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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42104

ENTERGY ARKANSAS, INC. AND ENTERGY SERVICES, INC.

v.

UNION PACIFIC RAILROAD COMPANY

AND

MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC.

Finance Docket No. 32187

MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC.
- LEASE, ACQUISITION AND OPERATION EXEMPTION -
MISSOURI PACIFIC RAILROAD COMPANY AND BURLINGTON NORTHERN
RAILROAD COMPANY

The Board clarifies the appropriate avenue for a shipper to seek relief from a carrier's interchange commitment and gives the complainant an opportunity to show that a new through route should be prescribed under 49 U.S.C. 10705.

Decided: June 25, 2009

In this proceeding, Entergy Arkansas, Inc. and Entergy Services, Inc. (collectively, Entergy) and Intervener Arkansas Electric Cooperative Corporation (AECC) – co-owners of a coal-fired electric utility plant in Arkansas – challenge the enforceability of the interchange commitment provisions of a lease between Union Pacific Railroad Company (UP) and the Missouri & Northern Arkansas Railroad Company, Inc. (MNA) involving approximately 300 miles of track in Arkansas, Kansas and Missouri. Entergy and AECC allege that the interchange commitment unlawfully restricts MNA from interchanging the plant's coal traffic with other carriers, including the BNSF Railway Company (BNSF).

In this decision, we conclude that Entergy has focused on the wrong provisions of the statute, and we provide an opportunity for the shipper to pursue this case under the appropriate provision. Entergy hinged its case-in-chief on its argument that the UP/MNA interchange commitment is an unreasonable practice under 49 U.S.C. 10702. But, as we explain below, the general nature of section 10702 makes it an inappropriate provision under which to establish the

impropriety of an interchange commitment when there is a more specific provision that governs the behavior at issue and its effects.

There is, however, a straightforward path whereby Entergy could seek to establish that it is entitled to the type of relief it desires – a Board order under 49 U.S.C. 10705 directing MNA to interchange with a long-haul carrier other than UP. Section 10705 authorizes the Board to force a carrier, including a bottleneck carrier (i.e., a carrier that is the sole source of rail transportation for part of a shipper’s movement), to establish a new through route with another carrier when such a route is needed “to provide adequate, and more efficient or economic, transportation” or where the established route is “unreasonably long when compared with a practicable alternative through route.” 49 U.S.C. 10705(a)(2)(B)-(C). The Board has stated that it will apply this competitive remedy where a bottleneck carrier has been shown to have “exploited its market power by providing inadequate service over its own lines or foreclosing more efficient service over another carrier’s lines.” Central Power & Light Co. v. Southern Pac., et al., 1 S.T.B. 1059, 1068 (1996) (CP&L), aff’d sub nom. MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999).

Because section 10705 provides a means to directly address and remedy the precise problem about which Entergy complains, it is the appropriate provision to invoke in this case. Therefore, we will afford Entergy an opportunity to amend its complaint accordingly within 30 days. If Entergy chooses to do so, the parties should then meet and confer and, within 14 days of the filing of such an amended complaint propose a new procedural schedule that would allow for discovery and further evidentiary submissions under section 10705.¹ We also provide guidance here regarding the evidence needed to evaluate a section 10705 through route request.

We are deferring consideration of Entergy’s request that we revoke our approval of this lease until the relief available under section 10705 has been pursued. If Entergy is unable to secure adequate relief under section 10705, or chooses to forego that option, we will address its revocation request in a separate decision.

BACKGROUND

Interchange Commitments. In Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League, Ex Parte No. 575 et al. (STB served Oct. 30, 2007) (Review of Rail Access), the Board determined that it would not prescribe rules of general applicability regarding interchange commitments, i.e., those contractual provisions in short line sale or lease agreements that restrict or discourage interchange with carriers other than the seller or lessor carrier. Because of the significant diversity in the terms of particular interchange commitments, id. at 4-5, the effect of any particular interchange commitment on shippers and carriers is a highly fact-specific inquiry, id. at 7-8. Accordingly, we consider the propriety of interchange commitments on a case-by-case basis. Id.

¹ There will be no filing fee for Entergy to amend its complaint and it should do so in the existing docket.

In reviewing particular interchange commitments, we will look at the benefits and harms associated with particular sale or lease terms to determine whether a particular interchange commitment violates, or contributes to a violation of, the Interstate Commerce Act. Id. at 14. We will also look at what effect a Board action voiding an interchange commitment would have on shippers and carriers on the line. See id. at 12 (noting that Board termination of an interchange commitment might cause some transactions to be rescinded under their contractual terms, resulting in shippers being served by the previous carrier again). We have listed various statutory provisions that might be relevant in a proceeding involving interchange commitments and noted that there is no exhaustive list of factors that the Board will consider when assessing interchange commitments. Id. at 15.

