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May 27, 2011

**VIA HAND DELIVERY**

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

ENTERED  
Office of Proceedings

MAY 27 2011

Part of  
Public Record

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

Dear Ms. Brown,

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

Please acknowledge receipt of Norfolk Southern's Reply Comments by returning a date-stamped copy 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



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Ex Parte No. 705**

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**COMPETITION IN THE RAILROAD INDUSTRY**

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**REPLY COMMENTS OF  
NORFOLK SOUTHERN RAILWAY COMPANY**

**ENTERED  
Office of Proceedings**

**MAY 27 2011**

**Part of  
Public Record**

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Dated: May 27, 2011

EXHIBIT A CONTAINS COLOR IMAGE

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Norfolk Southern Railway Company (“NS”) submits these Reply Comments in response to Initial Comments submitted by other parties to this informational proceeding. *See*, Notices, STB Ex Parte No. 705, *Competition in the Railroad Industry* (served Jan. 11, 2011 & Feb. 4, 2011) (“Ex Parte No. 705”). NS joins in the Reply Comments of the Association of American Railroads (“AAR”), and offers the following reply comments and responses to several of the legal and factual issues raised by other parties’ comments.

## **I. INTRODUCTION**

Most commenters who advocate greater regulatory intervention in the form of forced access and forced interchange narrowly rely upon a skewed reading of a single element of the 15-part National Rail Transportation Policy, that the policy should aim “to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail.” 49 U.S.C. § 10101(1). Allowing competition where it exists to establish rates is different than is a command to artificially create competition by increased government regulation and intervention in the market-place. As NS and AAR noted in their respective Opening comments, to do so would contradict the statute, prior agency decisions, and significant court decisions.

Moreover, those commenters neglect entirely to account for other, equally important rail transportation policies, including:

- “[T]o minimize the need for Federal regulatory control over the rail transportation system . . .”
- “[T]o promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues . . .”
- “[T]o ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public . . .” and

- “[T]o foster sound economic conditions in transportation . . .”

49 U.S.C. § 10101(2), (3), (4), (5). Indeed, most proponents of forced access would have the Surface Transportation Board (“STB” or “Board”) take actions that would defeat these RTP goals, by increasing federal regulatory control and intervention in the rail transportation marketplace; reducing the ability of rail carriers to earn adequate revenues and invest in their systems and service; and limiting the development, maintenance, and growth of a sound and robust rail transportation system necessary to serve the growing demand for rail transportation service. These and other negative consequences of forced access proposals would sacrifice the interests of rail carriers, the rail system and the national transportation infrastructure, most shippers and consumers, and the greater economy, all to create the narrow benefit of artificial rate reductions for a few rail shippers.

The United States is at a transportation infrastructure and economic crossroads. As recently as April 28, 2011, the *Economist* magazine published an article lamenting the state of infrastructure in this country and observing that “America, despite its wealth and strength, often seems to be falling apart.”<sup>1</sup> It further explained that “according to the World Economic Forum study America’s infrastructure has got worse, by comparison with other countries, over the past decade” and “now ranks 23<sup>rd</sup> for overall infrastructure quality.”

Today the federal government is grappling with how to address critical infrastructure in the United States. Congress is weighing the relative roles that rail, trucks, barges, and aviation play in the transportation tapestry and how to best foster each of these modes to keep America

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<sup>1</sup> “Americans are gloomy about their economy’s ability to produce. Are they right to be? We look at two areas of concern, transport infrastructure and innovation,” *Life in the slow lane; America’s transport infrastructure*, THE ECONOMIST (Apr. 28, 2011) available at <http://www.economist.com/node/18620944>.

moving in the right direction. With its responsibility for all transportation in America, Congress must weigh many intertwined considerations, including highway congestion, fuel costs, environmental issues, surface transportation funding, the role each transportation mode should play, and many others.

A Board decision to force rail interchange or access would have profound effects on the country's entire transportation system, not just those entities and activities over which the Board has regulatory jurisdiction. It would affect investment, maintenance, expansion or contraction, operating efficiencies, the amount of traffic that can move on the rails rather than the roads, the use of alternative modes, and the amount of pollution emitted to move that traffic because of the choice of mode. Increasing the availability or frequency of forced access and forced interchange would have consequences far broader than potentially generating lower rates for a few complaining rail customers and those negative consequences would cut both deeper and more broadly than the inevitable impairment of rail carriers' financial health.

The comments of the minority of shippers who advocate radical regulatory change in this proceeding have failed to justify the substantial risks of significant harm to the freight rail system and continued private investment in transportation infrastructure that their proposals would entail. Nor have they provided any compelling justification for altering the economic balance of the United States freight transportation market to the detriment and disadvantage of so many other rail customers.

- First, they have ignored substantial Supreme Court law and precedent that restricts the Board's power to act. Some shipper commenters blatantly ask the Board to do what Congress repeatedly has rejected and what many Members of Congress have expressly opposed in this proceeding. Congress has ratified Board regulations and policies by reenacting statutory provisions subsequent to the Board's adoption of implementing regulations and by Congress' repeated rejection of numerous proposed statutory changes over the course of the last 15 years. Several shipper comments do not

even acknowledge that Congress passed the Interstate Commerce Commission Termination Act, much less discuss its effect on rail transportation regulation. Moreover, prior court decisions present a significant hurdle to adopting any forced access or forced interchange proposal.

- Second, the record in this proceeding shows that many economic development authorities and government officials are rightly very concerned that forced interchange or forced access will undermine railroad health and investment, and the attendant benefits to state and local economies.

- Third, the imposition of forced access and forced interchange would have significant adverse consequences for the size, structure, and maintenance of the rail network and on the operations and efficiency of the rail network. Those negative effects would affect all customers – not just the vocal minority that seeks change to advance their own narrow pecuniary interests.

- Fourth, forced interchange and forced access proposals do not pit shipper against railroad. Rather, they pit some shippers versus many, many other shippers, railroads, economic development authorities, rail suppliers, and the rest of the backbone of the American economy.

- Fifth, what the complaining shippers – primarily coal and chemicals shippers who have ample access to the Board’s procedures for challenging rate reasonableness – really want are guaranteed lower rates. But the proper role of the regulator under the statute is to examine the reasonableness of a particular challenged rate. The mechanism for determining rate reasonableness that the statute establishes is rate litigation. There are no guarantees in litigation, and as rail carriers know as well as anyone, litigation is by its nature time consuming and expensive.

In short, no commenter has demonstrated an actual need or sufficient justification for the Board to attempt to overturn congressional judgments and longstanding court decisions in order to create artificial, forced “competition,” and all of the negative consequences such re-regulatory intervention would generate at these economic and transportation crossroads. The Board’s actions here will affect more than the group of complaining shippers and the railroads: many other rail customers’ futures, the economy, and the balance in surface transportation in the

United States are also at stake. Accordingly, NS respectfully submits that the Board should terminate this inquiry without further action in order to maintain regulatory stability and certainty on which future rail system investment will depend.

**II. MOST COMMENTERS IGNORE CONGRESSIONAL RATIFICATION OF CURRENT BOARD LAW, RULES, AND POLICY, WHILE OTHERS MISUNDERSTAND ITS FORCE AND EFFECT.**

In its Opening Comments, NS explained the legal principles of congressional ratification and how they apply to the rules, decisions, and policies at issue in this proceeding. *See* Opening Comments of Norfolk Southern Railway Company (“Opening Comments of NS”) at 14-29 & Appendix. No shipper commenter addressed the threshold issue of Congress’s ratification of the rules and policies adopted by the Interstate Commerce Commission (“ICC”) and the STB, or limitations on agency action to change those rules after Congress has repeatedly examined and rejected proposals to change established agency rules. As NS demonstrated in its Opening Comments, congressional ratification of existing access, routing, and interchange rules and policies means that only Congress may change those policies. And, despite myriad opportunities, Congress has uniformly refused to change the competition rules and policies that are the subject of this proceeding. Opening Comments of NS at 15-29.

Conspicuous by its absence from most shipper comments is any meaningful discussion of the effect of Congress’s enactment of the ICC Termination Act in 1996 (“ICCTA”). As NS demonstrated in its opening comments, Congress fully considered nearly all of the policies at issue in this proceeding during its development and consideration of the legislation finally enacted as ICCTA. *See* Opening Comments of NS at 14-22. Despite requests from various quarters to change existing access law, rules, and policies, Congress made a fully informed decision to ratify those policies and to reject forced access and forced interchange proposals,

thereby adopting existing rules, policies, and standards as part of governing federal commerce law. *See id.* Thus, when it enacted ICCTA, Congress endorsed and adopted the policies, rules, and standards at issue in this proceeding..

Perhaps recognizing this congressional ratification and the significant obstacle it poses to agency changes to access policies, commenters advocating changes making forced access or forced interchange more readily available generally do not discuss ICCTA or Congress's approval and adoption of standards in existence at that time. *See, e.g.*, Comments of Concerned Captive Coal Shippers; Comments of the Western Coal Traffic League; Initial Comments of National Coal Transportation Association; Joint Initial Comments of Omaha Public Power Dist., the AES Corp., et al., (hereinafter "OPPD"); Joint Comments of Alliance for Rail Competition ("ARC"), American Chemistry Council, et al<sup>2</sup>; Comments of the Fertilizer Institute ("TFI"); Comments of E.I. du Pont de Nemours & Company ("DuPont"); Comments Submitted by Olin Corporation ("Olin").

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<sup>2</sup>ARC briefly makes an ineffectual attempt to dismiss the significance of ICCTA. *See* ARC at 40-41. First, ARC states that ICCTA did not change the substantive law in place when it was enacted. *Id.* at 40. But that is precisely the point. Congress surveyed the substantive law, rules, and regulations existing at the time of ICCTA, considered repeated demands from some shipper groups that it reverse *Midtec* and otherwise make it easier for shippers to obtain forced access, and then determined existing rules should not be changed. By not changing the substantive law, rules, and policy and re-enacting those substantive provisions without change, Congress ratified and reaffirmed existing law, including forced access and forced switching rules. Second, ARC contends that the Board is not precluded from changing rules and policies ratified by ICCTA because the Board changed its rules concerning product and geographic competition in market dominance inquiries after the passage of ICCTA. *See id.* at 40-41. However, the Board changed product and geographic competition rules in response to congressional direction to take measures to make rate cases more simple and less expensive, not in contravention of congressional ratification of those rules. *Ass'n of American Railroads v. Surface Transp. Board et al.*, 306 F.3d 1108 (D.C. Cir. 2002) ("In short, the Board's construction of the statutory definition furthers its statutory mandate, added by the ICCTA in 1995, to establish procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates, including 'appropriate measures for avoiding delay in the discovery and evidentiary phases of such proceedings.' 49 U.S.C. § 10704(d). (emphasis added))."

