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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. EP 711

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**PETITION FOR RULEMAKING TO ADOPT REVISED
COMPETITIVE SWITCHING RULES**

COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY

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COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY

I. INTRODUCTION

Norfolk Southern Railway Company (“NS”) hereby files these comments on the Petition for Rulemaking to Adopt Revised Competitive Switching Rules (“NITL Petition”) as requested by the Board in its decision of July 25, 2012 (“Decision”).¹ NS also joins the comments submitted by the Association of American Railroads.

NS submits that the more NS examined the NITL Petition and attempted to derive the types of empirical information requested by the Board, the more apparent the fundamental flaws, omissions, and ambiguities in the NITL Petition became. Indeed, the Decision repeatedly notes the incompleteness of the NITL Petition. For example, the Board says “NITL’s proposal does not provide enough information” and that the Board needs “more precise information.” Decision at 7 & 8. However, the Board is not the only one handicapped by the vagueness and incompleteness of the NITL Petition.

¹ NITL submitted its proposal in Ex Parte 711 before the Board received the last filings in Ex Parte 705. In its opening filing in EP 711, Norfolk Southern incorporated all its filings from Ex Parte 705, which the Board notes are now part of this record. Decision at n. 8.

NS has examined the NITL Petition carefully in light of the Decision. Like the Board, NS cannot determine the true outline or scope of the NITL Petition. In fact, it became clear that the NITL Petition is too vague and too incomplete to permit NS to answer many of the Board's questions. Indeed, no party can conduct meaningful analysis because of these deficiencies because it requires too many assumptions, including who would be eligible under the NITL proposal, how the forced access would be implemented, and what the access fee would be in each individual situation.

The fundamental legal flaws with the NITL Petition doom it from the outset. The law prohibits such a restructuring of the industry under the guise of Section 11102. Moreover, the NITL Petition is not in the public interest. The Board has recognized in the Decision that a regime change like that proposed by NITL could result in substantial adverse impacts to the ability of railroads to continue to invest and to maintain efficient railroad operations, neither of which would be in the public interest.² Decision at 7-8. These potentially devastating effects to the United States transportation system and economy would result solely because a sub-group of rail shippers seek to have the government provide them with rates and services through forced access that the market (which may only support service from one railroad)³ would not otherwise support.

² Clearly, the Decision does not endorse the NITL Petition. Nor does it conclude that the current regulations regarding access should be changed. Nor does it provide any reasoned explanation of the need for a change to the existing regulations. For all the reasons NS has provided in Ex Parte 705, *Competition in the Railroad Industry* (“EP 705”), the Board could not reach that conclusion or provide a reasoned explanation.

³ General Accounting Office, *Industry Health Has Improved, but Concerns about Competition and Capacity Should Be Addressed*, at 44 (Oct. 2006) (“[S]ome markets may not have the level of demand needed to support competition among railroads.”).

Therefore, these comments address the broader issues related to any forced access or forced interchange proposal and discuss the vagueness and incompleteness of the NITL proposal that make it impossible for any party to analyze the NITL Petition in a meaningful and accurate way. Section II reviews the procedural history relevant to this matter. Section III discusses the fact that the NITL proposal is unlawful and would result in a shift from a remedial standard toward a scheme that simply redistributes money between railroads and shippers and among shippers.

Section IV explains why no party can conduct any meaningful studies or analysis of the NITL proposal. It addresses the elephant in the room – the absence in the NITL’s proposal of any price of access. NITL does “not include a methodology for access pricing.” Decision at 7. The Board is correct that access pricing “would be a significant factor in determining the extent to which a broad [forced] switching requirement could affect qualifying shippers.” Decision at 7. Accordingly, that omission makes it difficult for any party to provide meaningful “empirical evidence” in response to the decision. NS is in no position to speculate on what access price might be agreed to be any two railroads at any particular location and doing so is particularly hard because each location has unique facts and circumstances that may affect the access price. But access price is not the only omission or ambiguity that prevents any meaningful study; there are many more that are discussed in this section.

Section V provides an overview of some of the substantial questions that would need to be litigated each time a petition was filed pursuant to a proposal like the NITL’s proposal. Speculation that the NITL Petition might in some way reduce government

interference is simply erroneous. Decision at 6 (“An additional benefit of NITL’s proposal is that it would reduce government intervention . . .”).

Section VI describes the substantial operating impacts and inefficiencies that would result from the NITL proposal. These impacts would affect network operations, which would ultimately affect customers who would not be entitled to relief under the NITL proposal and rail commerce generally because the rail system is a network. They are difficult to quantify because the operations at each location are different. However, it is clear that the NITL proposal will increase car handlings, which directly reduces the efficiency of the network. Accordingly, the NITL Petition is harmful to the public interest.

II. PROCEDURAL HISTORY

The recent procedural history that has led to the filings of these comments began in 2009.

A. *Christensen Report Does Not Recommend Forced Access or Forced Interchange.*

In 2009, the Board commissioned a report on the rail industry by Laurits R. Christensen Associates, Inc. See Laurits R. Christensen Associates, Inc., *A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals That Might Enhance Competition* (2009) (“*Christensen Report*”). A small part of that report discussed potential economic effects of several forced access proposals (including bottleneck rates, reciprocal switching agreements, terminal access agreements, and trackage rights) that had been included in congressional and other proposals - none of

which even progressed as far as a vote on the floor of either house of Congress. *See id.* at vol. 3, pages 22-4 to 22-14.

However, the *Christensen Report* did not recommend that the Board adopt any new form of forced access. Its exploration of forced access was predicated on an important assumption: that the terms of access are “determined through voluntary negotiations between railroads.”⁴ As the authors’ later explained:

[t]he assumption that the terms of access reflect the result of voluntary negotiations implies that such an outcome produces a net gain in economic efficiency. . . . [F]or an open access policy to produce an overall economic welfare gain, it must generate a voluntary competitive response by railroads. . . . The construct of voluntary negotiations provides an economically principled benchmark for establishing terms of access that produce gains in economic efficiency. . . . [A]n important implication of this is that the success or failure of open access policies greatly depends on how the terms of access are determined.⁵

Further, the Report cautioned that “the distributional effects [of forced access] among shipper groups as well as between shippers and railroads” should be important “primary considerations.”⁶ The authors “concluded that relief to one group would imply negative consequences to other groups (either shippers and/or railroads).”⁷

Far from recommending the adoption of a new forced switching policy, the *Christensen Report* simply indicated that - based on its assumptions, including voluntary negotiated terms - reciprocal switching agreements would likely be among “the least costly in terms of loss of economic efficiency” of the various open access proposals.⁸

And, although the *Christensen Report* posited that reciprocal switching agreements

⁴ *Christenson Report*, vol. 3, page 22-12.

⁵ *EP 705*, AAR Reply Comments, Joint Verified Reply Statement of B. Kelly Eakin and Mark E. Meitzen, Christensen Associates at 11-12 (May 27, 2011) (emphasis added) (“Eakin and Meitzen Joint Statement”).

⁶ *Id.* at 22-14.

⁷ Eakin and Meitzen Joint Statement at 13.

⁸ *See Christensen Report*, vol. 3, page 22-13.

would likely be among the “least costly in terms of loss of economic efficiency” of the various open access proposals, it certainly did not conclude that there would be a net economic benefit to shippers or the public interest, let alone recommend adoption of a forced switching policy.

B. Record in Ex Parte 705 Clearly Demonstrates that Forced Access and Forced Interchange Are Unlawful, Unjustified, and Would Produce Substantial Adverse Consequences to Freight Transportation and to the Public Interest.

Then, on January 11, 2011, the Board issued a notice seeking comments and announcing a public hearing to explore the current state of competition in the railroad industry. *See EP 705*. NS submitted opening comments on April 12, 2011.⁹ Those comments detailed several of the statutory constraints that preclude the Board from substantially altering its competition-related rules. First, the Board itself has correctly and consistently recognized that it does not have statutory authority to implement “open access.”¹⁰ Second, the explicit statutory protection of a carrier’s long-haul right is a particularly critical provision that restricts the Board’s discretion in this area.¹¹ Third, Congress’s actions demonstrate that it has legislatively ratified the rules established in the *Midtec* and *Bottleneck* decisions.¹² Legislative history over the last two decades provides substantial evidence that Congress approves of the agency’s existing competition-related

⁹ *EP 705*, Comments of Norfolk Southern Ry. Co. (filed Apr. 12, 2011) (“NS EP 705 Comments”). NS also joined the comments of the AAR. *Id.* at 1.

¹⁰ *Id.* at 4 (citing *Union Pac. Corp et al. – Control & Merger – S. Pac. Rail Corp. (Houston Gulf Coast Oversight)*, 3 S.T.B. 1030, 1032 (1998) and *Central Power & Light Co. v. S. Pac. Transp. Co.*, 1 S.T.B. 1059, 1067 (1996) (“*Bottleneck I*”).

¹¹ *Id.* at 4-11.

¹² *Id.* 14-29; see *Midtec Paper Corp. v. Chicago & N.W. Transp. Co.*, 1 I.C.C. 2d 362 (1985) (“*Midtec I*”), *reconsidered*, 3 I.C.C. 2d 171 (1986) (“*Midtec II*”), *aff’d sub nom. Midtec Paper Corp. v. United States*, 857 F.2d 1487 (1988); *Central Power & Light Co. v. S. Pac. Transp. Co.*, 1 S.T.B. 1059, 1067 (1996) (“*Bottleneck I*”), *clarified*, 2 S.T.B. 235 (1997) (“*Bottleneck II*”).

rules. Congress's decision not to alter the access rules when it overhauled the statutory scheme in the Interstate Commerce Commission Termination Act ("ICCTA") shows that it has ratified the agency's interpretation, and its repeated rejection of legislation that would alter the *Midtec* and *Bottleneck* rules further demonstrates that Congress ratified the Board's statutory interpretations.

Moreover, NS discussed the potentially devastating effects forced access or forced interchange proposals could have on railroad capital investment, financial viability, and operational efficiency and the other practical considerations that counsel strongly against changing the existing access and bottleneck rules.¹³ NS witness Mark D. Manion, Norfolk Southern's Executive Vice President & Chief Operating Officer, explained that changing established rules at the demand of a few shippers who believe that doing so might lower their rates could have a significantly detrimental effect on operations and service to all NS customers.¹⁴ Accordingly, NS urged the Board not to consider measures that would threaten system-wide service and fluidity at the behest of a few shippers who would like to force access by another rail carrier as a way to obtain lower rates.

After reviewing comments submitted by other parties, NS filed reply comments on May 27, 2011.¹⁵ NS observed that "[n]o shipper commenter addressed the threshold issue of Congress's ratification of the rules and policies adopted by the ICC and the STB, or limitations on agency action to change those rules after Congress has repeatedly

¹³ NS EP 705 Comments at 30-39.

¹⁴ Verified Statement of Mark D. Manion on Behalf of Norfolk Southern Ry. Co., EP 705 ("Manion Statement").

¹⁵ EP 705, Reply Comments of Norfolk Southern Ry. Co. (filed May 27, 2011) ("NS EP 705 Reply Comments"). NS also joined the comments of the AAR. *Id.* at 1.

examined and rejected proposals to change established agency rules.”¹⁶ NS further pointed out that 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.¹⁷

NS made four other key points in that filing. First, the record in that proceeding showed 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 undermine the attendant benefits to state and local economies.¹⁸ Second, 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.¹⁹ NS pointed out that those negative effects would affect all customers (not just the vocal minority that seeks change to advance their own narrow pecuniary interests — which was a point many actual shippers

¹⁶ *Id.* at 5-10.

¹⁷ *Id.* at n.3 (citing from the *EP 705* record, 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).

¹⁸ *Id.* at 11-14.

¹⁹ *Id.* at 14-24.

made in their opening comments as well).²⁰ Third, 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.²¹ Fourth, what the complaining shippers – primarily coal and chemicals shippers who have ample access to the Board’s procedures for challenging rate reasonableness – really want is a guarantee of lower rates.²²

On June 22 and 23, 2011, the Board held a public hearing at which numerous parties appeared, including NS witnesses James A. Hixon, Executive Vice-President – Law and Corporate Relations, and Mr. Manion. Mr. Manion urged the Board to take care not to undermine the substantial investments that railroads like Norfolk Southern have made to this Nation’s rail infrastructure and the innovation that is underway. He explained that the uncertainty in traffic flows that forced access and forced interchange would create would make investment more problematic and harder to justify. In particular, the ability of customers to shift traffic would make it difficult to predict

²⁰ See, e.g., *EP 705*, Comments of Associated Asphalt at 1 (“[A]ny attempts to re-regulate railroads will have an extremely negative impact...”); *EP 705*, Comments of Beasley Forest Products (expressing same concern); *EP 705*, Comments of Mulch Manufacturing, Inc. at 1 (“[W]e view with some alarm any effort to reregulate this country’s freight railroads.”); *EP 705*, Comments of 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.”); *EP 705*, 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.”); *EP 705*, Comments of Rosebud Mining Co. (expressing similar concerns); *EP 705*, Comments of South Milford Gran Company, Inc. at 1 (“[I]f it ain’t broke, don’t fix it.”); *EP 705*, Comments of Sysco (“[These policies] would be unwise and extremely counterproductive.”).

²¹ NS *EP 705* Reply Comments at 25-27.

²² *Id.* at 28-32.

whether a particular investment could be justified. Next, Mr. Manion explained that forced access and forced interchange would generate serious adverse network effects. Mr. Manion used the examples of interchanges at Cleveland, Ohio, and Marion, Ohio, to illustrate the inefficiencies that would result.²³

Mr. Hixon closed by debunking the reckless arguments that had been made by chemical companies in the written filings.²⁴ In particular, Mr. Hixon showed a press release of the American Chemistry Council (“ACC”) that noted that, “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. ‘Shale gas extraction has been a ‘game changer’ for America’s chemical manufacturers, enabling us to remain highly competitive in a global market.’”²⁵ This press release, which had been removed from the ACC website before the STB hearing, undermined ACC’s prior arguments that rail was driving chemical companies off-shore.

At the end of the hearing, the Board asked parties to file supplemental comments. NS filed its supplemental comments on July 25, 2011.²⁶ Regrettably, NS had to spend a substantial amount of its filing addressing reckless, unsupported, and frankly erroneous statements made by some shipper witnesses at the Board’s hearing.²⁷ For example, allegations that carriers do not compete were eviscerated by the chart submitted by NS showing traffic volumes and market share changes for CSX and NS for agricultural

²³ See *EP 705*, Oral Argument Exhibits of Norfolk Southern Railway Co., slides 5-11 (filed June 23, 2011).

²⁴ *Id.* at slides 14-19.

²⁵ *Id.* at slide 19.

²⁶ *EP 705*, Supplemental Comments of Norfolk Southern Ry. Co. (filed July 25, 2011) (“NS *EP 705* Supplemental Comments”). NS also joined the comments of the AAR. *Id.* at 1.

²⁷ *Id.* at 7-15.

products, coal, and all traffic over the last decade and by the testimony of CONSOL's representative who said that NS and CSXT are "competitive."²⁸ Second, data again disproved the unsupported speculation and irresponsible allegations of some shippers that railroads discriminated against exports.²⁹ Third, because chemical witnesses continued to beat the drum that railroads were the cause of their supposed woes, NS had to present the opinion article written by the ACC president and published in *RollCall* after the Board's hearing, in which he plainly and truthfully eviscerated this fiction:

For the first time in years, U.S. chemical manufacturers have a competitive advantage over foreign chemical producers . . . This advantage is driving demand for U.S. chemical products overseas and boosting American exports. . . . But that's only part of the story. In recent months, numerous chemical manufacturers have announced new investments thanks to the outlook for predictable domestic natural gas markets. For example, Dow Chemical Co. announced it will restart operations in facilities idled during the recession and Eastman Chemical Co. has already done so.³⁰

Finally, NS submitted the verified statement of Alan H. Shaw, Group Vice-President, Chemical Marketing, to rebut the baseless accusations made by representatives of Dow and DuPont that railroads only made "take-it-or-leave-it" offers. Although NS gave Dow the opportunity to correct the record itself, NS detailed the give and take exchanges with those two shippers.³¹ Once they were called on it, neither Dow nor DuPont disputed NS's verified statement.

Having addressed other parties' looseness with the facts, NS then turned to the substance of the proceeding. NS explained that the hearing was helpful because it made

²⁸ *Id.* at 9 (citing *EP 705*, Hearing Testimony of Christopher Marsh, Consol Energy (File 3,01:02:33)).

²⁹ *Id.* at 9-10.

³⁰ *Id.* at 10-14 (quoting Calvin M. Dooley, CEO of American Chemistry Council, Opinion, *Dooley: NAT GAS Act Isn't the Solution for Energy*, ROLL CALL, July 13, 2011).

³¹ *Id.* at 14 & Highly Confidential Verified Statement of Alan H. Shaw.

clear that most proponents of railroad regulation are really seeking one thing and one thing only – lower rates.³² That distilled truth was presented clearly when Chairman Elliott asked a forced access proponent if his organization would prefer forced access or rate regulation changes. The witness replied "I think better rates frankly. That's the bottom line. You know, right now I think most of us are being served fairly well by the railroads and they're efficient and they're our partners."³³

Finally, NS provided a detailed explanation of carload operations and the potential impacts of forced access or forced interchange on those operations. Reiterating Mr. Manion's testimony at the hearing, NS explained that a typical carload merchandise car moving in "local" service (i.e., being moved on NS's rail network without any involvement of another carrier) is "handled" on average at least three times – although many are handled more. *See* NS EP 705 Supplemental Comments at 20. In addition, NS submitted a video to provide clarity regarding the complexity of moving a carload of freight from its specific origin, through the network and classification yards, and to its specific destination.³⁴ NS then discussed the substantial additional difficulties associated with injecting additional, unnecessary handlings through forced interchange and forced access. In short, those issues include: (1) introducing operational inefficiency; (2) having inadequate infrastructure to handle such operations; (3) the risk of stranded assets; (4)

³² *Id.* at 15.

³³ *EP 705*, Hearing Testimony of Wayne Hurst, National Association of Wheat Growers (File 1,03:58:01).