As we pointed out in Review of Rail Access, a *shipper's* right to adequate service, reasonable rates, or any other statutory right (including access to an alternative through route) cannot be contracted away by an agreement between *carriers*. Id. at 13, 15 n.38. Thus, if a certain combination of carriers is providing inadequate service or is foreclosing the possibility of a more efficient route, the fact that they have an interchange commitment agreement does not limit the Board's ability to order alternative service over the carriers' lines or to require the carriers to open a new interchange with another carrier.

To facilitate the review of interchange commitments in individual cases, we have promulgated disclosure rules, in Disclosure of Rail Interchange Commitments, Ex Parte No. 575 (Sub-No. 1) (STB served May 29, 2008), to make it easier and faster for interested parties to gain access to confidential interchange commitments when necessary to pursue a proceeding at the Board or when a new interchange commitment is proposed. See 49 CFR 1114, 1121, 1150, and 1180. These new rules provide an expedited process for shippers to obtain the terms of interchange commitments in order to analyze whether they violate or contribute to a violation of the Interstate Commerce Act, or are contrary to the statutory provision under which authorization of a transaction is being sought.

The Interchange Agreement Challenged Here. The basic facts of this case are not in dispute. Entergy operates a coal-fired power plant located near Newark, AR, known as the Independence Steam Electric Station (the Independence plant). Entergy co-owns the plant with AECC. The Independence plant burns low-sulfur coal obtained from the southern Powder River Basin (PRB) region of Wyoming. Since the commencement of operations at the Independence plant in 1983, all PRB coal burned at the plant has been delivered by railroad.

The Independence plant is directly served by one railroad, MNA. Presently, most coal destined to the Independence plant is transported by UP from the PRB to Diaz Junction, AR. At Diaz Junction, the loaded coal cars are handed off to MNA crews for delivery to the Independence plant. From Diaz Junction, MNA completes the 8-mile trip to the Independence plant, where the cars are then handed off to Entergy employees for unloading. After the cars are unloaded, Entergy releases them back to MNA crews, and MNA delivers the empty cars to UP's Neff Yard in Kansas City, MO, with UP handling the remainder of the empty car movement back to the PRB. See MNA's response to Interrogatory No. 1, attached to Complainants' Motion to Compel filed on April 28, 2008.

En route to Kansas City, MNA passes several points at which it has or could have interchange connections with BNSF, which also has lines extending to the same southern PRB mines. Entergy and AECC would like to have an MNA/BNSF route for the Independence plant traffic as a competitive option. However, as discussed below, MNA's lease agreement with UP contains a contractual interchange commitment with UP that makes it prohibitively costly to MNA to hand over Entergy's traffic to another railroad.

MNA was a newly formed entity when it obtained authorization from the Board's predecessor agency, the Interstate Commerce Commission (ICC), to lease, acquire, and operate lines held by UP's predecessor in interest, the Missouri Pacific Railroad Company (Missouri Pacific).² See Missouri & Northern Arkansas Railroad Company, Inc. – Lease, Acquisition and Operation Exemption – Missouri Pacific Railroad Company and Burlington Northern Railroad Company, Finance Docket No. 32187 (ICC served Dec. 22, 1992) (MNA Exemption).³

The MNA/UP lease has an interchange commitment provision.⁴ Under the lease, MNA pays no rent for the over 300 miles of track it leases from UP so long as MNA interchanges over 95% of its traffic with the UP. If MNA interchanges less than 95%, sections 4.01 and 4.03 of the lease provide for a schedule of rent that increases with the total volume of traffic that MNA interchanges with railroads other than UP as follows:

² The transaction was authorized pursuant to the agency's class exemption for a non-carrier to acquire a rail line under 49 U.S.C. 10901. See Class Exemption – Acq. & Oper. of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810, 817 (1985) (Class Exemption).

³ The notice also pertained to trackage rights over two Burlington Northern Railroad Company (now BNSF) lines in Missouri. Those trackage rights are not at issue in this proceeding.

⁴ See 49 CFR 1114.30(d) (interchange commitments defined as those provisions in line sales and leases that "serve to induce a party to the agreement to interchange traffic with another party to the agreement, rather than with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means").