The starkest example of avoidance of ICCTA, the most recent comprehensive rail regulatory legislation enacted by Congress, is in the Comments of the “Concerned Captive Coal Shippers” (“CCCS”). The CCCS comments devote 58 pages of their comments to the 123-year history of the Interstate Commerce Act and purportedly relevant policies and agency decisions, from 1887 to the present. *See* Comments of CCCS at 14-72. In addition, they append to their comments a two-page, single-spaced list of “Relevant [Legal] History,” from 1887 to 2009. Comments of CCCS at A-1 to A-2. In those sixty pages of comments, CCCS does not even *mention* ICCTA, let alone analyze its effect on rail access law and policy. Nor does CCCS mention the sixteen subsequent bills seeking to impose forced access and forced interchange, each and every one of which Congress rejected. This airbrushing of legal history is convenient for proponents of greater forced access because omitting ICCTA is the only way they can argue that the ICC and the Board incorrectly implemented the policies of the Staggers Act, and that the Board now has full and unfettered discretion to change those rules and policies. The refusal of forced access and forced interchange proponents to address this essential law and history does not make it go away—it simply shows they have no cogent response.

A few shipper commenters provide clear support for the proposition that Congress has rejected proposals to change the policies at issue in this proceeding. *See* Initial Comments of Westlake Chemical Corporation (“Westlake Chemical Corporation”) at 6 (acknowledging that “S. 2889 was not voted on by the entire U.S. Senate during the 111<sup>th</sup> Congress.”). Westlake Chemical Corporation notes that “S. 2889 (in the 111<sup>th</sup> Congress) would have overturned the Board’s ‘bottleneck rate’ rule, as would S. 158 in the 112<sup>th</sup> Congress.” Westlake Chemical Corporation at 35. As Westlake Chemical Corporation concedes, however “S. 2889 was not voted on by the entire U.S. Senate during the 111<sup>th</sup> Congress” much less by the House of

Representatives. *Id.* at 6. Noting that Congress has rejected forced access and other proposed changes to the rail regulatory regime, Westlake Chemical Corporation urges the Board to usurp the powers of Congress. “This proceeding is therefore necessary to attempt to accomplish what the Congress so far has not been able to accomplish.” Westlake Chemical Corporation at 5. If Congress wanted a change it could have made a change in ICCTA when the issues were squarely presented or it could have passed any of the many pieces of legislation addressing forced access and forced interchange that has been before it since 1995. But it has not. In fact, many Members of Congress – including the bi-partisan leadership of the Committee on Transportation and Infrastructure of the United States House of Representatives – have expressly advised the Board that they oppose changes to the rules and policies,<sup>3</sup> as have other government leaders.<sup>4</sup>

Even if the Board were permitted to address these legislative issues, they would still be more proper for Congress. There are many competing and interdependent interests and numerous issues involved in the surface transportation market – which includes, at minimum, trucks, barges, domestic ships, transloading, and rail. Congress, which alone has responsibility

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<sup>3</sup> Letter of Reps. Mica and Rahall; Letter of Rep. Sam Graves (“[K]now I will oppose any policy change by the STB which would restrict the railroads’ ability to invest, grow their networks and meet our nation’s freight transportation demands”); Letter of Reps. Altmire and Holden; Letter of Rep. Costello; Letter of Rep. Diaz-Balart; Letter of Sens. Isakson and Chambliss; Rep. Granger (“[R]efrain from issuing any new policies or regulations that would discourage the continued investment by the railroads.”); Letter of Sen. Johanns; Letter of Sen. Kyl; Letter of Rep. Miller (FL) (“The regulatory balance set forth under the Staggers Act is the proper standard for the rail industry, and I oppose any policy changes by the STB that would limit railroads’ ability to invest in Florida or in their company’s continued success.”); Letter of Letter of Rep. Miller (CA) (“[T]he existing regulatory environment is working.”); Letter of Sen. Moran; Letter of Rep. Rigell (“With Virginia and so many other states seeking to expand the economy and create jobs, any action by the Surface Transportation Board to adopt policies that would discourage private investment should be avoided.”); Letter of Rep. Terry; Letter of Sen. Warner.

<sup>4</sup> Letter of Governor Deal; Letter of Governor McDonnell at 1 (“I believe changes to [the Staggers] Act could negatively impact Virginia’s rail transportation network and could impede further growth of the system.”).

for all transportation in America, is the appropriate body to weigh all the competing concerns, which include highway congestion, environmental issues, surface transportation funding, and allocation of scarce transportation funds in a reasonable and coordinated manner. The Board, which lacks jurisdiction over other competitors in the surface transportation market, is not the proper forum for these weighty concerns to be balanced or addressed in a coordinated fashion. A recent report by the non-partisan Congressional Research Service noted that “[Congress faces consideration of] . . . [w]hether elimination of the captive shipper problem would be detrimental or beneficial to maintaining a strong and vibrant railroad system.”<sup>5</sup> NS further points out that the issues and the stakes are even larger than the ramifications for the railroad system and the interests of rail carriers. Those critical economic and policy issues affect the balance between other modes, truck, and rail, which will also affect highway infrastructure and congestion, and the strength and vitality of the entire surface transportation system.

Finally, as NS noted in its opening comments and as AAR discusses in its reply comments, there is substantial case law addressing issues such as the railroads right to the long haul or the prohibition on challenges to the reasonableness of a portion of a joint through rate, that are additional legal obstacles. *United States v. Mo. Pac. R.R.*, 278 U.S. 269, 276-82 (1929); *Pa. R.R. v. United States*, 323 U.S. 588, 591-92 (1945); *Central Power & Light Co. v. S. Pac. Transp. Co.*, 2 S.T.B. 235, 243 (1997); *Thompson v. United States*, 343 U.S. 549, 555 & n.8 (1940); *Denver & Rio Grande W. R.R. Co. v. Union Pac. R.R. Co.*, 351 U.S. 321, 327 (1956); *Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. United States*, 366 U.S. 745 (1961). See also *Union Pac. R.R. Co. v. Surface Transp. Board*, 202 F.3d 337, 339 (D.C. Cir. 2000) (“It has been

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<sup>5</sup> John Frittelli, *CRS Report for Congress: Railroad Access & Competition Issues*, CONGRESSIONAL RESEARCH SERVICE (Prepared for Members & Committees of Congress Aug. 3, 2007) at 12.

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.”).

### **III. ANY BOARD POLICY REVIEW SHOULD BE ANCHORED IN A BEDROCK PRINCIPLE – FIRST, DO NO HARM.**

As NS explained in its Opening Comments, the Board lacks authority to change the regulatory structure applicable to railroads, given Congressional ratification and rejection of subsequent legislative proposals to change current law. In addition, the Board should be guided by the core principle of “first, do no harm.”<sup>6</sup>

An essential part of doing no harm is ensuring that any regulatory change the Board might propose – and would have the power to make without further Congressional action – would not undermine the health of the national rail system, its maintenance and growth, its efficiency, or its ability to serve many customers of diverse commodities and with diverse shipping needs. For example, as the American Short Line & Regional Railroad Association (ASLRRA) noted: “All of the freight revenues generated by customers on a small rail line are vitally necessary to sustain the financial viability of that line. For this Board to depart from the traditional regulatory model, and ignore the absence of market power and abuse of market power in a through-route prescription analysis, serves no valid purpose, and could have the very real effect of undermining the financial viability of many small railroads.” Initial Comments of ASLRRA at 12. “Particularly in the absence of any evidence of market power or abuse, the

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<sup>6</sup> Cf., Initial Comments of the Kansas City Southern Railway Company at 1 (“*Primum non nocere*” (First, Do No Harm))”).

Board should be extremely cautious in allowing the lifeblood traffic of smaller railroads to be siphoned away.” Initial Comments of ASLRRRA at 16. These broad concerns are very similar to those articulated by NS in its opening comments and by AAR.<sup>7</sup>

**A. State and Local Governments Oppose Forced Rail Access.**

The importance of the primary responsibility to do no harm is highlighted by the comments submitted in this proceeding by many economic development authorities and state agencies. All of these public bodies are troubled by the potential for forced access and forced interchange proposals to adversely affect railroad investment and economic development. The following excerpts from comments submitted by state and local governments and economic development agencies are examples from the record that illustrate the consensus concerns of such public agencies about the negative effects of forced access policies:

- Comments of Franklin County Area Development Corporation at 1. “Franklin County is experiencing the benefit of strong rail systems with the presence of a CSXT Intermodal Terminal . . . and the commitment of Norfolk Southern to construct an intermodal terminal . . . We oppose any policy or regulatory changes that would hinder the freight railroads’ ability to continue investing billions of dollars annually in private capital to grow and modernize the nation’s rail infrastructure.”<sup>8</sup>

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<sup>7</sup> AAR at 51-53 (“Testimony submitted in this proceeding separately by operating officers employed by AAR member railroads identify in detail the adverse effects on rail operating and costs that could be expected from forced interchange and forced access.”); Opening Comments of NS at 35 (“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.”); Comments of Union Pacific (“Union Pacific”), Verified Statement of James R. Young at 11 (“If the Board were to adopt broad forced access and forced interchange measures of the sort some shippers want . . . Union Pacific would reduce investment and would have much less incentive to invest in the future.”).