³⁴ NS EP 705 Supplemental Comments, Exhibit C. ("Carload Video"). In addition to being in the record in *EP 705*, the Carload Video is now available at www.youtube.com/watch?v=oDTnIJsENwc.

creating disincentives to investment; and (5) additional safety risks.³⁵ NS concluded by reiterating the legal limitations and impediments to forced access and forced interchange.

C. Incomplete and Vague NITL Petition That Lacks Adequate Justification Is Filed.

On July 7, 2011, before the ink was hardly dry on the paper for the supplemental filings in Ex Parte 705, NITL filed the petition at issue here. The NITL Petition proposes to mandate forced access at an unstated access price if four criteria are met. To obtain forced access pursuant to the proposal, the shipper would have to show (1) that it is served by only one Class I railroad; (2) it lacks intermodal and intramodal competition (which is akin to the Board's market dominance inquiry in rate cases); and (3) that it is or can be within a reasonable distance of a working interchange between the Class I and another carrier (which can include Class II and Class III railroads). NITL Petition at 8. NITL did not address the price at which such access would be granted. *Id.* A petition for forced access would be defeated if a railroad shows it is not feasible or is unsafe or that it will "unduly hamper the ability of that carrier to serve its own shippers." *Id.*

For each of the second and third criteria, NITL asks the Board to create "conclusive" presumptions. NITL proposes to short circuit the inquiry into the existence of competition by establishing two conclusive presumptions that no effective competition exists if: (1) the movement for which the forced switching is sought has a revenue-to-

³⁵ NS specifically rebutted the only witness from a shipper commenter to attempt to address operational issues – the statement by Mr. McDonald on behalf of the Concerned Captive Coal Shippers. *EP 705*, Reply Comments of the Concerned Captive Coal Shippers (May 27, 2011) (Verified Statement of Richard H. McDonald). But Mr. McDonald did not even address carload traffic. His statement primarily addresses unit trains. And even for unit trains, NS believes Mr. McDonald's testimony understates and underestimates the operational inefficiencies and complications involved in forced switching and interchange.

variable cost ratio of 240% or more; or (2) the serving Class I railroad has “handled 75% or more of the transported volumes of the movement at issue for the twelve-month period prior” to the petition requesting forced switching. *Id.* at 41-52. Of course, if the outcome of these inquiries is unfavorable to the shipper, then the “presumption” is not conclusive at all. The shipper could still present evidence of a lack of competition. *Id.* at 35.

NITL also seeks presumptions for the requirement that there must be “a working interchange” within a “reasonable distance” of the shipper’s facility. *Id.* at 52-59. It first asks that the Board deem “a working interchange” to exist “where shipper’s facilities are within the geographic boundaries of a terminal established by a Class I rail carrier (incumbent carrier) serving that shipper, and cars are regularly switched between the incumbent carrier and the carrier for which competitive switching is sought.” *Id.* at 55-57. NITL then asks for a presumption that the “reasonable distance” requirement is met if the shipper’s facility is located within 30 miles of an interchange. *Id.* at 57-59. And, again, if the outcome of these inquiries is unfavorable to the shipper, then the “presumption” is not conclusive at all. *Id.* at 36.

As discussed further in these comments, despite these broad outlines, the NITL Petition is vague and incomplete in numerous ways.

Parties, including NS, filed comments in response to the NITL Petition in Ex Parte 711 on July 27, 2011.³⁶ In particular, NS filed comments in which it urged the Board to “reject the NITL Petition for Rulemaking because it fails to meet the standards for the Board to grant it.”³⁷ A petition that lacks adequate justification will be denied. 49

³⁶ *EP 711*, Comments of Norfolk Southern Ry. Co. (filed July 27, 2011) (“NS Opening Comments”). NS also joined the comments of the AAR. *Id.* at 1.

³⁷ *Id.* at 1.

C.F.R. 1110.2(f); *Class Exemption for Expedited Abandonment Procedure for Class II and Class III Railroads*, Ex Parte 647 (Dec. 15, 2006) (rejecting petition for rulemaking for failure to show that publication is warranted); *National R.R. Passenger Corp. and Consol. Rail Corp. – Application Under Section 402(a) of the Rail Passenger Service Act for an Order Fixing Just Compensation*, Finance Docket No. 32467 (Mar. 24, 1995) (rejecting petition for rulemaking for lack of adequate justification).

NS demonstrated that NITL failed to provide an adequate justification. In its July 27 comments, NS pointed out that NITL’s mere recitation of comments from Ex Parte 705 that were most favorable to its position was insufficient to justify the NITL Petition – especially because NITL ignored altogether most of the record in that proceeding.³⁸ NS also noted that the NITL proposal is incomplete and, at least in part, unlawful. Glaringly, it did not address compensation at all. Decision at 2 (stating that “that critical element was not included in NITL’s petition”). Among the other issues NS called to the Board’s attention, NS observed that NITL’s proposal did not clarify whether it would apply to hazardous materials in general and toxic inhalation hazards in particular and intermodal and other exempt traffic.³⁹

D. The Decision Seeks Comments on an Incomplete, Vague, and Unjustified NITL Petition.

Instead of denying the Petition for lacking an “adequate justification” as required by 49 C.F.R. § 1110.2, the Board issued the Decision seeking additional information for the Board to determine fully its effect on qualifying shippers. In particular the Board asked parties to:

³⁸ *Id.* at 2

³⁹ *Id.* at 3-4.

- Identify the existing terminals and shippers located within the boundaries of those terminals. Explain whether the shippers can currently obtain competitive switching and any restrictions or limitations on the shippers' competitive switching rights.⁴⁰
- Identify how many additional shippers and what amount of revenues earned by the incumbent Class I rail carrier from those shippers would be subject to competitive switching under NITL's proposal.⁴¹
- Based on the commenter's assumed access pricing methodology, by how much would NITL's proposal lower rates for the shippers identified in the study that would qualify for competitive access? How much revenue would the incumbent Class I rail carrier lose as a result of NITL's proposal? How much of this revenue loss could be offset through traffic increases or other gains?
- What would be the economic and regulatory impacts of NITL's proposal on the captive shippers served by the incumbent Class I rail carrier or carriers included in the study that would not be covered by NITL's proposal and, therefore, would continue to be served only by the incumbent carrier? Would their rates increase, and, if so, by how much, to offset the reduced rates to others?
- How would rail network efficiency be affected by NITL's proposal?

Decision at 9.

However, the Board repeatedly acknowledges in the Decision the incompleteness and vagueness of the NITL Petition. It noted that the NITL Petition "does not include a methodology for access pricing, which [the Board] believes would be a significant factor in determining the extent to which a broad competitive switching requirement could affect qualifying shippers, as well as the financial strength of the railroad industry."

Decision at 7. Further the Board observed that "[b]ecause we cannot project the extent of any net revenue loss to railroads that would result from NITL's proposal, we also cannot predict whether, or by how much, the remaining captive traffic would likely be charged

⁴⁰ NS notes that the number of shippers is not the right question because the inquiry would have to be conducted on a more granular level based on individual facilities of shippers and lanes.

⁴¹ Here, the more appropriate question would assess the impact on railroad contribution.

to make up for any revenues that would otherwise be lost to the carriers.” Decision at 7. Finally, the Board stated that “[it needs] more precise information about whether increasing the availability of [forced access] would affect efficiencies or impose costs on the railroads’ network operations.” Decision at 8. The fact that the Board’s Decision seeks information because from the NITL Petition the Board “cannot fully gauge its potential impact” and because “additional information is needed before [the Board] can determine how to proceed” proves the NITL Petition lacked an adequate justification. Decision at 2. Given the lack of justification for and the incompleteness of the NITL Petition, NITL’s Petition should have already been denied.

Nevertheless, without waiving any arguments related to process or substance, NS provides these comments on the NITL Petition in response to the Decision.⁴²

III. IT WOULD BE UNLAWFUL TO ADOPT NITL’S PROPOSAL AND WOULD BE A RADICAL SHIFT AWAY FROM A REMEDIAL STANDARD TO A WEALTH REDISTRIBUTION SCHEME.

NS explained in great detail in Ex Parte 705 that it would be unlawful for the Board to adopt a forced access proposal similar to that in the NITL Petition. Those arguments were fully set forth in NS’ various pleadings in that proceeding. Because

⁴² For purposes of these comments, NS relies on the NITL Petition and not the summary of the NITL Petition included in the Decision, which is sometime misleading. For example, in the Board’s hypothetical example at page 6 of the Decision, the Board would not “be required to give Railroad 2 access” if the shipper met either of the presumptions mentioned as implied, because meeting one of those two presumptions would only address one of the four requirements under the NITL proposal. NS further notes that the example is otherwise misleading for several reasons, including: (1) absent other facts, Railroad 2 may not be a competitor because it does not serve the shipper’s facility; and (2) the shipper would not have the option to pursue rate relief if Railroad 2 were a competitive alternative. Decision at 6.

those comments are part of the record in this proceeding as well, *see* Decision at n. 8, NS simply summarizes them here.

A. The Board Has Repeatedly Found that The Existing Statute Does Not Permit Adoption of Proposals Like the NITL Petition.

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

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

Union Pac. Corp et al. – Control & Merger – S. Pac. Rail Corp. (Houston Gulf Coast Oversight), 3 S.T.B. 1030, 1032 (1998). The Board made the same finding in *Bottleneck I*: “Congress chose not to provide for the open routing that shippers seek here. To the contrary, . . . Congress retained and strengthened the specific statutory provisions allowing carriers to select their routes and to protect their long hauls.” 1 S.T.B. at 1067. As the Board has found, a regulatory regime in which a shipper can obtain access to another railroad’s rail service upon demand is plainly not provided for by the statute. This finding has been further verified by the United States Court of Appeals for the District of Columbia Circuit:

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

Midtec Paper Corp. v. United States, 857 F.2d 1487, 1507 (1988). That finding in and of itself should end the matter.

B. Congress Has Repeatedly Ratified the Existing Regulatory Regime.

With respect to switching under 49 U.S.C. § 11102, Congress has ratified the Board's standard that requires a finding of competitive abuse before awarding access under that provision. In *Intramodal Rail Competition*, 1 I.C.C. 2d 822 (1985), the Interstate Commerce Commission ("ICC") adopted a joint railroad-shipper proposal for competitive access regulations that continues to govern competitive access complaints today. *See id.* at 839-43; 49 C.F.R. Part 1144. The ICC first applied its competitive access regulations in 1985. *See Midtec I*, 1 I.C.C. 2d 362, *reconsidered*, *Midtec II*, 3 I.C.C. 2d 171, *aff'd sub nom.*, 857 F.2d 1487. Consistent with *Intramodal Rail Competition*, the ICC held in *Midtec* that a complainant's ability to obtain government-prescribed access from another railroad depended on whether it could show that the railroad serving it "has engaged in or is likely to engage in conduct that is contrary to the rail transportation policy or is otherwise anticompetitive." *Midtec II*, 3 I.C.C. 2d 171, 181.

Congress's decision in 1995 to re-enact the access provisions of the Interstate Commerce Act ("ICA") as part of the ICCTA without revising the ICC's *Midtec* approach effectively ratified *Midtec*. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change." *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 783 n.15 (1985); *see, e.g., Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 476 U.S. 426, 437 (1986) ("When the statute giving rise to the longstanding interpretation has been reenacted without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended

by Congress.” (quoting *NLRB v. Bell Aerospace*, 416 U.S. 267, 275 (1974)); *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1964); *United States v. G. Falk & Brothers*, 204 U.S. 143, 151 (1907).

Congress was fully informed both of the ICC’s interpretation of its forced access authority and of the arguments of shippers seeking to lower the bar for obtaining an ICC order for forced access and forced interchange.⁴³ With that knowledge, Congress chose to reenact the reciprocal switching and terminal access provisions of the Interstate Commerce Act without making substantive changes to “existing standards.” H. Rep. No. 104-311, at 84, *reprinted in* 1995 U.S.S.C.A.N. 793, 796 (1995) (ICC functions including “terminal trackage rights and reciprocal switching jurisdiction” would be “transferred to the [successor agency] under existing standards with minor modifications for large Class I railroads’ transactions”).⁴⁴ In doing so, Congress made clear that it approved of and did not intend to alter the ICC’s post- Staggers approach to economic regulation, including its forced interchange and forced access standards and approach:

⁴³ It is worth noting that calls for Congress to amend the ICA to “encourag[e] the use of reciprocal switching” were made more than a decade before ICCTA. *See, e.g., Oversight of the Staggers Rail Act of 1980: Hearings Before the Subcomm. on Surface Transportation of the S. Comm. on Commerce, Science, and Transportation*, 98th Cong. (“*Staggers Oversight Hearings*”) at 55160 (statement of Chemical Manufacturers Association proposing legislation “to promote rail-to-rail competition” by requiring reciprocal switching on request); *see also id.*, at 231-35 (comments of shipper coalition the “Procompetitive Rail Steering Committee” calling for Congress to enact “clarifying legislation” to promote competitive access policies that would allow a shipper to “have access to as many railroads as can practically compete for his business”); *id.* at 336 (NITL statement encouraging Congress to take “remedial actions” to “[f]oster[] rail-to-rail competition”).

⁴⁴ *See also* H. Rep. No. 104-311 at 105, 1995 U.S.S.C.A.N. at 816 (ICCTA “retains the existing agency power to order access to terminal facilities”); H. Rep. No. 104-422, at 183-84, *reprinted in* 1995 U.S.S.C.A.N. 850, 868-69 (Conf. Rep.) (“Under the amended section 11102, the agency’s existing power to order access to terminal facilities, including main-line tracks a reasonable distance from the terminal, would be retained.”).

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

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

When Congress passed ICCTA, it was well aware of *Midtec* and the ICC’s interpretation of its forced access and forced interchange authority and was equally well-informed of the fact that some shippers believed that *Midtec* should be reversed. NS EP 705 Comments at 15-20. With that knowledge, Congress chose to re-adopt the access provisions of the ICA without altering the ICC’s preexisting interpretation. That informed action ratified the *Midtec* approach to regulating “market access,” and as a result only Congress may change that law. *See, e.g., Lindahl*, 470 U.S. at 783 n.15.

Moreover, powerful evidence that Congress approves of the Board’s current rules is the fact that, despite abundant opportunities over the course of the last 25 years, Congress has never altered the *Midtec* decision. While some individual members of Congress have deemed the Staggers Act “unfortunate[.]” and have introduced legislation that would overturn the *Midtec* decision, Congress repeatedly has rejected those efforts. Over the past fourteen years at least sixteen bills have been introduced in the House or

Senate that would alter the *Midtec* standard by lowering the burden for a shipper to obtain an order to force reciprocal switching or terminal access.⁴⁵ Not one of those bills passed even one house of Congress.

⁴⁵

See, e.g.:

- 1) Surface Transportation Board Reauthorization Act of 2009, S. 2889, § 303 (2009) (overturning *Midtec*, establishing when STB should provide terminal access, and create a pricing mechanism);
- 2) Railroad Competition and Service Improvement Act of 2007, S. 953, 110th Cong., § 104 (2007) (requiring, rather than authorizing, STB to order reciprocal switching);
- 3) Railroad Competition and Service Improvement Act of 2007, H.R. 2125, 110th Cong., § 104 (2007) (same);
- 4) Railroad Competition Improvement and Reauthorization Act of 2005, H.R. 2047, 109th Cong., § 5 (reversing *Midtec* by prohibiting Board from requiring evidence of anticompetitive conduct as condition to ordering reciprocal switching);
- 5) Railroad Competition Act of 2006, S. 2921, 109th Cong., § 104 (2006) (reversing *Midtec* by amending statute to read “the Board shall not require evidence of anticompetitive conduct by a rail carrier from which access is sought” as condition to terminal access or reciprocal switching);
- 6) Railroad Competition Act of 2005, S. 919, 109th Cong., § 102 (2005) (prohibiting Board from requiring evidence of anticompetitive conduct as pre-condition to ordering terminal access or reciprocal switching);
- 7) Railroad Competition Act of 2003, H.R. 2924, 108th Cong., § 5 (2003) (abrogating *Midtec* by prohibiting Board from requiring evidence of anticompetitive conduct as pre-condition to ordering terminal access or reciprocal switching);
- 8) Railroad Competition Act of 2003, S. 919, 108th Cong., § 5 (2003) (same);
- 9) Surface Transportation Board Reform Act of 2003, H.R. 2192, 108th Cong., § 104 (2003) (overturning *Midtec*);
- 10) Railroad Competition Act of 2001, S. 1103, 107th Cong., § 103 (2001) (abrogating *Midtec* by providing that, in considering requests for reciprocal switching or terminal access, STB “may not require evidence of anticompetitive conduct by a rail carrier from whom access is sought”);
- 11) Surface Transportation Board Reform Act of 2001, H.R. 141, 107th Cong., § 104 (2001) (same);
- 12) Railroad Competition and Service Improvement Act of 1999, H.R. 2784, 106th Cong., § 7 (1999) (overturning *Midtec* by prohibiting STB from requiring evidence of anticompetitive conduct as condition to ordering terminal trackage rights or reciprocal switching);
- 13) Railroad Competition and Service Improvement Act of 1999, S. 621, 106th Cong., § 7 (1999) (same);
- 14) Surface Transportation Board Reauthorization Act of 1999, H.R. 3163, 106th Cong., § 6 (1999)(same);

The purposes and intended effects of all of these legislative proposals were well known. Sponsors and congressional hearings have made clear that these bills were intended, *inter alia*, to repeal current access standards.⁴⁶ As the Supreme Court explained more than 30 years ago, “once an agency’s statutory construction has been fully brought to the attention of the public and Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.” *United States v. Rutherford*, 442 U.S. 544, 554, n. 10 (1979); see *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) (Congressional refusal to overrule agency construction of legislation is “evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress’s attention through legislation specifically designed to supplant it.”). The uniform refusal of Congress to adopt legislation overruling the *Midtec* standard for access under 49 U.S.C. § 11102 “make out an unusually strong case of legislative acquiescence in, and ratification” of existing Board access and competition policies. NS EP 705 Comments at 20-29. Because of this

15) Surface Transportation Board Reform Act of 1999, H.R. 3446, 106th Cong., § 104 (1999) (to same effect); and

16) Surface Transportation Board Modernization Act, H.R. 3398, 106th Cong., § 12 (1999) (overturning *Midtec* by changing the standards for terminal access and reciprocal switching and altering the procedure for Board action).

