached verified statement attached as Exhibit C ("Songer VS"), capital projects must compete for limited capital dollars. The return expected from an investment in terms of increased revenue opportunities is critical to this ranking. The more uncertainty there is about earning a projected return, the lower priority a project may have. Songer VS at 5-6.

Currently, KCS can estimate that building yard capacity to serve a certain shipper or set of shippers will enable it to handle additional traffic on which it can anticipate that it should be able to earn an acceptable rate of return. The Board's proposal, however, necessarily introduces a new element of risk or uncertainty into what level of return can be expected on investments in facilities such as yards. If the facility is susceptible to potential forced switching for future movements, the carrier that owns the facility will have less financial incentive/more financial risk in choosing to expand that facility. With vague, undefined, case-by-case standards, there is no certainty that a carrier will be able to obtain the necessary return on its investment capital to justify the investment.

The Board's proposal contains yet another disincentive to invest into additional yard and interchange capacity: one owner's additional investment actually makes it more likely that the owner's competitor would gain use of the owner's property. An owner's investment in additional yard capacity actually makes it easier for another carrier or a shipper to argue that forced switching is feasible, making it easier for the competitor to access the traffic for which the investment was made. This is illogical; indeed, it is exactly the opposite incentive that the Board should seek to create. Regulation should incentivize carrier investment in facilities, not discourage it. The end result of the Board's rule could well be a world where railroads would not invest at locations that would be susceptible to forced switching, and where building yard capacity could be required of shippers instead. See Songer VS at 7. The NPR's failure to deal with the data already presented on these issues is a fatal flaw.

III. THE BOARD HAS FAILED TO CONSIDER THE DIFFERENT IMPACTS OF THE PROPOSAL ON SMALLER AND LARGER CARRIERS

A. The Board Was Correct To Exclude Class II and III Carriers

In the NPR, the Board proposed to "limit the availability of reciprocal switching prescriptions to those situations that only involve Class I rail carriers." NPR at 20-21.[18] The Board acknowledged the lack of specific information on this matter, but apparently accepted ASLRRA's arguments that the proposed rules could have a devastating effect on ASLRRA's members.

In EP 711, ASLRRA put forth the testimony of Richard F. Timmons, President, American Short Line and Regional Railroad Association, ASLRRA EP 711 Reply Comments,

[18] Presumably, this limitation would exclude those situations where Class II and Class III carriers provide the only direct physical access to a shipper, regardless of whether the smaller carrier actually appears in the waybill.

filed May 3, 2013, to justify its request that its members be exempted from the rules. ASLRRA asserted that it was not necessary to apply the Board's forced switching rules to its membership because smaller carriers generally lacked market power, especially compared to the market power possessed by their larger connections. Id. at 3. Additionally, ASLRRA claimed that its member railroads were more likely to be irreparably harmed by the application of the Board's forced switching rules, which ultimately would result in a lessening of competitive transportation alternatives available to many shippers that would not benefit from the Board's rules.

ASLRRA identified several factors to justify its request for an exemption. ASLRRA argued that its members possessed limited to no market power because of the high percentage of traffic handled by smaller carriers that was already subject to competition from other modes of transportation. According to ASLRRA, up to 90% of small railroad traffic is subject to competition from trucks and barges. ASLRRA Reply Comments at 3. ASLRRA has also testified that its members face intense intramodal competition from the Class I railroads as well. EP 705, Competition In The Railroad Industry, Initial Comments Of ASLRRA, at 2, 7 (filed April 12, 2011). Thus, a short line's ability to recover the joint and fixed costs of its entire system was almost entirely dependent on its ability to maintain and grow traffic on its lines. That ability would be jeopardized if they were included as part of a forced switching regime.

ASLRRA correctly noted that a reciprocal switching rule would have disproportionate and discriminatory impacts. It would allow larger carriers to "cherry pick" the most profitable traffic from the lines of smaller carriers, leaving such carriers with little opportunity to maximize revenues from their remaining shippers to cover unattributable fixed costs. On the flip side of the coin, such smaller carriers would have almost no ability to "cherry pick" the most profitable traffic of the larger carriers because in many cases the only carrier that the short line connects to is the very same large carrier that it would be trying to cherry pick. Over the long run, allowing such smaller carriers to be cherry picked with little opportunity to recover those losses elsewhere would result in decreased economic viability for these carriers and ultimately result in a reduction of the competitive alternatives available for those shippers who can and do use short lines.

KCS shares the concerns expressed by ASLRRA. It supports the Board's decision to exclude Class II and III carriers from application of the rules. However, the Board has articulated no rational basis for ignoring the similar impacts that the proposed rules will have on smaller Class I carriers who share many of the same characteristics and concerns set forth in ASLRRA's comments, the testimony of Richard F. Timmons, or the testimony of ASLRRA Witness Carl Martland in EP 705.

B. Smaller Class I Carriers Could Suffer The Same Disparate Impacts As The Short Lines

The Board's failure to recognize that smaller Class I's would suffer some of the same impacts noted by the ASLRRA, or to provide a principled, evidence-based distinction between smaller Class I's and Class II's, is a policy shortcoming of the proposed rule and is legally indefensible. Because smaller Class I's could suffer the same disparate impacts as short lines, the Board should likewise exclude such smaller Class I's from application of the rules. The failure to do so here would be arbitrary and capricious.

As a general matter, an agency cannot treat similarly situated entities differently unless it "support[s] th[e] disparate treatment with a reasoned explanation and substantial evidence in the record." Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd., 403 F.3d 771, 777 (D.C. Cir. 2005). See also, Petroleum Communications Inc. v. FCC, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (and cases cited therein)(an agency must provide an adequate explanation to justify treating similarly situated parties differently.); Willis Shaw Frozen Express, Inc. v. ICC, 587 F.2d 1333, 1336 (D.C. Cir. 1978); Ace Motor Freight, Inc. v. ICC, 557 F.2d 859, 862 (D.C. Cir. 1977)("Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld.")

The NPR recognizes the adverse impacts it could have on smaller carriers, and thus exempts those carriers from its application. However, the rule does not exempt other carriers, such as smaller Class I's, even if those carriers may be exposed to the same potential adverse impacts as those articulated by the short lines or who could suffer greater revenue loss and operational inefficiencies than the largest four Class I carriers.

Like short lines, smaller Class I carriers, such as KCS, could be disadvantaged by the proposed rule. Like short lines, these smaller Class I carriers have less opportunity to gain traffic if the proposal is adopted and instead have many more locations where the larger carrier may be able to cherry pick them. Indeed, like short line carriers, the potential for harm is much greater for smaller Class I carriers than it is for the larger Class I carriers. The Board should recognize these disparities treat short lines and smaller Class I's similarly.

1. Like Class II and III Carriers, Smaller Class I Carriers Are More Subject To Adverse Effects Of The Proposal Than The Large Class I Carriers

As noted in AAR's comments, which KCS joins, all Class I's will be adversely impacted by the proposal. These impacts justify a complete rejection of the proposal. However, if the proposal moves forward, it is clear that smaller Class I carriers could, like short lines, be disproportionately impacted when compared to the larger Class I carriers. Like the short lines, these smaller Class I carriers simply do not have the same market reach and market power as the larger carriers.

The Board itself has recognized that smaller carriers do not possess the same market power as the larger Class I carriers and should not be treated the same with respect to numerous regulatory treatments, including the rate complaint processes.[19] Nevertheless, the Board appears to have accepted without analysis NITL's unsupported assertion (EP 711, NITL Petition at 400 that all Class I carriers have market power, while Class II and III carriers do not. This is simply not the case.

Smaller Class I's share many of the characteristics of the Class II's and III's. They lack market power and have limited geographic size and scope. Yet, they nonetheless are treated the same under the NPR as the four largest Class I carriers. The Board has articulated no rational basis for treating smaller Class I's differently than the Class II's and III's.

The disparity in market power between smaller Class I's and the larger Class I's can be illustrated by the Board's own RSAM calculations. RSAM is an indication of a carrier's ability to achieve revenue adequacy and recover its unattributable fixed costs. Higher RSAM's indicate that the carrier, when compared to other carriers, has less of an ability to recover its fixed costs from its shippers. Put simply, a high RSAM generally indicates that a carrier does not have the same market power as those with lower RSAM's.

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[19] See, e.g., Simplified Standards For Rail Rate Cases, Docket No. EP 646 (Sub-No. 1) (STB served Sept. 5, 2007); See generally, Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League, Docket No. EP 575, Docket No. EP 575 (Sub-No. 1) (STB served October 30, 2007) (discussing at great length the distinctions between larger and smaller railroads, and the public benefits delivered by smaller carriers); and TOM MURRAY, "A DIFFERENT WAY TO RUN A RAILROAD: REGIONAL VERSUS NETWORK CARRIERS," J. of Transp. Law, Logistics and Policy (Vol. 71, No. 3, Spring 2004).

As the below chart shows,[20] the smaller Class I's all have high RSAM's when compared to the four largest Class I's:

Carrier	4-yr RSAM	2014	2013	2012	2011
BNSF	182%	176%	169%	177%	204%
CSXT	265%	254%	269%	267%	269%
GTC	286%	266%	266%	284%	330%
KCS	299%	320%	320%	288%	267%
NS	259%	243%	253%	272%	268%
SOO	327%	350%	223%	397%	338%
UP	186%	171%	186%	182%	207%

"RSAM ratios are simply the average markups (on movements with R/VC percentages greater than 180) needed by carriers for their existing operations to be revenue adequate." Rate Guidelines—Non-Coal Proceedings, 1995 WL 705171 (served Dec. 1, 1995) at n. 31. The higher a carrier's RSAM, the further it is from achieving revenue adequacy under the Board's standards.

This illustrates that compared to the smaller carriers, the larger carriers have at least one measure of market power - a better opportunity to price their services in a manner to achieve revenue adequacy. They have many more locations and stations where they can control both the origin and destination, where the profit margin on a market-based rate need not be divided with another carrier. The fact that they have many more routes where they can control both the origin and destination also provides them with more opportunity to differentially price so as to achieve revenue adequacy. Larger carriers also have longer lengths of haul and higher GTM's per mile of road operated, which means that they have a greater ability to recover fixed costs on a per unit basis. In contrast, the smaller class Is are similar to class IIs and IIIs.

[20] Simplified Standards for Rail Rate Cases – 2014 RSAM and $R/VC_{>180}$ Calculations, Docket No. EP 689 (Sub-No. 7) (served February 26, 2016).

2. The Proposed Rules Will Likely Make It Harder For Smaller Class I Carriers to Achieve Revenue Adequacy

If the proposal moves forward without an exemption for the smaller Class I carriers, the larger carriers can leverage their market advantages selectively to access the smaller carrier's traffic through forced switching, leaving the smaller carriers less able to achieve revenue adequacy. The disparity in RSAMs between larger and smaller carriers will only grow as larger Class I carriers selectively siphon off traffic from smaller Class I carriers.

Applying the proposal to all Class I carriers would allow larger carriers to "cherry pick" the most profitable traffic from the lines of smaller carriers, leaving such carriers with little opportunity to maximize revenues from their remaining shippers so as to cover the unattributable fixed costs. If that occurs, to recover that lost revenue, the smaller Class I would have to seek to raise rates on its remaining traffic base. Assuming market conditions would allow this to occur, the remaining "captive" shippers would each have to bear a larger share of the revenue shortfall lost to cherry picking to allow the smaller carrier to achieve revenue adequacy. Absent the ability to raise rates on its remaining captive shippers, such smaller carriers, in order to maintain adequate revenues, would either have to reduce their future investment or begin to cut costs by shredding capacity or cutting back on service, or both. None of these potential effects would be in the public interest.

3. Under the Proposal, Larger Carriers Have More Opportunity To Gain Traffic, And Less Exposure to Losing Traffic, Than Smaller Carriers

One of the other reasons the short lines sought exemption from NITL's proposal is that there are many more opportunities for the larger carriers to cherry pick the short line traffic through forced switching than there are for short lines to obtain the traffic from the larger carriers. This is largely due to the limited geographic scope of a short line's network and the limited segment of the larger carrier's interchange locations where a short line may be able to gain traffic.

Smaller Class I's have these same concerns and limitations, while larger Class I's likely do not. Large Class I's are more protected from cherry-picking than smaller carriers. Smaller Class I carriers serve fewer markets than the larger Class I carriers, which reduces their ability to offer single-line service and means they must interline much more of their traffic than the larger carriers.[21] Even in those markets that they do serve, they face much more intramodal competition than the larger carriers. Both of these factors mean that it is much more likely that smaller Class I's would be cherry picked by the larger carriers than the other way around.

To examine the extent to which smaller Class I's serve markets already subject to intramodal competition, Mr. Bengt Mutén, a Senior Consultant at IHS Global, Inc. (IHS), conducted a waybill analysis of the BEA's served by the Class I's. This data was provided to Dr. Curtis Grimm, whose attached verified statement discusses the impacts of the NPR on smaller Class Is. See Grimm Verified Statement, attached as Exhibit D ("Grimm VS"). The analysis shows that there are practically no BEA's where the smaller Class I carrier is the only rail carrier, while there are a number of BEAs where a large Class I is the sole carrier.[22] This indicates that smaller Class I's, like short lines, are in markets where there is a high degree of intramodal competition. This increases the likelihood that there will be an interchange with another Class I that could be argued to be within a "reasonable distance" of the smaller Class I and more

[21] 2015 Freight Commodity Statistics (FCS). The FCS has traffic for all the Class I carriers broken down by local, forwarded, received, and bridged. "Local" traffic constitutes "single-line" traffic. For 2015, the percentage of local, or single-line traffic, was as follows: BNSF (74%); CN (U.S. Ops)(45%); CP (U.S. Ops)(10%); CSX (68%); KCS (U.S. Ops)(13%); NS (60%); and UP (62%).

[22] KCS Table I attached to the Grimm VS.

opportunities for the shippers, who are served by the smaller Class I carriers, to seek a forced switching order to obtain service from the larger Class I. Grimm VS at 9.

KCS's footprint illustrates this point. KCS's principal route has a north-south orientation. As a result, its system is intersected numerous times by the four largest Class I carriers, which primarily run east to west. According to Mr. Songer, Songer VS at 9, KCS has over 56 junctions, interchanges with other Class I's. Thus, because KCS must interline most of its traffic and is thus unable to offer a single line alternative to as many markets as the competing larger Class I's, has an inordinate number of working interchange with the larger Class I carriers, and most, if not all, of its markets are also served by these other carriers, KCS, like the other smaller Class I carriers, is thus more likely to be the incumbent carrier in a forced switching proceeding and be forced to short haul itself rather than the other way around. KCS assumes that the other smaller Class I's, who likewise tend to be north-south railroads, also have similar vulnerabilities.[23]

The larger carriers do not face similar risks. In this sense, KCS, and the other smaller Class I's, are similarly situated as the short lines and should be similarly treated, but are not. The asymmetry of the rule's effects presents smaller Class I carriers with significant economic challenges to compete in a forced switching regime that could eventually mean a reduction in competitive options over the long run.

[23] It is also worth noting that KCS and CP(Soo), the two smallest Class I's, have the two highest percentages of their existing stations open to reciprocal switching. According to the Serving Carrier/Reciprocal Switch ("SCRS") database maintained by Railinc, Corp., the Class I's have the following percentage of total stations served listed as Open (not including stations listed as Restricted): BNSF (22%); CN (13%); CPRS (30%); CSXT (8%); KCSR (27%); NS (18%); UP (7%). Grimm VS, Table II.

4. The Board Should Exempt Smaller Class I Carriers From The Rules

Like the Class II and Class III carriers that the Board has proposed to exempt from its rules, smaller Class I carriers have the potential to be disproportionately harmed by the imposition of the proposed forced switching regime. The only way to address this outcome, which could result in a restructuring of the rail industry, is to carefully tailor any final rules that the Board ultimately enacts, and to adopt an access price methodology that supports the RTP. Barring either of these reasonable actions, the Board should exempt smaller Class I carriers.

If the proposal applies to all Class I traffic, including interline traffic, smaller Class I carriers, who are heavily dependent upon interline traffic, have smaller geographic reach, and who lack the same pricing power to achieve revenue adequacy, will be disproportionately impacted. These carriers simply do not have the geographic size and scope to obtain as many access opportunities as the larger carriers will have to gain access against them. The result could be that the smaller, interline-dependent carriers could have much of their profitable traffic cherry-picked out from under them with little or no opportunity to recover that lost revenue through competition with larger carriers at other points. These smaller carriers could find themselves being increasingly limited to performing switch moves, resulting in less revenue available to maintain their networks, and weakening their ability to be competitive forces. This weakening could result in less competition, not more -- the precise opposite effect of what the Board (and shippers) would desire.

KCS does not believe that the proposal is needed and joins in the comments of the AAR that the proposal would be destructive to rail system as a whole. However, KCS also wishes to remind the Board that if the proposal moves forward, the consequences of subjecting all Class I carriers to identical new radical regulatory treatment would not be the same. Applying the proposal to all Class I carriers, could lead to less competition rather than more and could result in more operational problems, not less. Therefore, KCS believes it is appropriate to exempt smaller Class I carriers from application of the rule. Failure to do so would reflect an arbitrary and unjustified distinction between Class II and Class III carriers and smaller Class I carriers.

IV. IF THE BOARD ADOPTS ANY RULES, THOSE RULES SHOULD NARROWLY TARGET ONLY PROVEN PROBLEMS, AND ONLY WITHIN THE LIMITS OF THE STATUTE

For all of the foregoing reasons, the Board should not adopt the NPR. The proposed rules exceed the Board's statutory authority by attempting to regulate rates through Section 11102, and provide no solution to the many operational problems described at length in EP 711. The rules would also disproportionately impact smaller carriers. However, if the Board moves forward with its proposal despite these critical flaws, and seeks to regulate rates through use of forced access, the Board must at the very least respect the statutory limits on its rate regulating role.

A. The Remedy Should Fit Within The Existing Regulatory Framework

1. Forced Switching Should Be Utilized Only On A Movement-Specific Basis

Forced switching should only be ordered for individual movements, not entire facilities. While the mere existence of the remedy is intended to apply downward pressure on rates, any actual implementation of the remedy should only be movement-specific. Applying the remedy more broadly than on a movement-specific basis would simply show that the Board's real intent is not to remedy any wrong, but rather to coerce reduction of lawful rates by threatening to restructure the privately-owned rail network.

Applying the remedy on a movement-specific basis is consistent with the Board's rate reasonableness approach. The Board's proposed remedy is intended to reduce rates. Rates are movement-specific; that is, they apply to individual origin-destination pairs for specific commodities. A remedy that is intended to produce rate relief, therefore, needs to be similarly targeted.

The NPR seems to recognize the principle that application of forced switching would be movement-specific. Several factors listed by the Board in Section 1145.2(a)(1)(iii) are movement-specific – "efficiency of the route," "access to new markets," "the amount of traffic" and "impact…on the rail transportation network" are all movement-specific. A "route" is an origin-destination pair, and a market is product- and location-specific. Traffic volumes and related network impacts likewise are tied to specific routes and markets. Failure to focus the remedy on individual movements would simply be a confession by the Board that its proposed "remedy" is not intended to correct demonstrable problems or improper behavior by carriers, but simply to restructure the rail industry by granting access to private property, even though no rate problem is shown.

2. Any Rules Adopted Should Not Apply To Facilities That Are Already Subject To Intramodal Competition By Direct Access or Switching

To the extent a shipper facility is already served by two Class I carriers, whether as a result of connections with a short line or terminal railroad, already existing reciprocal switching arrangements, or through direct connections, that facility should not be eligible for forced switching under either of the Board's two prongs. Indeed, the NPR already recognizes that the existence of two carriers provides sufficient rail-to-rail competition so that a facility served by more than one Class I carrier would not be eligible for relief under the "necessary to provide competitive rail service" prong of the Board's proposed rule.

The Board should clarify that its "served by a single Class I carrier" language means precisely that and only that. In other words, if the facility is served by a single Class I carrier and a terminal railroad that connects with other Class I's, or already has reciprocal switching to a second Class I, or is served by single Class I and a short line that connects with a competing Class I, the facility is equivalently served by two Class I carriers. In any of those instances, the facility should not be eligible for forced switching under the "necessary to provide competitive service" prong. [24]

While recognizing that the existence of two carriers disqualifies a facility under the "necessary to provide competitive service" prong, the NPR proposes that a facility served by multiple Class I's may nonetheless qualify for forced switching under the "practicable and in the public interest" prong. The proposed rule would allow a shipper to seek access to a third (or even a fourth) Class I carrier if the shipper can meet whatever burden of proof may exist under the vague terms of the proposed rule. Proposed 49 C.F.R. 1145.2 (a)(1)(i) requires a party seeking a reciprocal switching arrangement to show that "the facilities of the shipper(s) and/or receiver(s) for whom such switching is sought are served by Class I rail carrier(s)." This explicitly means that even if the facility has service from two Class I's, it can still be eligible for forced switching. This should be modified to limit application of this "public interest' prong to only those facilities "served by a single Class I carrier" consistent with the "necessary to provide competitive service" prong.

It is difficult to imagine a situation where the potential benefits from a proposed switching arrangement outweigh the potential detriments where a facility is already served by two Class I carriers. If a facility already is served by two Class I carriers, rail-to-rail competition

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[24] This is consistent with the Board's competitive analysis in merger cases. In those instances, where a facility is served by Class I Railroad A and a short line that connects with Class I Railroad B, the Board has treated that facility as effectively having two carrier Class I service. As such, if Railroad A and B merge, the Board will treat that facility as a "2-to-1" facility entitled to receive access from another non-merging carrier. Union Pacific Corp. – Control And Merger – Southern Pacific Rail Corp., 1 S.T.B. 233 (1996) (Decision No. 44), aff'd Western Coal Traffic League v. STB, 169 F.3d 775 (D.C. Cir. 1999).

already exists there. Thus, if the notion of the NPR is to force rail-to-rail competition, where that intramodal competition already exists, the facility should not qualify for forced switching.[25] This is true whether the facility is physically served by both Class I carriers, via reciprocal switch among two or more Class I carriers, via a terminal railroad connecting with Class I's, or via a Class I and a short line where the short line connects to a competing Class I.[26]

If the intent of allowing the "public interest" prong to be invoked even though a shipper already has two carrier access is to provide a shipper a remedy for those situations where a shipper alleges the two carriers are not competing, that intent is unclear. If that is the intent, there is already a remedy – either under the antitrust laws or under the existing Midtec standard, which provides a remedy for such anticompetitive conduct.[27] Such shippers also can invoke the rate complaint process if they believe their rates are unreasonable, file an unreasonable practices case, or bring a complaint for the failure of a rail carrier to fulfil its common carrier obligations. The ability to seek service from a third Class I carrier simply is not necessary. There simply is no basis for allowing a shipper that is served by more than one Class I, either directly or indirectly, to be able to invoke the Board's proposed forced switching rules.

[25] To the extent the Board's proposal is aimed at other "public interest" factors, such as to improve service, there are already existing rules in place for shippers to obtain access to another carrier as a result of service inadequacies.

[26] The Board might need to clarify the scope and breadth of its proposed exemption for Class II and III carriers to ensure that if the facility is served by a single short line carrier that connects with a single Class I or even with two Class I's, that the rule cannot be invoked so as to allow the Class I carrier(s) to cherry-pick the most profitable traffic of the short line.

[27] Likewise, if that is the intent, i.e. to provide another carrier so as to force rail-to-rail competition, one would think that such a shipper should invoke the "necessary to provide competitive rail" prong, not the public interest prong, but the Board's rule does not provide for that remedy where there are already two carriers, which seems incongruous.

3. Switching Can Only Be Ordered Within A Terminal

The Board's proposal requires the incumbent Class I carrier to provide a "reciprocal" switch to a "working interchange" between it and a connecting Class I carrier if that "working interchange" is within a "reasonable distance of the facilities of the party seeking switching." There is no discussion or definition of what is a "reasonable distance." The NPR requests comments on defining the term "reasonable distance." KCS believes that under Section 11102(c), the Board can only order a switch if the facility is within a terminal.

To the extent the working interchange is within a terminal area, Section 11102(c) may be legally applicable; however, the NPR would have the Board extend forced switching remedies to areas outside of a terminal area. The Board thus professes to have the authority to order the forced switching regardless of the presence or absence of a terminal, and regardless of whether the connecting carrier to which the shipper seeks access even operates within a terminal. This construct is not legally defensible under Section 11102(c).

Until passage of the Staggers Act, it was unclear whether the agency even possessed the legal authority to order railroads to enter into reciprocal switching arrangements in the first instance. With the Staggers Act, and the adoption of what has since become 49 U.S.C. § 11102(c), the Board was given explicit authority to direct railroads to enter into reciprocal switching arrangements.

A review of the legislative and case history clearly establishes that Section 11102(c) entrusts the Board with the discretion to order a reciprocal switching agreement only in a terminal area (and not beyond). In adopting the precursor to today's Section 11102(c), Congress explained that the provision empowered the ICC to "order the more limited action of reciprocal switching," when compared to the ICC's established, and more expansive authority to "order joint use of terminal facilities."[28] Congress rejected calls to expand the scope of Section 11102(c) to allow the Board to order reciprocal switching in "all standard metropolitan areas,"[29] instead permitting the agency to engage in a fact-based evaluation of whether the requested relief was sought in a terminal.

The rejection of the application of Section 11102(c) to all metropolitan areas, combined with Congress' position that ordering reciprocal switching is a "more limited action" than ordering terminal trackage rights, clearly shows that Congress intended for the reciprocal switching provision to be less far-reaching in scope than the terminal trackage rights provision. Section 11102(a)'s terminal trackage rights provision, unlike the Section 11102(c) provision, allows forced trackage rights operations in "terminal facilities" and over "main-line tracks for a reasonable distance outside of a terminal." Congressional intent was for the Section 11102(c) remedy to be even "more limited." Because the proposed rule does not involve imposing terminal trackage rights or trackage rights outside of a terminal, but is deemed to be switching, it must be grounded by Section 11102(c), including the limiting scope of that provision.

The notion that Section 11102(c) was only to apply in terminal areas and/or "switching districts" is confirmed by examining the long-standing agency definition of the term "reciprocal switching," the phrase that appears in the statute. According to long-standing precedent, reciprocal switching is by definition an activity occurring within a terminal or switching district.

Before the advent of Staggers, the ICC described reciprocal switching thusly:

> In practice [reciprocal switching] means that one line-haul carrier operating within a terminal area will act only as a switching carrier in placing cars at industries on its own

[28] S. Res. 15319, 96th Congress, Congressional Record, Pub.L. No 448, 94 Stat. 1895 (1980).

[29] Id.

> trackage . . . as an incident of the line-haul movement of those cars over another carrier whose trackage does not extend to the serviced industry.[30]

The ICC continued to embrace the Switching Charges description of reciprocal switching in post-Staggers decisions. For example, in 1982, the ICC described reciprocal switching as follows:

> It has long been a common practice among the railroads to participate at commonly served terminal areas in what is called reciprocal switching. In practice this means that one line-haul carrier operating within the terminal area will act only as a switching carrier in placing cars at industries on its own trackage for loading or unloading, as an incident of the line-haul movement of those cars over another carrier whose trackage in that terminal area does not extend to the serviced industry. The carriers reciprocate in their roles as switching and line-haul carriers at this terminal in accordance with the flow of traffic to and from industries on their respective trackage.[31]

And again, in 1985, the ICC reaffirmed that reciprocal switching pertains to activities within a terminal area as follows:

> Reciprocal switching involves services performed by two road-haul railroads, rather than service performed by a single road-haul carrier in conjunction with a short-line or terminal railroad. The two railroads agree to participate at commonly served terminal areas in an arrangement under which one of the carriers acts as the switching carrier, placing cars at customer locations on its lines for loading and unloading which it will deliver to or has received from the other carrier for the line-haul movement. In the simplest reciprocal arrangement, . . . [t]he carriers, in effect, mutually exchange their switching services so that each can extend its lines to the industries served by the other, even on traffic for which they may be directly competitive as line-haul carriers.[32]

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[30] Switching Charges and Absorption Thereof at Shreveport, La., 339 I.C.C. 65, 70 (1971) ("Switching Charges"). The U.S. Supreme Court shortly thereafter took judicial notice of the ICC's Switching Charges definition of reciprocal switching in Port of Portland v. United States, 408 U.S. 811, 820 n. 8 (U.S. 1972).

[31] Delaware and Hudson Railway Company v. Consolidated Rail Corporation – Reciprocal Switching Agreement, 366 I.C.C. 845, 846 (1982) ("Delaware and Hudson").

[32] Investigation of Adequacy of Railroad Freight Car Ownership, Car Utilization, Distribution Rules and Practices, 1 *I.C.C. 2d 700* (citing Switching Charges and Absorption, 339 I.C.C. 65, 90 (1971).

In practice, the agency's actions have consistently reflected the understanding that reciprocal switching occurs exclusively within terminal areas, where reciprocal switching is common or customary, and therefore is or could be practicable under the statutory standard. Because there has been little dispute over the appropriate geographic scope of reciprocal switching, there are few post-Staggers cases taking on this discrete issue directly. But what cases there are reinforce Congress' intent that reciprocal switching is exclusively a terminal activity.

Leading among these cases is Central States Enterprises, Inc. v. Seaboard Coast Line Railroad, Finance Docket No. 38891 (ICC served May 17, 1984) ("Central States"), aff'd sub nom. Central States Enterprises, Inc. v. ICC, 780 F.2d 664 (7th Cir. 1985) ("Central States Appeal"). In Central States, the ICC denied a request for forced reciprocal switching in part because the shipper seeking the remedy was not within a nearby switching district, even though the shipper was located at a station just outside of an established switching district. As the ICC explained, because the shipper was not located in a common station or within a jointly-served terminal, "this was not a reciprocal switching situation" appropriate for the requested relief.[33] Central States not only reflects the understanding that reciprocal switching is available only in a terminal area, but it also recognizes the more limited scope of reciprocal switching in view of the agency's refusal to expand reciprocal switching to a "reasonable distance outside of a terminal" (in that case, only 1.4 miles beyond the established bounds of the terminal area) as could be done under the terminal trackage rights provisions of Section 11102(a).[34]

[33] Central States Appeal, at 670.

[34] In contrast, the Board's proposal would have "reciprocal switching" re-defined as the open-ended provision of intermediate transportation to and from any relatively nearby "working interchange" within a "reasonable distance" of the shipper facility. Under the Board's proposal,

Other post-Staggers decisions are consistent with Central States. For example, in Vista Chemical the parties acknowledged that the reciprocal switching request was appropriate for adjudication on the merits, inasmuch as there was "no controversy between the parties as to whether the [requested reciprocal switching arrangement] would be performed wholly within the limits of [an established] switching district."[35] This is true also of Midtec Paper Corp. v. Chicago and North Western Transportation, 3 I.C.C. 2d 171, 179-180 (1986), aff'd Midtec Paper Corp. v. United States, 857 F.2d 1487 (D.C. Cir. 1988) ("Midtec"), where the ICC's discussion of reciprocal switching consistently depicts the remedy as one inherently tied to a rail terminal. Finally, the aforementioned Delaware and Hudson decision clearly embraces the understanding that reciprocal switching is "terminal-centric."[36]

The above analysis establishes clearly that the term "reciprocal switching" has a very specific meaning within the railroad industry and at the agency. In particular, while reciprocal switching may not always be truly "reciprocal,"[37] it is always conducted within areas that are recognizable as terminals or switching districts. The reciprocal switching term does not apply outside of terminal areas. Unlike the plain language of Section 11102(a)(which does extend the Board's authority on tracks that are a reasonable distance outside of a terminal), there is no provision in Section 11102(c)(which provides for reciprocal switching), and none in agency

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the facility need not be in, or even near, a terminal area to obtain forced reciprocal switching. There is no legal support in the statute or case history for such an expansive reading of the scope of Section 11102(c).

[35] Vista Chemical, at 337.

[36] Delaware & Hudson, at 846 (observing that it is "common practice among the railroads to participate at commonly served terminal areas in what is called reciprocal switching").

[37] See, e.g., Id. at 847 ("Although traditionally service was assumed to be in balance between carriers in the terminal under a reciprocal switching agreement, in practice that is not a prerequisite to an agreement").

precedent, giving the Board the statutory authority to compel reciprocal switching outside of the bounds of a terminal. As such, if the Board does move forward with its proposal, the Board needs to clarify that it can only order switching within a terminal facility.

4. The Remedy Should Not Apply To Interline Traffic

Applying the proposal to interline (joint-line) movements would extinguish the incentives of interlining carriers to cooperate if one or the other might be able to obtain a longer-haul through forced switching, and would simply serve the non-public purpose of transferring revenue from the owning carrier to its competitor. Interline moves almost universally exist because one carrier serves the origin and a different carrier serves the destination. Under current regulation, the two carriers have to cooperate to find an effective, cost-competitive route to offer the shipper. Each carrier also seeks to maximize its long haul. The carriers eventually reach an agreement on where the interchange of an interline move is going to occur.

The Board's proposal could largely destroy this interline cooperation and result in nothing more than a transfer of wealth from one of the interline partners to another. This would not be in the public interest. This could occur if one of the interlining carriers has an opportunity to obtain a longer haul through forced access. In that case, the carrier's incentive will be to offer a less competitive interline rate in hopes of obtaining forced switching in order to short haul the other carrier, and maximize its long haul. If forced switching then occurs, the long haul carrier will effectively maximize its profits at the expense of the short hauled carrier. This will likely not result in a reduction of the rate to the shipper, but rather simply a transfer of division revenue from one carrier to the other.

As an example, take KCS's existing service to several of its utility plants. Several of these plants are solely served by KCS. There are KCS interchanges within a reasonable distance of the plant with KCS's interline partner, who happens to be the originator of the coal. Under existing law, KCS is able to interchange the coal at a mutually-agreed point that allows KCS to obtain a linehaul. That linehaul revenue allows KCS to obtain revenues sufficient to cover the actual cost of the movement and provides a contribution to the joint and unattributable costs for KCS to maintain its long haul route.

Now, under the NPR, the coal-originating carrier no longer has the incentive to allow KCS to obtain the long haul. Instead, it can manipulate its division requirements so as to force KCS to provide a switch to the nearby interchange; thus, obtaining the long haul revenue for themselves. If there is no mechanism for KCS to maintain the same contribution that it received from its linehaul movement, there could be a reduction in the revenues to support the rest of KCS's network, which could result in higher prices to the remaining shippers, reduced investment, or costing cutting measures, such as reducing service. This would also result in a transfer of revenue from KCS to its coal-originating connection. None of these effects are in the public interest. Yet, the burden of these effects will fall hardest on carriers with more interline traffic; namely, the smaller Class I's. To avoid this pernicious effect, the Board should exclude interline traffic from the scope of the proposed rule.

5. The Remedy Cannot Be Invoked For Shipments Of Exempt Commodities Unless The Exemption Is Fully Or Partially Revoked

Although not addressed in the NPR, the Board should clarify that the proposed forced switching regime, if it moves forward, would not extend to the transportation of commodities previously exempted from agency regulation pursuant to the Board's broad exemption authority (and mandate) under 49 U.S.C. § 10502. In fact, the Board has explained that the "exemption of a commodity under [Section 10502] generally excuses carriers from virtually all aspects of regulation involving the transportation of that commodity [including, for example,] . . . the dual requirements that a carrier furnish rates and provide service on reasonable request pursuant to those rates."[38] Moreover, "the exemption bars regulatory relief during the period when the exemption is in force."[39] To avoid any uncertainty on this issue, however, should the Board adopt some version of the proposed forced switching regulations, the Board should clarify that – (1) the new regulations would not extend to transportation previously exempted from agency oversight under Section 10502; and (2) if a shipper of an exempted commodity seeks relief under the new regulations now under consideration, that shipper must first obtain a full or partial revocation of the subject commodity exemption(s) pursuant to Section 10502(d).

6. Any Rules Adopted Should, Like Other Rate Remedies, Not Apply To Traffic Moving At A Rate Less Than 180 R/VC, Nor Should They Apply Where The Serving Carrier's Division Has An R/VC Ratio Below 180

The NPR claims that the 180 R/VC test, which applies to rate reasonableness challenges, is not a jurisdictional prerequisite to obtaining relief under Section 11102, citing Midtec, 3 I.C.C. 2d at 180. NPR at 22. Nonetheless, at least with respect to the competition prong of the proposed rule, the Board says it will "apply the market dominance test to determine whether a movement is without effective intermodal or intramodal competition." Id. It does not appear that this same qualifying limitation applies to requests filed under the proposed "public interest" prong.

The Board should clarify that under either prong, only traffic with a rate above the statutorily-prescribed 180 R/VC "jurisdictional threshold" is potentially subject to forced switching. Furthermore, in the case of an interline move, if the carrier serving the location where forced switching is sought has an interline division below the 180 R/VC threshold, the Board

[38] Pejepscot Indus. Park – Pet. for Declaratory Order, 6 S.T.B. 886, 891 (footnote omitted), reconsideration granted in part, 7 S.T.B. 220 (2003).

[39] Id.

should not order forced switching for the movements to which that division applies. The Board may not prescribe a rate if the existing rate is below the 180 R/VC threshold of 49 U.S.C. §10707(d). Accordingly, if an incumbent carrier is obtaining interline divisions less than 180% R/VC, the Board should not order rate relief (i.e., forced switching) against that carrier. See generally Official-Southwestern Divisions; In the Matter of Joint Rates Between Official and Southwestern Territories, Docket No. 29886 (Sub-No. 1), slip op. at 3 (Aug. 4, 1989) ("[t]he Staggers Rail Act of 1980 removed from [the agency's] reasonableness jurisdiction rates (including joint rates) with revenue to variable cost ratios below certain levels (now, 180 percent); and see 49 U.S.C. § 10707(d).

B. The Final Rules Should Provide Certainty To Railroads About Investment Decisions

1. Facilities Where A Railroad Has Made Significant Capital Investments

Facilities for which a serving Class I carrier has made a significant capital investment within the past ten years to serve a particular shipper or facility should not be subject to a reciprocal switching order. As previously discussed in Section II.C, supra, it is not unusual for a carrier to agree to make certain capital investments in order to serve a particular shipper. As discussed in that section, the existence of a forced switching remedy in the absence of anti-competitive conduct distorts the investment incentives. Shippers should not be allowed to invalidate or alter the economic assumptions associated with a carrier's capital investment ex post facto, which the rule would allow. If the Board moves forward with its proposal, the Board should allow a carrier the opportunity to show that it has provided substantial capital investment within the past ten years such that the underlying investment justification would be altered in the event of a forced switching order. If the carrier makes that showing, the Board should dismiss any request to allow forced switching.

2. Railroad-Owned Facilities

Facilities owned and developed by railroads should also be ineligible for the imposition of reciprocal switching arrangements. Railroad-owned facilities include, but are not limited to, intermodal ramps, storage in transit yards, and transload facilities. The potential that the railroad who invested in such a railroad-owned facility would have to short-haul itself so that its competitor can benefit from that investment would discourage carriers from making capital investments in their systems to handle and grow traffic. This would truly distort the market and investment decisions of the network.