<sup>8</sup> See also, Comments of: Altoona-Blair County Development Corporation; Columbus Regional Airport Authority; Cherokee County Development Board; Franklin County Area Development Corporation; Grant County Economic Growth Council; Greater Hazelton Can Do; Harrison County Economic Development Corporation; Hampton Roads Economic Development Alliance; Joint Industrial Development Authority of Wythe County, Wytheville, and Rural Retreat; Miami County Economic Development Authority; Monroe County Industrial Development Corporation; New Castle Henry County Economic Development Corporation; Ohio Department of Development; Pittsylvania County Department of Economic Development; Putnam County Development Authority; Roanoke Regional

- Comments of Ohio Rail Development Commission at 1. “The Staggers Act allowed railroads to become profitable and compete successfully with the trucking industry resulting in reduced shipping costs. This competition has fostered creative efficiencies that have led to the establishment of the integrated global multi modal transportation system, made up of ships, trains and trucks, we have today. . . I oppose any policy or regulatory changes that would reduce the railroads competitiveness and risk job creation across Ohio and the Midwest. The STB should not make any changes at this time.”
- Comments of Alabama State Port Authority at 1. “One of the most important factors is the attempt to put as much cargo as possible on modes other than highway due to shortage in highway funds . . . We respectfully request that no regulatory policy changes be pursued at this time by the Surface Transportation Board.”
- Comments of Georgia Ports Authority. “[I]ntermodal connections help make Savannah the Southeastern port of choice for retail distribution centers, by offering efficient operations and cost saving to 44 percent of the U.S. population . . . We oppose any policy or regulatory changes that would hinder the freight railroads’ ability to continue investing billions of dollars annually in private capital to grow and modernize the nation’s rail infrastructure.”
- Comments of Virginia’s Gateway Region Economic Development Organization at 1. “The freight rail network supports job growth and continued economic recovery which will only serve to improve both the business climate and the quality of life in our entire region and will continue to drive economic development forward in South Central Virginia.”
- Comments of St. Louis Regional Chamber & Growth Association at 1. “Encouraging the freight railroads to make new investments in their systems will lead to new job creation, improved reliability and service as well as provide a cost effective and environmentally friendly means for the transport of goods. . . Policies or regulations that would diminish or inhibit the freight railroads ability or desire to invest would surely have a negative impact on economic development.”
- Comments of Tri-State Development Summit at 1. “Our location in the heart of the Midwest means it is imperative that we access transportation networks including the

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Chamber of Commerce; Southwestern Michigan Economic Growth Alliance, Inc.; South Carolina State Ports Authority; Steuben County Industrial Development Agency; Southern Tier Economic Growth; Shenandoah Valley Partnership; Warren County Office of Economic Development; UpState SCAlliance; Broward County Florida, Port Everglades; KCSmartPort; Office of Economic Development, Danville, Virginia; Knoxville Chamber; New river Valley Economic Development Alliance; Port of Miami; Warren County Local Economic Development Organization; Waterfront Coalition; The Columbus Region; Jackson County Economic Development Authority; Comments of Jacksonville Chamber of Commerce; Comments of Great River Economic Development Foundation.

freight rail system to be competitive in the national and international marketplace. Therefore, we respectfully request that no regulatory or policy changes be pursued at this time by the STB.”<sup>9</sup>

**B. Rail Equipment and Supply Companies Oppose Increased Rail Regulation.**

The pernicious effects of adopting the wrong policies would spread beyond the railroads and economic development generally. The rail supply industry is also concerned about the loss of investment and the loss of jobs that would result. For example:

- Comments of Koppers, Inc at 1. “My concern is that if we roll back reasonable regulations, we will roll back the success of a strong industry, which will in turn roll back the ability of Koppers and other suppliers to remain financially healthy.”
- Comments of Plasser American Corporation at 1. “There is a threat coming before you – a threat that could reshape the rail industry for the worse. This threat is a change to the current regulatory framework that would make it difficult for rail to continue investing billions every year into maintenance. Doing away with reasonable regulations, essentially reversing the progress of the last thirty years, would be disastrous for railroads and disastrous for Plasser America and the men and women who work here.”
- Comments of Progress Rail Services at 2. “With the government under increasing pressure to expand the economy, cut expenditures, and create jobs following one of the worst recessions in our country’s history, any action by the STB to adopt policies that would discourage private investment in this country’s transportation infrastructure would be unwise and extremely counterproductive.”
- Comments of Wabtec Corporation at 1. “If changes were made to undo these reasonable regulations, private rail capital would dry up and companies like Wabtec, which have been instrumental in the modernization of the American rail network, would pay a steep price.”
- Central Sales & Service, Inc. “Central Sales and Service depends heavily on a strong railroad system because we service passenger and freight railroads. We are just

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<sup>9</sup> The principle of do no harm also extends to rail transit, whose advocates have expressed concern about changes to Board regulations and policy. See Comments of S.M.A.R.T. Regional Rail Transit. See also, John G. Allen, Phd., *Commuter Rail, Freight Railroads, & the Debate on Open Access*, available at [http://www.uppermidwestfreight.org/resources/Allen\\_CommuterRail.pdf](http://www.uppermidwestfreight.org/resources/Allen_CommuterRail.pdf).

beginning to feel resurgence in freight rail and, frankly, need the trend to continue in order to remain viable in this industry.”<sup>10</sup>

**IV. THE SECOND PRINCIPLE THAT SHOULD GUIDE THE BOARD IS THAT THERE IS NO FREE LUNCH.**

If the Board were to ill-advisedly consider changes to forced access or forced interchange rules or policies, it must keep in mind that regulatory changes have consequences. The Board should take care to be sure that it understands those consequences — including unintended consequences — and is prepared to accept responsibility for them.

Several adverse consequences of changes to existing access and routing regulation are clear from the record, but largely ignored by shipper commenters. First, railroad investment would suffer.

As the Board warned following a previous investigation of forced access proposals:

[C]arriers could be expected to seek to maintain an adequate rate of return by cutting their costs, which could include the shedding of unprofitable lines. Thus, it is quite possible that open access would produce a smaller rail system (although not necessarily a degraded one) that would serve fewer and a different mix of customers than are served today.

Decision, STB Ex Parte No. 575 (Sub-No. 0), *Review of Rail Access & Competition Issues* at 3 & n. 3 (served April 17, 1998). In this proceeding, Union Pacific makes the same point. Union Pacific, Verified Statement of Lance M. Fritz at 26 (“Forced access and forced interchange would require us to spend more to provide the same level of service, would strand investment that we previously made based on expectations that traffic flows would follow efficiency principles, not regulatory principles, and would make future investments more risky, and

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<sup>10</sup> See also, Comments of Ansaldo STS USA at 1; Comments of FreightCar America at 2.

therefore less likely.”). But so do economic development authorities, rail suppliers, government officials, and rail customers, including:

- Comments of Harnett County Economic Development Commission at 1. “Freight rail is the most capital intensive industry in the nation, and it is imperative that continued reinvestment be encouraged. With so many other states under pressure to expand the economy and create jobs, any action by the Surface Transportation Board to adopt policies that would discourage private investment would be counterproductive.”
- Comments of Jacksonville Port Authority at 1. “[W]e also want to ensure that freight railroads have the ability to reinvest and continue to provide strong service to their customers. We encourage you to pursue public policies that encourage reinvestment by the rail industry that support job growth and continued economic recovery.”
- Comments of Rosboro, LLC at 3. “The nation’s railroads responded to the transportation crisis of 2004-2005 by increasing their revenues and then plowing a substantial majority of their operating profits back into capacity-related expansion. This has been a responsible action, taken by railroads under existing regulatory guidelines, that has benefited their customers during the economic recession and will further benefit their customers as economic activity increases during the ongoing recovery.”
- Comments of Murex N.A., Ltd. at 1. “We are very concerned about Surface Transportation Board’s consideration of new railroad regulations. . . Now is not the time for regulators to promote policies that restrict rail earnings and threaten private investment . . . When the prospects of earning returns on investment decrease and railroads are faced with huge revenue shortfalls, spending on infrastructure and equipment will cease . . . The federal government should maintain the regulatory framework in place today, one that enables the self-sustaining freight railroads to remain financially healthy and meet the challenges of building a 21<sup>st</sup> century transportation system.”
- Comments of New York Air Brake Corporation at 4. “When the prospects of earning return on investment decrease and railroads are faced with huge revenue shortfalls, spending on infrastructure and equipment will cease. Existing track and equipment will deteriorate and plans for new capacity will be scrapped. Inevitably, rail service in North America will become slower, less responsive, less affordable and less efficient. STB should reject re-regulating the railroads industry.”
- Comments of International Chemical Company at 1. “With everyone under pressure to expand the economy and create jobs, any action by the Surface Transportation Board to adopt policies that would discourage private investment would be counterproductive.” Comments of Interstate Commodities, Inc. and Comments of Grand Worldwide Logistics, Corp. made the same point.

- Comments of U.S. Development Group at 1. “The regulatory framework for North America’s freight railroads has long been reasonable and predictable. Any action taken by the Surface Transportation Board to re-regulate railroads would turn the clock back to an era in which railroads were unwilling to invest the necessary capital to keep North America’s rail infrastructure safe and efficient. . . We therefore oppose any re-regulation of railroads.”
- Comments of The Judge Organization/Port Elizabeth Terminal & Warehouse Corporation at 1. “Freight rail is the most capital intensive industry in the nation, and it is imperative that continued reinvestment be encouraged. With everyone under pressure to expand the economy and create jobs, any action by the Surface Transportation Board to adopt policies that would discourage private investment would be counterproductive.”<sup>11</sup>

The need for infrastructure investment in rail is unquestioned. The U. S. Department of Transportation’s Federal Railroad Administration (“FRA”)’s September 2010 update to the national rail plan:

details the interplay of factors that demonstrate the importance of efficient and effective rail infrastructure to the Nation’s economy. These include a dramatic increase in population, particularly in high-growth areas, and the concomitant need for transporting more freight and improving safety. Such an infrastructure will also reduce fuel consumption, which, in turn, will enhance our national security by diminishing our reliance on foreign oil.<sup>12</sup>

And the record is clear that NS and other railroads are investing massive amounts of private capital into that infrastructure. See Exhibit A hereto (chart showing NS capital expenditures over the last decade). Those investments should not be undermined or deterred. Despite calls throughout the complaining shippers papers for lower rates, they ignore the consequences that

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<sup>11</sup> See also, Comments of All South Warehouse D/C, Inc.; Comments of Hartwell Warehouse, Inc.; Comments of Beasley Forest Products, Inc.; Comments of Bulk Service; Comments of Circle S. Ranch; Comments of Capital Cargo Incorporated; Comments of D&I Silica, LLC; Comments of FGDI Division of AGREX; Comments of Associated Asphalt. Several other commenters made essentially the same point.