⁴⁶ See S. Rep. No. 111-380, at 12 (2010) (stating that Surface Transportation Board Reauthorization Act of 2009 “would overturn the mid-1980s *Midtec* Paper decisions” and would require Class I carriers to quote bottleneck rates); 153 Cong. Rec. E1016 (statement of Rep. Oberstar) (May 10, 2007) (Railroad Competition and Service Improvement Act of 2007 would “eliminate bottlenecks” and prohibit STB from requiring abuse of market power to order competitive access); 145 Cong. Rec. E2482 (statement of Rep. Oberstar) (Nov. 19, 1999) (Surface Transportation Board Reform Act of 1999 would “correct[] the Board’s ‘bottleneck’ decision” and “make[] it easier to secure competing rail service in terminal areas, and by reciprocal switching”).

congressional ratification, the Board lacks the authority to rewrite fundamental policies that Congress has explicitly endorsed and repeatedly refused to revise.

C. NITL’s Petition Would Shift the Regulatory Regime from a Remedial One Consistent with Congressional Action and Court Precedent to an Unlawful Redistributive One.

The NITL proposal would represent a radical shift from a regime predicated on remedying demonstrably anticompetitive conduct to a regime that effectively constitutes wealth redistribution. Under the present system as implemented in *Midtec*, a complainant’s ability to obtain government-prescribed access from another railroad depends on whether it can show that the railroad serving it “has engaged in or is likely to engage in conduct that is contrary to the rail transportation policy or is otherwise anticompetitive.” *Midtec II*, 3 I.C.C. 2d at 181. Thus, the agency limited switching as a remedy to instances where there was an objective showing that a carrier acted in a particular way.

This interpretation is consistent with congressional action and Supreme Court precedent that protects generally the right of a railroad to a long haul. The Senate report accompanying the bill that became the Mann-Elkins Act further explained the policy animating the short-haul proscription, finding that it would be:

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

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

deprive carrier of its long haul). Over the last century, the Supreme Court has consistently rejected attempts to dilute the statutory protection of a controlling carrier's long haul. *See, e.g., United States v. Mo. Pac. R.R.*, 278 U.S. 269, 276-82 (1929) (“*Missouri Pacific*”); *Pa. R.R. v. United States*, 323 U.S. 588, 591- 92 (1945); *see also Bottleneck II* at 243 (acknowledging right of originating carrier “to maximize its long-haul”). Under the existing standard, before the agency will undermine the carrier's long haul it must find that the carrier acted contrary to the rail transportation policy or in an otherwise anticompetitive way. The mere facts that a railroad is the only railroad that serves a customer or that the customer does not like its rate are insufficient reasons to undermine a railroad's long-established right to a long haul.⁴⁷

By contrast, the NITL proposal is neither remedial nor consistent with the carrier's right to a long-haul. NITL's proposal does not attempt to address any action by the rail carrier. Rather, it is an attempt by a sub-group of shippers to have money redistributed from railroads to that sub-group of shippers. NITL's proposal is a blatant

⁴⁷ In the decade following the *Missouri Pacific* decision, the ICC made several unsuccessful attempts to persuade Congress to revise or repeal the short-haul prohibition. *See Pennsylvania R.R. Co. v. United States*, 323 U.S. 588, 591-92 (1945). Despite the ICC's urging, and introduction of several bills to repeal the short-haul prohibition between 1930 and 1938, Congress declined to change the law. *See id.*; *Thompson v. United States*, 343 US. 549, 555 & n.8 (1952); *Chicago, Milwaukee, St. Paul, & Pac. R.R. Co. v. United States*, 366 U.S. 745 (1961). As NS further explained in Ex Parte 705, these Supreme Court decisions remain the governing law of the land. Although the short-haul prohibition has been modified slightly, primarily by modest expansion of the exceptions and clarification that the prohibition does not apply to actions required to implement other sections of the statute (sections prohibiting unreasonable discrimination and authorizing the Board to order use of terminal facilities or reciprocal switching), the fundamental prohibition remains unchanged. *See* 49 U.S.C. §§ 10705(a)(2), 11102. The Board's competitive access regulations expressly recognize that, in addition to a finding of anti-competitive conduct, any access prescription must also comply with the requirements of Section 10705 or 11102. *See* 49 C.F.R. § 1144.2(a)(1).

effort to obtain two carrier access where there is not enough business to justify two carrier access in order to obtain lower rates. Indeed, the NITL proposal would ignore the findings of the General Accounting Office that “not all markets may have the demand needed to support competition among railroads” and would not even ask whether there is sufficient demand to support two railroads being in a particular market.⁴⁸

The fact that NITL’s proposal is a wealth redistribution scheme is highlighted by the fact that customers who would not qualify for rate relief under the statutory rate regime could obtain relief through forced access. First, the NITL proposal does not even acknowledge forms of competition other than rail-to-rail competition. Thus, the mere fact that a customer is served by only one Class I railroad is the only inquiry regarding competition. That same customer may have barge, truck, transload, and other forms of competition and would therefore not be eligible for rate reasonableness relief under the statute. For example, customers who have relatively higher, but still reasonable rates, like DuPont – which moves some traffic on NS at rates that generate a revenue-to-variable cost ratio above 240% but also enjoys effective truck competition for such traffic – are not eligible for rate reasonableness relief. But that customer would automatically become eligible under the NITL proposal simply because it was served by only one Class I railroad. Similarly, customers with effective competitive alternatives but who elect to ship 75% of their shipments in a particular lane on a Class I railroad would also be eligible, even if they could not demonstrate the existence of market dominance in a rate reasonableness case. Thus, unlike the existing regulations implementing Section 11102,

⁴⁸ General Accounting Office, *Industry Health Has Improved, but Concerns about Competition and Capacity Should Be Addressed*, at 4 (Oct. 2006).

the NITL proposal is designed to be redistributive even where the Board would lack jurisdiction to hear a rate challenge.

Second, customers could obtain (through Section 11102 as interpreted by NITL's forced access proposal) rates lower than they could otherwise obtain if they were eligible for rate reasonableness relief under Section 10704. *See* Decision at 2. Under Section 10704 and Section 10707(d)(1)(A), if the Board finds that a railroad's rate is unreasonable, the Board may not prescribe a rate that results in a revenue-to-variable cost ratio lower than 180 percent. But forced access may result in customers – who would otherwise have a limit of rate relief under the rate reasonableness regime – obtaining rates even lower than the maximum reasonable rate. The Board has implicitly acknowledged this fact in a recent decision regarding access: “[T]he proper inquiry is not whether the requesting shipper might receive a better rate under an alternative prescribed rate. We can presume that in most cases where a captive shipper seeks a competitive access remedy, it does so under the good faith belief that such relief will provide it with better rates. But as we stated in CP&L, ‘the competitive access rules were promulgated not to provide shippers with an alternative form of rate relief.’” *Entergy Arkansas, Inc. & Entergy Services, Inc. v. Union Pac. R.R. Co., Missouri & Northern Arkansas R.R. Co., Inc., & BNSF Ry. Co.; Missouri & Northern Arkansas R.R. Co., Inc. – Lease, Acquisition and Operation Exemption – Missouri Pac. R.R. Co. and Burlington Northern R.R. Co.*, Finance Docket No. NOR 42104, Finance Docket No. FD 32187 (served March 15, 2011) (“*Entergy Arkansas*”). Indeed, the United States Court of Appeals for the District of Columbia Circuit has already rejected the use of forced switching and access as “an

alternative means of obtaining rate relief.” *Midtec Paper Corp. v. United States*, 857 F.2d at 1505.

D. The NITL Petition Would Result in Section 11102 Nullifying the Rest of the Statute.

Section 11102 does not support the weight of the NITL proposal. Section 11102(c) is clearly intended as a remedial statute and not a statute authorizing broad forced access. The purpose of the Staggers Rail Act of 1980 was in large part to provide for the ability of railroads to price differentially. Thus, there are provisions that permit railroads to enter into contracts with customers, and there are legions of ICC/Board decisions devoted to the concept of differential pricing based on elasticity of demand. The underlying assumption in the development of differential pricing and the rate reasonableness process in the statute is that certain customers do not, and generally would not, have “effective competition” from another railroad. 49 U.S.C. § 10707. Although Section 11102(c) provides that the Board may order reciprocal switching to “provide competitive rail service,” an interpretation of that provision that would result in widespread forced access (as opposed to reciprocal switching, which must be reciprocal in specific, unique situations) would swallow the rest of the statute.

Section 11102(d) confirms that Section 11102 generally, and subsection (c) in particular, are not intended to justify, mandate, or support broad forced access. Section 11102(d) provides that in the limited situations in which the Board might order reciprocal switching, the two railroads must agree on the conditions and compensation for such access. Certainly, this provision contemplates that the provision applies in a limited fashion – such that the scope of the negotiation between the two carriers is manageable – and not in a fashion that supports widespread forced access. Otherwise negotiations

specific to a particular order would not have been necessary. Therefore, Section 11102(d) confirms that a broad forced access regime was not contemplated by Section 11102 generally.

Further, action under Section 11102(c) cannot be justified on the premise that the rail transportation policy of Section 10101 mentions competition. The competition discussed in the rail transportation policy is natural competition that arises from market forces. That competition is what Congress wanted to promote and wanted to constrain prices as much as possible as opposed to having the government set rates, as was the case before the legislation was enacted. *See* 49 U.S.C. § 10707 (providing that the Board has no jurisdiction over the reasonableness of rail rates when there is effective competition). Natural competition makes the market more efficient and results in improved service.⁴⁹ However, that provision does not support widespread artificially-created competition through government interference by the Board. Artificially-created competition does not create the benefits of natural competition. Although it may result in lower rates for some customers and lower revenues for railroads, it does not result in improved efficiency and service but does undermine efficiency and investment levels. By forcing access to facilities that can support a market return for only a single railroad, the NITL proposal would ensure that both railroads serving the facility would earn less than enough to support the infrastructure or justify further investment. That fact brings us full circle. Congress provided a remedy for unreasonable rates because it did not intend Section 11102(c) to be used broadly to create artificial-competition.

* * * * *

⁴⁹ As discussed in Section VI, *infra*, NITL's proposal would have the opposite, detrimental effect on rail efficiency.

In sum, the NITL Petition ignores congressional ratification of the current remedial-based standard for government intervention in the transportation market via forced access and is therefore unlawful. Further, the result of NITL's proposal would be that for many rail movements, the serving rail carrier would be denied its long-haul rights. *See, e.g., S. Rep. No. 355, 61st Cong., 2d Sess. 10; see Chicago, Milwaukee, St. Paul, and Pac. R.R. Co. v. United States, 366 U.S. 745, 750-52 (1961)* (discussing legislative history of provision in course of upholding ICC order refusing to prescribe through route that would deprive carrier of its long haul). The NITL proposal could result in broader and more extensive regulatory relief than is available pursuant to rate regulation. Indeed, the NITL's requested interpretation of Section 11102 would swallow the rest of the statute.

IV. THE NITL PETITION IS TOO VAGUE AND TOO INCOMPLETE AND DATA ARE TOO LIMITED FOR ANY PARTY TO CONDUCT A MEANINGFUL ANALYSIS OF THE QUESTIONS POSED BY THE BOARD.

In the Decision, the Board repeatedly acknowledges the incompleteness and vagueness of the NITL Petition. Decision at 7-8. The same shortcomings that do not permit the Board to assess the NITL Petition equally handicap all other parties, including NS, from providing meaningful evidence on the questions posed by the Board in the Decision, such as the number of shippers that would be eligible or the revenue loss the rail industry or individual railroads would suffer.

A. The NITL Proposal Does Not Address the Access Price.

The Board noted that the NITL Petition “does not include a methodology for access pricing, which [the Board] believes would be a significant factor in determining the extent to which a broad competitive switching requirement could affect qualifying shippers, as well as the financial strength of the railroad industry.” Decision at 7. Further the Board observed that “[b]ecause we cannot project the extent of any net revenue loss to railroads that would result from NITL’s proposal, we also cannot predict whether, or by how much, the remaining captive traffic would likely be charged to make up for any revenues that would otherwise be lost to the carriers.” Decision at 7. There can be no meaningful discussion of forced access without discussing the price the incumbent railroad can charge the second railroad that is acquiring access. Because NITL did not address the access price issue, which is “a significant factor in determining the extent to which a broad competitive switching requirement could affect qualifying shippers, as well as the financial strength of the railroad industry,” no party can provide any meaningful estimates to answer the Board’s questions.

Despite repeated attempts by shipper groups to mischaracterize the *Christensen Report*, that study concluded that the price was the critical element of any forced access proposal.

One critical detail is the terms of access, which evoke a very controversial topic in the economic literature. Not only can the terms of access have an effect on the degree to which open access occurs, but they can have important effects on incumbent’s investment behavior. None of the current policy proposals address these important details and, therefore, the implementation of any of these policy changes entails the very real risks of unintended and economically harmful outcomes.⁵⁰

⁵⁰ *Christensen Report*, vol. 3, page 22-14.

Yet the NITL Petition includes no price component. Indeed, without the price element “the economic effects of these open-access proposals becomes [sic] less predictable.”⁵¹

Perhaps NITL’s proposal omits the price component because of the limitations of the statutory provision that it argues gives the Board the power to adopt its proposal. NITL relies on Section 11102(c). NITL Petition at 1. That provision provides that “[t]he rail carriers entering into such an agreement shall establish the conditions and compensation applicable to such agreement, but if the rail carriers cannot agree upon such conditions and compensation within a reasonable period of time, the Board may establish such conditions and compensation.” 49 U.S.C. § 11102(c). Accordingly, if the Board were to order forced access that meets the other requirements of Section 11102(c), the Board would have no jurisdiction over the access price if the carriers were able to agree – regardless of what the access price was to which the carriers agreed. And there is nothing in the statute that gives the Board jurisdiction over the terms and compensation levels agreed to by the railroads pursuant to Section 11102(c).

Accordingly, it is difficult to provide empirical data to the Board for at least two reasons related to the access price. First it is difficult because, as the Board stated, “a significant factor in determining the extent to which a broad competitive switching requirement could affect qualifying shippers, as well as the financial strength of the railroad industry,” is just plain missing. Decision at 7. In other words, any party would have to create their own proposal on pricing to complete any study.

The Decision recognizes this problem and urges parties to “study the impact of NITL’s proposal under whatever access pricing proposal they believe the Board should

⁵¹ *Id* at 22-12. *The Christensen Report* includes reciprocal switching or force switching in the category of “open access” proposals. *Id* at 22-4.

adopt.” Decision at 10. NS cannot do so. The access price would be negotiated in each instance by the two carriers. There is no access pricing for the Board to adopt – at least in the first instance. In order to insert access prices into any study, NS would have to guess at (1) what agreement(s) it would reach with the other rail carrier regarding the compensation levels at a particular location and (2) at what agreement(s) any other two railroads might reach. Other parties would similarly have to guess as well.

These agreements would vary from location to location. And, at each location, the agreement might be influenced by a host of real-world issues the two railroads would have to address, including but not limited to:

- Is additional infrastructure required, how much will it cost, and what rate is necessary to compensate for the infrastructure?
- Which railroad is required to provide cars?
- Which railroad provides locomotives and crews?
- Which railroad is liable for incidents that occur on the shared track?
- Which railroad is liable for freight loss and damages?
- Is there car hire relief?
- Who pays the owning carrier the access fee – the second carrier or the customer?
- Does the owning carrier show in the rate?
- Which railroad has an obligation to store or hold cars for placement (alternatively stated, which railroad collects demurrage or storage charges)?
- When is the car collectively placed and the customer liable for damages?
- What happens if the interchange track is full?
- Who pays for the disruption to shipments for other shippers caused by forced access to another shipper?
- Does the forced access trigger positive train control (“PTC”) obligations, and if so, who pays?

Another factor that could affect the access price is labor protection, which the NITL Petition does not mention. Under Section 11102(c), “[t]he Board may require reciprocal switching agreements entered into by rail carriers pursuant to this subsection to contain provisions for the protection of the interests of employees affected thereby.” 49 U.S.C. § 11102(c). Because this issue is not addressed, it is difficult to calculate the

additional costs that would arise from any labor protection. For instance, would the Board require the serving carrier to pay labor protection when a second carrier is given forced access on the line (as in the case of forced trackage rights), which resulted in the crews of the serving carrier losing the work? Would the Board require the serving carrier to pay labor protection when the second carrier is given the long-haul (as in the case of forced switching), resulting in the incumbent carrier's crews losing work? Of course, the Board could decide that no labor protection was necessary because the issue arises only because of government fiat. But if the Board determined that labor protection was required, the cost of labor protection would certainly have to be factored into the carrier's negotiation to establish the "compensation applicable to such agreement."

All these factors, in addition to operating costs and return on investment, could affect the access price negotiated between two railroads. Because the NITL proposal does not address these issues (and others), it is impossible to determine what the access price would be at each individual location. Without the access price, it is impossible to answer many of the Board's questions.

B. It is Impossible to Determine Which Customers Are Solely-Rail Served By a Single Railroad Without an Individualized Inquiry.

The first criterion a shipper must meet under the NITL's proposal is that it must be served by a single Class I railroad. If the shipper is served by two Class I railroads or by a Class I railroad and a short line, it is not eligible. However, it is difficult if not impossible for any party to determine which customers are served by a single railroad without conducting an individualized inquiry. As the General Accounting Office ("GAO") has observed: "It remains difficult to determine precisely how many shippers are [served by] one railroad because the proxy measures that provide the best indication

can overstate or understate [the number].”⁵² Like GAO, NS does not believe there is any suitable proxy. As is necessary in rate cases, an individualized inquiry would be required to determine which shipper facilities are actually served by only one railroad.⁵³

C. So-called “Conclusive Presumptions” Regarding Intermodal and Intramodal Competition Are Unlawful, Long-Rejected, And Do Not Permit Identification of Eligible Shippers.