3. Any Reciprocal Switching Order Should Be Limited In Time

The Board should limit the duration of any reciprocal switching prescription ordered pursuant to its new rule to a reasonable length of time. Currently, the proposed rule does not include any limitation on the duration of any remedy imposed. Given the Board's stated desire to take a case-by-case approach to deciding reciprocal switch cases, limiting the duration of such an order would allow the Board and the parties involved to better manage any detrimental effects associated with such an order. KCS proposes that any reciprocal switching order be limited to not more than three years, after which it would expire unless a party petitions the Board for a renewal of the order and justifies its renewal.

If the Board does not limit the term of the remedy, then the Board should require the party that initially sought the reciprocal switching order to seek an extension of the order on an annual basis. That party should have the burden to prove again that each element that justified the grant of the order in the first instance continues to apply. The Board should not shift the burden to the incumbent rail carrier to have the order vacated in the event that circumstances change.

V. IF THE BOARD ADOPTS ANY RULES, IT SHOULD ADOPT AN ACCESS PRICING METHODOLOGY THAT FULLY PROMOTES ALL ASPECTS OF THE RAIL TRANSPORTATION POLICY

A. The Board's Proposed Compensation Methodologies Do Not Consider A Carrier's Revenue Adequacy

The NPR acknowledges that access pricing is an important issue. NPR at 25. It also proposes two alternative approaches. The first involves a vague case-by-case approach using certain factors, mainly including cost, distance, and geography. The Board also seeks comment on whether it should include lost contribution as part of that analysis. The Board also suggests use of the SSW Compensation[40] methodology and whether it should be modified to "devise fair access fees in reciprocal switching cases." NPR at 26.

At this time, it is difficult to assess the full impact of either of the Board's proposed access price proposals. However, one thing is clear - the proposed regulation clearly would open up circumstances under which an incumbent carrier would be deprived of long-haul traffic that, as differentially-priced, contributes toward that carrier's efforts to become revenue adequate. Therefore, any switching services compensation scheme that falls short of making an incumbent carrier whole takes the incumbent farther away from the statutory goal of revenue adequacy and risks a reduction in investment incentives.

With that underlying principle, the answer to the Board's question about whether its compensation methodology should include a portion of the incumbent's lost contribution is a simple yes, it should include all lost contribution. For any carrier that has not yet achieved

[40] St. Louis Southwestern Ry. Co. - Trackage Rights Over Missouri Pacific Railroad Company – Kansas City to St. Louis, 1 I.C.C. 2d 776, 1984 ICC LEXIS 347 (1984) ("SSW I") and St. Louis Southwestern Ry. Co. – Trackage Rights Over Missouri Pacific Railroad Company – Kansas City to St. Louis Trackage Rights Compensation, 4 I.C.C. 2d 668, 1987 ICC LEXIS 15 (1987) ("SSW II") (collectively, "SSW" or "SSW Compensation")

revenue adequacy, any Board imposed access fee that does not include reimbursement for the carrier's full lost contribution would be contrary to the Board's statutory requirement to foster sound economic regulations and policies so that a carrier may obtain revenue adequacy.

Indeed, the Board is statutorily obligated to adopt a compensation scheme that would allow railroads to achieve revenue adequacy, even in the context of a rule that is intended to promote rail to rail competition. As the agency's predecessor said:

> [The shippers] contend that the Congressional policy of encouraging competition among railroads is ...independent of considerations of revenue need . . . [T]hat interpretation [is] erroneous . . . [The ICC] properly rejected the notion that the Staggers Act is a mandate for it to compel restructuring of the rail industry to create more rail-to-rail competition . . . The contention that the policy favoring promotion of rail-to-rail competition is independent or preeminent of revenue need ignores the statute's clear requirement that we maintain standards and procedures for adequate revenue levels and ignores the principle that the various policies of the Act, some of which conflict, must be balanced. See [former] 49 U.S.C. 10101a(1), (2), (3), and (6); and [former] 49 U.S.C. 10704(a) (2). NITL's proposal would seriously diminish the ability of railroads to price their services differentially and, ultimately, to compete effectively with other modes. We have consistently recognized that differential pricing is crucial to the viability of the industry . . . [T]his is economically sound pricing.

In keeping with the above passage from Proportional Rates,[41] if the Board moves forward with the proposed rule, any methodology for determining the switching fee must provide a means by which a revenue inadequate carrier can be reimbursed for its entire lost contribution as necessary to obtain revenue adequacy, subject to a rate reasonableness challenge.

Any mandatory compensation scheme that focuses only on recovering the costs of switching plus a reasonable return on the use of the involved terminal facilities, such as the SSW Compensation approach does,[42] would not allow a carrier to recover the substantial joint and

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[41] See Intramodal Rail Competition – Proportional Rates, EP (Sub-No. 2), 1990 MCC LEXIS 70 at * 7-8 (April 17, 1990) (footnotes and citations omitted)("Proportional Rates").

[42] The SSW Compensation formula was designed to allow a carrier to be compensated for its portion of fixed and variable costs on a specific line segment, along with a return on capital for

common costs of the network as a whole. Yet, the ICC and the Board have consistently recognized that railroads need to recover the common network costs in order to achieve railroad revenue adequacy. See Proportional Rates, 1990 MCC LEXIS 70 at * 7-8 (April 17, 1990). The way railroads do that is through differential pricing, i.e., they price their services so as to recover a greater percentage of the common network costs from traffic that is most reliant on rail. As long as a specific rail rate remains reasonable, the carrier should be allowed to collect as much contribution as possible from that specific move in order to recover its network costs and achieve revenue adequacy. Any compensation methodology applicable to a forced switching scheme must therefore allow a carrier to recover its full contribution.

B. Use Of Efficient Component Pricing Promotes Revenue Adequacy While Facilitating Rail-to-Rail Competition

One idea to promote the statutory goal of revenue adequacy is known as the Efficient Component Pricing Rule (ECPR).[43] ECPR both encourages competition and preserves a carrier's ability to attain revenue adequacy. Incorporating ECPR into the forced switching pricing methodology would allow a serving carrier to receive its entire lost contribution, subject to a rate reasonableness constraint. KCS's proposal would satisfy the Board's obligation to

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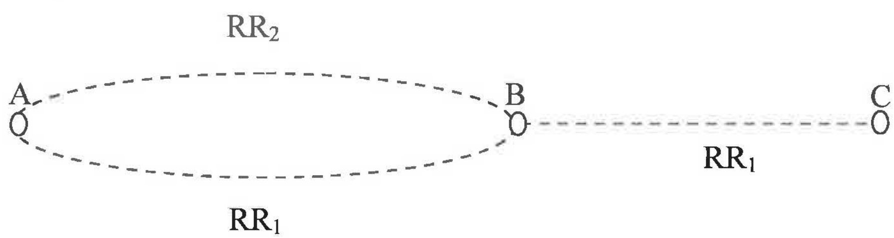
the specific assets used by the tenant railroad. The "cost" component of the SSW methodology does not include any contribution to the substantial joint and common costs of the network as a whole.

[43] See InterVISTAS Report, Section 7.7 at 108-110; ERIC BESHERS, HAGLER BAILLY SERVICES, INC., *VOLPE NATIONAL TRANSPORTATION SYSTEMS CENTER, EFFICIENT ACCESS PRICING FOR RAIL BOTTLENECKS* (Volpe National Transp. Systems Center, June 1, 2000); and NICHOLAS ECONOMIDES, LAWRENCE J. WHITE, *ACCESS AND INTERCONNECTION PRICING: HOW EFFICIENT IS THE "EFFICIENT COMPONENT PRICING RULE"?* (The Antitrust Bulletin, Fall 1995).

foster the incumbent carrier's revenue adequacy, while at the same time encouraging efficient competition.[44]

In KCS's view, application of ECPR is the only legally defensible means to ensure that an incumbent carrier can still recover its unattributable joint and common costs so as to achieve revenue adequacy.[45] The method also ensures that the competing, non-incumbent carrier is more efficient in order to "win" the move from the shipper. Otherwise, the competing carrier cannot beat the incumbent's price.

This is best illustrated as follows:



In the figure above, RR_1 provides rail service over its own infrastructure between Points A and B and between Points B and C. Thus, it is able to provide continuous, single-line service between Points A and C. RR_2, on the other hand, only owns infrastructure between Points A and B. In order to provide an alternative rail service to RR_1's single line service, RR_2 would need to operate over its tracks between Points A and B and over RR_1's tracks between Points B and C.

[44] The Board's InterVISTAS Report has an excellent discussion of ECPR. In general, ECPR requires that the access price to be charged to a second carrier providing a complementary service should include the bottleneck carrier's lost contribution for the lost move plus the bottleneck carrier's costs of providing access to the new carrier.

[45] InterVISTAS Report at 108 ("The ECPR requires that the price of access to a bottleneck segment to be paid by a competing tenant carrier include an amount for the net contribution the vertically integrated carrier had previously received toward common costs plus all relevant costs of providing access. This ensures that the common costs of the carrier controlling the bottleneck segment are covered, thus preserving revenue adequacy of the landlord carrier.")

Using ECPR principles, the Board should establish an access price from B to C equal to RR_1's lost contribution for the move between Points A and C plus RR_1's variable costs associated with the move between Points B and C. In that case, it makes economic sense for RR_2 to provide an alternative route between Points A and C only if RR_2 is more efficient at providing rail service between Points A and B. To ensure that carriers' rates remain reasonable, KCS suggests that any final rate resulting from a forced access decision should continue to be subject to challenge under the Board's rate reasonableness procedures.[46]

C. Failure To Adopt A Compensation Method That Provides A Carrier With Its Full Contribution Would Be An Unconstitutional Taking Of A Carrier's Property

The Board's proposed rule would use the power of government to transfer the property rights of one private party - the incumbent carrier's right to use its property lawfully to earn income - to another private party - a shipper or the incumbent carrier's competitor. To be lawful, such a transfer must be for a public purpose.

If the transfer is for a public purpose, the property owner must be compensated at constitutional minimum value for its property. A common Board measure of constitutional minimum value is the earning potential of the property.[47] Unless the incumbent carrier is

[46] The Board's consultant regarding rate reasonableness proceedings contemplated the application of ECPR to an access price regime. It acknowledged that "[a] maximum rate reasonableness methodology such as SAC may be needed to make a rate reasonableness assessment for ECPR access charges." InterVISTAS Report at 110.

[47] PYCO Industries, Inc.—Feeder Line Application—Lines Of South Plains Switching, Ltd. Co., Docket No. FD 38940 (served June 11, 2010), slip op. at 2 and n. 4 ("GCV is the value of the rail line as an ongoing business") ("PYCO"). See also 49 U.S.C. Section 10907(b)(2), and Abandonment And Discontinuance Of Rail Lines And Rail Transportation Under 49 U.S.C. 10903, STB EP 537 (served Dec. 24, 1996) ("AB Rail") ("Fair market value equals constitutional minimum value which is the greater of the net liquidation value of the line or the going concern value of the line.")

guaranteed its lost contribution on the traffic to be switched, the carrier will be unconstitutionally deprived of the constitutional minimum value of its property.

There is no dispute that a rail carrier's track serving a shipper is private property. As long as the incumbent carrier is using that private property in a lawful manner and is not charging an unreasonable rate, the carrier is entitled to obtain as much revenue from that property as possible. Indeed, the right to use that property is itself a property right.[48]

While the STB may have the legal authority to order a carrier to give up part of its property rights, the government may not take the private property of one party for the private benefit of another party without a public purpose and without adequate compensation. Kelo v. New London, 545 U.S. 469 (2005)("Kelo"). Unless a carrier is fully compensated for its costs and lost contribution, the Board's forced access proposal essentially transfers wealth from one private party to another. This is not a public purpose. See Verified Statement of Mark Fagan in AAR's May 30, 2013 Reply Comments in EP 711, at 2 ("The public does not benefit from a mere wealth transfer.... [I]t appears likely that mandated switching would produce only a wealth transfer from railroads to shippers that does not constitute a public benefit.").

The Board attempts to cast this taking as serving the public interest, but its vague "practicable and in the public interest" proposal fails to meet the public purpose test under the

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[48] The use of property is a fundamental attribute of ownership. See, e.g., Henneford, et al. v. Silas Mason Co., 300 U.S. 577, 57 S. Ct. 524 (1937) ("The privilege of use is only one attribute, among many, of the bundle of privileges that make up property ownership," citing cases). Inherent in this right of ownership is the right to exclude others from use. See, e.g., Nollan, et ux. v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141 (1987)("We have repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"") and Fresh Pond Shopping Center, Inc. v. Callahan, et al., 464 U.S. 875, 104 S. Ct. 218 (1983) ("property ownership carries with it a bundle of rights, including the right "to possess, use and dispose of it, [citing cases]...")

Kelo standard. Due to the vagueness of the Board's "any relevant factor" standard, it is impossible to tell whose interest – other than the shipper's interest in lower rates or the competing railroad's interest in earning profit without having to invest capital to do so – would be served. As just one example, the Board's proposal to consider access to new markets is simply a benefit to the shipper (and possibly a detriment to the shipper's competitors and their employees). Despite the Board's attempt to cast its proposal in statutory terms of "practicable and in the public interest," the Board's "any relevant factor" formulation gives no assurance of public benefit. The NPR certainly doesn't set forth what public purpose is being served.

Even if the proposal is for a public purpose and therefore meets the Kelo test, the incumbent carrier should still be entitled to full compensation, subject to a rate reasonableness challenge. The Board commonly uses the concept of going concern value as a measure of constitutional minimum value. See Note 47, infra. Going concern value is, in essence, the stream of revenue that would be expected to flow from the carrier's continued use of its property. See National Railroad Passenger Corporation-Conveyance Of Boston And Maine Corporation Interests In Connecticut River Line In Vermont And New Hampshire, 4 I.C.C.2d 761, 789 (1988), rev'd on other grounds, 911 F.2d 743 (D.C. Cir. 1990), reversal overturned, 503 U.S. 407 (1992) ("GCV is usually defined as the value of a business based on the expected profits that the business will generate in the future, *i.e.*, the net present value (NPV) of future profits."). Thus, as long as a carrier was charging a reasonable rate and was revenue inadequate, any access pricing methodology must allow a carrier that is ordered to short-haul itself the ability to recoup its costs and its prior full contribution.[49]

[49] The incumbent carrier's contribution, including offsets for any added costs from the switching, is the equivalent of "going concern value" or "constitutional minimum value" in this

The Board's suggestion that it could set switch fees based on costs and nothing more would be constitutionally deficient. A carrier's lawful rate is not limited to some URCS revenue/variable cost ratio. Rather, the carrier's lawful rate is determined according to the free market, as long as it is reasonable. If the Board orders forced switching, it must assure in setting any switch rate that the switching carrier is fully compensated for that loss. Anything less than full ECPR pricing fails that test and would not be constitutionally valid.

CONCLUSION

The Board should not adopt its proposed rules because they do not address shippers' concerns about the rate complaint process. The proposal is simply an attempt to regulate rates outside of the rate reasonableness process by artificially creating rail-to-rail competition. The Board does not have the statutory authority or the Congressional directive to grant such a remedy.

As drafted, the proposed rules will result in significant unintended consequences by disrupting network operations and undermining railroad's investment incentives. Smaller carriers will feel the unintended consequences of the rule more acutely than larger carriers. Therefore, KCS agrees with the Board's proposal to exempt situations involving Class II and Class III carriers from the application of the rule. However, the Board also should consider the effect of the rule on smaller Class I carriers. Smaller Class I carriers share certain characteristics of the Class II's and III's, but nonetheless are treated the same under the NPR as the largest Class I carriers. The proposed rules will likely negatively affect the ability of the smaller Class

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circumstance. If the switcher's contribution earned from use of its property is reduced, the switcher will not be fully compensated for the taking of use of its property.

I's to achieve revenue adequacy and could place a larger revenue burden on their "prospective captive" shippers who cannot utilize the rule.

Any final rules adopted by the Board must fit within the existing regulatory framework. For example, the rule should only apply on a movement-specific basis. It should not apply to movements of exempt commodities or movements where the rate or divisions are below the 180% revenue/variable cost jurisdictional threshold. Neither should a facility be eligible for forced switching if intramodal competition is already present at the facility. Additionally, any final rules should provide some certainty to the railroad industry with respect to investment decisions by exempting railroad-owned facilities and facilities in which a carrier has invested significant capital investments, as well as limiting the duration of any remedy granted.

Finally and critically, any final rules should adopt an access pricing methodology that promotes the RTP. The two methodologies proposed by the Board do not adequately consider a railroad's ability to attain revenue adequacy. Therefore, the Board should incorporate ECPR into its access price methodology. Failure to do so will drive carriers further away from revenue adequacy and is likely unconstitutional.

Respectfully submitted,

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Attorneys for The Kansas City Southern Railway Company

Dated: October 26, 2016

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. EP 711 (SUB-NO. 1)

RECIPROCAL SWITCHING

OPENING COMMENTS AND EVIDENCE OF THE
KANSAS CITY SOUTHERN RAILWAY COMPANY IN EP 711

EXHIBIT A

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March 1, 2013

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VIA E-FILING

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: STB Docket No. EP 711
Petition For Rulemaking To Adopt Revised Competitive Switching Rules

Dear Ms. Brown:

In accordance with the Notice served on July 25, 2012 and the decision issued on October 25, 2012, both issued in the above-referenced proceeding, enclosed are the "Opening Comments And Evidence Of The Kansas City Southern Railway Company" to be submitted as part of the record in this proceeding. If there are any questions concerning this filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,

William A. Mullins

Enclosures

cc: Warren K. Erdman
W. James Wochner
David C. Reeves

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. EP 711

PETITION FOR RULEMAKING TO ADOPT REVISED COMPETITIVE SWITCHING RULES

OPENING COMMENTS AND EVIDENCE OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

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Dated: March 1, 2013

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. EP 711

PETITION FOR RULEMAKING TO ADOPT REVISED COMPETITIVE SWITCHING RULES

OPENING COMMENTS AND EVIDENCE OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

INTRODUCTION

In a Notice issued by the Surface Transportation Board ("STB" or "Board") on July 25, 2012, the Board invited interested parties to submit comments and empirical evidence on a proposal by the National Industrial Transportation League ("NITL") to have the Board, through government regulation, establish numerous conclusive presumptions regarding the market power of a railroad serving a shipper facility. If the railroad's service to that shipper fell within those conclusive presumptions, the shipper would be entitled to require the serving railroad to "switch" the shipper's traffic at unspecified rates to the nearest actual or potential working interchange with another railroad, as long as that working interchange was within 30 miles of the shipper facility. The serving railroad would be required to provide this "switch" to the other railroad notwithstanding that the serving carrier could deliver the shipper's traffic to/from origin/destination via its own lines or via a voluntarily negotiated interline agreement (i.e., joint service via two railroads) and notwithstanding the operational and service concerns that would impact the rail network. The switch would be required even in the absence of any finding that the rate being charged by the incumbent carrier was unreasonable. The purpose of the NITL proposal is to ensure reasonable rail rates by increasing rail-to-rail competition. Notice at 6.

The Kansas City Southern Railway Company ("KCS" or "Kansas City Southern") hereby provides these Opening Comments and Evidence. The Board should reject the NITL proposal for four reasons. First, the proposal is another attempt by certain shippers to resolve complaints about the level of rail rates. KCS believes that there should be effective regulatory relief available for shippers who are being charged unreasonable rates. The solution, however, is not to impose a heavily regulated switching regime that has significant unintended consequences, but rather, to continue this Board's long standing and largely successful efforts to develop ways in which shippers can cost effectively and efficiently challenge the level of rail rates. Second, the proposal fosters significant unintended consequences, creating operational inefficiencies on the incumbent railroad and throughout the rail network, increasing government regulatory involvement, and raising litigation costs. The proposal also could potentially result in the lessening of competition as smaller railroads, especially those that depend upon interline traffic, are unable to obtain sufficient revenues to obtain revenue adequacy. Third, even if the Board is inclined to adopt the proposal, it does not have the legal authority to undertake most aspects of the proposal and cannot do so without Congressional changes to the statute. Finally, the proposal is bad policy as it runs counter to current antitrust policy and prior Interstate Commerce Commission ("ICC") findings with respect to the use of conclusive presumptions.

I. THE PROPOSAL IS UNNECESSARY TO RESOLVE THE SHIPPERS' CONCERNS

A. The Shipper's Concerns Are Really About Regulating Rates, Not About Allowing Rail To Rail Competition To Set The Rates

The genesis of this proceeding began in 2011, when the Board held a hearing to consider the state of competition in the railroad industry and what steps, if any, it should take to resolve shipper concerns about increasing rail rates. See Competition in the Railroad Industry, Docket No. EP 705. While some commenters focused on the Board's authority to direct switching under 49 U.S.C. § 11102(c) as a means to provide more rail-to-rail competition, the vast majority of commenters did not suggest that the solution to their concerns lay in increasing the number of railroads serving their particular facility(ies), but rather, the almost unanimous complaint was that rail rates were too high and that there was not an effective regulatory remedy to challenge those rates. Most shipper commenters did not support mandatory switching or competitive access proposals; rather, most wanted a more effective rate complaint system.

An example of the majority of views is Occidental Chemical Corporation ("Oxychem"). Oxychem, in its post hearing supplemental testimony, focused almost entirely on rail rates, not access to more carriers. According to Oxychem, in 2009, it had to shut down operations on its polyvinyl chloride production in Louisville, which was open to reciprocal switching on one end, because of high rates. See EP 705, Oxychem Supplemental Testimony. Oxychem testified that during the 2-3 years prior to closing the Louisville plant, rail rates increased by 25%. In 2008, Oxychem shut down its Muscle Shoals chlor-alkali manufacturing operations. In announcing that closure, the company stated "rapidly escalating rail transportation costs" was a factor. Id. Oxychem testified that "rail freight rates are material and directly impact our ability to compete nationally and globally." Id. Oxychem's testimony is illustrative of the fact that the real concern is not about increasing the number of rail-to-rail competitors[1] at a given facility, but rather about finding a way to effectively challenge rail rates; however that is accomplished.

The Consumers United for Rail Equity ("CURE") also expressed discontent, not about the need to promote rail to rail competition by increasing the number of railroads at a singly served facility, but rather about the lack of an effective means by which to challenge rates, and the costs and inefficiencies of the existing rate methodologies, arguing it was time for Board to identify a rate reasonableness standard that can be applied more easily. See EP 705, Initial Comments of Consumers United for Rail Equity at 15. In fact, when given the choice between remedies they would like the Board to pursue, CURE responded to a question posed by Commissioner Begeman at the June 22, 2011, where she asked whether the shipper community would rather have increased access to competition or an improved rate regulation process, that in its opinion, the most important "fix" was to fix the rate complaint process – not increasing the number of railroads via enhanced access. It recommended a change in the current rate regulatory program (removing small rate case relief caps) and a clarifying statement by the Board regarding one aspect of that program (changing the market dominance test). See EP 705, Supplemental Comments of Consumers United for Rail Equity at 1. Thus, CURE, will also supporting enhanced access, believed the Board should find ways to improve the rate complaint regulatory process. EP 705, Supplemental Comments of the Interested Parties at 6-7.

The EP 705 Opening Comments of the Fertilizer Institute also expressed concern about increasing rail rates and the need to have an effective means by which to challenge those rates. It

[1] It is important to note that the Oxychem facility was already open to reciprocal switching – the very same remedy NITL's proposal now seeks to impose on the entire industry. Yet, notwithstanding the ability to use another carrier via reciprocal switching, Oxychem still claimed that its rail rates were too high. This just goes to show that the existence of rail-to-rail competition is not the panacea the Petition would like this Board to believe.

noted that phosphate shippers have experienced rate increases of 60% and "rail rates rose ten times faster than the rate of inflation." EP 705, Opening Comments of the Fertilizer Institute at 3. The Fertilizer Institute noted that rates were increasing for both shippers served by more than one railroad, and the so-called captive shippers. Id. In contrast to what the NITL proposal suggests, and what the Board is now considering, the Fertilizer Institute also suggested that increasing access was of limited value. See EP 705, Opening Comments of the Fertilizer Institute at 10.

M&G Polymers USA, LLC complained not about the need to increase the number of rail competitors at its facility, but rather that rail rates were increasing to unreasonable levels. Indeed, M&G noted that even where there were two railroads, rates still increased because, in their view, the railroads' refused to compete. See EP 705, M&G Notice of Intent to Participate. It appears that M&G, like others, was not saying that it lacked competitive options, but rather it was being subjected to high rates. Further, M&G claimed that the expense and time required to obtain a lawful rate before the Board limited the utility of the remedy. See EP 705, Opening Comments of M&G Polymers USA, LLC at 9.

Most of the Initial Comments of Total Petrochemicals ("TP") were devoted to allegations of railroad pricing power, non-competitive pricing behaviors and duopolistic pricing behavior, and the consequent need to reform rate case methodologies. See EP 705, Opening Testimony of Total Petrochemicals USA, Inc. at Pages 1-5. TP argued that Board action is necessary to "control runaway rail rates," because even where a shipper possesses alternative options, competition as it exists is insufficient to allow the marketplace to dictate rates.[2]

[2] Several large shippers and some shipper groups commented that rail rates were increasing even at competitively served locations as well as at singly served (so-called "captive" locations), which shows that such rate increases were not the result of the unlawful exercise of market

The fact that shippers are really interested in rate relief, not enhanced rail to rail competition, was further evidenced by comments of the Alliance for Rail Competition ("ARC"). As the supplemental testimony of ARC states, shippers "are more likely to benefit from increased protection against unreasonable rail rates and charges and unreasonable railroad practices than from increased competitive remedies such as improved access, increased switching, reopening of the Bottleneck Decisions,[3] or actions on paper barriers." See EP 705, ARC Supplemental Testimony at 2. In response to Commissioner Mulvey's question in the June 22, 2011 hearing about what can the Board do to address shipper concerns, ARC offered "The Board should consider ways to reduce existing barriers in law and policy to relief from unreasonable rates and charges, and relief from unreasonable rail practices." Id. It did not name forced competitive switching as a preferred alternative.

Ameren's testimony echoed the same sentiment. Ameren's opening comments were almost exclusively about rates, and the need to revise rate methodologies. Ameren offered that competition was sometimes insufficient even when the shipper had access to two carriers; "from 2004 to 2011, Ameren issued bids for rail rate quotes for eleven competitive rail-served plants. Not a single one of these plants changed carriers as a result of these requests for new rates."[4] See EP 705, Opening Testimony of Ameren Corporation at 4. Ameren recommended that the Board revise rate methodologies: (1) the STB should move to interpret the statute that if any rate

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power, but rather the result of other market based factors. It also shows that one cannot assume that simply adding another railroad to a singly served location would automatically result in lower rates.

[3] Central Power & Light Co. v. Southern Pacific et al., 1 S.T.B. 1059 (1996) (Bottleneck I), clarified, 2 S.T.B. 235 (1997) (Bottleneck II), aff'd sub nom. MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999)("Bottleneck Decisions").

[4] Of course while Ameren equates this to mean the two railroads are not competing, there is another explanation: perhaps the reason why the incumbent railroad has the traffic in the first instance is because it is the low cost competitor.

exceeds 180% R/VC, that rate *prima facie* demonstrates that there is a clear lack of effective competition, and can be challenged under the STB rate guidelines[5]; and (2) the bar for revenue adequacy is currently set too high to provide meaningful guidance to rail rate issues. Id at 6. Interestingly, Ameren's opening comments don't address mandatory switching regimes such as those proposed by NITL.

All of the shippers in EP 705 had one thing in common: they wanted rate relief and/or a revision in the existing rate complaint methodologies in order to make it easier for them to obtain rate reductions. The shippers' comments demonstrated that what was of the most value to them was the Board's continued focus on changes to the rate relief process. NITL's proposal would have the Board ignore these calls for changes in the rate complaint process in favor of a mandatory switching regime based upon arbitrary unsubstantiated presumptions.

As KCS has said many times before, the Board should respond to these concerns and focus its energy on the rate complaint processes rather than pursue untested and unsupported mandatory switching remedies. Shippers in EP 705 repeatedly complained about rate levels, repeatedly called for changes to the rate complaint process, and repeatedly said that access to multiple carriers did not resolve their rate concerns. The appropriate response to these concerns is not to create a new regulatory switching regime based on faulty premises that threatens to disrupt the nation's rail transportation system; rather, the Board should continue to explore means to make the rate complaint process fair, accurate, expeditious and less costly. Indeed, the fact that there have been no Simplified SAC cases as yet which have required final resolution by the Board is a sign that the Board's most recent rate case revisions are working, encouraging settlements of rate complaints.

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[5] Such relief would, however, be prohibited by 49 U.S.C. §10707(d)(2).

B. The Premises Underlying The NITL Proposal Have Not Been Sufficiently Established So As To Warrant Consideration Of The Proposal At This Time

NITL's proposal is premised on the unsubstantiated assertion that creating government mandated rail-to-rail competition will result in better service and lower rates, but, in a network industry characterized by high capital investment and differing route structures, this assertion is not necessarily correct. The NITL Petition contains no empirical data to support its premise, nor has the Board undertaken such a study. Indeed, if one reads the EP 705 comments of those shippers who today have dual rail service, the Board cannot reach the conclusion that adoption of the NITL proposal will automatically result in lower rates or better service.

For example, a number of shippers in the EP 705 proceeding argued that rail to rail competition, even as it exists at dual served facilities, was insufficient to provide shippers with what they viewed as competitive rates. In their view, the rates were still going up, even at such dual served facilities. See EP 705, Reply Comments of Consumers United for Rail Equity at 3; and the Oral Argument Exhibits of Omaha Public Power District ("OPPD"), The AES Corporation, Oklahoma Gas & Electric Company, and Colorado Springs Utilities ("CSU") Supplemental Testimony at 8. ("OPPD Joint Commenters"). OPPD argued that the presence of rail-to-rail competition at a given facility is insufficient to allow the free marketplace to determine rates.[6] Likewise, CSU testified that while it has access to both UP and BNSF, CSU found that BNSF lacked any interest in competing with UP for CSU's contract upon renewal in

[6] As an example, OPPD claimed that at one of their facilities, there is physical access to two carriers, UP and BNSF, but the two carriers still do not necessarily compete with one another. It claimed that when OPPD's contract with UP came up for renewal in 2008, BNSF refused to make a meaningful opportunity to compete for its business. See EP 705, Oral Argument Exhibits of Supplemental Testimony of Omaha Public Power District, The AES Corporation, Oklahoma Gas & Electric Company, and Colorado Springs Utilities, at 3. Interestingly, this statement demonstrates that even in the presence of two-carrier competition, shippers are still unhappy because of what they perceive as high rail rates.

2010. *Id.* The National Rural Electric Cooperative Association indicated that its members reported that rail-to-rail competition has ceased, "even in many situations where a rail customer has direct, physical access to two rail carriers." See EP 705, June 22, 2011 Hearing Testimony of Glenn English, Chairman, Consumers United for Rail Equity, CEO, National Rural Electric Cooperative Association at 2. ARC noted that even where shippers have access to two carriers, "many railroads that could provide effective competition decline to do so." See EP 705, Supplemental Testimony of ARC at 1. Total Petrochemicals USA, Inc. argued that "Class I railroads have shown [a] reluctance to compete directly for business where their own Class I competition has a foothold." See EP 705, Opening Testimony of Total Petrochemicals USA, *Inc.* at 5.

Clearly, the presence of multiple carriers does not satisfy many shippers because their concerns have little to do with the presence of competing carriers, but rather are driven by shippers' discontent with rates. These shippers believe that rates are going up, even at dual served facilities, because railroads are not competing for their business or that rail mergers have given the railroads too much market power. Furthermore, the NITL Petition is void of any empirical data to demonstrate the extent to which its proposal would actually achieve the results it presumes will be achieved. It has not shown how many locations impacted by the proposal are locations where the serving carrier is exercising undue market power so as to warrant imposition of Section 11102(c) nor has it shown that granting relief at those locations would be both practicable and in the public interest, as required by the statute. The NITL Petition does not demonstrate that increasing the number of carriers serving a certain shippers' location will actually result in better rates and service so as to provide a policy justification for their proposal, nor has it presented any empirical data for the assertion that rate increases are indicative of market power. In fact, what empirical data there is says precisely the opposite. According to the Board commissioned Christensen Study,[7] "[t]he increases in RPTM [rail prices per ton –mile] observed in the later years of our current analysis thus appear to reflect cost increases rather than an increased exercise of market power by the railroads."[8]

If, as noted above, the majority of the concerns are about increasing rail rates and the shippers' belief that those increases are a result of the exercise of undue market power, which is contrary to the findings of the Christensen Study, then NITL should prove its assertions before the Board embarks on a proposal to fundamentally restructure the rail industry.

Without any empirical data to back up its underlying assumptions, it does not appear that the NITL proposal is really aimed at simply increasing rail-to-rail competition at so-called "captive" facilities and then allowing those two carriers to freely compete for that shipper's business in the marketplace. Instead, the proposal appears to be about enacting rules which would come close to allowing all shippers served by one carrier to become automatically entitled to relief under section 11102(c), a concept rejected as inconsistent with the Rail Transportation Policy ("RTP") 49 U.S.C. §10101.[9] This would be the worst type of regulatory interference and will result in significant unintended consequences, is not consistent with the statute, and is contrary to existing antitrust policy.

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[7] An Update To The Study Of Competition In The U.S. Freight Railroad Industry, Final Report, Laurits R. Christensen Associates, Inc., Madison, WI, January 2010, Prepared for The Surface Transportation Board, Washington D.C.

[8] Id at 5-20.

[9] Vista Chemical v. The Atchison, Topeka and Santa Fe Railway Company, 5 I.C.C. 2d 331, slip op. at 339 (STB served Feb. 6, 1989). ("Vista Chemical")

C. The Solution To The Shippers' Concerns Lies In Continuing To Reform The Rate Complaint Process

Based on the comments in EP 705, it appears that the real goal of the shippers is to have their concerns about rates and the ability to challenge rates resolved. That being the case, the Board should focus its resources on increasing shippers' access to rate complaint processes and at lower litigation costs rather than restructuring the entire regulatory structure in a manner not allowed by law through an unproven and untested proposal.

Reforming the rate complaint process to the extent necessary can be easily accomplished and without significant unintended consequences. The Board already has well established standards for assessing the reasonableness of rates, but where those standards have been found to be inadequate, the Board has not been hesitant to change them. The Board has made many changes to these processes over the years to accommodate the concerns of shippers. While those changes apparently have not fully satisfied shippers, these changes have undoubtedly reduced the cost and complexity of rate reasonableness cases.

While shippers may still feel the Board has not done enough, when one examines the numerous decisions made by both the ICC and the STB over the years with respect to rate issues, the pattern indicates that far from being unresponsive to shipper concerns, the agency has continually responded with changes favored by shippers. These changes have resulted in significant improvements in the ability of shippers to challenge rates and otherwise use the regulatory process to prevent railroads from abusing whatever market power they possess.

One of the first major adjustments after the adoption of the Coal Rate Guidelines[10] involved whether to adopt a productivity adjustment to the rail cost adjustment factor ("RCAF").

[10] Coal Rate Guidelines--Nationwide, 1 I.C.C.2d 520 (1985), aff'd, *Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3rd Cir. 1987)("Coal Rate Guidelines").

After years of experience with the index and several attempts by the shipper community and by Congress to require a productivity adjustment, the Commission agreed in 1989 to the shippers' requests, and adopted procedures requiring the adjustment of the quarterly index for a measure of productivity.[11] Neither the railroads nor the shippers were entirely satisfied, but significant movement toward the shipper position had occurred.

This pattern of some shippers asking for the Board to respond to perceived inequities in the regulatory process and the Board responding to those claims by making continual changes to address the concerns has happened time and time again, with the pace of such responses picking up substantially over the past few years. In 1998, the Board responded to concerns that the complexities of meeting the market dominance test were making rate complaints too expensive and too time-consuming. The Board responded by modifying its market dominance rules to eliminate the railroads' ability to use evidence relating to product and geographic competition to rebut any market dominance claims. Market Dominance Determinations – Product and Geographic Competition, 3 S.T.B. 937, remanded sub nom. Assn. of American Railroads v. STB, 237 F.3d 676 (D.C. Cir. 2001).

In 2003, the Board initiated and concluded yet another proceeding[12] to streamline the process for resolving stand alone cost ("SAC") cases brought under the Coal Rate Guidelines standard. The Board proposed, and eventually adopted several measures to reduce the costs and complexities. In 2005, the Board issued its decision in Major Issues in Rail Rate Cases, Docket No. EP 657 (Sub-No. 1) (STB served October 30, 2006) where it adopted several procedural and substantive changes to the SAC test, almost all of which were recommended by the shippers.

[11] Railroad Cost Recovery Procedures-Productivity Adjustment, 5 I.C.C.2d 434 (1989), aff'd sub nom. Edison Electric Institute, et al. v. ICC, 969 F.2d 1221 (D.C. Cir. 1992).

[12] Procedures To Expedite Resolution Of Rail Rate Challenges To Be Considered Under The Stand Alone Cost Methodology, Docket No. EP 638 (STB served April 3, 2003).

The goal was to make it faster, easier, and less costly for a shipper to bring a rate complaint. In 2007, the Board adopted Simplified Standards for Rail Rate Cases ("Simplified Standards"), Docket No. EP 646 (Sub-No. 1) (STB served September 5, 2007), which established new simplified methodologies for assessing the reasonableness of rates involving small shipments and small shippers. In that proceeding, the Board largely adopted proposals favored by the shippers. More recently, the Board has continued to propose making changes to how it undertakes its market dominance analysis,[13] how it calculates URCS,[14] and making numerous changes to Simplified Standards, including raising the relief caps.[15] All of these changes are aimed at lowering litigation costs, improving the accuracy of the rate complaint process or improving shippers' access to the rate complaint processes.

Even without the most recently proposed changes in effect, shippers have benefited tremendously from the numerous changes. Since adoption of Simplified Standards, chemical shippers have prevailed on seven of eight, or 87.5%, of the rate challenges brought under the 3-B methodology. More broadly, since the adoption of Simplified Standards, the STB has heard at least 20 rate cases, every single one of them brought by a large chemical or coal shipper. Of the cases that have reached final resolution, 92% ended in either a settlement or a finding that the challenged rate was unreasonable. Based upon this record, one can only conclude that existing rate challenge procedures are providing accessible and appropriate avenues of relief for shippers who believe their rates are too high. The Board can, has, and will respond to shippers' concerns.

[13] M&G Polymers USA, LLC v. CSX Transp., Inc., Docket No. NOR 42123 (STB served Sept. 27, 2012).

[14] Review of the General Purpose Costing System, Docket No. EP 431 (Sub-No. 4) (STB served Feb. 4, 2013).