<sup>12</sup> See U.S. Dep’t of Transp. – Federal Railroad Admin., *Nat’l Rail Plan: Moving Forward. A Progress Report* at 3-4 (Sept. 2010), available at [http://www.ushsr.com/images/National\\_Rail\\_Plan\\_September\\_2010\\_1\\_.pdf](http://www.ushsr.com/images/National_Rail_Plan_September_2010_1_.pdf).

would result from transferring away from railroads the funds that give railroads the ability to invest in and maintain infrastructure for all customers and giving them to a subset of healthy rail shippers.

Second, operational and service problems would hurt carriers, shippers, and consumers. As the FRA has cautioned:

Arguments advocating competitive policies in the rail industry generally highlight the textbook advantages of competition over monopoly of a larger sum of consumer and producer surplus due to a restriction on output by monopoly. However, the advantages of competition over monopoly are not as clear cut as the simple textbook illustrations show. The advantages are only so clear when the costs of providing services are the same for competitive or monopoly firms. In cases where there are substantial economies of scale and scope in the production (as there appears to be in the rail industry), competition can increase the costs of resources used in production, potentially reducing societal welfare.

John Bitzan, Ph.D, N.D. State Univ., *Railroad Cost Conditions – Implications for Policy* at v-vi (May 10, 2000), available at [http://www.fra.dot.gov/downloads/policy/rr\\_costs.pdf](http://www.fra.dot.gov/downloads/policy/rr_costs.pdf).

In its opening submission, NS discussed the inefficiencies that would result from forced interchange or forced access. Mr. Manion described in detail that such proposals would:

- upset the balance that NS strives to achieve for service levels to all of its customers;
- inject extra complexity into the system through forced interchange proposals or forced access proposals undermines efficient service;
- 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; and
- cause real problems in the allocation of assets such as crews, locomotives, cars, and track capacity.

It is clear from the record that “[i]nvariably, rail service will become slower, less responsive, less affordable and less efficient.” Comments of Murex N.A., Ltd. (“Murex N.A., Ltd.”) at 1. Thus, speculative and unsupported comments like those of ARC – “[t]o the extent the rail system is experiencing or will soon experience certain capacity constraints, particularly those constraints resulting from operations at specific choke points in the rail system, the increased use of reciprocal switching could provide additional efficiencies”<sup>13</sup> – must be dismissed.

Although the shipper parties failed to address these impacts, the Opening Comments of M&G Polymers, USA, LLC, (“M&G”) illustrate the point Mr. Manion made in his verified statement that forced interchange would result in inefficiencies for all customers. M&G noted that “[r]ailroads also use routing and bizarre pricing to limit M&G’s ability to obtain competition and/or reasonable rates.”<sup>14</sup> M&G at 5. As an example, M&G cites its Apple Grove facility, which it claims is “approximately 14 rail miles from a potential connection to NS at Point Pleasant, WV.” M&G at 5. M&G continues by arguing that nevertheless, M&G products are often interchanged in Cincinnati (188 miles away) or other distant cities.”<sup>15</sup> Opening Comments of M&G at 5.

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<sup>13</sup> ARC at 37.

<sup>14</sup> Although NS discusses and develops joint line routes with CSXT regularly and NS and CSXT have gateway guidelines for toxic inhalation hazards, NS does not have routing guidelines the way it does with the some other railroads. Moreover, these guidelines are exactly that – guidelines only.

<sup>15</sup> M&G exaggerates the scope of the issue. According to NS records, in 2010 NS received 867 cars that originated at the Apple Grove facility. Of those cars, NS received 498 at Hagerstown, MD; 343 at Columbus, OH; 21 at Point Pleasant; and 5 at Cincinnati. Thus, the Cincinnati, OH example is not the rule.

In the first instance, in 2010, there was an average of fewer than two M&G cars per month and an average of fewer than five total cars per month at the Point Pleasant (PTPLS) interchange. With so little traffic, there are infrequent operations to Point Pleasant. M&G cars waited an average of more than 4 days at the Point Pleasant interchange since January 2010. By comparison, cars originating at Apple Grove and going to Nicholasville, KY, as an example, on average were on an NS train leaving Columbus within about two and a half days after being received at interchange from CSXT at Columbus on a CSXT train. Mr. Manion similarly noted that in a forced access or forced interchange regime these delays are exactly what one should expect. Verified Statement of Mark Manion (“*V.S. Manion*”) at 10-11 (“Implementing any type of forced interchange proposal would result in the very delays and inefficiencies that Norfolk Southern has sought to avoid...”); *Id.*, at 17 (“Because of the coordination that would be required between railroads for safe operations under forced access proposals, customers should expect service declines...”).

Further, M&G’s comments do not discuss the final destination of the traffic. Although there may be a closer interchange point, that fact tells us virtually nothing about the service M&G would get. For example, Point Pleasant is used for one M&G move - Apple Grove to Institute, WV, (near Charleston) for Meglobal Americas, Inc. When NS receives M&G cars at Point Pleasant, they usually do not go directly to Institute/Charleston. According to NS’s operating plan, those cars must be routed back to Columbus, OH, where they are switched in a yard and added to a train for Institute/Charleston. As Mr. Manion described, the need to route cars to as few switching yards as possible and to get the cars to the correct trains is essential when moving cars through a rail system where interchange is required. *V.S. Manion* at 8-9.

M&G's simplistic view of drawing the shortest line on a map bears no relations to railroad operations. Mileage is only one component of developing the best route. Car-days, handlings, traffic type, line and terminal capacity are other components that define the best operating plan. In the case of the Point Pleasant interchange, there is not a switching terminal in that proximity.

Finally, because of this inefficient operation, NS and CSXT have discussed many times, and as recently as last year, whether to close the Point Pleasant interchange. Shipper proposals for forced interchange would permit them to dictate interchange points and thereby create many more low volume interchanges like Point Pleasant, which in turn would result in infrequent service, longer transit times, and other inefficiencies. What the shipper parties are arguing for with forced interchange proposals is to permit them to chose interchange points and create more Point Pleasant-like inefficiencies throughout the rail network.

Third, operating costs for railroads would increase substantially. Union Pacific and NS witness Mark Manion addressed this issue in opening comments. *See* Opening Comments of NS, *V.S. Manion* at 21; Union Pacific at 5-6. Forced access and forced interchange would undermine hard-won operating efficiencies and service design that railroads have been able to achieve since the Staggers Act and very effectively move the most traffic in a manner that serves the overall public good. For example, railroad routing protocols have developed over time to improve the efficiency of the rail network and to ensure that railroad shipments comply with other federal regulations, including those for the shipment of TIH commodities. *See, e.g., V.S. Manion* at 3 (“Norfolk Southern’s railroad consists of several networks...a carload network, an intermodal network, and a unit train network. Norfolk Southern invests and develops operating plans that are best for operating all three networks in combination with one another.”); *See also*

*id.* at 9 & n. 3, (Discussion of TIH regulations and requirements). Some commenters take issue with routing protocols. *See e.g.*, Comments of Occidental Chemical Corporation at 4; DuPont at 5 (Opposing carrier routing protocols even while acknowledging “that routing protocols have operating efficiency benefits and that pure open routing is not desirable.”). It is well-established that railroads, not shippers, determine how traffic moves and what interchange points will be used.<sup>16</sup> As the Board previously found: “Giving the shippers the routing control they seek here would defeat the statutory provisions protecting each railroad’s right to determine, at the outset, which reasonable through rates it will use to respond to requests for service.” *Central Power & Light Co. v. S. Pac. Transp. Co.*, 1 S.T.B. 1059, 1065 (1996) (“*Bottleneck I*”). Moreover, as NS pointed out in its Opening Comments, each individual shipper focuses exclusively on its own shipment (and what it perceives the most efficient route would be for only that shipment) and not what the effect would be on the railroad, the rail network, and other shippers if one specific customer’s shipment were handled differently. *See* Opening Comments of NS at 35 (If customers were allowed to dictate routing, “[e]ach customer would make its decision based on its parochial interests regardless of its effect on the network.”) To take one

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<sup>16</sup> *Black v. ICC*, 837 F.2d 1175, 1178 (DC Cir. 1988) (“The law is well settled that the selection of an interchange point is made by the carriers...”); *Burlington N. R.R. Co v United States*, 731 F.2d 33, 38 (DC Cir. 1984) (“[L]ong-standing custom requires the receiving railroad in a direct physical interchange to designate a point on its own line where it will receive traffic...”); *Norfolk Southern Ry. Co. – Pet. for Decl. Order – Interchange with Reading Blue Mountain & Northern R.R. Co*, STB Docket No. 42078 (filed Apr. 23, 2003) (“Custom requires the receiving railroad in a direct physical interchange to designate a point on its line where it will receive traffic and to provide a free route over its tracks to that point for the delivering carrier.”); *Canadian Nat’l Ry. Co & Grand Trunk Corp. – Control – EJ&E West Co.*, STB Docket No. 35087, Mar. 13, 2008 (“The Board and courts have consistently upheld this right of a receiving carrier to specify a reasonable location for interchange”); *cf.* 49 U.S.C. § 10747(a)(1) providing that a shipper “may direct the rail carrier to transport the property over an *established* through route.” (emphasis added) However, the provision has been interpreted to mean that the shipper may select a through route that the carrier has chosen to establish and maintain, not that shippers can demand any route or even that a carrier must maintain a sufficient number of routes for shippers to have a selection. *Central Power & Light Co. v S. Pac. Transp.*, 1 S.T.B. 1059, 1066 at n. 14 (1996) (§ 10747 “does not require that a carrier maintain two routes in order to give a shipper [a] choice.”).

example, one party states rather naively that “[r]outing protocols should not be used to prevent shippers from using existing junctions where railroads already interchange similar traffic.”

DuPont at 5. But as Mr. Manion explained, existing junctions are used based on the movement and numerous other variables. *See, e.g., V.S. Manion* at 5-15. Whether the traffic is a similar commodity has little to do with whether a junction makes any operating sense.