Percentage of Total Traffic Interchanged with UP	Base (Unadjusted by PPI) Annual Rent (December 2002 Levels)
100 - 95%	\$-0-
94 - 85%	\$10,000,000
84 - 75%	\$20,000,000
74 - 65%	\$20,000,000
62 - 55%	\$30,000,000
54 - 45%	\$40,000,000
44 - 35%	\$50,000,000
34 - 25%	\$60,000,000
24 - 15%	\$70,000,000
14 - 5%	\$80,000,000
0 - 4%	\$90,000,000

The rentals are indexed to the Producer Price Index for Finished Goods (PPI). Entergy maintains, and UP does not dispute, that, as of December 2007, the maximum annual rental under the lease would have been \$114,000,000.

Sections 3.01 and 3.04 of the lease also permit UP, at its sole discretion, to provide exclusive service directly to Entergy over the leased lines upon 7 days' notice to MNA and a payment to MNA of \$60,000 per year. Section 5.05 prevents MNA from using its trackage rights over UP between Pleasant Hill and Kansas City, MO – which would be necessary for MNA to reach BNSF at Kansas City – to interchange traffic with carriers other than UP.

The lease provides that either party may terminate it if Section 4 (the rental schedule) is found to be unlawful or unenforceable. See section 15.01. The lease has a 20-year initial term, but MNA may renew the lease up to three times, for a possible total term of 80 years.

The Complaint. By complaint filed on February 19, 2008, in STB Docket No. 42104, Entergy alleges that sections 4.01, 4.03, 3.01, 3.04 and 5.05 of the lease between UP and MNA unlawfully prevent MNA from interchanging Entergy's traffic with BNSF. As discussed below, Entergy alleges a violation of several different statutory provisions, and its preferred remedy is prohibition of continued enforcement of the provisions of the lease that restrict MNA from interchanging with carriers other than UP, along with prohibition of the parties' rights under the lease to terminate the lease. AECC supplements Entergy's arguments by suggesting that a more efficient route – involving an MNA interchange with BNSF at Lamar, MO – is being foreclosed by the interchange commitment.

The parties engaged in significant discovery, which included several rounds of motions regarding the permissible scope of discovery, and requested a number of extensions to the procedural schedule initially established by the Board. On July 11, 2008, Entergy filed its opening statement, in both highly confidential and public versions, and AECC filed an opening statement. On August 11, 2008, UP filed a reply statement, in both highly confidential and public versions, and MNA filed a reply statement. On September 2, 2008, Entergy and AECC filed rebuttal statements, in both highly confidential and public versions.

DISCUSSION AND CONCLUSIONS

As this is a case of first impression, Entergy has offered several statutory bases for its complaint. Its main argument is that the interchange restrictions in the lease constitute an unreasonable practice under section 10702. Alternatively, it seeks to invoke the standards for revoking an exemption set forth in section 10502(d), or to find the requirement for prior agency approval of a pooling arrangement under section 11322. Intervener AECC suggests that the interchange agreement violates the carriers' interchange obligations under section 10705.

The relief sought by Entergy is also varied. Primarily, Entergy asks us (1) to leave the lease in place, but preclude UP from enforcing the rental payment provision; (2) to prevent UP from exercising any right to provide exclusive service to Entergy without its consent; and (3) to preclude UP from exercising any right to terminate the lease. See Entergy Opening Evidence and Argument (Entergy Open.) at 60-61. Alternatively, if UP were allowed to terminate the lease, Entergy asks that we somehow give shippers generating a majority of the carloads on the line (here Entergy) a right to veto any new lease if those shippers object to the terms of the lease. Id. at 62-63. Finally, Entergy seeks clarification that, if the lease is permitted to remain in place as is, and if Entergy obtains a new through rate involving BNSF (or bottleneck rate) pursuant to section 10705, MNA's rental payment to UP would play no role in a challenge to the new through route under the stand-alone cost (SAC) test.

Entergy explains that it is pursuing the termination of the interchange commitment provisions in the UP/MNA lease "in order to be able to pursue the possibility of PRB coal transportation service from BNSF and [MNA] in addition to UP in the interest of both competitive pricing and reliable transportation service." See Complaint ¶19. Entergy currently receives rail transportation services from UP under a long-term contract. Public documents suggest that the terms of the contract would permit Entergy to pursue rail service from a carrier other than UP for PRB coal movements in "several years."⁵

The variety of arguments raised and relief sought by Entergy here reflects the novelty of this case. This is the first case to challenge a consummated transaction that contains an interchange commitment since we addressed our policy in Review of Rail Access, and it is the first case since then seeking to have a new interchange opened over the objection of the originating or terminating bottleneck carrier. Entergy has not had the benefit of a body of precedent regarding how to obtain the relief it seeks: to force MNA to interchange its traffic with a carrier other than UP. Accordingly, we discuss here each of the various statutory provisions that have been raised to find the appropriate avenue for the relief Entergy seeks.

