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HAND DELIVERY

Chairman Daniel R. Elliott
Surface Transportation Board
Suite 1220 - Office of Chairman
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: STB Ex Parte No. 705 Competition in the Railroad Industry

Dear Chairman Elliott:

Enclosed for filing in the above-referenced proceeding are an original and ten copies of the Opening Comments of Norfolk Southern Railway Company.

Please acknowledge receipt of Norfolk Southern's Opening Comments by date-stamping the enclosed extra copies to be returned with our messenger. Thank you for your assistance in this matter. Should you have any questions, please contact the undersigned.

Sincerely,

Paul A. Hemmersbaugh

Counsel to Norfolk Southern Railway Company

Enclosures

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 705

COMPETITION IN THE RAILROAD INDUSTRY

OPENING COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY

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Dated: April 12, 2011

TABLE OF CONTENTS

I. STATUTORY CONSTRAINTS PRECLUDE THE BOARD FROM ALTERING ITS COMPETITION-RELATED RULES. 4

A. The Board Has Correctly Found That Its Governing Statute Does Not Permit It To Impose Anything Close To Forced Interchange or Forced Access. 4

B. The Board's Policies Are Consistent With Congress's Protection of Long-Haul Rights. 6

1. The Statutory Mandate Protecting a Carrier's Long Haul Right Has Long Been Affirmed By The Supreme Court. 6

2. The Board May Not Prescribe A Through Route That Short Hauls A Participating Carrier Unless One of the Three Statutory Exceptions Is Satisfied. 11

C. The Board's Existing Forced Interchange and Forced Access Standards Have Been Approved By Congress, and the Board Does Not Have Authority to Alter These Policies Unless Congress Acts. 14

1. Congress Has Ratified the Existing Competitive Access Rules 15

2. Congress Has Ratified *Great Northern*'s Holding that a Shipper May Not Challenge the Reasonableness of a Portion of a Through Rate. 20

3.Congress's Repeated Rejection of Legislation That Would Alter the *Midtec* and *Bottleneck* Decisions Is Further Evidence of Congressional Ratification of the Agency's Access Standards. 22

II. CHANGES IN ACCESS RULES WOULD NEGATIVELY AFFECT OPERATIONS AND RAIL SERVICE TO ALL CUSTOMERS. 30

A. Efficient Rail Operations Are Critical to the U.S. Economy. 30

B. Rail Operations Are Interconnected and Are Designed to Meet the Needs of As Many Customers As Possible. 33

Norfolk Southern Railway Company ("NS") submits these Comments in response to the Board's January 11, 2011 *Notice* requesting parties to comment on the state of competition in the railroad industry and on the Board's competitive access rules and policies ("*Notice*"). NS joins in the comments of the Association of American Railroads ("AAR") and offers the following supplemental comments on several of the important legal and factual issues raised by the *Notice*.

For several decades, under the cloak of seeking "competition," certain shippers have asked Congress, the Interstate Commerce Commission ("ICC"), and the Board for a regulatory regime that would allow shippers served by a single railroad to have government-mandated access to service by other railroads. Some have sought a change in the law to allow shippers to obtain forced interchange such as "reciprocal switching" or a government-imposed right to require a railroad to quote a rate to any interchange it serves, regardless of whether that railroad would thereby "short-haul" itself or whether the shipper had a contract with another railroad to that interchange.[1] Others have demanded forced access, such as terminal trackage rights on demand with rates prescribed by the government. These forced interchange and forced access proposals would be deeply unwise as a policy matter, both because they would divert funds needed for critical infrastructure investments into the pockets of a few select shippers and because they would have crippling effects on railroad operations and service.

But more fundamentally, the Board has long recognized that it <u>cannot</u> permit any arrangements that have the effect of forced interchange or forced access unless and until Congress amends the Interstate Commerce Act to allow it. As the Board expressly found:

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[1] In its *Notice*, the Board described two of the open access measures most commonly mentioned by rail shippers: "(1) requiring railroads to quote a rate between any two points they serve to allow another railroad to serve the shipper from an intermediate point to the final destination; and (2) imposing new rules for competitive access, such as mandated reciprocal switching or mandated terminal use arrangements, including trackage rights." *Notice* at 2.

> Whether an open access regulatory scheme for the railroad industry is good for carriers, shippers, and the Nation, absent demonstrated merger-related harm open access — as even a representative of the Consensus Plan Parties conceded at oral argument (Transcript at 17-18) — is not provided for in the statute that the Board currently administers, and thus, in our view, is a matter more appropriately debated in Congress.

Union Pac. Corp et al. – Control & Merger – S. Pac. Rail Corp. (*Houston Gulf Coast Oversight*), 3 S.T.B. 1030, 1032 (1998) (emphasis added). There has been no relevant change to the statute since that pronouncement. In fact, on multiple occasions the Board has reiterated its finding that it lacks statutory authority to implement open access.

The Board's conclusion that the statute precludes it from adopting the proposed forced interchange and forced access schemes is well-founded. The competition-related rules at issue in this proceeding – including the *Midtec* standard and the rules prescribed in the *Bottleneck* decisions[2] – are predicated on the text of the Interstate Commerce Act, decisions of the United States Supreme Court, and the deregulatory policies of Staggers and the ICC Termination Act ("ICCTA"), including Congress's continuing commitment to differential pricing and recognition of railroads' right to quote rates that maintain their long hauls. The Board could not change those statutory policies, even if it were inclined to do so.

Moreover, legislative history over the last two decades provides substantial evidence that Congress approves of the agency's competition-related rules. Congress's decision not to alter the ICC's access rules when it overhauled the statutory scheme in ICCTA shows that it has ratified the agency's interpretation. And Congress's repeated rejection of legislation that would

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[2] *Central Power & Light Co. v. S. Pac. Transp. Co.*, 1 S.T.B. 1059 (1996) ("*Bottleneck I*"), *clarified*, 2 S.T.B. 235 (1997) ("*Bottleneck II*").

alter the *Midtec* and *Bottleneck* rules further demonstrates that Congress ratified the Board's statutory interpretations.

Even if the Board somehow were to conclude that it is not bound by these legal constraints, and even if the Board were to consider forced interchange or forced access proposals despite the potentially devastating effect such policies could have on railroad capital investment and financial viability,[3] other practical considerations would still counsel strongly against changing the existing access and bottleneck rules. As Mark Manion, Norfolk Southern's Executive Vice President & Chief Operating Officer, explains in the attached verified statement, changing established rules at the demand of a few shippers who believe that doing so might lower their rates could have a significantly detrimental effect on operations and service to all NS customers. The Board should not consider measures that would threaten system-wide service and fluidity at the behest of a few shippers who would like to force access by another rail carrier as a way to obtain lower rates.

Most of the calls for forced interchange and forced access boil down to a belief by some shippers that "my rate is too high, and access to another carrier might give me leverage to get a lower rate." The Board has made significant efforts to provide access to its rate reasonableness policies, including developing less rigorous simplified standards for rate cases involving smaller amounts of money and substantially lowering filing fees. If a shipper believes that its rate is too high (or that a railroad's practices are not reasonable), it is free to use the Board's processes to challenge the reasonableness of that rate or practice. But the parochial concerns of some

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[3] The AAR's comments detail the important policy reasons why the Board should not risk undoing the successes of Staggers and ICCTA by, among other things, modifying competition policy in a way that could prevent railroads from collecting sufficient revenues to fund needed capital investments. NS joins in the AAR's comments.

shippers wishing to pay lower rates are no reason to put the health of the entire rail network in jeopardy by altering the regulatory balance established by Congress. The Board should not take that step, and indeed it cannot take that step, unless and until Congress authorizes a regulatory regime that would permit forced interchange or forced access.

Section I of these Comments details several of the statutory constraints that preclude the Board from substantially altering its competition-related rules. First, the Board itself has correctly and consistently recognized that it does not have statutory authority to implement "open access." Second, the explicit statutory protection of a carrier's long-haul right is a particularly critical provision restricting the Board's discretion in this area. Third, Congress's actions demonstrate that it has legislatively ratified the rules established in the *Midtec* and *Bottleneck* decisions. The Board therefore lacks the authority to substantially change those policies without Congress's approval. Section II of these Comments briefly summarizes the operational complications and difficulties that could result from adoption of proposed forced access or forced interchange proposals. These operational reasons are further detailed in the attached Verified Statement of Mr. Manion. *See* Verified Statement of Mark D. Manion On Behalf of Norfolk Southern Railway Company ("*V.S. Manion*").

I. STATUTORY CONSTRAINTS PRECLUDE THE BOARD FROM ALTERING ITS COMPETITION-RELATED RULES.

A. The Board Has Correctly Found That Its Governing Statute Does Not Permit It To Impose Anything Close To Forced Interchange or Forced Access.

The Board's *Notice* asked for comments addressing not only the merits of the Board's various competition-related policies but also "whether there are statutory constraints on the Board's ability to change policy at this time." *Notice* at 6. Simply put, the Board itself has

already answered the question. The Board has determined that an open access regime is not permitted by the existing statutory scheme.

> Whether an open access regulatory scheme for the railroad industry is good for carriers, shippers, and the Nation, absent demonstrated merger-related harm open access — as even a representative of the Consensus Plan Parties conceded at oral argument (Transcript at 17-18) — is not provided for in the statute that the Board currently administers, and thus, in our view, is a matter more appropriately debated in Congress.

Union Pac. Corp et al. – Control & Merger – S. Pac. Rail Corp. (*Houston Gulf Coast Oversight*), 3 S.T.B. 1030, 1032 (1998) (emphasis added). The Board made the same finding in *Bottleneck I*: "Congress chose not to provide for the open routing that shippers seek here. To the contrary, . . . Congress retained and strengthened the specific statutory provisions allowing carriers to select their routes and to protect their long hauls." 1 S.T.B. at 1067 (emphasis added). As the Board has found, a regulatory regime in which a shipper can obtain access to another railroad's rail service upon demand is plainly not provided for by the statute. That finding in and of itself should end the matter.

B. The Board's Policies Are Consistent With Congress's Protection of Long-Haul Rights.

1. The Statutory Mandate Protecting a Carrier's Long Haul Right Has Long Been Affirmed By The Supreme Court.

An important statutory guarantee that has shaped the Board's access policies is Congress's protection of carriers' right to long hauls. For more than a century, the Interstate Commerce Act has generally prohibited the ICC and the Board from prescribing a through route that "short hauls" a rail carrier. *See, e.g.,* 49 U.S.C. § 10705(a)(2). The rule that a carrier participating in a movement originating on its own lines and terminating on the lines of another carrier may not be "short-hauled" by an agency-prescribed through route was first incorporated in the Interstate Commerce Act by the Mann-Elkins Act of 1910. *See* 36 Stat. 539, 552. As the author of that Act explained, the proscription of short-hauling and protection of the controlling carrier's long haul codified the longstanding principle that:

> The [rail]road that initiates the freight and starts it on its movement in interstate commerce should not be required . . . to transfer its business from its own road to that of a competitor . . . when that commerce initiated by it can be as promptly and safely transported by its road as by the line of a competitor.

45 Cong. Rec. 3475-3476 (1910) (statement of Senator Elkins). The Senate report accompanying the bill that became the Mann-Elkins Act further explained the policy animating the short-haul proscription, finding that it would be:

> unreasonable to empower the [ICC] to require a railroad company having a line of its own between two designated termini to allow a portion only of that line to be taken and linked up with other lines for the purpose of creating another through route in competition with it, thus depriving it of the natural advantage of possessing a direct line between termini.

S. Rep. No. 355, 61st Cong., 2d Sess. 10; *see Chicago, Milwaukee, St. Paul, and Pac. R.R. Co. v. United States*, 366 U.S. 745, 750-52 (1961) (discussing legislative history of provision in course

of upholding ICC order refusing to prescribe through route that would deprive carrier of its long haul).

Over the last century, the Supreme Court has consistently rejected attempts to dilute the statutory protection of a controlling carrier's long haul. *See, e.g., United States v. Mo. Pac. R.R.*, 278 U.S. 269, 276-82 (1929) ("*Missouri Pacific*"); *Pa. R.R. v. United States*, 323 U.S. 588, 591-92 (1945); *see also Central Power & Light Co. v. S. Pac. Transp. Co.*, 2 S.T.B. 235, 243 (1997) ("*Bottleneck II*," acknowledging right of originating carrier "to maximize its long-haul"). For example, in several cases in the 1920s, the ICC ruled that the statute protecting a carrier's long haul applied only to originating carriers, and the short-haul prohibition did not apply to through routes that short-hauled an intermediate or terminating carrier. In one case, the ICC applied its narrowing construction of the short-haul proscription to order a through route that short-hauled an intermediate carrier. On appeal, the Supreme Court reversed, holding that the purpose of the statutory limit on the ICC's power to prescribe through routes "is to protect the long haul routes of carriers."[4] *Missouri Pacific,* 278 U.S. 269, 277 (1929). Rejecting the ICC's attempt to narrow the scope of the short-haul prohibition, the Supreme Court admonished, "It is for Congress to determine whether the Commission should have more authority in respect of the establishment of through routes. Construction may not be substituted for legislation." *Id.*, at 278.

In the decade following the *Missouri Pacific* decision, the ICC made several unsuccessful attempts to persuade Congress to revise or repeal the short-haul prohibition. *See Pennsylvania R.R. Co. v. United States*, 323 U.S. 588, 591-92 (1945). Despite the ICC's urging, and introduction of several bills to repeal the short-haul prohibition between 1930 and 1938,

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[4] The short-haul prohibition provision in effect at that time was codified at 49 U.S.C.A. §15(4).

Congress declined to change the law. *See id.*; *Thompson v. United States,* 343 US. 549, 555 & n.8 (1952). In 1940, the Senate passed a bill eliminating the short-haul prohibition, and the House passed a bill retaining the prohibition without change. The House-Senate conference adopted a compromise provision that retained the general prohibition, but created an exception allowing the ICC to order a through route that short-hauls a carrier only if it first found that the proposed alternative route "is needed in order to provide adequate, and more efficient or more economic, transportation." *Pennsylvania R.R.*, 323 U.S. 588, 591; *Thompson*, 343 U.S. 549, 555 (in the Transportation Act of 1940, Congress refused to eliminate the short-haul prohibition, but adopted "a new exception applicable only where the Commission makes the special findings listed in the amended" statute).

The following decade, the Supreme Court rejected another ICC attempt to dilute the short-haul prohibition and expand the agency's authority to prescribe through routes. *See Thompson*, 343 U.S. 549 (1952). This time, the ICC effectively claimed that through routes already existed where physical rail connections were available, even if the carrier(s) involved did not offer service between the origin and destination. *See Thompson*, 343 U.S. at 556-557. Therefore, the Commission suggested, if physical rail connections existed between two points (regardless of whether the carriers offered rail transportation service over the supposed through route), the Board's authority to prescribe alternative through routes – and the short haul prohibition limiting that authority – was not implicated. *See id.*, ("Confronted with . . . consistent legislative refusal to eliminate the short-hauling restriction on its power to establish through routes, the Commission" asserted that a through route already existed due to the existence of a physical rail connection). The agency then ordered a combined through rate that was lower than

the sum of the local rates charged by the two carriers for their portions of the "through route" posited by the Board. *Id.*, at 551.

The Supreme Court rejected the Commission's construction of the statute, finding that the "logical conclusion" of the Commission's theory was that "through routes exist between all points . . . wherever physical rail connections are available . . . [and] the Commission . . . would never have to establish through routes under [its statutory authority to order through routes] but could divert traffic to any route between two points by ordering reduction of the sum of the local rates over that route." *Id.*, at 559. As the Court further explained, the Commission's argument would effectively eliminate the short haul prohibition established by Congress:

> Acceptance of [the ICC's] argument would mean that Congress' insistence on protecting carriers from being required to short haul themselves could be evaded whenever the Commission chose to alter the form of its order. . . . In short, acceptance of the Commission's argument would mean that the acts of Congress since 1906 granting the Commission only a carefully restricted power to establish through routes have been unnecessary surplusage.

Id., at 560-61; *see Denver & Rio Grande W. R.R. Co. v. Union Pac. R.R. Co.,* 351 U.S. 321, 327 (1956) (stating that in *Thompson* the Court "emphasized the purpose of S. 15(4) to bar the Commission from compelling railroads to establish through routes resulting in trunkline 'short-hauls' without faithful observance of restrictive conditions imposed by that section").[5] Thus, the Supreme Court re-affirmed that the statute prohibiting the ICC from short-hauling a carrier must be enforced according to its terms and again rejected the implementing agency's attempted curtailment of the short haul prohibition.

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[5] *See United States v. Great Northern Ry. Co.,* 343 U.S. 562 (1952) (acknowledging application of short-haul prohibition as limitation on ICC power to prescribe through routes, but finding it inapplicable because through route already existed and Commission was prescribing a *rate* for that existing through route).

Subsequently, the Supreme Court again reaffirmed rail carriers' right to preserve their long haul and the general prohibition against regulatory short hauling in the prescription of through routes. In *Chicago, Milwaukee, St. Paul, & Pac. R.R. Co. v. United States*, 366 U.S. 745 (1961), the Court confronted the question of whether the short-haul prohibition covered the entire combined route of two connecting carriers, the second owned and controlled by the first. The Court first explained that the statutory "short haul exception" limited the ICC's authority to prescribe a through route, by prohibiting the agency from prescribing a through route that would deprive a rail carrier of its long haul. *Id.*, at 749 (ICC "shall not . . . require any carrier . . . to embrace in such [a through] route substantially less than the entire length of its railroad"). The Court went on to rule that the long haul protection of the statute applied to the entire combined route operated by a carrier and its subsidiary, and affirmed the ICC's denial of a competing carrier's request for prescription of a route that would have short-hauled the parent carrier. *Id.*, at 753-56.