Fourth, the combined effects of forced interchange and forced access would be felt by all customers. Opening Comments of NS at 35-36 (“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.”) Examining these issues through their own lens, the short line railroads reach the same conclusion: “A restructuring of the current regulatory landscape in a manner which would reduce the small railroads’ ability to serve their customers or to generate revenues sufficient to meet their high fixed and variable costs would cause substantial and irreparable harm, not only to these railroads but also to the multitude of communities, employees, and significant industries they serve.” Initial Comments of ASLRRA at 2-3. Perhaps as significant are the myriad customer comments from all sectors of the economy, expressing similar concerns that regulatory changes would adversely affect the rail transportation service they receive.<sup>17</sup>

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<sup>17</sup> *See, e.g.,* Comments of Associated Asphalt at 1 (“[A]ny attempts to re-regulate railroads will have an extremely negative impact...”); Comments of Beasley Forest Products (Expressing same concern); Comments of Mulch Manufacturing, Inc. at 1 (“[W]e view with some alarm any effort to reregulate this country’s freight railroads.”); Murex N.A., LTD at 1 (“Attempts to re-regulate the freight rail industry will have catastrophic results.”); Comments of PENN Warehousing & Distrib. at 1 (“[A]ny attempts to re-regulate railroads will have an extremely negative impact on our country.”); Comments of Robindale Energy Servs., Inc. at 1 (“We are very concerned that allowing customers to segment routes or forcing railroads to provide access to one another will have adverse consequences on our shipments.”); Comments of Rosebud Mining Co. (expressing similar concerns); Comments of South Milford

Other shippers' tunnel vision comments ignore these consequences. Instead they rely exclusively on a misreading of a single policy phrase from a complex statute -- "to allow . . . competition and the demand for rail services to establish reasonable rates for transportation by rail." See Initial Comments of Arkansas Electric Cooperative Corporation ("AECC") at 8; Olin at 6. But that phrase simply means that the agency should allow competition (among railroads, across modes, and in the economy) where it naturally exists to function unfettered by regulation. Contrary to the apparent belief of some commenters, that single provision of the statute cannot mean that a government agency should intervene to manufacture artificial rail-to-rail competition where competition would not develop on its own because of the economic circumstances -- such as where there is insufficient business to sustain two carriers.<sup>18</sup> The ICC long ago affirmed this view of the Staggers Act:

[W]e think it correct to view the Staggers changes as directed to situations where some competitive failure occurs. There is a vast difference between using the Commission's regulatory power to correct abuses that result from insufficient intramodal competition and using that power to initiate an open-ended restructuring of service to and within terminal areas solely to introduce additional carrier service.

*Midtec Paper Corp. v. Chicago & Nw. Transp. Co.*, 3 I.C.C. 2d 171, 174 (1986) ("*Midtec*").

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Gran Company, Inc. at 1 ("[I]f it ain't broke, don't fix it."); Comments of Sysco ("[These policies] would be unwise and extremely counterproductive.").

<sup>18</sup> NS notes that rail-to-rail competition is not the proper view of the transportation marketplace because it ignores the effects of other modes and product and geographic competition and other individualized factors that influence the surface transportation market. See Initial Comments of AAR, Verified Statement of Robert D. Willig at 13 ("Congress, the ICC and the STB have all recognized that rail carriers face a broad range of competition for their services...These varying competitive circumstances range from intense intra- and intermodal competition...and competition from substitute products or sources of supply.").

Rail-to-rail competition has in fact developed over the years through build-outs and transload facilities where there is economic justification for it.<sup>19</sup>

Government rules that create such competition by fiat are properly limited to truly “extraordinary circumstances.” See AECC at 8 (complaining that Board rules force accessorially in “extraordinary circumstances”). Otherwise, the government would be creating competition where the market will not support it. See AAR, Verified Statement of Robert Willig at 4 (“That a market does not include a second railroad is not a sign of market failure...entry of a second railroad may be neither efficient nor economically viable.”) The goal of the Staggers Act was to have a healthy, viable freight rail system that could compete in the transportation marketplace with trucks, barges and other forms of transportation; and thereby provide the benefits of market competition to shippers and the public. The purpose of Staggers emphatically was not to ensure that every customer had access to two railroads, which has never been the case in the nation’s history.

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<sup>19</sup> Decision, *Norfolk S. Corp & Norfolk S Ry Co. – Construction & Operation – In Ind. Cnty, PA*, S.T.B. Docket No. 33928 (May 15, 2003). OPPD notes that the pace of build-outs has declined, which should not be surprising. OPPD at 16. Now that many of the most economically attractive and advantageous build-outs have been completed, economically irrational build-outs are not being advanced. That fewer build-outs are being undertaken today than in the past says nothing about the present state of competition and certainly does not justify the artificial creation of competition sought here.

In addition, some shipper commenters contend that competition has promoted investment and that manufactured competition would not deter railroad investment in the future. For example, they note that “the major railroads have invested billions of dollars in facilities associated with intermodal services and the PRB Joint Line, both of which involve large volumes of prospectively competing traffic.” AECC, Verified Statement of Michael Nelson at 24. Witness Nelson proves the railroads’ point, however, because such investments have been made where there are sufficient volumes of traffic for competition to develop naturally. In contrast, government-created forced artificial competition will not foster rail carrier investment, it will undermine incentives for such investment.

**V. THE CENTRAL CONFLICT IN THIS PROCEEDING IS BETWEEN A FEW SHIPPERS ON THE ONE HAND AND RAIL CARRIERS, AND MANY OF THE CUSTOMERS THEY SERVE, ON THE OTHER.**

The issues on which the Board's notice requested comments do not divide railroads against all shippers. Rather, as the initial comments amply demonstrate, those issues pit selected groups of shippers against the interests of a diverse group of other shippers, railroads, and other stakeholders. Although a few shipper groups (most notably some coal shippers, chemicals shippers, and certain agricultural products shippers) seek to advance their narrow self interests by advocating radical regulatory change and increased government intervention, most shipper commenters oppose such ill-advised charges. This opposition is demonstrated in the following illustrative quotations from the opening comments of customers who are trouble by this proceeding.

- Comments of Rosboro, LLC at 3. “Nowhere is the economic principle known as fallacy of composition better exemplified than in the ongoing efforts of a few organizations to obtain, through new regulations, an economic advantage that would be limited to their members at the expense of the general shipping public and the productivity of the nation's transportation system.”
- Comments of Hanjin Shipping Company, Ltd at 1. “I know that some customers believe that changing the regulatory structure will benefit their own pecuniary interest. However, such a shift actually could harm many more shippers in the long run. By taking actions that could reduce railroad revenue, which in turn will harm the interest of intermodal customers, as well as the public at large, who benefit from strong railroads that are able to invest in infrastructure expansion, terminals, and rolling stock. [W]e are concerned that changes in the rules could result in service disruptions that would adversely affect all shippers.”
- Comments of Hapag-Lloyd at 1. “We and our customers who employ thousands of U.S. citizens depend upon an efficient, cost-effective global supply chain, including the railroads. . . A change in direction would be devastating to our industry, those it employs and the customers we serve.”
- Comments of Peerless Storage and Customer Freight Sales, Inc. at 1. “[W]e believe that the re-regulation of the freight railroad industry would derive counter-productive results that would hinder growth for our companies and companies similar to ours . . . since we believe that the re-regulation proposals being discussed . . . would

provide a disincentive for the freight railroad industry to continue to invest in their infrastructure and equipment. This is also the case concerning the domestic and international intermodal freight industry.”

- Comments of Sysco Corporation at 1. “As a food distributor, we are forced to find the most cost effective way to get our products transported. We are able to realize an 89% savings on our fuel surcharges when rail is used as opposed to trucking. . . the STB should focus its resources on actions that will encourage investment and promote this country’s continued economic recovery.”
- Comments of Cornerstone Systems at 1. “We have approximately 180 employees and offices in twenty three locations. Approximately 70% of our business is invested in intermodal and carload rail business. We are heavily involved in the movement of toys, tire, auto parts, spirits and wine. . . A healthy, prosperous and growing rail industry is key to not only our continued success, but I believe is critical to the future of this country and is a proven environmentally better choice than over the road movements.”
- Comments of OOCL (USA) Inc. at 1. “I don’t think anyone should underestimate the foresight shown by Congress, the Interstate Commerce Commission before 1996, and the STB after that time in providing the appropriate regulatory structure that promotes, enhances and grows the railroad industry. . . I know that some customers believe that changing the regulatory structure will benefit their own interest. However, a regulatory change may harm many more shippers in the long run by reducing railroad revenue, which in turn will harm the interest of intermodal customers, as well as the public at large.”
- Comments of Mulch Manufacturing, Inc. at 1. “A healthy and vibrant rail network has allowed our company to grow, as well as providing employment to our people in six states. We vehemently oppose any efforts to curtail or restrict the railroads ability to invest private capital to expand and improve our nations [sic] rail infrastructure. Our company has recently taken advantage of this expansion [sic] to grow our own business.”
- Comments of Agmark Intermodal Systems, Inc. at 1. “It is impossible for government to know what is best for entities as complicated as railroads.”

Nor were coal and agricultural shippers uniform in requesting greater forced access, forced interchange and other regulatory changes. A number of such shippers submitted comments opposing such regulatory changes, as illustrated by the following excerpted quotes from their opening comments.

- Comments of Consol Energy at 1. “I know that some customers believe that changing the regulatory structure will benefit their own specific interests. However, such a shift actually could harm many more shippers in the long run. We are very concerned that allowing customers to segment routes, or forcing railroads to provide access to one another, will have adverse consequences on our shipments. The difficulties of operating in the [Eastern] coalfields and the capacity limitations [would be consumed by railroads trying to] coordinate operations.”<sup>20</sup>
- Comments of Sunrise Cooperative. at 1. “I believe any attempts to re-regulate railroads will have an extremely negative impact on our country . . . any action by the Surface Transportation Board to adopt policies that would discourage private investment would be counterproductive.”
- Comments of South Milford Grain Company, Inc. at 1. “I think the wise old advise of ‘if it ain’t broke, don’t fix it’ says it best and should certainly be considered before reregulating the rail industry.”
- Comments of Topflight Grain Cooperative at 1. “I am writing to express Topflight Grain Coop support for a strong freight railroad network across the nation. . . With everyone under pressure to expand the economy and create jobs, any action by the Surface Transportation Board to adopt policies that would discourage private investment would be counterproductive.”
- Comments of Cagle’s, Inc. at 1. “Without timely delivery and competitive prices from our rail providers our animals are without feed, we are out of business, and our 2,000 plus employees are out of work...oppose any policy that will hinder the freight railroads’ ability to continue to invest...”