⁵ See Entergy Arkansas Inc. 10-K Annual Report at 202, filed with the U.S. Securities and Exchange Commission on Mar. 3, 2009 (Entergy 10-K). The Board sometimes takes official notice of publicly available financial information that is not submitted by parties. See, e.g., AEP Texas North Company v. BNSF Railway Company, STB Docket No. 41991 (Sub-No. 1), slip op. at 9 n.25 (STB served May 15, 2009). The precise terms of Entergy's contract with UP were filed under seal.

Interchange Requirements – 49 U.S.C. 10705. Any shipper faced with a situation where a railroad refuses to interchange the shipper’s traffic with another carrier may seek a Board order to compel the creation of a new interchange and through route. As a general matter, a railroad has a right to rationalize its system and to provide service over its most efficient routes. But a carrier may not defeat legitimate competitive efforts of other rail carriers and shippers by foreclosing more efficient service. Thus, the Board may exercise its authority under section 10705 to order a carrier to open another route if a party demonstrates that the bottleneck railroad has exploited its market power by (1) providing inadequate service over its lines or (2) foreclosing more efficient service over another carrier’s line.⁶

UP and MNA cannot contract away the statutory rights of a third party or neglect their own obligations under the statute. Thus, if Entergy or AECC can demonstrate that, due to this interchange commitment, UP and MNA are providing inadequate service or foreclosing more efficient service over another carrier, we may direct that a new route be opened and order MNA to establish a common carrier rate for interchange with that other carrier.⁷

In this case, however, Entergy did not focus its presentation on demonstrating that relief from the interchange commitment is warranted under section 10705, but rather took the more diverse approach described above. And although AECC did present some argument on the efficiency of an alternative route, that evidence was not presented until rebuttal.

We conclude that further examination under section 10705 is warranted for a number of reasons. First, Entergy has essentially alleged an abuse of market power. Entergy is served solely by MNA/UP today, and Entergy alleges that UP, in conjunction with MNA, has exploited that market power to foreclose competition. Second, before it entered into a contract with UP in 1983, Entergy received its coal via a joint movement of Missouri Pacific (over the lines now leased to MNA) and BNSF, suggesting that the alternative routing Entergy seeks may be feasible, which would be one of the predicates for establishing the route’s efficiency.⁸ Third, AECC alleges that the alternative route is shorter than the route imposed by the UP/MNA agreement. See AECC Rebuttal at 5; see also 49 U.S.C. 10705(a)(2)(B) (Board to consider whether through route is “unreasonably long when compared to a practicable alternative through route that could be established”). Thus, although Entergy has not referenced section 10705 specifically in its complaint, its arguments could be construed liberally to encompass aspects of a section 10705 challenge, and AECC has made specific allegations regarding section 10705.

⁶ See CP&L at 1068.

⁷ In Review of Rail Access, at 9, we suggested that, before a new interchange could be required to be opened, a shipper would need to enter into a rail transportation contract with the alternative carrier. There is no such requirement for the prescription of a through route (see CP&L, 1 S.T.B. at 1069-70), although Entergy would need to obtain a contract rate from BNSF in order to require MNA to quote a separately challengeable rate for MNA’s segment of the move.

⁸ See Entergy Open. at 10 n.7.

Although we do believe that the case is more properly adjudicated under section 10705, the record before us today is inadequate to permit us to determine whether a route that involves BNSF would be more efficient. For example, we lack evidence on such key issues as the costs of serving any alternative route. Accordingly, we will provide Entergy an opportunity to amend its complaint. If Entergy opts to do so, the parties should confer on an appropriate procedural schedule to supplement the record (which should provide time for additional discovery on parties and non-parties as necessary).

In this next phase of the case, the parties should be guided by section 10705 and the discussions concerning alternative route prescriptions in CP&L. The Board has declined to “declare in advance” precisely what showing would justify the prescription of a through route because that question is necessarily fact-specific. See CP&L, 1 S.T.B. at 1069. Thus, the question of how to establish that a foreclosed route is “more efficient” under 10705 is a matter of first impression and we will consider all relevant factors. Those factors should include, but are not limited to, those listed in 49 CFR 1144.2(a)(1), such as the revenue associated with the traffic, the relative costs of moving traffic on the alternative routes, and the volume of traffic that could be expected to move over the alternative route.

As the Board has suggested, the requirements for making the showing to obtain a through route prescription are less rigorous than those required to justify the “far more intrusive” remedies of terminal access or reciprocal switching. CP&L, 1 S.T.B. at 1068-70. Through route prescription merely entails the activation of interchange relationships that, while perhaps dormant, already physically exist. Thus, the question of whether there are “benefits, advantages, and projected efficiencies” that would make service over the proposed new through route “better” than the existing through route (see CP&L, 1 S.T.B. at 1069) involves the consideration of fewer factors regarding issues such as the operational conflicts between multiple carriers operating on a single line.