These Supreme Court decisions remain the governing law of the land.[6] The general teachings of these decisions remain valid and binding: (1) The longstanding requirement that the Board protect a carrier's right to its long haul in the exercise of its authority to establish through routes – statutorily mandated by Congress – must be strictly applied and followed; (2) the agency may not engraft additional exceptions, adopt a construction at odds with the language and history of the short haul prohibition, or otherwise seek to avoid that prohibition in order to serve policy

[6] Although the short-haul prohibition has been modified slightly, primarily by modest expansion of the exceptions and clarification that the prohibition does not apply to actions required to implement other sections of the statute (sections prohibiting unreasonable discrimination and authorizing the Board to order use of terminal facilities or reciprocal switching), the fundamental prohibition remains unchanged. *See* 49 U.S.C. §§ 10705(a)(2); 11102. The Board's competitive access regulations expressly recognize that, in addition to a finding of anti-competitive conduct, any access prescription must also comply with the requirements of Section 10705 or 11102. *See* 49 C.F.R. § 1144.2(a)(1).

goals or initiatives not expressly addressed by Section 10705(a)(2)[7]; and (3) the agency must respect and abide by repeated congressional decisions rejecting proposed changes to the statute.

2. The Board May Not Prescribe A Through Route That Short Hauls A Participating Carrier Unless One of the Three Statutory Exceptions Is Satisfied.

The Board's power to deprive a carrier of its long haul right by establishing a through route is narrowly limited to the enumerated exceptions set forth in subsections (A), (B), and (C) of Section 10705(a)(2). The statute clearly and expressly states that the Board may order a through route that short hauls a carrier only in one of three circumstances: (1) when required to implement three other provisions of the statute; (2) when the carrier's long haul would make the route unreasonably long in comparison with a practicable alternative route; or (3) when the Board finds the proposed through route is needed to provide adequate and more efficient or economic transportation. *See* 49 U.S.C. § 10705(a)(2) ("The Board may require a rail carrier to [short haul itself] in a through route . . . only when— . . ."). Under *Chevron* and its progeny, where a statute is clear, it must be applied according to its terms. *See Chevron, U.S.A. v. Nat'l Res. Def. Council et al*, 467 U.S. 837, 842-43 ("If the intent of Congress is clear, that is the end of the matter . . . the agency, must give effect to the unambiguously expressed intent of Congress.").

The express language of Section 10705(a)(2) makes clear that the Board has very limited authority to prescribe a through route that short hauls a rail carrier. Under any other circumstance, the century-old short-hauling prohibition and the Supreme Court's strict interpretation thereof precludes the Board from depriving a carrier of its right to a long haul.

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[7] It is black letter law that an administrative agency may not, directly or indirectly, overrule Supreme Court decisions. *See, e.g.,* Pierce Admin. L. Treatise § 2.9 at 129.

Any Board decision, rule, or regulation contrary to this statutory command would be outside the agency's power and unlawful. *See, e.g., Am. Library Ass'n v. Federal Commc'ns Comm'n*, 406 F.3d 689, 691, 698-99 (D.C. Cir. 2005); *Aid Ass'n for Lutherans v. United States Postal Serv.*, 321 F.3d 1166, 1174 (D.C. Cir. 2003) (agency regulation under a statute is impermissible if the regulation "exceeds the agency's authority" delegated by Congress). Thus, in considering any possible change to its competitive access rules, the Board must take care not to exceed the limits of its authority, including the short-haul prohibition. As discussed below, at least one "relaxed standard" the Board may consider in this proceeding appears likely to violate that statutory command.

In a single, fleeting discussion in 1996, the Board speculated that, in the future, it might seek to prescribe a through route based on a determination that service by a non-bottleneck carrier over an alternative route would be "better" than service provided by a bottleneck carrier over the existing through route. *See Bottleneck I*, 1 S.T.B. at 1069 (further opining that such relief would be permissible under the Board's competitive access rules). This speculative suggestion – which the Board did not rely upon for its decision dismissing the complaints in *Bottleneck I,* and which had no application to the facts and allegations of the case—was *dicta* and has no precedential effect. And, over the next 14 years, the Board did not decide any case based on the hypothetical approach it briefly mentioned in *Bottleneck I.*

In a very recent decision, however, the Board relied on the *Bottleneck I dicta* discussed above to assert that "[s]ome Board precedent suggests that a party may be able to obtain a through route prescription under an arguably more relaxed standard than set forth in our [competitive access] regulations. . . . [A] party could, under certain circumstances, obtain relief after establishing that the prescribed through route was 'better' or 'more efficient' in lieu of

making an anticompetitive conduct showing." *Entergy Arkansas, Inc. et al v. Union Pac. R.R. Co. et al,* STB Docket Nos. 42104, 32187, Decision at 7 (March 15, 2011) ("*Entergy*"). That *dicta* is inconsistent with the statute (at least to the extent the prescribed through route would "short-haul" a carrier) because it is not within any of the three narrow exceptions to the statutory prohibition of Section 10705(a)(2).

The Board went on to find that neither the standard established by its regulations nor the "more relaxed standard" mentioned in *Bottleneck I* were satisfied and denied complainants' request to establish an alternative through route. *Id.*, slip op. at 16. In the same decision, the Board stated that it "need not clarify what standard applies" to competitive access requests in the *Entergy* decision, but that it expected to address what standard applies and "more fully explore the proper legal framework to govern future competitive access cases" in the present proceeding (STB Ex Parte No. 705). *See Entergy*, slip op. at 8, n. 16.

The clear answer is that the "better route" approach the Board created and purported to apply in *Entergy* cannot supplant the statutory short-haul prohibition of § 10705(a)(2). While the Board has some discretion in its consideration and application of the standards articulated in 49 U.S.C. § 11102 (for terminal access rights), the short-haul prohibition of § 10705(a)(2) is stated in clear, absolute terms. The statute clearly prohibits the Board from establishing an alternative route that short-hauls a participating carrier, unless one of the statutory exceptions is satisfied.[8] *See* 49 U.S.C. § 10705(a)(2) (Board may prescribe route short-hauling carrier "only" if one of three exceptions is met). Just as the ICC could not evade the clear requirements of the short-haul

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[8] Those exceptions include routings necessary to effectuate access through use of terminal facilities required by the Board under its power established by 49 U.S.C. § 11102. The Board's existing competitive access regulations expressly recognize that, in addition to a finding of anti-competitive conduct, any competitive access prescription must also comply with the requirements of Section 10705 or 11102. *See* 49 C.F.R. § 1144.2(a)(1).

prohibition in multiple attempts in the 20th century, so the Board may not – directly or indirectly – evade those requirements today. *See, e.g., Thompson v. United States,* 343 U.S. 549 (1952); *United States v. Mo. Pac. R.R.,* 278 U.S. 269 (1929). For more than 100 years, the Interstate Commerce Act has protected carriers' right to a long haul by expressly prohibiting this agency from short-hauling a carrier except under certain limited circumstances enumerated in the statute. Until Congress changes the law, the Board (which derives all of its authority from Congress) lacks authority to prescribe a route that deprives a carrier of its long haul, except in compliance with the governing statute.[9] *See generally Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."). This longstanding limit on the Board's route prescription authority remains as inviolate and binding today as it has been throughout the last 100 years.

B. The Board's Existing Forced Interchange and Forced Access Standards Have Been Approved By Congress, and the Board Does Not Have Authority to Alter These Policies Unless Congress Acts.

The Board's *Notice* asked for comments addressing not only the merits of the Board's various competition-related policies but also "whether there are statutory constraints on the Board's ability to change policy at this time." *Notice* at 6. The Board's concern about the statutory constraints on its ability to alter longstanding forced access policies is well placed. Congress approved the access rules that the ICC adopted pursuant to the Staggers Act, and ICCTA effectively ratified the *Midtec* approach to requests for forced access. Similarly,

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[9] If the Board wishes to establish additional conditions prerequisite to its consideration of a request to prescribe a through route or terminal access, it has authority to do so. *See, e.g.* 49 C.F.R. Part 1144 (competitive access rules). However, the irreducible minimum precondition to any route prescription that would short haul a carrier is satisfaction of one of the exceptions to the general prohibition on such prescriptions. *See* 49 U.S.C. § 10705(a)(2).

Congress's repeated ratification of the Supreme Court's application of the Interstate Commerce Act in *Great Northern* precludes the Board from departing from its precedents to authorize rate reasonableness challenges to a portion of a through rate. The fact that Congress has repeatedly rejected legislation that sought to reverse *Midtec* and *Great Northern* provides further strong evidence that Congress approves of these longstanding interpretations. The Board lacks the authority to rewrite fundamental policies that Congress has explicitly endorsed and repeatedly refused to revise.

1. Congress Has Ratified the Existing Competitive Access Rules.

Many of the competitive policies at issue in this proceeding have been in place for nearly a quarter century. In *Intramodal Rail Competition*, 1 I.C.C. 2d 822 (1985), the ICC adopted a joint railroad-shipper proposal for competitive access regulations that continue to govern competitive access complaints today. *See id.,* at 839-43; 49 C.F.R. Part 1144. The ICC first applied its competitive access regulations in 1985. *See Midtec Paper Corp. v. Chicago & N.W. Transp. Co.*, 1 I.C.C. 2d 362 (1985) ("*Midtec I*"), *reconsidered,* 3 I.C.C. 2d 171 (1986) ("*Midtec II*"), *aff'd sub nom. Midtec Paper Corp. v. United States,* 857 F.2d 1487 (1988). Consistent with *Intramodal Rail Competition*, the ICC held in *Midtec* that a complainant's ability to obtain government-prescribed access from another railroad depended on whether it could show that the railroad serving it "has engaged in or is likely to engage in conduct that is contrary to the rail transportation policy or is otherwise anticompetitive." *Midtec II*, 3 I.C.C. 2d 171, 181.

By 1986, therefore, the ICC had clearly established that under Staggers competitive access should only be imposed in "situations where some competitive failure occurs," and that therefore the ICC would not force access in the absence of evidence that a railroad was abusing its market power. *Midtec II*, 3 I.C.C. 2d at 174. Because Congress is presumed to be aware of

that agency interpretation, Congress's decision in 1995 to re-enact the access provisions of the Interstate Commerce Act without revising the ICC's *Midtec* approach effectively ratified *Midtec*. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change." *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 783 n.15 (1985); *see, e.g.*, *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 (1964); *United States v. G. Falk & Brothers*, 204 U.S. 143, 151 (1907).

While in some cases an agency has the authority to alter a longstanding interpretation of its governing statute if the agency has sufficient grounds for such a reversal, an agency does not have freedom to reverse itself if Congress has approved of the previous interpretation. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, (2000). In *FDA v. Brown & Williamson*, the Supreme Court held that the FDA was not free to change its previous view that it did not have jurisdiction to regulate tobacco products because Congress had "effectively ratified the FDA's previous position" by enacting tobacco-specific legislation "against the background of the FDA repeatedly and consistently asserting that it lacks jurisdiction . . . to regulate tobacco products as customarily marketed." *Id.*, at 155-56. Simply put, while an agency has the ability to change its own interpretation of a statute so long as Congress has not spoken on the question, it loses that ability if Congress acts to adopt that same interpretation.

Here, Congress's knowing ratification of the *Midtec* standard in ICCTA is more than a presumption. There is powerful evidence that Congress explicitly considered the ICC

competitive access rules – including proposals that would expand or eliminate those rules – before choosing to affirm the ICC's "existing standards." H. Rep. No. 104-311, at 84, *reprinted in* 1995 U.S.C.C.A.N. 793, 796 (1995). On October 25, 1994 – just over a year before ICCTA was enacted – the ICC gave Congress a comprehensive report on the ICC's interpretation of its regulatory responsibilities. *See* ICC, *Study of Interstate Commerce Commission Regulatory Responsibilities Pursuant to Section 210(a) of the Trucking Industry Regulatory Reform Act of 1994* (Oct. 25, 1994), *available at* 1994 WL 639996 (hereafter "*ICC Regulatory Responsibilities Report*"). Among other things, the *ICC Regulatory Responsibilities Report* described the statutory framework for access remedies and the ICC's interpretation of the appropriate scope of those remedies. *See id.*, at *25-26. The report noted that "[l]ittle use has been made of the forced switching and terminal trackage rights provisions of the statute" and that "[t]he Commission will force such arrangements only where necessary to redress anticompetitive actions." *Id.*, at *25 & n.152 (citing *Midtec*). The *ICC Regulatory Responsibilities Report* emphasized that "regulatory intervention is now properly limited to those situations in which it is necessary to address a carrier's anticompetitive actions" and that it was important for access remedies to be "used cautiously," in part because "requiring railroads to make their tracks available to competitors undermines the incentive carriers have to invest in their facilities." *Id.*, at *26. The *ICC Regulatory Responsibilities Report* thus gave Congress further clear notice of *Midtec* and the ICC's determination that competitive access remedies were only available "to address a carrier's anticompetitive actions."

Shortly after Congress received the *ICC Regulatory Responsibilities Report*, the House Transportation Committee's Subcommittee on Railroads held comprehensive hearings on the functions of the ICC. *See Disposition of the Railroad Authority of the Interstate Commerce*

Commission: Hearing Before the Subcomm. on Railroads of the H. Comm. on Transportation, 104th Cong. (Jan. 26 & Feb. 22, 1995) (hereafter "*ICC Authority Hearings*"). The primary subject of those hearings – held when Congress was developing the legislation that became ICCTA – was what ICC functions should be preserved, what functions should be terminated, and whether the scope of rail regulation under the Interstate Commerce Act should be altered in any other ways. Many of the witnesses in that hearing – including the chair of the ICC – specifically discussed the scope of the ICC's authority to order competitive access.[10] Some argued that Congress should amend the statute to lower the burden to obtain agency-mandated reciprocal switching or terminal access.[11] Indeed, some shipper groups specifically criticized the *Midtec* decision and standards.[12] Of particular note was testimony offered on behalf of the Department of Transportation that urged legislators to preserve the current legal standard under which the agency "can order access under certain conditions" and "on a very limited basis." *Id.*, at 17-18 (testimony of J. Canny, Deputy Assistant Secretary of Policy, U.S. Department of Transportation). In response to a question about whether the ICC had authority to order one railroad to provide access to another, the DOT witness responded that "the ICC can order access

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[10] *See, e.g.*, *ICC Authority Hearings* at 111 (statement of ICC Chairman Gail McDonald, noting that ICC had authority to order competitive access); *id.,* at 260 (comments of National Industrial Transportation League); *id.,* at 404 (statement of American Short Line R.R. Association); *id.,* at 425 (additional statement from Chairman McDonald).

[11] *See ICC Authority Hearings* at 192-93 (testimony of R. Granatelli on behalf of Society of Plastics); *id.,* at 281-82, 291 (Society of Plastics statement urging legislation to promote competitive access for shippers served by one railroad); *id.,* at 493-94 (statement of U.S. Clay Producers urging "statutory requirements and procedures for competitive access through switching, trackage rights, or otherwise, so that shippers served by only one Class I railroad are assured of access to other Class I railroads with reasonable rates and routes"); *id.,* at 496 (statement of U.S. Clay Producers: "A prompt and effective approach must be provided in the statute so that all shippers are permitted access to more than one Class I rail carrier upon reasonable request."); *id,.* at 534 (comments of Chemical Manufacturers Association on "Competitive Access": "Any new legislation must encourage greater rail-to-rail competition than currently exists. All shippers must have the right of access to two or more railroads at reasonable rates and service.").

[12] *See ICC Authority Hearings*, at 282 & n.8.

under certain conditions and that they do that on a very limited basis," and later made clear that DOT "propose[d] no change to that provision." *Id.* In a written statement, DOT argued that "competitive access authority should be retained in its current form" and that such authority "must be exercised judiciously." *Id.*, at 221; *see also id.*, at 25 (DOT recommendation to maintain ICC's existing access authority).

Manifestly, Congress was fully informed both of the ICC's interpretation of its forced access authority and of the arguments of shippers seeking to lower the bar for obtaining an ICC order for forced access and forced interchange.[13] With that knowledge, Congress chose to re-enact the reciprocal switching and terminal access provisions of the Interstate Commerce Act without making substantive changes to "existing standards." H. Rep. No. 104-311, at 84, *reprinted in* 1995 U.S.S.C.A.N. 793, 796 (1995) (ICC functions including "terminal trackage rights and reciprocal switching jurisdiction" would be "transferred to the [successor agency] under existing standards with minor modifications for large Class I railroads' transactions").[14] In doing so, Congress made clear that it approved of and did not intend to alter the ICC's post-Staggers approach to economic regulation, including its forced interchange and forced access standards and approach:

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[13] It is worth noting that calls for Congress to amend the ICA to "encourag[e] the use of reciprocal switching" were made more than a decade before ICCTA. *See, e.g.*, *Oversight of the Staggers Rail Act of 1980: Hearings Before the Subcomm. on Surface Transportation of the S. Comm. on Commerce, Science, and Transportation*, 98th Cong. ("*Staggers Oversight Hearings*") at 551-560 (statement of Chemical Manufacturers Association proposing legislation "to promote rail-to-rail competition" by requiring reciprocal switching on request); *see also id.*, at 231-35 (comments of shipper coalition the "Procompetitive Rail Steering Committee" calling for Congress to enact "clarifying legislation" to promote competitive access policies that would allow a shipper to "have access to as many railroads as can practically compete for his business"); *id.*, at 336 (NITL statement encouraging Congress to take "remedial actions" to "[f]oster[] rail-to-rail competition").