For the criterion that the shipper must show an absence of intermodal or intramodal competition, NITL proposes two conclusive presumptions. NITL appears to have intended this criterion to be like the Board’s market dominance inquiry under 49 USC § 10707, which is a jurisdictional prerequisite to the Board examining the reasonableness of a rail rate. In a rate reasonableness case, this inquiry is fact-specific – as it must be – to take into account the wide differences in the transportation marketplace and the variety of transportation options that may or may not be available depending on a variety of individual factors. *McCarthy Farms, et al. v. Burlington Northern Inc.*, 4 I.C.C. 2d 262 (1989) (“However, market dominance is determined on a case-by-case basis . . .”); *see also Market Dominance Determinations and Consideration of Product Competition*, 365 I.C.C. 118 (1981) (eliminating rebuttable presumptions because inaccurate and providing for “more accurate market dominance determinations on a case-by-case basis”) (“*Market Dominance Determinations*”).

⁵² General Accounting Office, *Freight Railroads: Updated Information on Rates and Other Industry Trends*, at 7 (Aug. 15, 2007); *see also*, General Accounting Office, *Industry Health Has Improved, but Concerns about Competition and Capacity Should Be Addressed*, at 19, 25, & 29-30 (Oct. 2006).

⁵³ The data provided by the AAR in its comments is only at the station level – and not at the shipper, or more accurately, the facility level. Even the station data is imprecise. For example, a shipper served at a particular station that appears to be served by multiple carriers when viewed at the station level may have access to only one carrier at the shipper’s specific facility.

NITL proposes to short circuit that fact-specific inquiry by establishing two conclusive presumptions. Where the complainant shows either “(a) that a movement for which reciprocal switching is sought has a revenue-to-variable cost ratio of 240% or more; or (b) that the Class I carrier solely serving the shipper’s facilities has handled 75% or more of the volume transported in the past twelve months for a movement for which competitive switching is sought, then there would be a conclusive presumption for those movements that there is a lack of inter- or intramodal competition.” NITL Petition at 35.

1. Calling Presumptions “Conclusive” Is Incorrect.

Calling the presumptions conclusive, however, is highly misleading. What NITL seeks is a conclusive presumption only if it is favorable to the shipper. If the outcome of the inquiry into these “conclusive” presumptions does not favor the shipper, then the shipper gets to continue to take bites at the apple: “If one or more of the movements for which competitive switching is sought could not qualify for either of those conclusive presumptions, the shipper would have to litigate the question of effective inter- and intramodal competition for those movements, and the issue would have to be decided by the Board.” NITL Petition at 35; *see also id.* at 36 (“If the petitioner could not qualify for either one of those conclusive presumptions, the issue would have to be litigated and decided by the Board.”). As the Board noted in footnote 9 of the Decision, the conclusiveness of the presumption is a one-way street. Decision at 7, n.9 (noting that movements with an R/VC ration below 240% are merely “generally ineligible for [forced] switching absent a showing of market dominance”). On the one hand, the railroad would be forbidden from arguing about the existence of competition if the presumption is met; on the other hand, the shipper would still be able to litigate whether

it lacks intermodal or intramodal competition even if it fails the presumption. This “heads we win, tails we get to try again” proposal is facially unfair especially when it could lead to draconian governmental interference in the transportation marketplace through forced access or forced interchange. Importantly for purposes here, the fact that they are not truly conclusive presumptions means that no party can accurately assess the number of shippers who would be eligible under the NITL’s proposal or the amount of revenue/contribution at issue.

2. Reliance on Presumptions Based on Revenue-to-Variable Cost Ratios, Which the Board Has Long Rejected, Will Produce Meaningless Results.

The agency has already found that simplistic presumptions are not accurate or appropriate to use to determine whether intramodal or intermodal competition exists. After using for some time rebuttable presumptions to determine whether competition existed, the agency jettisoned that approach:

Time has shown that the use of rebuttable presumptions has not enhanced the accuracy of market dominance determinations. While they did serve a useful purpose while we gained experience, the factors determining the degree of competition faced by a rail carrier are too numerous and too varied to be gauged, with any reasonable degree of accuracy, by so few measures. Further the measures themselves are often only approximations of the underlying conditions they are intended to reflect.

Market Dominance Determinations, 365 I.C.C. at 120. Those factors remain as numerous and as varied as ever.

More specifically, the agency has long rejected presumptions based on revenue to variable cost (“R/VC”) ratios because they are misleading. “There are any number of reasons why a high price /cost ratio may not be indicative of true market power on the part of the railroad. Reliance on such ratios will, therefore, not only be misleading, but

will preclude more relevant information from being introduced." *Id.* at 122. The presumptions NITL proposes would be equally inaccurate for the same reasons.⁵⁴

Recently, the Board announced its intention to adopt a new market dominance test in a rate case, which it called the "limit price" test. *M&G Polymers USA, LLC v. CSX Transp. Inc.*, STB Docket No. 42123 (Sept. 27, 2012) ("*M&G Decision*"). Under that test, if the "limit price" R/VC ratio exceeded the RSAM figure, the Board would preliminarily conclude that "the alternative cannot exert competitive pressure sufficient to effectively constrain the rate at issue." *Id.* at 4. The Board concluded that most of the transportation alternatives that were feasible failed the limit price test, and therefore that CSX was market dominant over those movements.

Some parties may contend that this decision opens the door to return to a market dominance test based on presumptions. It does not. First, the Board has not adopted that test as no final decision was issued after the Board sought comments on the test and the test has not been reviewed by a court of appeals. Second, the "limit price" is unlawful because, at the end of the day, all it does is presume market dominance based on the level of R/VC ratios in violation of Section 10709(d)(2) of Title 49. Third, as noted above, not only did the ICC reject reliance on rebuttable presumptions generally, but it also specifically rejected rebuttable presumptions based upon R/VC ratios.⁵⁵ Fourth, there is no rational explanation for reincarnating a test based on R/VC ratios that was long-ago rejected or for relying on RSAM, which says nothing about the presence or vigor of

⁵⁴ *Revision of Tariff Regulations, All Carriers*, 1 I.C.C. 2d 404 (1984) ("We have held that to the extent carrier practices affect rate levels, we cannot ignore the need for market power findings. The statute also so provides. See 49 U.S.C. § 10707a(h). This ensures we regulate only where necessary. See 49 U.S.C. § 10101a.") (emphasis added).

⁵⁵ See, e.g., *Market Dominance Determinations*, 365 I.C.C. at 122.

competition in the marketplace for a specific movement. Fifth, despite lots of jargon and precise-looking mathematical formulas, there is also no economic basis for the test, which fails to take into account the individual market factors that the Board's predecessor has found must be considered to determine the effectiveness of otherwise feasible transportation alternatives. *See, e.g., Market Dominance Determinations* at 133. Finally, the fallacy of the limit price test is revealed by the absurd results it generates. *See e.g., Comments of Norfolk Southern Ry. Co., M&G Polymers USA, LLC v. CSX Transp. Inc., Finance Docket No. 42123 (filed Nov. 28, 2012).*

3. The 240% R/VC Proposed Presumption Is Unlawful and Contrary to the Real World.

Turning to the specific presumption proposed here, the 240% R/VC presumption is contrary to fact and reality. There is nothing magical about a revenue-to-variable cost ratio of 240%. Indeed, Congress has expressly declared that a revenue-to-variable cost ratio does not create a presumption that a rail carrier “has or does not have market dominance.” 49 U.S.C. § 10707(d)(2). Clearly, Congress does not want the agency relying on revenue-to-variable cost ratios as a substitute for an actual inquiry into whether there is competition for the transportation at issue. That inquiry is required to “minimize the need for Federal regulatory control.” 49 U.S.C. § 10101(2).

Moreover, many factors contribute to a transportation rate – whether for rail, truck, or barge – including the commodity, the length of haul, capacity and similar constraints on other modes, volume commitments, other terms of shipping, and other factors. Nevertheless, if the 240% presumption were met, it would apply regardless of these factors.

The reason a conclusive presumption that there is a lack of intermodal or intramodal competition for a specific movement when a rate exceeds an R/VC ratio of 240% fails is amply illustrated by the results in the *M&G Decision* itself. In that case, the Board concluded that CSX lacked market dominance over six rates: Apple Grove-Columbus, Apple Grove-Lynchburg, Belpre-Columbus, New Orleans-Clifton Forge, New Orleans-Orlando, and Apple Grove-Clifton Forge. *See M&G Decision* at 21. However, *all* of the challenged lanes governed by those rates had R/VC ratios greater than 240%. For example, the Apple Grove-Columbus rate governed three lanes: Apple Grove-Fremont, Apple Grove-Hebron, and Apple Grove-Nicholasville. *See M&G Decision*, Appendix at 42-43. The first quarter 2011 R/VC ratios for those three lanes were 386%, 282%, and 386%, respectively. *See CSX Reply Market Dominance Evidence*, Ex. II-A-2, *M&G Polymers USA, LLC v. CSX Transp. Inc.*, STB Docket No. 42123 (July 5, 2011). Similarly, the Belpre-Columbus rate governed one lane, Belpre-Fremont. *See M&G Decision*, Appendix at 49. The first quarter 2011 R/VC ratio for that lane was 402%. *See CSX Reply Market Dominance Evidence*, Ex. II-A-2 (July 5, 2011). In short, the Board found that CSX lacked market dominance over six rates, covering nine different lanes, and *every lane* would have been improperly deemed to lack competition under the conclusive presumption proposed by NITL.

As the Board is aware, NS has disputed that DuPont lacks effective competition from other modes for 99 of the lanes DuPont challenged in a rate reasonableness case. *E.I DuPont de Nemours & Co. v. Norfolk Southern Ry. Co.*, STB Docket No. 42125. For 98 of those lanes, the challenged rail rate exceeds 240%. However, it is clear that DuPont possesses effective competitive alternatives to NS's rail service from trucks. In fact, NS provided DuPont's own contracts with trucking companies and showed that

those truck rates are often less than the rail rate and in no case more than twenty percent higher than the rail rate. Indeed, the 240% bar would apply regardless of the fact that the customer can use (and may have in the past used) other modes of transportation, which is precisely the case with DuPont. Accordingly, the 240% presumption, which the railroads would be prohibited from rebutting, would be arbitrary and capricious.

There is also uncertainty about the 240% presumption because it is based on the current Uniform Rail Costing System (“URCS”). The Board has from time to time discussed the possibility of revising URCS. And, recently the Board issued a notice of proposed rulemaking regarding URCS. Of course, if the Board decided to revise URCS, any study based on current URCS that is submitted in this proceeding would immediately be inaccurate and meaningless for that reason as well. *See Review of the General Purpose Costing System*, Ex Parte 421 (Sub-No. 4) (served Jan. 25, 2013).

4. Presumption Based on 75% of Traffic By Rail

The second presumption – that there is no competition if the serving Class I handled 75% of the movement volumes in a particular lane in the prior twelve months – also makes it impossible for parties to conduct any meaningful study. NITL Petition at 50-52.

As an initial matter, that criterion is indefensible. NITL’s attempts to cloak its 75% proposal with references to things like the Herfindahl/Herschman Index or to antitrust analyses that purportedly show market power must fail. NITL Petition at 51-52. First, like R/VC ratios, the agency has similarly long rejected presumptions based on market share information, finding that they “detract[] from the accuracy of market dominance determinations.” *Market Dominance Determinations*, 365 I.C.C. at 123; *see*

also Product and Geographic Competition, 2 I.C.C. 2d 1, 4 n.11 (1985) (“The quantitative measures (i.e., the market share, cost, and rail investment presumptions) were found to be poor indicators of market dominance in the widely varying fact situations to which they were designed to apply.”).

Second, accurately determining a company’s market share first requires a determination of the relevant market. However, “[t]he factors that determine the appropriate scope of a market vary widely from one case to another.” *Market Dominance Determinations*, 365 I.C.C. at 123. A market definition must focus “on customers’ ability and willingness to substitute away from one product to another.” U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* § 4 (2010); *see also Market Dominance Determinations*, 365 I.C.C. at 123. The agency has previously concluded that “[t]his problem precludes any formula for market share determination which is both practicable and serviceable.” *Id.* NITL’s proposal blithely ignores this essential determination of individual markets, improperly assuming that each shipper or receiver’s “transported volume of the movement(s) for which such switching is sought” in a particular lane comprises the totality of the relevant market.

Third, even if a market share percentage could be easily and accurately calculated, “the competitive implications of any given market share percentage . . . also vary widely from case to case.” *Id.* Market share is intended to assess substitutability, but a particular percentage, without more information, says little about what options are currently available in the market. *Id.* While the Board continues to look at market share as one factor for evaluating market dominance among other quantitative and qualitative evidence, the agency has made it clear that particular percentages cannot logically

support even a preliminary conclusion about competition. Indeed, “[r]ather than an absence of competition, a large rail market share could mean that the railroads have been able, at least temporarily, to compete successfully.” *Rail General Exemption Authority – Exemption of Grease or Inedible Tallow, etc.*, 10 I.C.C. 2d 453, 459 (1994); *see also id.* at 460 (“It does not necessarily follow, however, that railroads have exploitable market power with respect to the movement of commodities for which they enjoy a substantial share of the available traffic.”). In short, these limitations make any presumption based on market share, let alone a conclusive one, invalid.

A presumption based on what percentage of a shipper’s traffic in a particular lane in a particular lane was handled by a Class I railroad also produces illogical results. Consider a scenario in which NS and a trucking company both bid to transport the movement for the shipper. NS wins that bid with a rail rate that results in a revenue-to-variable cost ratio of 120%. As part of the deal (and to make it worth the railroad bidding at such a low price), the shipper agrees in a contract to move 80% of its volume pursuant to the rail contract. The shipper has now contracted itself into eligibility – even if it had shipped 100% by truck before entering into this contract. That shipper now meets this prong of the test for forced switching because the Class I railroad handled more than 75% of the volumes of the movements pursuant to the mutually-negotiated contract.⁵⁶

This situation is not just hypothetical. NS has numerous contracts that provide for substantial volume commitments as a result of bilateral negotiations with the customer. These volume commitments are included in contracts where there is modal competition

⁵⁶ Under the NITL proposal, the shipper would still have to meet the other requirements before the Board could order forced switching.

and often are for 75% or more of particular shipments.⁵⁷ These volume commitments are included in contracts with rates that run the revenue-to-variable cost spectrum. Thus, movements covered by these contracts may fail the 240% presumption. Simply because of this contract requirement, the shipper could be eligible for relief – even if its R/VC ratio was very low.

Clearly, determining whether the customer ships 75% of its traffic by rail would require substantial discovery and litigation – even if the 75% criterion were defensible. The railroad would not otherwise have information about the extent of the customers’ use of other modes such as trucks and barges. Parties and the Board would need to explore the shipping history of a complainant in each instance.

For our purposes here, there is simply no data on the relative market share of rail and other transportation options for individual lanes and commodities, let alone which shippers have contracts with volume commitments. Thus, even after setting aside the absurdity of this presumption, there is no dataset that any party could use to estimate the number of shippers or the amount of revenue at risk pursuant to this presumption.

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}} These contracts are merely examples of lanes that might be potentially eligible because of the 75% rule. NS has not undertaken a comprehensive review of its contracts to determine how many shippers or how much revenue would become potentially eligible under the 75% rule simply because of bilateral contract provisions similar to this one. {{

}} These contracts are provided under seal in the Appendix.

D. The So-Called “Conclusive Presumption” Regarding Whether a “Working Interchange” Is Within a “Reasonable Distance” Is Too Vague and Ambiguous To Model.

The second criterion for which NITL proposes presumptions is the requirement that there must be “a working interchange” within a “reasonable distance” of the shipper’s facility. NITL Petition at 52-59. NITL asks the Board to establish two conclusive presumptions related to this criterion. Each of these presumptions is too vague and ambiguous to permit any party to model the effects of the NITL Petition.

1. Calling Presumptions “Conclusive” Is Incorrect.

Like the presumptions regarding intermodal and intramodal competition, NITL is fond of calling the presumptions regarding “a working interchange” within a “reasonable distance” conclusive. Calling the presumptions conclusive, however, is incorrect. What NITL again seeks is a conclusive presumption only if it is favorable to the shipper. If the outcome of the inquiry into these “conclusive” presumptions does not favor the shipper, then the shipper gets to continue to take bites from the apple. “If the petitioner could not qualify for either one of those conclusive presumptions, the issue would have to be litigated and decided by the Board.” NITL Petition at 36. Thus, there is no way for any party to model who would qualify and who would not qualify under the NITL proposal, because the presumptions are not conclusive at all.

2. “Terminal” Is an Undefined Term.

NITL first asks the Board to deem “a working interchange” to exist “where shipper’s facilities are within the geographic boundaries of a terminal established by a Class I rail carrier (incumbent carrier) serving that shipper, and cars are regularly switched between the incumbent carrier and the carrier for which competitive switching is sought.” *Id.* at 55-57 (emphasis added). For purposes of this discussion, NS will

discuss places where NS and another carrier interchange cars—although NITL may mean something else by using the phrase where “cars are regularly switched” between the two carriers.

The term “terminal” is not a defined term. NITL does not define it. NITL Petition at 57 (“The determination of when the carrier has “established” a “terminal” is left undefined.”). Nor does the law define it. In fact, the law makes clear that the term is not susceptible to a black and white definition. The Board and its predecessor have repeatedly held that whether something is a terminal area is a fact intensive inquiry determined on a case-by-case basis. *Golden Cat Div. of Ralston Purina Co. v. St. Louis Southwestern Ry. Co.*, Finance Docket No. 41550 (Apr. 25, 1996) (stating that factors to be considered in determining whether an area is a terminal area include: (1) whether the use is for terminal functions such as the transfer, collection, or delivery of freight; (2) whether operations take place within railroad yard limits; (3) whether service is performed within a cohesive commercial area; and (4) whether there are team tracks, freight houses, or assembly facilities present). Accordingly, this presumption is not really a presumption at all because the parties would have to present evidence and the Board would have to determine in each case whether an area is a terminal. Therefore, it is impossible for any party to conclude with a broad brush what is a terminal for purposes of responding to the Board’s requests in the Decision.

Even if “terminal” were a defined term, it is ambiguous whether this presumption would take into account the capacity of the interchange compared to the volume of traffic for which the shipper seeks forced switching. For example, can unit coal trains be sent to an interchange where “cars are regularly” interchanged but where only 20 cars can be

accommodated? If so, are we to assume when determining the impacts on the railroads that the customer seeking forced access would pay for the additional infrastructure that would be needed at that interchange to handle the unit coal train?