Our discussion of Entergy’s evidentiary burden in a section 10705 challenge presupposes that Entergy would continue to obtain coal from PRB mines served by UP. Should Entergy choose instead to source coal from a northern PRB mine not served by UP (e.g., Dry Fork, Rawhide, Eagle Butte, Buckskin), it would not need to bring a section 10705 case or establish that a particular route is more efficient in order to obtain an alternative route. In this situation, MNA would be obligated to interchange with BNSF upon request (as would UP if it terminated the lease or exercised its contractual right to serve the Independence plant exclusively).⁹ UP tacitly acknowledges this, stating that the UP/MNA lease would not block Entergy from sourcing coal from a western Missouri mine on the MNA line and that UP would have a statutory obligation to establish a through route with MNA notwithstanding UP’s contractual right to serve

⁹ See 49 U.S.C. 10742 (a rail carrier “shall provide reasonable, proper and equal facilities that are within its power to provide for the interchange of traffic between . . . its respective line and a connecting line of another rail carrier”); see also 49 U.S.C. 10703 (requiring rail carriers to establish through rates with each other).

the Independence Plant exclusively.¹⁰ Although this alternative sourcing might not be a practical option for Entergy today due to various contractual commitments, public documents filed by Entergy indicate that its long-term PRB mine contract (which accounts for some 45% of Entergy's coal requirements) is set to expire in 2011 and that its long-term rail contract will satisfy Entergy's rail transportation needs for just "several years beyond 2009."¹¹

Entergy also requests that we clarify the role that the contract lease payment would play in a SAC case if Entergy were to obtain an MNA routing that did not include UP (either pursuant to a section 10705 prescription or voluntarily offered by MNA and another carrier) and to challenge the resulting rate. We are reluctant to attempt to offer any guidance in the abstract, as the answer may depend on both the design of the SAC analysis and the arguments raised by the parties. For example, were Entergy to pursue relief under the full SAC test, it would presumably design a hypothetical stand-alone railroad (SARR) that would construct (rather than lease) the facilities used by MNA to serve Entergy. In such a circumstance, it is unclear that the lease payment would play any role in the rate reasonableness analysis, as the SAC analysis would include the full replacement cost of the facilities in question. However, such issues would be considered based on the evidence and argument of the parties in any future case.

Unreasonable Practice – 49 U.S.C. 10702. Entergy has devoted most of its efforts to an attempt to demonstrate that certain provisions of the 1992 lease agreement constitute an unreasonable practice in violation of section 10702. Specifically, Entergy cites Section 4 of the lease agreement (setting the annual rental schedule for the line), Section 3 (giving UP the right to resume serving Entergy's plant exclusively on 7-days' notice), and Section 15 (giving UP or MNA the right to terminate the lease on 30-days' written notice if a court or other body determines that any or all of the provisions of Section 4 are unlawful or otherwise unenforceable). Entergy argues that these three provisions prevent MNA from interchanging Entergy's coal traffic with a rail carrier other than UP.

Entergy further contends that UP has overstepped the bounds of reasonableness by imposing restrictions on MNA that are designed to do more than simply preserve the pre-transaction economic value associated with the divested line. Entergy argues that the rental provision was designed to generate a revenue stream vastly greater than the pre-transaction net revenue stream associated with the line. Entergy submitted considerable testimony in an effort to show that the lease payment provisions in Section 4 would exceed the revenue stream UP would have received had it not leased the rail facilities in question. Entergy concludes that UP

¹⁰ See UP Reply at 17 n.10. UP also suggests that it would waive the interchange commitment if Entergy were to source coal from an origin that UP cannot serve "in a situation in which UP was unable to meet its obligations to deliver PRB coal to Independence and unable to offer a reasonable through route for the substitute coal." See UP Reply at 47.

¹¹ See Entergy 10-K at 202.

would receive an extraordinary windfall if MNA were to interchange substantial levels of traffic with a carrier other than UP.¹²

Entergy also analogizes the railroads' characterization of Section 4 as a rental provision to the practice the Board found unreasonable in Rail Fuel Surcharges, STB Ex Parte No. 661 (STB served Aug. 3, 2006). Entergy cites the Board's statement in that decision, at 4, that "applying what the railroads label a fuel surcharge in a manner that is not limited to recouping increased fuel costs that are not reflected in the base rate" constituted an unreasonable practice. Entergy argues here that Section 4 in reality is a penalty provision and that characterizing it as a rental provision similarly constitutes an unreasonable practice.