[15] Rate Regulation Reforms, Docket No. EP 715 (STB served July 25, 2012).

The point in discussing the numerous proceedings attempting to address shipper concerns is to provide some historical context to the existing proceeding. The issues raised in this proceeding have been dealt with for over 25 years. The ICC and the Board, especially, have consistently responded to shipper concerns regarding the complaint process. As noted, even as recently as July of last year, the Board has taken significant steps to expedite rail rate cases by streamlining and simplifying the complaint process as never before. Likewise, the Board has adopted procedures and processes to deal with service and other complaints and to facilitate better communication between the railroads and shippers. In making these changes, the Board has been careful to accommodate shipper concerns without jeopardizing the fundamental structure and financial health of the freight rail industry. It should continue with such a balanced approach and resist the siren calls for an "easy fix" that has no factual predicate underlying its premises and will result in operational inefficiencies, increased litigation, and enhanced government oversight and regulation, and potential unintended competitive consequences on railroads that heavily depend on interline shipments.

II. THE PROPOSAL CREATES SIGNIFICANT UNINTENDED CONSEQUENCES

A. The Proposal Creates Operational Inefficiencies

The Board has requested information about whether increasing the availability of mandatory competitive switching would affect efficiencies or impose costs on the railroads' network operations. The Board wants to know whether potential operating inefficiencies would occur that could offset the benefits of the proposal and impede the fluidity of the rail network. AAR's comments, especially the verified statement of Mr. Rennicke, address these issues, and KCS joins in those comments. The simple answer is: yes, the NITL's essentially one-size-fits-all proposal will create significant operating inefficiencies and could impede the fluidity of the network. The accompanying verified statement of Gregory Walling, Assistant Vice President, International Network Planning, for KCS, provides 2 examples of what KCS believes would be many, many inefficiencies the NITL proposal could create.

Railroad terminal operations typically involve a high amount of carrier-to-carrier interaction, switching activity, and close coordination, including the blocking and regular exchange of cars from one carrier to another. It is true that reciprocal switching within a terminal area can actually reduce the need for additional railroad infrastructure within an already complex terminal network because it allows multiple carriers to avoid having to build redundant infrastructure to serve the shippers within that terminal. As a result of decades of operational experience and numerous rail mergers over the past few decades or so, rail carriers have been able to minimize costs and promote operational fluidity to the fullest extent possible through coordinating operations in such terminals and through well-established interchanges.[16] The NITL proposal threatens to undo this progress.

NITL's proposal essentially demands an expansive short-haul service regime, threatening to undo years of industry effort to promote the efficient movement of interline traffic at well-established interchange points. NITL's proposal assumes that by getting the Board to force currently-serving carriers to short-haul themselves and interchange traffic at any relatively nearby active or potential interchange point will work to the shippers' financial advantage. But

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[16] Cf. Terminal Performance Standards Governing the Transportation of Nonperishable Commodities, 364 I.C.C. 166 (1980) (the ICC rescinded a proposal to implement new rules to govern terminal operations, concluding that if the rules were put into effect, "they will discourage blocking and the making up of trainload and unit-train movements, and hamper efficient system operations. Also, they fail to recognize wide variations in operating conditions and traffic volumes among different terminals. Their imposition would . . . deprive railroad[s] . . . of the necessary flexibility to meet changing conditions. The proposed standards would also be extremely costly to implement, and, by diverting funds and personnel, would impede individual carrier initiatives to improve their terminal service").

such a forced switching regime may not result in significant cost savings at all. More likely the proposal will result in increased administrative, operating, and handling costs occasioned by the forced short-haul, multi-carrier operation. For example, as shown in Mr. Walling's statement, applying NITL's proposal to KCS's interchange with the Union Pacific Railroad Company ("UP") at Sallisaw, Oklahoma could impair operations on both carriers' main lines, require construction of additional infrastructure in a physically-constrained space, require taxiing crews dozens of miles to make each interchange, and cause other inefficiencies. As a consequence, a forced switching regime, will increase railroad operating costs, will likely result in increased origin-destination transit times, and will therefore result in increased transportation costs that may eliminate much, if not all of the rate savings that a shipper might hope to gain via access to another rail carrier.

These conclusions are supported in the Rennicke verified statement attached to AAR's comments. As Mr. Rennicke explains, the proposal would add time, resources and effort and could lead to congestion, consume capacity in yards, and require additional infrastructure improvements that may or may not be needed. The inevitable result of the added complexity and reduced predictability of traffic flows would be to make rail service less reliable and to increase the risk of congestion or service failure.

Other exercises of NITL's proposal could create other types of network inefficiencies, such as additional miles of operation and additional switching. As explained in Mr. Walling's verified statement, the potential forced interchange with UP with respect to KCS's existing service to West Monroe area carload shipper(s) demonstrates the principle that NITL's proposal will destroy efficiencies already created while at the same time creating new operating problems and complexities.

B. <u>The Proposal Actually Increases The Potential For Government Intervention and Increased Litigation Costs</u>

According to the Board, an "additional benefit of NITL's proposal is that it would reduce governmental intervention by limiting regulation to the access price and relying on demand and the marketplace to set rates and judge the service provided by the railroads." Notice at 6. The Board assumes this result without any underlying factual analysis. Rather than reducing the Board's role in rate and service issues, the proposal will dramatically increase the Board's role. This is because there are many terms in the proposal, many of which flow from the statute itself, which are undefined and vague. Even the Board recognizes this when it says "NITL's proposal does not provide enough information for the Board to determine fully its effect on qualifying shippers" (Notice at 7) and that "we need more precise information." Notice at 8.

While the Board has requested the parties to provide the missing information, as AAR has stated, and KCS fully concurs, one cannot accurately respond to the Board's requests or fully estimate the financial impacts or operational disruptions that NITL's proposal would cause until NITL or the Board clearly defines when and how the proposal is actually intended to apply. There are just too many undefined terms.

In addition, unless the multitude of inadequately defined terms of NITL's proposal are specifically defined and narrowed, as was done in all post-Staggers Act and post-ICCTA cases involving application of Section 11102(c), the parties will be forced to litigate over each and every one of them, resulting in more litigation, not less. A simple review of the numerous vague terms, each of which would be subject to extensive debate and litigation between the parties, illustrates this point.

- Does the phrase "shipper (or group of shippers) served by a single Class I rail carrier" mean one particular facility at a specific location? What if that shipper has more than one facility at that location, do you look at the facilities as a group or each individual facility?

What if the location is served by a Class I and a shortline, does that facility still qualify as being served by a single Class I rail carrier? What if the shipper facility is open to reciprocal switch to another Class I already, does that disqualify the facility even though the shipper may not like the existing reciprocal switch charge?

- How and on what basis is a "group of shippers" determined or defined so as to qualify for the proposal? Do all shippers in the "group" have to be at the same facility or in the same terminal area? What if only some of the "group of shippers" meets the various tests, but others do not, does that still mean the entire group is entitled to avail itself of the rule?

- If the R/VC ratio for one product at a particular shipper facility is over 240% or meets the 75% market share test, is reciprocal switching available on all commodities shipped to/from that location?

- Does the 75% presumption apply regardless of price level or availability of other modes of transportation? In other words, the railroad may have 75% of the traffic because it was the lowest priced transportation option even though other options were available. Is the 75% calculated on looking at the rail market share for all inbound and outbound commodities or the total transportation market share, including those that move by other modes? If the 75% test is met, however that test is determined, but the R/VC ratio is less than 180, does the proposal still apply? Does it include contract traffic? What about exempt commodities?

- How is the 75% eligibility determined when the railroad may be transporting more than the individual movement at issue? What if the carrier has a 75% market share and is carrying more than one commodity for that particular shipper but only one of the commodities it is transporting meets the R/VC test or the 75% test? [17]

- Once a shipper facility or certain traffic qualifies for competitive switching under the rules, does the remedy last forever? Does the remedy go away if the R/VC ratio drops to less than 240% or the rail market share drops below 75%?

- What happens if a shipper qualifies because of the R/VC test (but the rail market share is below 75%), and as a result of the access, the R/VC ratio drops to below 240%, but because of lower rail rates, rail has become the most cost effective means of transportation so as to increase the rail market shares above 75%, does the shipper still

[17] Take a simple example: suppose Shipper A generated a 78% rail traffic share on shipments to Receiver Y and a 65% rail share on its shipments to Receiver Z; meanwhile, Shipper B generated a 95% rail share on its shipments to Receiver Z and only a 72% share on its shipments to Receiver Y. Shippers A and B file a joint compulsory switching petition under the proposed NITL rule, alleging (accurately) that the incumbent railroad accounts for over 75% of their aggregate shipments to Receivers Y and Z. Would all the A and B shipments to either Y or Z be eligible for compulsory switching under the proposed NITL rule? Or only the A to Y shipments and the B to Z shipments?

qualify for access (but now under the 75% rule) even though rail's market share was not the result of market power?

- What is the definition of a terminal? Does the shipper facility have to be within a terminal? Will the parties be allowed to challenge application of the rule since the existence of a terminal requires a fact-specific inquiry and is not defined by regulation or statute.

- Since under the statute the railroads are first free to negotiate and agree to the appropriate switching charge, i.e. the "access charge," could the shippers challenge that rate? If the railroads were unable to agree to such a charge or the charge was challenged by the shippers, what methodology would apply to calculate the proposed access charge? Would that charge include a contribution to lost profit? If so, how would that be determined?

- Who would be responsible for paying the labor protection costs under 11102(c)(2)? Would this be included in the access charge? Which labor protective conditions would apply? Would the unions have standing to intervene or challenged application of the rule so as to avoid labor impacts?

Each and every one of these issues is unaddressed by the proposal, and each are fact specific and subject to interpretation, debate, and litigation.[18] Case history, both at the STB and in general antitrust prudence, suggests that the Board was overly optimistic when it believed the proposal would reduce governmental intervention. The history suggests that, when the incumbent railroad has been faced with a request by either a shipper or a competing railroad for access under Section 11102, the result has been a significant amount of litigation over the applicability and implementation of any remedy.[19]

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[18] Indeed, KCS believes that it is impossible to undertake an accurate empirical analysis of the financial impacts of the proposal, the extent of system disruptions the proposal would cause, or determine the extent of indirect harms to other parties, especially other shippers, that would be caused by a few shippers' decisions to reroute traffic from current routes without such terms being clearly defined or without making various assumptions about what the various terms mean. While AAR has attempted to address the Board's requests for empirical data, and KCS supports those comments, even AAR's evidence is based upon making certain assumptions regarding the applicability of NITL's proposal which assumptions cannot be verified.

[19] See Pyco Industries, Inc. – Alternative Rail Service—South Plains Switching, LTD. Co., et al., Docket No. FD 34889 (STB served January 11, 2008); Denver Rock Island Railroad –

This will be especially true with respect to the so-called "access price." The NITL Petition does not offer any guidance on what pricing methodology the Board should employ for any compulsory switching that it might authorize under the NITL rulemaking proposal. The NITL Petition simply urges "the Board to set, via rulemaking, the methodology for compensation that it would use if the carriers cannot agree." NITL Pet. 62. The Board offers no guidance or proposals either. Absent such a standard, it is impossible to determine what, if any, traffic would be affected by NITL's proposal.

What this means is that, there will first be many areas where Board involvement will be required. First whether the shipper meets the criteria , especially given the vagueness of the various presumptions as discussed above, and then, assuming those issues are resolved, the Board will very often still have to conduct a hard-fought rate proceeding over what the railroad that is providing the reciprocal switch is permitted to charge. The net result will not be the creation of a realistically "competitive" market for origin-to-destination traffic. Rather, the net result will simply be an invitation for the STB to create a new, more complex "regulatory" regime in which (i) litigation over whether conditions justifying application of the proposal have been met in the first instance; followed by (ii) detailed rate-making litigation over what exactly the reluctant operator of the origin-to-interchange segment has to be paid. Thus, acceptance of the NITL proposal by the Board would seem very likely to create a full employment program for private lawyers, accountants, and economists, while draining STB staff resources.

Alternative Rail Service – Lines of Kansas Southwestern Railway, L.L.C., 4 S.T.B. 264 (STB served June 16, 1999).

C. The Proposal Could Be Subject To Manipulation By Interline Carriers And Could Result In Less Carrier Choices, Not More

As an initial matter, it is unclear whether the proposal is intended to apply to interline routes or just to single-line routes. In the Notice, the Board speaks about, and assumes, that the proposal is talking about providing competitive alternatives to the existing "single-line" rate being offered by the incumbent carrier. In the background Section, where the Board is explaining the concept, the Board states:

> [r]eciprocal switching, or as it is more generally termed "competitive switching" because it is not always a reciprocal arrangement between carriers, thus enables the competing railroad to offer its own single-line rate, even though it cannot physically serve the shipper's facility, to compete with the incumbent's single-line rate.

Notice at 3 (emphasis supplied). Likewise, the Board's schematic illustrating the basic objective of NITL's proposal is premised on the incumbent railroad serving both the origin and destination in single-line service.

KCS believes that, if NITL's proposal were to be implemented (which it should not be), it would be both appropriate and legally sufficient to limit the proposal to single-line service and not apply the proposal to rates and service involving joint-line service. Applying the NITL proposal to interline (joint-line) movements creates several issues: (1) the non-incumbent railroad will have the incentive and the ability to manipulate the joint rate (or its division requirement) so as to move the shipment on its own line regardless of whether the incumbent railroad is exercising undue market power; (2) the proposal could be invoked against an interline partner even though that railroad's share of the overall interline rate would be below the 240 R/VC threshold and it is not the railroad exercising any undue market power; and (3) carriers who have a significant amount of interline traffic are at risk of having profitable traffic "skimmed" away by the carrier with the larger geographic scope, which could lead to less competition rather than more.

The ability for one railroad to capture the "monopoly rent" doesn't normally exist in the interline context. In those contexts, oftentimes the shipper has a choice of different routes, different interchange points, and even the choice to use different interline carriers at either origin or destination. This significantly reduces the market power of either the originating or terminating railroad in the context of an interline movement. As partial evidence of this phenomenon is the fact that of the 49 rate cases since ICCTA, only a handful involved joint-line rates. The simple truth is that the NITL proposal is not needed to remedy alleged market power in the context of an interline movement.

Furthermore, applying the NITL proposal to joint-line rates involving interline partners could lead to the perverse consequence of less competition, not more, as the carrier with the bargaining leverage and broader geographic scope either consciously manipulates its division requirements so as to invoke the access provisions or is already charging a high division so the access remedy applies. As noted above, the proposal could force those carriers who rely upon a significant amount of interline traffic to continually be short-hauled; depriving them of much needed long-haul revenues. Obviously, the more interchange/interline traffic one has, the more vulnerable one is to being short hauled, i.e. having to give up your traffic at the nearest interchange point to the larger competing railroad.

Even NITL's Petition recognized that smaller carriers who depend upon interline traffic simply do not have the same market power as the larger carriers by excluding Class II and III railroads from the reach of its proposal noting that:

> The League believes that, due to their size and reach, in general Class I railroads have market power; while the much smaller Class II and III railroads generally do

> not. The Board is not required to regulate Class II and III railroads in the same way as Class I carriers, and the Board has frequently distinguished between the classes of carriers in a variety of settings. The League believes that it is appropriate at this time and in this setting for the Board to distinguish between Class I versus Class II and III carriers with respect to competitive switching.

NITL Pet. at 40. Likewise, the Board itself has recognized that smaller carriers, whose traffic is mostly interline traffic, do not possess the same market power as the larger Class I carriers and should not be treated the same with respect to numerous regulatory treatments, including the rate complaint processes.[20]

Left in the regulatory void are those smaller Class I carriers, who share many of the characteristics of the Class II's and III's, but nonetheless are treated the same under the NITL Proposal as the four largest Class I carriers. KCS, for example, simply does not have the same geographic reach as the four large carriers – its average length of haul is significantly shorter, it does not serve multiple plant locations of the same shipper to the same extent as other larger carriers, and it is heavily dependent upon interline traffic. For example, the vast majority of the traffic transported by the four largest Class I carriers (on average, 72% or more)[21] is handled in single-line service. In contrast, only 12.3% of KCS's traffic is single line traffic. This is similar to the Class II and Class III railroads that both originate and terminate about 14% of their

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[20] See, e.g., Simplified Standards For Rail Rate Cases, Docket No. EP 646 (Sub-No. 1) (STB served Sept. 5, 2007); See generally, Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League, Docket No. EP 575, Docket No. EP 575 (Sub-No. 1) (STB served October 30, 2007) (discussing at great length the distinctions between larger and smaller railroads, and the public benefits delivered by smaller carriers); and Tom Murray, "A Different Way to Run a Railroad: Regional Versus Network Carriers," J. of Transp. Law, Logistics and Policy (Vol. 71, No. 3, Spring 2004).

[21] 2011 Freight Commodity Statistics (FCS). The FCS has traffic for all the Class I carriers broken down by local, forwarded, received, and bridged. "Local" traffic constitutes "single-line" traffic. For 2011, the percentage of local, or single-line traffic, was as follows: BNSF (73.9%); CN (U.S. Ops)(52.5%); CP (U.S. Ops)(10.2%); CSX (83.0%); KCS (U.S. Ops)(12.3%); NS (70.6%); and UP (61.0%).

traffic.[22] Like those carriers, the vast majority of KCS's traffic – approximately 88% - KCS either receives from, or delivers to, other carriers. As a result, KCS, like other carriers where the majority of their traffic is interline traffic, is, in many respects, as dependent upon the larger carriers as are the shippers and the shortline industry. Consequently, KCS has not been the subject of any formal rate or service complaint at the ICC or the STB in over 25 years.

As a result of the differences in size, scope, and market power of rail carriers, the Board and NITL have recognized that Class II and III carriers should not be subject to having their local shippers opened to access under the NITL proposal. There is a rational basis for excluding such carriers where 86% of their traffic is interline traffic. But there is no rational basis for applying the proposal to carriers who share the very same characteristics as Class II's and III's, i.e. lack of market power, heavily dependent upon interline traffic, not the subject of rate complaints, simply because these carriers' revenues happen to fall above an artificially created Class I classification threshold test.

If the proposal applies to all Class I traffic, including interline traffic, there is a risk that those carriers who are heavily dependent upon interline traffic will be disproportionately impacted. These carriers simply do not have the geographic size and scope to obtain as many access opportunities as the other carriers will have to obtain against them. The result could be that the smaller, interline-dependent carriers will have their most profitable traffic cherry-picked out from under them with little or no opportunity to recover that lost revenue through competition with larger carriers at other points. These carriers will find themselves being short-hauled more and more, depriving them of the revenue necessary to maintain the rest of their

[22] Source of Data: ASLRRA, *Facts & Figures*, 2009; 2011 ASLRRA Biennial Survey; ASLRRA 2011 Special Survey for EP 705. 2010 data represents carloads handled by 536 small railroads.

network and weakening their ability to be competitive forces. This weakening could result in less competition, not more -- resulting in the precise opposite effect of what the Board (and shippers) would desire.

As a result, the Board must be mindful that the NITL proposal, if applied to interline traffic, could have different impacts on some carriers as opposed to others. While KCS does not believe that the NITL proposal is needed and joins in the comments of the AAR that the NITL proposal likely would be destructive to rail system efficiency, KCS also wishes to remind the Board and the shipping community that the consequences of subjecting all rail carriers to identical new radical regulatory treatment would not be the same. Applying the NITL proposal to interline movements (1) risks carriers manipulating their division requirements so as obtain access to the shipment regardless of whether the serving railroad is exercising undue market power; (2) could provide a windfall to the very same carrier whose division of the rate may be well above any given R/VC ratio at the risk of the carrier who has less bargaining power with respect to divisions; (3) puts those carriers who are heavily dependent upon interline traffic at risk of having profitable traffic "skimmed" away by the carrier with the larger geographic scope, which could lead to less competition rather than more; and (4) could result in more operational problems, not less.[23] Therefore, KCS believes it is both appropriate and legally sufficient to limit the proposal to those instances where a single railroad serves both the origin and destination in single-line service and not to apply the proposal to rates and service involving joint-line service.

[23] Unlike single-line traffic, in the context of an interline movement, the involved carriers have already figured out the most effective and operationally efficient interchange for that movement; having developed both service and capital budgets based upon that interchange location. The NITL proposal would disrupt that effective interchange.

III. AS PRESENTED, THE PROPOSAL IS INCONSISTENT WITH THE STATUTE AND CANNOT BE LEGALLY SUSTAINED

A. Section 11102(c) Cannot Be Used To Require Switching Outside Of A Terminal

The Board and NITL have loosely described the proposal as requiring one carrier to provide a "reciprocal switch" to a "working interchange" between the incumbent Class I carrier and a connecting carrier if that "working interchange" is within a "reasonable distance." The interchange would be considered within a "reasonable distance" if it is within the boundaries of a terminal; or, in the alternative, within a 30-mile radius of an active interchange where cars are "regularly switched." As the legal basis for the Board's authority to order forced switching in such circumstances, the NITL proposal relies upon Section 11102(c).

NITL's proposal goes far beyond the legal confines of Section 11102(c). The NITL proposal is only partially tethered to considerations of whether or not the shipper's facility is located within a terminal. To the extent the remedy was limited to ordering "reciprocal switching" solely within a terminal, Section 11102(c) may be legally applicable; however, NITL's proposal would have the Board extend forced switching remedies[24] to areas far beyond a terminal area, thus far beyond traditional reciprocal switching. Under the NITL construct, the Board would profess to have the authority to order the forced switching regardless of the presence or absence of a terminal, and regardless of whether the connecting carrier to which the shipper seeks access even operates within a terminal. In fact, NITL proposes that such access can be ordered up to 30 miles away regardless of whether that interchange is within a terminal or

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[24] Although the Section 11102(c) remedy is specifically termed "reciprocal switching," the Board has in this proceeding coined a new term not specifically found in the statute – "competitive switching." The Board's re-labeling has no basis in the statute. It would have been more accurate, for example – if the Board insists upon abandoning the term "reciprocal switching" – to adopt the term "forced switching" as a substitute. The statute, however, makes clear that the Board may impose "reciprocal switching" as Congress then understood that term, not "competitive switching."

a switching district. As these comments will show, this construct is not legally defensible under Section 11102(c).

As NITL correctly notes, until passage of the Staggers Act, it was unclear whether the agency even possessed the legal authority to order railroads to enter into reciprocal switching arrangements in the first instance.[25] With the Staggers Act, and the adoption of what has since become 49 U.S.C. § 11102(c), the Board was given explicit authority to direct railroads to enter into reciprocal switching arrangements. But under what conditions and geographic scope did Congress allow the Board to order such forced switching? NITL's Petition claims that the Board has the authority to order the forced switching regardless of the presence or absence of a terminal, and regardless of whether the connecting carrier to which the shipper seeks access even operates within the nearest terminal. In fact, under NITL's proposal, such access can be ordered for distances up to 30 miles outside of a terminal.[26] Yet, a review of the legislative and case history clearly establishes that Section 11102(c) entrusts the Board with the discretion to order a reciprocal switching agreement only in a terminal area (and not beyond) and to do so only where the remedy is both "practicable" and "in the public interest" (the element of the standard that is NITL's Petitions chief focus in the request for a liberalized access regime). The proposal totally ignores this limited scope of Section 11102(c).

[25] "Prior to the Staggers Act of 1980, the authority of the ICC to impose reciprocal switching arrangements upon carriers or to decide the terms and conditions of reciprocal switching arrangements was not clear." NITL Pet. at 10.

[26] Curiously, in initiating this proceeding and seeking comments, the Board seems to have at least initially cast the NITL proposal as requiring the presence of a terminal, even though such characterizations are not entirely in keeping with what the NITL proposal wants. For example, in introducing the proposal, the Board's Notice states that the NITL has asked the Board to "mandate switching where a captive shipper (located in a terminal area) is within 30 miles of a working interchange." A bit later in the Decision, however, the Board dispenses with the limiting "shipper located in a terminal area" language and clarifies that the NITL' proposal would have a potential impact upon "captive shippers" that are "located in a terminal area <u>or</u> within 30 miles of a working interchange." Notice at 2.

In adopting the precursor to today's Section 11102(c), Congress explained that the provision empowered the ICC to "order the more limited action of reciprocal switching," when compared to the ICC's established, and more expansive authority to "order joint use of terminal facilities."[27] At that time Congress rejected calls to expand the scope of Section 11102(c) to allow the Board to order reciprocal switching in "all standard metropolitan areas,"[28] evidently preferring instead to permit the agency to engage in a fact-based evaluation of whether the requested relief was sought in a terminal. The rejection of the application of Section 11102(c) to all metropolitan areas, combined with Congress' position that ordering reciprocal switching is a "more limited action" than ordering terminal trackage rights,[29] signifies that Congress intended for the reciprocal switching provision to be less far-reaching in scope than the terminal trackage rights provision.

The notion that Section 11102(c) was only to apply to activity that occurs in terminal areas and/or "switching districts" is confirmed by examining the long-standing agency definition of the term "reciprocal switching" – which is the phrase that appears in the statute and which Congress would have been well aware of at the time it adopted the precursor to Section 11102(c). According to long-standing precedent, reciprocal switching is by definition an activity

[27] S. Res. 15319, 96th Congress, Congressional Record, P.L.- 448, 94 Stat. 1895 (1980).

[28] Id.

[29] NITL's Petition confuses Section 11102(c)'s more limited purpose and function (which addresses activities exclusively within a terminal or switching district) with the wider reach of Section 11102(a)'s terminal trackage rights, which, unlike the Section 11102(c) provision, allows forced trackage rights operations in "terminal facilities" and over "main-line tracks for a reasonable distance outside of a terminal." Despite the Petition's evident, result-oriented "hybridizing" of Subsections (a) and (c), because this proceeding does not involve imposing terminal trackage rights or trackage rights outside of a terminal, but is deemed to be switching, it must be grounded by Section 11102(c), including the limiting scope of that provision.

occurring within a terminal or switching district. Before the advent of Staggers, the ICC described reciprocal switching thusly:

> In practice [reciprocal switching] means that one line-haul carrier operating within a terminal area will act only as a switching carrier in placing cars at industries on its own trackage . . . as an incident of the line-haul movement of those cars over another carrier whose trackage does not extend to the serviced industry.[30]

The ICC continued to embrace the Switching Charges description of reciprocal switching in post-Staggers decisions. For example, in 1982, the ICC described reciprocal switching as follows:

> It has long been a common practice among the railroads to participate at commonly served terminal areas in what is called reciprocal switching. In practice this means that one line-haul carrier operating within the terminal area will act only as a switching carrier in placing cars at industries on its own trackage for loading or unloading, as an incident of the line-haul movement of those cars over another carrier whose trackage in that terminal area does not extend to the serviced industry. The carriers reciprocate in their roles as switching and line-haul carriers at this terminal in accordance with the flow of traffic to and from industries on their respective trackage.[31]

And again, in 1985, the ICC reaffirmed that reciprocal switching pertains to activities within a terminal area as follows:

> Reciprocal switching involves services performed by two road-haul railroads, rather than service performed by a single road-haul carrier in conjunction with a short-line or terminal railroad. The two railroads agree to participate at commonly served terminal areas in an arrangement under which one of the carriers acts as the switching carrier, placing cars at customer locations on its lines for loading and unloading which it will deliver to or has received from the other carrier for the line-haul movement. In the simplest reciprocal arrangement, . . . [t]he carriers, in effect, mutually exchange their

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[30] Switching Charges and Absorption Thereof at Shreveport, La., 339 I.C.C. 65, 70 (1971) ("Switching Charges"). The U.S. Supreme Court shortly thereafter took judicial notice of the ICC's Switching Charges definition of reciprocal switching in Port of Portland v. United States, 408 U.S. 811, 820 n. 8 (U.S. 1972).

[31] Delaware and Hudson Railway Company v. Consolidated Rail Corporation – Reciprocal Switching Agreement, 366 I.C.C. 845, 846 (1982) ("Delaware and Hudson").

switching services so that each can extend its lines to the industries served by the other, even on traffic for which they may be directly competitive as line-haul carriers.[32]

In practice, the agency's actions have consistently reflected the understanding that reciprocal switching is by definition an activity occurring exclusively within discernible terminal areas – areas where reciprocal switching is common or customary, and therefore is or could be practicable under the statutory standard. Because there has been little dispute over the appropriate geographic scope of reciprocal switching, there are few post-Staggers cases taking on this discrete issue directly. But what cases there are reinforce the understanding that reciprocal switching is fundamentally and exclusively a terminal activity.

Leading among these cases is Central States Enterprises, Inc. v. Seaboard Coast Line Railroad, Finance Docket No. 38891 (ICC served May 15, 1984) ("Central States"), aff'd sub nom. Central States Enterprises, Inc. v. ICC, 780 F.2d 664 (7th Cir. 1985). In Central States, the ICC denied a request for forced reciprocal switching in part because the shipper seeking the remedy was not within a nearby switching district, even though the shipper was located at a station just outside of an established switching district. As the ICC explained, because the shipper was not located in a common station or within a jointly-served terminal, "this was not a reciprocal switching situation" appropriate for the requested relief.[33] Central States not only reflects the understanding that reciprocal switching is available only in a terminal area, but it also recognizes the more limited scope of reciprocal switching in view of the agency's refusal to expand reciprocal switching to a "reasonable distance outside of a terminal" (in that case, only

[32] Investigation of Adequacy of Railroad Freight Car Ownership, Car Utilization, Distribution Rules and Practices, *1 I.C.C. 2d 700* (citing Switching Charges and Absorption, 339 I.C.C. 65, 90 (1971).

[33] Central States, slip op. at 6.

1.4 miles beyond the established bounds of the terminal area) as could be done under the terminal trackage rights provisions of Section 11102(a).[34]

Other post-Staggers decisions are consistent with Central States. For example, in Vista Chemical the parties acknowledged that the reciprocal switching request was appropriate for adjudication on the merits, inasmuch as there was "no controversy between the parties as to whether the [requested reciprocal switching arrangement] would be performed wholly within the limits of [an established] switching district."[35] This is true also of Midtec Paper Corp. v. Chicago and North Western Transportation, 3 I.C.C.2d 171, 179-180 (1986), aff'd Midtec Paper Corp. v. United States, 857 F.2d 1487 (D.C. Cir. 1988) ("Midtec"), where the ICC's discussion of reciprocal switching consistently depicts the remedy as one inherently tied to a rail terminal. Finally, the aforementioned Delaware and Hudson decision clearly embraces the understanding that reciprocal switching is "terminal-centric."[36]

The above analysis establishes clearly that "reciprocal switching" has, and did have at the time of the Staggers Act, a very specific meaning within the railroad industry and at the agency. In particular, while reciprocal switching may not always be truly "reciprocal,"[37] it is always conducted within areas that are recognizable as terminals or switching districts. It is a term

[34] In contrast, the NITL proposal would have "reciprocal switching" re-defined as the open-ended provision of intermediate transportation to and from any relatively nearby active or potentially active point of interchange. Under NITL's proposal, a shipper need not be in, or even near, a terminal area to obtain forced reciprocal switching. The proximity of a terminal is merely one of several conclusive presumptions under which NITL's proposal would have the Board order switching to another carrier. See Petition at 55-57. Yet, there is no legal support in the statute or case history for such an expansive reading of the scope of Section 11102(c).

[35] Vista Chemical, at 337.

[36] Delaware & Hudson, at 846 (observing that it is "common practice among the railroads to participate at commonly served terminal areas in what is called reciprocal switching").

[37] See, e.g., id. at 847 ("Although traditionally service was assumed to be in balance between carriers in the terminal under a reciprocal switching agreement, in practice that is not a prerequisite to an agreement").

inapplicable to intermediate carriage outside of such territories. Unlike the plain language of Section 11102(a)(which involves terminal trackage rights and allows the Board to impose trackage rights over "main line tracks for a reasonable distance outside of a terminal"), there is no provision in Section 11102(c)(which provides for reciprocal switching), and none in agency precedent, giving the Board the statutory authority to compel reciprocal switching outside of the bounds of a terminal, yet alone over main-line tracks up to 30 miles away to the nearest working interchange.[38] As such, NITL's proposal to extend a so-called "reciprocal switching" remedy to so-called "captive" shippers who are not even located in a terminal area or to order that the switching can occur to areas far beyond any terminal area (including areas nowhere near a terminal) does not comport with the law. No matter how the proposed switching access may be labeled, the Board lacks the statutory authority under Section 11102(c) to compel switching access under any circumstances outside of the bounds of a terminal facility.

B. The Proposal Would Force Railroads To Short-Haul Themselves in Violation of Section 10705

Taken at face value, NITL's proposal to establish a regime of forced switching when a shipper's facility is at least 30 miles from a "working interchange" entails far more than a reciprocal switching remedy sanctioned under Section 11102(c). This is so because the NITL's proposal is not limited to any traditional and long-standing notions of reciprocal switching, which, as shown above, have been consistently predicated upon the shipper's location within a discernible terminal area or switching district. Thus, to the extent NITL's proposal extends to areas beyond a terminal, it is no longer governed by Section 11102(c). Rather, it becomes a regime for forcing an incumbent Class I to short-haul itself. As such, the NITL proposal does

[38] There is no justification in the statute or case precedent for use of a 30 mile threshold. This is an arbitrary figure which appears to be based upon the use of 30km (18.64 miles) in the Canadian system.

not seek to revisit competition issues in the railroad industry in a measured and cautious manner at all. The NITL proposal is, instead, under the misleading guise of the reciprocal switching provisions of Section 11102(c), urging radical and sweeping changes to Board regulation to basically reverse the Bottleneck Decisions by requiring a "rate," i.e. access charge, for upwards of 30 miles and then imposing a regulated cap on that bottleneck rate. NITL's Petition also seeks a short-cut around the through route provisions of Section 10705; forcing incumbent railroads to short-haul themselves contrary to the dictates of Section 10705(a).

In the Bottleneck Decisions, the Board concluded that a shipper could not routinely direct a bottleneck carrier capable of providing origin-to-destination rail service to "short haul itself by routing traffic over the lines of a connecting, non-bottleneck carrier." In so holding, the Board explained that a shipper could seek to force an alternative routing only if it could show, under Section 10705 and the Board's rules developed in Intramodal Rail Competition,[39] that there would be sufficient benefits associated with the alternative routing.[40] Importantly, the statute places strict limits on the Board's ability to require carriers to short-haul themselves. The statutory preference essentially dates back over 100 years.[41]

NITL's proposal would have the Board ignore Section 10705 and the Bottleneck Decisions. It would allow shippers to circumvent the requirements and limitations in the

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[39] Intramodal Rail Competition – Proportional Rates, Ex Parte No. 445 (Sub-No. 2) (Apr. 17, 1990) ("Proportional Rates")

[40] See Policy Alternatives to Increase Competition in the Railroad Industry, Docket No. EP 688, slip op. at 2-3 (STB served Apr. 14, 2009) (summarizing the outcome of the aforementioned Bottleneck Decisions).

[41] "The origins of [the Section 10705(a)(2)] directive can be traced to the 1910 statute. The provision was amended in the Transportation Act of 1940 as part of an expansion of the ICC's authority to prescribe routes, in order to limit the ICC's ability to require a carrier to short-haul itself (i.e., to embrace a route substantially less than the entire length of its railroad)." Canexus Chemicals Canada L.P. v. BNSF Railway Company, STB Docket No. NOR 42131, slip op. at 10 (STB served Feb. 8, 2012).

governing statute on the prescription of through routes, and require carriers to short-haul themselves in violation of Section 10705. There simply is no basis in law for the Board to order a carrier to participate in a through movement in a manner prohibited by the statute under the guise of ordering "reciprocal switching." Any relief available under Section 11102(c) must be limited to "reciprocal switching" within a terminal or switching district, but the proposals 30-mile presumption fails to meet this test.

C. Traffic Moving Pursuant to A Section 10709 Contract Cannot Be Included Under The Proposal

Section 10709(b) makes it clear that except as otherwise provided in that section, that "[a] party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract." Likewise, Section 10709(c) states that "transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part." The NITL proposal fails to account for the fact that its proposal cannot be used to override in whole or in part any rail service being provided via a Section 10709 transportation contract.[42]

Unless the Board or NITL makes it clear that its proposal is not intended to cover transportation under Section 10709, the threat that this new regulatory regime could be used to invalidate rail transportation agreements would only serve to discourage the use of such arrangements in the future. Yet, shippers in other proceedings have decried the lack of railroads' desires to enter into contracts. See EP 705 Opening Comments of M&G Polymers USA, LLC at 3; EP 705 Opening Comments of National Industrial Transportation League at 6. In light of this,

[42] Furthermore the existence of a Section 10709 contract may result in 75% of the traffic to/from that facility being transported by rail regardless of the lack of market dominance.

KCS believes that shippers would expect the Board to preserve the sanctity of railroad-shipper contracts, even within the context of a forced reciprocal switching regime.[43]

Consistent with the statutory provisions of Section 10709, KCS would expect the Board, if it determines to move forward with the proposal, which it should not, to clarify that the proposal cannot be used to abrogate shipper obligations under separately negotiated-for railroad transportation agreements with the carriers. Such a clarification would be wholly consistent with other recent decisions such as Rail Fuel Surcharges, STB Ex Parte No. 661, slip op. at 13 (STB served Jan. 26, 2007).[44] At a minimum, therefore, were the Board to proceed with the subject rulemaking in some fashion or another, it should clarify that the new regulations it would adopt would have no impact on existing or future railroad transportation contracts.

D. Existing Commodity Transportation Exemptions Govern When Applicable, Unless Fully Or Partially Revoked

Although not squarely addressed by either the NITL Petition or the Board, the Board should clarify that the proposed forced switching regime, if it moves forward (which, again, it should not), would not extend to the transportation of commodities previously exempted from agency regulation pursuant to the Board's broad exemption authority (and mandate) under 49 U.S.C. § 10502. In fact, the Board has explained that the "exemption of a commodity under [Section 10502] generally excuses carriers from virtually all aspects of regulation involving the transportation of that commodity [including, for example,] . . . the dual requirements that a

[43] See, e.g., Major Rail Consolidation Procedures, STB Docket No. EP 582 (Sub-No. 1), slip op. at 349 (STB served June 11, 2001) (National Grain and Feed Association argued that, in revising its major railroad consolidation rules, the Board should "respect the sanctity of . . . privately negotiated contracts between railroads and their customers," just as it does with respect to collective bargaining agreements and that the Board should, accordingly, "look with extreme disfavor on overrides of such agreements").

[44] In that proceeding, the Board made it clear that its surcharges holding did not apply to traffic handled under rail transportation contracts because under 49 U.S.C. § 10709 the Board lacked the authority to regulate rail rates and services that are governed by a contract.

carrier furnish rates and provide service on reasonable request pursuant to those rates."[45] Moreover, "the exemption bars regulatory relief during the period when the exemption is in force."[46] To avoid any uncertainty on this issue, however, should the Board adopt some version of the proposed forced switching regulations, the Board should clarify that – (1) the new regulations would not extend to the transportation of commodities previously exempted from agency oversight under Section 10502; and (2) if a shipper of an exempted commodity seeks relief under the new regulations now under consideration, that shipper must first obtain a full or partial revocation of the subject commodity exemption(s) pursuant to Section 10502(d).