Without knowing what is a qualifying terminal, it is impossible to meaningfully answer the Board's questions.

3. How 30 Miles Is to Be Determined Is Ambiguous and Unclear.

NITL then asks for a presumption that the "reasonable distance" requirement is met if the shipper's facility is located within 30 miles of an interchange. *Id.* at 57-59. This presumption is wholly-unsupported by any analysis and is therefore arbitrary and capricious. But more importantly for responding to the Decision, is the 30 miles to be calculated "as the crow flies" or based on rail miles? This is a critical distinction.

Thirty miles as the crow flies could mean upwards of a hundred or more miles by rail, which would substantially change the number of eligible shippers, the amount of revenue at risk, and the effects on operations and additional operating costs. For example, NS and CSX have an interchange in the Norfolk, Virginia, area. As the crow flies, that interchange is fewer than 30 miles from customers served solely by CSX on the Peninsula. However, for NS actually to serve that traffic on the Peninsula, it would have to do so from, or by way of, Petersburg/Richmond, Virginia. *See Verified Statement of Fred M. Ehlers at 21 ("Ehlers Statement")*.

Moreover, it is likely that such a presumption would have a more significant effect on railroads in the Eastern United States than those in the West. As the Board notes, substantial areas in the West would not benefit from NITL's proposal because "virtually none of those shippers is located within 30 miles of a competitor railroad." However, NS and CSX have scores of interchange locations with each other. And NS

has interchange locations with all the other Class I railroads as well. As shown in Figure 1 below, a sizeable amount of NS territory is situated within 30 miles “as the crow flies” of an interchange point with CSX (orange) or another Class I (blue), excluding interchanges with short lines.

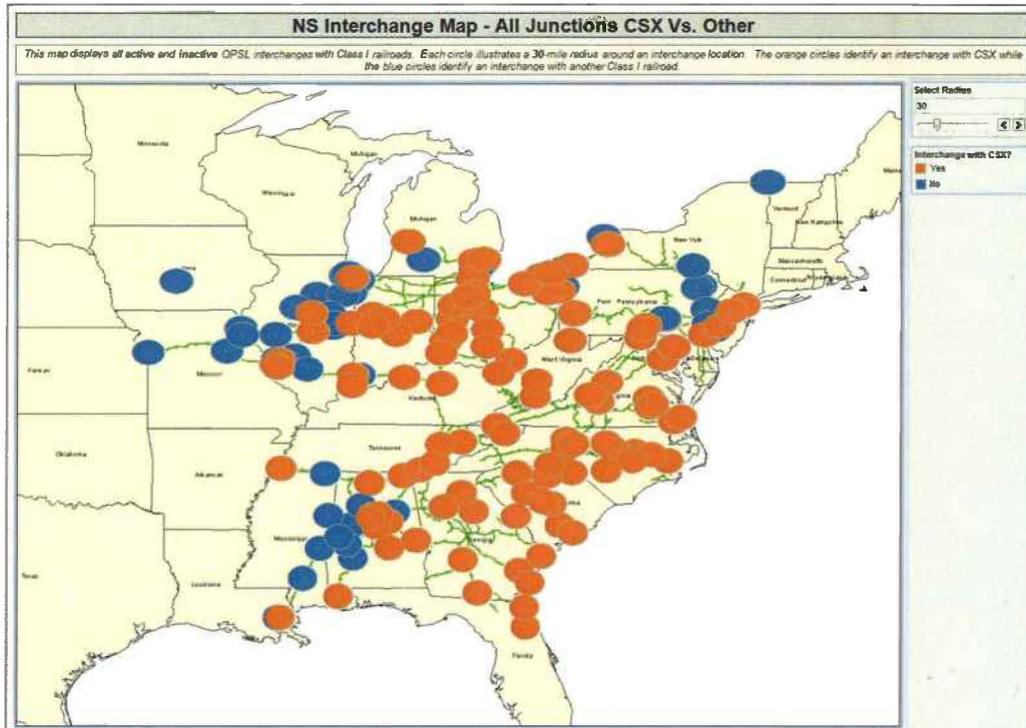


Figure 1. NS Interchange Locations with CSX and other Class Is

Accordingly, the NITL proposal would result in nothing short of an industry restructuring for railroads in the East. *Midtec Paper Corp. v. United States*, 857 F.2d at 1507 (“We have not found even the slightest indication that Congress intended the [Board] in this way to conform the industry more closely to a model of perfect competition.”).

For purposes here, it is difficult to calculate the number of shippers who could potentially benefit and the amount of revenue at issue without knowing what NITL meant.

E. No Party Can Assess the Downstream Effects on Other Traffic.

No party can accurately estimate the potential costs to the railroad industry that would result if the NITL proposal were adopted because no party can estimate the downstream effects of injecting artificial competition that is not supported by the market. If the market could support multiple carriers, then the economics of a build-out or build-in might result in competition. But the NITL Petition seeks to have the government create artificial competition in order to drive rates down for a small group of customers. No party can estimate how many customers would gain or how much revenue railroads would lose from the direct application of NITL's ambiguous and incomplete proposal. But parties are even less equipped to calculate the downstream effects from compression of rates for customers who do not qualify under the NITL proposal.

Consider two customers shipping grain into the same end market. One of those customers is able to get lower rates from the NITL proposal; the other is not eligible. The customer who is not eligible now faces a disadvantage in the market that was created by government interference. That customer may now seek lower rates from the railroad in order to remain competitive vis-à-vis the customer who qualified for lower rates under the NITL proposal, face substantially decreased profits, or go out of business. No party can estimate the impact of these market responses to government intervention in the market.

Another downstream effect is what happens to regulated traffic that is not eligible under the NITL Petition. On the one hand, if total revenues on line segments decline as a result of the NITL proposal, there would be less revenue for complainants in stand-alone cost cases. As a result, the test would likely yield higher maximum reasonable

rates for these shippers. On the other hand, if the potential comparable movements in the Three-Benchmark test are now lower rated, the Three Benchmark test could result in further downward spiraling of rates and rail revenues.⁵⁸

F. What Traffic Is Covered By the NITL Petition?

Yet another omission in the NITL Petition that makes it impossible for any party to conduct meaningful studies is that NITL has not clearly stated to what traffic it intends for its proposal to apply. Is other exempt traffic covered? Does it apply to traffic under contract? Does it apply to traffic that was shipped under a recently expired contract that had a volume commitment of at least 75%?

Another example is hazardous traffic and toxic-by-inhalation hazards (“TIH”). If NITL intends for its proposal to apply to hazardous materials traffic, and more specifically, TIH traffic, then there are numerous conflicts with other federal regulations that would have to be resolved. Consider just three examples.

- The Pipeline and Hazardous Materials Safety Administration (“PHMSA”) proposed new rules regarding rail transportation of hazardous materials on December 21, 2006.⁵⁹ Among other things, the rules, which also became final on November 26, 2008,⁶⁰ require railroads to compile data concerning hazardous materials they transport and use those data to select the safest and most secure practicable routes for those materials,⁶¹ to work with shippers to minimize the time a rail car containing hazardous materials is placed on a track awaiting pick-up, delivery, or transfer,⁶² and to conduct enhanced security inspections of rail cars carrying hazardous materials. PHMSA regulation HM-232E contains “Risk Routing Regulations” whereby the

⁵⁸ The potential devastating effects in the Three Benchmark scenario would be further exacerbated if the rate relief caps under this test were removed.

⁵⁹ See Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments, Notice of Proposed Rulemaking, 71 Fed. Reg. 76,834 (Dec. 21, 2006).

⁶⁰ See Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments, Final Rule, 73 Fed. Reg. 72,182 (Nov. 26, 2008).

⁶¹ See 49 C.F.R. § 172.820(b)-(f).

⁶² See 49 C.F.R. § 172.820(g).

routing of hazardous materials are checked to minimize routing certain hazardous materials through high risk areas and HTUA (“High Threat Urban Areas”).⁶³ If hazardous materials and TIH traffic are covered by the NITL proposal, railroads might be forced to interchange this traffic in HTUAs. As a result, more of this traffic would be handled in and around HTUAs rather than less.

- Railroads are required to have hazardous materials training for T&E employees, Train Dispatchers, MOW, and Transportation supervisors. FRA requires that records be kept of all such training and that it be readily available for review.⁶⁴ Thus, if hazardous materials traffic is to switch back and forth, there must be consideration of whether the railroad can comply with regulations like this one.
- All hazardous material shipments are governed by the "48 hour" rule from the Federal Railroad Administration, whereby no hazardous materials shipment can sit on a railroad for more than 48 hours without being moved to final destination, with limited exceptions.⁶⁵ As we will see below, many interchanges have traffic that can dwell for substantially longer than 48 hours. Thus, railroad operations would have to be reconfigured to deal with this traffic.

NS and CSX have worked to streamline the interchange on these commodities to comply with the various government regulations and to maintain or increase shipment velocity. *See Ehlers Statement at 11.* In fact, they have consolidated traffic flows so that the traffic is interchanged only at locations that comply with all the various regulations, including many not mentioned here.

The NITL Petition does not address how these shipments would be treated.

Would carriers be forced to interchange traffic at locations that do not currently comply with federal safety and security regulations? Would carriers be forced to interchange traffic at locations that will result in more hazardous traffic in HTUAs? How would the PTC rules affect forced routings over lines not otherwise required to have PTC? Without

⁶³ *See* 49 C.F.R. § 172.820.

⁶⁴ 49 C.F.R. Subpart H.

⁶⁵ 49 C.F.R. § 174.14.

knowing the answer to how hazardous materials and TIH traffic is treated it is difficult to determine the effect of the NITL Petition.

G. If a Shipper Obtains Forced Access, How Long Does Forced Access Last?

In order to develop the calculations the Board seeks, parties need to know the effect of forced access. In other words, if a customer obtains forced access, does the forced access last forever or for some limited period of time? If the remedy applies only for a limited period of time, how long does it last? Is a customer who obtains forced access locked in to using it, or can the customer switch its status back and forth? The NITL Petition is silent on all these issues. But to conduct meaningful studies, parties have to know what NITL is proposing.

V. THE NITL PROPOSAL WOULD RESULT IN SUBSTANTIAL LITIGATION, WOULD NOT NECESSARILY REDUCE GOVERNMENT INTERVENTION, AND MAKES IT IMPOSSIBLE FOR ANY PARTY TO CONDUCT A CREDIBLE STUDY.

The Board states that one of the potential benefits of NITL's proposal is that it would "reduce governmental intervention by limiting regulation to the access price." Decision at 6. The premise of this statement seems to be a belief that NITL's forced access proposal would reduce the need for government involvement in rate reasonableness disputes. However, resolving rate reasonableness disputes is one of the main reasons the STB exists. 49 U.S.C. §§ 10701, 10704, 10707.

Moreover, the Board's assumption that the NITL proposal might reduce government intervention is simply incorrect. Although NITL uses platitudes to describe

its proposal,⁶⁶ at the end of the day, NITL itself recognizes that many issues would have to be litigated in each case. For example:

- "Finally, the burden of proof for this condition would lie with the party seeking an order for competitive shipping. It is envisioned *that the factual inquiry* for this condition would in the very large majority of cases be simple..." NITL Petition at 41 (emphasis added).
- "If one or more of the movements for which competitive shipping is sought could not qualify for either of those conclusive presumptions, the shipper would have to litigate the question of effective inter- or intra-modal competition for those movements, and *the issue would have to be decided by the Board.*" *Id.* at 35 (emphasis added).
- "Of course, if the party seeking competitive switching cannot meet the conclusive presumption as to the effectiveness of inter- and intramodal competition, *it would still be open to litigate the matter.*" *Id.* at 46 (emphasis added).
- "If the petition could not qualify for either one of those conclusive presumptions, *the issue would have to be litigated and decided by the Board.*" *Id.* at 36 (emphasis added).
- "Thus, for example, if the facilities of a shipper were not in a "terminal" established by the carrier and were 35 miles from an interchange at which cars are regularly switched, *that shipper would have to prove in litigation before the Board* that there is or could be a 'working interchange' and that the 35-mile distance between the shipper's facilities and that interchange was "reasonable" on the basis of facts presented." *Id.* at 55 (emphasis added).
- "The League's proposed fourth condition would permit a carrier to make its case before the Board, with a decision by the Board based on the specific facts and circumstances." *Id.* at 62.
- "How "regular" such switching must be would be left to the Board's determination." *Id.* at 59.
- "Thus, the conclusive presumption would not operate in cases where cars might be, but in fact are not, regularly switched between two involved carriers. *In such a case, competitive switching might be ordered, but only after a full determination by the Board, without the use of the conclusive presumption.*" *Id.* at 56 (emphasis added).

⁶⁶ See, e.g., NITL Petition at 6 ("The objective of the League's proposal is also to establish clear rules that may be implemented in a straightforward manner and that reduce the need for complex and expensive litigation in many cases.").

- "The determination of when the carrier has in fact "established" a "terminal" is left undefined." *Id.* at 57.
- "The League's proposed rules set forth in Appendix A do not include a specific proposal governing compensation for competitive shipping." *Id.* at 62.

The issues that NITL admits would be subject to litigation are only the tip of the iceberg. Among the other issues that also would have to be litigated are the following:

- What is the duration of the forced access grant? Would shippers be able to seek forced access and then disavow it when it suits them?
- Whether the calculation of 240% was correctly done.
- Whether the 240% calculation or the 75% calculation are based on proper assumptions.
- Railroads will litigate the 75% calculation if it results from a negotiated contract in which the shipper agreed to a volume commitment after the railroad won the traffic from another mode of transportation.
- Whether the customer meets the 75% presumption will be litigated and require substantial discovery because the railroads may not know how much total volume the customer ships, how much it ships by truck, whether it is able to ship by truck but has changed shipping patterns to qualify, etc.
- Whether exempt traffic is eligible.
- Whether intermodal and automotive traffic is eligible simply because one Class I railroad has better facilities in an area even though another Class I railroad also has facilities but which the shipper may consider to be inferior.
- Whether forced access operations can be performed feasibly and safely.
- Whether there will be an adverse impact on other service locally or as ripple effects roll through the network.
- Whether an interchange point should be eligible given capacity limitations and other localized factors.
- Which railroad is required to provide cars?
- Which railroad is liable for incidents that occur on the shared track?
- Which railroad is liable for freight loss and damages?
- Is there car hire relief?
- Who pays the owning carrier – the second carrier or the customer?
- Does the owning carrier show in the rate?
- Who collects demurrage?
- When is the car collectively placed and the customer liable for damages?
- What happens if the interchange track is full?
- Service requirements given the delays and inefficiencies created by the forced access?
- Whether there is labor protection.

- Who conducts and pays for the environmental review?

The litigation involved in each instance in which a shipper would seek relief under the NITL proposal would be expansive and time consuming because these are only examples of the many issues that would be litigated and would cause substantial government involvement.

VI. OPERATIONAL AND INFRASTRUCTURE ISSUES ARE SUBSTANTIAL AND DEMONSTRATE THAT THE NITL PROPOSAL IS NOT IN THE PUBLIC INTEREST.

The update to the *Christensen Report* was clear that rail price increases were not a product of market power. See Laurits R. Christensen Associates, Inc., *An Update to the Study of Competition in the U.S. Freight Railroad Industry: Final Report*, at pages 4-7 (January 2010) (“*Christensen Report II*”). That report instead concluded that price increases were a result of changes in railroad costs. *Id.* Ironically, NITL’s solution is to propose a regime that would assuredly increase rail costs and would make the rail system less efficient for moving the goods for shippers. Measuring those costs is very difficult, however, because: (1) omissions and ambiguities in the NITL Petition make it difficult to determine how operations would change and (2) railroad operations differ from location to location.

As Mr. Manion explained in Ex Parte 705, NS is a rail system with over 20,000 route miles in 22 states and moves cars between tens of thousands of point pairs for tens of thousands of customers. Verified Statement of Mark D. Manion on Behalf of Norfolk Southern Ry. Co., *EP 705* (filed Apr. 12, 2011) () (“Manion Statement”). It consists of three networks – carload, unit train, and intermodal – all operating on the same infrastructure. NS’s multiple service products all use the same set of scarce resources,

including track space, yards, locomotives, and crews. In a complex network like NS's and the rail network generally, any service issue is exacerbated because of the intensive resource utilization and the intricately-timed, interrelated moving parts.

Therefore, service design is a crucial aspect of operating Norfolk Southern and providing high levels of customer service. Mr. Manion further explained that every car on NS has a plan before it is even loaded. *Id.* The major inputs into these plans are both historic train movements and forecasts for future movements. The key is that as many movements be predictable for a long-enough period of time. NS has scores of people and sophisticated technology to help develop those plans. NS also spends a lot of time and effort to get assets – cars, locomotives, and crews – in the right place to handle traffic flows. Getting those assets in the right place takes substantial lead time, whether that involves moving locomotives or training crews to operate over particular territory. Moreover, the service design is dependent on the track and capacity available across the network. This intricate service design is essential to integrate NS's various services with one another and with assets and to avoid causing congestion problems that ripple through the network. *Id.*

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

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

deposit her at her workplace at 9:00. But bus routes are planned to provide the best possible service to the most people, rather than being tailored to each rider's specific desire. Service on a rail system is much the same. Our customers have different needs and the priorities they place on such factors as transit time, price, safety, damage-free handling, and frequency of service and switching often differ.⁶⁷

Mr. Manion explained that NS's goal therefore is to run as efficient a network as possible, which means maximizing long-hauls, minimizing car handlings and switches, minimizing the number of times a car must be handled in a yard, maximizing train lengths, consolidating traffic flows, and other efficiency-generating activities. *See* Manion Statement at 5. NS must minimize additional handlings of cars to avoid the many adverse consequences that result, such as increased costs, increased transit times, and reduced utilization of cars, crews, locomotives, and track. In addition, NS has rationalized its interchange operations to become more efficient. Thus, NS and CSX have consolidated traffic flows so that 90% of the traffic interchanged between the two carriers flows over 36 interchange points. *See* Ehlers Statement at 12.

The NITL Petition undermines all these efforts that are essential to efficient railroading and providing the best service to a diverse group of customers.