The risk of harm from forced interchange and forced access are real and substantial and indiscriminate. ASLRRRA concluded: “Eliminating or reducing those revenues through a prescribed short-haul for the benefit of one shipper would, therefore, have a cascading effect which would directly and adversely impact all shippers on the rail line.” ASLRRRA at 12. The fears expressed by a large swath of shippers are in accord with the ASLRRRA statement.

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<sup>20</sup> See also, Comments of James River Coal Co.; Comments of Rosebud Mining Co.; Comments of Robindale Comments of Energy Serv.; Comments of Teco Coal Corp.; Comments of Xcoal Energy & Res.

**VI. SHIPPERS ADVOCATING REGULATORY CHANGE ARE SIMPLY SEEKING LOWER RATES, NOT COMPETITION AND THEIR REMEDY IS TO FILE A RATE CASE TO DETERMINE WHETHER THE RATE IS UNREASONABLE.**

Several shipper commenters observe that they have lower rail rates at locations served by two railroads than at locations served by one railroad. *See, e.g.*, Comments of PPG Indus., Inc. (“PPG”) at 4; Comments of Arkema, Inc. (“Arkema”) at 4; Comments of CF Indus., Inc. (“CF Industries”) at 2-3. NS does not dispute that this may be the case. NS also contends that there is nothing surprising about that fact, which is the expected result of basic market economics. Even where customers must admit there is competition for their transportation business either among railroads or between a railroad and another mode, they strenuously assert that it is not really competition – largely because they want rates that are lower still.<sup>21</sup> PPG admits it has access to truck competition, for example; it just doesn’t like the fact that trucks are available “at an increased freight cost.” PPG at 7. The Fertilizer Institute wrestles mightily with actual competition, but cannot deny that it exists and that it constrains rail pricing – even if the limitation on other modes permit rail prices to increase:

Intermodal competition has only been of limited effectiveness as a constraint on rail rates. Those TFI members with access to barge transportation have had the most success. However, barges have significant limits as to where they can serve, because rivers do not reach everywhere, and when barges are an option, because certain parts of the inland waterways shut down in the winter and locks frequently are closed for repairs. Trucks are an inherently higher

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<sup>21</sup> Some shippers endorse tests that create rebuttable presumptions in favor of forced access or otherwise require forced switching or access based solely on the absence of “rail-to-rail” competition. *See, e.g.* AECC at 8-9. Such arguments are predicated on a view of the transportation market that is artificially narrow, unsupported, and unrealistic. This crabbed view ignores the presence and constraining competitive force of trucks, barges, and other modes and of product and geographic competition. Certainly, they cannot be asking the Board to ignore the realities of the transportation marketplace that were prominently on display in STB Ex Parte No. 704, *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*.

cost alternative than rail and are not very practical for high volume lanes. Moreover, as fuel costs increase, trucks become even less efficient and competitive. New truck driver hours of service rules will only aggravate the situation by creating driver shortages. The effectiveness of truck competition also is highly dependent upon distance and volumes. As all of these factors reduce the already limited competitiveness of trucks, railroads will have even more room to continue raising their rates, unless greater competition among railroads themselves can be created.

TFI at 5. These shippers may not like the level at which barge and truck competition (in terms of price, service, and other factors) constrains rail rates, but they cannot ignore the existence of such competition and that such competition constrains rail pricing.

Still other parties simply argue that they have made a choice to use rail instead of other modes.

Therefore, from those parties' perspective whether other modes provide viable transportation alternatives is irrelevant. *See e.g.*, DuPont at 7 ("DuPont prefers rail over truck because high volumes of trucks can cause congestion at and around the DuPont facilities, and have higher handling costs in the form of more personnel needed to load, unload, supervise and administratively handle truck shipments."). The fact that a shipper has a general preference not to move its freight by truck does not mean that it has no competitive alternative to rail transportation. It means the shipper prefers rail transportation over available alternative competitive transportation for a number of different reasons. A railroad should not be penalized because of a shipper's selection of rail over another available mode of transportation.

Whether they are attempting to sweep under the rug the actual existence of other modes of transportation or attempting to hide behind the choices they made to prefer rail transportation, the bottom line is that these shippers do not seek "merely" forced access to supplement other modes and product and geographic competition. The same is true for customers who claim no

transportation alternatives as well. These comments all boil down to one simple fact – they want guaranteed lower rail rates.

Indeed, some parties drop any pretense of advocating for greater competition or forced access, and candidly ask the Board for rate caps. PPG and Olin, for example want all TIH rates capped at some R/VC ratio. *See* PPG at 12; Olin at 22-24. ARC bluntly asserts that “real relief will be unlikely without prescribed rate reductions,” effectively abandoning the premise that forced access or other “competitive” remedies will address their complaints. ARC at 6.

Many of the shipper commenters openly acknowledge that the regulation they seek has little to do with competition and everything to do with forcing lower rates by any means they can find.

In support of its requested repeal of the bottleneck rule, ARC notes “however, properly understood, Bottleneck relief can be more accurately described as facilitating and simplifying [rate] litigation than as promoting competition.” Joint Comments of ARC at 6. Shortly thereafter, ARC further asserts that “[r]eversing ICC and Board policies on competitive access and paper barriers, though necessary, is unlikely to be sufficient. . . . Absent barriers to excessive access charges and paper barrier buyout compensation, these competitive remedies may also necessitate invocation of STB regulatory remedies.” ARC at 7. PPG similarly complains that even where it has obtained the equivalent of a quote to an interchange, the price is still too high. PPG at 10-11.

The proper avenue of redress for customers’ rate concerns is a rate case. The Board has established clear guidance for bringing rate cases and standards and precedents for the

determination of maximum reasonable rates.<sup>22</sup> In recent years, the Board has adopted significant changes and simplifications to make stand alone cost rate cases more simple, more accessible, and less costly. Further, it has developed and made readily available less rigorous and less accurate rate evaluation methodologies like SSAC and the 3-Benchmark approach, in order to further expand access to rate challenges for smaller shipments. In light of the unprecedented number of rate cases currently pending before the Board, allegations that there is a “lack of a sufficient regulatory backstop in the form of potential rate relief” ring hollow. See OPPD at 10; Comments of Total Petrochemical at 4 (a party that has a pending rate case against CSXT); CF Industries at 1.

The complaining shippers do not want to pursue relief in streamlined rate cases: they want guaranteed lower rates. The Agricultural Retailers Association could not be clearer on this point: “Agricultural shippers have been advocates of providing rate relief through the small case proceeding . . . but in general, the risk vs. potential reward of such a case is not well balanced . . . Given the risk of losing, plus the likelihood that even if a case is won, the benefit might be less than the maximum allowed, we see few if any situations where agricultural shippers will find the 3-B small rate case approach appealing.” Joint Comments of Agricultural Retailers Association at 3. The risk of winning and losing is not only inherent in litigation but reflects the very real possibility that the rates are entirely lawful and reasonable. It appears that what some of the

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<sup>22</sup> NS of course has actively contested a number of the Board’s rate case procedures and standards, *e.g.* *CSXT v. Surface Transp. Board*, 584 F.3d 1076 (D.C. Cir. 2009), and will continue to do so as it deems necessary and appropriate. And NS is not in agreement with some of the Board’s existing rate cases rules, procedures, and standards. Nonetheless, the point is that there are established rate case procedures, and several of the commenters have in fact invoked them recently.

complaining shippers seek is a process by which they can simply ask for a rate reduction, and then automatically and recklessly obtain that reduction.

Some shipper commenters attempt to cloak their desire for lower rates in terms of “public interest” assertions, such as that chemical shippers need the safety of rail service. *See* Comments of National Association of Chemical Distributors at 2. But forced interchange and forced access are irrelevant to that public safety goal. In any regulatory regime, these customers would need safe rail service. The only difference would be that under a forced interchange or forced access regime, for a time some shippers might get lower rates for their safe rail service cheaper (although, based on the record developed in the initial comments, whether they would get the same or better service is certainly questionable) and the additional car handlings and exchanges of cars certainly increase the risk of an accident. Rail Transportation Security, 73 Fed. Reg. 72130 (Nov. 26, 2008) (codified at 49 C.F.R. § 1580); Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments, 73 Fed. Reg. 72182 (Nov. 26, 2008) (codified as 49 C.F.R. §§ 172, 174).

In the end, these commenters want lower rates even at the cost of asking the government to force a railroad to allow someone else to use its privately-owned assets. *See* Comments of National Association of Chemical Distributors at 2 (“A primary cause of this lack of choice is the fact that the railroads completely control access to the tracks.”). Rail carriers build and maintain their systems, and operate them with equipment purchased with private investors’ funds and they must be able to earn an adequate return on those investments and replace those assets. If the shoe were on the other foot, how many chemical companies or other complaining shipper would step forward to allow the government to mandate that it allow other companies to use its production facilities or participate in the manufacturing and sale of its products?