[14] *See also id.*, at 105, 1995 U.S.S.C.A.N. at 816 (ICCTA "retains the existing agency power to order access to terminal facilities"); H. Rep. No. 104-422, at 183-84, *reprinted in* 1995 U.S.S.C.A.N. 850, 868-69 (Conf. Rep.) ("Under the amended section 11102, the agency's existing power to order access to terminal facilities, including main-line tracks a reasonable distance from the terminal, would be retained.").

> Beyond weeding out outdated and unnecessary provisions, the bill generally does not attempt to substantively redesign rail regulation. Rather, it would preserve the careful balance put in place by the 4R Act and the Staggers Act that led to a dramatic revitalization of the rail industry while protecting significant shipper and national interests.

S. Rep. No. 104-176, at 6 (1995). Indeed, the Senate Report explicitly rejected calls for further regulation of issues such as "market access": "The Committee recognizes that certain affected shipper groups – most notably smaller shippers and smaller railroads – believe that further legislative changes are necessary or desirable to more fully protect their interests. However, the Committee is concerned that such additional measures would necessarily cast an overly broad regulatory net and even then might be ineffective to solve the underlying concerns (e.g., car supply, market access, etc.)." *Id.*, at 9-10.

In short, there is little question that when Congress passed ICCTA it was well aware of *Midtec* and the ICC's interpretation of its forced access and forced interchange authority and that Congress was equally well-informed of the fact that some shippers believed that *Midtec* should be reversed. With that knowledge, Congress chose to re-adopt the access provisions of the ICA without altering the ICC's preexisting interpretation. That informed action ratified the *Midtec* approach to regulating "market access," and as a result only Congress may change that law. . *See, e.g., Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 783 n.15 (1985).

2. Congress Has Ratified *Great Northern*'s Holding that a Shipper May Not Challenge the Reasonableness of a Portion of a Through Rate.

While the Board's *Bottleneck* decisions and their affirmance by appellate courts post-date ICCTA, the foundation of those decisions – the Supreme Court's *Great Northern* decision holding that a shipper may not bring a rail reasonableness challenge to a portion of a joint rate – was well-established law at the time of ICCTA (and at the time of Staggers). As early as 1925

the Supreme Court made clear that under the Interstate Commerce Act a shipper has no right to challenge the reasonableness of a portion of a joint through rate because "[t]he shipper's only interest is that the joint rate be reasonable as a whole." *Louisville & No. R.R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 234 (1925); *see Great Northern Ry. Co. v. Sullivan*, 294 U.S. 458, 463 (1935). That interpretation and application of the law has been repeatedly affirmed by federal courts of appeals,[15] by the ICC,[16] and by the STB.[17] And Congress has long been well aware of the *Great Northern* rule.[18] Over the last 75 years *Great Northern's* prohibition of challenges to a portion of a joint through rate has become deeply woven into the fabric of commerce law. Congress has never altered the *Great Northern* rule, despite passing multiple comprehensive revisions of the Interstate Commerce Act over the last several decades, including the 4R Act, the Staggers Act, and ICCTA. Congress's decision to maintain the *Great Northern* interpretation of the agency's authority to entertain rate reasonableness challenges to a

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[15] *See, e.g.*, *Union Pac. R.R. Co. v. STB*, 202 F.3d 337, 339 (D.C. Cir. 2000) ("It has been a venerable principle of rail regulation that the reasonableness of a rate is to be assessed on a 'through basis' – that is to say, a shipper may challenge only the rate of the origin-to-destination route as a whole, rather than the reasonableness of rates charged for a particular segment of the route."); *Western Resources, Inc. v. STB*, 109 F.3d 782, 789 (D.C. Cir. 1997) ("Shippers . . . charged either a joint or proportional rate, must challenge the rate for the *entire* through movement; they cannot challenge individual segments") (emphasis in original); *United States v. ICC*, 198 F.2d 958, 974 (D.C. Cir. 1952) ("[*Great Northern*] held that the shipper could not complain of the division of the charges among the participating carriers, and . . . remarked that 'The shipper's only interest is that the charge shall be reasonable as a whole.").

[16] *See, e.g.*, *Metropolitan Edison v. Conrail*, 5 I.C.C.2d 385, 408 (1989) ("The Supreme Court's conclusions in *L&N* and *Great Northern* continue to have vitality after the Staggers Act").

[17] *See, e.g.*, *Arizona Elec. Power Coop., Inc. v. Burlington No. & Santa Fe Ry. Co. & Union Pac. R.R. Co.*, STB Docket No. 42058, at 12 & n.18 (Mar. 15, 2005) ("Both Supreme Court and agency precedent require that, whether examining joint rates or proportional rates, we must address the reasonableness of the through rate as a whole, rather than the reasonableness of the component part of the through rate."); *Major Rail Consolidation Procedures*, 5 S.T.B. 539, 564 (2000) ("It is now well settled that, absent a transportation contract to a junction, our statutory scheme does not permit shippers to challenge segments of joint or through rates.").

[18] Indeed, on several occasions during the years between the passage of the Staggers Act and the passage of ICCTA, Congress was asked to amend the ICA to require carriers to quote bottleneck rates. *See, e.g.*, *ICC Authority Hearings* at 260 (NITL statement seeking legislation giving "[a]ll shippers . . . the right to buy transportation to a specific interchange point and to switch their cargo to a competing carrier"); *Staggers Oversight Hearings* at 559-60.

portion of a through rate is strong evidence that Congress concurs with, and has ratified, that interpretation. *See Herman & Maclean v. Huddleston*, 459 U.S. 375, 385-86 (1983).

3. Congress's Repeated Rejection of Legislation That Would Alter the *Midtec* and *Bottleneck* Decisions Is Further Evidence of Congressional Ratification of the Agency's Access Standards.

Further powerful evidence that Congress approves of the Board's current rules is the fact that, despite abundant opportunities over the course of the last 25 years, Congress has never altered either the *Midtec* decision or the *Bottleneck* rules. While some individual members of Congress have deemed the Staggers Act "unfortunate[]" and have introduced legislation that would overturn the *Midtec* or *Bottleneck* decisions,[19] Congress repeatedly has rejected those efforts. Over the past twelve years at least sixteen bills have been introduced in the House or Senate that would alter the *Midtec* standard by lowering the burden for a shipper to obtain an order to force reciprocal switching or terminal access.[20] Not one of those bills passed even one

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[19] *See* 146 Cong. Rec. S9891 (Oct. 5, 2000) (statement of Sen. Rockefeller) ("When the Staggers Act was passed to deregulate the railroads, *which unfortunately this Congress did in 1980*, they divided it into two parts.") (emphasis added).

[20] *See, e.g.*:

1) Surface Transportation Board Reauthorization Act of 2009, S. 2889, § 303 (2009) (overturning *Midtec,* establishing when STB should provide terminal access, and create a pricing mechanism);
2) Railroad Competition and Service Improvement Act of 2007, S. 953, 110th Cong., § 104 (2007) (requiring, rather than authorizing, STB to order reciprocal switching);
3) Railroad Competition and Service Improvement Act of 2007, H.R. 2125, 110th Cong., § 104 (2007) (same);
4) Railroad Competition Improvement and Reauthorization Act of 2005, H.R. 2047, 109th Cong., § 5 (reversing *Midtec* by prohibiting Board from requiring evidence of anticompetitive conduct as condition to ordering reciprocal switching);
5) Railroad Competition Act of 2006, S. 2921, 109th Cong., § 104 (2006) (reversing *Midtec* by amending statute to read "the Board shall not require evidence of anticompetitive conduct by a rail carrier from which access is sought" as condition to terminal access or reciprocal switching);
6) Railroad Competition Act of 2005, S. 919, 109th Cong., § 102 (2005) (prohibiting Board from requiring evidence of anticompetitive conduct as pre-condition to ordering terminal access or reciprocal switching);
7) Railroad Competition Act of 2003, H.R. 2924, 108th Cong., § 5 (2003) (abrogating *Midtec* by prohibiting Board from requiring evidence of anticompetitive conduct as pre-condition to ordering terminal access or reciprocal switching);

house of Congress. Similarly, since 1998 Congress has considered at least seventeen bills that would overturn the Board's *Bottleneck* decisions.[21] Again, not one of those bills passed in either

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8) Railroad Competition Act of 2003, S. 919, 108th Cong., § 5 (2003) (same);
9) Surface Transportation Board Reform Act of 2003, H.R. 2192, 108th Cong., § 104 (2003) (overturning *Midtec*);
10) Railroad Competition Act of 2001, S. 1103, 107th Cong., § 103 (2001) (abrogating *Midtec* by providing that, in considering requests for reciprocal switching or terminal access, STB "may not require evidence of anticompetitive conduct by a rail carrier from whom access is sought");
11) Surface Transportation Board Reform Act of 2001, H.R. 141, 107th Cong., § 104 (2001) (same);
12) Railroad Competition and Service Improvement Act of 1999, H.R. 2784, 106th Cong., § 7 (1999) (overturning *Midtec* by prohibiting STB from requiring evidence of anticompetitive conduct as condition to ordering terminal trackage rights or reciprocal switching);
13) Railroad Competition and Service Improvement Act of 1999, S. 621, 106th Cong., § 7 (1999) (same);
14) Surface Transportation Board Reauthorization Act of 1999, H.R. 3163, 106th Cong., § 6 (1999)(same);
15) Surface Transportation Board Reform Act of 1999, H.R. 3446, 106th Cong., § 104 (1999) (to same effect); and
16) Surface Transportation Board Modernization Act, H.R. 3398, 106th Cong., § 12 (1999) (overturning *Midtec* by changing the standards for terminal access and reciprocal switching and altering the procedure for Board action).

[21] *See, e.g.*:

1) Surface Transportation Board Reauthorization Act of 2009, S. 2889, § 302 (2009) (overturning *Bottleneck* decisions by providing that the rail carrier shall, "upon the reasonable request of a rail customer, establish a bottleneck rate for the purpose of providing transportation over a bottleneck segment");
2) Railroad Competition and Service Improvement Act of 2007, S. 953, 110th Cong., § 102 (2007) (eliminating the *Bottleneck* rule by stating "[u]pon request of a shipper, a rail carrier shall establish a rate for transportation and provide service requested by the shipper between any 2 points on the system of that carrier at which traffic originates, terminates, or may reasonably be interchanged.");
3) Railroad Competition and Service Improvement Act of 2007, H.R. 2125, 110th Cong., § 102 (2007) (nullifying the *Bottleneck* rule by requiring that "[u]pon the request of a shipper, a rail carrier shall establish a rate for transportation and provide service requested by the shipper between any two points on the system of that carrier where traffic originates, terminates, or may reasonably be interchanged.");
4) Railroad Competition Improvement and Reauthorization Act of 2005, H.R. 2047, 109th Cong., § 3 (abrogate *Bottleneck* decisions by requiring carrier to establish rate for service between any two points at which traffic originates or terminates or could be interchanged);
5) Railroad Competition Act of 2006, S. 2921, 109th Cong., § 102 (2006) (same);
6) Railroad Competition Act of 2005, S. 919, 109th Cong., § 102 (2005) (same);
7) Railroad Competition Act of 2003, H.R. 2924, 108th Cong., § 6 (2003) (overturning the *Bottleneck* decisions by requiring a carrier to establish a rate between any two points on the system "where traffic originates, terminates, or may reasonably be interchanged" at the shipper's request.);
8) Railroad Competition Act of 2003, S. 919, 108th Cong., § 6 (2003) (same);
9) Surface Transportation Board Reform Act of 2003, H.R. 2192, 108th Cong., § 102 (2003) (reversing *Bottleneck* by requiring rail carriers to "establish a rate for transportation and provide service requested by the shipper between any two points on the system of that carrier where traffic originates, terminates, or may reasonably be interchanged" at the shipper's request.);

house of Congress.[22] The purposes and intended effects of all of this proposed legislation were well known. Sponsors made clear that these bills were intended, *inter alia,* to repeal current access standards and the bottleneck rules.[23]

Consistent Congressional rejection of proposed legislation that would overrule agency construction of federal statutes is strong evidence of congressional agreement with that construction. As the Supreme Court explained more than 30 years ago, "once an agency's statutory construction has been fully brought to the attention of the public and Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States v.*

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10) Railroad Competition Act of 2001, S. 1103, 107th Cong., § 101 (2001) (eliminating the *Bottleneck* rule by providing that "[u]pon the request of a shipper, a rail carrier shall establish a rate for transportation and provide service requested by the shipper between any two points on the system of that carrier where traffic originates, terminates, or may reasonably be interchanged.");
11) Surface Transportation Board Reform Act of 2001, H.R. 141, 107th Cong., § 102 (2001) (same); S. 747, 106th Congress § 7 (revising *Bottleneck* rule);
12) Railroad Competition and Service Improvement Act of 1999, H.R. 2784, 106th Cong., § 5 (1999) (abrogate the *Bottleneck* rule);
13) Railroad Competition and Service Improvement Act of 1999, S. 621, 106th Cong., § 5 (1999) (abrogating *Bottleneck* rule, and requiring service and rates between any two points where traffic may reasonably be interchanged, originated, or terminated);
14) Surface Transportation Board Reform Act of 1999, H.R. 3446, 106th Cong., § 102 (1999) (same);
15) Surface Transportation Board Modernization Act, H.R. 3398, 106th Cong., § 10 (1999) (same);
16) Surface Transportation Board Amendments of 1998, S. 2164, 105th Cong., § 8 (1998); and
17) Railroad Shipper Protection Act of 1997, S. 1429, 105th Cong., § 6 (1997) (reversing *Bottleneck* rule and requiring carrier to quote rate between any two points on its system where traffic could originate, terminate, or be interchanged).

[22] These counts do not include the currently-pending Senate bill that would overrule both *Midtec* and the *Bottleneck* decisions. *See* Surface Transportation Board Reauthorization Act of 2011, S. 158, §§ 302, 303 (2011). At the time of these comments, Congress has not taken action on that bill.

[23] *See* S. Rep. No. 111-380, at 12 (2010) (stating that Surface Transportation Board Reauthorization Act of 2009 "would overturn the mid-1980s Midtec Paper decisions" and would require Class I carriers to quote bottleneck rates); 153 Cong. Rec. E1016 (statement of Rep. Oberstar) (May 10, 2007) (Railroad Competition and Service Improvement Act of 2007 would "eliminate bottlenecks" and prohibit STB from requiring abuse of market power to order competitive access); 145 Cong. Rec. E2482 (statement of Rep. Oberstar) (Nov. 19, 1999) (Surface Transportation Board Reform Act of 1999 would "correct[] the Board's 'bottleneck' decision" and "make[] it easier to secure competing rail service in terminal areas, and by reciprocal switching")

Rutherford, 442 U.S. 544, 554, n. 10; *see United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) (Congressional refusal to overrule agency construction of legislation is "evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress's attention through legislation specifically designed to supplant it."). While courts are generally "slow to attribute significance to the failure of Congress to act on particular legislation," courts properly may infer congressional acquiescence in an agency interpretation where Congress has repeatedly failed to act on legislation specifically aimed at reversing that interpretation. *Bob Jones University v. United States*, 461 U.S. 574, 600 (1983); *see Canada Packers, Ltd. v. Atchison, Topeka & Santa Fe Ry. Co.*, 385 U.S. 182, 184 (1966) (rejecting challenge to joint through rate reasonableness determination under *Great Northern,* citing the "longstanding construction of the statute by both the [ICC] and this Court," and holding that fact that "Congress, which could easily change the rule, has not yet seen fit to intervene" supported ICC's "long-standing construction of the statute").[24]

In *Bob Jones*, over a twelve-year period, thirteen bills were introduced to overturn an IRS statutory interpretation, and Congress did not adopt any of them. The Supreme Court found Congress's failure to enact any of those bills to be "significant" evidence that Congress approved of the IRS's interpretation. *Id.*, at 600-01; *see Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 170 n.5 (2001) (*Bob Jones* presented "overwhelming evidence of acquiescence"). But as strong as the evidence of congressional acquiescence was in

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[24] Although courts have generally been slow to read congressional intent into congressional inaction, the Supreme Court has long held that, in appropriate circumstances, it is appropriate to rely on longstanding congressional acquiescence in executive branch policies and practices to presume congressional concurrence. *See, e.g., United States v. Midwest Oil Co.,* 236 U.S. 459, 474 (1915); *Costanzo v. Tillinghast*, 287 U.S. 341, 345 (1932); *see also Brown & Williamson v. FDA,* 153 F.3d 155, 170 ("[U]nder certain circumstances, inaction by Congress may be interpreted as legislative ratification of or acquiescence to an agency's position") (citing *Bob Jones University*).

Bob Jones, it is even more overwhelming here, where Congress has rejected at least sixteen bills seeking to overturn this agency's interpretations – three more than in *Bob Jones*. *See Brown & Williamson v. FDA,* 153 F.3d 155, 170-71 (relying on congressional rejection of 15 bills that would have reversed FDA determination that it lacked jurisdiction over tobacco products to find legislative acquiescence as strong as that in *Bob Jones University* and reject revised FDA position asserting jurisdiction).

Numerous statements of authors and sponsors of the bills further demonstrate that the bills Congress rejected would have overturned precisely the agency regulations and provisions at issue. For example, the same year the Board issued the *Bottleneck II* decision, five Senators introduced S. 1429, the "Railroad Shipper Protection Act of 1997," which sought to overrule the *Bottleneck* rules. The bill's sponsors explained to the Senate what the bill was designed to accomplish:

> This legislation addresses the broader issues of promoting rail competition . . . [and] makes a couple of changes in specific policies of the STB. First, this bill overturns the STB's decision on the so-called "bottleneck" case where the STB concluded that carriers have no obligation to quote a rate for a segment of line.