A. NITL's Proposal Is Contrary to the Public Interest And Long-Standing Agency Precedent Regarding Rail Efficiency, and Would Undermine Those Very Rail Efficiencies that Benefit Customers.

NITL's proposal is contrary to the best interests of the rail system and most shippers. The Board has long recognized that single-line routes are better and benefit shippers and the public interest. *See, e.g., Kansas City Southern—Control—The Kansas City Southern Ry. Co. et al.*, STB Finance Docket No. 34342, slip op. at 17 (served

⁶⁷ *Hearing on the 25th Anniversary of the Staggers Rail Act of 1980*, Ex Parte 658, Stephen C. Tobias on Behalf of Norfolk Southern Corp. (Oct. 2005).

November 29, 2004) (approving an end-to-end transaction and noted that the transaction will “benefit shippers by enabling KCS to offer expanded single-line service”); *CSX Corporation et al. – Control and Operating Leasees/Agreements – Conrail Inc. et al.*, 3 S.T.B. 196, 333 (1998) (citing as a public benefit the fact that “the expansion of the NS and CSX systems will enable them to provide more competitive single-line service over more direct routes . . .”); *Union Pacific Corp., Union Pacific Railroad Co. and Missouri Pacific Railroad Co. – Control and Merger – Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Railway Co., SPCSL Corp., and the Denver and Rio Grande Western Railroad Co.*, 1 S.T.B. 233, 535 (1996) (Vice Chairman Simmons, Commenting) (“Furthermore, on the whole, divestiture would not benefit shippers, inasmuch as many current single-line moves would become two-line or three-line moves, wiping out the efficiencies of single-line service.”); *Union Pacific Corp., Union Pacific Railroad Co. and Missouri Pacific Railroad Co. – Control – Chicago and North Western Transp. Co. and Chicago and North Western Railway Co.*, 1995 ICC LEXIS 37, **181-82 (1995) (“We find that common control will enable UP and CNW to improve railroad service in new as well as existing markets. There are substantial efficiencies in single-line service compared to joint-line service.”). In one of the more thorough explanations of the agency’s position on single-line service, the agency held that:

- “A single-line route can make more efficient use of equipment. By improving the use of both system-owned equipment and foreign cars, a single-line system can have a more efficient fleet exhibiting faster turnaround time and improved loading ratios. These efficiencies are achieved by the elimination of interchanges, a common equipment placement program, more accurate and responsive monitoring of the fleet, and the pre-blocking of cars, as well as a quicker response to equipment supply problems that may develop.”

- “A single-line route provides an opportunity for improved service. A single-line carrier can provide more consistent and reliable service, which accrues to the benefit of shippers and consumers. . . . In addition, the carrier is better able to provide pre-blocking of cars, to exercise control over service, to assure consistent and coordinated schedules, to eliminate interchange delays, and to respond more quickly and effectively to problems as they arise.”
- “Shippers will benefit because improved efficiency and shorter transit times will allow them to reduce their inventories and thereby lower their operating costs and increase their efficiency. Shippers will also benefit because their products will be able to reach their markets with more consistency and reliability, thereby providing a basis for improving future business prospects.
- “[S]ingle-line operation is more efficient than multi-line operation.”
- “Shippers also benefit from improved transit times and resultant reduced equipment costs made possible when single rail systems are able to minimize interchange delays by increasing the use of pre-blocking and run-through trains.”

Rio Grande Industries, Inc., SPTC Holding, Inc., and the Denver and Rio Grande Western Railroad Co. – Control – Southern Pacific Transportation Co., 4 I.C.C. 2d 834, 894-96 (1988). NS could not explain it better.

Nothing regarding railroad operations has changed to justify a departure from these long-documented observations about the operations of the railroad industry. Nevertheless, NITL’s proposal would dramatically undermine the service benefits of single-line service to the entire system.

B. It Is Difficult to Quantify Total Impacts on Rail System Because of Omissions and Ambiguities in NITL Petition and Because of Location-Specific Issues.

Just as there are omissions and ambiguities that make it impossible for any party to conduct a meaningful study of the number of shippers potentially affected and the amount of revenue/contribution at risk, it is equally impossible to quantify the operational

impacts.⁶⁸ Even if the NITL Petition was clear and complete, a party would have to consider at least increased operating expenses, decreased asset utilization, and additional capacity requirements to account for all costs.

1. NITL Does Not Define Safe and Feasible Operations.

The fourth criterion under the NITL proposal is that the complainant would not be entitled to forced switching if it is shown that the proposed access is not safe or feasible or if the access “will unduly hamper the ability of [a] carrier to serve its shippers.” NITL Petition at 60. NITL proposes that the Board carry out this analysis on a case-by-case basis, and accordingly its meaning cannot be factored into a study.

In addition, NITL is not clear about the scope of the phrase “unduly hamper the ability of [a] carrier to serve its shippers.” The NITL proposal will result in haves and have-nots. Not every customer is eligible. But those that are not eligible will still feel the effects. For example, and as discussed below, pushing more cars through forced access to an interchange that is already capacity constrained will likely cause dwell time to increase for other customers. These customers will suffer an adverse effect because their service will deteriorate. Implementing forced access at other locations may result in circuitous routings, which will reduce car supply and locomotive supply for other customers.

NITL does not state whether these effects are adverse or whether they “unduly hamper” other shippers. The proper inquiry is whether any shipper’s service would be

⁶⁸ In the discussion throughout this Section VI, NS discusses numerous examples of operating issues, interchanges, and through movements. These examples illustrate particular points that are generally applicable to forced access, but given the ambiguities and omissions in the NITL Petition, NS cannot be sure whether each individual situation is intended to be implicated by the NITL Petition.

adversely affected anywhere on the NS system. NS believes that no other customer should be adversely affected at all because another customer obtained forced access.

Absent a location specific analysis done within the context of the particular type of traffic to be moved, it is impossible to identify what would be required to hold other rail customers harmless. It may require substantial infrastructure in the vicinity of the customer's facility, at the interchange, or elsewhere on the rail system. Or, it may require operating plan changes that would affect crew needs, train starts, and locomotive requirements. The key is that the network that serves all customers must not be adversely affected by the forced access granted for any of the customers who would be eligible under the NITL proposal. And, as illustrated by the examples described in the following discussion, the operating issues differ from location to location, so the hold harmless requirements will differ correspondingly.

2. Each Location on NS Is Different and Has Different Operating and Capacity Issues, Which Prevents Any Party From Developing Generic System-Wide Assumptions.

In addition to the omissions and ambiguities in the NITL proposal, an empirical study of the impact on operations is difficult because the operating constraints and capacity available vary by location. The following subsections illustrate a few different operating issues that could arise under the NITL proposal and drive railroad costs and infrastructure needs depending on the location of the forced access. These examples are discussed in more detail in the Ehlers Statement. There would no doubt be other issues as well.

a. Atlanta, Georgia – Interchange operations are limited by yard configuration and capacity constraints.

Merely looking at a map and measuring 30 miles does not begin to illustrate the operational issues that would arise and result in inefficient service to customers, including customer who would not be entitled to relief under the NITL proposal. Atlanta, Georgia is a good example. NS and CSX have yards directly adjacent to one another there. Ehlers Statement at 13. NS's Inman Yard was once used as a general freight yard, but has been used for intermodal since the 1990s. There is no longer room for general freight traffic at that yard. {{

}} The limitations on the volume that can be handled in Atlanta, and the need to block the cars elsewhere because of the existing capacity constraints, would increase circuitous miles, add handlings, and lengthen the transit time for these cars – not to mention the effects on the shipments of other customers.

{{

}}

Figure 2. Atlanta, Georgia, Interchange

b. Mobile, Alabama – Track Configuration and Third Party Involvement Limit Switching Operations.

NS's interchange with CSX at Mobile, Alabama, is an example of an interchange with unique operational constraints, in its case due to the interjection of a third party because of the switching location. *Id.* at 17-18. Although both NS and CSX have yards in Mobile, interchange does not occur over NS or CSX tracks, but instead in a yard

owned and operated by the Terminal Railway Alabama State Docks (“TASD”). NS shares access to the TASD yard with CSX and two other carriers. NS must access the TASD yard over track owned by CN.

The Mobile interchange faces fundamental operational and congestion problems. These problems stem from the number of carriers that conduct operations in the TASD yard as well as the proximity of the yard to the port, which often requires TASD to manage capacity based on the vessel schedule at the port. {{

}} These interchange failures in turn cause congestion in NS’s yard, as the cars meant for interchange consume capacity sitting in NS’s yard and degrade switching efficiencies. *Id.* Increased interchange volumes would compound these complications and affect all NS traffic in the area.

c. Decatur, Alabama – Capacity Constraints Would Be Exacerbated.

Some locations are already capacity constrained. Injecting additional and more complicated operations through forced access into the area will reduce the efficiency of the operations in the area. In *EP 705*, Mr. Manion discussed NS’s interchange with CSX in Decatur, Alabama, which is an example of a location that faces capacity constraints under current conditions, and any additional volume based on NITL’s proposal would only exacerbate the situation. *See* Manion Statement at 14-15; *see also* Ehlers Statement at 22-23. Decatur is located on NS’s mainline that extends from Chattanooga to Memphis, and on CSX’s mainline that extends from Nashville to Birmingham. NS

operates between 20-25 trains per day over the line through Decatur, while CSX operates 25-30 trains. Interchange occurs at NS's Old Yard in downtown Decatur. NS's also has a second, medium-sized flat switching yard in Decatur, the New Yard, located on the west side of the city, while CSX has its own medium-sized flat switching yard, Oakworth Yard, south of the interchange. *See* Map of NS's Decatur Operations in Manion Statement at Appendix B. As Mr. Manion explained in his Verified Statement, the Decatur interchange faces capacity constraints under current traffic conditions and became extremely congested during a period of increased volumes in 2008. *See id.* (describing operations in Decatur in more detail.)

Capacity is constrained by the size of the Old Yard, which has four interchange tracks, two of which are used by NS and two by CSX. Interchange is currently limited to fewer than 45 cars. Further, each delivery and pick-up requires multiple moves at the Old Yard to place and/or pull the cars from the two different interchange tracks. During these moves, and during the federally-required brake testing, grade crossings and the mainline are blocked by the interchange activity. *See id.* Increased switching volumes at Decatur or other capacity constrained interchanges due to the NITL proposal would at minimum result in similar delays for new traffic, and would likely result in average dwell times increasing for all traffic moving across the interchange.

d. Wilmington, Delaware – The type of traffic to be interchanged affects the nature of interchange operations.

Typically, NS and CSX do not interchange unit trains, and accordingly, not all of our interchange locations are capable of facilitating the interchange of unit trains. For example, as crude oil becomes available from places like North Dakota, eastern refineries

have become interested in moving unit trains of crude oil.⁶⁹ If CSX and NS were forced to interchange unit trains in the Wilmington, DE area, there is no room to do so. Ehlers Statement at 18-19. Under the NITL proposal, this could be possible because the PBF facility is within 30 miles of the interchange location in Wilmington. However, unit trains would have to be broken into three or four blocks and moved through the interchange separately, which would consume substantial time, track space, and additional resources and heap additional congestion on the area.⁷⁰ *Id.*

e. Hampton Roads, Virginia and Coal Moves to North Carolina – Circuitous and Inefficient Routing Would Result.

Breaking single-line service into multiple parts through forced access would result in many instances in which the resulting route would be circuitous and inefficient, resulting in excessive consumption of cars, locomotives, and crews to the detriment of the rail system and service to all customers. A prime example of this issue is the example previously discussed in the Hampton Roads area of Virginia. *Id.* at 20. NS and CSX have an interchange in the Norfolk, Virginia, area, which is fewer than 30 miles from customers served solely by CSX on the Peninsula. However, for NS actually to serve that traffic, CSX would have to move the traffic through Richmond and Petersburg to get to Norfolk, a trip which is more than 200 miles by rail.

Less dramatic but equally circuitous routings could result elsewhere under NITL's proposal. NS and CSX have an interchange at Winston Salem, NS, which is within 30 miles of the coal-fired power plant known as Belews Creek, which is solely-rail served

⁶⁹ See Allison Snyder, *PBF Energy Completes Rail Facility at Delaware City Refinery*, WALL ST. J., Feb. 4, 2012.

⁷⁰ In *EP 705*, NS described a similar constraint in Decatur, Alabama, where an interchange of unit trains would affect Tennessee River Barge traffic. See Manion Statement at 15.

by NS. Today, NS hauls coal directly to Belews Creek from Williamson, WV, over a route that is 306 miles. *See id.* at 21-22. If under the NITL proposal, CSX originated the traffic at Martin, KY (a CSX served origin near Williamson, WV) and interchanged it at Winston-Salem or delivered to the plant the route would be 576 miles due to differences in the railroads' respective networks. *See id.* Thus, if it were even possible to interchange unit coal trains at Winston Salem, the new route would be more than 85 percent longer (excluding additional dwell and handlings).

3. The Efficiency of the Carload Network, Which Consumes a Disproportionate Share of Resources, Would Be Undermined to the Detriment of the System and Customers.

NS's carload network moves merchandise traffic from each carload's specific origin, through the network, and to its specific destination. In 2012, that merchandise traffic represented {{ }} of NS's carloads.⁷¹ *Id.* at 2.

{{

}}

Figure 3. 2012 NS Volume Mix (Adjusted for Rail Car Equivalents)

⁷¹ These volumes are adjusted for carload equivalents to account for the fact that intermodal volume is typically measured in units, while one intermodal car can typically carry more than one unit.

However, the merchandise network consumes a disproportionate amount of resources.

As shown in the charts below, {{ }} of crew starts and {{ }} of locomotives on NS in 2012 were attributable to the carload merchandise network. *Id.* at 3.

{{

}}

Figure 4. NS Crew Starts and Locomotive Use

To operate the carload network, NS has over 32,000 point pairs that it must connect, including origins, destinations, local serving yards, and classification yards, as shown below. *Id.* at 4.

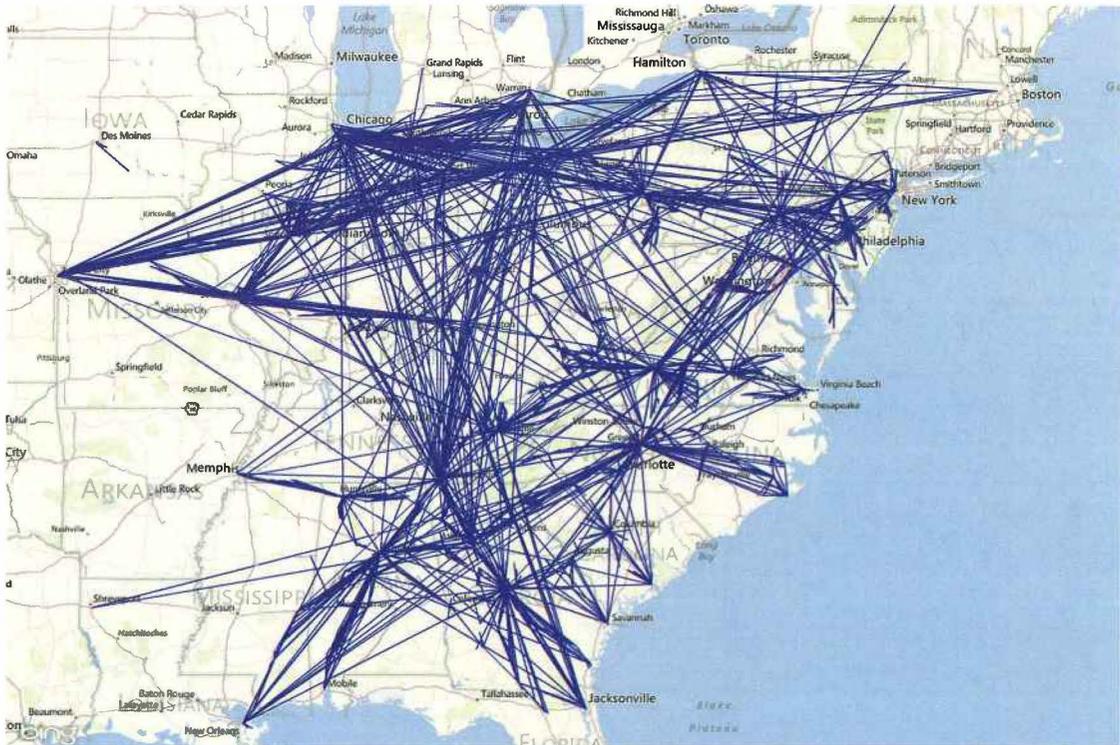


Figure 5. NS Road Haul and Local Blocking Network

Because there are so many point pairs and this traffic consumes resources, NS actively manages the transit cycle of this traffic in order to optimize its operations and asset management for all of its traffic.

a. The NITL Proposal Increases the Number of Intermediate Handlings which Reduces Shipment Velocity.

The loaded merchandise transit cycle can be broken down into distinct components: origin handling, intermediate handling, road transit, and destination handling.

{{

}}

Figure 6. Merchandise Transit Cycle Time Allocation

Obviously, the biggest component of the transit cycle for loaded carloads is intermediate handling. Thus, NS has worked and continues to work to reduce the number of intermediate handlings and the amount of time spent during these handlings. *Id.* at 7.

Today, a carload of freight moving in the merchandise network is handled an average of {{ }} times, including the origin and destination handling.⁷² *Id.* at 6. The NITL proposal will drive this number up and increase intermediate dwell time as a result of disaggregating traffic flows and staging traffic over unproductive interchange points. These activities will impose unnecessary operating costs onto the railroad.

b. To Run an Efficient and Cost Effective Carload Network, NS Works to Maximize Shipment Velocity (LHMpD).

From a customer perspective, service performance will suffer as well. An important metric that NS manages and tracks is shipment velocity, measured in terms of line-haul miles per day (“LHMpD”). *Id.* at 7. LHMpD simply represents the number of miles a shipment moves in a 24 hour period. LHMpD is a good indicator of how fluid its

⁷² See Carload Video, *supra* note 34.

network is running because it reflects both train velocity, i.e., travel time during the road haul portion of a particular move, and all intermediate handling time, which includes all intermediate handlings as well as non-handling delays.⁷³ From a customer perspective, maximizing LHMpD is important because it has a high correlation to NS's composite service metric ($R^2=0.6752$).⁷⁴ *Id.* at 9. Importantly, LHMpD has a low correlation to volume ($R^2=0.1976$), which means it is not dependent on volume levels. *Id.* In other words, because changes in traffic volume do not account for changes in shipment velocity, it is a valid indicator for service performance regardless of traffic demand.