Conduct is not appropriately challenged under section 10702 where there is another statutory provision that specifically governs the lawfulness of the conduct in question. For example, the courts have held that a complainant may not argue that charging certain rates is an unreasonable practice under section 10702; the complainant must instead challenge the rates under the more specific rate provisions at 49 U.S.C. 10701.¹³ Similarly, a complainant may not argue that discrimination by a carrier constitutes an unreasonable practice under section 10702, as our statute has specific provisions governing discrimination claims.¹⁴ Indeed, the Supreme Court has struck down an attempt by our predecessor, the ICC, to use the unreasonable practice provision to prescribe conduct specifically contemplated elsewhere in the statute.¹⁵

Here, the core of Entergy's challenge to the terms of the lease comes down to this basic question: is it unreasonable for MNA to refuse to interchange Entergy's traffic with a carrier other than UP? The rights and obligations of railroads to interchange traffic with other carriers are matters expressly governed by section 10705.

Moreover, the conduct in question here is different from the conduct in question in the fuel surcharge case. That case was essentially about the manner in which fees were characterized by the carriers. Carriers were imposing charges on shippers that were called "fuel

¹² Pointing out that, if the lease is extended, the interchange commitment could continue in effect for up to 80 years, Entergy contends that the interchange commitment provisions should be governed by our statement in Review of Rail Access that "[p]arties should expect a higher level of scrutiny on agreements that contain a total ban on interchange with other carriers or go on in perpetuity." Id. at 15. That statement, however, addressed proposed transactions, not preexisting ones.

¹³ Union Pacific R. Co. v. ICC, 867 F.2d 646 (D.C. Cir. 1989). See also Shippers Committee, OT-5 v. Ann Arbor Railroad Co., 5 I.C.C.2d 856, 863 (1989), aff'd sub nom. Shippers Committee OT-5 v. ICC, 968 F.2d 75 (D.C. Cir. 1992).

¹⁴ See DHX, Inc. v. Matson Navigation Company and Sea-Land Service, Inc., STB Docket No. WCC-105 (STB served Dec. 15, 2004), aff'd, DHX, Inc. v. STB, 501 F.3d 1080 (9th Cir. 2007) (analyzing a discrimination provision applicable to water carriers).

¹⁵ Maislin Indus. U.S. v. Primary Steel, 497 U.S. 116 (1990).

surcharges” but were not adequately tailored to actual changes in fuel costs. This objectionable conduct was not explicitly covered by any other specific provision of our statute and the Board found that it constituted an unreasonable practice under section 10702. Here, in contrast, there is a specific statutory provision that governs the rights and obligations of carriers to interchange with other railroads. Moreover, there are no allegations of deception here, but rather simply claims of a refusal to interchange.

Entergy’s “windfall” argument does not provide a basis for applying section 10702 . In discussing future interchange commitments, we noted in Review of Rail Access, at 10, that the “revenue stream resulting from the agreement should be no more than what the carrier would have received had it not divested or leased the rail facilities in question, or had it demanded more in the sale price or rental fee.” This was a general statement to address arguments raised in that proceeding that carriers have somehow been “overcompensated” over time by these interchange agreements. It was not intended, as Entergy has interpreted it, to provide a substantive reason to strike down an existing lease as an unreasonable practice.

When UP and MNA entered into the lease in 1992, they mutually agreed to payments should MNA begin to interchange traffic with a carrier other than UP. It appears, based on this record, that those payments were designed initially by UP to compensate the carrier for the lost revenue from traffic MNA might interchange with other carriers. If traffic levels increased, the payment might eventually become too low to fully compensate UP for the lost traffic, or vice versa. One can virtually guarantee that the payment privately negotiated between MNA and UP would, over time, either provide more or less compensation to UP than was expected in 1992 when the agreement was formed, depending on how circumstances changed since 1992. This is an inherent risk in long-term contracts that set a fixed amount of compensation.

Because we conclude that the conduct here is not appropriately challenged under section 10702, we do not reach the question of whether the terms of the UP/MNA contract are reasonable in isolation, nor do we opine on whether the Board would approve such terms if they were contained in a new interchange commitment presented to the Board today. Rather, we merely find that the proper course for shippers that perceive themselves harmed by a refusal to interchange pursuant to an existing interchange commitment is to challenge the conduct itself and pursue relief specifically provided under section 10705. Accordingly, the portion of Entergy’s complaint that certain provisions of the lease constitute an unreasonable practice in violation of section 10702 is denied, but Entergy may amend its complaint to pursue relief in this docket under section 10705.