Statement of Senator Dorgan 143 Cong. Rec. S12019 (Nov. 7. 1997); *see id.*, at 12018, Statement of Senator Rockefeller ("This bill would . . . overturn[] the bottleneck decision by requiring railroads to quote a rate on any available segment of service . . ."). The bills were not enacted. In the intervening 13 years, sponsors of numerous other bills repeatedly made clear that

their intention was to overturn the Bottleneck rules, and to require a carrier to quote a rate for movement of freight over any segment of its system.[25]

In addition to the numerous bills Congress has considered since ICCTA, it has held a number of hearings addressing the very issues raised in this proceeding, including *Midtec* and the bottleneck rules. In these hearings, Congress heard from the Board, shippers, rail carriers, and members of Congress concerning these issues. Additional examples from the extensive record are included in an appendix to these comments. Together with the proposed legislation, this amounts to a lengthy legislative record of congressional consideration of the bottleneck rule, trackage rights, reciprocal switching, and terminal access. *See Bob Jones*, 461 U.S. 574, 600 (relying in part on congressional hearings regarding the agency rulings in question to find that Congress was well aware of those rulings, and in further support of the conclusion that Congress's repeated, knowing refusal to act demonstrated its approval of those rulings).[26] The

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[25] *See, e.g.,* S. Rep. No. 111-380 at 12 (bill would "combine requirements for mandated reciprocal switching in terminal areas with those for quoting bottleneck rates."); *id.,* ("Act would require a Class I rail carrier . . . to quote a bottleneck rate to a shipper . . . . This provision is intended to cover situations related to traditional bottle neck rate cases and those that are considered reciprocal switching cases currently addressed by 49 U.S.C. 11102."); *id.,* at 13 ("The provision would also require the Board to establish and maintain standard for determining whether a bottle neck rate is reasonable."); Statement of Congressman Oberstar, 151 Cong. Rec. E875 (May 4, 2005); Statement of Congressman Oberstar introducing STB Reform Act of 1999, 145 Cong Rec. E2482 (Nov. 19, 1999); Statement of Senator Rockefeller, 145 Cong. Rec. S2674 (March 15, 1999); *Id.,* at S2677 (Senator Dorgan); S. 1103, the *Railroad Competition Act of 2001;* H.R. 141, the *Surface Transportation Board Reform Act of 2001.* H.R. 2192, the *Surface Transportation Board Reform Act of 2003;* H.R. 2924, the *Railroad Competition Act of 2003;* S. 2921, *The Railroad Competition Act of 2006; S. 919 The Railroad Competition Act of 2006; See* S. 953, the *Railroad Competition and Service Improvement Act of 2007;* H.R. 2125, the *Railroad Competition and Service Improvement Act of 2007;* Statement of Senator Vitter, 153 Cong Record S3528 (2007) (legislation would eliminate bottleneck rules); *see also* Appendix to NS Comments. Because, as in *Bob Jones,* the legislative record of proposals to change the rules in question is "overwhelming," space does not permit discussion of much of that record. Selected additional excerpts from the history of congressional review of issues under review in this proceeding are set forth in an appendix.

[26] Because, as in *Bob Jones,* the legislative record of proposals to change the rules in question is "overwhelming," space does not permit discussion of much of that record. Selected additional excerpts from the history of congressional review of bottleneck issues, forced access, and forced interchange are set forth in an Appendix to these Comments.

one constant is that Congress has steadfastly declined to change the law and implementing rules. An executive branch agency may not accomplish through regulatory action changes to statutory law that Congress has considered and decided not to adopt. *See, e.g., Thompson*, 343 U.S. 549 (1952).

Over the last fourteen years Congress has held numerous hearings and considered numerous bills that directly would have eliminated the rules established in the *Bottleneck* cases and overturned *Midtec* or the competitive access rules. In every single instance, Congress refused to adopt the proposed legislation. Congress's consistent, repeated decisions to reject legislation that would override the access policies in question is powerful evidence that it approves of the Board's policies.[27] Here, as in *Bob Jones,* evidence of congressional acquiescence in the *Bottleneck* rules and the *Great Northern* rule is "overwhelming." The uniform refusal of Congress to adopt legislation overruling specific, well-known, and longstanding Supreme Court decisions, agency rulings and interpretations of the law "make out an unusually strong case of legislative acquiescence in, and ratification" of existing Board access and competition policies, including those at issue in this proceeding. *See Bob Jones Univ.,* 461 U.S. 574, 599.

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In sum, the competitive access and *Bottleneck* rules about which the Board has requested comment are the product of a carefully-designed statutory scheme and strike the correct balance between the national need to ensure a healthy and vibrant rail industry and appropriate protection

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[27] *See also Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 313 (1933) ("Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years."); *Costanzo v. Tillinghast*, 287 U.S. 341, 345 (1932) ("The failure of Congress to alter or amend the section, notwithstanding this consistent construction by the department charged with its enforcement, creates a presumption in favor of the administrative interpretation, to which we should give great weight").

for shippers. Even if the Board were considering policies in these areas *de novo*, it would be wise to adopt rules that mirror the current regulatory regime. But the Board is not writing on a blank slate. On the contrary, in enacting ICCTA, Congress knowingly chose to ratify the *Midtec* approach to competitive access claims and the *Great Northern* rule that shippers may only challenge a through rate. And, Congress's consistent rejection of proposed legislative changes to the Board's forced access rules (including the *Bottleneck* rules) in the fourteen years since the *Bottleneck* decisions further demonstrates Congress's continuing approval of those rules. Importantly, the current chairs and ranking members of the House Committee on Transportation and Infrastructure and the Subcommittee on Railroads, Pipelines, and Hazardous Materials share this view and have expressly advised that the Board should "maintain[] the existing regulatory balance between the railroads and shippers." *See* Letter of Chairman J. Mica *et al.* to Chairman D. Elliot at 1 (Jan. 24, 2011).[28] Because Congress has approved the Board's forced interchange and forced access rules, only Congress may change them. If a party believes that Congress should strike a different balance, or that changed circumstances justify reexamination of the current rules and law, then it should take its case to the legislative arena. Unless and until Congress acts to change the law, however, the Board does not have the authority to revisit Congress's policy choices.

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[28] Other legislators and public officials have similarly urged the Board not to impose new regulations or change the balance of interests embodied in the Board's current policy. *See, e.g.,* Letter of Congressmen J. Altmire and Tim Holden to Chairman D. Elliott (March 15, 2011); Letter of Senators J. Isakson, S. Chambliss to Chairman D. Elliot (March 22, 2011); Letter of Governor N. Deal to Chairman D. Eliot (March 14, 2011); Letter of Alabama State Port Auth. CEO J. Lyons to Chairman D. Eliot (March 30, 2011). Letters are available in STB Docket for Ex Parte 705.

II. CHANGES IN ACCESS RULES WOULD NEGATIVELY AFFECT OPERATIONS AND RAIL SERVICE TO ALL CUSTOMERS.

Apart from the legal barriers to agency alteration of established access rules and law, the forced interchange and forced access proposals that shippers have put forward would have devastating practical consequences for railroads and their customers. Moreover, those proposals could undermine the oft-stated goal of many policymakers to move more freight by rail to ease highway congestion and to reap the attendant energy savings and environmental benefits.

A. Efficient Rail Operations Are Critical to the U.S. Economy.

"[R]ailroads play a key role in overall U.S. freight shipments" and the economy as a whole.[29] Indeed, efficient rail transportation is one of the United States's comparative advantages that help U.S. businesses compete in that world economy. Demand for rail transportation has been steadily growing, and railroads are hauling greater and greater amounts of the nation's freight. As shown in the chart below, on a ton-mile basis Class I railroads' freight traffic grew steadily from the passage of the Staggers Act until the recession year of 2009.

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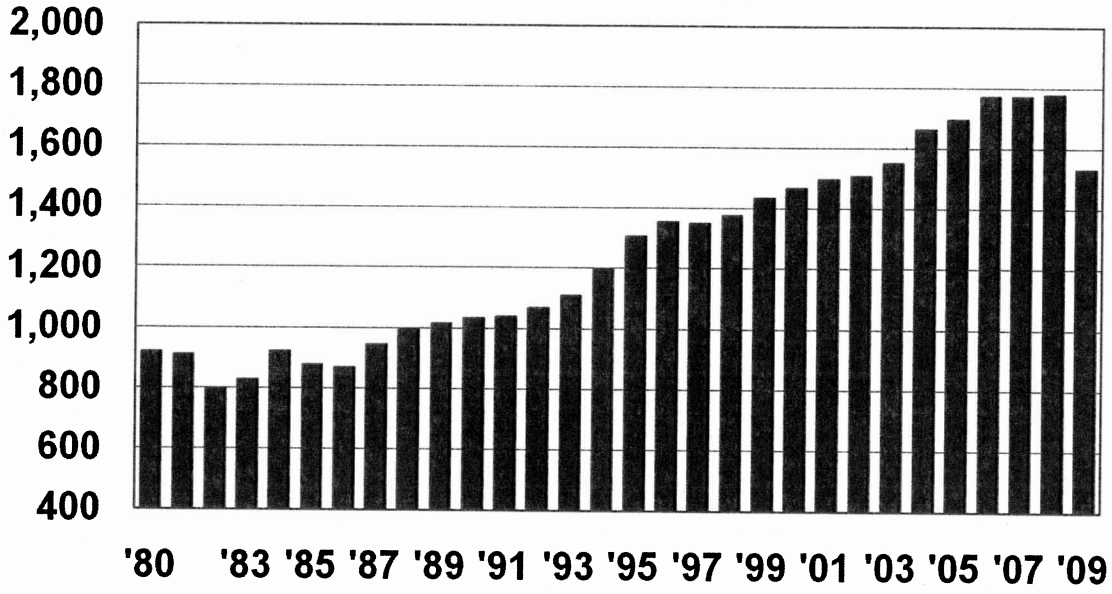
[29] A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals that Might Increase Competition, Christensen and Associates (Nov. 2009) at ES8.

(Billions of Ton-Miles)



As the nation recovers from the recent economic downturn, the demand for rail transportation is expected to grow rapidly. Recently, the National Rail Plan found that by 2035, "[f]reight rail would carry an additional 450 million tons. This represents a 23 percent increase in tonnage from 2007 levels."[30]

Railroads will be critical to meet this growing demand in an environmentally-friendly way. In addition, rail transportation provides significant environmental benefits that have been repeatedly noted.[31] The National Rail Plan states: "One example of the dramatic benefits of shifting to rail intermodal is illustrated by the fact that just one long distance, double-stack train between Chicago and Los Angeles can save 75,000 gallons of fuel by replacing 300 trucks, each

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[30] *National Rail Plan* at 16, available at http://www.fra.dot.gov/downloads/NRP_Sept2010_WEB.pdf.

[31] *National Rail Plan* at 26 ("High-performance freight rail is more fuel efficient than trucks.").

traveling 1,983 miles."[32] Even setting the environmental benefits of rail over truck transportation aside, truck transportation has limited capacity to meet growing freight demands. Many highways are already choked with traffic; and highway capacity is not likely to expand to any significant degree.[33]

Accordingly, the National Rail Plan and most policymakers have looked to the rail industry to take trucks off the highways and to play an even larger role in freight transportation in the United States. The National Rail Plan establishes two goals. The first goal is to support the current freight rail market share and growth.[34] The second is to develop strategies to attract 50 percent of all shipments 500 miles or greater to intermodal rail.[35] Combined, these goals reflect a national policy to grow freight rail and for freight rail to help ease highway congestion. Many legislators and policymakers strongly support this goal, including:

- "There are communities all over America that want to relieve congestion [on the highway] and the investments that we've made in the freight rail system support this." DOT Secretary Ray LaHood (July 11, 2010).[36]
- "While trucks will remain a vital component in our nation's transportation system for a long time to come, freight trains help Americans beat congestion by reducing the number of trucks on our roads and saving drivers time, money and fuel costs. For example, one single intermodal train takes some 280 trucks off the road." Sen. Tom Carper (August 11, 2008).[37]

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[32] *National Rail Plan* at 20.

[33] AASHTO, Freight Rail Bottom-Line Report, at 2.

[34] *National Rail Plan* at 14.

[35] *Id.*

[36] *See* Journal of Commerce Video: *DOT Secretary Ra LaHood on Trucks, Railroads, and Freight Policy*, available at http://www.joc.com/government-regulation/joc-video-dot-secretary-ray-lahood-trucks-railroads-and-freight policy.

[37] The Hill, *Fuel-efficient Freight Rail Deserves More Federal Support*, July 9, 2008.

- "I'm a big proponent of putting merchandise on rail so that we can get trucks off the road." Rep. Albio Sires (March 17, 2011).[38]

- "Railroad's resurgence could not have come at a better time. Highway congestion and environmental concerns have become increasingly important, and railroads are an effective means of mitigating both issues. A single freight train takes 280 trucks off the road and can move a ton of goods 457 miles on one gallon of diesel. If just 10 percent of the trucks on the road were shifted to freight rail, America would save 1 billion gallons of fuel each year." Rep. Bill Shuster (June 4, 2010).[39]

In short, efficient rail transportation is critical to both the present and the future. The Board should not consider changing policy at the behest of a minority of shippers concerned only with transferring freight rail revenues to themselves, when those changes could undermine the national interest in promoting freight transportation.

B. Rail Operations Are Interconnected and Are Designed to Meet the Needs of As Many Customers As Possible.

In the attached Verified Statement, Mr. Manion details the significant operational concerns that forced access and forced interchange proposals would raise. Mr. Manion's detailed explanations of the practical operational reasons why these proposals risk damage to all stakeholders in the rail transportation system are briefly summarized below.

While the Board may hear from a number of shippers in this proceeding, and particularly from certain large and well-funded shippers who may believe that they can use this proceeding to appropriate rail revenues, there are many thousands of rail shippers from whom the Board may not hear. Those shippers have a need for rail service that is just as important – if not more important – than the parochial desires of shippers who believe they could obtain lower rates

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[38] *Federal Regulatory Overreach in the Railroad Industry: Implementing the Rail Safety Improvement Act: Hearing Before the Subcomm. On Railroads, Pipelines, and Hazardous Materials of the Comm. On Transportation and Infrastructure,* 112th Cong. (Mar. 17, 2011).

[39] Roll Call, *Shuster: Don't Regulate Freight Rail System*, June 4, 2010.

through forced interchange or forced access. NS designs its service and operations to best balance the needs of all its customers, many of whom have different transportation needs and different priorities with respect to such factors as transit time, price, safety, damage-free handling, and frequency of service and switching for the thousands of different commodities that they ship and receive.[40]

One of the fundamental rules of railroad operations is that a system operates more efficiently when traffic has the fewest handlings possible. Maximizing single-line service by taking a car from a NS-served origin to a NS-served destination is the best way to make sure our network operates as efficiently as possible. Similarly, blocking cars to be transported together in long-haul movements is one of the best ways to increase the efficiency of the network. The Board is well aware that "more efficient direct long-haul rail service" benefits both railroads and shippers. *CSX Corp. & CSX Transp., Inc.; Norfolk Southern Corp. and Norfolk Southern Ry. Co.; Control & Operating Leases/Agreements Conrail, Inc. & Conso. Rail Corp.*, Finance Docket No. 33388, slip op at *47 (May 22, 1998). Simply put, fewer car handlings are always more efficient than more. *Id.,* at *41 ("[T]he proposed expansion of single-line rail service, allowing grouping of rail cars for longer trips with fewer required car switching movements, would result in a four percent system-wide decrease in freight-car handling in rail yards."). Similarly, blocking cars to operate together in long-hauls is one of the best ways to increase the efficiency of the network.

A second important way to increase system efficiency is to engage in extensive service design, which is a crucial but little noticed aspect of modern railroad operation and customer

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[40] It is also part of a larger network that all interconnected railroads – big and small – comprise. Therefore, Norfolk Southern is also affected by the ripple effect from disruptions on other railroads.

service. Running a massive network is incredibly complex and requires extensive coordination of limited assets, including track space, yards, locomotives, and crews. Service design is focused on using NS's assets fully without causing congestion and creating operating plans that meet the disparate needs of all these customers and services. The key to effective service design is having predictable traffic flows that can be forecasted.

Even with good planning, sudden shifts in traffic, localized inefficiencies, and other disruptions can propagate quickly across the entire network and cause congestion, the consumption of existing resources, and spikes in resource needs. As Mr. Manion describes, the effects spread across a railroad just like weather delays ripple across airline networks. *V.S. Manion*, at 3-5, 11, 14-15, 21-22.

Mandating forced interchange or forced access would destroy the operating efficiencies NS has gained from network design, make resource allocation much more problematic (particularly if customers are permitted to alter their demands of railroads with little or no warning), sap existing resources, force the reallocation of investments to the extent investment could be justified, and be disastrous for service to all customers. Mr. Manion identifies four critical reasons why forced access and forced interchange proposals could damage operations.

First, such proposals would upset the balance that NS strives to achieve for service levels to all of its customers. Unquestionably, NS is in a better position to judge what is best and most efficient for its network than each of its thousands of customers, each with their own parochial interests. Allowing customers to demand interchange or switching to another railroad or to demand service from another carrier on NS's lines will not benefit the system. Each customer would make its decision based on its parochial interests regardless of its effect on the network. Each of those individual decisions and demands would undermine the ability to engage in

proactive system design that provides the most efficient service to all customers because these changes will be unpredictable – undermining the purpose of system design. *V.S. Manion*, at 3, 5-6, 13, 21-22.