E. ICCTA Precludes Forcing A Carrier To Provide Switching Services When The Issue Traffic Moves At A Rate Less Than 180 R/VC

Under their proposal, the NITL would have the Board adopt alternative "conclusive presumptions" that forced switching is warranted where either –(1) the rate for the issue movement has an R/VC ratio of 240% or more; or (2) the incumbent has handled 75% or more of the transported volumes over the most recent 12-month period. As is discussed below, the "75%-of-the-traffic" categorical presumption (which the NITL proposal intends to serve as a proxy for a finding that the incumbent has market dominance over the issue traffic and that the shipper lacks effective inter- and intramodal service alternatives) is inconsistent with antitrust principles and ICC/STB precedent. But, even worse, the 75% categorical presumption – which the NITL Petition proposes to be an alternative to the 240 R/VC presumption – is an end-run around the 180 revenue-to-variable-cost ("180 R/VC") provisions of 49 U.S.C. §10707(d), which establish that the Board may not find that a carrier possesses market dominance over issue traffic where the applicable common carrier rate is below 180 R/VC.

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[45] Pejepscot Indus. Park – Pet. for Declaratory Order, 6 S.T.B. 886, 891 (footnote omitted), reconsideration granted in part, 7 S.T.B. 220 (2003).

[46] Id.

It is possible, indeed very likely, that for certain commodities or distances, a shipper may depend heavily, if not exclusively, upon an incumbent rail carrier's service to the exclusion of other service options, which results in an R/VC ratio greater than 180%. But it is also quite plausible that, due to any variety of circumstances, the incumbent carrier's rate for such traffic is set below the R/VC 180 threshold. Nevertheless, under the NITL proposal, such traffic could be subject to forced switching under the 75% categorical presumption, notwithstanding the language of Section 10707(d)(1)(A) which states that a carrier does not have market dominance over the issue traffic "if the carrier proves that the rate charges results in a revenue-variable cost percentage . . . that is less than 180 percent."

Simply put, the NITL Petition has proposed a new rule that would give a shipper seeking forced switching an alternative path to such a remedy even where the shipper cannot satisfy the statutorily-prescribed 180 R/VC "jurisdictional threshold" for an STB finding of market dominance, which is itself a threshold consideration for rate-related remedies. As such, the proposed alternative 75% presumption would nullify the protections afforded to railroads by statute under Section 10707 where the shipper cannot satisfy the proposed 240 R/VC presumption and the issue traffic is moving at rates below 180 R/VC. Accordingly, a Board finding that a forced switching remedy should be afforded to a shipper whose issue traffic is shown to be moving at rates below 180 R/VC because that shipper can satisfy the alternative 75% presumption would clearly violate Section 10707.[47]

[47] For the same reason, should the Board be called upon under a forced switching order to prescribe the economic terms for such switching under Section 11102(c)(1), then the Board is limited in its discretion to prescribe the economic terms of the switching service by virtue of Chapter 107 (Rates) of Title 49. Assuming that the incumbent's switching charge may be challenged separately, the Board may not prescribe a rate that set that rate below the 180 R/VC threshold of 49 U.S.C. §10707(d). Accordingly, an incumbent carrier forced to provide switching services to a connecting carrier under NITL's proposal is legally entitled to charge a

F. Any Regime That Would Force A Carrier To Provide Switching Or Short-Haul Services At Compensation Levels Below the Incumbent's RSAM Figure Violates The Rail Transportation Policy of 49 U.S.C. § 10101(2)-(6)

In the Notice, the Board explained that "the policies governing railroad regulation require [it] to balance a variety of factors reflecting the tension between the desire for competitive rates for shippers, on the one hand, and adequate revenues for railroads, on the other."[48] The difficulty with NITL's proposal is that it is an utterly one-sided proposition focusing entirely on mechanisms for achieving what NITL's Petition states, but does not prove, will be lower rates, and totally ignores the Board's statutory mandate to ensure that the nation's railroads become, and remain, revenue adequate. AAR previously pointed out the glaring omissions in NITL's proposal, including, as relevant here, the Petitions failure to address access pricing, and the failure to address the revenue impacts of forced switching,[49] and it does so again in its March 1 Opening Comments, which KCS supports.

Noting the potentially serious revenue impacts of the forced switching proposal, the Board acknowledges that it "may be appropriate" in this proceeding for the parties and for the Board itself to bear in mind "the amount of demand-based differential pricing that the carrier needs to earn a reasonable return on its investments."[50] In light of this consideration, the Board has suggested that perhaps the forced switching presumption should, for example, be based upon

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switching rate that is at least equal to the 180 R/VC ratio, and the Board may not set a rate below that threshold. See Official-Southwestern Divisions; In the Matter of Joint Rates Between Official and Southwestern Territories, Docket No. 29886 (Sub-No. 1), slip op. at 3 (Aug. 4, 1989) ("[t]he Staggers Rail Act of 1980 removed from [the agency's] reasonableness jurisdiction rates (including joint rates) with revenue to variable cost ratios below certain levels (now, 180 percent); and see 49 U.S.C. § 10707(d).

[48] Notice 6 (49 U.S.C. §§ 10101(1)-(6); 49 U.S.C. § 10704(a)).

[49] See Reply of the Association of American Railroads to the National Industrial Transportation League's Petition for Rulemaking at 2-3.

[50] Notice at 2.

"a carrier's 4-year average Revenue Shortfall Allocation Methodology (RSAM) benchmark," rather than on the proposals arbitrary 240 R/VC ratio. The Board's comments, although unfocused in light of the uncertainties and vague terms of NITL's proposal regarding when and how the proposal could actually be implemented, reflect an understanding that the Board does have an obligation to ensure that the railroads attain and maintain revenue-adequacy.

This is not the first time that certain shipper interests have attempted to have the agency overlook railroad revenue adequacy considerations in the interest of changing the competitive dynamics of railroad transportation. Rather, in Proportional Rates, the ICC rejected an eerily-similar proposal by some shippers to have the agency require railroads to publish a proportional rate to a junction point with a second railroad on traffic that the first railroad could handle single-line for a longer haul. When a consortium of shippers urged the ICC to reconsider its original decision not to institute the proportional rate regime, the ICC, using language that has been echoed by the Board in this proceeding, explained that the shippers' proposal essentially ignored the fact that the proposal undercut the agency's statutory obligation to promote railroad efforts to achieve revenue adequacy as follows:

> [The shippers] contend that the Congressional policy of encouraging competition among railroads is ...independent of considerations of revenue need . . . [T]hat interpretation [is] erroneous . . . [The ICC] properly rejected the notion that the Staggers Act is a mandate for it to compel restructuring of the rail industry to create more rail-to-rail competition . . . The contention that the policy favoring promotion of rail-to-rail competition is independent or preeminent of revenue need ignores the statute's clear requirement that we maintain standards and procedures for adequate revenue levels and ignores the principle that the various policies of the Act, some of which conflict, must be balanced. See [former] 49 U.S.C. 10101a(1), (2), (3), and (6); and [former] 49 U.S.C. 10704(a) (2). NITL's proposal would seriously diminish the ability of railroads to price their services differentially and, ultimately, to compete effectively with other modes. We have consistently recognized that differential pricing is crucial to the viability of the industry . . . [T]his is economically sound pricing.[51]

[51] Proportional Rates at 7-8 (footnotes and citations omitted).

In keeping with the above passage from Proportional Rates, the Board cannot adopt new regulations concerning the proposed forced switching regime without taking careful stock of regulation's impact upon differential pricing principles and railroad revenue adequacy, and it cannot implement new rules if the agency's action is likely to preclude affected railroads from becoming (and remaining) revenue adequate.

At this time, it is difficult to assess the full impact of the proposed forced switching regime's impact on railroad revenue adequacy, because there at too many vague terms and unanswered questions regarding when and how the proposal would apply, including the question of what compensation standard the Board should apply in the absence of an "agreement" among the involved carriers under Section 11102(c)(1). However, one thing is for sure - the proposed regulation clearly would open up circumstances under which an incumbent carrier would be deprived of long-haul traffic that, as differentially-priced, contributes toward that carrier's efforts to become revenue adequate. As such, any switching services compensation scheme that falls short of making the incumbent carrier whole takes the incumbent farther away from the incumbent's revenue adequacy aspirations.

For these reasons, although KCS objects to the Board moving forward with any forced switching scheme at this time, KCS submits that at no point should access even be considered if the existing overall rate is less than the carrier's Revenue Shortfall Allocation Method ("RSAM") rate. Furthermore, any proposed access compensation standard must allow an incumbent carrier to assess switching charges that allow that carrier to continue to move toward revenue adequacy. Anything less than the RSAM rate would be patently contrary to the Rail Transportation Policy provisions set forth at 49 U.S.C. § 10101(2)-(6). Inasmuch as the RSAM methodology "takes into account the key economic and equity principles embodied in the

Interstate Commerce Act[, and] . . . provides for differential pricing and a railroad's need to earn adequate revenues by directly linking its 'revenue need shortfall' to a benchmark markup for captive traffic,"[52] it should be abundantly clear that no prescribed switching rate below an incumbent carrier's RSAM figure could ever satisfy the Board's mandate under the Rail Transportation Policy – particularly as set forth in 49 U.S.C. § 10101(3).

IV. THE PROPOSAL GOES IN THE OPPOSITE DIRECTION OF EXISTING ANTITRUST THEORY AND IS INCONSISTENT WITH PRIOR ICC FINDINGS ON MARKET DOMINANCE

A. The Proposal Is Inconsistent With Modern Day Antitrust Theory

NITL claims its proposal is a good thing because its focus on market-shares, rather than competitive abuse, is fully consistent with antitrust principles and would reduce the Board's role in regulating rates. KCS has already explained, in Section II-B, why the proposal will actually increase the Board's regulatory role rather than reduce it. But what the NITL proposal does not recognize is that the use of "conclusive presumptions," especially the 75% market share test, actually runs counter to modern antitrust policy and law and is inconsistent with previous findings by the ICC.

The proposals conclusive presumption test is meant to establish that "there is no such effective competition where *either*: (a) movement for which competitive switching is sought has a R/VC of 240% or more; *or* (b) the Landlord Class I carrier has handled 75% or more of the freight volume for a movement for which competitive switching is sought in the twelve months prior to the petition seeking switching." (NITL Pet. 8, emphasis added). As previously noted,

[52] M&G Polymers USA, LLC v. CSX Transportation, Inc., STB Docket No. NOR 42123, slip op at 15 (STB served Sept. 27, 2012) (quoting Rate Guidelines – Non-Coal Proceedings, EP 347 (Sub-No. 2), slip op. at 4 (ICC served Nov. 16, 1992) (footnote omitted)).

this requirement is disjunctive and can generate compulsory switching even if the R/VC <240% but the rail traffic market share >75%.

This customer-centric market share measurement is open to numerous defects or manipulations that are broadly inconsistent with sound antitrust policy. First, the 75% test could be used to punish the incumbent railroad for having done a *very good job* of serving the customer(s) that are now seeking to invoke NITL's proposed compulsory switching rule (i.e., the petitioning shipper had alternatives that it chose to forego because the incumbent railroad's offerings were significantly better; either in terms of price or service).[53] Because the proposed NITL rule makes the market share presumption irrebuttable, the incumbent railroad would be barred from making a "superior service" defense to explain its >75% share of the petitioning shipper's traffic![54] Second, each individual shipper (or group of shippers) might forego slightly better competitive alternatives to achieve the 75% market share, if it (or they) believed a STB compulsory switching order would be likely to produce even more favorable rates than the already existing competition providing by either the railroad or some other mode, particularly if a carrier's temporary handling of 75%+ of the traffic would lead to a permanent reciprocal switching access. Third, and most importantly, the use of such a test runs plainly counter to the fundamental trend of modern antitrust law since the 1970's.

NITL's proposal closely echoes the justifications accepted by the Supreme Court, especially during the 1940-1970 era, to adopt *per se* antitrust prohibitions for often ambiguous conduct as a way of eliminating litigation burdens for the Government and private plaintiffs.

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[53] As Judge Learned Hand, explained in his seminal Sherman Act Section 2 opinion: "The successful competitor, having been urged to compete, must not be turned upon when he wins." U.S. v Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[54] In these circumstances, the shipper(s) might still file a compulsory switching petition as a way of pressuring the incumbent railroad to offer even lower rates as settlement that would avoid all the costs of the costs of going through the STB proceeding.

"This principle of *per se* unreasonableness...avoids the necessity for an incredibly complicated and prolonged economic investigation...in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often fruitless when undertaken."[55] Yet, beginning in the 1970's, the Department of Justice and the courts began to (i) abandon conclusive presumptions found in *per se* prohibitions; and (ii) replace them with market-based evaluations of actual facts under the so-called "Rule of Reason".[56] Such an approach was firmly supported by the Supreme Court which ultimately concluded that "easy labels do not always supply ready answers," and therefore a fuller threshold inquiry is needed over whether the challenged category of competitor conduct "facially appears to be one that would always or almost always tend to restrict competition and decrease output."[57] And in dealing with vertical customer-supplier relationships, the Court has gone further, saying "a *per se* rule based on the nature of the restriction is, in general, undesirable."[58] NITL's Petition ignores these antitrust principles and seeks to turn the clock back to the use of *per se* rules regardless of whether such rules are truly reflective of the use of monopoly power.

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[55] See Northern Pacific Ry. Co. v. U.S., 356 US 1, 5 (1958)(Douglas J).

[56] The one exception where antitrust law remains fully committed to *per se* prohibitions concerns naked agreements among direct competitors concerning prices, output, or markets or customers served (i.e., "Cartel Agreements"). Agreements in this category are generally treated as felonies under Section 1 of the Sherman Act (15 USC 1). This limited category of *per se* prohibitions for hard core conduct has no particular relevance to NITL's proposal for extensive conclusive presumptions as a way of avoiding litigation over subjects on which reasonable people can sometimes differ.

[57] Broadcast Music Inc. v. CBS, 441 US 1, 8,19-20 (1978) (rejecting the use of a *per se* rule vis-à-vis an agreement among competitors which involved packaged licensing and pricing the competitors' copyrighted music).

[58] Continental TV v. GTE Sylvania, Inc., 433 US 36, 58 n.29 (1977) (striking down the *per se* rule on vertical territorial restrictions adopted in U.S. v. Arnold Schwinn & Co., 388 US 365 (1967)). Also, see Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 US 877 (2007)(striking down the *per se* prohibition on resale price maintenance originally adopted in Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 US 373 (1911)).

This is true even with respect to the Petition's spirited defense of the use of market shares. While NITL's Petition claims such an approach is fully consistent with antitrust principles, but the facts tell another story. It is true that in the 1960's and early 1970's, market shares were accepted by the Supreme Court as creating a virtually irrebuttable presumption of market power. Thus, in its 1963 landmark Philadelphia National Bank decision, the Court said that a merger that "results in a significant increase in the concentration of firms in [the relevant] market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[59] Eleven years later, however, this mechanistic approach was abandoned by the Court in a case with high market shares, because "other pertinent factors affecting the...industry and the business of the [parties] mandated a conclusion that no substantial lessening of competition occurred or was threatened by the acquisition."[60] That 1974 case was the Supreme Court's last decision on the relevance of market shares in a merger case.

Since then, the merger enforcement process has evolved, so that market shares have become merely a screening device used by the antitrust agencies to determine whether they have to even do an in depth investigation of a particular merger, not a conclusive presumption. The 2010 Merger Guidelines, issued by the Department of Justice and the Federal Trade Commission ("the Agencies"), make clear that they no longer follow an "uniform methodology" relying heavily on market shares; instead they use a "fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period of time."[61] This "fact-

[59] U.S. v. Philadelphia National Bank, 374 US 321, 363 (1963).

[60] U.S. v. General Dynamics Corp., 415 US 486, (1974)

[61] 2010 MERGER GUIDELINES Section 1

specific process" is the very opposite of the conclusory process that NITL's Petition argues for at pp. 50-52 of its Petition.

The NITL Petition relies heavily on a few Supreme Court monopoly decisions out of the same earlier "don't bother us with too many facts" era in antitrust history to support its conclusive presumption that handling 75% of a shipper's shipments establishes that Class I railway has monopoly power.[62] As with mergers, the modern trend in antitrust enforcement and decision making on monopolies has been to look beyond market shares somewhat as a way of establishing monopoly power, and certainly not relying on market shares as establishing conclusive presumptions. Rather, the Agencies and the courts use market shares merely as threshold screens which can be used to exclude some weaker cases from further consideration. They do not use them alone as determinative factors establishing the monopoly power necessary for liability.[63]

In addition, the 75% rail traffic share test proposed is essentially different from normal antitrust market share analysis. A true market share analysis depends on a supplier's share of all sales to all customers in the relevant market. Instead, the proposal would have the Board look to a supplier's share of revenues from a self-defined customer or set of customers—i.e., those that are participating in the petition for compulsory switching - rather than first defining the relevant market, i.e. the selling of electricity in a given market and railroad's market share of the relevant commodity used to produce that electricity. By elevating rail traffic market shares as

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[62] See NITL Pet. 50, citing the last Section 2 monopoly case in which market shares were used that way. U.S. v Grinnell Corp., 384 US 563, 571 (1966) ("existence of such [monopoly] power ordinarily may be inferred from the predominant share of the market" held by the defendant).

[63] See e.g., PepsiCo. Inc. v Coca Cola Co., 315 F.3d 101, 109 (2nd Cir. 2002)(a 64% market share is insufficient to show monopoly power absent additional evidence to exclude competition or control prices).

determinative of monopoly power, NITL's Petition is standing modern antitrust learning on its head.[64]

B. The Proposal Is Also Inconsistent With The ICC's Prior Market Dominance Findings

The NITL proposal is also an attempt to reverse the clock on modern day ICC and STB jurisprudence. Prior to the Staggers Act, the ICC did rely upon a series of rebuttable presumptions[65] in making market dominance determinations in the context of a rate complaint. Such presumptions included an R/VC test, a market share test, whether shippers had made a substantial investment into long term rail infrastructure, whether shippers had entered into long term coal supply contracts, and whether the rates were set through the rate bureau process. In 1981, the ICC eliminated the use of such rebuttable presumptions.[66] The ICC found that:

> Time has shown that the use of rebuttable presumptions has not enhanced the accuracy of market dominance determinations. While they did serve a useful purpose while we gained experience, the factors determining the degree of competition faced by a rail carrier are too numerous and too varied to be gauged, with any reasonable degree of accuracy, by so few measures. Further the measures themselves are often only approximations of the underlying conditions they are intended to reflect. For these reasons, the use of rebuttable presumptions in market dominance determinations often placed too much emphasis on quantitative evidence which did not fully reflect the circumstances of any given movement. This quantitative evidence was frequently offered at the expense of

[64] The post-1980 Sherman Act Section 2 decisions cited on pp. 51-52 of the NITL Petition all weigh other factors (such as barriers to entry) into the court's determination of monopoly power, rather than relying exclusively on a high market share number to control this determination, as NITL's Petition urges the Board to do in this proceeding.

[65] In contrast to NITL's proposal, at least these presumptions were rebuttable presumptions as opposed to "conclusive" presumptions, and notwithstanding the rebuttable nature of such presumptions, the ICC still found that the use of presumptions was not consistent with modern day economic analysis.

[66] Market Dominance Determinations And Consideration Of Product Competition, EP 320 (Sub-No. 2), 365 I.C.C. 118, 1981 ICC LEXIS 51 (1981)("Market Dominance").

> other evidence which, though less subject to quantification, is more reflective of the degree of market power possessed by a rail carrier over certain traffic.

Market Dominance, 1981 ICC LEXIS 51, *6 (1981).

As was happening in the courts with respect to the evolution of antitrust analysis, many agencies and shippers argued for the elimination of such rebuttable presumptions. The Department of Transportation argued that the presumptions were "excessively restrictive." Inland Steel argued that the presumptions should be eliminated because they were "not universally suitable" and that cases should be treated individually. However, as here, the various shippers groups argued for the retention of the rebuttable presumptions. The ICC, perhaps even slightly ahead of the courts and the various federal agencies, held firm and rejected the shippers' arguments; holding that presumptions were inaccurate indicators of the presence of market dominance and should be rejected because they encouraged rate complaints that should not be brought and discouraged others that should. In the ICC's view, flexibility was key because there were substantial differences among the various cases that precluded application of universal rules.

It is illuminating to read what the ICC said about the applicability of an R/VC threshold test and the market share test (the very same ideas that have been resurrected by in NITL's proposal here) and whether such tests were truly indicative of market power as NITL's Petition would have the STB believe. With respect to the R/VC test, the ICC said:

> But we question whether, even if calculated on the basis of accurate cost information, they reliably indicate the presence or absence of market dominance. Ratios do not, for instance, tell us about the degree of market power possessed by the railroad, since they do not tell us whether a proposed rate will actually move traffic over an extended period of time. If the rate is high, shippers may find alternatives more attractive, forcing the rate back down again. Some may accept the high rate because of a preference for the carrier or because of a premium service associated with it. There are any number of reasons why a high price/cost ratio may not be indicative of true market power on the part of the railroad.

> Reliance on such ratios will, therefore, not only be misleading, but will preclude more relevant information from being introduced.

With respect to the market share test, which held that a "rebuttable presumption of market dominance will arise where the proponent carrier has handled 70 percent or more of the involved traffic or movement during the preceding year." The ICC said:

> [T] here are formidable difficulties associated with both the accurate calculation of a market share percentage and the interpretation of such a percentage in relation to market dominance. Such problems make impractical the use of market share information in the form of a rebuttable presumption.
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> * * *
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> To calculate accurately a market share percentage for the proponent carrier in a rate case, one must first determine the appropriate scope of the market. Since the purpose of a market dominance proceeding is to determine the degree of competition that the proponent carrier faces in regard to the movement in question, the appropriate scope of a market must be compatible with all movements of traffic that directly or indirectly exert competitive pressures on the challenged rate. The factors that determine the appropriate scope of a market vary widely from one case to another. This problem precludes any formula for market share determination which is both practicable and serviceable.
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> Another drawback of the market share presumption is that the competitive implications of any given market share percentage, even if accurately calculated, also vary widely from case to case. For example, the market share percentage does not measure the substitutability of one carrier or mode for another. Substitutability, which is what market share is primarily intended to measure, can be more accurately determined with a combination of evidence, both quantitative and qualitative. In short, observed market share percentage are more indicative of what transportation alternatives have been selected in the past as opposed to what alternatives are currently available.
>
> We, therefore, conclude that use of market share information in the form of a rebuttable presumption detracts from the accuracy of market dominance determinations and, as a consequence, we have decided to eliminate the market share test. Evidence of current market shares and market share trends may, of course, be submitted in addition to or in conjunction with evidence suggested in guidelines.

NITL's Petition would have the Board believe that its approach -- relying upon conclusive presumptions regarding R/VC ratios and market shares -- is somehow novel, unique, and designed to reduce government's regulatory role. It is not. Both the courts, in the context of antitrust theory, and the ICC, in struggling with how best to determine market dominance, have dealt with these precise same issues in the past. In both instances, the approach suggested by NITL's Petition was rejected. This agency should do so again.

CONCLUSION

In this proceeding, NITL has put forth an unworkable and ill-defined proposal that could fundamentally change the financial and regulatory structure of the rail industry. NITL has put forth this proposal based on the following assumptions: (1) rail rates having been increasing due to railroads' exercising undue market power; (2) that the proposal will increase rail-to-rail competition, which will result in lower rates and better service; (3) that the Board will not have to involve itself in any underlying regulatory disputes over the access; and (4) the access price will be set pursuant to some formula where Board involvement will be limited.

All of these assumptions have to be true for the proposal to make any regulatory sense and to even justify further consideration. Yet, NITL's Petition does not present any underlying data or evidence to support the underlying assumptions. While rail rates may have been increasing for some commodities in some areas, there is no evidence that those rate increases are being driven by railroads exercising undue market power. Indeed, the Board's own Christensen Study showed that rate increases reflected cost increases rather than an increased exercise of market power by the railroads. Likewise, given the numerous changes the Board has made in its rate complaint processes and methodologies, and continues to make, there is no discussion or analysis as to why these changes are insufficient to resolve the rate concerns. There is no data to back up the assumption that the proposal will actually result in lower rail rates or better service.

In fact, the evidence indicates that the proposal will result in less operating efficiencies, not more.

What about the assumption that the proposal will result in less regulatory involvement, not more? Prior case precedent establishes that parties will argue over every aspect of both the applicability of, and implementation of, the proposal. Indeed, because the terms of the NITL proposal are vague and undefined there is likely to be more litigation, not less. Furthermore, there are several aspects of the proposal that can't even be legally implemented, such as ordering switching for a shipper not located within a terminal or ordering the switching to an interchange located outside of a terminal or switching district or applying NITL's proposal to contract traffic. These legal challenges will only add to the complexity and ineffectiveness of the proposal. Finally, rather than representing a step forward, the NITL proposal is an attempt to turn the clock back to regulatory and economic theories that were popular in the 1960's and early 1970's, but have been thoroughly rejected by the ICC, the courts, and numerous government agencies since at least the early 1980's.

In the end, the Board should not be criticized for not doing enough for shippers. It has made significant progress over the past decade in responding to shippers' concerns about rates and the rate complaint process, and the vast majority of those changes were done at the request of shippers. These changes have clearly sacrificed accuracy in favor of expediency in the rate challenge process, and in some ways, compromised the fairness of the process to the railroads, but they nonetheless made the process faster and less costly for the shipper. The STB has also significantly improved the communication between shippers and the rail industry and adopted significant other changes to resolve non-rate issues, such as service or other complaints. This progress appears to have borne fruit as the shippers have filed more and more rate and other complaints and have won significant cases over the past several years and obtained several settlements.

Given this progress, the Board should not embark upon an unsupported and untested proposal and theory, especially when that theory could lead to more regulation and less competition. Until such time as NITL or the Board can establish that the underlying assumptions are in fact grounded in empirical data, the Board should resist the siren call for fundamental changes in its regulatory structure and should allow its existing processes and procedures to work.

Respectfully Submitted,

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Dated: March 1, 2013

Attorneys For The Kansas City Southern Railway Company

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. EP 711 (SUB-NO. 1)

RECIPROCAL SWITCHING

REPLY COMMENTS OF THE
KANSAS CITY SOUTHERN RAILWAY COMPANY IN EP 711

EXHIBIT B

234333

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May 30, 2013
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May 30, 2013

VIA E-FILING

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: STB Docket No. EP 711
Petition For Rulemaking To Adopt Revised Competitive Switching Rules

Dear Ms. Brown:

In accordance with the Notice served on July 25, 2012, and the decision served October 25, 2012, both issued in the above-referenced proceeding, enclosed are the "Reply Comments Of The Kansas City Southern Railway Company" to be submitted as part of the record in this proceeding. If there are any questions concerning this filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,

William A. Mullins

Enclosures

cc: Warren K. Erdman
W. James Wochner
David C. Reeves

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. EP 711

PETITION FOR RULEMAKING TO ADOPT REVISED COMPETITIVE SWITCHING RULES

REPLY COMMENTS OF THE
KANSAS CITY SOUTHERN RAILWAY COMPANY

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Dated: May 30, 2013

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. EP 711

PETITION FOR RULEMAKING TO ADOPT REVISED COMPETITIVE SWITCHING RULES

REPLY COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

BRIEF BACKGROUND

In a Notice issued by the Surface Transportation Board ("STB" or "Board") on July 25, 2012, the Board invited interested parties to submit comments and empirical evidence on the subject National Industrial Transportation League ("NITL") proposal for new, so-called "competitive switching" rules (the "NITL Proposal"). The NITL Proposal would have the Board promulgate a series of rules requiring all seven Class I railroads to fundamentally restructure existing operating and marketing practices to provide a limited group of shippers with government-mandated "competitive access" to another railroad. Railroads would be required to provide such forced access even in the absence of evidence that – (1) existing service is inadequate, (2) current rates are unreasonable, (3) there is inadequate intermodal competition or anticompetitive activity; and (4) the serving railroad has market dominance.

On March 1, various parties, including The Kansas City Southern Railway Company ("KCS") submitted opening comments on the NITL Proposal. In accordance with the Board's procedural schedule, KCS hereby provides these comments in reply to the various opening comments, and urges the Board not to move forward with the NITL Proposal.

SUMMARY

Given that the NITL Proposal purportedly promises lower rates and better service for "shippers," one would have expected widespread support from most, if not all, of the shipping community. However, there obviously is no consensus among shippers that the NITL Proposal is worth the effort. Although the proposal received strong support from a few large chemical companies, who anticipate receiving the lion's share of the purported benefits of the proposal, there was only lukewarm support from other shippers and government agencies. Some shippers were unenthusiastic because, as they acknowledged, the NITL Proposal would not apply to them. Many expressed concern over rates, insisting that the Board needed to remain focused on rate relief. Further, not one independent trade association or academic think-tank endorsed the proposal. The opening comments thus confirm that the NITL Proposal is only of interest to a limited group of large shippers.

Not only did the proposal receive limited support, but the evidentiary record does not justify pursuing the proposal. Indeed, NITL didn't even analyze its own proposal, omitting analysis of the effects on 3 of the 7 Class I carriers; failing to analyze one of the two principal proposed threshold criteria - the 75% criterion; failing to include many existing interchanges; failing to analyze the impacts of the proposal on carrier costs and efficiency; and failing to clarify the many ill-defined aspects of the proposal. Similarly, the United States Department of Agriculture ("USDA") and others only addressed select elements of the NITL Proposal. Instead, NITL and other proponents generally said, "Well, it works in Canada, so it will work here," while failing to acknowledge the substantial differences between U.S. and Canadian rail systems and between the NITL Proposal and Canadian interswitching, and without acknowledging that

even in Canada, despite interswitching, shippers continue to make the same types of complaints about carrier rates and service that the Board hears.

The net effect is that the proposal's proponents have not fully analyzed the proposal's impacts, contrary to the Board's request. Such incomplete analysis simply makes it impossible for the Board to accurately assess forced switching's true impact on traffic, revenue, and network efficiency (the latter being an issue that most shippers assiduously avoided in their opening comments). On the other hand, the record contains independent and objective evidence presented by well-respected and well-known economic consulting firms, such as Oliver Wyman and Christensen Associates, showing that the proposal would result in rail network inefficiency, and that it is nothing more than a redistribution scheme intended to benefit a limited subset of very wealthy companies to the detriment of other shippers and customers.

In view of the NITL Proposal's acknowledged vagueness, lack of cohesive shipper support (due to more promising rate reasonableness reform), and the serious threat of transportation network harm, the Board should not move forward with the proposal. Instead, the Board should continue to review, and if necessary, refine, its rate complaint processes to make them less costly and more efficient for shippers to have their rate concerns addressed.

I. THE RECORD REFLECTS LIMITED SUPPORT FOR THE NITL PROPOSAL BUT GREATER CONCERN OVER THE PERCEIVED INABILITY TO EFFECTIVELY CHALLENGE RAIL RATES

A. NITL's Proposal Has Limited Support

As the Decision pointed out, the origins of this proceeding can be traced back to STB Docket No. EP 705, Competition in the Railroad Industry, including the two-day hearing that the Board held in that proceeding to address the topic of competition in the rail industry. The EP 705 proceeding generated widespread interest, and over one hundred parties filed comments and participated in that matter in one way or another. Due to the broad scope of interest in the EP 705 proceeding, and NITL's contention that its proposal is in the public interest, one might have expected here an outpouring of support from shippers, government agencies, and independent academics and economists. That hasn't happened.

What shipper support there is comes from some of the largest, most profitable companies in this country (and in the world), which can easily afford to apply the Board's existing regulatory processes and their considerable bargaining leverage to resolve rate and service matters with railroads. Even those very large industries expressed support through trade associations, not individually. Besides NITL, the American Chemistry Council, whose membership consists of such companies as Dow and DuPont (both also members of NITL), supports the proposal. No other large, independent shippers or other trade associations expressed full support for the NITL Proposal. While a few individual shippers expressed support for the proposal, including Glacial Lakes Energy ("GLE"), Roanoke Cement, and Diversified CPC International, even these shippers didn't support the NITL Proposal as it now exists, believing that it didn't go far enough. Perhaps most noteworthy is that the largest U.S. trade association for utility companies, Edison Electric Institute, a well-known litigant before the Board, filed no comments.

Only two governmental entities commented: The United States Department of Transportation ("DOT") and USDA. DOT provided numerical analysis but took no position on the NITL Proposal. USDA provided evidentiary analysis, sponsoring the same expert as NITL. USDA generally supported the NITL Proposal, but insisted that it didn't go far enough. Instead, USDA wanted to expand it even further, which would only exacerbate the operational problems that the proposal would bring. The two primary federal agencies tasked with ensuring and promoting competition, the Department of Justice and the Federal Trade Commission, did not participate.

Likewise, given that the NITL Proposal advocates that forced switching is "pro-competitive' and would result in net public benefits, one would have expected the emergence of academic or "think tank" community support. At least there would have been support from some well-known, pro-competition economists. Yet, no independent academic, antitrust economist, or third-party think tank supported the proposal. Instead, the Competitive Enterprise Institute, a think tank committed to preserving and enhancing competition, filed initial comments opposing the proposal because it would endanger the financial health of the rail industry, was contrary to economic principles governing network industries, and would result in over-regulation. Most importantly, the very same independent and well-respected economic consulting firm hired by the Board in 2007 and 2008 to assess the state of competition in the rail industry, Christensen Associates, acknowledged that the proposal would create winners and losers among shippers, and that the economic costs of a forced switching regime could outweigh any potential benefit.[1]

The proposal was opposed by every single participating railroad for very good reason: they understand the crippling operating problems and disinvestment it would bring the nation's rail network. The evidence submitted by the railroads made numerous salient points. Specifically, railroads demonstrated that the NITL Proposal would create substantial operating problems, and it is merely a redistribution scheme intended to benefit a limited group of very

[1] According to Chistensen's analysis, even for shippers who might benefit through lower rates, the "potential side effects of the NITL proposal would be degradation in service quality that … could spread throughout the network." STB Docket No. EP 711, Opening Comments of the Association of American Railroads ("AAR's Opening Comments"), Verified Statement of B. Kelly Eakin and Mark E. Meitzen, Page 18. Shippers ineligible for relief under the proposal "would likely suffer service quality declines and cost increases, but receive no offsetting rate reductions to compensate for these negative impacts." Id.

wealthy companies to the detriment of many other shippers and customers. Also, the NITL Proposal would create substantial inefficiencies, and is inconsistent with the statute. Finally, adoption of the NITL Proposal would result in net public costs rather than benefits, and could substantially reduce the capital available for future infrastructure investment. Even the short line railroad industry, whose members are specifically exempted under the proposal, expressed concern.

In the end, when compared to the EP 705 proceeding, where the focus was on rail competition and rates, there is a remarkable lack of support for the NITL Proposal, especially given that the proposal's intent is (ostensibly) improved service and lower rates. Indeed, it is clear that there is no consensus within the shipper community itself regarding how, when, and under what circumstances should shippers qualify for forced switching under the NITL Proposal. The Board should take note of this lack of consensus around NITL's "competitive access" proposal, and should not move forward with the NITL Proposal. Instead, the Board should continue its efforts at reforming its rate relief processes.

B. The Comments Reflect Concern Over Access To Rate Relief Rather Than Support For A Mandatory Switching Regime

The lack of a general consensus for the adoption of a "competitive access" switching proposal should not be surprising given the numerous comments made in STB Docket No. EP 705 focusing on rates at the expense of switching proposals. As KCS has previously noted, the majority of shipper interests in STB Docket No. EP 705 focused upon rail rates and the perceived regulatory obstacles to rate relief. There was in that proceeding, as is the case here, a division of opinion among the shipper community as to the effectiveness of a forced switching regime.

Here, several shippers and shipper groups expressed reservations about the NITL Proposal, and instead commented on continuing concerns over the Board's rate reasonableness processes. For example, the Alliance for Rail Competition ("ARC") expressed qualified support for the NITL Proposal, but noted that the proposal would not resolve concerns about rates and unreasonable practices. ARC added that many of its members would be unable to avail themselves of forced access under the NITL Proposal.

The Chlorine Institute ("CI"), which has such large members as Bayer Corporation, Borden, Canexus, Clorox, and Westlake Chemicals (all companies who have separately participated in prior Board proceedings), was concerned that the STB might be viewing the NITL Proposal as a "cure-all" for shippers that also relieves the Board of any need to address the agency's rate complaint processes. According to CI, "[regulating rates] will continue to be a crucial factor to ensure fairness in the rail transportation market." STB Docket No. EP 711, Opening Comments of The Chlorine Institute, Inc., Page 2. CI believes that the Board should focus on the rate relief process and consider reopening some of the "mega merger" proceedings to reevaluate whether the conditions imposed in those mergers have truly been effective in preserving competition.

The Joint Coal Shippers ("JCS"), a consortium of coal consumers, including Kansas City Power & Light Company, expressed concern that the proposal would undermine a shipper's ability to utilize the Board's rate relief process, and observed that the NITL Proposal may fail to "provide any meaningful market-based rate relief." STB Docket No. EP 711, Opening Submission of Entergy Arkansas, Inc.,Kansas City Power and Light Company, Seminole Electric Cooperative, Inc., and Wisconsin Electric Power Company d/b/a WE Energies, Page 8. JCS does not appear to share NITL's view that the proposal will result in improved service and lower prices, and instead, appears to believe that the Board's resources should be focused, in part, on improving the rate complaint process.

JCS's view was echoed by Olin Corporation. In Olin's view, it is the ability to utilize the rate complaint process that will provide the incentive for railroads to compete, even with the adoption of the NITL Proposal. Without some method to force railroads to compete (and Olin implies that the Board's rate complaint process is that method), the "logical result is that the NITL proposal will not promote more rail-to-rail competition." STB Docket No. EP 711, Initial Comments of Olin Corporation, Page 7.

There are several other comments by the above parties and others that reflect their view that the NITL Proposal may not actually result in better rates and service. While such shippers do not oppose the NITL Proposal, the evidence here, especially when combined with the record in STB Docket No. EP 705, indicates that the primary concern of most of the commenting shippers remains rate increases and rate levels and having an effective process by which they can challenge those rates. KCS believes that these shippers have it conceptually right -- the Board can and should continue to review, and if necessary, reform, its rate complaint process rather than embarking on a radical restructuring that could have significant unintended consequences.