**VII. A SUBSTANTIAL CHANGED CIRCUMSTANCE IN RECENT YEARS IS THE DEVELOPMENT OF FEDERAL REGULATIONS AND REQUIREMENTS RELATED TO THE TRANSPORTATION OF TOXIC INHALATION HAZARDS.**

The advent of federal regulations regarding routing, processes for interchanging of railcars, and the development and implementation of positive train control are all factors that must be taken into account when reviewing the comments of chemical shippers and their associations. These regulations impose strict non-discretionary requirements on railroads in some instances; in other instances they provide target goals, results, or requirements that afford railroads more flexibility in selecting the means they use to implement or achieve those requirements.<sup>23</sup> Thus, many allegations by commenters about routings not being available must be read within the context of these new and substantial obligations.<sup>24</sup> For example, Olin discusses issues it has encountered with movements of chlorine involving Alabama and Gulf Coast Railway. Comments Submitted by Olin at 33. Olin and the Board may or may not be aware that the TSA has been specifically involved with those movements, including the establishment of restrictions, and requirements on how that traffic may be moved.<sup>25</sup>

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<sup>23</sup> See e.g., 49 C.F.R. § 1580; 49 C.F.R. § 172.820; 49 C.F.R. § 174.9; Transportation Security Administration, TSA Recommended Security Action Items for the Rail Transportation of Toxic Inhalation Hazard Materials (June 23, 2006), available at [http://www.tsa.gov/what\\_we\\_do/tsnm/freight\\_rail/programs.shtm](http://www.tsa.gov/what_we_do/tsnm/freight_rail/programs.shtm); Transportation Security Administration, Recommended Security Action Items for the Rail Transportation of Toxic Inhalation Hazard Materials, Supplement No. 1 (Nov. 21, 2006) available at [http://www.tsa.gov/assets/pdf/Supplement\\_No%201\\_TIH-SAI.pdf](http://www.tsa.gov/assets/pdf/Supplement_No%201_TIH-SAI.pdf); Transportation Security Administration, Recommended Security Action Items for the Rail Transportation of Toxic Inhalation Hazard Materials, Supplement No. 2 (Feb. 12, 2007), available at [http://www.tsa.gov/assets/pdf/sai\\_for\\_tih\\_supplement2.pdf](http://www.tsa.gov/assets/pdf/sai_for_tih_supplement2.pdf); Rail Transportation Security, Final Rule, 73 Fed. Reg. 72,130 (Nov. 26, 2008) and as amended, 73 Fed. Reg. 77531 (Dec. 19, 2008).

<sup>24</sup> See e.g., Comments Submitted by Olin at 5-6 (“Although only one set of rail tracks leads to these plants, there is no physical or legal barrier to prevent ‘competing’ railroads from reaching the plants on the existing tracks. Rather, the present-day barrier that prevents competing railroads from utilizing the same existing tracks is caused by the railroads’ refusals to share their physical assets with each other for a fair fee.”).

<sup>25</sup> NS participated in conversations with TSA about the interchange of TIH cars in Mobile, AL, involving AGR.

In addition, NS is facing a mandate to install costly positive train control systems that return little benefit.<sup>26</sup> According to the Federal Railroad Administration's own estimates, PTC will cost railroads up to \$13.2 billion to install and maintain over 20 years, but will return only \$1 in safety benefits for every \$20 spent. PTC implementation requires substantial investments, including in a spectrum, equipment, locomotive upgrades, wayside detectors, hardware and software, and communications systems.

Given the substantial added costs, requirements, and constraints on rail transportation of TIH commodities from these regulations and the risk to railroads from hauling them, comparisons of rail rate increases for TIH commodities to indices for non-TIH freight is essentially meaningless. *See* Comments of PPG at 3.

**VIII. NS WILL LARGELY IGNORE THE HOST OF COMMENTS UNRELATED TO THE TOPICS NOTICED BY THE STB, WHICH ARE NOT PROPERLY AT ISSUE IN THIS PROCEEDING.**

Some parties have strayed far afield from the announced subjects of this proceeding. None of the tangential issues mentioned in this section could reasonably be seen as a logical outgrowth of the Board's notice. Indeed the Board expressly said it did not seek comment on some of these topics. Accordingly, NS does not intend to respond substantively to most of the tangential issues that commenters have raised but provides the following cursory observations on a few of them.

First, NS takes the Board at its word that interchange commitments and rate case rules are not at issue here, and accordingly will not provide comments in response to the myriad of shipper comments on these topics. STB Ex Parte 705 at 5; *See, e.g.* Comments of Occidental

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<sup>26</sup> Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, § 104(a), 122 Stat. 4848, 4856-57 (2008) (codified at 49 U.S.C. § 20157(a)(1)).

Chemical Corporation at 2 (discussing interchange commitments); Joint Comments of Agricultural Retailers Association at 5 (acknowledging that the Board indicated it would not consider interchange commitments here).

Second, certain chemical shippers claim that rail transportation rates may cause them to shift production to less expensive locations overseas. See ARC at 50-51 (“It is often cheaper to produce [chemical] products in Asia or the Middle East, and then ship them by ocean carrier to the United States . . . rather than to produce the chemicals in the U.S. and ship them by rail to the same customer. . . . [R]ailroads noncompetitive rates destroy American jobs and business...”). The notion that rail transportation costs are determinative of where chemical companies manufacture their products is dubious at best. Although, the proportion of overall chemical manufacturers’ costs attributable to rail transportation is not readily determinable from public sources<sup>27</sup> it is highly doubtful that rail transportation costs are the primary driver of chemical companies’ costs or decisions about moving operations overseas or determining where to invest. There are other, far more significant factors and costs, prominently including the price of a major input to the production of many chemical products, natural gas.

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<sup>27</sup> Some information can be pieced together from public sources. DuPont’s North American Logistics Manager testified to Congress that “DuPont purchases approximately \$550 million in transportation in North America,” (presumably annually). *Railroad & Hazardous Materials Transp Programs. Reforms & Improvements to Reduce Regulatory Burdens*, 112<sup>th</sup> Cong. (Apr. 7, 2011) available at <http://republicans.transportation.house.gov/Media/file/TestimonyRailroads/2011-04-07%20Pileggi.pdf>. DuPont’s total cost of goods sold including costs to deliver goods was \$23.416 billion in 2010. SEC Form 10-K available at <http://www.sec.gov/Archives/edgar/data/30554/000104746911000602/a2201761z10-k.htm>. Thus, even if rail carriers were the sole mode of transportation used by DuPont (which is certainly not the case), that transportation would account for only 2.3 percent of DuPont’s total cost of goods sold.

In 2005, the American Chemistry Council testified before Congress that “higher natural gas prices shift chemical industry investment overseas.”<sup>28</sup> Indeed, as natural gas prices rose five years ago the U.S. chemical industry was widely reported to be in crisis.<sup>29</sup> U.S. chemical companies were closing domestic plants and shifting investment and production overseas.<sup>30</sup> Significantly, ACC did not claim that rail transportation costs were a significant driver of chemical companies shifting domestic production overseas.

But as the supply of recoverable natural gas has risen in the United States, the pendulum has swung back. U.S. chemical manufacturers are reaping the benefits of low natural gas prices driven by abundant shale gas reserves and the development of processes to economically extract

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<sup>28</sup> Testimony of the American Chemistry Council on the Impact of High Energy Costs on Consumers and Public Presented to the Energy and Mineral Resources Subcommittee (May 19, 2005) available at [http://www.americanchemistry.com/s\\_acc/bin.asp?SID=1&DID=807&CID=206&VID=109&DOC=File.PDF](http://www.americanchemistry.com/s_acc/bin.asp?SID=1&DID=807&CID=206&VID=109&DOC=File.PDF).

<sup>29</sup> Michael Arndt, *No Longer the Lab of the World*, BUSINESS WEEK (May 2, 2005) available at [http://www.businessweek.com/magazine/content/05\\_18/b3931106.htm](http://www.businessweek.com/magazine/content/05_18/b3931106.htm) (Describing natural gas prices as a “capper” harming chemical manufacturers and driving plant closures); Greg Schneider, *Chemical Industry in Crisis*, The WASHINGTON POST (Mar. 17, 2004) available at <http://www.marshall.edu/cber/media/040317-WP-chemical.pdf> (Discussing U.S. chemical companies being “squeezed not only by cheap foreign competition but also soaring energy costs.”). Claudia H. Deutsch, *Storm and Crisis: The Impact, As Natural Gas Prices Rise, So Do the Costs of Things Made of Chemicals*, NY TIMES (Sept. 28, 2005) available at <http://query.nytimes.com/gst/fullpage.html?res=9C00E1DD1230F93BA1575AC0A9639C8B63> (“The effect on chemical company costs has been huge. Most have already shuttered energy guzzling plants and installed productivity-enhancing programs in the remaining ones. Yet the savings have not kept pace with the costs.”).

<sup>30</sup> Simon Romero, *Natural Gas: Big Worry This Winter*, NY TIMES (Nov. 15, 2005) available at <http://www.nytimes.com/2005/11/15/business/15natgas.html?hp&ex=1132030800&en=0674c873a692978e&ei=5094&partner=homepage> (“The American Chemistry Council estimates that 10,000 jobs at companies that rely largely on natural gas have been lost since prices for the fuel began climbing in 2000”; “‘We need to declare a national crisis,’ Andrew N. Liveris, the chief executive of the Dow Chemical Company, said in recent testimony before the Senate. Dow, the nation’s largest chemical maker, has shut 23 plants in the United States in the last three years in places like Somerset, N.J.; South Charleston, W.Va.; and Elizabethtown, Ky., as it shifted production to Kuwait, Argentina, Malaysia and Germany, where natural gas is cheaper.”); American Chemistry Council, *Balancing the Nation’s Natural Gas Supply and Demand*, Comments Submitted to the Department of Energy (Jan. 5, 2006) available at [http://fossil.energy.gov/epact/Section\\_1818/American\\_Chemistry\\_Council\\_1-05-06.pdf](http://fossil.energy.gov/epact/Section_1818/American_Chemistry_Council_1-05-06.pdf) (“Until three years ago, that new plant, and those 1,000 jobs, was going to be built in Freeport, Texas. Liveris said that the high cost of natural gas here – now 12 times higher than it costs on the Arabian Peninsula – is why Dow moved the project.”).

that gas.<sup>31</sup> The American Chemistry Council proclaimed shale natural gas a “game changer” for U.S. chemical manufacturers. *See* American Chemistry Council, *Economic Outlook for U.S. Chemical Industry Improving, ACC’s Year-End Report Reveals*, available at <http://www.americanchemistry.com/Media/PressReleasesTranscripts/ACC-news-releases/Economic-Outlook-for-US-Chemistry-Industry-Improving-ACCs-Year-End-Report-Reveals.html> (“This low price for natural gas compared to oil has enabled U.S. chemicals manufacturers to become more competitive than producers in much of the rest of the world.”). Numerous U.S. chemical companies have benefitted substantially from the greater availability and lower cost of domestic natural gas.<sup>32</sup> As a result, the domestic chemicals industry – including several commenters in this proceeding – has resumed *expansion* in the U.S., with new plants being planned and old plants being reopened. *See, e.g.*, Associated Press, *Dow Chemical to build new chemical plants*, BUSINESSWEEK.COM (Apr. 21, 2011, 6:39 PM) available at <http://www.businessweek.com/ap/financialnews/D9MOB4A81.htm> (“The improved outlook for U.S. natural gas supply from shale brings the prospect of competitively priced ethane and propane feed stocks to Dow ...” Jim Fitterling, Dow’s president of corporate development and Hydrocarbons, said in a statement”” describing two new plants and a restarted old one); Gruppo M&G to Launch Next Generation PET & PTA Plants in the U.S. Gulf Coast Region PET Capacity to Be 1 Million Metric Tons; PTA to Be 1.2 Million Metric Tons, (Nov. 5, 2011),

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<sup>31</sup> Ernest Scheyder, *Analysis. Crude Oil Price Surge Helps U.S. Chemical Makers*, REUTERS (Mar. 10, 2011), available at <http://www.reuters.com/article/2011/03/10/us-chemicals-oil-idUSTRE72971420110310> (“Large-scale exploitation of shale formations in the United States has driven down natural gas prices by 12 percent in the past year... effectively handing U.S. chemical producers a global advantage.”).