Second, injecting extra complexity into the system through forced interchange proposals or forced access proposals undermines efficient service. At their core, forced interchange proposals would convert single-line traffic to interline traffic and introduce extra handlings, interchanges, inefficient or operationally-unjustified circuitous routings, and other delays. As Mr. Manion explains in detail, interchanging traffic is one of the most inefficient aspects of rail operations. *See, e.g., V.S. Manion*, at 3, 6-17, 27-29. Forced interchange proposals would allow the shippers to chop up long-haul or single-line movements.

Similarly, forced access would inject substantial complexities that would undermine efficiency. Mr. Manion explains that two railroads operating on the same track is almost always less efficient because of the substantial coordination and scheduling that is required in order to operate safely. The Board knows well the operational problems that are likely to result, which is why in the past it has warned against taking actions that would force an owning railroad to permit other railroads to operate on its tracks:

> RCT's proposal to give substantial UP/SP properties to PTRA would not produce a switching arrangement that would give line-haul carriers access to shippers in a way that relieves the burden on Houston's already limited railroad capacity. Rather, RCT's proposal would simply give to PTRA UP/SP's lines serving Houston's industries, so that PTRA could then handle the same traffic that UP/SP currently handles, using the same lines that over which UP/SP currently operates, into the same congested Houston infrastructure that UP/SP currently uses. The main difference between the RTC plan and UP/SP's current plan is that RCT's approach would require an additional, and we believe, unnecessary interface for most Houston shipments. *As we have noted, turning single-carrier operations into multiple-carrier operations would not promote improved service.*

Union Pac. Corp. – Control & Merger – S. Pac. Corp., 3 S.T.B. 1030; STB Finance Docket No. 32760 at n.46 (Sub-No. 26) (STB-released Dec. 21, 1998) (emphasis added). These operational problems are not less likely to happen because railroads are financially healthier or any other reason someone might concoct to try to convince the Board to seriously consider forced access proposals.

Third, forced interchange and forced access proposals would undermine investment, because it would be difficult to determine where capacity is needed and to calculate a return on investment when traffic flows can shift abruptly. *V.S. Manion*, at 22. That investment would be needed simply to handle current traffic.

Fourth, these proposals would cause real problems in the allocation of assets such as crews, locomotives, cars, and track capacity. NS spends considerable time and effort to get assets – cars, locomotives, and crews – in the right place at the right time to handle traffic flows. Getting those assets in the right place takes substantial lead time, whether that involves moving locomotives or training crews to operate over particular territory. Forced interchange proposals would slow the rate at which cars turn in the system and thereby create a need for more cars and locomotives. *See V.S. Manion,* at 3, 7-9, 15-16. Similarly, more locomotives would be required to operate the shorter trains and to conduct all of the extra switching associated with interchanging cars that otherwise would not be interchanged. If a customer were permitted to demand interchange or access on short or no notice – or to flip-flop between single-line service and forced interchange or forced access – it would be even more difficult to relocate those assets.

Similarly, forced access proposals would unnecessarily consume assets and create the need for more assets. At a minimum, NS would need more cars because the existing cars would be turning at a slower rate. Similarly, more locomotives would be required to operate the shorter

trains and to conduct all the extra switching associated with interchanging cars that otherwise would not be interchanged. But there is a limit to how many cars and locomotives can operate on the existing track capacity, not to mention how much capital there is to invest under such conditions.

These four major areas of concern are not hypothetical. Today, there are real world examples of access voluntarily granted to another railroad and of switching and the complexities and service difficulties that can result even from a voluntary access arrangement. To illustrate that fact, Mr. Manion describes in detail the problems that already exist in Decatur, Alabama. He describes the complexities and the service issues that have historically resulted from switching arrangements in Indianapolis, Indiana. These complexities and service issues would be replicated across NS's network, and cannot be ignored.

Moreover, the service design problems, service inefficiencies, complications in investment decisions, and asset allocation problems that would be created are exponentially greater than today because there would be vastly more routing permutations. In isolation, it might be easy to think about one customer segmenting a route between railroads, where that interchange might occur (or whether the second railroad would operate over NS tracks), where crews and assets would be needed (or the second railroad's crews would need to be certified to operate over NS tracks), and all the other issues that would arise. But broad application of such shipper-dictated routes across the entire rail system would be operationally unwieldy and would rapidly magnify the resulting problems. The Board should not be surprised in such circumstances if the result were frequent and unpredictable service problems.

Finally, these operational changes would undermine the significant environmental benefits of railroads because they would lead to increased fuel consumption. *See V.S. Manion*, at

3, 16-17. As the Board's Section of Environmental Analysis found in a similar context, "[t]he capacity constraints, more circuitous routing of rail service, delays, and slower operating speeds that could result without the new connection may cause additional fuel consumption and increase pollutant emissions from locomotives." *See e.g., CSX Corp. Transp., Inc., Norfolk Southern Corp. & Norfolk Southern Railway Co. – Control & Operating Leases/Agreements – Conrail Inc. & Consol. Rail Corp.*, STB Finance Docket No. 33388 (May 22, 1998); *Changes in Routing Provisions – Conrail – July 1981, No. 38676*, 365 I.C.C. 753 (March 18, 1982) ("[W]e believe it clear that fuel consumption will decrease substantially as a result of the overall less circuitous movements, fewer interchanges, and reduced transit time.").

CONCLUSION

The Board should recognize the overwhelming legal, policy and operational impediments to changing its existing forced interchange, forced access, and bottleneck rules and terminate this proceeding without taking any further action. Any substantive changes to the regulatory regime applicable to those matters may only come from Congress, not the Board.

Respectfully submitted,

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Dated: April 12, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2010, I caused copies of the foregoing Opening Comments of Norfolk Southern Railway Company to be served by first-class mail or more expeditious means on all Parties of Record in STB Ex Parte No. 705.

Eva Mozena Brandon

V.S. MANION

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE 705

COMPETITION IN THE RAIL INDUSTRY

VERIFIED STATEMENT OF MARK D. MANION
ON BEHALF OF
NORFOLK SOUTHERN RAILWAY COMPANY

I. MY BACKGROUND

My name is Mark D. Manion, and I serve as Executive Vice-President and Chief Operating Officer. I have spent more than 35 years working in rail operations.

II. MY UNDERSTANDING OF WHAT THE BOARD IS CONSIDERING

Having read the Surface Transportation Board's Notice issued on January 11, 2011, for this hearing, I understand that "[s]ome shippers have suggested that mandated access by a second carrier to singly served businesses would be in the public interest." I further understand that the Board noted that "[o]ver the years, various possible measures that would change the way rail shippers currently obtain access to rail service have been debated, including: (1) requiring railroads to quote a rate between any two points they serve to allow another railroad to serve the shipper from an intermediate point to the final destination; and (2) imposing new rules for competitive access, such as mandated reciprocal switching or mandated terminal use arrangements, including trackage rights."

The first measure mentioned by the Board – allowing shippers to dictate interchange points to railroads – would result in railroads interchanging traffic they do

not interchange today. Similarly, the imposition of mandated and widespread reciprocal switching, in which a customer in a terminal area might require the railroad serving its facility to switch its freight to another carrier at some price, also would result in railroads interchanging traffic that is not interchanged today. For ease of reference throughout this statement, I am going to refer to the proposals that would require railroads to interchange traffic at interchange points dictated by shippers as "forced interchange proposals."

I will refer to the concept of imposing mandated terminal use or other trackage rights arrangements as "forced access proposals."

The Board has invited "comments from all interested parties on the positive and negative impact any proposed change would have on the railroad industry, the shipper community, and the economy as a whole." Among other things, the Board has asked for comments about the potential effects that these changes could have on "service." Based on my expertise and knowledge of Norfolk Southern's operations and the extensive efforts Norfolk Southern has undertaken to streamline and improve service, I believe that forced interchange and forced access proposals would have a decidedly negative effect on rail service. That negative result would not only affect the customers with regulated traffic to whom such new rules might apply, but it also would negatively affect the service that all customers receive.

III. OVERVIEW OF MY STATEMENT

Although the remainder of my statement will discuss issues in more detail, let me provide a general overview of my main points.

- First, a crucial but little noticed aspect of modern railroad operation and customer service is service design. Running a massive network is incredibly complex, with

multiple products being produced using the same set of scarce resources. To be able to hone operations to get the most out of those resources and to use those resources to provide the greatest possible service quality and reliability to our customers, Norfolk Southern must be able to make reliable predictions about its future operational patterns. Such predictions would be exponentially more difficult – and perhaps impossible – under forced access or forced interchange proposals.

- Second, Norfolk Southern's rail operations are designed both to meet customer needs and to function efficiently. They must account for the different needs of different customers and simultaneously provide appropriate levels of service to all of our traffic. Accordingly, it takes coordinated judgment to maximize the capacity and efficiency of the Norfolk Southern network.

- Third, by contrast individual rail customers do not take account of the needs of the broader rail network. Individual rail customers make decisions based on their own immediate commercial interests.

- Fourth, converting single-line traffic to interline traffic through forced interchange proposals would introduce extra handlings, extra interchanges, inefficient or operationally-unjustified circuitous routings, and other delays, as well as the potential for damage to cargo – all of which negatively affect all customers, increase the need for additional assets, and undermine the environmental benefits of rail. Converting single-line traffic to interline traffic would reduce service levels and increase the resources needed to provide any given level of service by disrupting NS's ability to plan its operations for optimum resource utilization and service performance.

- Fifth, forced access proposals create nettlesome operational issues that would consume resources and undermine the railroads' ability to provide quality service. Operational interference on shared trackage cannot be avoided even when the two railroads communicate well and have a shared interest in providing service. Multiple, competing rail services on the same line consume more capacity than one-railroad operation, produce crew issues, and would make investment expenses harder to justify.

- Sixth, the effects of forced interchange and forced access cannot be viewed by looking merely at one customer in isolation. The effects would span the entire network and would affect all traffic flows at the same time. It is one thing to imagine an individual shipper switching back-and-forth from a single-line route to a joint-line route; it is entirely different to image many regulated shippers exercising that right at the same time.

In sum, superimposing on Norfolk Southern a broad set of new mandatory interchange or access obligations would be a disaster because it would destroy the

delicate operational balance. The result of undermining Norfolk Southern's ability to plan traffic flows and long-term investment, creating congestion in many areas, and consuming additional finite resources such as crews, locomotives, track space, and time would be a degradation in service quality for all customers and the possibility of sending more freight back to our already congested highways.

IV. NORFOLK SOUTHERN'S RAIL SYSTEM IS A NETWORK DESIGNED AND OPERATED TO PROVIDE OPTIMAL LEVELS OF SERVICE FOR ALL SHIPPERS USING THE AVAILABLE RESOURCES.

Norfolk Southern's railroad consists of several networks layered on top of one another: a carload network, an intermodal network, and a unit train network.[1] Norfolk Southern invests and develops operating plans that are best for operating all three networks in combination with one another. As with any network, service issues, delays, labor shortages, congestion, and other factors affect Norfolk Southern and its connections. Issues in any one area can often spread to affect the network generally.

Service design is a crucial aspect of operating Norfolk Southern and providing high levels of customer service. When things are going smoothly, it is in part because of the advance work that is occurring in service design. Running a railroad network that spans 20,000 route miles in 22 states, serves tens of thousands of customers, interfaces with six other Class I railroads and hundreds of regional and short line railroads is incredibly complex. Norfolk Southern's multiple service products all use the same set of scarce resources, including track space, yards, locomotives, and crews. In a complex network like Norfolk Southern's and the rail network generally, any service issue is

[1] To help understand some of the key railroad terms that I use in this statement, I have included a glossary with definitions and pictures as Appendix A.

exacerbated because of the intensive resource utilization and the intricately-timed moving parts.

Moreover, in today's competitive environment, customers have greater and greater service expectations generally. The days of sending a car around to wait for the next available train going in the right direction are long gone. Every car on Norfolk Southern has a plan before it is even loaded. The major inputs into these plans are both historic train movements and forecasts for future movements. The key is that as many movements be predictable for a long-enough period of time. We have scores of people and sophisticated technology to help us develop those plans. Norfolk Southern also spends a lot of time and effort to get assets – cars, locomotives, and crews – in the right place to handle traffic flows. Getting those assets in the right place takes substantial lead time, whether that involves moving locomotives or training crews to operate over particular territory. This intricate service design is essential to integrate our various services with one another and with assets and to avoid causing congestion problems that ripple through the network.

Therefore, in examining our network operations, service design, and investment plans, Norfolk Southern tries to balance the competing needs of all its varying customers to provide the best service we can to the most customers. In prior testimony before the Surface Transportation Board, our former Executive Vice-President for Operations, Steve Tobias, analogized this balance on our railroad to the operations of an urban or suburban bus system:

> Everyone who rides the bus would like for it to come at the time that most suits their individual needs. For two riders who live next door to one another, one may want the bus to come at 8:00 to deposit him at his workplace at 8:30, and another may want the bus to come at 8:15 to

> deposit her at her workplace at 9:00. But bus routes are planned to provide the best possible service to the most people, rather than being tailored to each rider's specific desire. Service on a rail system is much the same. Our customers have different needs and the priorities they place on such factors as transit time, price, safety, damage-free handling, and frequency of service and switching often differ.[2]

Our goal therefore is to run as efficient a network as possible, which means maximizing long-hauls, minimizing car handlings and switches, minimizing the number of times a car must be handled in a yard, maximizing train lengths, consolidating traffic flows, and other efficiency-generating activities. We must minimize additional handlings of cars to avoid the many adverse consequences that result, such as increased costs, increased transit times, and reduced utilization of cars, crews, locomotives, and track.

V. FORCED INTERCHANGE PROPOSALS WOULD ADVERSELY AFFECT RAIL OPERATIONS AND SERVICE TO ALL CUSTOMERS.

Interchange occurs when one railroad hands off one car or train to another. The location of this exchange is also referred to as an interchange or an interchange point, and the way these interchanges operate is largely dependent on infrastructure and track layout decisions made many decades ago. Just because two railroads meet on a map does not make that spot an interchange point. It may only be a crossing. So looking at a map does not tell you much about where two railroads can execute an interchange, let alone whether they can do so efficiently.

Interchange points vary in their capacity and operations. Some interchanges consist of a small track where some small number of cars can be set off; others are larger tracks in yards where entire trains can be interchanged. Some interchanges are used

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[2] *Hearing on the 25th Anniversary of the Staggers Rail Act of 1980*, Ex Parte 658, Stephen C. Tobias on Behalf of Norfolk Southern Corp. (Oct. 2005).

daily; others are used rarely, having no scheduled train operations. Interchanges also vary by their ability to handle toxic inhalation hazard ("TIH") traffic, as special federal regulations prevent many interchanges from handling those commodities in spite of sufficient capacity.

To work effectively, interchanging requires significant coordination between the two railroads involved. Depending on the circumstances, that coordination can be quite feasible. NS operates several high-volume interchanges with other carriers that work quite well. But making interchange work well demands planning, coordination, investment in the needed resources to accommodate interchange operations (such as receiving and inspection tracks), and above all predictability. When these ingredients are not present, interchange inevitably results in delays because the frequency of interchange at that particular interchange point does not allow for advance planning and routinization and does not assure the availability of crews and locomotives to conduct the interchange.

A. Interchange Today Is Streamlined to Provide the Most Efficiency to the Rail Network, Which Means that Many Interchange Points Are Rarely Used.

To provide a perspective on the scope of Norfolk Southern's interchange operations today, let me provide a few key statistics:

- Most of Norfolk Southern's interchanges involve carload traffic. During 2010, Norfolk Southern interchanged an average of more than 15,500 carloads per day with other railroads.

- A minority of Norfolk Southern's interchanges are unit trains interchanged with other railroads. During 2010, Norfolk Southern interchanged on average about 27 of these trains per day, with the vast majority being unit coal trains.

- In 2010, Norfolk Southern interchanged traffic with all Class I railroads daily and also with more than 200 short line railroads.

- By volume, our largest interchange partner is BNSF. However, Norfolk Southern has the most physical interchange points with CSX – over 150 of them.

Because interchanging traffic can be one of the most inefficient elements of operating a rail network, Norfolk Southern has worked hard over the years to reduce the number of interchanges that are actively used, to consolidate traffic moving to those interchange points, and to avoid interchange where possible by moving the traffic from origin to destination in single-line service. Where interchange is necessary we have worked to consolidate traffic flows and to develop close working relationships with our key interline partners designed to make those interchanges simulate as closely as possible single-line service. Norfolk Southern has made substantial progress with Western connecting railroads – where Norfolk Southern and the other roads connect end-to-end and the carriers often have run-through operations. However, Norfolk Southern has not been able to generate the same level of efficiency improvement with connections in the East where the rail networks overlap and there are fewer run-through operations.

B. Interchange Operations Are Complicated and Consume Assets.

With that background on interchange points, I will review the component parts of interchange operations. For each of unit train operations and carload operations, I will use an example to illustrate how it works. These descriptions are overly simplified for illustrative purposes.

1. An Example of the Interchange of a Unit Train

For unit train operations, our example will be a coal train that originates on BNSF. When the train arrives at the interchange, the Norfolk Southern crews board the train while the BNSF crews get off. If the Norfolk Southern crews are not ready to

board at the appropriate time, then the train is forced to wait at the interchange, consuming track capacity. Additionally, in some instances, the BNSF locomotives are removed in favor of Norfolk Southern ones, consuming additional time and resources. Absent a waiver, the Norfolk Southern crew is required to inspect the train upon receiving it at the interchange, which is a time-consuming inspection that is not required for a single-line train. After the inspection, the Norfolk Southern crews operate the train to its destination, where the train is unloaded. The process then occurs in reverse, with the Norfolk Southern crews returning the train to the interchange to deliver it to BNSF.