C. The Board's Resources Should Be Devoted To Improving Its Rate Complaint Process For All Shippers

Given the limited support for the NITL Proposal, the concerns expressed by many that the proposal could be counter-productive, and that many shippers want the Board to continue to focus on reforming its rate complaint process, the Board should not pursue the NITL Proposal further. The record in STB Docket No. EP 705 and here show that shippers are concerned more about rate increases, the existing rail rates, and their perceived inability to effectively challenge those rates. The obvious path, therefore, is for the Board address those rate-related concerns directly, rather than continue along the path of considering a systemic change in rail regulation that would at best attack the perceived problem only indirectly and likely won't resolve shippers' expressed concerns at all; and at worst, result in crippling operating problems and disinvestment in the U.S. rail network.

Reforming the rate complaint process, rather than implementing a mandatory switching regime lacking in widespread support, is quite possible and it avoids unintended consequences.[2] In the past, both the ICC and this agency have repeatedly responded to shipper concerns by revising the Board's rate reasonableness processes in ways that have favored shippers.[3] More

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[2] It appears that NITL and others supporting forced access have decided to focus on obtaining switching relief rather than rate regulation reform, all in the hope of attaining some sort of rate relief via a process other than the rate complaint process. Of course 49 U.S.C. § 11102 was never intended as an alternative statutory remedy for unreasonable rates. The Board recently reiterated this principle in Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pacific Railroad Company, Missouri & Northern Arkansas Railroad Company, Inc. & BNSF Railway Company, STB Docket No. NOR 42104, slip op. at 15 (STB served March 15, 2011), where it noted that "as we stated in CP&L, the competitive access rules were promulgated not to provide shippers with an alternative form of rate relief, but to offer a competitive remedy where a bottleneck carrier has exploited its market power.... [footnote omitted] Thus, the proper inquiry is whether we have before us a monopolist, indifferent to the needs of its shipper, who is exploiting its market power by charging abusive rates (or providing poor service)." NITL's proposal is of course intended to do away with any requirement that a carrier be shown to have abused its market power and as such is simply a thinly-disguised attempt to obtain rate relief through another means.

[3] See e.g. Railroad Cost Recovery Procedures-Productivity Adjustment, 5 I.C.C.2d 434 (1989), aff'd sub nom. Edison Electric Institute, et al. v. ICC, 969 F.2d 1221 (D.C. Cir. 1992)(adoption of productivity adjustment); Market Dominance Determinations – Product and Geographic Competition, 3 S.T.B. 937, remanded sub nom. Assn. of American Railroads v. STB, 237 F.3d 676 (D.C. Cir. 2001)(simplifying the market dominance analysis); Procedures To Expedite Resolution Of Rail Rate Challenges To Be Considered Under The Stand Alone Cost Methodology, Docket No. EP 638 (STB served April 3, 2003)(streamlining the process for resolving stand alone cost ("SAC") cases brought under the Coal Rate Guidelines standard); Major Issues in Rail Rate Cases, Docket No. EP 657 (Sub-No. 1) (STB served October 30, 2006)(adopting several procedural and substantive changes to the SAC test); and Simplified Standards for Rail Rate Cases ("Simplified Standards"), Docket No. EP 646 (Sub-No. 1) (STB served September 5, 2007)(adopting new methodologies for assessing the reasonableness of rates involving small shipments and small shippers).

recently, the Board has continued to propose changes to how it undertakes its market dominance analysis,[4] to its URCS methodology,[5] and to its Simplified Standards, including raising the relief caps.[6] It has also very recently rejected a rail industry call for reinserting readily-apparent market and geographic competition considerations into the Board's threshold market dominance inquiry in even a few cases.[7] All of these steps were (and are) aimed at lowering litigation costs, simplifying the rate complaint procedures, and increasing shipper access to rate relief. The changes make shippers better able than ever in the post-ICCTA world to challenge rates and to use the regulatory processes to defend against railroad market power abuse to the extent such exists.

Obviously some of the comments in STB Docket No. EP 705 and here reflect that, notwithstanding the Board's continued efforts to move the rate complaint process in the direction requested by shippers, some shippers continue to believe the Board still has not done enough. Conversely, some railroads would likely charge that the Board has already gone too far, substituting expediency for accuracy in setting railroad rates. Perhaps this means that the Board has it "just about right." Indeed, a seeming recent increase in the number of matters being settled, rather than litigated to completion, indicates that the Board's efforts are having favorable effects of reducing the difficulty of resolving rate complaints. Simply because some shippers

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4 M&G Polymers USA, LLC v. CSX Transp., Inc., STB Docket No. NOR 42123 (STB served Sept. 27, 2012).

5 Review of the General Purpose Costing System, STB Docket No. EP 431 (Sub-No. 4) (STB served Feb. 4, 2013).

6 Rate Regulation Reforms, STB Docket No. EP 715 (STB served July 25, 2012).

7 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 Docket No. 717 (STB served March 19, 2013).

remain unhappy with the Board's rate case policies doesn't mean the Board should abandon its rate review reforms in favor of a forced switching scheme that permits shippers and this agency to tinker dangerously with railroad operations.

There remain opportunities to simplify the rate review process and make it less expensive. The Board currently has several such proceedings under consideration. KCS supports consideration of proposals such as these to determine whether they could provide useful reform without sacrificing needed accuracy in the rate challenge system. The Board should actively pursue a more cost-effective and quicker way (or ways) to ascertain whether a disputed rate is reasonable or not. Such a process would be in the best interest of all and avoids the ill consequences to rail network operations and to the majority of shippers who could not access the "solution" proposed by NITL. The Board should not accept the extreme shipper mantra that any rate above 180 R/VC must mean the Board's processes aren't working and the Board needs to fix it through forced switching no matter the cost to the rail industry or other shippers.

II. THE RECORD DOES NOT SUPPORT A CONCLUSION THAT THE NITL PROPOSAL IS IN THE PUBLIC INTEREST

The major purpose of the Board's July 25, 2012 decision seeking comments was for the Board to gather information to help it assess the impact of the proposal on shippers and the rail industry. As the Board stated:

> [W]e cannot fully gauge [the NITL proposal's] potential impact. For example, we do not know how many shippers would be able to take advantage of mandatory competitive switching, nor has NITL provided such data in its submission. We must also consider an appropriate methodology for access pricing that would be used in conjunction with competitive switching. The access price would be a significant factor in determining the impact of such a broad competitive switching requirement, but that critical element also was not included in NITL's petition. Therefore, additional information is needed before we can determine how to proceed.

The Decision also states as follows:

> NITL's proposal does not provide enough information for the Board to determine fully its effect on qualifying shippers, as we do not yet have an estimate of how many shippers would be able to take advantage of mandatory competitive switching. (Decision at 7)
>
> NITL's petition itself, however, does not include detailed evidence or analysis of the likely benefits to shippers that could obtain mandatory switching that would result from its proposal, nor does it address how remaining shippers might be affected. And, it does not include a methodology for access pricing, which we believe would be a significant factor in determining the extent to which a broad competitive switching requirement could affect qualifying shippers, as well as the financial strength of the railroad industry. (Id.)
>
> [W]e cannot project the extent of any net revenue loss to railroads that would result from NITL's proposal, we also cannot predict whether, or by how much, the remaining captive traffic would likely be charged to make up for any revenues that would otherwise be lost to the carriers... Therefore, the extent to which a program of broad competitive access could affect other captive shippers who may not participate in the program must also be examined. (Id.)
>
> [W]e need more precise information about whether increasing the availability of mandatory competitive switching would affect efficiencies or impose costs on the railroads' network operations. (Decision at 8)

The Board then listed five specific questions for commenters to address. Taking the numerous comments and questions in context, the Board's questions and comments basically solicit input on four key items of legitimate concern – (1) the number of shippers who could invoke the proposal; (2) impacts upon ineligible shippers; (3) impacts on operating efficiency; and (4) the access price and its impact on the proposal.

The opening comments did not fully respond to such questions. No party fully addressed each of the Board's specific requests for information regarding the proposal's breadth and impact. If anything, the opening comments demonstrate that it would be all but impossible to find that the proposal would be in the public interest because there are too many unusual questions and the proposal is too vague.

As discussed below, the proposal's proponents have failed to produce a solid basis for finding that the proposal is in the public interest. To begin with, the proposal remains too ill-defined, requiring interested parties to make critical assumptions about the scope of the proposal and interpretation of key elements. As such, the proposal is not a fully-developed concept, and it is an inadequate foundation for thorough discussion and assessment worthy of a rulemaking, as many commenters tacitly have acknowledged. Beyond that, the proposal's advocates, as noted, failed to address key items of Board concern (such as number of eligible shippers, the impacts on operating efficiencies, and the access price methodology). As such, there are many important questions left unanswered about the proposed forced switching regime and its impact.

A. The Proposal Is Incomplete And Leaves Too Many Unanswered Questions; Such Gaps Require Making Numerous Assumptions

Much of the fault underlying commenters' incomplete analyses lies in the NITL Proposal itself. The NITL Proposal fails to set forth the specific parameters underlying the various criteria NITL posited for applying forced switching. As a result, the NITL Proposal requires that each commenter first make assumptions about significant aspects of the proposal that may or may not be part of the Board's (or NITL's) specific vision of a forced switching regime. This is in turn, means there is not an accurate record reflecting comment and analysis on "the" NITL Proposal.

As examples of the many critical questions that go begging in light of the vagueness of the proposal are the following:

- Does the phrase "shipper (or group of shippers) served by a single Class I rail carrier" mean one particular facility at a specific location or a group of facilities in proximity to each other and, if the latter, how is that group defined?
- If the R/VC ratio for one product shipped to or from a particular shipper facility (or group of shippers' facilities?) is over 240% or meets the 75% market share test, is reciprocal switching available on all commodities shipped to/from that facility (or facilities)?
- Does the 75% presumption apply regardless of price level or competitiveness of other modes of transportation?

- Once a shipper facility or certain traffic qualifies for forced switching under the rules, does the remedy last forever?
- Who would be responsible for paying labor protection costs under Section 11102(c)(2)? Which labor protective conditions would apply? Would unions have standing to intervene or challenge the application of the rule so as to avoid labor impacts?

As DOT explained, "there are varying interpretations and corresponding methodologies on how much traffic should be included in the data set . . . The analysis and results may vary depending upon how such assumptions are made." STB Docket No. EP 711, Opening Comments of the United States Department of Transportation, Page 3. How the parties addressed the above questions and the assumptions made in addressing those questions impacted their analysis. Because each party made different assumptions, no party - including NITL itself - can be said to have actually analyzed the same proposal. There simply is no one "NITL Proposal" to analyze.

NITL itself failed to take the opportunity in its comments to further define its proposal. Instead of filling out the details of its proposal, closing gaps and providing accurate definitions of the proposal, NITL chose to analyze only part of the proposal, limiting its waybill analysis to only the four largest Class I's, ignoring the 75% standard for triggering access, limiting its analysis to an arbitrary 30 rail miles instead of a similar arbitrary 30 mile radius as it proposed, and limiting the number of interchanges analyzed. NITL had no analysis on the impact of the proposal on the remaining, smaller Class I's and the impact on the vital role they provide as competitive alternatives to the four largest Class I's. When NITL did have to make a choice, it made assumptions that effectively resulted in a knowing understatement by NITL of the effect of its proposal. The end result is that the Board simply does not know the impact of the NITL Proposal because the parties all analyzed different proposals based upon the assumptions they were forced to make.

B. No One Knows How Many Shippers Would Be Eligible

1. No One Has Determined How Many Shippers Meet The 75% Rail Market Share Threshold

Among the criteria that NITL sets forth as allowing a shipper to obtain forced access is the notion that if the incumbent Class I railroad handles 75% or more of a given movement from a facility in the prior twelve months, market dominance will be presumed. This is an alternative test to the 240 R/VC test.[8] But there are several unanswered questions. For example, is mandatory access available if the railroad had 75% of the traffic because it was the lowest-priced transportation option, and even though other modes were available? If a railroad lowered its rate and thus attracted 90% of a shipper's shipments of a particular product from a competitive barge movement, would that rate reduction open access to the shipper, or even to a group of shippers, by forced switching? If rail handles 75% of one origin-destination move for one commodity, is the entire shipper facility or group of shipper facilities opened to forced switching for all commodities? If rail handles 75% of the subject traffic at rates with an R/VC ratio less than 180, does the NITL Proposal still conclusively presume market dominance even though by statute an R/VC ratio less than 180 conclusively shows lack of market dominance? Is the 75% test calculated using contract traffic, so that if a railroad offers an attractive rate and service package

[8] The use of a 75% market share test, like the use of a 240 R/VC test, is wholly arbitrary. There is no rational basis to conclude that an R/VC above 240 or a rail market share above 75% incontrovertibly proves that a railroad is market dominant. Indeed, 49 U.S.C. Section 10707(d)(2) says that an R/VC above 180 does NOT establish a presumption of market dominance. Likewise, such arbitrary presumptions make no sense in those instances where a shipper may be served by one Class I carrier at origin or destination but have several interchange options for completing the entire route. It is for these reasons, as KCS pointed out in its opening comments, that the courts and the Department of Justice have long rejected the use of conclusive presumptions in favor of a fact specific analysis when trying to determine market power. STB Docket No. EP 711, Opening Comments of The Kansas City Southern Railway Company ("KCS's Opening Comments"), Page 36.

in a contract, earning the shipper's traffic, the railroad also opens itself to forced switching? What about exempt commodities? None of these questions were addressed by NITL or clarified in any opening comments of the proposal's advocates.

As a result, parties simply could not determine how to analyze the 75% market share criteria. As NS observed, "determining whether the customer ships 75% of its traffic by rail would require substantial discovery and litigation – even if the 75% criterion were defensible" STB Docket No. EP 711, Opening Comments of the Norfolk Southern Railway Company ("Norfolk Southern's Opening Comments"), Page 48, and the data and other limitations "make[] it impossible for parties to conduct any meaningful study." Id. at 45. UP admitted that it cannot determine how many shippers may meet the 75% threshold test. STB Docket No. EP 711, Opening Comments and Evidence of Union Pacific Railroad Company ("Opening Comments of Union Pacific"), Page 59. NITL notes "that . . . its analyses of the CSP include only the 240% R/VC conclusive presumption and not the 75% market share presumption." NITL at 7, n.10. National Grain and Feed Association noted that it would require a special study to examine the 75% requirement, and admitted that most of its members wouldn't benefit from the presumption anyhow.[9] AAR could not assess the effect of the 75% presumption because the Waybill sample lacks data that would allow analysis of the 75% presumption. AAR's Opening Comments, Pages 12-13. DOT similarly did not include any traffic that would be potentially eligible under the 75% presumption. See STB Docket No. EP 711 Opening Comments of Department of Transportation ("DOT's Opening Comments"), Page 3, n.2 ("The Department did not undertake

[9] See STB Docket No. EP 711, Joint Opening Submission of the National Grain and Feed Association, the Agricultural Retailers Association, National Barley Growers Association, USA Rice Federation, National Oilseed Processors Association, the National Chicken Council, the National Association of Wheat Growers, the National Council of Farmer Cooperatives, and the National Corn Growers Association ("Interested Agricultural Parties"), Page 13, n.25

an examination of the NITL's 75 percent test proposal," and DOT "could not figure how to account for it easily in its analysis." Id. And USDA did not even mention the 75% requirement.

The simple fact is that none of the studies presented by any party included any analysis of potentially eligible shipments under this element of the NITL Proposal. As such, the Board has no evidentiary basis on which to make a rational conclusion regarding how many shippers would be impacted by the proposal and what those impacts would be.

2. The Impact of the Proposal Also Depends Upon The Unresolved Question Of Rail Miles vs. Air Miles

Likewise, because the proposal was not clear on whether it uses air miles or rail miles, no party's analysis fully addressed how many shippers would qualify for relief under the NITL Proposal. The NITL Proposal itself says it applies if a shipper's facility(ies) "are within a radius of 30 miles" of an interchange, NITL Pet. at 36, implying that NITL is using air miles as its point of reference, as does Canadian interswitching. However, commenters' analyses applied different approaches. Consistent with NITL's language, AAR used air miles (AAR's Opening Comments, Page 11). DOT and USDA used track miles (DOT's Opening Comments, Page 9 and STB Docket No. EP 711, Comments of the U.S. Department of Agriculture ("USDA's Opening Comments"), Page 5). NITL used rail miles, but then conveniently leaves open the possibility of shifting to an air miles standard, explaining that it "chose" rail miles for purposes of analysis (which has the obvious effect of reducing the scope of the traffic covered by the proposal). Yet, nowhere has NITL made clear which measuring standard its proposal intends will apply. For the Board and the parties to conduct an accurate analysis, there must be (but currently isn't) a single measuring standard.

C. The Proposal Lacks An Access Price Methodology, And No One Has Filled This Void

Despite the Board's clear directives, there was no meaningful analysis on the issue of access price. AAR explained that it cannot estimate rate reductions resulting from forced switching, in part because there is no set STB access rate prescription. AAR's Opening Comments, Pages 14-15. NS noted that the access price is to be set by the carriers and it could not fully analyze the impacts of the proposal in part because there is no way to determine the compensation level that the carriers might agree to. Norfolk Southern's Opening Comments, Pages 35-36. NS said it too cannot fully study the impact of NITL's proposal because, under the statute, the access price is to be negotiated in each instance by the two carriers involved, and failing agreement, then set by the Board. Id. And UP noted that access price uncertainties also make quantification/projections impossible. Opening Comments of Union Pacific, Page 59.

USDA said that the methodology for determining the access price must be "simple, easily calculated, and applied to all switching under the competitive access rules" and afford genuine, economical access to another carrier. USDA's Opening Comments, Page 19. But in so doing, USDA ignored the statutory requirement that carriers first negotiate an access price, and recommended instead that the STB adopt the Canadian interswitching fee structure. NITL did not offer an objective methodology that reflects the movement's operating and market characteristics. Instead, NITL suggested use of a Canadian "cost based" fee in its analysis.

In the end, no party provided a methodology that could be applied and used in the Board's analysis. While NITL suggested basically adopting the Canadian model, it did so at the expense of ignoring the statutory language that requires the involved railroads to negotiate the access price. And, lacking a readily-available methodology, NITL did not even analyze its own proposal. As the Board said, the access price is a "critical element" of the NITL proposal, as is the calculation of the access price. Without this "significant factor" and "critical element," the Board cannot "determine how to proceed." See Petition For Rulemaking To Adopt Revised Competitive Switching Rules, Docket No. EP 711 (STB served July 25, 2012).

If the Board does not terminate this proceeding at this stage, which it should, before the Board moves forward it will have to at least require further analysis on a specific access price methodology and then require parties to update or redo their impact analysis after taking into account the access price. The Board requested the parties to do that here, but the issue remains largely unaddressed, and without evidence or discussion, the Board cannot fully analyze the proposal's impact.

D. Several Other Important Issues Highly Relevant To The Board's Consideration Of The Proposal Are Likewise Missing

1. No Party Analyzed The Proposal's Impact On Smaller Class I Railroads And Other Smaller Railroads

The NITL study includes no evidence or attempt to show the impact of its proposal on the three smaller Class I railroads: KCS, CN, and CP. Yet, traffic originating or terminating on these three railroads would be subject to the proposal to same extent as on the so-called "Big Four," specifically UP, BNSF, CSX, and NS.

While the Decision posited that an analysis of the Big Four is "sufficiently representative of the railroad industry as a whole," it is not representative of the NITL Proposal's impact on KCS. As explained in its Opening Comments, KCS's network and traffic mix is much more akin to a Class II or III than to any of the four largest Class I's.[10] KCS has nowhere near the revenues,

[10] The NITL Proposal exempts Class II and III carriers from its application because "The League believes that, due to their size and reach, in general Class I railroads have market power; while the much smaller Class II and III railroads generally do not." NITL Pet. at 40. Because it, too, lacks the market power of the Big Four, KCS has suggested that if the proposal moves

geographic reach, or market power of the four largest carriers. Its average length of haul is significantly shorter, it generally does not serve multiple plant locations of the same shipper as do the larger carriers, and it is heavily dependent upon interline traffic.[11] For example, on average, the four largest Class I carriers handle approximately 72% or more of their traffic in single-line service. In contrast, only 12.3% of KCS's traffic is single line traffic. This is similar to the Class II and Class III railroads that both originate and terminate about 14% of their traffic. Like those carriers, the vast majority of KCS's traffic – approximately 88% – originates or terminates on other carriers through interchange. KCS's Opening Comments, Page 24. Accordingly, analysis relying upon data concerning BNSF, CSX, NS and UP alone is not representative of the impacts of the NITL Proposal on KCS.[12]

NITL's omission of KCS, CP, and CN from its waybill analysis also significantly understates the proposal's impact on the rail network as a whole. Each of these carriers' traffic is represented in the waybill sample, yet the NITL analysis excluded consideration of their traffic. Because KCS, CP and CN largely operate north-south, with the larger Class I's crossing them at multiple locations, omitting KCS, CP and CN from NITL's analysis significantly understates the number of interchanges enveloped in NITL's Proposal. Also, because CP and CN, like KCS, each also handle a larger percentage of interline traffic than do any of the larger Class I's, the effect of the NITL Proposal on the larger Class I's is not at all representative of the effect on the 3 smaller Class I's who rely so much more on interchange traffic which gives shippers more

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forward, which it should not, the Board should consider exempting interline traffic (or perhaps carriers with large amounts of interline traffic).

[11] STB Docket No. EP 705, Initial Comments of Kansas City Southern Railway Company, Page 12.

[12] There are no data limitations on including KCS, as the Waybill data includes information on KCS traffic.

competitive options. Accordingly, NITL's choice to exclude KCS, CN and CP from its waybill analysis deliberately skews the data in a way that leaves the Board uninformed of the effect of NITL's Proposal on KCS, CP and CN.

Similarly, no party analyzed the impacts on Class II's and III's. Because they are excluded from NITL's Proposal, one would think the impacts need not be analyzed. However, there are several aspects of the proposal that could impact Class II's and III's. For example, while a shipper facility served exclusively by a Class II or III carrier cannot obtain access to a Class I, shippers eligible to invoke forced access under the NITL Proposal can employ a Class II or III carrier as the competitive alternative. ("Of course, the requirement that a party seeking competitive switching show that the facility of the shipper is served by rail only by a single, Class I carrier could mean that a Class II or Class III carrier could . . . provide competitive rail service to the facility of that shipper." NITL Petition at 40-41). In other words, Class II's and III's can't lose traffic, but they can gain traffic.

Likewise, many shortline carriers do not show up in the Waybill because their rates are often included in the connecting Class I's line haul rate. As such, a particular shipper facility may be exclusively served by a Class II or Class III but the Waybill reflects the facility as being exclusively served by the connecting Class I carrier, which may or may not be the only Class I interchange for that shortline carrier. If that shipper facility otherwise qualifies for access, how does that impact the shortline carrier? We don't know because no party included such impacts in its analysis. There are more than 500 Class II and Class III railroads in the United States. Failure to include an analysis of the impact of the NITL Proposal significantly underestimates the potentially eligible traffic and the potential revenue loss.

2. Many Other Questions Go Begging, Which Should Not Be The Case

Besides the unanswered questions noted above, there were other questions contained in the opening comments of others, such as those set forth in the NS and CSX comments, which highlighted the ambiguities of the NITL Proposal. But very few of those questions are addressed by NITL or others in the opening comments. Following are just a few of the issues that were either unanalyzed or overlooked:

- Is Exempt Traffic and Contract Traffic Included Or Excluded?

Under statute, exempt traffic and traffic moving under contract would not be subject to the proposal (unless, for exempt traffic, the exemption is first removed). But the Decision requesting comments on the NITL Proposal is unclear on whether this traffic should be analyzed. NITL's opening comments didn't specifically address the topic, although Mr. Roman's statement does not list such traffic as being excluded from his analysis. AAR and USDA, on the other hand, included this traffic in their studies. See AAR's Opening Comments, Page 13 (including contract and exempt traffic "because the NITL proposal does not appear to exclude such traffic"); USDA's Opening Comments, Page 14 (discussing need to offset results because of contract traffic). DOT included some, removing "exempt trailer-on-flatcar and container-on-flatcar (TOFC/COFC) traffic, as well as other exempt commodity traffic," but included traffic moving in other exempt equipment (boxcars) and contract traffic. DOT's Opening Comments, Page 4. NGFA excluded TOFC/COFC traffic but included the other types of traffic in its analysis. See Interested Agricultural Parties' Opening Comments, Page 12. The Board cannot make a reasoned analysis on the treatment of such exempt and contract traffic without more clarification and consistent analysis.

- Who Pays For Labor Protection And What Labor Protection Applies?

Similarly, NITL and other proponents were silent on the statute's requirement that any mandatory switching include labor protections. KCS, NS and CSX raised the issue, and pointed out that the proposal is unclear on how the Board would address employees whose positions were impacted by forced switching and who would bear the costs of any imposed labor conditions, or for that matter, which condition should apply – New York Dock or some other provision. The United Transportation Union-New York State Legislative Board ("UTU-NY") filed comments asking the Board to make labor protections for employees mandatory should it adopt NITL's proposal, but it did not address the question of who pays and bears the costs. Again, as this issue bears on the NITL Proposal's cost and the access price, the Board cannot fully appreciate the impact without further evidence and analysis.

- Other "Small" Considerations With Huge Ramifications

There are many other questions caused by the vagueness of the NITL Proposal. This leaves each interested party with the opportunity to fill the gaps with its own assumptions, which, in turn, prompts each party to draw its own conclusions concerning the proposal's scope and impact. It is unclear what assumptions the Board will embrace, and thus it is not yet possible for the parties to have a consistent discourse on the issues or to provide accurate analysis. For example, the parties do not appear to agree on such fundamental proposal elements as the definition of "working interchange." Consequently, the various analyses disagree on how many such interchanges exist. NITL's Mr. Roman identified 407 interchanges (NITL's Opening Comments, Roman V.S. at 16-17), but USDA, applying a similar methodology, identified 500 interchanges (USDA's Opening Comments, Appendix at 3). AAR identified 1500. STB Docket No. EP 711, Reply Comments of the Association of American Railroads, Reply V.S. of Phil C.

Ireland and Rodney E. Case, Page 8. Without an agreed-upon definition, the parties are left to guess between figurative "apples" and "oranges."

Similarly, parties made different assumptions with respect to traffic originating or terminating outside of the United States. DOT, for example, excluded traffic moving to/from Canada, but didn't address what it did with traffic moving to/from Mexico. Presumably the Big Four's traffic to/from the Mexican border was included in DOT's analysis, but KCS traffic was not. Likewise, it is unclear how NITL and others analyzed traffic that either originates or terminates outside of the U.S.

Finally, no party addressed NEPA.[13] Yet, when authorizing switching, NEPA considerations apply to the Board's regulatory action. Such forced switching will increase train activity within discrete areas, and the Board would have to consider the impact of its decision ordering switching with respect to air quality, noise, and the like. NITL fails to explain how the Board will take such environmental impacts into account in assessing the merits of a request for forced switching.

Given that the proposal is ambiguous and undefined with respect to many of its terms, it is not surprising that different parties took different assumptions and came to vastly different conclusions with respect to the proposal's impact. Likewise, certain key issues simply went unaddressed due to the lack of adequate data (e.g., failure to analyze the impact of the 75% market share), or because of the complexity of the issue (e.g., failure to set forth an access price methodology). In light of the fact that no party presented a complete analysis of the actual proposal and given the widely divergent approaches to "solving" the proposal's ambiguities, the Board cannot conclude based upon the existing record that it has enough "precise information" to

[13] National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370(f)

"fully gauge" the proposal's impact. As a result, the Board cannot make a reasoned conclusion with respect to some of the critical elements of the proposal so as to justify moving forward with the proposal at this time.

III. THE PROPOSAL WILL HARM MOST SHIPPERS RATHER THAN BENEFIT THEM

A. Shipper Commenters Ignore Or Gloss Over The Fact That a Few Large Shippers Would Benefit At The Expense Of Many Smaller Shippers

As AAR and its witnesses, B. Kelly Eakin and Mark E. Meitzen, both with Christensen Associates, pointed out on opening, the NITL Proposal would create winners and losers among shippers. The comments filed by other parties, including the shippers themselves, back up this analysis. Many of the "winners" (who assume the proposal would result in lower rates and better service, though that has not been established) would be large chemical and coal shippers; a fact that even the shippers appear to recognize. Other non-favored shippers may see their rates go up, lose the benefit of operational efficiencies, see service quality go down, and ultimately lose market share to their beneficiary shipper competitors.

Among the large shippers, the American Chemistry Council ("ACC") candidly admits that chemical shippers will be the primary beneficiaries of the NITL Proposal.[14] Large coal shippers have also expressed general support for the proposal, although they remained concerned about the Board's rate complaint process. On the other hand, many small shippers who could not avail themselves of the proposal would be disadvantaged. ARC noted that many of its members

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[14] "ACC estimates that the potential rate reductions for chemical shippers would generate nearly one billion dollars in economic output." STB Docket No. EP 711, Comments of American Chemical Council, Page 5. NITL's own analysis claims that its proposal will only result in a revenue loss to the railroads of $1.3 billion. The fact that the chemical shippers are claiming $1 billion would go to them clearly shows that even under the assumptions most favorable to shippers, it is large chemical companies that would gain the most from the proposal.

would be unable to avail themselves of the proposal. Opening Comments of Alliance for Rail Competition, et al., Page 13. GLE admitted that "most of its traffic moves at rates below 240 R/VC" (STB Docket No. EP 711, Comments and Verified Statement by The Tom O'Connor Group, LLC on behalf of Glacial Lakes Energy, LLC, Page 10) and therefore the proposal might do little to provide meaningful relief to their rate concerns. Roanoke Cement, while filing comments, admits that it would not qualify under the proposal. NGFA asserts that relief for agricultural shippers would be "minimal." Interested Agricultural Parties' Opening Comments, Page 23. It appears that if the proposal is broken down into winners and losers, the Ag parties fear they would fall under the losers' category. Id. at 7. USDA claims that the proposal "would benefit too few grain and oilseed shippers." (USDA's Opening Comments, Page 5). NITL itself appears to believe that many shippers will not qualify for forced switching. (NITL Pet. at 57).

While even the shippers acknowledge that some groups will benefit from the NITL Proposal while others will not, there is no recognition by these same parties of the notion that even for those shippers who might see rates reduced, all shippers will most likely bear the burdens and costs of the proposal. As AAR and the railroad commenters note (see B below), forced switching will most likely result in service problems and added operational costs so there will be a net reduction in public benefits. As a network industry, operating inefficiencies in one area will "spill over" and impact the entire network.

While favored shippers may see rate reductions, non-favored shippers will suffer these inefficiencies without any offsetting reduction in rates. Furthermore, to the extent the favored shippers do (*if* the proposal has the effects NITL intends) see reduced costs, this will enable them to take market share from their non-favored competitors. None of the commenters other than AAR addressed this issue; i.e., that the favored shippers could use their reduced transportation cost (assuming the favored shippers don't simply distribute cost savings to their shareholders) to take market share away from the non-favored shippers. Thus, reduced rates to the favored shippers could competitively disadvantage their non-favored competitors.

B. Forced Switching Will Cause Substantial Network Inefficiency

The opening comments by AAR and the railroad parties, including KCS, clearly established that a forced switching regime, if implemented, would strain existing rail network capacity and drive down operating efficiency. The result will be to drive up rail service costs. Most forced switching advocates ignore this issue. [15] The handful of shipper interest acknowledging the NITL Proposal's adverse impacts upon "rail network efficiency" offer nothing more than unsupported platitudes that network impacts probably won't be that bad, and that setbacks probably can be overcome in time. Opening Comments of ARC, et al., Page 9.

The railroads each provided detailed analyses of the rail network impacts that would result from a forced switching regime. In their respective opening comments, CSX, KCS, NS, and UP each offered numerous specific illustrations of how the NITL Proposal could result in serious operational challenges and increased operating costs for the railroads in the event that they are forced to submit to a forced switching regime. KCS, for its part, offered the testimony of Gregory Walling, Assistant Vice President, International Network Planning, who provided two concrete examples of interchange points on its system that are ill-suited to handle forced switching traffic – Sallisaw, Oklahoma, and West Monroe, Louisiana. Consistent with the testimony of the other participating railroads, Mr. Walling's testimony reinforced the point that a forced switching regime would undo various operating practices that have evolved over time to

[15] To its credit, NGFA and various agricultural interests sharing NGFA's position acknowledged up front that they would not attempt to address the potential impact of the NITL Proposal on rail network efficiency. See Comments of the "Interested Agricultural Parties" at 7.

maximize rail network efficiency in the interest of improving the competitiveness of rail to other modes of transportation.

The NITL Proposal's advocates downplay or ignore the reality that the proposal will disrupt long standing efficient network interchanges. NITL did not examine the essential particulars of inter-carrier switching (especially where such switching does not exist today, may never have existed, or has not existed for years), what sort of yard and track facilities would need to be in place to ensure the "least inefficient" forced switching, or how switching would or could be carried out to avoid (ostensibly) or minimize handling and transit time delays and the attendant costs. Other proponents, such as Highroad Consulting, similarly concede that forced switching would inevitably increase rail operating costs.[16] Indeed, NITL itself actually acknowledges that the forced switching regime it would like to see implemented will not necessarily yield service improvements, and that the competitive alternative to an incumbent carrier's direct service made available through forced switching will likely mean slower overall transit times.[17]

The record makes clear that the essence of a forced switching regime is more car handling, reduced car velocity, and increased transit times, not just for the shipper seeking access, but for all shippers who must adjust to the operational changes required by forced switching. Simply put, increased car handling will translate into added costs for shipper and carrier alike. In the face of this evidentiary record, KCS submits that the only rational conclusion is that the NITL Proposal would be harmful to rail network efficiency.

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[16] STB Docket No. 711, Opening Comments of Highroad Consulting, Neil Thurston V.S., Page 27.

[17] See, e.g., Opening Comments of NITL, Page 49.

C. The Proposal Creates More Litigation And Regulation, Not Less

In soliciting comments on the proposal, the Board expressed its view that implementing some form of forced switching somehow would reduce agency involvement in rate and service issues and stave off related litigation. NITL, as the forced switching proponent, shared this view, stating that forced switching would "reduce the need for complex and expensive litigation." NITL Petition at 6. But a review of the opening comments shows precisely the opposite – the proposal will result in more litigation and more regulation.

As an initial matter, most of the shipper comments expressed the view that the NITL Proposal should not be a substitute for, but rather, a supplement to, the Board's rate reasonableness processes. In that regard, NITL acknowledged that it "did not intend to limit or foreclose captive shippers' options to address railroad market power" (NITL Opening Comments, Page 16), and viewed the proposal as simply "a supplement to, and not a replacement for, the existing remedies to shippers." Id. Other shippers expressed a similar view that the proposal should be in addition to the rate complaint processes, not in lieu of it.[18] Of course "supplementation" of the current regulatory regime, rather than replacement of that regime, will only add to regulatory oversight and litigation.

[18] ARC Opening Comments at 2 (The STB needs to be ready to step-in when a shipper lacks access to a switching remedy); Opening Comments of Chlorine Institute, Page 2 ("The STB's role in regulating rates will continue to be a crucial factor to ensure fairness in the rail transportation market."); Opening Comments of Joint Coal Shippers at 9 (Expressing view that the mere availability of a competitive switching option should not, standing alone, substitute for other remedies); Interested Agricultural Parties Comments, Page 24 (Arguing that if the STB adopts mandatory switching rules, such rules should have no effect on the STB's determination of whether the STB has jurisdiction over the reasonableness of line-haul rates in the presence of a switching alternative.); and Opening Comments of Olin, Page 6 (Suggesting shippers must be able to challenge the reasonableness of rates resulting from mandated switching.).

Aside from the fact that shippers want the forced switching remedy to add another layer of Board regulation, a mandatory switching regime would also engender substantial litigation. As noted previously, there are numerous vague terms, each of which will be subject to extensive debate and litigation. Rather than avoiding the expense of complicated, multi-faceted litigation and removing pressure upon the Board's already overburdened docket, the proposal will do the opposite. It will, if invoked, trigger more agency activity and litigation, putting more pressure on the Board's limited resources by leading to invocation of forced switching, followed by attempts to challenge the resulting rate (including the switch charge). In the end, adding a vague, incomplete, and untested process will not "reduce the need for complex and expensive litigation," but will, as KCS said, "result in creating a full employment program for private lawyers, accountants, and economists, while draining STB staff resources." KCS Opening Comments, Page 20.

IV. THE CANADIAN MODEL DOES NOT ESTABLISH THAT FORCED SWITCHING WILL RESULT IN LOWER RATES AND BETTER SERVICE WITHIN THE CONTEXT OF THE U.S. NETWORK

Perhaps one of the greatest fallacies put forth by the proposal's advocates is that interswitching works in Canada, so NITL's Proposal undoubtedly will work in the U.S. According to these shippers, the mere right to invoke the so-called Canadian "interswitching remedy" results in lower rates, better service, and reduced regulation – just like they believe it will do here in the U.S. For example, Highroad Consulting's opening comments include a report by Neil Thurston entitled "Assessing Canada's Regulated Interswitching Impact on Rail Operations and Service to Customers" which suggests that Canadian interswitching has had a limited impact on railroad operations. See EP 711, Opening Comments of Highroad Consulting, LTD., Neil Thurston report. Highroad's comments reflect two unsupported, and ultimately invalid, propositions – (1) that Canadian interswitching "works," and (2) that Canadian interswitching would work in the U.S. without causing serious rail network disruption. Id.

Expert testimony in the reply comments of AAR and others will more than adequately address the lack of merit in equating interswitching in Canada to NITL's Proposal. Furthermore, publicly-available information demonstrates that Canadian interswitching does not operate as the panacea that shippers would lead this Board to believe. In reality, Canadian shippers, like their U.S. counterparts, still complain that their rates are too high and/or that the rail service they receive is inadequate. And shippers in Canada continue to call for more government regulation and action to curb the alleged "abuses" of railroads in a never-ending campaign to get lower transportation rates.

KCS' research revealed that various Canadian industries, such as the farming, forest, mining, and chemical industries are as engaged as ever in asserting concerns over rates, alleged geographic monopolies, service, and the desire for expanded access. For example, in a recent article, Pierre Gratton, President and CEO of the Mining Association of Canada said: "To date, the CTA [Canadian Transportation Act] has largely been ineffective at protecting shippers against high prices and spotty service."[19] Canadian agricultural economist Ian McCreary has expressed frustration that freight rates have gone up by 18% over the last decade when adjusted for hauling distance.[20] The Western Canadian Wheat Growers Association ("WCWGA") questions whether shippers are actually better off under the CTA. Earlier this year, for example,

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[19] Pierre Gratton, Miners needs better rail freight deal, Financial Post, Aug. 15, 2012, available at http://opinion.financialpost.com/2012/08/15/miners-need-better-rail-freight-deal/.

[20] Allan Dawson, Railway revenues rekindle costing review calls, AGCanada.com, Jan. 4, 2013, available at http://www.agcanada.com/manitobacooperator/2013/01/04/railway-revenues-rekindle-costing-review-calls%e2%80%a9/.