There are only about four ways to increase LHMpD. *Id.* at 7. NS can reduce handlings per trip. NS can reduce dwell per handling. NS can reduce non-handling dwell by, for example, expediting crew changes. And NS can increase train speed by having less mechanical and engineering delay, by reducing time trains are in sidings, by reducing re-crews, and by being able to run more of each trip at permitted track speeds.

c. NITL's Proposal Would Increase Handlings and Dwell and Decrease Line-Haul Miles per Day, Which Means a Railroad Is Less Efficient for All Customers.

NITL's proposal would pull two of these four levers in the wrong direction. As a result, intermediate handlings would increase, thereby reducing LHMpD, increasing costs, and reducing efficiency and service levels to customers.

⁷³ This could include delays associated with crew changes, re-fueling activities, or inspections, as well as time spent in passing sidings.

⁷⁴ NS's composite service metric is made up of three components: train performance, connection performance and plan adherence. Train performance refers to how well a train runs according to its schedule, connection performance refers to how well shipments make their connections and plan adherence refers to how well a train performs its scheduled activities.

First, it would increase handlings, which would decrease shipment velocity. This makes sense because each handling introduces additional time during which the car is not moving towards its destination and the greater the delay, the less distance the car averages in a given day. *Id.*

{{

}}

Figure 7. Shipment Velocity and Number of Intermediate Handlings

As shown in Figure 7 above, most shipments on NS require at least one intermediate handling, and shipment velocity decreases significantly as the number of intermediate handlings increases. *Id.*

{{

}}

Figure 8. Shipment Velocity versus Intermediate Handlings

Figure 8 above illustrates that as NS has reduced the average number of intermediate handlings per trip over the last two years, velocity has increased from less than {{
}} to approximately {{
}}. Therefore, increasing the intermediate handlings through forced access will therefore decrease LHMpD. The NITL proposal, by interjecting additional interchanges, will increase the number of handlings for most traffic subject to forced access. For example, NS traffic destined for Atlanta will still {{

}} But it will also have an otherwise unnecessary interchange handling.

Second, the NITL proposal would increase dwell. NS has looked at a number of its active interchanges with CSX. For cars delivered today from NS to CSX, the data show that many interchange operations result in cars sitting for a long time. *Id.* at 13.

Table 1 below shows the time a car was within 100 miles of the interchange starting from (a) when a car reached a distance of one hundred miles from the interchange on NS's system or (b) when a car was picked up from a customer origin within one hundred miles of the interchange for a few of our interchanges.⁷⁵ *Id.* Importantly, it also shows the number of hours on average that a car dwelled in the vicinity of the interchange (primarily either at a local yard or at the interchange track) and the total number of cars interchanged at that location during the third quarter of 2012. *Id.* For example, {{

}}

Thus, allowing customers to push more cars through an interchange will clearly increase the dwell time as cars previously moving in single-line service would add to these totals.

Dwell time equates to less efficient utilization of cars and consumed track capacity. Car days spent in dwell is really just a measure of the number of track miles needed for the cars to dwell. For example, {{

⁷⁵ It is important to look at this 100-mile radius because cars may be held or processed at other nearby locations to facilitate interchange. *See* Ehlers Statement at 13.

other customers, other existing infrastructure would be stranded and needed projects would be jeopardized. Railroads own their own infrastructure. For decades they have invested in that infrastructure based on their estimates of whether they could earn a sufficient return. Each year NS engages in an extensive capital budgeting process in which billions of dollars of projects are proposed. NS has made investments to accommodate the efficient movement of all customers' traffic based on historic and projected traffic volumes. If forced access were to shift traffic flows, those investments would have been in vain and would be stranded.

The risk to infrastructure investment is well known and discussed in the academic literature. The *Christensen Report* reviewed that literature, including the work of Graeme Guthrie. It noted that he concluded that "opening up networks to competition typically slows down the incumbent's investment in situations where rivals cannot pre-empt the incumbent's investment (the most likely situation in railroads where rivals are not likely to duplicate the network)."⁷⁶

Moreover, without proper levels of pricing for access, past investments and potential future investments would be jeopardized. The *Christensen Report* summarized Guthrie's work: "he states that the terms of access to [facilities owned by one railroad] is a crucial influence on investment behavior."⁷⁷ It also noted that "the setting of appropriate access fees is an issue that is not easily resolved."⁷⁸

⁷⁶ *Christensen Report* at 22-11 (explaining the work of Graeme Guthrie, "Regulating Infrastructure: The Impact on Risk and Investment," *Journal of Economic Literature*, 44(4), 2006, pp. 968-69).

⁷⁷ *Id.* at 22-11.

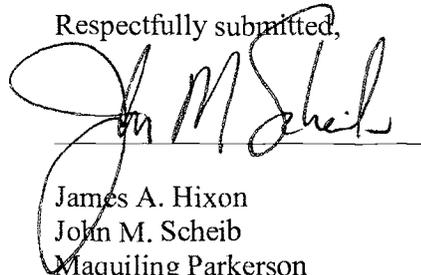
⁷⁸ *Id.* at 22-10.

VII. CONCLUSION

The more NS studied the NITL Petition and attempted to answer the Board's questions, the more apparent it was that the NITL proposal was so incomplete and ambiguous that it prevents meaningful analysis. However, the NITL Petition is fatally flawed legally. The agency, its predecessor, and the court of appeals have all found that Section 11102 does not give the agency the power to restructure the rail industry. Congress also has never amended the statute to give the agency that power.

The statutory scheme was designed to give railroads the ability to become more streamlined and more efficient for the good of the public interest and freight transportation. Railroads have enhanced single-line service and minimized car handlings in order to promote the public interest in an efficient rail transportation network that serves the needs of a diverse group of shippers. Even if it were not legally flawed, the NITL proposal would undermine all those achievements.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John M. Scheib", is written over a horizontal line. The signature is stylized and cursive.

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March 1, 2013

APPENDIX

Examples of Contracts with Volume Commitments of 75% or Greater

{{FILED UNDER SEAL}}

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 711

PETITION FOR RULEMAKING TO ADOPT REVISED
COMPETITIVE SWITCHING RULES

VERIFIED STATEMENT OF FRED M. EHLERS

My name is Fred M. Ehlers. I am employed by Norfolk Southern Corporation (NS) in the capacity of Vice President Network & Service Management. My office is in Atlanta, Georgia. I have been employed by NS or an NS subsidiary since 1985 and have occupied my present position since 2007. I have a Bachelor of Arts degree from Michigan State University and a Masters in Business Administration from Queens College. Since 2007, the responsibilities of my present position have included customer service and the network management.

Based on my expertise and knowledge of Norfolk Southern's operations and the significant efforts NS has made towards developing efficient service design plans that optimize both asset utilization and service performance to our customers, I believe that NITL's proposal would introduce inefficiencies into the shipment transit cycle that would result in a loss of operating efficiency for affected parts of the overall system and increase the required amount of network resources and infrastructure investment. I will focus my comments largely on NS's merchandise network, which is a good proxy for our entire system for reasons I explain below. I will also explain what we have found when we look at the intermediate handling component of the merchandise transit cycle, which allows us to posit the potential effects of the NITL's

proposal. Finally, I will discuss some examples of complexities in our existing interchange operations, which demonstrate the uniqueness of railroad operations that vary by location and capacity and operating constraints.

I. Carload network operations are complex.

The goal of good service design is to deploy existing resources in such a way that optimizes service for all of our customers.¹ The achievement of this goal is made even more difficult due to the complicated nature of network operations. Norfolk Southern’s system comprises over 20,000 route miles in 22 states, on which NS essentially runs three different networks layered on top of one another: a unit train network dedicated primarily to coal, a premium service network dedicated primarily to intermodal and automotive traffic, and a general merchandise carload network. When discussing the potential impact of NITL’s proposal on NS’s system, it makes sense to focus on our carload network because that segment of our business serves as a good proxy for the entire system. NS serves approximately 8,700 shippers and receivers over its carload network. As shown in Figure 1, merchandise traffic, or carload

{{

}}

Figure 1. 2012 NS Volume Mix (Adjusted for Rail Car Equivalents)

¹ See Mark D. Manion’s discussion of service design at pages 3-5 of his Verified Statement filed in Ex Parte 705 (“Manion Statement”).

traffic, accounted for {{ }} of NS’s 2012 volume, when adjusted for rail car equivalents.² More importantly, it accounted for {{ }} of NS’s total crew starts and approximately {{ }} of NS’s locomotive fleet.

{{

}}

Figure 2. NS Crew Starts

{{

}}

Figure 3. NS Locomotive Use

Additionally, most of NS’s infrastructure is used to serve the carload network: 12 large production hump yards, 49 medium-sized regional flat yards, and 350 small industrial serving

² NS’s publicly reported volumes include intermodal units, however different types of intermodal flat cars may carry more than one unit per car.

yards. From the service design perspective, the merchandise blocking network is very complex, with 32,000 origin-destination pairs as shown in Figure 4 below. NS provides this service using over 1,500 road-haul blocks and 5,000 local blocks.



Figure 4. NS Road Haul and Local Blocking Network

The intensive handling requirements of merchandise traffic are another reason why it is helpful to focus on this segment of NS's business in the context of this proceeding.³ Generally, each car of traffic is taken from a specific customer facility by a local train to the origin serving yard. From there, the car is taken to a classification yard, where crews sort the car along with other cars into blocks headed for the same destination. Depending on the type of yard, the sorting process involves either sending the cars over a hump or flat switching them (with crews in locomotives pushing cars around) onto classification tracks. Cars are grouped into blocks

³ For a better idea of the operations involved with moving a car from origin to destination, please see NS's Carload Network video, which can be viewed at <http://www.youtube.com/watch?v=oDTnIJsENwc>.

based on common destination. Once the cars are sorted into blocks, the blocks are combined into trains in the forwarding, or departure, yard. Although a car may have to go through several classifications at various yards, when it arrives at the serving yard near its destination or interchange location, a local train will then take it to its specific destination or interchange point. Each handling event consumes resources and introduces delays in transit time for the traffic. To optimize network efficiency, NS tries to maximize long-hauls, minimize car handlings and switches, minimize the number of times a car must be handled in a yard, maximize train lengths, consolidate traffic flows, and engage in other activities to increase efficiency.

The loaded merchandise transit cycle can be broken down into distinct components: origin handling, intermediate handling, road transit, and destination handling. Figure 5 shows the percentage of total transit time attributable to each component based on 2012 carload data:

{{

}}

Figure 5. Merchandise Transit Cycle Time Allocation

The origin handling component {{ }} represents the time from when the car is pulled from the customer to the departure from the origin serving yard. The road transit component {{ }} represents the time a car is moving on a road train, while the intermediate handling

component {{ }} represents the time a car spends, or dwells, at any intermediate yards. Finally, the destination handling component {{ }} represents the time from arrival at the destination serving yard to customer availability and placement. Obviously, the biggest component of the transit cycle for loaded carloads is the intermediate handling portion. This is the part of the transit cycle that will be directly affected by the NITL proposal, which will increase the number of car handlings per shipment and increase intermediate dwell time as a result of disaggregating traffic flows and staging traffic over unproductive interchange points.

II. Increases in the number of intermediate handlings result in decreased shipment velocity and service performance.

The number of car handlings per shipment drives the size of the intermediate handlings component. Figure 6 below shows the number of handling events used to move NS’s loaded carload traffic in 2012.

{{

}}

Figure 6. NS Number of Intermediate Handlings per Shipment

On average, NS’s carload traffic had {{ }} intermediate handlings per car. Total number of handlings averaged {{ }} when handlings at origin and destination are included.

Minimizing the number of intermediate handlings is critical to optimizing shipment velocity.⁴ Shipment velocity – measured in terms of line haul miles per day (LHMpD) – is simply the total number of miles a car travels in twenty-four hours. This metric includes train speed during the road haul portion of the movement and all dwell and handling time at intermediate yards, passing sidings, and interchange, as well as non-handling delays such as crew change, inspection, and fueling activities. When we look at the relationship between the number of handlings per move and shipment velocity, we see that shipment velocity decreases on NS as the number of handlings increases. This makes sense because each handling introduces additional time during which the car is not moving towards its destination and the greater the delay, the less distance the car averages in a given day. Thus, in Figure 7 below, LHMpD decreases dramatically when one intermediate handling must occur and reduces further with each additional handling.

{{

}}

Figure 7. Shipment Velocity and Number of Intermediate Handlings

⁴ NS could also increase LHMpD by reducing the dwell per handling, reducing the non-handling dwell, and increasing train speed.

NS has applied its understanding of this dynamic to alter over time its operating plan, which has allowed it to improve or maintain shipment velocity while reducing train starts in such a way that the number of minimizes the number of intermediate handlings. Figure 8 below, which plots the average velocity on a quarterly basis from 2010 to present against the number of intermediate handlings per carload, i.e., the number of times we switch a car between origin and destination serving yards, shows this inverse relationship. As NS has reduced the average number of intermediate handlings per trip, LHMpD has increased. The graph further shows that in the first quarter of 2011 – when average car handlings increased – LHMpD noticeably decreased.

{{

}}

Figure 8. Shipment Velocity versus Intermediate Handlings

During the last several months, NS has reduced the operating plan by {{

}}, but in a way that reduces or holds steady the number of intermediate handlings thereby maintaining or improving shipment velocity over the same period.

In the context of NS's response to the Board's request for information on operational impact in Ex Parte 711, understanding the connection between the number of handlings and shipment velocity is particularly useful because we have found that shipment velocity is highly correlated to service performance, as measured by NS's composite service metric.⁵ NS's composite service metric is made up of three components: train performance, connection performance and plan adherence. Train performance refers to how well a train runs according to its schedule, connection performance refers to how well shipments make their connections, and plan adherence refers to how well a train performs its scheduled activities.⁶ When we consider the three components of our service performance metric, it seems intuitive that the shipment velocity would be highly correlated to service performance. When shipment velocity is high and the system is running well, you would expect that trains and shipments move between origin and destination pairs on time and perform all of the planned activities and according to the operating plan. Conversely, when system velocity slows because of increased handlings, as occurred in the first quarter of 2011, it affects all customers because a slower system velocity means that many customers' cars are moving more slowly. Lower shipment velocity affects trains, not just individual cars. This is true irrespective of volume.⁷ Therefore, because changes in traffic volume do not account for changes in velocity, it is a valid indicator for service performance regardless of traffic demand. Beyond the benefits described above for better customer service, NS seeks to maximize LHMpD because higher shipment velocity translates into better asset utilization in the form of higher equipment turns, fewer locomotive hours, and fewer crew hours.

⁵ A correlation analysis yields an r^2 value of 0.6752. See Exhibits A and B.

⁶ For example, in order to adhere to a train's scheduled time table, a crew may choose to forego picking up or setting out cars at a particular location. In this particular case, a train might meet its train performance metric goal, but still fall short on its plan adherence measure.

⁷ Our analyses indicate that velocity is not dependent on volume. See Exhibit C for correlation analyses.

III. Interchanges have unique operating characteristics.

As Mark Manion discussed in his verified statement submitted in EP 705 and as is borne out by the data, interchange operations necessarily introduce inefficiencies into service because of the increased number of handlings and the delivery and receipt processes required to move the traffic from one system to the next. *See* Manion Statement at 6-16. The nature of the operations at each interchange location also differs because each interchange is different based on capacity and operational constraints. In order to fully understand the NITL's proposal's potential impact on operations, it is important to understand the limitations of each interchange which can only be done on a case-by-case basis.

In 2011, there were 170 interchange locations on NS. Figure 9 below shows all the interchange points NS has with Class I railroads and the circles illustrate the 30-mile radius around each interchange point. This map includes interchange points no matter how frequently used. Many of the interchange points are not used. NS has worked hard over the years to reduce the number of interchanges that are actively used, to consolidate traffic moving to those interchange points (i.e., maximizing block size and minimizing the number of blocks), and to avoid interchange where possible by moving the traffic from origin to destination in single-line service. In particular, NS and CSX have made significant progress in our efforts to date.