2. An Example of the Interchange of Carload Traffic

Carload traffic is taken from customer facilities by local trains to the origin serving yard, where the cars are combined into trains with cars from other customers. The trains are then taken to the sorting yard, arriving in what is called the receiving yard. From there, the cars are taken to the classification yard, where crews sort the cars into blocks headed for the same destination. That sorting is achieved either by sending the cars over a hump or by flat switching them (with crews in locomotives pushing cars around), depending on the type of yard. Once the cars are sorted into blocks, they are combined into trains in the forwarding, or departure, yard. Although a car may have to go through several classifications at various yards, when it arrives at the serving yard near its interchange point, a local train will then take it to the interchange.

Once at the interchange point, the car (or block of cars) may sit for some time before the connecting railroad is able to pick it up. However, once the second carrier takes possession, the crew must inspect each car received at the interchange point, which is a time-consuming inspection that would not be present in single-line service. Then, the

second carrier moves the car to a yard, sends it through the classification process, and gets it to a destination serving yard for delivery by a local train.

Throughout this process of switching cars and building blocks and trains, crews repeatedly must conduct air-brake tests and inspect the cars.

The process for interchanging TIH commodities is even more complex and difficult than the basic scenario for carload traffic described above. There are now a host of government regulations that govern the interchange of these commodities.[3]

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[3] I will not detail them all, but some of the requirements include, the following:

- On November 21, 2006, TSA recommended that railroads develop site-specific security plans to address the risk posed by transportation of bulk TIH materials in High Threat Urban Areas ("HTUAs"). Specifically, the TSA asked railroads to develop plans that, among other things, would reduce the number of hours TIH cars were held in yards, terminals, and on railroad-controlled leased track in HTUAs, minimize the occurrence of unattended TIH cars in HTUAs, and develop procedures for positive handoff of TIH cars at points of origin, destination, and interchange in HTUAs.
- On December 21, 2006, TSA proposed significant new requirements on railroads transporting TIH materials. Among other things, the rules, the majority of which became final on November 26, 2008, require railroads to follow strict "chain of custody and control" procedures when transferring TIH cars to or from shippers or other carriers.
- The Pipeline and Hazardous Materials Safety Administration ("PHMSA") also proposed new rules regarding rail transportation of hazardous materials on December 21, 2006. Among other things, the rules, which also became final on November 26, 2008, require railroads to compile data concerning hazardous materials they transport and to use that data to select the safest and most secure practicable routes for those materials, to work with shippers to minimize the time a rail car containing hazardous materials is placed on a track awaiting pick-up, delivery, or transfer, and to conduct enhanced security inspections of rail cars carrying hazardous materials.
- Finally, and most recently, on January 13, 2009, PHMSA issued new rules that impose a 50 mile-per-hour speed limit for all trains transporting loaded cars of TIH.

3. Complications from the Interchange Process.

Whether the interchange involves a unit train or carload traffic, the two railroads must coordinate on a variety of issues, including: (1) the route; (2) the interchange point; (3) responsibility for the various required inspections; (4) the special interchange rules for TIH; and (5) how repairs to equipment will be handled, especially if there is no RIP track located near the interchange point. With respect to unit trains, if the locomotive is scheduled to stay with the train past the interchange point, the railroads must also coordinate which carrier will fuel the locomotive. This additional coordination between carriers provides opportunities for problems and delay, causing inefficiencies not present in single-line service.

Inserting an interchange may not seem like a big deal when a particular shipper is asking for an interline route for a few cars instead of its existing Norfolk Southern single-line route. That shipper might think it should be able to make the choice between Norfolk Southern's single-line service and an interline route with CSX, even if that routing might take longer or be less reliable. The problem is that railroad networks do not work one carload at a time. Just as any assembly line would be stopped cold by custom orders inserted into the process – or unexpected additional inputs added to the flow of goods – so a rail network would be disrupted and investment would be harder to plan and justify if all of a sudden it had to accommodate interchange options that did not exist before.

C. Operations Would Change Significantly Under Forced Interchange Proposals.

Implementing any type of forced interchange proposal would result in the very delays and inefficiencies that Norfolk Southern has sought to avoid through streamlining

its interchange operations. The forced interchange proposals would increase the amount of traffic subject to these delays, consume assets and capacity, deter investment, and impair operations planning – at least with respect to those locations where it would be possible to implement the proposals at all. The additional switching, handlings, and idling that would result would likely cause delays throughout the entire rail system.

1. Widescale Interchange Is Inefficient.

Even where interchange occurs voluntarily, it is often inefficient. Prior to the Conrail transaction, the Indianapolis area was served primarily by Conrail, although CSX also served some customers in the area largely through switching and trackage rights. Then, as part of the Conrail transaction, CSX acquired Conrail's assets in Indianapolis, and customers who had previously had access to two railroads before the transaction continued to have such access with Norfolk Southern as a second carrier. This access was provided both by trackage rights and by CSX switching Norfolk Southern traffic into and out of customer facilities. Thus, service options stayed basically the same;[4] however, so did service issues.

Despite Norfolk Southern's efforts, the switching in Indianapolis still suffers from many operating inefficiencies. CSX switches the traffic for up to 67 different of Norfolk Southern's customers in Indianapolis. To handle this traffic, CSX moves the traffic between three separate CSX yards. Usually, the cars move from Hawthorne Yard, where Norfolk Southern delivers them, to Avon Yard, where CSX reclassifies the cars as needed. From Avon Yard, the cars are sent either to Transfer Yard or back to Hawthorne

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[4] The Board specifically noted the similarities: "we . . . believe that NS will be able to replace the competition formerly provided by CSX, which now serves shippers in this area primarily under similar switching and trackage rights arrangements." STB Finance Docket No. 33388, at 94 (July 23, 1998).

Yard, from where the cars are delivered to customers. Because the same handling is then done in reverse for the outbound traffic, this switching operation adds three days to the route each way. Thus, as this example illustrates, even voluntary interchange operations tend to be less efficient and more cumbersome than single-line operations, in spite of various attempts to improve the situation.

2. Customers' Desires Would Bear No Relations to Efficient Network-wide Operations.

A customer's desire for interchange might conflict with efficient railroad operations. A customer would be seeking to gain potential commercial advantage. In particular, the customer would be concerned with its total price for transportation or the total delivered price for the commodity, particularly on shipments that are not time-sensitive. However, the customer's motivation would have nothing to do with the efficiency of Norfolk Southern or the rail system or with the service received by other customers.

Even under the current regulatory regime, which favors single-line rail shipments where possible, it can be difficult to get assets – cars, locomotives, and crews – to the right place at the right time. Allowing customers to switch to interline routes would have disastrous consequences for the efficiency of the network and dramatically increase its resource needs. Far worse still would be allowing customers to change their minds back and forth, flip-flopping between single-line service and splitting the route. It would be even more difficult to relocate those assets, particularly with little or no advance notice. The result of such flip-flops would be service problems for that customer, but also for many other customers.

3. Forced Interchange Proposals Would Result in Long-haul Routes Being Chopped Up, More Car Handlings and Interchange Delays.

The forced interchange proposals would allow the shipper to artificially inject a second carrier in a movement such that the long-haul or single-line movement would be chopped up. This process would create multiple inefficiencies. First, whereas Norfolk Southern alone handled the car before, now there would be at least one – and possible two or more – additional handlings when the car would have to be interchanged with another carrier. Norfolk Southern also would have to move the car to the proper local train for the particular interchange point (which might not be part of regular or daily train service).

Second, to operate cars to rarely used interchange points, Norfolk Southern would need to increase the number of blocks that it would have to build. Today, Norfolk Southern does not build blocks for many interchange points because they simply are not used. Under a forced interchange regime, Norfolk Southern would have to build such blocks. Then, Norfolk Southern would have to begin serving that interchange point, which would consume crews and locomotives that would be unavailable for other operations on the system. In addition, this new service of shuffling around small blocks of cars would increase the number of trains operating, thereby consuming finite capacity.

Third, the operating plans of Norfolk Southern and the railroad granted a forced interchange would likely not be synchronized. As a result, cars that arrived at an interchange point would likely wait even longer than cars that are interchanged today. Those delays would consume existing assets, reduce car utilization, and consume track

capacity. Those cars sitting in yards would likely make yard operations worse for all customers.

Fourth, the delays and operating issues related to complying with the specific rules for interchanging TIH traffic would be magnified if all of the single-line business on Norfolk Southern were converted at the shipper's whim to inter-line business.

4. Forced Interchange Proposals Would Likely Undermine Efforts to Streamline Interchange Operations.

The forced interchange proposals would compel railroads to decide which interchanges to maintain. Although Norfolk Southern and CSX have more than 150 physical interchange points, almost all traffic interchanged with CSX is now interchanged at only 47 of those points. Moreover, many so-called "country interchanges" no longer receive rail service at all, and may not even have interchange tracks, despite being listed as interchange points. For example, Orangeburg, South Carolina, is still listed as an interchange even though there is no interchange track. It has remained that way to give the railroad flexibility to reinstate that interchange if warranted by operational needs and efficiency for the two railroads in the future. However, it would be nearly impossible to justify investment at these locations given the uncertainty of the traffic flows and the inability to earn a return on the investments.

In addition, even some existing interchange points where Norfolk Southern handles traffic likely could not handle the additional traffic that the railroad is currently not required to interchange. As I describe in more detail in Appendix B, Norfolk Southern currently interchanges traffic with CSX at Decatur, Alabama, but the interchange is limited by the 44-car capacity of the interchange track and the operations needed to move cars in and out of the interchange. Even on a good day, operations in

Decatur are constrained. In 2008, with somewhat higher volumes of traffic interchanged there, the interchange operation became very congested and caused many customer complaints. Moreover, due to the limited capacity at Decatur, any forced interchange of a unit train at this location would have to occur on a main line, which would block crossings, block traffic on the Tennessee River by preventing bridge lifts, or both.

I expect that under forced interchange proposals the same thing would occur again at Decatur and many other places, situations like this one would be repeated at locations across Norfolk Southern.

5. Forced Interchange Proposals Would Result in the Need for More Assets.

By undoing the progress made over the years in streamlining the interchange process and otherwise creating additional handlings, short train operations, and the other negative consequences that would result from forced interchange proposals, these proposals would increase the need for rail assets. At a minimum, Norfolk Southern would need more cars because the existing cars would be turning at a slower rate. Similarly, more locomotives would be required to operate the shorter trains and to conduct all the extra switching associated with interchanging cars that otherwise would not be interchanged. But there is a limit to how many cars and locomotives can operate on the existing track capacity, not to mention how much capital there is to invest in these additional assets under such conditions.

6. Forced Interchange Proposals Would Undermine the Environmental Benefits of Rail.

The environmental benefits of rail transportation would be compromised under a forced interchange proposal because of the increased switching, the need to run short

trains to interchange points, longer transit times, and inefficient or operationally-unjustified circuitous routings and the extra handlings. These operational changes would tend to undermine the environmental benefits generated by rail because of the increased fuel consumption that would result.

VI. FORCED ACCESS PROPOSALS ALSO WOULD CREATE OPERATIONAL PROBLEMS.

A. Description of How Forced Access Would Work.

In the most general terms, I understand the forced access proposals to mean that a second railroad would be permitted to use Norfolk Southern tracks in order to serve customers located on those tracks that today are served only by Norfolk Southern. However, rail infrastructure is simply not as flexible as highways, for example, where trucks come and go on public infrastructure that does not require dispatching and other coordination for safety and efficiency.

Norfolk Southern is a party to some voluntary trackage rights arrangements. Most of these arrangements result from intensive negotiations between the owning railroad ("landlord") and the railroad sharing the line ("tenant"). While the terms of these agreements vary according to the needs and priorities of the parties in each negotiation, often they address at least the following:

- The price the tenant will pay for use of the line;
- Whether the tenant will only use the landlord's line to connect with another line ("overhead" rights) or will be allowed to serve some or all of the rail customers located on the line;
- The relative priority that the landlord's and tenant's trains will have when operating at the same time on the line;
- Allocation of liability between the parties; and

- The parties' respective rights if disputes arise under their agreement. Disputes under these agreements are typically resolved like most other commercial disputes, by courts or arbitrators, not by the Board.

Importantly, voluntary trackage rights arrangements exist in the rail industry only where both railroads believed they would make sense for both railroads. They are never undertaken lightly because they substantially affect the business and operations of both the landlord and the tenant.

B. Operational Issues Would Arise from Joint Operations Under Forced Access Proposals.

Because of the coordination that would be required between railroads for safe operations under forced access proposals, customers should expect service declines and the ability of the serving railroad to respond to special requests to be substantially reduced, if not eliminated. If a customer were to request on short notice that the serving railroad pick-up or deliver an extra car or make an extra switch in a particular week, such a request could not be accommodated until both railroads agreed. With both railroads operating on the same track, CSX trains might prevent Norfolk Southern from adding that special service (or vice-versa).

C. Crew Issues Would Arise From the Joint Operations Mandated by Forced Access Proposals.

Crew issues would arise from forced access proposals, particularly trackage rights proposals. Railroad crews are not fungible. Only those crews that are qualified may operate on a line. Those qualifications are specific to each railroad and to each line segment of that railroad. The training and qualifications fall into three categories. First, there are the FRA rules (e.g., part 240 certification of locomotive engineers) that are generally applicable. Second, crews must be trained in the operating rules of the carrier

on whose lines they will work. Norfolk Southern has its own operating rules, as do the other railroads, and they are not always the same. An operating employee must be qualified on the rules of the foreign carrier when operating on that railroad. 49 C.F.R. § 240.229(c)(ii). Third, the crew must be qualified on the physical characteristics of the track on which they will operate. 49 C.F.R. § 240.229(c)(iv). This last qualification is normally done by taking several trips along the specified territory. The engineer must become familiar with all of the grade crossings, whistle posts, sidings, interlocking, signals, and the like on the line. Thus, a CSX crew could not just start operating on Norfolk Southern's network generally nor could that crew start operating on a specific line segment owned by Norfolk Southern. Making this even more complicated is the fact that some customers also have their own operating rules in which railroad crews must be trained. If a customer were to flip-flop on its routing desires, the railroads would have gone to great time and expense to train and qualify crews only have that time and training wasted.

D. There are Few Examples of Access Models, But Those That Exist Are Either Complicated or Have Not Worked Well.

Trackage rights examples in Indianapolis illustrate how difficult and problematic operations pursuant to voluntary access agreements can be. In Indianapolis, Norfolk Southern has trackage rights over the CSX Indianapolis Line to reach CSX's Hawthorne Yard in Indianapolis. Pursuant to the trackage rights agreement, Norfolk Southern operates over CSX tracks between Anderson, Indiana and a junction called "Belt Junction," which is located in Indianapolis. The distance between these points is a little more than 33 miles. Until about June 2010, Norfolk Southern operated five days per week between these points, until limitations on track time forced Norfolk Southern to

reduce service over this line to only two days per week. This reduction in track time has also decreased the efficiency of Norfolk Southern trains when they do run. It now takes three crews to make the round trip whereas it used to take only one.

Norfolk Southern has tried several solutions to improve the efficiency of its operations with CSX in this area. First, Norfolk Southern attempted to route the traffic through Muncie, Indiana, on to Hawthorne Yard in Indianapolis, and then back to Muncie, but train crews were not able to make the round trip without exceeding the hours of service rules. Similarly, Norfolk Southern tried routing the traffic to Indianapolis through Marion, Indiana, but those crews also could not make the return trip before exceeding the hours of service rules. Thus, efforts to reroute the traffic failed, and the operational problems in this area continued.

There are other examples of problems associated with trackage rights in Indianapolis. For instance, although Norfolk Southern has trackage rights to CSX's Hawthorne Yard to interchange traffic with INRD, Norfolk Southern has not yet been able to arrange that interchange with INRD due to issues of track availability at Hawthorne Yard. As these service issues illustrate, having two railroads operate on the same tracks causes dispatching, capacity, crew, train prioritization, and asset utilization issues. Under forced access proposals, these problems would be more substantial and widespread throughout the rail system and would affect many customers other than those seeking the access.

VII. FORCED INTERCHANGE AND FORCED ACCESS PROPOSALS WILL ADVERSELY AFFECT ALL CUSTOMERS

Aggregating rail business allows Norfolk Southern to be as efficient as possible so as to justify investments. For the government to mandate inefficient interchanges and operations through forced interchange proposals or forced access proposals would be counterproductive to the rail system's goal of serving as many customers and hauling as much freight as possible.

Forced interchange and forced access proposals cannot be viewed from the perspective of any single customer in isolation. It is one thing to imagine an individual shipper switching back-and-forth from a single-line route to a joint line route; it is entirely different to image many regulated shippers exercising that right at the same time. Accordingly, these proposals must be viewed by looking at the entire network because the resulting effects would span the entire network and all traffic flows at the same time. Service delays, congestion, a lack of resources in the right place, and the like in one place in the rail system has a ripple effect. It is similar to the cascading effects of a rain storm in Boston that grounds a plane bound for Atlanta, which in turn means the flight from Atlanta to Houston that was to use the same plane is delayed.

These effects would be indiscriminate. They would not simply affect the customers who seek these proposals. They would affect all customers. From a public policy perspective that means that the decades of investment and work by railroads to compete effectively to lure more freight from the highways would be reversed to the extent we could no longer meet those customers' service needs. Given rail's environmental advantage and highway congestion today, that would be an ironic result.

Simply stated, superimposing on Norfolk Southern a broad set of forced interchange or forced access obligations would upset the delicate operational balance. Service planning would be significantly more complicated *even if* interchange patterns were fixed because there would be vastly more permutations of traffic flows. The possibility that customers could on a whim flip-flop between single-line and joint service would undermine the ability to plan traffic flows and long-term investments and sap resources needed to operate the network because every new interchange or access scenario would consume additional finite resources such as crews, locomotives, track space, and time.