Blair Rutter, WCWGA's policy manager stated, "We want to ensure farmers are paying freight rates that would be in line with what we would see in a competitive market." Id. Of course, if NITL were correct that Canadian-style interswitching reduces the role of government, yields lower rail rates, and betters service, then such expressions of dissatisfaction with the Canadian system should not exist. But they do.

Shipper dissatisfaction with the Canadian system eventually resulted in the appointment of a Rail Freight Service Review Panel ("RFSR Panel") tasked with examining the Canadian rail service and rail-based logistics issues. In January 2011, the Department of Transport, Canada released a report based upon the RFSR Panel's investigation. The report disclosed that shippers expressed a high level of dissatisfaction with service provided by CN and CP under the CTA. Shipper complaints ranged from such issues as inadequate car supply, inconsistent transit times, high rates, and railroad detachment and unwillingness to resolve apparent operational problems.[21] In short, despite decades of interswitching in Canada, shippers there still complain almost incessantly about rates and service.

Contrary to NITL's assertions, the grass is clearly not greener in Canada. Canadian interswitching has left shippers there dissatisfied and eager to challenge the effectiveness of the rail regulatory processes there. This experience shows that the mere existence of competitive access through government-mandated switching will not reduce the STB's role, but rather would simply add another regulatory layer on top of what already exists and provide yet another regulation for shippers to complain about and seek further refinement.

[21] Rail Freight Service Review Final Report, Transport Canada, Jan. 2011, available at http://www.tc.gc.ca/eng/policy/acg-rfs-review-examen-sfm-rvw-eng-2616.htm

As demonstrated more fully in the AAR's reply comments, even if Canadian interswitching can be seen as providing competitive choices to otherwise captive shippers, the predominantly two-carrier, east/west Canadian rail system is not a good model for whether interswitching could be imposed in the U.S. without causing operational nightmares. A multitude of factors differentiate rail operations in Canada from those in the U.S., including the number of major carriers, the volume of traffic, the number of cities served by multiple large carriers, and the number of interchanges at which forced switching could apply. The statement of Phil Ireland and Rodney Case submitted by AAR explains these important differences in detail.

Moreover, NITL is not proposing adoption of the Canadian interswitching system. Instead, NITL plucked the number "30" from the Canadian rules that measure distances in kilometers, and simply tacked it onto the U.S. measure of distance, miles. This one, seemingly small change increases the area of each forced switching zone by approximately 160%, from roughly 1086 square miles to over 2800 square miles. When factored in with the number of Class I carriers, the number of affected interchanges, and the number of major communities served by more than 2 Class I carriers, NITL's Proposal multiplies the complexities of the Canadian system many fold in trying to impose forced switching on the United States. These complexities make it highly unlikely that the benefits of the Canadian system, if any, can be achieved in the U.S.

CONCLUSION

NITL has put forth an unworkable and ill-defined proposal that could fundamentally change the financial, operational, and regulatory structure of the rail industry in the U.S. NITL appears to assume that a forced switching regime will assuredly result in lower rates, better service, and reduce the need for the Board to involve itself in regulatory disputes over price and service. To test these assumptions, the Board requested commenters to address several questions regarding the proposal's impacts.

KCS filed opening comments showing that shippers were more concerned with access to a cost effective-process by which to test the reasonableness of rates rather than access to government-mandated switching. KCS showed that the Board has, and continues to be, responsive to shippers over rate concerns. KCS also showed that the proposal would not result in lower rates, would result in operating inefficiencies, no net public benefits, increased government involvement, and would be contrary to the statute and precedent. Finally, KCS pointed out that the proposal could easily be manipulated by both shippers and other railroads so as to result in the unintended consequence of reducing the competitive role played by smaller Class I's, like KCS.

The opening comments filed by others confirmed some of KCS's views. The comments reflected that although a few large corporations supported the NITL Proposal, there was lukewarm support from many shippers and government agencies. Other shippers indicated that the proposal would not help them at all. Most continued to express concern over rate levels and the need for the Board to focus on effective rate relief as a more meaningful "fix" to their concerns.

Furthermore, even though the Board asked for specific evidence analyzing specific components, the evidence provided by the shippers did not fully address the Board's questions. Many proponents, including NITL itself, didn't even analyze the proposal, failing to: (1) address the impact of the 75% threshold criterion; (2) analyze the impacts on smaller Class I's and the Class II's and III's; (3) include many existing interchanges; (4) analyze the impacts of the proposal on carrier costs and efficiency; and (5) clarify the many ill-defined aspects of the proposal. Most ignored one of the proposal's most crucial elements – what is the access price, how should it be determined, and what is the impact of applying the access price to the analysis.

In contrast, there was independent and objective evidence presented by well-respected and well known economic consulting firms that the proposal would create substantial operating problems, is merely a redistribution scheme intended to benefit a limited subset of very wealthy companies to the detriment of many other shippers and customers, and would create substantial inefficiencies. The opening comments also reflected that the proposal would result in more regulation, not less, and was inconsistent with the Board's prior precedents and operating statutes.

As KCS stated in its opening comments, "until such time as NITL or the Board can establish that the underlying assumptions [i.e. that the proposal will result in lower rates and better service] are in fact grounded in empirical data, the Board should resist the siren call for fundamental changes in its regulatory structure and should allow its existing processes and procedures to work." KCS's Opening Comments, Page 51. The empirical data presented by proponents of the proposal failed this test. As a result, the Board should not move forward with the proposal. Instead, the Board should continue to review, and if necessary, refine, its rate complaint processes to make it less costly and more efficient for shippers to have their rate concerns addressed.

Respectfully Submitted,

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Dated: May 30, 2013

Attorneys For The Kansas City Southern Railway Company

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. EP 711

PETITION FOR RULEMAKING TO ADOPT REVISED COMPETITIVE SWITCHING RULES

OPENING COMMENTS AND EVIDENCE OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

EXHIBIT A

VERIFIED STATEMENT OF GREGORY WALLING

My name is Gregory ("Greg") Walling. I am the Assistant Vice President, International Network Services for The Kansas City Southern Railway Company (KCS). I previously served as KCS' General Director, Service Design. Prior to joining KCS, I worked for Norfolk Southern for six years, largely on former Conrail properties. In all, I have thirteen years' experience working for Class I carriers. I hold a Bachelor's Degree in International Business with a concentration on Intermodal Transportation.

In my current position, I am responsible for KCS asset management and service design. My responsibilities extend to oversight of the KCS transportation operating plan, in connection with which I manage service agreements, new service design, asset modeling, capacity/demand forecasting and operating systems, and participate in infrastructure planning. I am offering this verified statement to offer examples of how the forced switching proposal currently under consideration by the Surface Transportation Board (STB) would, if implemented, affect rail network efficiency.

In its petition for a rulemaking to establish a new STB-administered forced switching regime, The National Industrial Transportation League (NITL) offers a essentially "one-size-fits-all" proposal that would permit shippers within 30 miles (or possibly more) of an existing or potential "working interchange" to force switching between railroads. Such an approach ignores the physical and operational limitations of many interchange points – particularly but not exclusively at points of interchange outside of traditional terminal areas –is impracticable, fails to account for "real world" rail operations, and could have serious adverse impact upon KCS's interchange operations. As the illustrations provided below will demonstrate, NITL's proposal would undo decades of railroad industry operational and infrastructure modifications that were accomplished to make interline rail operations more efficient and less capital-intensive.

I. Sallisaw, Oklahoma – A Location-Specific Case Study On The Inefficiencies Of NITL's Proposal

The NITL proposal would insert serious new inefficiencies into railroad network operations. One case-in-point is the KCS interchange with Union Pacific Railroad Company (UP) in Sallisaw, Oklahoma, where the NITL proposal could disrupt the current provision of efficient and cost-effective interline service to Sallisaw-area shippers.

Sallisaw, Oklahoma – History and Facility Configuration

Sallisaw is a small community located about 20 miles west of the Arkansas-Oklahoma border, roughly equidistant between the northern and southern borders of Oklahoma. Sallisaw is approximately 21 miles west of Fort Smith, Arkansas, and about 40 miles southeast of Muscogee, Oklahoma.

KCS' north- south main line between Kansas City, Missouri, and Shreveport, Louisiana, runs through the western side of Sallisaw. There, KCS's main line intersects UP's east-west-oriented main line extending between Wagoner/Muscogee, Oklahoma and Fort Smith, Arkansas. KCS' Kansas City-Shreveport line is KCS' core north-south route. UP's line through Sallisaw is a medium-density, single-track main line.[67] UP's line is principally operated directionally, with a predominant west-to-east traffic flow. The UP line connects with a UP Kansas City-Dallas route, and serves as a conduit for traffic flowing to or from Little Rock and Pine Bluff, Arkansas.

The KCS-UP crossing and interchange track at Sallisaw are depicted in Map A, below. Several features of the crossing and interchange are important to note, including the following:

- The interchange is configured so that only UP traffic coming from the west can be delivered to KCS efficiently.

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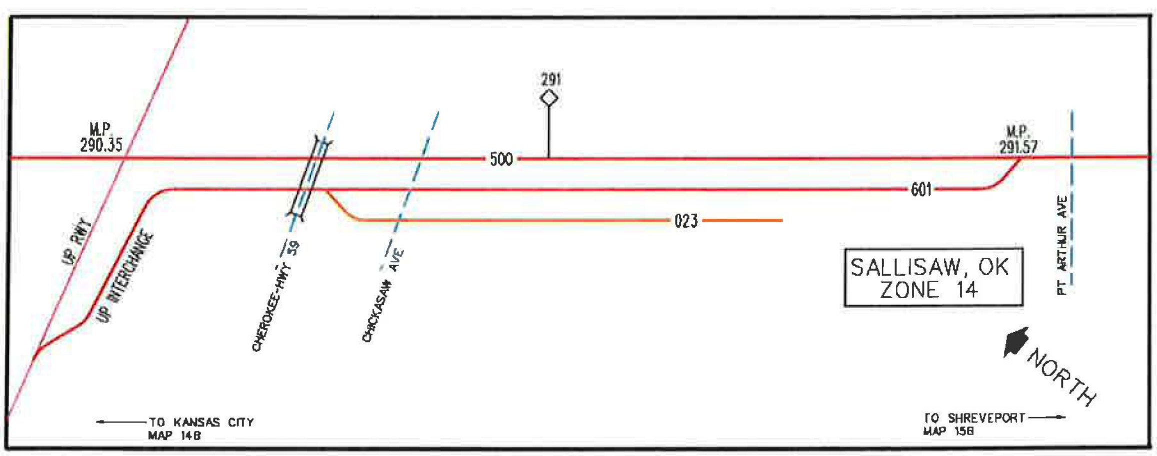
[67] http://www.up.com/investors/factbooks/2011/disclosure.shtml, Union Pacific Corporation 2011 Fact Book at 5.

- There is a single interchange track (Track 601 shown on Map A). (Track 500 is the KCS main line, and Track 023 is a stub-ended storage track, primarily used for holding maintenance-of-way equipment.)
- Track 601 has approximately 4,350 feet of interchange capacity, and is intersected at grade by a public street – Chickasaw Ave. – as is shown on Map A. As is shown on Map A, Track 601 and the KCS main line cross U.S. Highway 64/West Cherokee Avenue via a rail-over-road grade separation. The grade separation structure is configured to accommodate only the two tracks currently located on it.
- Neither UP nor KCS has personnel stationed at Sallisaw. There are no crew change facilities. The nearest standard crew change location for KCS is Heavener, Oklahoma, 47 miles to the south. KCS understands that the nearest UP crew change location is Fort Smith, Arkansas, approximately 21 miles distant.

While it is possible for KCS and UP to interchange traffic at Sallisaw, no regular interchange occurs there, due to the low volume of local business and the physical limitations of the interchange facilities. A map of the Sallisaw crossing and interchange tracks follows:



Sallisaw Area Operations

There are at least two KCS-served shippers located along the KCS main line that are within 30 miles of the KCS-UP crossing at Sallisaw. One is a coal-fired power plant that receives unit trains of Powder River Basin coal. The other is a carload shipper receiving inbound traffic that currently originates on UP.

UP and KCS interchange traffic for these two shippers in the Kansas City terminal area. The UP-originated unit coal trains move directly from the UP-KCS point of interchange at Kansas City to the power plant, a distance of approximately 310 rail miles, ordinarily utilizing a total of two KCS crews out of Kansas City. The carload shipper's inbound freight, on the other hand, moves from the current UP-KCS point of interchange at Kansas City to Watts, Oklahoma – the location of a KCS secondary yard about 75 miles north of the customer. At Watts, the traffic is placed on a KCS local train that operates five days per week, picking up and delivering cars from and to the customer as needed.

The Kansas City-based interchange of traffic for these two customers located near Sallisaw is highly efficient. KCS and UP have invested heavily in facilities in Kansas City that promote the efficient interchange of interline traffic. For KCS' part, these facilities include three coal main tracks at KCS' Knoche Yard, each capable of receiving an entire unit coal train. Related facilities include ancillary tracks for positioning locomotives at different points in the train to provide distributed power capability. Knoche Yard is a major crew change point for KCS. Equipment maintenance facilities are also available in Knoche Yard to deal with mechanical issues on interchanged cars and/or locomotives. KCS and UP also have large switching yards in Kansas City, facilitating the cost-effective assembly and transport of carload traffic blocks destined to intermediate yards, such as Watts.

The NITL Proposal Would Disrupt Efficient, Cost-Effective Service For Shippers Near Sallisaw

Sallisaw has very little of the yard and interchange facilities that can be found in Kansas City.[68] Track 601, the UP-KCS interchange track, is not long enough to hold a standard unit coal train. If it were extended to do so (a significant cost), the track would extend over multiple at-grade street crossings, each of which would be blocked by an empty or loaded unit coal train designated for interchange there.[69] Even assuming the simplest "step-on/step-off" interchange where a KCS crew would replace a UP crew on a loaded train destined to the power plant the moment that a train arrived at Sallisaw, without having to change locomotives on the train (there being no track on which to hold the UP locomotives if they were to be swapped out for KCS locomotives), the coal train would probably block the crossings at least 20-30 minutes each time a train was received from UP and, for that matter, each time the empty train was returned to UP via Sallisaw.

That relatively short interchange process, however, assumes that both carriers would have crews and crew transport vans immediately available to accomplish such a time-sensitive exchange. As mentioned, there is no KCS or UP crew change point at Sallisaw. Rather, each carrier would have to taxi crews 20-40 miles one way to Sallisaw. Moreover, even if Track 601 were long enough to contain a unit coal train, there would be no track space for an empty train to

[68] For purposes of the examples in this statement, I have assumed that the shipments involved would meet the '75% of shipments' and 'within 30 miles of an interchange' tests stated in NITL's proposal. I have not considered for any of these examples the rate levels of any of the shippers involved.

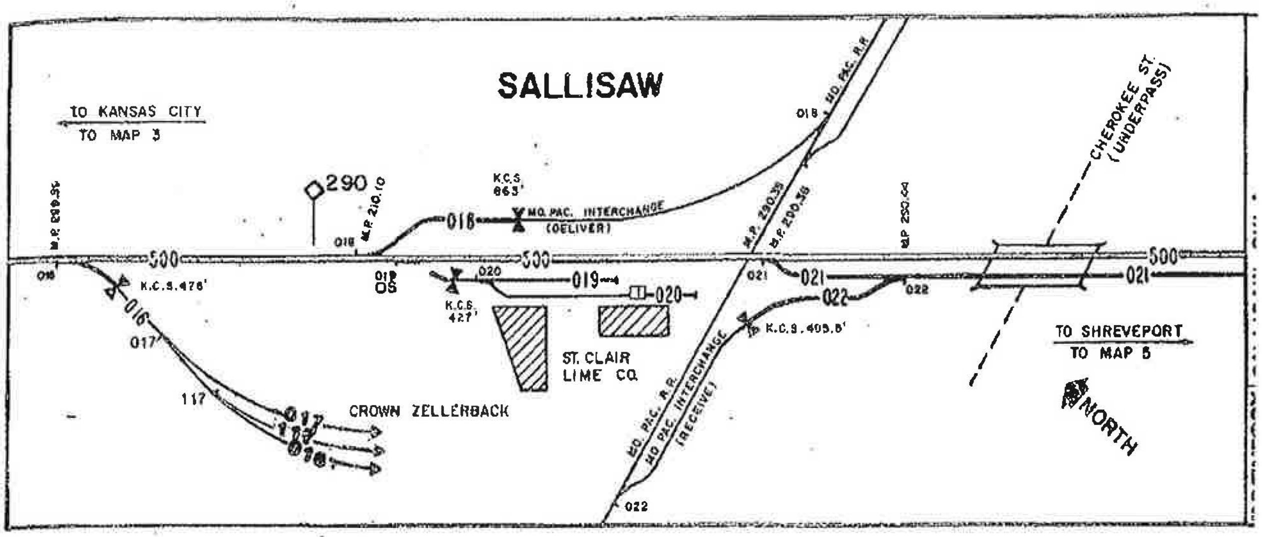
[69] If the Sallisaw interchange track were not extended, then interchanging coal trains at Sallisaw could require either carrier to park unit coal trains on their respective main lines or at a passing siding some distance from the actual interchange point. Such an arrangement would convert one or more passing sidings that now facilitate expeditious main line operations into a storage or staging track, thereby unnecessarily consuming infrastructure not intended for interchange purposes, and resulting in less efficient main line service for both KCS and UP.

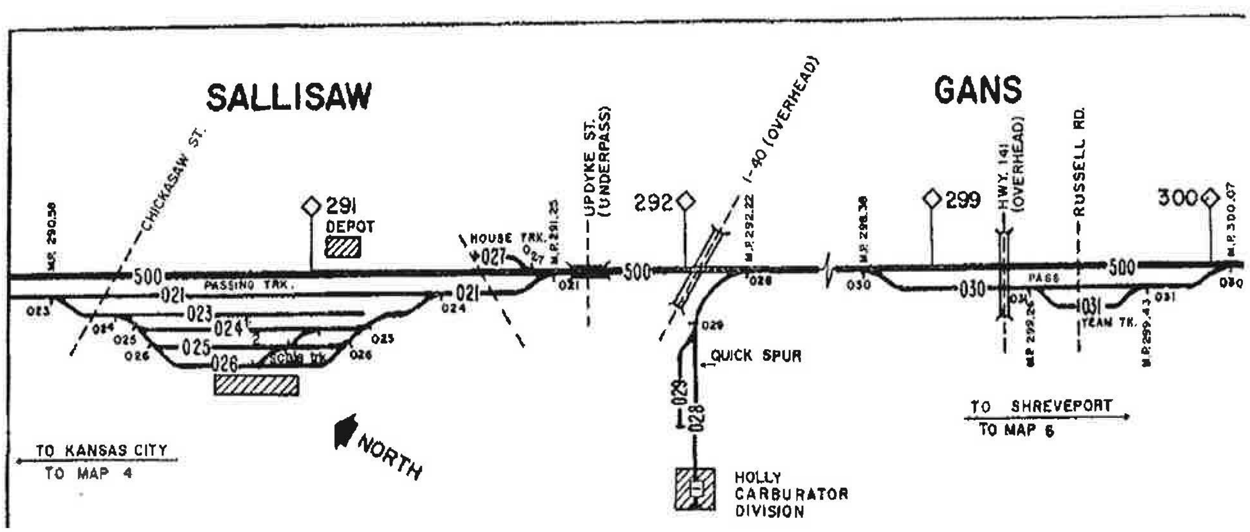
interchange back to UP when a loaded train was delivered. Thus, UP and KCS crews would likely have to be transported by van to or from Sallisaw at least twice to complete one round trip for a unit coal train. Traffic, weather, and the challenges of coordinating the activities of the two crews at a location without any crew facilities would make an efficient interchange at Sallisaw nearly impossible. Such an arrangement would be considerably less efficient than the current practice of interchanging trains at Kansas City. These difficulties which would be encountered in trying to interchange unit coal trains between KCS and UP at Sallisaw do not occur today because the physical facilities and crew change capabilities on both UP and KCS at Kansas City are capable of handling such interchange.

Interchange problems and inefficiencies at Sallisaw would be even more forbidding when one factors the carload shipper's traffic into the equation. Interchanging the occasional KCS-UP carload shipments at Sallisaw also would also require use of the lone interchange track – Track 601. The carload traffic would not move in unit coal train service, so the carload interchanges would occur on a different schedule than the unit train interchanges. Interchanging the carload shipments between UP and KCS on Track 601 would conflict with unit coal train interchange, and would make a very difficult interchange arrangement for unit trains virtually impossible once carload interchange is added to the mix. Therefore, before a coal train could be interchanged, someone (likely a passing KCS train on the main line) would have to confirm that no loaded or empty car destined to or from the carload shipper was occupying Track 601, and if carload traffic was set out on Track 601, no unit train exchanges could occur until the carload traffic was picked up by the appropriate local train. Such a system of holding coal trains out due to interchange facility "congestion" at Sallisaw would disrupt the current cycle times of the unit trains. The economics of the carload interchange likely also would be unattractive, as each carrier would have to arrange for separate local trains to interchange the load and the empty of the carload shipper at different times, since the configuration of Track 601 would not allow both dropping off and picking up at the same time.

The NITL Proposal Would Undo Years of Service Improvements In The Sallisaw Area

Due to the efficiency of the Kansas City interchange for traffic moving to and from the general Sallisaw area, KCS and UP have been able to eliminate unnecessary infrastructure at Sallisaw over the years, thus reducing overall track maintenance and operating costs. Below is a graphic representation of rail facilities at Sallisaw in 1983. As can be seen, KCS' facilities at Sallisaw previously included a small yard, a track scale and other facilities. In addition, UP's





facilities included interchange tracks allowing connection to KCS by both eastbound and westbound UP trains.

As KCS and UP scaled their respective operations to reflect relative declines in the amount of interline rail traffic in the Sallisaw area, and to account for operational changes (such as UP's use of its line through Sallisaw predominantly for eastbound movements), unnecessary facilities were removed. Such facilities, which have been rendered unnecessary in light of improved interline handling at Kansas City, would have to be rebuilt at significant expense if the STB were to force KCS and UP to restore the practice of interchanging traffic at Sallisaw.

II. Forced Switching Would Create System Inefficiencies

Sallisaw is not an isolated example of the inefficiencies and increased costs that would be occasioned by NITL's proposal. Rather, the changes at Sallisaw over the years illustrate the types of efficiencies that can be and have been achieved throughout the rail system in the last thirty years, through the consolidation of various interchange operations at larger yards. Those efficiencies, and the way those savings have kept many rail rates down since the passage of the Staggers Act are undone by the NITL proposal.

Another example of inefficiencies that the NITL proposal could cause involves KCS-served shippers in the general vicinity of West Monroe, Louisiana. West Monroe is in north Louisiana, at Milepost 72.3 of the Vicksburg Subdivision, on the Meridian Speedway, LLC (MSLLC) line. The Ouachita River separates West Monroe from Monroe, Louisiana, where UP's Alexandria, Louisiana-to-Pine Bluff, Arkansas, line crosses MSLLC at Milepost 71.1. A small interchange track along the UP line connects to a small and busy 6-track yard lying parallel to the MSLLC line.

Within thirty miles of the UP crossing of the MSLLC line at Monroe, KCS serves shippers that move traffic in boxcars to off-line destinations on the West Coast.[70] Currently, KCS handles such traffic for these customers via its direct east-west route over Shreveport to the Dallas/Fort Worth area. Such carload traffic originating at West Monroe is assembled into a block of westbound cars, and is handled in carload train service to Shreveport, where the cars are added to KCS's Jackson-to-Dallas train for transport to the Dallas area. At Dallas, the traffic is interchanged to either BNSF or UP for movement to the West Coast. KCS's route via MSLLC and KCS track to Dallas from West Monroe is the shortest available route, extending about 316 rail miles.

Applying NITL's proposal to this traffic would undo the efficiencies of the current traffic routing. KCS's West Monroe-area carload shipper(s) are within the 30-mile zone of the UP-MSLLC crossing, and thus potentially could appeal to the STB for forced switching/interchange of cars at Monroe under the NITL proposal. If the shipper(s) did so, their traffic could be interchanged to UP at Monroe rather than Dallas, using the rather limited and crowded facilities at Monroe. KCS understands that, from Monroe, UP would move the traffic about 85 miles south to a freight classification yard at Alexandria, Louisiana. And from Alexandria, UP would move the car(s) back north and west about 113 miles to Shreveport, and then west along UP's line from Shreveport to Dallas/Fort Worth. In all, UP's route would likely involve an additional switch at Alexandria and, at 404.5 rail miles from Monroe to Dallas, is 28 percent longer than KCS' direct routing. So, while the shipper might consider using forced switching to get to the "closest" point of interchange with UP, doing so would add inefficiency to the overall rail system with extra mileage, extra switching and extra delay.

[70] The MSLLC agreement provides that KCS retains the right and responsibility to provide local service to shippers along the MSLLC line.

VERIFICATION

I, Gregory Walling, Assistant Vice President, International Network Services for The Kansas City Southern Railway Company, declare under penalty of perjury that the foregoing statement is true and correct. Further, I certify that I am qualified to file this Verified Statement. Executed this 28th day of February, 2013.

Gregory Walling

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. EP 711 (SUB-NO. 1)

RECIPROCAL SWITCHING

VERIFIED STATEMENT OF JEFFREY M. SONGER

EXHIBIT C

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. EP 711 (SUB-NO. 1)

RECIPROCAL SWITCHING

VERIFIED STATEMENT OF JEFFREY M. SONGER

My name is Jeff Songer. I am Executive Vice President and Chief Operating Officer of The Kansas City Southern Railway Company (KCSR). The purpose of my statement here is to address briefly the operational and investment impacts that the Surface Transportation Board's (STB's or Board's) proposal in this proceeding would have on KCSR. I will also briefly address the disparate impacts that the rule could have on KCSR vis-à-vis larger carriers.

BACKGROUND

I began my career with KCSR in 2005 in the company's Engineering Department. I have progressed over the past 11 years with KCSR through roles as General Director – Planning, Scheduling and Administration; Assistant Vice President-Engineering and Planning; Vice President and Chief Engineer; and Senior Vice President Engineering and Chief Transportation Officer. I took on my current responsibilities as Executive Vice President and Chief Operating Officer in March 2016.

Prior to joining KCSR, I spent 12 years in the construction and finance industries. I hold a master of business administration and a bachelor of arts in engineering from the University of Kansas.

In my roles as Chief Transportation Officer (CTO) and now Chief Operating Officer (COO) for KCSR, I have overseen the overall operation of KCSR's 10-state, nearly 3,400-mile operating footprint. The company's Engineering, Transportation and Safety, and Mechanical functions all report to me. In turn, I report directly to KCSR's President, Pat Ottensmeyer.

My roles as Chief Engineer, CTO and now COO all involve daily exposure to two areas of KCSR's activities that I believe will be significantly affected by the STB's proposal in this matter - investment in KCSR's facilities and operating those facilities. The next two sections of this statement discuss some of the impacts of the Board's proposal in these areas.

Investment Impacts of the Board's Proposal

The Board's proposal in this proceeding will affect how KCSR decides to invest its available capital. In particular, I expect that investment to maintain and improve yard capacity will have a reduced priority in comparison to other expenditures that offer a more reliable return to the shareholders that provide the capital needed to build and maintain KCSR's system.

It goes without saying that railroading is a capital intensive industry. Every day, railroads operate huge, expensive machines over thousands of miles of privately-financed track. Building and maintaining that track infrastructure is expensive. The switches, rails and ties themselves are expensive. Keeping them operating smoothly and safely requires a work force on KCSR of hundreds of people moving across our network daily, inspecting, maintaining and replacing our physical infrastructure.

Despite being the smallest of the Class I railroads, KCSR has an extensive physical plant. KCSR operates over 2,751 miles of owned, main line track and 637 miles of trackage rights.[1] In addition, KCSR has nearly 600 additional miles of sidings, crossovers, turnouts and way switching tracks.

[1] KCSR also owns 371 miles of other track which is leased to shortline operators.

The capital investments required to maintain these facilities and to expand them to serve shippers better are substantial. In late 2015, KCSR's parent Kansas City Southern (KCS) projected, despite expected reduced shipping volumes, incurring capital expenditures in the $580-$590 million dollar range for 2016. See Exhibit 1, attached hereto.[2] Over 40% of that amount must be spent just to maintain the existing physical infrastructure, while a similar, slightly smaller portion is spent on growth.

I would highlight that for 2016, KCS projected spending 11% of its entire capital budget on a single set of projects designed primarily to serve one shipper's major new facility. This investment is part of a huge, multi-year investment for our company, committed to before the Board's proposal.

In making investment decisions, KCSR must prioritize where to spend its capital. As a general rule, there is never enough capital available to do all of the infrastructure projects that would be projected to produce a sufficient return on investment to justify constructing them. Capital needs for physical infrastructure - track and yards, for example - must compete with investment needs in other areas - computer and communication systems, cars and locomotives, etc. Therefore, each infrastructure project must be assessed individually to estimate what rate of return can be expected from it in terms of increased capacity to handle traffic, increased efficiency in handling traffic, and the like. Expected rate of return is one significant factor which, along with others such as urgency of operational need, goes into determining where a particular infrastructure project falls among competing investment priorities.

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[2] Because KCSR is a wholly-owned subsidiary of KCS, KCSR stock is not publicly traded and data like Exhibit 1 on capital expenditures is usually only made public at the KCS level. While Exhibit 1 is stated on a holding company level, the proportions of KCSR revenue going to maintenance, IT, regulatory (mainly PTC) and growth are roughly the same for KCSR as for KCS as a whole.

Risk is one of the factors that I and the rest of KCSR's executive team consider in setting investment priorities; specifically, what the risk is that a particular infrastructure investment will not yield the financial return that we project. As a simple example, if KCSR is considering whether to spend an amount to expand or reconfigure a yard to increase or improve its capacity to handle the traffic of shippers served from that yard, I want to know what additional traffic KCSR can expect as a result of that investment.

Before I recommend investing capital in expanding yard capacity, I want to know how likely it is that KCSR will earn an acceptable rate of return on that investment, either through direct payment for switching itself or, more likely, through linehaul movements on KCSR's system. Switching itself is capital and labor intensive. It requires large tracts of land with lots of tracks and switches and many employees and locomotives moving cars between trains for pickup, delivery or linehaul movement. KCSR has nearly 700 miles of yard track.[3] Total yard switching hours shown in KCSR's R-1 report for 2015 were 377,276, as compared to only 749,198 hours of road service and train switching.[4] By this measure, 33.5% of KCSR total train hours are spent on yard switching. Since switching costs are generally covered by the linehaul rate, what additional linehaul revenue will result from investments in yard capacity is significant in deciding whether to make those investments.

The Board's current proposal to force carriers to provide switching service to their competitors increases the risk that a KCSR investment in yard capacity will not earn the rate of return KCSR would otherwise expect. Unless KCSR can cover all of the costs of the switching and earn the same contribution toward fixed costs and profitability from the forced switching as it could from the linehaul, the expected return on investments in yard capacity will be reduced.

[3] KCSR 2015 R-1, Schedule 700.

[4] KCSR 2015 R-1, Schedule 755, Lines 117 and 115.

As the smallest of the Class I's, KCSR competes with carriers that are 8 to 10 times its size in terms of track miles, revenues, etc. KCSR's competitors are perfectly capable of investing their own money to earn linehaul revenue. In my view, KCSR should not be required to invest its shareholders' money for its competitors' benefit.

The Board's proposal to set the switching rate that a carrier can charge for forced switching also increases the risk that an investment in yard capacity will not earn the rate of return otherwise expected. The Board's proposal indicates that, if called on to do so, it would set switching rates based on the costs of the switching. That proposal appears to me to depart from the market-based approach to rate-making that was directed by the Staggers Act. That departure would affect KCSR's expectations on what return it could earn on investment in yard capacity.

The vagueness of the Board's proposed rule also increases the risk that an investment in yard capacity will not earn the rate of return otherwise expected. Having read the Board's proposed rules, it is not at all clear to me under what circumstances the Board would order forced switching. Unless KCSR can accurately assess whether the Board would order use of a KCSR investment in yard capacity for the benefit of KCSR's competitors, I would be less certain after the Board's rule took effect than I am now about whether such an investment will earn an acceptable rate of return. In my view, all other things being equal, the greater the uncertainty, the less appealing the investment is.

Because the Board's rules proposed in this proceeding increase the risk that an investment in expansion or efficiency improvement in yards will not earn the otherwise expected rate of return, potential investment in yards would have lower priority in KCSR's budgeting under the Board's proposal than it does now. As previously stated, capital investments must be prioritized, as there seldom if ever is enough capital to do all projects. The risk that an investment will not earn the projected rate of return – because the returns on the investment could be reduced through cost-based rate controls or because the ability to earn linehaul revenue could be diverted from KCSR to its competitors – will make that investment a lower priority than an otherwise equivalent investment with a more solid expectation of return. In short, the Board's rule in its proposed form reduces the likelihood of investing in yard capacity from the likelihood that exists today.

Reduced investment in yards will, in some instances, have negative operational effects, as explained next.

Operating Impacts of the Board's Proposal

De-emphasizing investment in yard and switching capacity will affect the fluidity of network operations. As described above, the Board's proposed rule, if finalized, will chill investment in yard and switching capacity. Reduced investment in switching capacity, as well as forced increases in switching under the Board's rule, will reduce network surge capacity and resiliency, harming overall effectiveness of the rail network. These effects will only worsen the adverse service impacts already described in detail in carrier and industry filings in the earlier proceeding in the Ex Parte 711 ("EP 711") docket.

A large portion of railroad operations occur in and around yards. Road trains are disassembled for delivery of cars to customers. Cars are assembled into road trains for linehaul movement to different cities. Customer cars are held for delivery, and sometimes stored. All of these activities are essential to rail operations, and require investment in yard capacity.

To assure fluid yard operations, it is useful to maintain some amount of surge capacity. Shippers' day-to-day shipping volumes fluctuate due to their ordering practices and sales success. That and many other factors cause the amount of yard activity to fluctuate daily. To accommodate those times when traffic in a yard may be above normal, a certain amount of spare yard capacity is desirable.

The Board's proposed rule would turn a choice to invest in surge capacity in a yard against the investing railroad. An investment in surge capacity in a yard increases the amount of switching that a yard can perform. Theoretically, therefore, an investment in surge capacity could make it more "practicable" for the railroad making that investment to perform forced switching for a competitor's benefit. The potential for the railroad's investment to be turned against it in this manner will reduce incentive to invest in surge capacity in yards.

Surge capacity is crucial to maintaining the fluidity of rail network operations. While not completely analogous, the Board need only look at the service issues that arose in the winter of 2013-2014, where a surge in traffic ran headlong into restricted terminal capacity, particularly in Chicago, to see the effect that a lack of surge capacity could have.

By reducing incentives to invest in yard capacity and to maintain surge capacity, the Board's proposed rule could have a somewhat similar effect across the rail system of reducing network surge capacity. While carriers were able to overcome the Winter 2013-2014 problems through significant investments of resources, a shortage of yard capacity would not be easily overcome as it usually takes months or longer to create.

One other potential consequence of reducing railroads' willingness to invest in yard capacity is that shippers will be forced to take on those costs. The Board's proposed rule does nothing to change the need for switching and for yard capacity; if anything, the additional switching the rule would require could increase those needs. By making it less likely that railroads will invest in switching capacity, while the need for switching continues to grow due to shippers' business growth or some form of forced access, it could fall to shippers to build their own yard capacity as part of their projects. Shippers' need to build their own yard capacity as part of their plant construction or expansion projects would add substantial costs to those projects. It also likely would be less efficient for rail traffic overall, with each shipper having separate yard facilities that would have to be switched individually rather than having shared, centralized, railroad-owned yard facilities. Nevertheless, this could be an outcome of the Board's proposal.

Reduced carrier investment in yards and reduced surge capacity will amplify the operational disruptions and increased costs already described to the Board in the EP 711 proceeding. The Board's broadening of NITL's proposal will amplify those harms as well.

Carrier and industry filings and testimony in EP 711 described extensively the added switching and added operating costs that would result from the NITL proposal. The Board's current proposal offers nothing to diminish those harms. Instead, the Board's proposal now under consideration says that it broadens NITL's proposal.

Because the Board says that it will consider "any relevant factor," and gives no direction on how the Board will weigh or balance any of those factors, it is difficult at this time to determine how much worse a broader proposal will make the operating impacts projected from the NITL proposal. Broadening the NITL proposal, however, cannot reduce the inefficiencies and added costs already projected; it can only make them worse. Coupled with reduced railroad investment in yard capacity and greater inefficiency from decentralizing yard operations to costly shipper-owned yards, the Board's current proposal appears likely to create even more costs and inefficiencies than the original NITL proposal.

The Potential Disproportionate Effect of the Rule on KCSR

Due to the sweeping terms and lack of hard standards for application of the Board's proposed rule, it is impossible to know how much linehaul traffic that KCSR now handles might be ordered to be switched to one of its larger competitors. Nevertheless, even if switching is seldom actually ordered, the downward pressure on rates that the Board seeks to create could disproportionately affect KCSR.

As a largely north-south railroad in the Midwest and Mid-South, KCSR has interchanges with its larger competitors at many KCSR service locations. This is true not only of such major metropolitan areas as St. Louis, Kansas City, Dallas and New Orleans, but also of smaller locations such as Jacksonville, IL; Joplin, MO; Sallisaw, OK; Texarkana, TX; Shreveport, Monroe and Baton Rouge, LA; Jackson and Gulfport, MS. Altogether, KCSR has 56 different published interchange locations with the BNSF, CSX, NS or UP on lines KCSR operates. At many of these locations, KCSR connects with more than one of these larger carriers. There are several more locations at which KCS has interchanges with CN or CP, and not with any of BNSF, CSX, NS or UP.

In some ways, this connectivity serves KCSR well. Roughly 80% of KCSR's traffic is interline traffic that is interchanged with other carriers. KCSR's multiple interchanges with its larger connections enable KCSR to provide alternate routings for shippers. Traffic that KCSR originates and which could be delivered by Carrier A or Carrier B, for example, can often be interchanged to either of them by KCSR.

KCSR's connectivity could be turned against it by the Board's proposal, however. KCSR may have opportunities at its interchanges with other, larger carriers to seek forced switching. But that doesn't place KCSR on an equal footing with its larger connections.

KCSR's larger connections, with 6 to 10 times as much main line as KCSR, have many origins or destinations on their lines that they could market to a shipper as "single-line" service if they could obtain forced switching to the KCSR-served origin or destination. Though it was many years ago and KCSR has grown substantially since then, it was the Board's perception of KCSR's comparatively limited reach (vis-à-vis UP and BNSF) that led the Board to make portions of the Lake Charles, LA area a 2-to-3 carrier location in the UP/SP merger.

Meanwhile, the size of KCSR's system gives it relatively limited access to forced switching of traffic that its larger competitors now linehaul. While the four largest Class I's each operate in most of the states that KCSR serves, KCSR does not operate in most of the states that they serve. That means effectively that while they could compete for significant portions of KCSR's traffic through forced switching, KCSR cannot compete for similar portions of their traffic through the Board's proposal.