Revocation & Reexamination – 49 U.S.C. 10502 & 10901. Where a lease or sale was authorized by this agency by exemption, any person may seek revocation of the exemption under 49 U.S.C. 10502(d). An exemption may be revoked, in whole or in part, when the application of the Board’s regulation to a person, class or transportation is necessary to carry out the rail

transportation policy set forth in 49 U.S.C. 10101.¹⁶ In deciding whether to revoke an exemption, the Board assesses whether the carrier possesses substantial market power, whether regulation is necessary to protect against abuses of that market power, and whether regulation would better advance the objectives of the rail transportation policy and the public interest.¹⁷

In creating class exemptions such as the one invoked by MNA, we use our exemption power under section 10502 to authorize certain categories of rail transactions – those that are typically noncontroversial – quickly. We exercise our revocation authority to correct any market abuses after the transaction is authorized.¹⁸ Accordingly, the agency exempted from regulation all noncarrier transactions subject to section 10901 in Class Exemption, as the vast majority of such transactions had been unopposed and routinely authorized by individual exemption. The policy behind Class Exemption was to facilitate continued operation of marginal lines, reduce the costs of entry into the rail industry, and eliminate uncertainty in negotiations with potential purchasers.¹⁹ In Class Exemption, the agency reserved the right to undo a transaction consummated under an exemption from section 10901 and order divestiture.²⁰ But while the ability to revisit consummated transactions is a powerful tool, it is one that the Board must wield wisely and with great care.²¹

Here, Entergy seeks partial revocation of the exemption under which the ICC authorized the UP/MNA lease in 1992, arguing that such action would further the rail transportation policy goal of ensuring effective competition among rail carriers, 49 U.S.C. 10101(4), and would alleviate the need to construct redundant rail facilities. Entergy Open. at 53, 55. Entergy does not seek revocation of the ICC’s approval of the lease, but rather a more “limited” action to impose conditions that would “preclude the continued enforcement of the paper barrier restrictions.” See id. at 53-55. Entergy’s preferred relief would (1) prevent UP from requiring that MNA compensate UP pursuant to the rental provisions of the lease, (2) prevent UP from

¹⁶ See New York Central Lines, LLC – Abandonment Exemption – In Montgomery and Schenectady Counties, NY, STB Docket No. AB-565 (Sub.-No. 14X) slip op. at 3 (STB served Jan. 22, 2004).

¹⁷ Rail Exemption Misc. Agricultural Commodities, 8 I.C.C.2d 674, 682 (1992); Pejepscot Indus. Park, Inc. -- Petition for Declaratory Order, STB Finance Docket No. 33989, slip op. at 7 n.15 (STB served May 15, 2003).

¹⁸ See, e.g., American Trucking Ass’n v. ICC, 656 F.2d 1115, 1127 (5th Cir. 1981); Consolidated Rail Corp. — Declaratory Order — Exemption, 1 I.C.C.2d 895 (1986) (noting that Congress “explicitly directed [the agency] to grant exemptions and then rely upon ‘after the fact’ remedies, such as revocation”).

¹⁹ SF&L Railway, Inc. – Acquisition and Operation Exemption – Toledo, Peoria and Western Ry. Corp. Between La Harpe and Peoria, IL, STB Finance Docket No. 33995, slip op. at 11 (STB served Oct. 17, 2002) (SF&L).

²⁰ Class Exemption, 1 I.C.C.2d at 812.

²¹ See SF&L (STB served Feb. 6, 2003), slip op. at 2.

exercising its rights to serve the Independence plant directly (absent Entergy's request), and (3) prevent UP from terminating the lease.

At this time, we will defer consideration of whether to revoke our authorization for this lease, as Entergy may be able to obtain effective relief from the challenged interchange commitment under section 10705. If so, that relief would be narrowly tailored; it would simply require MNA to interchange with a party other than UP. In contrast, the revocation that Entergy seeks would be far broader in scope and effect. It might well result in the immediate termination of the lease,²² which could harm MNA, its employees, and other shippers located on the line.²³ Moreover, if relief from the interchange commitment were obtained under section 10705, such relief would seem to moot any need to consider revoking our approval of the lease. If Entergy is unable to secure adequate relief under section 10705, or chooses to forego that option, we will address its revocation request in a separate decision. But in the interim, we will defer consideration of Entergy's revocation request.

Pooling Authority – 49 U.S.C. 11322. The interchange commitments in the lease did not require pooling authority when the lease was executed in 1992, and they do not require such authority now. The pooling provisions of section 11322 require Board approval for an agreement between a “rail carrier providing transportation subject to the jurisdiction of the Board” and “another of those rail carriers.” The clear implication of this statutory language is that the agreement must be between existing regulated rail carriers. There is no requirement for approval under that provision of other types of agreements, such as an agreement between (a) a rail carrier and (b) a party that, like a prospective lessee of a line, is not providing regulated transportation when the agreement is submitted for approval. Moreover, the focus of section 11322 is on how agreements affect competition. Thus, the agreement must not only be between existing regulated carriers, but, as the ICC held in Union Pacific RR. et al. – Trackage Rights Over CNW, 7 I.C.C.2d 177, 184 (1990), those carriers must also be competitors.