Norfolk Southern's ability to invest would also be undermined by forced interchange or forced access proposals in fundamental ways. First, there is the question of how much investment Norfolk Southern could support depending on how much of its revenue would be reduced as a result of one of these proposals being adopted. Second, innovative rail services that address market needs often require specific investment in infrastructure, such as maintenance or upgrading of existing track and structures, construction of track, or building transload facilities. If the Board were broadly to permit customers to constantly change routings under these proposals, it would substantially reduce the incentive for Norfolk Southern to continue to maintain (much less expand) that infrastructure. For instance, with traffic shifting it would be very difficult to determine where capacity is actually needed over the long-term. Third, it would be nearly impossible to predict over the long-term whether an investment in infrastructure would make a sufficient return to justify the investment. Absent that calculable return, a particular investment would likely not be made.

All of these negative results would be to the detriment of customer service generally, of all customers, and of the national interest in an effective rail system to handle freight growth and ease highway congestion in an environmentally-friendly manner.

APPENDIX A

GLOSSARY OF TERMS

BAD ORDER

A car in need of repair. Bad ordered cars are identified by a bad order tag and removed from revenue service pending repair.

BLOCK

When referring to freight cars in a yard, a block is a group of cars classified for movement to the same yard or terminal.

FLAT YARD

Perhaps the simplest type of rail yard is the common flat yard. The flat yard is just that, a flat yard, with tracks that run parallel to each other, connected by a common ladder track (or 2 common ladder tacks, one at each end). Flat yards can be as small as a simple 1 or 2 track siding used for storing freight cars, to a massive 50 track yard used for classification and sorting. The key to a flat yard is that all the switching is done manually. Thus, it is a slow and inefficient method for sorting and classifying cars. In most cases these yards are usually used in industrial areas or for regional/local yards.

Flat yards are often very simple and use track numbering that is also very simple, often starting 'track 1' from the closest parallel track from the main line and working out from there. There are often no pre-determined receiving or departure tracks, however, often these tracks will be used for the same purpose on a regular basis. It is also rare for a flat yard to have more than 2 ladder tracks. Busy yards may have 3 or 4 ladder tracks, however, most only have 2 – one on each side. Flat yards also rarely have more than one or two main lobes (groupings).

HUMP YARD

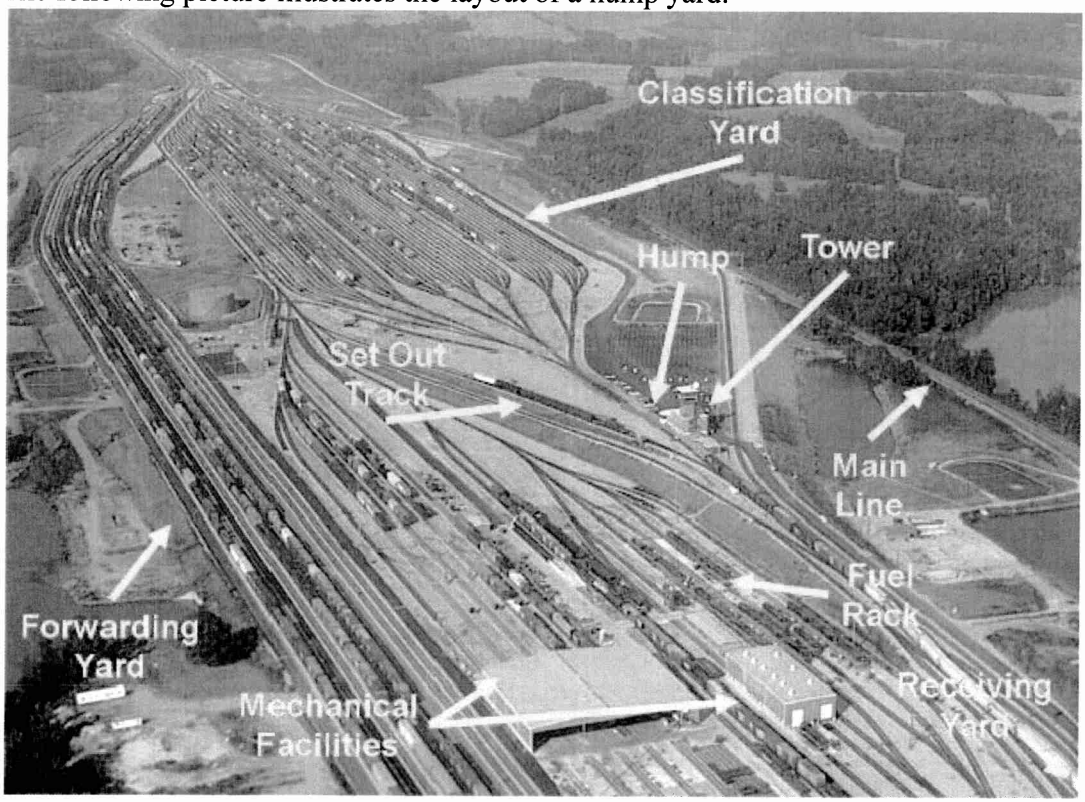
A hump yard is a regional gathering point where freight is classified and forwarded to final destination. The classification of cars is accomplished by pushing them over a hill, known as a hump, beyond which they run by gravity into their assigned track. There are 3 components of a hump yard:

1. A receiving yard, used for receiving trains from over-the-road movements in preparation for classification.

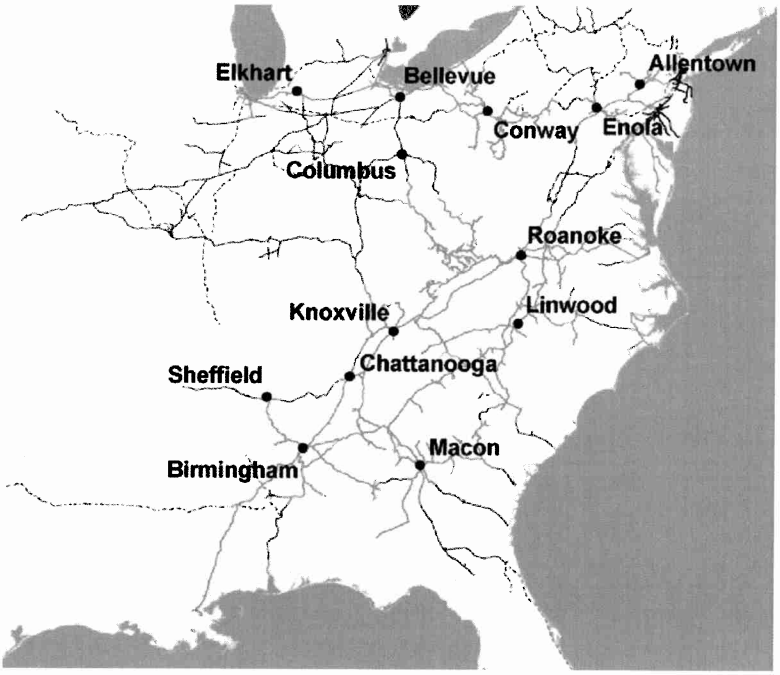
2. A classification yard, in which the classification of cars is accomplished by pushing them over a hump beyond which they run by gravity into their assigned track.

3. A forwarding yard, where cuts of cars are pulled from the appropriate classification tracks and assembled into outbound trains for departure.

The following picture illustrates the layout of a hump yard.



There are 13 hump yards on the Norfolk Southern system, as shown below:



LOCAL TRAIN

Train that performs local service from a serving yard. These crews are responsible for spotting and pulling (switching) rail cars at customer locations.

RIP TRACK

RIP (Repair in Place) is a term used to denote track on which car repairs are made.

RUN-THROUGH OPERATIONS

Operations conducting between two railroads where the locomotives stay with the train after the train is handed-off between railroads.

SERVING YARD

Yard from which local trains deliver cars to customers (destination serving yard) and to which local trains deliver cars after picking the cars up from customers (origin serving yard).

APPENDIX B

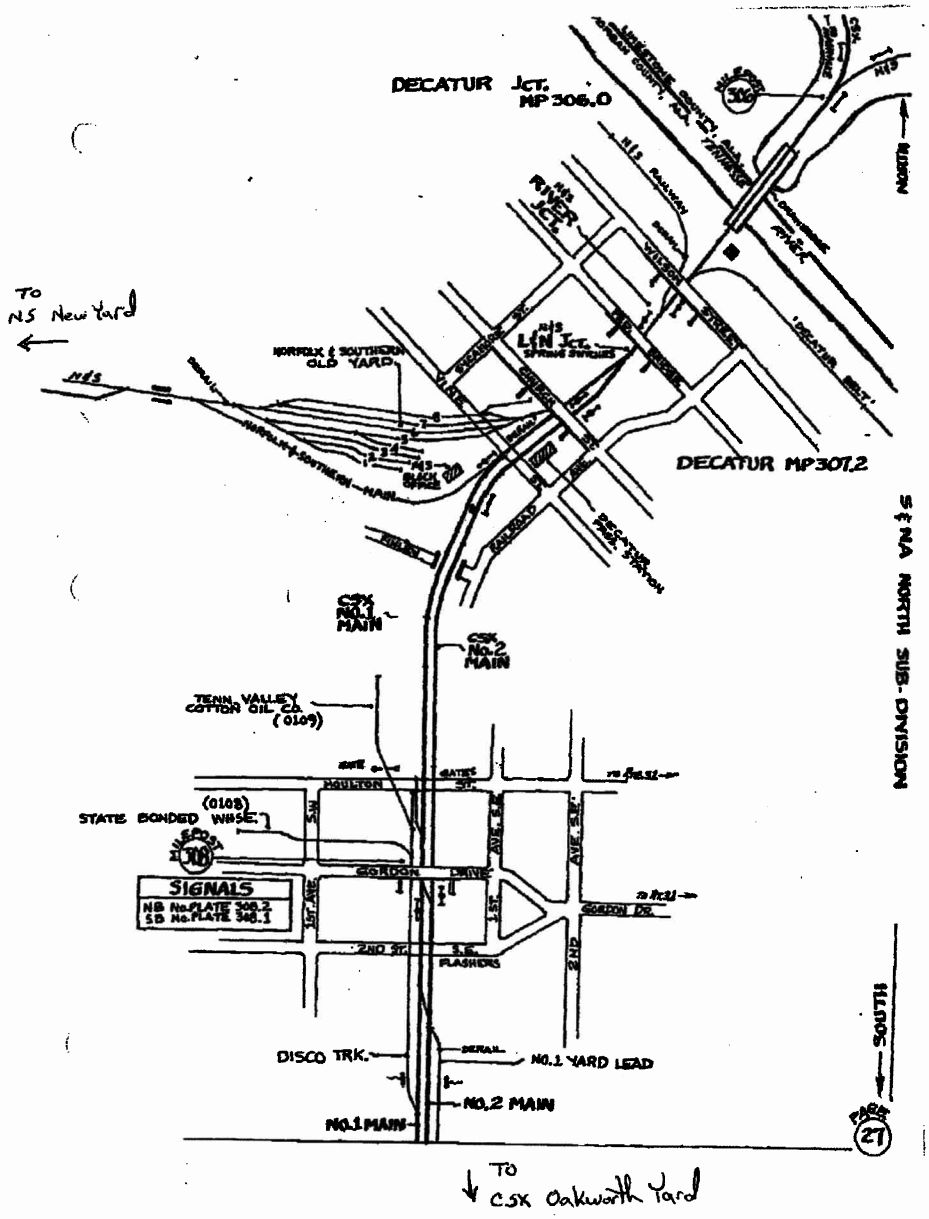
DESCRIPTION OF INTERCHANGE AT DECATUR, ALABAMA

Norfolk Southern and CSX use a single track lift bridge owned and controlled by Norfolk Southern to cross the Tennessee River. Decatur is located on Norfolk Southern's mainline that extends from Chattanooga to Memphis and on CSX's mainline that extends from Nashville to Birmingham. Norfolk Southern operates between 20-25 trains per day though Decatur, while CSX operates 25-30 trains per day there. Both Norfolk Southern and CSX have medium-sized flat switching yards in Decatur. The Norfolk Southern yard, which is called "New Yard", holds 500 cars. The CSX yard, called "Oakworth Yard" holds approximately 300.

The two railroads interchange traffic in the "Old Yard" in downtown Decatur. The yard is equipped with four interchange tracks, two of which are used by Norfolk Southern and two by CSX. Forty-four cars (44) can be interchanged at one time.
Norfolk Southern typically travels approximately one mile from its New Yard to the Old Yard to pull cars delivered by CSX. Due to grade crossings in the area and the volume of through trains traveling through Decatur, neither railroad can bring cars with them when they pull the interchange traffic. The locomotive enters the yard and couples to the first track of cars to be pulled.

After inspecting the cars to be picked up, the crew pulls the cars and pushes back into the yard to get the cars on the second track. Once the cars are all coupled together into a train, the crew makes a brake test, as required by Federal law, and then takes the train back to New Yard. After arriving, the crew places the cars on a track to be switched and classified for the various customers in the area. They then couple onto the traffic that needs to be delivered by Norfolk Southern to the interchange tracks at Old Yard, perform a brake test, and then deliver the traffic to the Old Yard. Again, it takes multiple moves because half the cars are pushed into the first interchange tracks and uncoupled, and then the other cars are then pushed into the second track and uncoupled.

CSX performs similar moves with their traffic traveling the mile from their Oakworth Yard to the Old Yard.



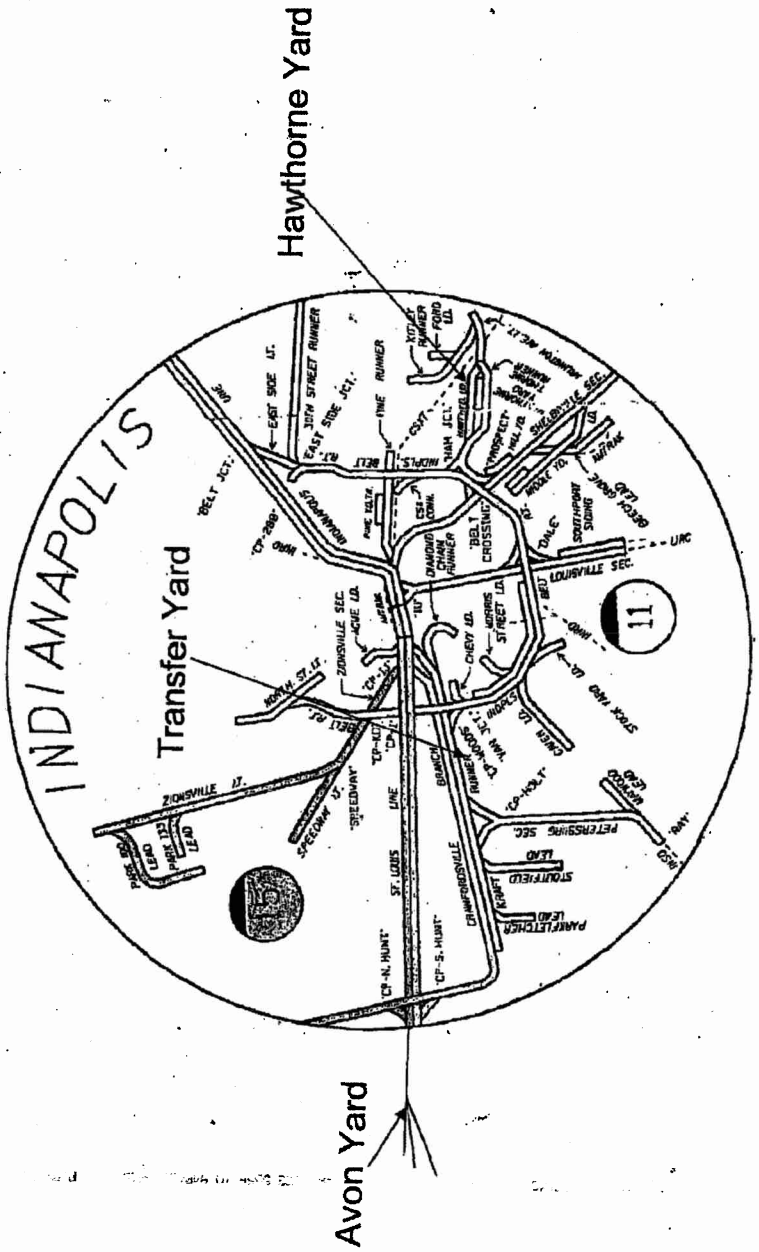
If there are more than forty-four (44) cars being interchanged on a given day the process is repeated throughout the day as needed. Today, approximately 90% of the traffic interchanged from CSX to Norfolk Southern is for local Decatur customers served by Norfolk Southern. Those cars are returned to CSX when empty cars are loaded by the customers on Norfolk Southern for shipment to destinations on CSX.

With each trip, grade crossings are blocked while the federally-required brake tests are made and the cars are pulled from or pushed into the interchange tracks. The mainline is also blocked, which impedes the 20-25 trains per day Norfolk Southern moves through the area and the 25-30 trains per day that CSX moves through the area. When CSX road

trains stop to set off or pick up traffic on Oakworth Yard, grade crossings within the city are blocked. Additional traffic could require an additional train to stop and "work" at the CSX yard.

The Norfolk Southern's New Yard is located on the West side of the city where there are not any road crossings. Neither railroad can move through trains when trains are stopped to pick up or set off traffic at New Yard.

APPENDIX C



VERIFICATION

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

Executed this 6th day of April, 2011.