<sup>32</sup> Leo Sun, *Dow Chemical (DOW) Trims Its Margins and Diversifies its Products*, InvestorGuide.com, Jan. 7, 2011, available at <http://www.investorguide.com/article/7470/dow-chemical-dow-trims-its-margins-and-diversifies-its-products/> (“Dow...has watched its costs of production plunge and its profits rise as a result of natural gas prices.”).

available at <http://www.gruppomg.com/news.php?newsid=26> (“As a result of demand growth fully recovering in 2010 and of several plants in North America having closed or been sold over the past few years, the industry supply/demand balance has now been restored, creating room in the market for our new plant.”); Josh Cable, *Chemical Producer to Expand its Lake Charles, La., Site*, Industry Week, Dec. 2, 2010 available at [http://www.industryweek.com/articles/chemical\\_producer\\_to\\_expand\\_its\\_lake\\_charles\\_la\\_site\\_23343.aspx](http://www.industryweek.com/articles/chemical_producer_to_expand_its_lake_charles_la_site_23343.aspx) (“[T]he investment reflects our confidence in the competitiveness of the U.S. petrochemicals industry.”); *Westlake Chemical Announces New Chlor-Alkali Unit Construction in Louisiana*, R&D (Aug. 31, 2010), available at <http://www.rdmag.com/News/Feeds/2010/08/materials-westlake-chemical-announces-new-chlor-alkali-unit/> (describing new plant); Jack Kaskey, *Chevron Phillips May Build Ethane Cracker on U.S. Gulf Coast*, BLOOMBERG (Mar. 28, 2011 10:48 AM), available at <http://www.bloomberg.com/news/2011-03-28/chevron-phillips-chemical-evaluating-gulf-coast-ethane-cracker.html> (“North America’s gas-price advantage, partly a result of increased production from shale formations, may lead to the construction of two North American crackers by 2015, Chemical Market Associates Inc., a Houston-based consultant, said...”). Finally, commenter DuPont, which has often threatened to curtail operations, or even shut down, its NS-served plant in Edge Moor, Delaware, recently announced a large planned expansion of its production of titanium dioxide in North America, including the Edge Moor plant. See Jonathan Starkey, *Delaware business: DuPont’s Edge Moor Plant set to expand*, DELAWARE ONLINE (May 11, 2011 9:57 PM), available at <http://www.delawareonline.com/article/20110512/BUSINESS/105120324/Delaware-business-DuPont-s-Edge-Moor-Plant-set-expand> (announcing DuPont plans to spend \$500 million over

next 3 years to expand production of titanium dioxide). Thus, rather than off-shoring U.S. chemical manufacturing and jobs, foreign chemical manufacturers are actually moving their production facilities and jobs to the United States.<sup>33</sup>

Happily for the U.S. chemical manufacturing industry, cost factors (including natural gas) have favored them in recent years, resulting in reduced costs and increased attractiveness of operations in the United States. In any event, the cost of rail transportation has very little to do with decisions about where chemical companies will manufacture their products. The chemical companies know rail transportation costs are just a small fraction of chemical manufacturers' overall expenditures. Other factors such as the cost of natural gas are much more determinative of where manufacturers choose to invest and produce their products as their public statements outside the Board demonstrates. The threat that rail transportation prices may drive chemical manufacturers overseas is not credible, and should not be given serious consideration in this proceeding.

Third, a few commenters raise issues related to the Board's determinations of revenue adequacy. *See, e.g.*, Comments of Ameren at 6. NS submits that the Board's annual calculation is not economically sound for several reasons, chief among them the fact that it does not take into account replacement costs of assets and otherwise overstates a railroad's revenue adequacy. Nevertheless, NS understands that concerns about revenue adequacy were not included among the competition issues noticed by the Board and are thus outside the scope of this proceeding.

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<sup>33</sup> *FPG to Build Texas Plant*, *TAIPEI TIMES* (Nov. 14, 2010), available at <http://www.taipetimes.com/News/biz/archives/2010/11/14/2003488456> (Discussing new ethylene and propylene plants being built by Taiwan's largest diversified industrial company in Texas); *Kuraray America eyes La Porte for chemical expansion*, *HOUSTON BUSINESS JOURNAL* (Jan. 26, 2011 6:05 AM) available at <http://www.bizjournals.com/houston/news/2011/01/26/kuraray-america-eyes-la-porte-for.html> (Announcing land purchase by U.S. subsidiary of the Japanese chemical company to build a new chemical plant).

Although parties point to selected measures of railroad performance in financial markets, none of those limited metrics addresses the long term viability of an entity with assets like a railroad. *See, e.g.* Comments of the National Industrial Transportation League at 7-8; Comments of NRG at 1-2; Olin at 7-8; PPG at 11-12. Indeed, even the stock price of Bethlehem Steel rose for periods as it gradually collapsed and went out of business.

One commenter flatly asserts that no matter what the Board finds in any proceeding, NS is revenue adequate. This assertion is baseless and reckless. Westlake Chemical Corporation at 16-30 (“There is no question that the Class I railroad industry as a whole is quite healthy, and has been ‘revenue-adequate’ for some time...Norfolk Southern...has been ‘revenue-adequate’ ...for most of the last several years.”) Even using the Board’s shortcut methodology for the annual determination of revenue adequacy, which substantially differs from an economically-sound test, NS did not earn revenues sufficient to cover its cost of capital in 2009 and does not expect to do so in 2010. A pending rate case poses the question of whether NS is long-term revenue adequate, but that issue is complex and will be the subject of substantial evidence in that proceeding.

Fourth, some commenters raise questions specifically related to legal issues regarding contracts. For example, DuPont complains about the use of fuel surcharges calculated as a percent of revenue when used in contracts. As the Board well knows, the terms of contracts are outside its jurisdiction and the decision in Ex Parte 661 Fuel Surcharges was clearly expressly inapplicable to contracts. Decision, STB Ex Parte 661, *Rail Fuel Surcharges*, at 13 (decided January 25, 2007) (“Ex Parte 661”).

Fifth, Arkema, Inc. asks the Board to subject contract rates to rate reasonableness challenges. Arkema at 7. Other commenters ask the Board to entertain rate cases whenever it

finds a challenged rate generates an R/VC greater than 180%, regardless of whether there are multiple railroads or other alternative modes of transportation available to compete for the traffic at issue. Comments of Ameren at 6. By statute, the changes sought by these proposals are *per se* unlawful. 49 U.S.C. § 10709; 49 U.S.C. § 10707.

Sixth, some commenters use this proceeding to raise complaints about rail fuel surcharges. See e.g., Initial Comments of The Mercury Group; OPPD at 17; Joint Comments of the Agricultural Retailers Association, et al, at 6; Ameren at 6; DuPont at 10. The Board held a thorough proceeding regarding fuel surcharges. See Ex Parte 661. The Board has ongoing cases exploring whether and how to examine a railroad's fuel surcharge applicable to publicly-priced, regulated traffic. STB Docket No. 42120, *Cargill, Inc. v. BNSF Railway Co.* (filed Apr. 19, 2010). This proceeding is neither the time nor the forum for further debates about fuel surcharges.

Seventh, some parties even raise railroad antitrust rules (so-called exemptions) and discuss those issues as though they were relevant here. See Olin at 17. Plainly, they are not. See *generally* Notice, Ex Parte No. 705 (served Jan. 11, 2011) (no mention of antitrust regulations in this proceeding).

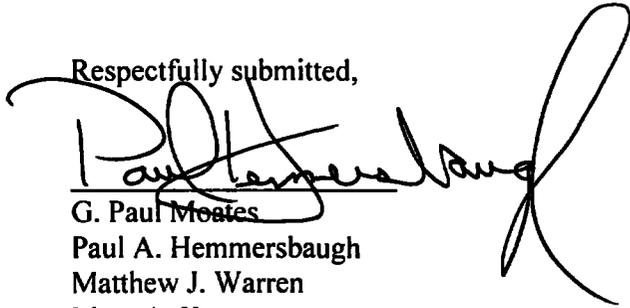
NS will not address the litany of other issues raised by parties, many of which are the subject of separate, proceedings before the Board, including various reasonable practices cases. See Joint Comments of Agricultural Retailers Association, et al, at 5-7.

## 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. No commenter has provided any sufficient justification for changing existing law and policy, even if the Board had the power to make such changes. The Board does not have that power or authority. Any substantive changes to the regulatory regime applicable to those matters may only come from Congress, not the Board.

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Dated: May 27, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that on this 27th day of May 2011, I caused copies of the foregoing Reply 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.

A handwritten signature in black ink, appearing to read 'Eva Mozena Brandon', with a horizontal line extending to the right from the end of the signature.

Eva Mozena Brandon

# **EXHIBIT A**

EXHIBIT A TO THE REPLY COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY  
IN STB EX PARTE No. 705, *COMPETITION IN THE RAILROAD INDUSTRY*

## Capital Expenditures (\$ millions)