Entergy cites Chicago & N.W. Ry. v. Peoria & Pekin Union Ry., 319 F.2d 117 (7th Cir. 1963) (C&NW/PPU). There, C&NW and PPU, a connecting terminal railroad, agreed that they would not compete with each other in switching cars in the terminal area and that C&NW would give all its switching business to PPU. The court held that the agreement required pooling authorization under a predecessor provision to section 11322. However, C&NW/PPU can be

²² Entergy would have us preclude enforcement of the interchange commitment provisions but require UP to continue leasing the line to MNA either for no compensation or through a compensation scheme that was not negotiated by the parties. However, UP expressly reserved the right to terminate the lease “in the event a court or other body determines that all or any of the provisions of [the rent/interchange commitment] are unlawful or otherwise unenforceable.” See Lease at section 15.01.

²³ Kansas City Power & Light, which is not a party to this proceeding, has a generating station served by MNA at Ladue, MO. In 2007, non-Entergy traffic over the line accounted for approximately 45% of the total line revenue. See Entergy Open., V.S. Thomas Crowley, Exh. TDC-4, Attachment No. 1, page 6, lines 1 and 2, Col. 16 (year 15).

distinguished because C&NW and PPU were switching service competitors at the time that they entered into an agreement not to compete.

When the lease at issue here was approved, UP's predecessor in interest (Missouri Pacific) and MNA were not competing regulated carriers, and thus the lease did not require pooling authority. For the Board to hold otherwise would be to go against longstanding precedent holding that short lines and the Class I's from which they acquire lines generally are not competitors at the outset,²⁴ and that newly created short lines are not regulated rail carriers prior to the effective date of their obtaining authorization under section 10901.

Emergency Service Provisions – 49 U.S.C. 11123. In appropriate circumstances, shippers experiencing serious service problems can obtain temporary relief from interchange restrictions under provisions of our statute bearing upon emergency situations. Under 49 U.S.C. 11123, the Board may “prescribe temporary through routes” when the agency determines that there has been a “failure of traffic movement” that “creates an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States, or that a rail carrier providing transportation subject to the jurisdiction of the Board under this part cannot transport the traffic offered to it in a manner that properly serves the public.” For example, if rail transportation of coal were to be disrupted due to weather or mine conditions, that disruption could constitute a “failure of traffic movement” under section 11123. If that failure of traffic movement were to threaten substantial adverse effects on a utility's ability to serve their customers in a region of the United States, then that utility could seek an emergency service order requiring the serving carrier to cooperate in opening a new, temporary interchange with another carrier that would allow the traffic to move (from other origins if necessary). Emergency relief is also available under sections 11102(a), 11102(c), or 10705(a) of our statute. See 49 CFR Parts 1146 and 1147.

In its pleadings, Entergy describes several instances in the past where relief might have been warranted under the Board's alternative service or emergency service provisions, but Entergy does not appear to be seeking relief here based on the argument that the interchange commitment precluded its ability to seek alternative service under these provisions. Nor does Entergy cite these provisions as a basis for relief.

We take this opportunity to clarify that any shipper may seek emergency service relief regardless of whether there is a contractual commitment in place between the carriers. As we have stated previously, carriers may not contract away a shipper's statutory rights through an interchange commitment. If a shipper believes it needs an order to remedy an emergency situation of such magnitude as to have substantial adverse effects on shippers, it should seek relief from the Board.

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

²⁴ See Class Exemption, 1 I.C.C.2d at 817 (exempted section 10901 transactions will generally maintain the status quo); Review of Rail Access, slip op. at 10.

It is ordered:

1. Entergy may amend its complaint by July 27, 2009, to seek relief in the form of a prescription of a new through route under 49 U.S.C. 10705. Supplemental evidence under section 10705 will be accepted in this proceeding.

2. If Entergy chooses to amend its complaint, the parties shall meet and confer and, within 14 days of the filing of the amended complaint, propose a reasonable procedural schedule to supplement the record. If the parties cannot agree, each should submit a proposed procedural schedule within 21 days of the filing of Entergy's amended complaint.

3. This decision is effective on its date of service.

By the Board, Acting Chairman Mulvey, and Vice Chairman Nottingham.

Anne K. Quinlan
Acting Secretary