Even if the proposed rule merely puts downward pressure on rates and switching is seldom ordered, as one Board member's comment suggests, that pressure will fall disproportionately on KCSR. Because a higher proportion of KCSR's traffic would be subject to non-market-based pressure on rates, KCSR will be disproportionately affected vis-à-vis its larger competitors. This seems particularly unfair because KCSR has not, as I understand it, been subject to a rate complaint in over 25 years.

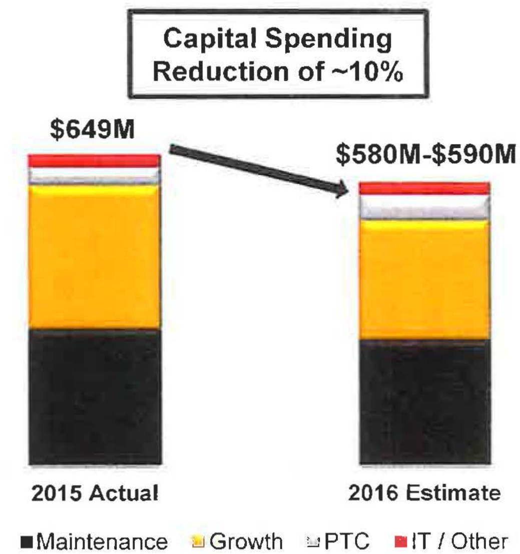
In short, the opportunity to provide additional service created by the Board's proposal is not reciprocal – more of KCSR's traffic could be competitively switched to other railroads than their traffic could be competitively switched by KCSR. For the most part, this would merely be converting existing KCSR interline routes to "single-line" routes on a larger carrier, with the Board, rather than the carriers, choosing where the handoff between KCSR and its larger connection occurs and with the Board, rather than the carriers, possibly establishing the revenue division. Thus, the proposed rule would have a different impact on KCSR than it would on the larger Class I's.

Reduced Capital Spending While Still Investing for Future Growth

Total Capex $580-$590 Million Range

Investing in Growth – Capacity and Equipment

- Significant spending on Sasol Project in 2016 and 2017
- New or expanded sidings to improve line of road fluidity
- Expansion of intermodal and automotive fleets
- Continuation of Sanchez Yard three year, $60M+ expansion project
- Increased PTC spending versus 2015



2016 Capital Expenditures

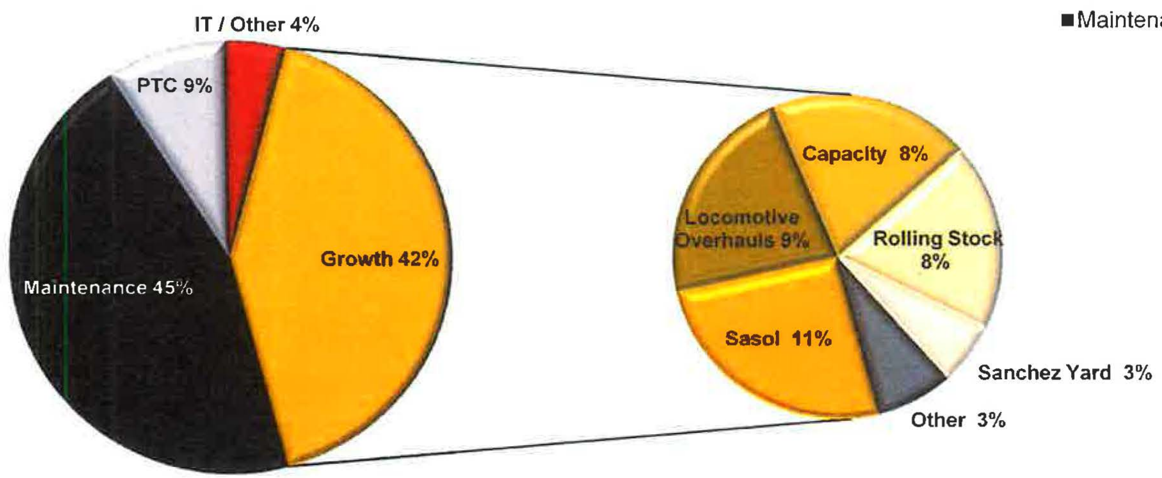


EXHIBIT 1

VERIFICATION

I verify, under penalty of perjury, that the foregoing is true and correct.

Executed on October 26, 2016.

Jeffrey M. Songer
Executive Vice President & Chief Operating Officer
The Kansas City Southern Railway Company

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. EP 711 (SUB-NO. 1)

RECIPROCAL SWITCHING

VERIFIED STATEMENT OF CURTIS M. GRIMM

EXHIBIT D

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. EP 711 (SUB-NO. 1)

RECIPROCAL SWITCHING

VERIFIED STATEMENT OF CURTIS M. GRIMM

I. INTRODUCTION

My name is Curtis M. Grimm, and I am Professor and Charles A. Taff Chair of Economics and Strategy at the University of Maryland, Robert H. Smith School of Business, University of Maryland at College Park. I have been a member of this College since 1983. I received my B.A. in economics from the University of Wisconsin-Madison in 1975 and my Ph.D. in economics from the University of California-Berkeley in 1983. My Ph.D. dissertation investigated competitive impacts of railroad mergers.

In my background, I have extensively addressed public policy issues regarding transportation, including those examined in Interstate Commerce Commission ("ICC") and Surface Transportation Board ("STB") proceedings with regard to rates, competition and competition policies. I have previously been employed by the Wisconsin Department of Transportation, the United States Interstate Commerce Commission, and the Australian Bureau of Transport and Communication, and I have provided consulting services to several other government agencies and private firms regarding transportation issues.

I have previously participated in several ICC and STB proceedings, including transactions involving competing bids by Burlington Northern, Inc. ("BN"), the Soo Line Railroad Company ("Soo Line"), Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("Milwaukee Road"), and the Chicago and North Western Transportation Company ("CNW") for the Green Bay and Western

Railroad ("GBW"); the Burlington Northern/Santa Fe (BN/ATSF) merger; the Union Pacific Corporation ("UP")/Missouri Pacific Corporation ("MP")/The Western Pacific Railroad Company ("WP") merger ("UP/MP/WP merger"); the Wisconsin Central Transportation Corp. ("WCL")/Fox Valley & Western Ltd. ("FV&W") merger ("WCL/FV&W merger"); the UP/Southern Pacific Railroad Corporation ("SP") merger ("UP/SP merger"); The Kansas City Southern Railway Company ("KCSR")/ Gateway Western Railway Company ("GWWR") merger ("KCSR/GWWR merger"); the KCSR/Texas Mexican Railway Company ("Tex Mex")("KCSR/Tex Mex control"); the Canadian Pacific ("CP")/Dakota, Minnesota, and Eastern ("DM&E")("CP/DME merger"); and most recently, the acquisition of a rail line owned by the Delaware & Hudson ("D&H") by Norfolk Southern Railway ("NS"). In all of these cases, I was called upon to evaluate the competitive consequences of the various transactions and have provided testimony in most of them.

My research has involved deregulation, competition policy, competitive interaction and management strategy, with a strong focus on transportation. This research has resulted in over 100 publications, including articles in leading journals such as *Journal of Law and Economics, Transportation Research, Transportation Journal, Logistics and Transportation Review, Academy of Management Journal, Management Science, Strategic Management Journal, and Journal of Management*. More than two dozen publications have dealt specifically with the railroad industry, focusing mainly on deregulation, mergers, and competition issues. I have also co-authored four books or monographs. Further details may be found in the attached curriculum vitae, attached hereto as Appendix 1 to my statement.

In summary, I have extensively researched and evaluated competitive issues within the railroad industry. KCS has asked me to evaluate the Board's proposal to adopt a case-by-case approach in determining whether to require mandatory switching. In preparing my testimony in this proceeding, I have drawn on my experience and have analyzed a number of sources of data, including data provided by Mr. Bengt Mutén, of IHS Global, Inc. (IHS), a provider of technical information, decision-support tools and related services with principal offices in Englewood, Colorado.

II. BACKGROUND AND SUMMARY OF CONCLUSIONS

In a Notice Of Proposed Rulemaking ("NPR") issued by the Surface Transportation Board ("STB" or "Board") on July 27, 2016, the Board invited interested parties to submit comments on its proposal to require an incumbent serving railroad to "switch" the shipper's traffic at unspecified rates to the nearest actual or potential working interchange with another railroad, as long as that working interchange was within a reasonable distance of the facility seeking such access. If a shipper or a competing carrier could meet one of two tests – a "practicable and in the public interest" test or a "necessary to provide competitive rail service" test -- the serving railroad would be required to provide this "switch" to the other railroad. The Board proposed to "limit the availability of reciprocal switching prescriptions to those situations that only involve Class I rail carriers." NPR at 20-21. It excluded Class II and III carriers from either invoking the rule or having the rule invoked against them.

In preparing these comments, I have reviewed the comments of the American Short Line Regional Railroad Association ("ASLRRA") filed in EP 711 on May 30, 2013, and their initial comments filed in EP 705, Competition In The Railroad Industry on April 12, 2011. I share their concerns and support the Board's decision to exclude Class II and III carriers from application of the rules.

The record shows that the failure to exempt Class II and III carriers from application of the rule could result in significant revenue losses as larger carriers cherry-pick the short lines' most profitable traffic. If subjected to the proposed switching rules, Class II and III carriers would have little opportunity to recoup any lost revenue by raising rates on their remaining traffic base because the majority of short lines have relatively short lengths of haul, when compared to the average length of haul of large Class I carriers, and a large majority of their traffic consists of traffic that is subject to intermodal competition. They also have limited market reach, which means that if they were included in the rule, they would have little, if any, ability to benefit from a mandatory switching regime by acquiring traffic from shippers located on a Class I. Accordingly, it was appropriate to exclude them from the rule.

While the proposed rule recognizes the adverse impacts it could have on smaller carriers, and proposes to exempt those carriers from their application, the rule does not exempt other carriers similarly affected, the smaller Class I's. Smaller Class I's, especially KCS and CP(Soo), share some of the same characteristics of the Class II's and III's and are likely to suffer similar harm as the short lines. These smaller Class I's have limited geographic reach, do not have the same pricing power as the largest four (UP, BNSF, CSX, and NS – "Big Four") carriers, and have limited ability to recoup any contribution losses caused by a reduction in their participation in traffic from a line haul carrier to what would essentially be a switching carrier.

III. IN THE AFTERMATH OF THE 1990S RAIL MERGER WAVE, THE INDUSTRY IS NOW DOMINATED BY FOUR LARGE CARRIERS

Rail mergers since the Staggers Act have occurred in waves. As discussed by Grimm and Winston (2000), in the early 1980s, Chessie System and Seaboard Coast Line formed CSX, Norfolk and Western and Southern Railroad formed Norfolk Southern, Missouri Pacific and Western Pacific became part of Union Pacific, and the St. Louis-San Francisco Railroad along with Colorado Southern and Fort Worth Denver formed part of Burlington Northern. The next merger wave began in the mid-1990s. The Burlington Northern-Santa Fe and Union Pacific-Southern Pacific mergers left only two major railroads in the western United States while Norfolk Southern's and CSX's joint acquisition of Conrail left only two major railroads in the east. These four railroads now dwarf smaller Class I's, regional railroads, and short line railroads in the U.S. The smallest of the large Class I's is now has approximately nine times the annual operating revenue of KCS and almost six times as much track.

Railroad	Operating Revenue	Miles of Track

		Operated
UP	$23.975 Billion	31,974
BNSF	$23.036 Billion	32,643
CSX	$12.342 Billion	20,796
NS	$$11.624 Billion	19,759
CNGT	$3.550 Billion	6,091
CP	$1.771 Billion	5,506
KCS	$1.359 Billion	3,339
*Statistics are from 2014		

The impact of the rule as proposed would have a significantly disparate impact between the large carriers and the smaller Class I's, Class II's and Class III's, based on size alone. It is widely accepted in the industry and among most of the railroad economists that there appears to be a competitive balance in the West between UP and BNSF and a similar balance in the East between CSX and NS. The smaller Class I's play a vital competitive role, largely, for example, by providing shippers located on their lines with the option of connections with multiple carriers for interline movements. However, it is generally agreed in the industry that the smaller Class I railroads are significantly different than the Big 4.[1]

IV. THE RATIONALE FOR EXEMPTING SMALLER RAILROADS FROM COMPETITIVE ACCESS RULES IS MANIFEST AND APPLIES EQUALLY TO SMALLER CLASS 1'S, REGIONAL, AND SHORTLINE CARRIERS

While the proposed rule recognizes the potential adverse impacts it could have on smaller carriers, and thus exempts those carriers from their application, the rule does not exempt smaller Class I's, which could be subject to the same disparate impacts as the short lines. Because of the similarity between short lines and smaller Class I's, the Board should likewise exclude such smaller Class I's from application of the rules.

[1] The Board's demarcation between Class I's, II's, and III's is a creature of regulatory rulemaking and is largely revenue based. It does not consider market power, geographic scope, and the competitive roles played by the various carriers. Being a regulatory standard, there is nothing preventing the Board from changing that standard or drawing distinctions amongst the Class I's. For example, see 49 C.F.R. 1180.0(b), establishing a rebuttable presumption that the Board's merger rules should not apply to KCS, the smallest of the Class I's.

A starting point for treating larger and smaller railroads differently is NITL's original 711 petition, which recognized that smaller carriers simply do not have the same market power as the larger carriers:

> The League believes that, due to their size and reach, in general Class I railroads have market power; while the much smaller Class II and III railroads generally do not. The Board is not required to regulate Class II and III railroads in the same way as Class I carriers, and the Board has frequently distinguished between the classes of carriers in a variety of settings. The League believes that it is appropriate at this time and in this setting for the Board to distinguish between Class I versus Class II and III carriers with respect to competitive switching.

NITL Pet. at 40.

Clearly, NITL recognizes that there is an asymmetry between smaller and larger railroads with regard to many aspects of competition and competition policy and this asymmetry justifies excluding the short lines from application of the rules. But what NITL's statement ignores is that this asymmetry also exist between the smaller Class I's and the Big Four.

A. Smaller Class I's Also Lack The Market Power Of The Big Four

The impetus for competitive access from shippers, the creation of the four mega-carriers and shippers' concern about the exercise of market power by these four carriers, simply does not apply to the smaller Class I's. Shippers have long complained about high rates and market power by the Big Four, but certainly not to the same degree regarding smaller railroads, including the smaller Class I's. One only needs to examine the dearth of rate cases filed against smaller Class I's to realize that it is not these carriers who are the primary focus of shipper rate complaints. Indeed, KCS has not had a rate case filed against it for over 25 years. The profile of railroads with regard to the rate complaint cases supports the notion that concerns regarding market dominance and unreasonably high rates have not been directed at KCS or the other smaller Class 1 carriers.

The disparity in market power between smaller Class I's and the larger Class I's can also be somewhat illustrated by the Board's own RSAM calculations. RSAM is an indication of the carrier's ability to differentially price so as to achieve revenue adequacy and recover its unattributable fixed costs.[2] Higher RSAM's indicate that the carrier, when compared to other carriers, has less of an ability to recover its fixed costs from its "potentially captive" shippers. Put simply, a high RSAM generally indicates that a carrier does not have the same ability as those with lower RSAM's to price its services so as to achieve revenue adequacy. Among other reasons, this is due in part to the lack of ability to exercise market power so as to obtain higher contributions.

It is illustrative that the carrier's with the highest RSAM's are also the carriers who have the highest amount of interline traffic.[3] Such carriers simply do not have a lot of routes where they control both the origin and destination, which limits their pricing power.

As the below chart shows,[4] the smaller Class I's all have high RSAM's when compared to the four largest Class I's:

Carrier	4-Year Average RSAM	2014	2013	2012	2011
BNSF	182%	176%	169%	177%	204%
CSXT	265%	254%	269%	267%	269%
GTC	286%	266%	266%	284%	330%
KCS	299%	320%	320%	288%	267%
NS	259%	243%	253%	272%	268%
SOO	327%	350%	223%	397%	338%
UP	186%	171%	186%	182%	207%

The higher a carrier's RSAM percentage, the further it is from achieving revenue adequacy under the Board's standards. This illustrates that compared to the smaller carriers, the larger carriers have a better opportunity to price their services in a manner to achieve revenue adequacy. Such

[2] RSAM ratios are simply the average markups (on movements with R/VC percentages greater than 180) needed by carriers for their existing operations to be revenue adequate." Rate Guidelines—Non-Coal Proceedings, 1995 WL 705171 (served Dec. 1, 1995) at n. 31.

[3] 2015 Freight Commodity Statistics (FCS). The FCS has traffic for all the Class I carriers broken down by local, forwarded, received, and bridged. "Local" traffic constitutes "single-line" traffic. For 2015, the percentage of local, or single-line traffic, was as follows: BNSF (74%); CN (U.S. Ops)(45%); CP (U.S. Ops)(10%); CSX (68%); KCS (U.S. Ops)(13%); NS (60%); and UP (62%).

[4] Simplified Standards for Rail Rate Cases – 2014 RSAM and $R/VC_{>180}$ Calculations, Docket No. EP 689 (Sub-No. 7) (served February 26, 2016).

pricing power is at least one measure of market power and reflects in part that smaller Class I's do not have the same market power as the Big Four. Any reduction in contribution resulting from lost traffic due to the proposed rules would be more difficult for smaller carrier to replace.

B. Smaller Class I Carriers Do Not Have The Same Opportunity To Gain Traffic As The Big Four

Similar to the concerns expressed by the ASLRRA, applying the proposal to all carriers could allow larger carriers to "cherry-pick" the most profitable traffic from the lines of the smaller Class I's. There are several reasons for this. First, compared to the Big Four, smaller Class I's have fewer markets in which they are the only carrier in the market. Thus, these carriers are already subject to intramodal competition from the Big Four, which could be exacerbated by the rule. Second, for those smaller Class I's who have a large number of existing closed stations, a large number of interchanges, and rely upon interchanges with the Big Four for a large proportion of their moves, the opportunity for cherry-picking by the Big Four is simply greater than it is for the smaller Class I's to cherry-pick the traffic of the Big Four. Finally, because the smaller Class I's interline traffic and contribution from that traffic is a larger percentage of their total traffic and contribution, they are more vulnerable to being short hauled through a mandatory switching regime.

To examine the extent to which smaller Class I's already face extensive competition from other Class I carriers, i.e., face the potential for additional cherry picking by existing intramodal competitors, I requested Mr. Mutén, Senior Consultant at IHS Global, Inc. (IHS), to conduct a waybill analysis of the BEA's served by the Class I's.[5] Mr. Mutén's waybill analysis shows there are practically no BEA's where a smaller Class I carrier is the only rail carrier; and thus would be

[5] In my prior merger analysis, BEA's have proven to be a good starting point for examining the extent of intramodal competition and whether a potential transaction might result in a reduction of competition between BEA origins and destinations. See also the methodology employed by the United States Department of Justice in the SF/SP case, *Santa Fe Southern Pacific Corp.--Control--SPT Co.,* 2 I.C.C. 2d 709 (1986), 3 I.C.C. 2d 926 (1987)("SF/SP"); and R.W. Pittman, "Railroads and Competition: The Santa Fe/Southern Pacific Merger Proposal," *The Journal of Industrial Economics*, 1990. The DOJ also used BEA's as a relevant market in analyzing the UP/SP merger.

protected from having the rule invoked against it.[6] This indicates that smaller Class I's are in markets where there is a high degree of intramodal competition. This increases the likelihood that there will be an interchange with another Class I that would be within a "reasonable distance" of the smaller Class I; and thus more opportunities for the shippers, who are served by the smaller Class I carriers, to seek a mandatory switching order to obtain service from the larger Class I.

This potential for cherry picking is even greater for those smaller Class I carriers who have a higher percentage of "closed" stations, yet face a high degree of potential intramodal competition within that BEA and have a high number for potential interchanges. Take KCS for example, 45% of its stations are closed at either origin or destination.[7] Yet, because of its limited size and scope, like short lines, it interlines most of its traffic – approximately 87% if you count KCSR/KCSM interlines or 82.8% if you exclude KCSM interlined traffic. KCS also has a principally north-south orientation, which has resulted in a disproportionately high number of interchanges with the four largest Class I carriers, which primarily run east to west. According to Mr. Songer, KCS's Executive Vice President and COO, KCS has 56 different published interchange locations with the Big Four on lines KCS operates. KCS connects with more than one of the Big Four at many of those locations. There are several more locations at which KCS also has interchanges with CN or CP, and not with any of the Big Four. Altogether, therefore, there are many points across KCS's system at which a shipper or a KCS competitor might seek to invoke the mandatory switching remedy.

KCS does not have a similar ability to invoke mandatory switching against a Big Four carrier. Having the most BEA's served by a large Class I carrier, having a large number of potential interchanges within a reasonable distance, and given that most of its traffic eventually has to be interlined with another carrier, it is my opinion that KCS is much more likely to be the carrier

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[6] I attach this analysis as Table I.

[7] See Table II.

required to short haul itself than the other way around. My cursory review of the networks of the other smaller Class I's shows a similar vulnerability.

In contrast, and as an example, my review of the UP and BNSF networks, who compete against each other in the Western U.S., shows that UP and BNSF have a large number of locations and stations that would not be within a reasonable working distance, which limits their exposure to being short hauled. Where there are such interchanges, the competitive balance between UP and BNSF means that UP would be able to gain as much traffic from BNSF as it loses and vice-a-versa. There simply is not a similar symmetry of opportunity to gain access by mandatory switching between the smaller Class I's and the Big Four. The asymmetry of the rule, therefore, presents smaller Class I carriers with significant economic challenges to compete effectively in a mandatory switching regime, challenges that would not be faced by the larger carriers.

Smaller Class I carriers who are heavily dependent upon interline traffic and who do not have the geographic size and scope, or the pricing power, of the Big Four, simply do not have as many opportunities to gain traffic as the Big Four will have to gain access against them. The result could be that the smaller, interline-dependent carriers could have their most profitable traffic cherry-picked out from under them with little or no opportunity to recover that lost revenue through competition with larger carriers at other points.[8]

A smaller Class I, would have limited opportunity to secure additional traffic from one of the Big Four, so it would have to raise rates or reduce investment and/or costs to maintain the same level of contribution. It is unlikely that a smaller carrier could make up that lost contribution by raising rates on its remaining shippers, as presumably those rates are already optimally set based on market conditions. It is also unlikely that a smaller Class I would be able to make up the revenue through

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[8] Given the somewhat arbitrary nature of a revenue threshold cut-off and the disparity between the Big Four and the smaller Class I carriers, the Board may want to reconsider its standards for how its defines a Class I carrier.

gains made by invoking mandatory switching on the larger carriers. This means that these carriers could find themselves being increasingly limited to performing switch moves, resulting in less contribution available to maintain their networks, and weakening their ability to be competitive forces.

In the end, the smaller carriers are more likely to be short hauled than they are to gain traffic, would have to either cut costs, including reductions in investment or service levels; and/or potentially spin off marginally profitable lines or even pursue abandonment of such lines. Any of these results would result in less competition, not more -- resulting in the precise opposite of the intended effect of the Board's proposal. As a result, the Board must be mindful that the proposal, if applied to smaller Class I's who have a significant amount of interline traffic, could have a different impact on them as opposed to significantly larger carriers.

V. CONCLUSION

The solution to this asymmetry is to treat the smaller Class I railroads like the short lines, provide and provide an exemption for such carriers. The Board has a strong basis for exempting such smaller Class I railroads from the proposed competitive access rules. The fundamental asymmetry between railroads of disparate size means that the access rules could exacerbate the competitive imbalance between the larger and smaller Class I railroads, to the detriment of shippers and the public interest.

TABLE I

BEAs served by a single class I carrier (served being defined as originating or terminating any traffic, on their own or through haulage rights)

Source: 2014 Carload Waybill Sample

BEA	BEA Name	Carrier
145	Great Falls, MT	BNSF
154	Flagstaff, AZ	BNSF
156	Albuquerque, NM	BNSF
161	San Diego, CA	BNSF
2	Portland, ME	CN
58	Northern Michigan, MI	CN
59	Green Bay, WI	CN
60	Appleton, WI	CN
76	Greenville, MS	CN
25	Wilmington, NC	CSXT
32	Fort Myers, FL	CSXT
33	Sarasota, FL	CSXT
34	Tampa, FL	CSXT
81	Pensacola, FL	CSXT
92	Fayetteville, AR	KCS
14	Salisbury, MD	NS
42	Asheville, NC	NS
148	Idaho Falls, ID	UP
149	Twin Falls, ID	UP
150	Boise City, ID	UP
159	Tucson, AZ	UP

TABLE II

Source: Carrier/Reciprocal Switch ("SCRS") database maintained by Railinc, Corp.
2015 Data

Row Labels	Closed	% of Closed	Local	% of Local	Open to Switching	% of Open	Restricted	% of Restricted Station	Total # Served Stations
BNSF	2,024	28%	2,787	39%	1,558	22%	858	12%	7,227
CN	1,398	13%	4,232	39%	1,371	13%	3,935	36%	10,936
CPRS	793	27%	537	18%	888	30%	754	25%	2,972
CSXT	3,024	43%	3,098	44%	598	8%	394	6%	7,114
KCS	535	45%	324	27%	323	27%	18	2%	1,200
NS	2,325	27%	2,885	34%	1,550	18%	1,733	20%	8,493
UP	6,281	56%	3,513	31%	737	7%	691	6%	11,222
Grand Total	16,380		17,376		7,025		8,383		49,164

VERIFICATION

I verify, under penalty of perjury, that the foregoing is true and correct.

Executed on October 26, 2016.

Curtis M. Grimm
Professor and Charles A. Taff Chair of Economics and Strategy at the University of Maryland, Robert H. Smith School of Business, University of Maryland at College Park

3/16

CURTIS M. GRIMM

PRESENT POSITION

Charles A. Taff Chair of Economics and Strategy; Robert H. Smith School of Business; University of Maryland; College Park, MD 20742; Named as a University of Maryland Distinguished Scholar-Teacher, 2010-2011.

(Appointed as Assistant Professor, August, 1983; promotion to Associate Professor, August, 1989; promotion to Full Professor, August, 1993; promotion to Dean's Professor, July 2003; promotion to Chaired Professor, September 2012)

Served as Department Chair from December 1994-July 2003.

EDUCATION:

Institution	Degree	Date	Field
University of California Berkeley	Ph.D.	6/83	Economics Major Areas: Industrial Organization, Transportation and Econometrics/Statistics.

Ph.D. Dissertation: Strategic Motives and Competitive Effects in Railroad Mergers (Ted Keeler, Advisor)

Freiburg University Freiburg, West Germany		9/76 – 9/77	International Studies

Recipient of Rotary International Fellowship

University of Wisconsin Madison	B.A.	5/75	Economics (with honors)

Recipient of Dean's Prize for Outstanding Scholastic Achievement, awarded to the two top College of Letters & Science graduates

PREVIOUS EMPLOYMENT:

Visiting Scholar, Institute for Business Innovation, Haas School of Business, University of California, Berkeley, Oct-Dec 2010.

Visiting Research Fellow, Bureau of Transport and Communication Economics, Canberra, Australia, July 1991 - January 1992.

Economist, Office of Policy and Analysis, Interstate Commerce Commission, Washington, D.C., January 1981 - December 1981.

Assistant to the Chief of Intercity Transport Development, Planning Division, Wisconsin Department of Transportation, Madison, October 1977 - August 1978 and November 1975 - July 1976.

AIESEC (International Association of Students in Economics and Commerce) Trainee, Swedish State Power Board, June 1975 - September 1975.

PUBLICATIONS:

Books

1) C. Winston, T. Corsi, C. Grimm and C. Evans, The Economic Effects of Surface Freight Deregulation, Brookings Institution, Washington, D.C., 1990.

2) Smith, K., C. Grimm and M. Gannon, The Dynamics of Competitive Strategy, Sage Publishing, Newbury Park, CA, 1992.

3) Grimm, C. and K. Smith, Strategy as Action: Industry Rivalry and Coordination, West's Strategic Management Series, West Publishing Company, 1997.

4) Grimm, C., H. Lee and K. Smith, Strategy as Action: Competitive Dynamics and Competitive Advantage, Oxford University Press, New York, 2006.

Articles in Refereed Journals

5) Grimm, C. and R. Harris, "Structural Economics of the U.S. Rail Freight Industry: Concepts, Evidence, and Merger Policy Implications," Transportation Research Vol. 17A, No. 4, 1983, pp. 271-281.

6) Grimm, C., "An Evaluation of Economic Issues in the UP-MP-WP Railroad Merger," Logistics and Transportation Review Vol. 20-3, 1984, pp. 239-259.

7) Fanara, P. and C. Grimm, "Stand-Alone Costs: Use and Abuse in Determining Maximum U.S. Railroad Rates," Transportation Research Vol. 19A, No. 4, July 1985, pp. 297-303.

8) Grimm, C. and R. Harris, "The Effects of Railroad Mergers on Industry Performance and Productivity, Transportation Research Record 1029, 1985, pp. 9-17.

9) Grimm, C., K. Phillips and L. Selzer, "The Economics of Coal Transportation: Implications for Railroad and Shipper Strategies," Transportation Research Record 1061, 1985, pp. 14-26.

10) Grimm, C. and K. Smith, "The Impact of Rail Regulatory Reform on Rates, Service Quality, and Management Performance: A Shipper Perspective," Logistics and Transportation Review Vol. 22-1, 1986, pp. 57-68.

11) Grimm, C., "Excess Branch Line Capacity in the U.S. Railroad Industry: A Simulation Model Approach," Logistics and Transportation Review Vol. 22-3, 1986, pp. 223-240.

12) Barbera, A., C. Grimm, K. Phillips, and L. Selzer, "Railroad Cost Structure - Revisited," Journal of the Transportation Research Forum Vol. 28, No. 1, 1987, pp. 237-244.

13) Corsi, T. and C. Grimm, "Changes in Owner-Operation Use, 1977-1985: Implications for Management Strategy," Transportation Journal Vol. 26-3, Spring 1987, pp. 4-16.

14) Smith, K. and C. Grimm, "Environmental Variation, Strategic Change and Firm Performance: A Study of Railroad Deregulation," Strategic Management Journal Vol. 8-4, July/August 1987, pp. 363-376.

15) Grimm, C., J. Kling and K. Smith, "The Impact of U.S. Rail Regulatory Reform on Railroad Management and Organizational Structure," Transportation Research Vol 21A, No. 2, March 1987, pp. 87-94.

16) Corsi, T. and C. Grimm, "Mobility Barriers in the Motor Carrier Industry, Journal of the Transportation Research Forum Vol. 28, No. 1, 1987, pp. 302-309.

17) Kling, J. and C. Grimm, "Microcomputer Use in Transportation and Logistics: A Literature Review with Implications for Educators," Journal of Business Logistics Vol. 9, No. 1, 1988, pp. 1-18 (also published in the Proceedings of the 1987 Transportation and Logistics Educators Conference).

18) Grimm, C. and R. Harris, "A Qualitative Choice Analysis of Rail Routings: Implications for Vertical Foreclosure and Competition Policy," Logistics and Transportation Review Vol. 24, No. 1, March 1988, pp. 49-67.

19) Smith, K., M. Gannon, C. Grimm, and T. Mitchell, "Decision Making Behavior in Smaller Entrepreneurial and Larger Professionally Managed Firms," Journal of Business Venturing Vol. 3, No. 3, Summer 1988, pp. 223-232 (earlier version published in 1987 Southern Academy of Management Proceedings).

20) Grimm, C., K. Phillips and L. Selzer, "The Impact of Rail Rationalization on Traffic Densities," Transportation Research Record 1177, 1988, pp. 1-5.

21) Grimm, C., K. G. Smith, M. Gannon and K. A. Smith, "The Importance of Strategic Planning in the Wake of Deregulation: A Study of the Travel Agent Industry," Journal of the Transportation Research Forum Vol. 29, No. 1, 1988, pp. 44-49.

22) Smith, K., C. Grimm, M. Chen and M. Gannon, "Predictors of Response Time to Competitive Strategic Actions: Preliminary Theory and Evidence," Journal of Business Research 18, 1989, pp. 245-258.

23) Corsi, T. and C. Grimm, "ATLFs: Driving Owner-Operators into the Sunset," Journal of the Transportation Research Forum Vol. 29, No. 2, 1989, pp. 285-290.

24) Grimm, C. and T. Corsi and J. Jarrell, "U.S. Motor Carrier Cost Structure under Deregulation," Logistics and Transportation Review Vol. 25, No. 2, Sept 1989, pp. 231-250.

25) Grimm, C., K. Smith and R. Blankinship, "Post-Deregulatory Strategic Performance of the Railroad Industry," Journal of Business Strategies Vol. 6, No. 1, Spring 1989. pp. 33-41.

26) Corsi, T. and C. Grimm, "Strategies and Performance in the Truckload General Freight Segment Before and After Deregulation," Journal of the Transportation Research Forum Vol. 30, No. 1, 1989, pp. 92-97.

27) Smith, R., T. Corsi and C. Grimm, "Motor Carrier Strategies and Performance," Transportation Research Vol. 24A, No. 3, May 1990, pp. 201-210.

28) Kling, J., C. Grimm and T. Corsi, "Hub-Dominated Airports: An Empirical Assessment of Challenger Strategies," The Logistics and Transportation Review Vol. 27, No. 3, 1991.

29) Grimm, C. and K. Smith, "Management and Organizational Change: A Note on the Railroad Industry," Strategic Management Journal Vol 12, 1991, pp. 557-562.

30) Smith, K. and C. Grimm, "A Communication Model of Competitive Response Timing," Journal of Management 17(1), 1991, pp. 5-23.

31) Corsi, T., C. Grimm, K. Smith and R. Smith, "Deregulation, Strategic Change, and Firm Performance Among LTL Motor Carriers," Transportation Journal Vol. 31, No. 1, 1991, pp. 4-13.

32) Smith, K., C. Grimm, M. Gannon, and M. Chen, "Organizational Information Processing, Competitive Responses and Performance in the U.S. Domestic Airline Industry," Academy of Management Journal 34(1), 1991 pp. 60-85.

33) Kling, J., C. Grimm and T. Corsi, "Strategies of Challenging Airlines at Hub-Dominated Airports," Journal of the Transportation Research Forum Vol. 31, No. 2, 1991, pp. 359-370.

34) Guthrie, J., C. Grimm, and K. Smith, "Environmental Change and the Top Management

Teams," Journal of Management Vol. 17, No. 4, 1991, pp. 735-748.

35) Smith, R., T. Corsi, C. Grimm, and K. Smith, "The Impact of LTL Motor Carrier Size on Strategy and Performance," Logistics and Transportation Review Vol. 28, No. 2, 1992, pp. 129-145.

36) Emerson, C., C. Grimm and T. Corsi, "The Advantage of Size in the U.S. Trucking Industry: An Application of the Survivor Technique," Journal of the Transportation Research Forum, 1992, Vol. 32, No. 2, pp. 369-378.

37) Chen, M., K. Smith and C. Grimm, "Action Characteristics as Predictors of Competitive Responses," Management Science Vol. 38, No. 3, 1992, pp. 439-455.

38) Gannon, M., K. Smith and C. Grimm, "An Organizational Information-Processing Profile of First-Movers," Journal of Business Research 25, 1992, pp. 231-241.

39) Corsi, T., C. Grimm and J. Feitler, "The Impact of Deregulation on LTL Motor Carriers: Size, Structure, and Organization," Transportation Journal Vol. 32, No. 2, 1992, pp. 24-31.

40) Grimm, C., C. Winston and C. Evans, "Foreclosure of Railroad Markets: A Test of Chicago Leverage Theory," Journal of Law and Economics Vol. XXXV, October 1992, pp. 295-310.

41) Grimm, C., T. Corsi, and R. Smith, "Determinants of Strategic Change: A Discrete Choice Analysis," Transportation Journal Vol. 32, No. 4, 1993, pp. 56-62.

42) Grimm, C., and H. Sapienza, "Determinants of Shortline Railroad Performance," Transportation Journal Vol. 32, No. 3, 1993, pp. 5-13.

43) Grimm, C., and H. Milloy, "Australian Domestic Aviation Deregulation: Impacts and Implications," Logistics and Transportation Review, Vol. 29, No. 3, 1993, pp. 259-273.

44) Guthrie, J., C. Grimm and K. Smith, "Environmental Change and Management Staffing: A Reply," Journal of Management Vol. 19, No. 4, 1993, pp. 889-896.

45) Xu, K., R. Windle, C. Grimm and T. Corsi, "Reevaluating Returns to Scale in Transportation," Journal of Transport Economics and Policy, September, 1994, pp. 275-286.

46) Schomburg, A., C. Grimm and K. Smith, "Avoiding New Product Warfare: The Role of Industry Structure," Advances in Strategic Management, P. Shrivastava, A. Huff and J. Dutton, eds, JAI Press, Vol. 10B, 1994, pp. 145-173.

47) Young, G., K. Smith and C. Grimm, "Austrian and Industrial Organization Perspectives on Firm-Level Competitive Activity and Performance," Organization Science, Vol. 7, No. 3, May-June 1996, pp. 243-254.

48) Emerson, C. and C. Grimm, "Logistics and Marketing Components of Customer Service: An Empirical Test of the Mentzer, Gomes and Krapfel Model," International Journal of Physical Distribution and Logistics Management Vol. 26, No. 8, 1996, pp. 29-42.

49) Smith, K, G. Young, M. Becerra, and C. Grimm, "An Assessment of the Validity of Competitive Dynamics Research," Best Paper Proceedings, Academy of Managment, August, 1996.

50) Sapienza, H. and C. Grimm, "Founder Characteristics, Start-Up Porcess and Strategy/Structure Variables as Predictors of Shortline Railroad Performance," Entreprenuership Theory and Practice Vol. 22, No. 1, Fall, 1997.

51) Feitler, J., T. Corsi and C. Grimm, "Measuring Firm Strategic Change in the Regulated and Deregulated Motor Carrier Industry: An Eighteen Year Evaluation," The Logistics and Transportation Review Vol. 33E, No. 3, September 1997.

52) Smith, K., C. Grimm, G. Young and S. Wally, "Strategic Groups and Rivalrous Firm Behavior," Strategic Management Journal Vol. 18, No. 2, February 1997.

53) Young, G., K. Smith, and C. Grimm, "Multimarket Contact, Resource Heterogeneity, and Rivalrous Firm Behaviour," Best Paper Proceedings, Academy of Management, August 1997.

54) Feitler, J., T. Corsi and C. Grimm, "Strategic and Performance Changes Among LTL Motor Carriers," Transportation Journal, Vol. 37, No. 4, pp. 5-12, Summer 1998.

55) Emerson, C. and C. Grimm, "The Relative Importance of Logistics and Marketing Customer Service: A Strategic Perspective," Journal of Business Logistics Vol. 19, No. 1, 1998, pp. 29-42.