Mark D. Manion

Executive Vice President and Chief Operating Officer

APPENDIX

APPENDIX TO OPENING COMMENTS OF NORFOLK SOUTHERN RAILWAY

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 705

COMPETITION IN THE RAILROAD INDUSTRY

NS' Opening Comments in STB Ex Parte 705 discuss some of the voluminous legislative record concerning the numerous proposals to alter the *Midtec* and *Bottleneck* decisions and the Board's forced interchange and forced access rules. In addition the selected legislative material cited in NS's Comments, there is substantial additional evidence demonstrating Congress' attention to these issues and its consideration of proposed changes to the law as applied by the Board. As the Comments demonstrated, Congress considered numerous bills to change the law concerning forced access, forced interchange, bottleneck segments of through routes, and "competitive access." Congress has also considered the policies and law at issue in this proceeding in several congressional hearings. The lengthy legislative record strongly supports the conclusion that Congress has ratified the Board's interpretation and application of its statutes, including the Bottleneck rules. *Bob Jones University v. United States*, 461 U.S. 574 (1983); Sec. I.C.3 of the Comments. This Appendix summarizes some of the additional legislative history further supporting that conclusion.

Congressional Bills Concerning Bottleneck Rules

During the 106th Congress, Senator Rockefeller authored S. 621, the *Railroad Competition and Service Improvement Act of 1999.* The bill addressed the bottleneck rules and forced access, as Senator Rockefeller explained by stating:

> The legislation we introduce today . . . will jump-start competition and uphold the common carrier obligation by *requiring railroads to quote a rate on any given segment*; it will reduce monopoly routing by facilitating terminal access . . .

Statement of Senator Rockefeller, 145 Cong. Rec. S2674 (Mar. 15, 1999) (emphasis added). Co-sponsor Senator Dorgan presented a summary of the bill's provisions, stating in relevant part:

> The bill overturns the STB's "bottle neck" decision that has been disappointing for shippers. Under the legislation, rail carriers would have to quote a rate for transportation over a segment of line upon the request of a shipper. If the rail carrier refuses, the STB shall establish the rate.

Id., at S2677. The same year, Congressman Oberstar introduced the *Surface Transportation Board Reform Act of 1999*, explaining that the bill

> corrects the Board's "bottle neck" decision, which says that, even if a railroad monopolizes only part of the route along which a shipper wishes to transport a shipment, it can effectively monopolize the whole route, because the railroad can refuse to offer to ship along only part of the route. The bill also makes it easier to secure competing rail service in terminal areas . . .

Statement of Congressman Oberstar, 145 Cong. Rec. E2482 (Nov. 19, 1999). The same month saw the introduction of another bill seeking to abrogate the bottleneck decision, the *Surface Transportation Board Modernization Act*. As the bill's sponsor summarized,

> It would bring an end to "bottlenecks" along rail lines. In bottlenecks, the STB allowed one rail carrier to prevent or discourage a shipper from interchanging with another rail carrier for more direct service by refusing to quote a rate or quoting an excessive rate along its portion of a line.

Statement of Congressman Nadler, 145 Cong. Rec. E2427 (Nov. 17, 1999).

In the next Congress (the 107th Congress), bills were again introduced to both houses of Congress that would, among other things, eliminate the bottleneck rule. *See* S. 1103, the *Railroad Competition Act of 2001;* H.R. 141, the *Surface Transportation Board Reform Act of 2001*. In the following Congress, two bills to change the law were introduced to the House. *See* H.R. 2192, the *Surface Transportation Board Reform Act of 2003;* H.R. 2924, the *Railroad Competition Act of 2003.* In 2005, the House of Representatives considered a sweeping bill, the *Railroad Competition Improvement and Reauthorization Act of 2005*, that would change many of the Board's rules governing competition. As one of the bill's sponsors stated, the bill would:

> Eliminate "bottlenecks." Under the bill, on the request of a shipper, the carrier must establish a rate for any two points on the carrier's system where traffic originates, terminates, or can be interchanged. In addition, the reasonableness of the rate would be subject to challenge. The bill will give shippers access to competitive rail service even if a single carrier has monopoly control over a short, bottleneck portion of a route.

Statement of Congressman Oberstar, 151 Cong. Rec. E875 (May 4, 2005). In each session of the same Congress, other bills were introduced in the Senate to change the Board's competitive access rules, including the bottleneck rule. *See* S. 2921, *The Railroad Competition Act of 2006; S. 919 The Railroad Competition Act of 2005.* One of the Senate bill's sponsors summarized the bottleneck provisions of the legislation as designed to "correct problems in the Surface Transportation Board's implementation of railroad deregulation. Specifically, the legislation ensures that rail customers will receive rate quotes form movements between various points on a railroad system." Statement of Senator Burns, 151 Cong. Rec. S4407 (April 27, 2005).

The 110th Congress saw two major bills aimed at changing the very rules the Board is considering in this proceeding, including elimination of the bottleneck rule. *See* S. 953, the *Railroad Competition and Service Improvement Act of 2007;* H.R. 2125, the *Railroad Competition and Service Improvement Act of 2007; see also* Statement of Senator Vitter, 153

Cong. Rec. S3528 (2007) (describing a specific real world bottleneck example and how the legislation would eliminate the bottleneck). During the 110th Congress, the Senate held oversight hearings addressing the Board's policies and implementation, including forced access issues.

Finally, in the 111th Congress, the Senate reported the *Surface Transportation Reauthorization Act* out of Committee in 2010. The Senate report described the ways that the legislation would address bottlenecks. *See, e.g.,* S. Rep. No. 111-380 at 12 (bill would "combine requirements for mandated reciprocal switching in terminal areas with those for quoting bottleneck rates."); *id.*, ("Act would require a Class I rail carrier . . . to quote a bottleneck rate to a shipper . . . . This provision is intended to cover situations related to traditional bottle neck rate cases and those that are considered reciprocal switching cases currently addressed by 49 U.S.C. 11102."); *id.*, at 13 ("The provision would also require the Board to establish and maintain standards for determining whether a bottle neck rate is reasonable.").

Congressional Hearings Concerning Bottleneck Rules and Forced Access

In testimony before Congress about the Bottleneck rules and "open access," the Board has directly informed Congress that it believes changes to existing rules may only be made by Congress, not by the agency. For instance, in 1998 Senators asked the Board to report on its competitive access rules, and the Board reported that any alterations to those rules would "raise basic policy issues—concerning the appropriate role of competition, differential pricing, and how railroads earn revenues and structure their services—that are more appropriately resolved by Congress than by an administrative agency." *See* Letter from STB Chair L. Morgan to Sens. J.

McCain & K. Bailey Hutchinson, at 4 (Dec. 21, 1998).[1] And on multiple occasions Board members have testified before Congress that the Board's *Midtec* and *Bottleneck* decisions were dictated by the statute and could only be changed if Congress amended the statute. In a 2001 hearing, for example, then-Chairman Morgan testified that the rule that shippers must show an abuse of market power to obtain STB-ordered access could not be changed because "the Staggers Rail Act of 1980 was not an open access law." *The Surface Transportation Board's New Merger Rules: Hearing Before the Subcomm. On Surface Transportation. and Merchant Marine of the Senate Commerce Comm.*, 107th Cong., at 67, 71-72 (June 28, 2001). Chairman Morgan further testified that the Board could not "undo" the Bottleneck decision because it "was based on the statute." *Id.,* at 21. The Chair concluded that congressional action to "change the law" was a necessary precondition to altering the bottleneck rule. *Id.,* at 20-22. STB representatives have also discussed access and competition issues in other congressional hearings.[2]

At other hearings Congress heard testimony from the Board that agency-initiated changes to access or bottleneck rules "would not be consistent with current law"[3] and that

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[1] *Oversight Hearing on the Surface Transportation Board: Hearing Before the Subcomm. Surface Transportation and Merchant Marine of the Senate Commerce Comm.*, 107th Cong., at 15 (March 2001) (letter entered into the record).

[2] See, e.g., *Nominations of Linda J. Morgan, to Be a Member of the Surface Transportation Board; And Dr. Stephen D. Van Beek, to be Associate Deputy Secretary and Director, Office of Intermodalism, and Michael J. Frazier, to be Assistant Secretary for Government Affairs, of the U.S. Department of Transportation: Hearing Before the Comm. on Commerce, Science, and Transportation* , 106th Cong., at 16-18, 54-56, 62-64, 66-67 (Sept. 28, 1999) (Discussing the bottleneck rule and shipper options for recourse in her opening statement and in exchanges with Senator Hutchison and Senator Rockefeller).

[3] *Railroad Shipper Concerns: Hearing Before the Subcomm. On Surface Transp. and Merchant Marine of the Senate Commerce Comm.*, 107th Cong., at 10-11 (July 31, 2001) (testimony of STB Chairman L. Morgan).

"legislation would be required" before the Board could allow "more open access that, unlike the current law, would not require a threshold showing that the serving carrier acted in an anticompetitive way."[4] Simply put, the Board has long recognized that it is not empowered to change its competition-related rules without Congressional action, and nothing has changed to alter that conclusion.

Shippers who have testified at rail hearings include chemical companies, agricultural concerns, electric utilities, and others. At a 2007 House Committee on Transportation and Infrastructure hearing, for example, two shippers explained the bottleneck problem to Congress.[5] Gary Spitzer, a Du Pont Vice President, stated "[t]he STB has ruled that carriers are not required to facilitate competition to or from captive locations by offering a reasonable rate to the nearest interchange with another carrier."[6] A representative of Lafayette Utilities Service discussed his power plant's own bottleneck issue explaining "[w]e have a 1,500 mile trek from Wyoming to our power plant of which 20 miles is the only section that is captive. But because of the rules that the STB has in place, all 1,500 miles are subject to a captive rate."[7] At a previous House hearing, a representative of the National Grain and Feed Association spoke up about farmers'

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[4] *Oversight Hearing on the Surface Transportation Board: Hearing Before the Subcomm. On Surface Transp. and Merchant Marine of the Senate Commerce Comm.*, 107th Cong., at 7 (Mar 21, 2001) (testimony of STB Chairman L. Morgan).

[5] *Rail Competition and Service: Hearing Before the House Comm. on Transportation and Infrastructure*, 110th Cong., at 10-11 (Sept. 25, 2007).

[6] *Id.*, at 77.

[7] *Id.*, at 78.

concerns with bottlenecks.[8] The bottleneck issue was also raised in a Senate Subcommittee hearing by a shipper who stated that the "'bottleneck doctrine' effectively blocks competition even where two railroads could each provide service over a portion of a longer route."[9] Shippers have also raised the other competitive access issues at hearings before Congress.[10]

Rail carriers also testified at length in congressional hearings concerning forced access. The CEO of Burlington Northern Santa Fe, Matthew Rose, testified specifically on forced access issues in both the 107th and 111th Congresses.[11] Mr. Rose discussed his company's participation in the legislative process at one of those hearings, explaining "we've met with staff a number of

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[8] *U.S. Rail Capacity Crunch: Hearing Before the Subcom. on Railroads of the House Comm. on Transportation and Infrastructure,* 109th Cong., at 67 (April 26, 2006).

[9] *Railroad Shipper Concerns: Hearing Before the Subcomm. on Surface Transportation and Merchant Marine of the Senate Comm. on Commerce, Science, and Transportation*, 107th Cong., at 60 (July 31, 2002).

[10] *See, e.g., Addressing Surface Transportation Needs in Rural America: Hearing Before the Subcomm. on Surface Transportation and Merchant Marine Infrastructure, Safety and Security of the Senate Comm. on Commerce, Science, and Transportation*, 111th Cong., at 30 (Aug. 10, 2009) (Corn Growers Association discussing need to address "unreasonable switching charges"); *Railroad Shipper Concerns: Hearing Before the Subcomm. on Surface Transportation and Merchant Marine of the Senate Comm. on Commerce, Science, and Transportation*, 107th Cong., at 60-63 (July 31, 2002) (Shipper concerns with switching and terminal access); *The Surface Transportation Board's New Merger Rules: Hearing Before the Subcomm. on Surface Transportation and Merchant Marine of the Senate Comm. on Commerce, Science, and Transportation*, 107th Cong., at 56 (June 28, 2001) (Dow Chemical testimony on terminal access).

[11] *Addressing Surface Transportation Needs in Rural America: Hearing Before the Subcomm. on Surface Transportation and Merchant Marine Infrastructure, Safety and Security of the Senate Comm. on Commerce, Science, and Transportation*, 111th Cong., at 45-46 (Aug. 10, 2009); *Oversight Hearing on the State of the Railroad Industry: Hearing Before the Subcomm. on Surface Transportation and Merchant Marine of the Senate Comm. on Commerce, Science, and Transportation*, 107th Cong., at 57-58 (May 9, 2001).

times, and it's been a very thoughtful dialogue."[12] Other rail carriers have also testified in several Congressional hearings concerning the rules and law governing competitive access.[13]

Outside experts have shared their views with Congress on access issues as well. For example, transportation economist Harvey Levine spoke about Congress' power to "mandate adequate competition through a change in legislation that provides for increased access..."[14]

Finally, numerous members of Congress have addressed forced access issues during rail oversight hearings. For example, Congressman Richard Baker discussed the possibility of Congressional action, noting "this is a window for this Committee to act and for us to deliver to the STB a product that might make a good deal more market sense."[15] Senator Byron Dorgan also noted that Congressional action would be required in order to effect the rail policy changes

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[12] *Addressing Surface Transportation Needs in Rural America: Hearing Before the Subcomm. on Surface Transportation and Merchant Marine Infrastructure, Safety and Security of the Senate Comm. on Commerce, Science and Transportation*, 111th Cong., at 45-46 (Aug. 10, 2009).

[13] *See, e.g., Rail Competition and Service: Hearing Before the House Comm. on Transportation and Infrastructure*, 110th Cong., at 104-105 (Sept. 25, 2007) (Chairman Oberstar exchange with Jim Young of UP on trackage rights); *Oversight Hearing on the State of the Railroad Industry: Hearing Before the Subcomm. on Surface Transportation and Merchant Marine of the Senate Comm. on Commerce, Science, and Transportation*, 107th Cong., at 8 (May 9, 2001) (Statement of Richard Davidson of UP on access rights); *Id.*, at 58-60 (Exchange between Senator Rockefeller and R. Davidson of UP regarding competitive access issues); *Id.*, at 63 (Exchange between Senator Smith and Davidson of UP regarding bottlenecks); *The Surface Transportation Board's New Merger Rules: Hearing Before the Subcomm. on Surface Transportation and Merchant Marine of the Senate Comm. on Commerce, Science, and Transportation*, 107th Cong., at 53-54 (June 28, 2001) (Exchange between Senator Rockefeller and Canadian National Railway CEO Paul Tellier on bottlenecks).

[14] *Oversight Hearing on the State of the Railroad Industry: Hearing Before the Subcomm. on Surface Transportation and Merchant Marine of the Senate Comm. on Commerce, Science, and Transportation*, 107th Cong., at 104 (May 9, 2001).

[15] *Rail Competition and Service: Hearing Before the House Comm. on Transportation and Infrastructure*, 110th Cong., at 96 (Sept. 25, 2007).

(including open access) sought by shippers, noting that "part of the reason we want legislation moved is [STB Chairman] Morgan has told us that she does not have the authority to do all that Senator Rockefeller, myself, and others would want her to do."[16] Senator Conrad Burns (R-MT) also called for passage of legislation repealing the bottleneck rule, stating "we need to move our bill…to get rid of this bottleneck and to get some equity on shippers…"[17] And of course numerous other legislators have discussed the access issues more broadly.[18]

In sum, Congress has carefully scrutinized forced access issues and law in numerous hearings over the last two decades. In those many hearings, Congress has repeatedly heard from all of major stakeholders concerning the bottleneck rule and the other policies at issue in this hearing but has consistently declined to change the law. Congress's consistent refusal to amend the relevant statutory provisions – despite having been repeatedly advised by the Board that

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[16] *Railroad Shipper Concerns: Hearing Before the Subcomm. on Surface Transportation and Merchant Marine of the Senate Comm. on Commerce, Science, and Transportation*, 107th Cong., at 5 (July 31, 2002).

[17] *Nominations of Linda J. Morgan, to Be a Member of the Surface Transportation Board; And Dr. Stephen D. Van Beek, to be Associate Deputy Secretary and Director, Office of Intermodalism, and Michael J. Frazier, to be Assistant Secretary for Government Affairs, of the U.S. Department of Transportation*, 106th Cong., at 10 (Sept. 28, 1999).

[18] *See, e.g.,* Footnotes 8, 11, and 13 *supra; Oversight Hearing on the State of the Railroad Industry: Hearing Before the Subcommittee on Surface Transportation and Merchant Marine of the Senate Committee on Commerce, Science, and Transportation*, 107th Cong., at 115-116 (May 9, 2001) (Senator Smith submitted written questions to UP CEO on access and competition); *Id.*, at 112-113 (Senator Smith submitted written questions to UP CEO regarding trackage rights); *The Surface Transportation Board's New Merger Rules: Hearing Before the Subcommittee on Surface Transportation and Merchant Marine of the Senate Committee on Commerce, Science, and Transportation*, 107th Cong., at 20-22 (June 28, 2001) (Senator Rockefeller exchange with STB Chairman Morgan on bottlenecks); *Id.,* at 67-68 (Senator Dorgan submitted written questions to STB Chairman Morgan on bottlenecks and open access); *Id.*, at 70 (Senator McCain submitted written questions to STB Chairman Morgan on competitive access); *Id.*, at 70-72 (Senator Specter submitted written questions to STB Chairman Morgan on competitive access issues);

additional legislation would be necessary to authorize the Board to consider such regulatory change–is strong evidence that Congress approves of the agency's current approach. Congress's repeated uniform decisions to reject legislation that would override the access policies in question is very powerful evidence that it approves of the Board's policies *See Bob Jones Univ.*, 461 U.S. 574, 599.