56) Ferrier, W., K. Smith and C. Grimm, "The Role of Competitive Action in Market Share Erosion and Industry Dethronement: A Study of Industry Leaders and Challengers," Academy of Management Journal Vol. 42, No. 4, pp. 372-388, August 1999. WINNER OF AWARD FOR BEST PAPER PUBLISHED IN ACADEMY OF MANAGEMENT JOURNAL IN 1999.

57) Grimm, C and J. Plaistow, "Competitive Effects of Railroad Mergers," Journal of the Transportation Research Forum Vol. 38, No. 1, pp. 64-75, 1999.

58) Lee, H., K. Smith, C. Grimm and A. Schomburg, "Timing, Order and Durability of New Product Advantages with Imitation," Strategic Management Journal Vol. 21-1, 2000, pp. 23-30.

59) Carter, C., R. Kale and C. Grimm, "Environmental Purchasing and Firm Performance," Transportation Research Part E: Logistics and Transportation Review, Vol. 36, 2000, pp. 219-228.

60) Young, G., K. Smith, C. Grimm and D. Simon, "Multimarket Contact and Resource Heterogeneity: A Competitive Dynamic Perspective, " Journal of Management 26 (6), 2000, 1217-1236.

61) Shaffer, B. T. Quasney and C. Grimm, "Firm Level Performance Implications of Nonmarket Actions, " Business and Society Vol. 39, No. 2, June 2000.

62) Johnson, C., R. Krapfel, Jr. and C. Grimm, "A Contingency Model of Supplier-Reseller Satisfaction Perceptions in Distribution Channels, " Journal of Marketing Channels Vol. 8, No. ½ 2001, pp. 65-90.

63) Smith, K, C. Grimm and W. Ferrier, "King of the Hill: Dethroning the Industry Leader," Academy of Management Executive, Vol. 15, Number 2, May 2001, pp. 59-70.

64)Ferrier, W., C. MacFhionnlaoich, K. Smith and C. Grimm, "The Impact of Performance Distress on Aggressive Competitive Behavior: A Reconciliation of Conflicting Views" Managerial & Decision Economics, Special Issue on "The Dynamics, Context, and Consequences of Strategy" Vol. 23, Issue 4-5, 2002, pp. 301-316.

65) Patterson, K., C. Grimm and T. Corsi, "Adopting New Technologies for Supply Chain Management," Transportation Research Part E: Logistics and Transportation Review Vol. 39E, No. 2, March 2003, pp. 95-121.

66) Lee, H., Smith, K. G. & Grimm, C. M. "The effect of new product radicality and scope on the extent and speed of innovation diffusion." Journal of Management, Vol. 29 (5), October 2003, pp. 753-768. WINNER OF AWARD FOR BEST PAPER PUBLISHED IN JOURNAL OF MANAGEMENT IN 2003.

67) Patterson, K., C. Grimm and T. Corsi,"Diffusion of Supply Chain Technologies," Transportation Journal Vol. 43, No. 3, Summer 2004, pp. 5-23.

68) Cheng, L. and C. Grimm, "The Application of Empirical Strategic Management Research to Supply Chain Management," Journal of Business Logistics Vol. 27, No. 1, 2006, pp. 1-56.

69) Basdeo, D., K. Smith, C. Grimm, V. Rindova and P. Derfus, "The Impact of Market Actions on Firm Reputation" Strategic Management Journal Vol. 27, No. 12, December 2006, pp. 1205-1219.

70) Cantor, D., T. Corsi and C. Grimm, "Safety Technology Adoption Patterns in the U.S. Motor Carrier Industry," Transportation Journal, Vol. 45, No. 3, Summer 2006, pp. 20-45.

71) Johnson, Carol J., C. Grimm and V. Blome, "Customer Service in the Baltic Region: An Exploratory Analysis," The International Journal of Logistics Management, Vol. 18, No. 2, 2007, pp. 157-173.

72) Derfus, P., P. Maggitti, C. Grimm, and K. Smith, "The Red Queen Effect: Competitive Actions and Firm Performance," Academy of Management Journal Vol. 51, No. 1, 2008, pp. 61-80.

73) Cantor, D., T. Corsi and C. Grimm, "Determinants of Motor Carrier Safety Technology

Adoption," Transportation Research Part E: Logistics and Transportation Review, Volume 44E, No.5, September 2008.

74) Han, C., T. Corsi, and C. Grimm, "Why Do Carriers Use Owner Operators in the U.S. For-Hire Trucking Industry?" Transportation Journal, Vol. 47, No. 3, Summer 2008, pp. 22-35.

75) Grimm, C., "The Application of Industrial Organization Economics to Supply Chain Management Research," Journal of Supply Chain Management, Volume 44, No. 3, 2008 (invited note).

76) Cantor, D., T. Corsi and C. Grimm , "Do Electronic Logbooks Contribute to Motor Carrier Safety Performance?" Journal of Business Logistics, Vol. 30, No. 1, 2009.

77) Cantor, D., T. Corsi, C. Grimm and K. Ozpolat, "A Driver Focused Truck Crash Prediction Model" Transportation Research Part E: Logistics and Transportation Review, Vol. 46, 2010, pp. 683-692.

78) Britto, R., T. Corsi and C. Grimm, "The Relationship between Motor Carrier Financial Performance and Safety Performance," Transportation Journal, Vol. 49, No. 4, Fall 2010, pp. 42-51.

79) Corsi, T., C. Grimm, D. Cantor and D. Sienicki, "Safety Performance Differences Between Unionized and Non-Union Motor Carriers," Transportation Research Part E: Logistics and Transportation Review Vol. 48, No. 4, 2012, pp. 807-816.

80) Cheng, L., D. Cantor, M. Dresner, and C. Grimm, "The Impact of Contract Manufacturing on Inventory Performance: An Examination of United States Manufacturing Industries," Decision Sciences Journal 43 (5), 2012, pp. 889-928.

81) Bridoux, F, K. Smith and C. Grimm, The Management of Resources: Temporal Effects of Different Types of Actions on Performance," Journal of Management Volume 39, May 2013, pp. 928-957.

82) Cantor, D, H. Celebi, T. Corsi and C. Grimm, "Do owner–operators pose a safety risk on the nation's highways?" Transportation Research Part E: Logistics and Transportation Review Vol. 59, Nov 2013, pp. 34-47.

83) Ribbink, D. and C. Grimm, "The impact of cultural differences on buyer-supplier negotiations: An experimental study," Journal of Operations Management Vol. 32 (3), March 2014, pp. 114-126.

84) Corsi, T., C. Grimm, D Cantor and D. Wright, "Should Smaller Commercial Trucks be Subject to Safety Regulations?" Transportation Journal, Vol. 53, No. 2, 2014, pp. 117-143.

85) Grimm, C., A. Knemeyer, M. Polyviou, and X. Ren, "Supply Chain Management Research in Management Journals: A Review of Recent Literature (2004-2013)," International Journal of Physical Distribution and Logistics Management Volume 45 (5) 2015, pp. 404-458.

86) Cheng, L., D. Cantor, C. Grimm and M. Dresner, "Supply Chain Drivers of Organizational Flexibility – A Study of U.S. Manufacturing Industries, Journal of Supply Chain Management Vol. 50(4), October 2014, pp. 62-75.

Cantor, D., T. Corsi, C. Grimm, and P. Singh, "Technology, Firm Size, and Safety: Theory and Empirical Evidence from the U.S. Motor Carrier Industry," Transportation Journal, Vol. 55, No. 2 (2016), pp. 150-167.

Articles in Edited Volumes

87) Grimm, C., "Horizontal Competitive Effects in Railroad Mergers," Research in Transportation Economics, Vol. 2, Theodore E. Keeler, editor, JAI Press, 1985, pp. 27-53.

88) Harris, R. and C. Grimm, "Revitalization of the U.S. Rail Freight Industry: An Organizational Perspective," International Railway Economics, K.J. Button and D.E. Pitfield eds., Gower Publishing Company, 1985, pp. 49-84.

89) Grimm, C. and J. Holcomb, "Choices Among Encompassing Organizations: Business and the Budget Deficit," Business Strategy and Public Policy, David Beam, Al Kaufman, and Alfred Marcus, eds., Quorum Books, New York, 1987, pp. 105-118.

90) Smith, K., C. Grimm, and M. Gannon, "Competitive Moves and Responses Among High Technology Firms," Handbook of Business Strategy: 1989-1990, Harold E. Glass, ed., Warren, Gorham and Lamont, N.Y., N.Y., 1990, pp. 31-1 through 31-11.

91) Grimm, C. and G. Rogers, "Liberalization of Railroad Policy in North America," Transportation Deregulation: An International Perspective, K. Button and D. Pitfield, eds., Macmillan, London, 1991.

92) Grimm, C. and R. Harris, "Access and Competition Policy in the U.S. Rail Freight Industry: Potential Applications to Telecommunications," Sustaining Competition in Network Industries through Regulating and Pricing Access, D. Gabel and D. Weiman, eds., Kluwer Publishing, Boston, 1998.

93) Grimm, C. and R. Windle, "Regulation and Deregulation in Surface Freight, Airlines and Telecommunications," in Regulatory Reform and Labor Markets, J. Peoples, ed., Kluwer Academic Publisher, Boston, 1998.

94) Grimm, C. and C. Winston, "Competition in the Deregulated Railroad Industry: Source, Effect and Policy Issues," in S. Peltzman and C. Winston, editors, Deregulation of Network Industries: The Next Steps, Brookings, Washington, D.C. 2000, pp. 41-72.

95) Dresner, M. and C. Grimm, "Public Policy and Logistics," in Handbook of Logistics and Supply-Chain Management, edited by A.M. Brewster, K.J. Button, and D.A. Hensher, Pergamon, Amsterdam, 2001.

96) Ferrier, W., K. Smith and C. Grimm, "The Role of Competitive Action in Market Share Erosion and Industry Dethronement: A Study of Industry Leaders and Challengers," published in Selected Collection of Award Winning Papers in Academy of Management Journal, Anne S. Tsui, ed., Peking University Press, 2006. (This book is a collection of papers which had received a best paper award in AMJ or AMR.)

97) Grimm, C. "Merger Analysis in the Post-Staggers Railroad Industry," chapter in Competition Policy and Merger Analysis in Deregulated and Newly Competitive Industries, P. Carstensen and B. Farmer, eds., Edgar Elgar Publishing, Northampton, MA 2008.

Articles in Journals with Internal Review Boards

98) Grimm, C. and R. Harris, "The Financial Performance and Prospects of Railroads in the South and Southwest," Texas Business Review 56 (6), November/December 1982, pp. 257-262.

99) Grimm, C. and R. Harris, "Vertical Foreclosure in the Rail Freight Industry: Economic Analysis and Policy Prescriptions," ICC Practitioners' Journal 50 (5), July/August 1983, pp. 508-531.

100) Corsi, T. and C. Grimm, "Transportation Education in the 1980's: An Examination of Teaching Materials," Transportation Practitioners' Journal 52 (1), Fall 1984, pp. 27-39.

101) Grimm, C. and J. Kling, "Integrating Microcomputers into a Transportation and Logistics Curriculum," Defense Transportation Journal Vol. 44, No. 5, October 1988, pp. 14-22.

Articles in Proceedings (other than those listed above)

Grimm, C., "Public Interest Evaluation of Recent Rail Mergers," 1981 Eastern Transportation Law Seminar Papers and Proceedings, Association of ICC Practitioners, Washington, D.C., pp. 171-176.

Grimm, C., "Promoting Competition in the Railroad Industry: A Public Policy Analysis," Transportation Research Forum Proceedings, 1984, pp. 222-227.

Grimm, C. and K. Smith, "Impact of Deregulation on Railroad Strategies and Performance," Transportation Research Forum Proceedings, 1985, pp. 540-544.

Corsi, T., C. Grimm and R. Lundy, "ICC Exemptions of Rail Services: Summary and Evaluation," Transportation Research Forum Proceedings, 1985, pp. 86-92.

Corsi, T., C. Grimm and R. Smith, "Motor Carrier Strategies in a Changing Environment: An Empirical Analysis," Transportation Research Forum Proceedings, 1986, pp. 177-180.

Grimm, C., K. Smith and R. Blankinship, "Railroad Strategies and Performance: An Exploratory Study," 1987 Eastern Academy of Management Proceedings, pp. 25-28.

Smith, E., M. Gannon, C. Grimm and G. Young, "Competitive Advantage in Diverse Industries," Proceedings of the Second Biennial High Technology Conference, University of Colorado, Boulder, Colorado, January 1990.

Grimm, C., "The Impact of Entry and Concentration in Australian Aviation: A Test of Contestability Theory," Transportation Research Forum Proceedings, 1992.

Sapienza, H. and C. Grimm, "The Importance of Founder, Start-Up Process, and Structural Variables in Entrepreneurial Firms: A Study of the Shortline Railroad Industry," Frontiers of Entrepreneurship Research, 1994.

Other Publications, Reports and Monographs

Grimm, C., "Combining Scholarly Research with Public Policy Evaluation," ITS Review, Vol. 5, No. 2, Institute of
Transportation Studies, University of California, February 1982.

Grimm, C., "Strategic Motives and Competitive Effects in Railroad Mergers: A Public Policy Analysis," Dissertation Series, Institute of Transportation Studies, University of California, August 1983 (UCB-ITS-DS-83-1).

Grimm, C., "Preserving and Promoting Rail Competition," Report to the National Industrial Transportation League, 1984.

Grimm, C., "Econometric Techniques to Estimate Rail Costs," Report to the Railroad Accounting Principles Board, General Accounting Office, Washington, D.C., October 1985.

Roberts, M., T. Corsi and C. Grimm, "Benefit-Cost Analysis of Weight Limit Exemption for Vehicles Carrying International Freight in the Route 50 Corridor," Study Prepared for the State Highway Administration, State of Maryland, February 1988.

Deregulation of Domestic Aviation: The First Year, Bureau of Transport and Communication Economics, Australian Government Publishing Service, Canberra, Australia, 1991 (lead author).

Cambridge Systematics; Leeper, Cambridge and Campbell; T. Corsi, and C. Grimm, "A Guidebook for Forecasting Freight Transportation Demand," NCHRP Report 388, National Academy Press, Washington, D.C. 1997.

CONTRACTS, GRANTS, AND AWARDS:

Co-Principal Investigator, U.S. DOT Federal Motor Carrier Safety Administration cooperative research agreement, 2005-2013.

Smith School Summer Research Award, 2005-present.

Course Development Grant, Joint MS Program in Telecommunications.

University of Maryland Center for International Education and Research (CIBER) Research Award, 1991.

University of Maryland Dingman Center for Entrepreneurship Research Award, 1990.

Small Business Administration, Small Business Development Center, University of Maryland. From 1985 - 1989, Ken Smith, Martin Gannon and I received funding to establish Center for the counseling and training of small business managers. We also conducted research on strategic management of small businesses, including travel agencies and electronic firms. (Amount: $200,000)

Department of Education Business and International Education Program. During 1988 and 1989, I was part of a team which received a two-year grant for curriculum development, research and professional outreach. The program involves collaboration with the Maryland Port Authority on research, outreach and internships. (Amount: $110,000).

Maryland Department of Transportation. During 1987/88 I worked with Tom Corsi and Merrill Roberts on a contract to study the impact of exempting Eastern Shore export container traffic from the 80,000 pound highway weight limitation. (Amount: 35,000).

University of Maryland Grant to Integrate Computer Use into the Classroom, 1985.

University of Maryland General Research Board Summer Research Award, 1984.

PAPER PRESENTATIONS:

"Public Interest Evaluation of Recent Rail Mergers," presented at the 11th Association of ICC Practitioners' Eastern Transportation Law Seminar, October 1981.

"Stand-Alone Costs: Use and Abuse in Railroad Maximum Rate Determination," presented at the Eastern Economics Association Annual Meeting, March 1984 (with Philip Fanara).

"Promoting Competition in the Railroad Industry," presented at the Transportation Research Forum Annual Meeting, October 1984.

"The Politics of the Budget Deficit and the Role of Political Interest Groups," presented at the Annual Meeting of the Association for Public Policy Analysis and Management, October 1984 (with John Holcomb).

"Impact of the Staggers Act on Rates and Shipper Quality: Role of Shipper Size and Competition," presented at the American Economics Association/Transportation and Public Utilities Group Annual Meeting, December 1984 (with Ken G. Smith).

"The Effects of Railroad Mergers on Industry Performance and Productivity," Transportation Research Board Conference on Rail Productivity, University of Illinois, June 1985, (with Robert G. Harris).

"Environmental Variation, Strategic Change and Firm Performance: A Study of Railroad Deregulation," presented at the Annual Meeting of the Academy of Management, August 1985 (with Ken G. Smith).

"Management Characteristics, Strategy, and Strategic Change," presented at the Strategic Management Society Annual Meeting, Barcelona, Spain, October 1985 (with Ken G. Smith).

"Impact of Deregulation on Railroad Strategies and Performance," presented at the Transportation Research Forum Annual Meeting, November 1985 (with Ken G. Smith).

"ICC Exemptions of Rail Services: Summary and Evaluation," presented at the Transportation Research Forum Annual Meeting, November 1985 (with Thomas M. Corsi and Robert Lundy).

"Excess Branchline Capacity in the Railroad Industry," presented at the Transportation Research Board Annual Meeting, January 1986.

"The Economics of Coal Transportation: Implications for Railroad Shipper Strategies," presented at the Transportation Research Board Annual Meeting, January 1986 (with Les Selzer and Kent Phillips).

"The Organization as a Reflection of its Top Managers: An Empirical Test," presented at the Annual Meeting of the Academy of Management, August 1986 (with Ken G. Smith).

"Motor Carrier Strategies in a Changing Environment: An Empirical Analysis," presented at the Transportation Research Forum Annual Meeting, September, 1986 (with Thomas M. Corsi and Raymond Smith).

"Shifts in Use of Owner-Operators Among LTL General Freight Carriers Since the Motor Carrier Act of 1980," presented at the Transportation Research Forum Annual Meeting, September, 1986 (with Thomas M. Corsi).

"Environmental Variation, Decision Comprehensiveness and Performance," presented at the Strategic Management Society Annual Meeting, Singapore, October, 1986 (with Ken G. Smith, Martin Gannon, and Terence Mitchell).

"Gambit and Repartee: A Theory of Competitive Action and Responses," presented at the Annual Meeting of the Academy of Management, August 1986 (with Ken G. Smith).

"The Impact of the Environment on Personnel Policies: Management Characteristics in the U.S. Railroad Industry," presented at the Annual Meeting of the Academy of Management, August 1987 (with James Guthrie and Ken G. Smith).

"Mobility Barriers in the Motor Carrier Industry," presented at the Transportation Research Forum Annual Meeting, November 1987 (with Thomas M. Corsi).

"Railroad Cost Structure - Revisited" presented at the Transportation Research Forum Annual Meeting, November 1987 (with Tony Barbera, Kent Phillips and Les Selzer).

"The Impact of Rail Rationalization on Traffic Densities: A Test of the Feeder Line Theory," presented at the Transportation Research Board Annual Meeting, January 1988 (with Les Selzer and Kent Phillips).

"Porter's Generic Strategies and Organizational Size," presented at the Strategic Management

Society Annual Meeting, October 1988 (with Ken Smith).

"Predictors of Competitive Responses in the Domestic Airline Industry," presented at the Strategic Management Society Annual Meeting, October 1988 (with Ken Smith and Martin Gannon).

"ATLFs: Driving Owner-Operators into the Sunset," presented at
the Transportation Research Forum Annual Meeting, November 1988 (with Thomas M. Corsi).

"Competitive Strategic Interaction: Action Characteristics as Predictors of Response," presented at the Annual Meeting of the Academy of Management, August 1989 (with Ming-Jer Chen and Ken G. Smith).

"Strategies and Performance in the Truckload General Freight Segment Before and After Deregulation," presented at the Transportation Research Forum Annual Meeting, October 1989 (with Thomas M. Corsi).

"Rivalry in the U.S. Domestic Airline Industry," presented at the Strategic Management Society Annual Meetings, October 1989 (with Ken Smith and Martin Gannon).

"Building Competitive Advantage in Diverse Industries," presented at the Boulder, Colorado Conference on the Management of the High Technology Firm, January 1990 (with Greg Young, Ken Smith, and Martin Gannon).

"Economic Effects of Surface Freight Deregulation," presented at the Transportation Research Board Annual Meeting, January 1990 (with Cliff Winston and Thomas Corsi).

"Strategies of Challenging Airlines at Hub-Dominated Airports," presented at the Transportation Research Forum Annual Meeting, October 1990 (with James Kling and Thomas M. Corsi).

"Size, Strategy, and Performance: LTL Motor Carriers," presented at the Transportation Research Board Annual Meeting, January 1991 (with Raymond Smith and Thomas Corsi).

"The Role of Firm Reputation in Competitive Interaction," presented at the Annual Meeting of the Academy of Management, August 1991 (with Leith Wain, Martin Gannon and Ken G. Smith).

"The Advantage of Size in the U.S. Trucking Industry," presented at the Transportation Research Forum Annual Meeting, November 1991 (with Carol Emerson and Thomas M. Corsi).

"The Impact of Entry and Concentration in Australian Aviation: A Test of Contestability Theory," presented at the Transportation Research Forum Annual Meeting, October 1992.

"Reevaluating Returns to Scale in Transportation," presented at the Transportation Research Forum Annual Meeting, October 1993 (with K. Xu, R. Windle and T. Corsi).

"Access and Competition Policy in the US Rail Freight Industry: Potential Applications to

Telecommunications," presented at a conference on Sustaining Competition in Network Industries through Regulating and Pricing Access, CITI, Columbia University, November 1993 (with R. Harris).

"Engaging Competitors," presented to the Whitmore Conference, Dartmouth College, New Hampshire, September 1994, (with G. Young and K. Smith).

"Engaging a Rival for Competitive Advantage: Firm Resources and the Competitive Environment as Predictors of Competitive Firm Activity," presented at the Annual Meeting of the Academy of Management, August 1994 (with G. Young, A. Schomburg and K. Smith).

"David and Goliath: Strategies for Challenging the Dominant Rival," presented at the Annual Meeting of the Academy of Management, August 1994 (with K. Smith, T. Corsi and J. Kling).

"Wealth Effects of New Product Rivalry," presented at the 14th annual international conference of the Strategic Mangement Society, Paris, September 1994 (with H. Lee, K. Smith, and A. Schomburg).

"Business Distress and a Firm's Propensity to be Rivalrous," presented at the 14th annual international conference of the Strategic Mangement Society, Paris, September 1994 (with C. MacFhionnlaoich and K. Smith).

"Industrial Organization Economics, Resource-Based Theory, and Schumpeterian Perspectives on Competitive Advantage: Toward an Action-Based Model of Advantage," presented at the Annual Meeting of the Academy of Management, August 1995 (with K. Smith).

"Strategic Groups and Rivalrous Firm Behavior: Towards a Reconciliation," presented at the Annual Meeting of the Academy of Management, August 1995 (with K. Smith and G. Young).

"Shareholder Wealth Effects of New Product Rivalry," presented at the Annual Meeting of the Academy of Management, August 1995 (with H. Lee and K. Smith).

"Creative Destruction and Competitive Dynamics: An Action-Based Study of Industry Dethronement and Market Share Erosion," presented at the Annual Meeting of the Academy of Management, August 1996 (with W. Ferrier and K. Smith).

"The Rate of International Alliance Formation: The Role of Firm Resources, Strategy, and Industry Structure," presented at the Annual Meeting of the Academy of Management, August 1996 (with G. Young and K. Smith).

"An Assessment of the Validity of Competitive Dynamics Research," presented at the Annual Meeting of the Academy of Management, August 1996 (with G. Young, M. Becerra and K. Smith).

"The Rate of International Alliance Formation: The Role of Firm Resources, Strategy, and Industry Structure," presented at the 16th annual international conference of the Strategic Management

Society, Tempe, Arizona, October 1996 (with G. Young and K. Smith).

"Performance Implications of Market and Non-Market Actions," presented at the Annual Meeting of the Academy of Management, August 1997 (with T. Quasney and B. Shaffer).

"Multimarket Contact, Resource Heterogeneity, and Rivalrous Firm Behavior," presented at the Annual Meeting of the Academy of Management, August 1997 (with G. Young and K. Smith).

"Performance Implications of Market and Non-Market Actions," presented at the Annual Meeting of the Academy of Management, August 1997 (with T. Quasney and B. Shaffer).

"Techniques of Transportation Analysis: Costs," discussant at Transport Policy and Economics Conference in Honor of John R. Meyer, Kennedy School of Government, Harvard University, September 1997.

"A Conceptual Model of Supplier-Reseller Satisfaction Perceptions in Distribution Channels," Academy of Marketing Science, Coral Gables, Florida, 1997 (with C. Emerson and R. Krapfel).

"The Impact of Financial Condition on Competitive Behavior: Towards a Reconciliation of Competing Views," presented at the Annual Meeting of the Academy of Management, August 1998 (with C. MacFhionnlaoich, W. Ferrier and K. Smith).

"Competitive Effects of Railroad Mergers," Transportation Research_Forum Annual Meetings, Philadelphia, October 1998 (with J. Plaistow).

"The Canadian Experience with Competitive Access, " Transportation Research Board Annual Meeting, January 1999.

" Predicting Order and Timing of New Product Moves: The Role of Top Management," presented at the Annual Meeting of the Academy of Management, August 1999 (with A. Srivasta, H. Lee and K. Smith).

"Competition in the Deregulated Railroad Industry: Source, Effect and Policy Issues," presented at the AEI-Brookings conference on Deregulation of Network Industries, December, 1999.

"Future of Rail Regulation," presented at the Alliance for Rail Competition Second Annual Rail Customer Forum, Washington, D.C., March 1, 2000.

"The State of Railroad Research," presented at the Transportation Research Forum Annual Meeting, Annapolis, November 2000.

"Investigating the Action Dilemma: Untangling the Relationships Between Firm Activity, Rival Activity, and Firm Performance," presented at the Annual Meeting of the Academy of Management, August 2001 (with P. Derfus and K. Smith).

Discussant, Workshop on Airline and National Strategies for Dealing with Airport and Airspace Congestion, College Park, March 2001.

Participant, Federal Railroad Administration and Surface Transportation Board Joint Roundtable on Rail Freight Industry, June 2002.

"A Schumpeterian Perspective on Innovation," presented at the Leading Through Innovation Research Conference, College Park, January 2003.

"The Role of Conduct in the Structure, Conduct, Performance Relationship," presented at the Annual Meeting of the Academy of Management, August 2003 (with P. Maggitti, P. Derfus and K. Smith).

"The Impact of Market Actions on Firm Reputation," presented at the Annual Meeting of the Academy of Management, August 2003 (with D. Baseo, V. Rindova, P. Derfus and K. Smith).

"Merger Analysis in the Post-Staggers Railroad Industry," presented at a conference on Competition Policy and Merger Analysis in Deregulated and Newly Competitive Industries, Madison Wisconsin, June 2005.

"Firm Action, Rival Action and Firm Performance: Understanding the Effect of Competitive Interdependence," presented at the Annual Meeting of the Academy of Management, August 2005 (with P. Maggitti, P. Derfus and K. Smith).

"Electronic Logbooks and Motor Carrier Safety Performance," presented at the Federal Motor Carrier Safety Administration, June 2007 (with T. Corsi and D. Cantor).

"Reflexive and Selective Organizational Learning," presented at the Annual Meeting of the Academy of Management, August 2009 (with D. Major, P. Maggitti and K. Smith).

"Interactive Effects of firm resources and actions on performance," presented at the Annual Meeting of the Strategic Management Society, October 2009 (with D. Major, K. Smith, and R.

D'Aveni).

"Multimarket Contact and Performance under Imperfect Observability," presented at the Annual Meeting of the Academy of Management, August 2010 (with W. Guo).

"The Impact of Culture on Contractual Buyer-Supplier Relationships," presented at the Annual Meeting of the Academy of Management, August 2010 (with D. Ribbink).

"Digging at Discourse: Examining the Effects of Novelty, Reputation, and Competitive Intensity on Market Discourse," presented at the Annual Meeting of the Strategic Management Society, October 2010 and the Israel Strategy Conference, December 2010 (with S. Livengood, K. Smith, and W. Guo).

"New Product Novelty and Market Discourse in the U.S. Cell Phone Industry," to be presented at the Annual Meeting of the Academy of Management, August 2011 (with S. Livengood, K. Smith, and W. Guo).

"The Impact of Culture Differences in Contractual Buyer-Supplier Relationships," presented at the Annual Meeting of CSCMP, October 2011 (with D. Ribbink).

"Examining the Direct and Mediating Effects of Market Discourse on Performance," presented at the Annual Meeting of the Strategic Management Society, October 2011, (with S. Livengood, K. Smith, and W. Guo).

"The Impact of Cultural Differences on Contract Clauses in Buyer-Supplier Relationships," presented at the Annual Meeting of the Decision Sciences Institute, November 2011 (with D. Ribbink).

"Leveraging Supplier Innovations to Enhance Buyer Innovative Performance," presented at the Production and Operations Management Society Annual Conference, May 2014, Atlanta, GA (with I. Elking, D. Cantor, and C. Hofer).

"Examining the Interaction of Power and Supply Chain Strategy on Firm Performance." Paper presented at the Production and Operations Management Society Annual Conference, May 2014, Atlanta, GA (with I. Elking, J. Paraskevas , T. Corsi, and A. Steven).

"The Impact of Cultural Distance in Contractual Buyer-Supplier Relationships," presented at the Production and Operations Management Society Annual Conference, May 2015 (with D. Ribbink and T. Sohail).

"Competitive Dynamics Perspectives in a Supply Chain Context," presented at the INFORMS Annual Meeting, November 2015 (with X. Ren, D. Cantor and C. Hofer).

"Alliance Formation: A Prisoner's Dilemma Perspective." Paper presented at the Decision Sciences Institute Annual Conference, November 2015, Seattle, WA (with J. Paraskevas and S. Eckerd).

"Supply Chain Experience in the C-Suite: a Study of Supply Chian Responsiveness and Quality Glitches to be presented at the Production and Operations Management Society Annual Conference, May 2016 (with J. Paraskevas, A Steven, and T. Corsi).

RESEARCH AWARDS AND INFORMATION:

University of Maryland Distinguished Scholar-Teacher Award.

Transportation Journal 2013-2014 Best Paper Award.

Journal of Management 2004 best paper award, for the paper determined to be the best published in 2003 in the *Journal of Management.*

Academy of Management 2000 best paper award, for the paper determined to be the best published in 1999 in the *Academy of Management Journal.*

Award for best paper, marketing channels track, Academy of Marketing Science conference, Coral Gables, Florida, 1997.

Award for the best airline paper and best paper overall, 1990 Transportation Research Forum Conference.

Plowman Award for the best paper, 1987 Transportation and Logistics Educators Conference.

Regular Common Carrier Conference Award for the best motor carrier paper, Transportation Research Forum Annual Meeting, September, 1986.

EDITORIAL AND REVIEWING ACTIVITIES:

Editorial Review Board, Strategic Management Journal(2010-present).

Associate Editor, Journal of Business Logistics (2010-present).

Associate Editor, Journal of Supply Chain Management (2010-present).

Editorial Review Board, Transportation Journal (2008-present).

Editorial Review Board, Journal of Transportation Management (1993-present).

Editorial Review Board, Transportation Research – Part E (2001-present).

Advisory Editorial Committee, Journal of Law, Transportation and Policy (2011-present).

Editorial Review Board, Journal of the Transportation Research Forum (2001-2010).

Consulting Editor (1991-1993) Journal of the Transportation Research Forum.

Frequent referee activity for numerous journals.

TEACHING AND ADVISING:

Courses Taught

BMGT 110 (Introduction to the Business Value Chain)
BMGT 298 (Sophomore Fellows Seminar)
BMGT 370 (Introduction to Transportation: also served as course coordinator)
BMGT 372 (Introduction to Logistics Management)
BMGT 476 (Computer Models in Transportation and Logistics)
BMGT 495 (Business Policy)
BMGT 670 (Economic Environment of Business)
BMGT 671 (Managerial Economics)
BUSI 683 (Global Economic Environment; also served as course coordinator)
BMGT 770 (Transportation Theory and Analysis)
BMGT 798 (Field Studies in Industry and Competitor Analysis)

BMGT 808 (Seminar in Industrial Organization and its Application to Strategic Management; Seminar in Supply Chain Management Research)

EMBA 683 (Global Economic Environment)

ENTS 631 (Telecommunications Policy)

HONR 288N (Understanding the Global Economic Environment)
Teaching Awards

Allen J. Krowe Award for Teaching Excellence, College of Business and Management, 1988 and 2011; Krowe Award nominee 2005, 2006, 2007 and 2009.

Selected as one of the top 15% teachers in the College of Business and Management (20 times, most recently in 2013).

Named as a University of Maryland Distinguished Scholar-Teacher.

Member of the Following Ph.D. Dissertation Committees:

John Patrick Paraskevas (co-chair)
Isaac Elking (chair)
Anupam Kumar (chair)
Pamela Donovan (co-chair)
Dina Ribbink (chair)
David Cantor (co-chair)
Victor Cheng (co-chair)
Tom Quasney (chair)
Kirk Patterson (co-chair)
Wally Ferrier (co-chair)
August Schomburg (co-chair)
Greg Young (co-chair)
Hun Lee (co-chair)
Carol Emerson (chair)
Cormac Mac Fhionnlaoich (co-chair)
Pam Derfus (co-chair)
Omar Sherif Elwakil
Heidi Celebi
Jian-yu Ke
Zuozheng Wang
Scott Livengood
Adams Steven
Dave Major
John McDonald
Ayesha Malhotra
Ming Zhou
Stephanie Head
Chris Lin
Constantinos Christou
Chul Moon
Deborah Lyons
Jane Feitler
Laura Power
Ming-Jer Chen
Harry Sapienza
Jack Scarborough
James Kling
Robert Trempe

George Rubenson
Ven Sriram
Raymond Smith
Ritu Lohtia
Jason Chang
Douglas Meade
Barbara Houchen
Leith Wain
John Burgess
Douglas LaBahn
Ker-Tsung Lee
Yeon Myung Kim
Steven Chien
Chad Syverson
Eungcheol Kim
Radu Paun
Helena Schweiger
Koray Ozpolat
Jeta Menkulasi
Rodrigo Britto
Antoine Gervais

SERVICE:

Chair, Faculty Council, 2011-2013.

Member, Master's Program Committee, 2012-present.

Member, Associate Dean of MBA-MS Programs Search Committee, 2012.

Chair, Smith School's Junior APT Committee, 2011-2013.

Chair, Senior Director of Custom Programs Search Committee, 2011.

Chair, Academic and Faculty Integrity Committee,2009-2011.

Member, Provost's Committee to establish a university faculty club, 2011-2012.

Faculty Advisor, Net Impact, 2008-present. Net Impact is an active organization of MBA students focusing on corporate social responsibility and related issues.

Department Chair, Transportation/Logistics, Business and Public Policy (December 1994-July 2003).

Member, Smith School Dean search committee, 2007-2008.

Member, Committee to evaluate the Smith School strategy area, 2008.

Chair, Teaching Enhancement Committee, 2004-2009.

Member, APAC (Campus level committee, chaired by the Provost, charged with advising the Provost on strategic and programmatic matters) 2000-2003.

Member, Vice President for Administrative Affairs search committee (2002-2003).

Member, Committee to Critique MBA Program Report, 2005.

Member, Ad Hoc committee to design an EMBA program (2001-2002).

Member, MBA director search committee (2001)

Member, Provost's Committee to conduct five year review of Dean Howard Frank (2001).

Chair of Search Committee, Executive Director of the Center for Knowledge and Information Management, 1999.

Member, CRC T&P Committee, Don Riley (1998), Samer Faraj (2004), and Josh Newberg (2004); Gil Souza (2005); P.K Kannon and Wilbur Chung, 2006; Wedad Elmaghraby, 2007; Leigh Anenson and Anand Gopal(2008); Rachelle Sampson (2009). Also frequent ARC chair.

Chair, Extra Merit Step for Non-Exempt Employees Committee, 1999.

Member, MBA 4th Track Committee (subcommittee of executive committee) (1996-1998).

Member, Strategic Planning Committee (subcommittee of executive committee) (1996-1998).

College Workload coordinator (responsible for attending meetings with Provost and reps re: workload requirements and taking lead on filling out compliance forms) (1996-2003).

Member, Executive Committee, Middlestates Accreditation Committee, University (Dan Fallon/Nelson Markley, Chair), Dec. 1995-1997.

Member, Faculty Composition and Development Section, AACSB Accreditation committee (1995).

Lead College Member on Campus Committee to form and fund a Global China Institute (1995).

Chair of Search Committee for Faculty Positions (1994-5, 1995-6, 1996-7, 1997-8, 1998-9, 1999-2000, 2009-2010).

Member, College Strategic Planning Committee (drafted section on MBA program), 1994-5.

Chair, MBA Oversight Committee, College of Business and Management (May 1994-Jan. 1995).

Member, MBA Oversight Committee, College of Business and Management (1992-1994).

Chair, ELM Coordinator's Committee, College of Business and Management, (1993-1994).

Member, External Communications Committee, College of Business and Management, 1994.

Chair, PR on Academic Quality Committee, 1993.

Member Technology Advancement Program Business Screening Panels (1986-1990).

Member, Faculty Grievance Hearing Board, College Park Campus (1991).

Member, College Budget Committee (1990-1991).

Member, Strategic Planning Steering Committee, and Chair, MBA Subcommittee, College of Business and Management (1989-1990).

Member, General Committee on Faculty Affairs, College Park Campus Senate (1984-1986, 1987-1988).

Elected Representative to the College Park Campus Senate (1988-1991).

Member, Graduate Committee, College of Business and Management (1987-1988).

Chairman, MBA Case Competition Subcommittee of the Graduate Committee (1987).

Faculty Assistant Coordinator, MBA/Rutgers Invitational Case Tournament (1986-1987).

Faculty Judge, MBA Case Competition, College of Business and Management (1989).

Member, Undergraduate Committee, College of Business and Management (1987-1988).

Faculty Co-Advisor, University of Maryland Transportation and Logistics Club (1985-1990).

Member, International Task Force, College of Business and Management (1986-1987).

Member, Dean's Computer Integration Task Force, College of Business and Management (1986-1988).

Participant in Planning Session for External Activities, College of Business and Management, Wye Woods (Sept. 1987).

Member of Multiple Faculty Search Committees (1985-present).

In November 1995, I presented testimony before the United States Senate and House Committees on Small Business at a joint hearing on "Railroad Consolidation: Small Business Concerns."

In March 2004, I presented testimony to the U.S. House of Representatives Committee on Transportation and Infrastructure regarding railroad competition legislation.

In October 2005, I provided testimony to the Surface Transportation Board on the 25th Anniversary of the Staggers Rail Act of 1980.