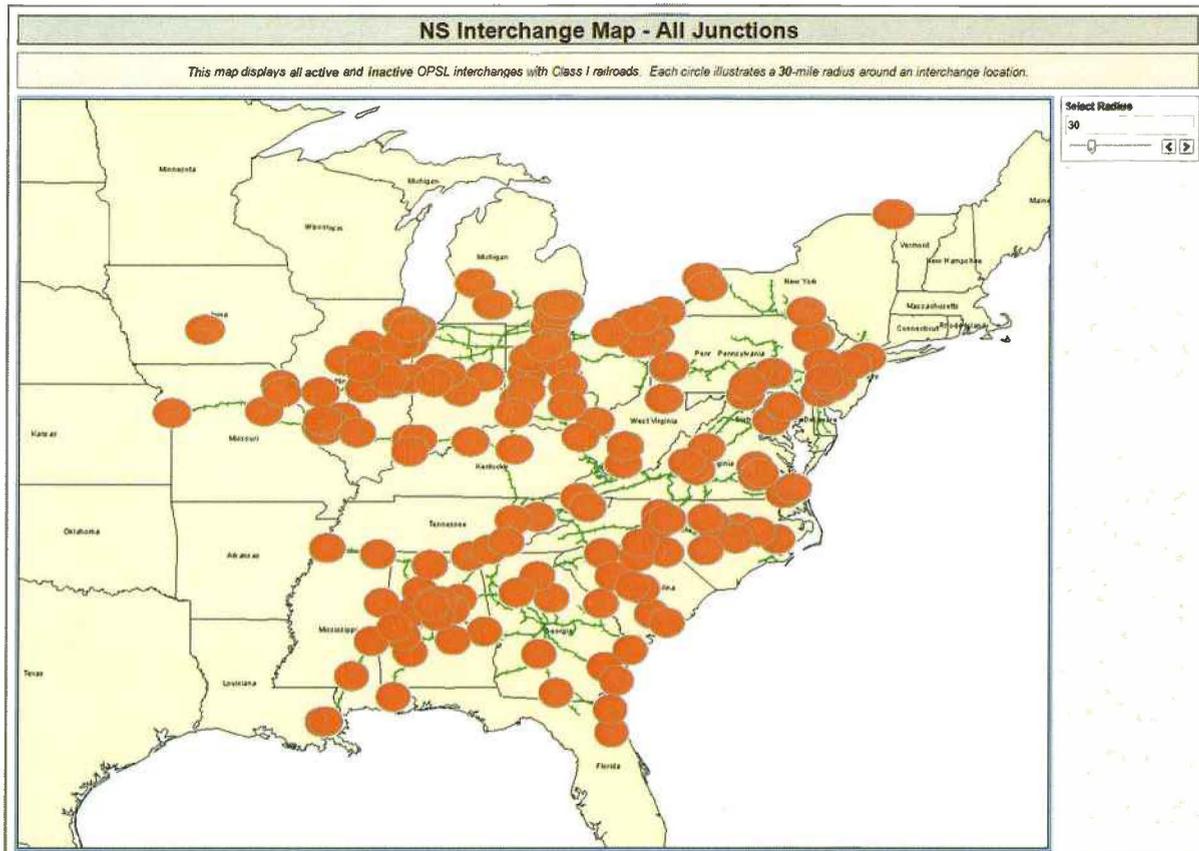


Figure 9. NS Interchange Locations with Class Is

In 2011, NS and CSX had more than 150 possible interchange points, 47 over which flowed the majority of the traffic interchanged between the two carriers. Today, 36 physical interchange points handle approximately 90% of the traffic interchanged between NS and CSX. By doing this, NS and its interline partners have consolidated traffic flowing over those particular interchange locations that best match the demands of the traffic flowing over that interchange in such a way that maintains or improves shipment velocity. For example, NS and its interline partners have increased shipment velocity and efficiency by consolidating traffic flows of TIH traffic over those interchange locations that meet federal safety and security regulations for hazardous materials and TIHs. It is unclear whether the NITL's proposal contemplates the unraveling of these gains made by NS and its interchange partners for the sake of forced access.

Even at those locations where interchange operations occur today, the data shows that these operations are inefficient compared to single-line service. To demonstrate the inherent inefficiency associated with interchange operations, NS examined the movement records of general merchandise traffic in the third quarter of 2012 for traffic being delivered to CSX in interchange. For each location with sufficient data, NS looked at the amount of time a car spent within one hundred miles of an interchange before being placed at the interchange for delivery to CSX; NS started the time measurement either (a) when a car reached a distance of one hundred miles from the interchange on NS's system or (b) when a car was picked up from a customer origin within one hundred miles of the interchange. NS further broke out the amount of time that car dwelled while in that 100 mile vicinity; that is, the amount of time the car records show the car was not part of a train movement.

Although the use of 100 miles is somewhat arbitrary, it is necessary to track car movements prior to interchange within a meaningful area to reflect the differences in system infrastructure or operations required to handle a car to interchange, which would not be captured completely by looking solely at the interchange itself. For example, a car may require an additional switch to be placed on a local train that serves an interchange or it may dwell somewhere within the 100 miles around the interchange point if the interchange operation between two railroads does not occur daily or when the interchange is at capacity. In short, the nature of the operations or capacity constraints may be such that a car spends a lot of time within the 100 mile radius because its intermediate handlings occur far from the interchange.

Table 1 below shows the average time spent within the 100 mile vicinity and the dwell time component of that time for five NS-CSX interchanges. At a minimum, the lengthy vicinity

{{

}}

times reflect the complicated nature of each existing NS-CSX interchange location. As such, generalizations cannot be made about the availability or ease of switching additional volumes at any location without considering individual factors. Factors such as operational constraints, the type of traffic, track capacity, and configuration can all result in the increased delay and variability of interchanged shipments shown above. Specific examples from NS's system demonstrate that every interchange is different.

a. Yard configuration and capacity constraints affect the ability to interchange traffic with other roads.

For example, in the Atlanta area, NS's Inman Yard is located directly adjacent to CSX's Tilford Yard, a few miles northwest of downtown Atlanta. A schematic of NS and CSX operations in the Atlanta area is included as Exhibit D. At first blush, one might assume that interchange occurs quickly and directly between the two yards. Instead, some traffic interchanged between CSX and NS in Atlanta {{

}}

that would not be able to handle increases in interchange volume.

NS's Inman Yard used to operate as a general freight yard, during which time NS and CSX carried out reciprocal switching between Inman Yard and Tilford Yard as frequently as

multiple times a day. However, in the 1990's NS began using Inman Yard as an intermodal facility to serve the Atlanta area. As NS's intermodal business has expanded, removing trucks and congestion from the roadways, intermodal traffic at Inman Yard has grown to the point that there is no longer any capacity for general merchandise traffic. {{

}} These operations make interchange in Atlanta extremely complex, and operations differ depending on the direction of the interchange.

i. Traffic Originating in Atlanta on CSX and Interchanged to NS

Under current operations, traffic interchanged from CSX to NS in Atlanta {{

}} A car from a current CSX customer originating traffic within 30 miles and passing over the Atlanta interchange to NS, like those that would be eligible under the NITL proposal, is interchanged from {{

}} and travels through to its destination.

ii. Traffic Interchanged From CSX to NS for Delivery in Atlanta

{{ }} for a customer's car which is currently interchanged from CSX to NS in Atlanta for delivery to a destination within 30 miles of the interchange, again like those who would be eligible for forced switching under the NITL proposal. Table 2 below illustrates the handling of a car interchanged from CSX to NS in Atlanta and destined for Forest Park, GA, a little over ten miles south of downtown and well within a thirty mile radius of the interchange.

{{

}} and finally to the customer facility. Assuming the car makes all trains as scheduled, the total transit time on NS from receipt from CSX in Atlanta until delivery ten miles away will take {{ }}.

iii. Traffic Originating in Atlanta on NS and Interchanged to CSX

Local traffic originating on NS within thirty miles of Atlanta also cannot use the intermodal facility at Inman Yard to interchange with CSX. Instead, {{

}} is currently capacity constrained. If local interchange volumes increased significantly, as is possible under NITL's proposal, NS would not be able to handle current general freight traffic {{ }} as well as the new volume. Such a change would leave NS with limited possibilities: remove some of the customers currently utilizing {{ }} to increase capacity, and presumably build new capacity elsewhere for them; create a new facility in the Atlanta area for interchange traffic, which would require a time-consuming permitting and construction process, not to mention the expense; or potentially block traffic destined to CSX at a larger yard outside of Atlanta.

iv. Traffic Interchanged From NS to CSX for Delivery in Atlanta

Like all other traffic passing over the interchange, traffic interchanged from NS to CSX for local delivery cannot be classified in the Atlanta area. {{ }}
}}

* * *

Thus, operational realities, and not the proximity of two railroads' yards or an interchange's proximity to customers, determines the extent of the adverse impacts from forced

access. Indeed, Atlanta demonstrates that the implications of forced switching can be drastically different depending on which direction traffic moves over the exact same location. Increased switching volumes at other interchanges could require NS to move traffic far from the location of the interchange to properly classify and block cars for delivery.

b. The need to coordinate movements with multiple carriers affects the ability to interchange traffic between carriers.

Mobile, Alabama, is another NS interchange with unique operational constraints due to fact that interchange occurs on the property of a third party, which must switch the traffic for four different carriers. NS currently interchanges traffic with CSX (as well as other railroads) in Mobile. CSX and NS each have yards less than a mile apart along the Mobile River. A schematic of NS's operations in the Mobile area is included as Exhibit E. However, interchange does not occur over NS or CSX tracks, but instead in an adjacent yard owned and operated by the Terminal Railway Alabama State Docks (TASD), because there is no direct connection between NS and CSX. NS shares access to the TASD yard with CSX and two other carriers. NS has a local yard nearby, but must access the TASD yard over track owned by CN.

The Mobile interchange faces fundamental operational and congestion problems. These problems stem from the number of carriers that conduct operations in the TASD yard as well as the proximity of the yard to the port, which often requires TASD to manage capacity based on the arrivals and departures of vessels making calls at the port. {{

}} These interchange failures in turn cause congestion in NS's yard,

as the cars meant for interchange consume capacity sitting in NS's yard and degrade switching efficiencies.

c. The type of traffic to be interchanged affects the nature of interchange operations.

As detailed above, NS has rationalized many of its interchange locations and facilities to improve operational efficiencies. As a result, many interchanges are configured to handle the type of traffic currently interchanged, but do not have the infrastructure or the configuration to handle other train types. As discussed by Mr. Manion, Decatur is one such example, as unit train operations would be forced to occur on the mainline and potentially impact traffic on the Tennessee River by preventing bridge lifts. *See Manion Statement at 15.*

Another example is NS's interchange with CSX in Wilmington, Delaware. Interchange occurs just southwest of downtown Wilmington, alongside a line owned by Amtrak. To access the interchange tracks, NS currently has to {{

}} as depicted in Figure 9 below. NS can fit no more than 20-25 cars in the "shove" track, and {{ }} which is currently at capacity. The interchange currently is served once a week, with an average delivery of {{ }}.

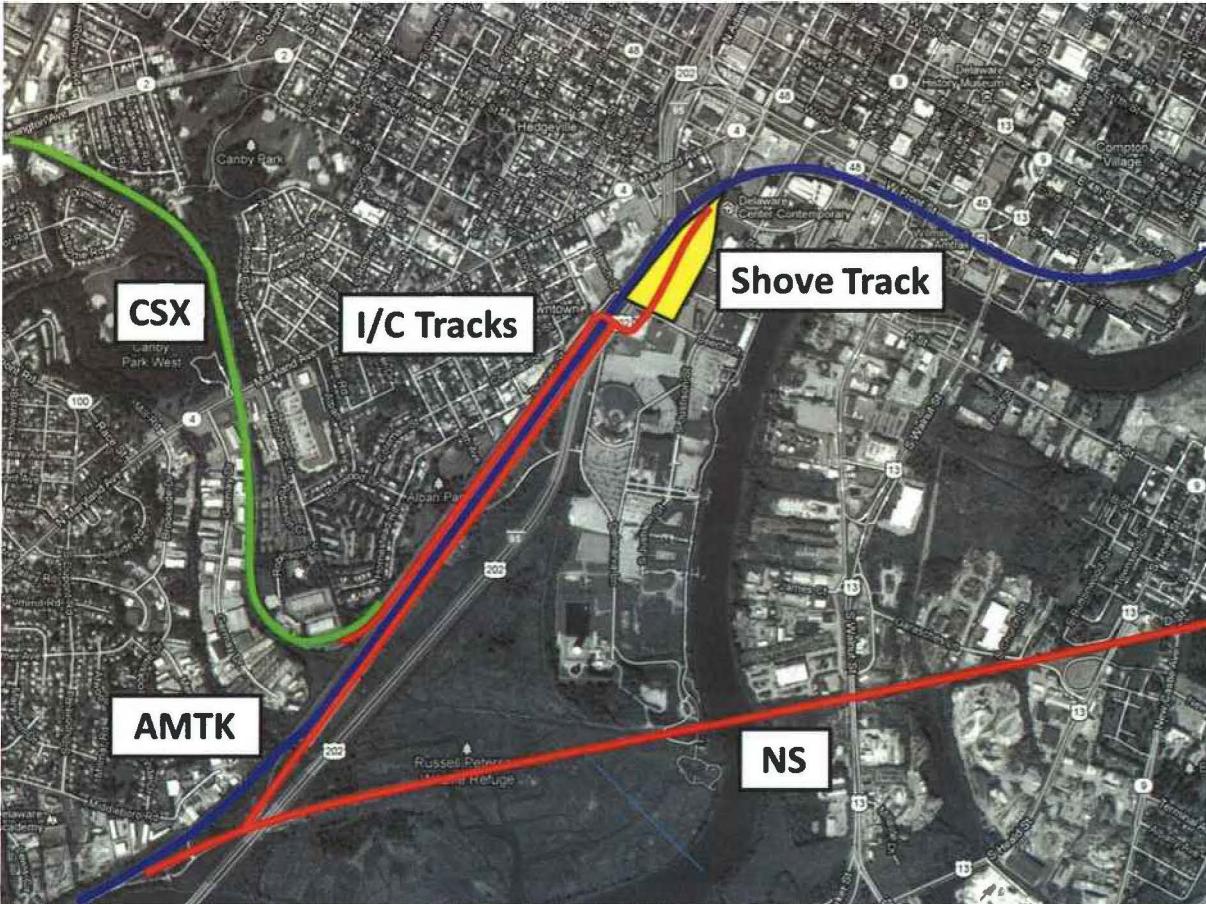


Figure 10. Wilmington, Delaware Interchange

The configuration of the interchange and the capacity constraints in Edgemoor Yard already make Wilmington a potentially problematic interchange for any changes in switching volume. However, a nearby refinery in Delaware City within 30 miles of the interchange has recently undergone major upgrades to its rail capabilities and is capable of receiving 110,000 barrels of crude oil a day by rail. See Allison Snider, *PBF Energy Completes Rail Facility at Delaware City Refinery*, WALL ST. J., Feb. 4, 2012, available at <http://online.wsj.com/article/SB10001424127887324445904578284023071463336.html?>. If NS was forced to accept crude oil-unit trains from CSX at Wilmington for delivery to Delaware City, the interchange is not designed to handle the 100 car unit trains in which it is transported. The trains would need to be broken down into at least three or four blocks and moved through the interchange separately, and

then reassembled once complete. During switching, the blocks would heap additional congestion on NS's already strained Edgemoor Yard. Needless to say, interchange would add days to the handling time of the crude oil unit trains themselves, but it would also negatively impact NS's service for other customers in the area.

e. Existing geography may result in circuitous routes that increase inefficiencies associated with interchange operations.

Finally, looking solely at the proximity of an origin or destination to an interchange location ignores the reality that due to network configurations, different railroads often have drastically different routing in terms of length and feasibility when moving shipments between geographically proximate locations. As a result, any assumptions based on the proximity to an interchange without consideration of the individual routing can lead to absurd or undesirable results that will reduce network efficiency.

A prime example of this issue is the example previously discussed in the Hampton Roads area of Virginia, shown in Figure 11 below. NS and CSX have an interchange in the Norfolk, Virginia, area, which is fewer than 30 miles from customers served solely by CSX on the Peninsula. However, for a hypothetical CSX customer in Newport News, Virginia, eligible to be switched to NS at Norfolk under the NITL proposal, CSX would have to move those cars over 200 miles – up the Peninsula, through Richmond, south through Petersburg, briefly into North Carolina, and then back east to the interchange location. Even if CSX and NS sought to minimize this circuitousness by switching the traffic in Richmond in contravention to the NITL proposal, the new interchange point would still be more than 70 miles by rail from the customer's location.

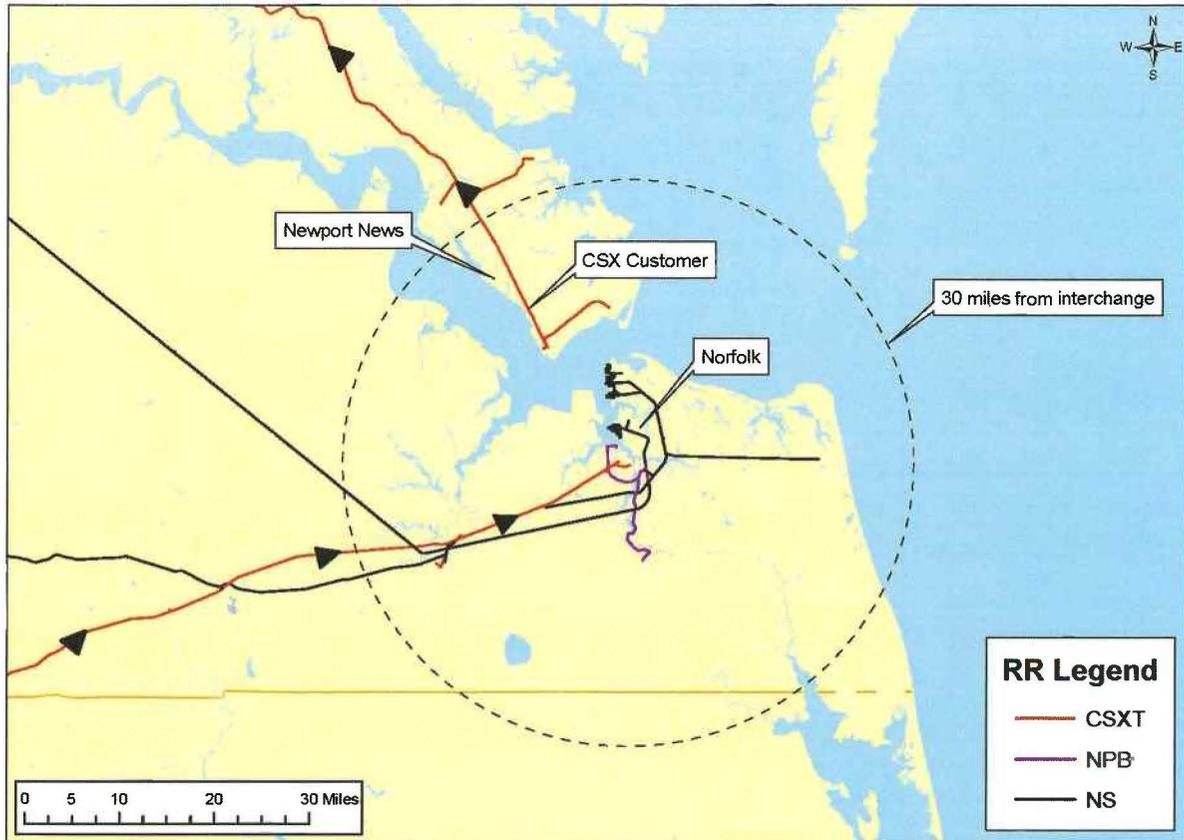


Figure 11. NS and CSX Interchange in Hampton Roads

Another example is that NS and CSX have an interchange at Winston Salem, NC, which is within 30 miles of the coal-fired power plant known as Belews Creek, which is solely-rail served by NS. A schematic of NS’s operation in the Winston Salem area is included as Exhibit F. Tables 3 and 4 below show the trip plans for a car moving via NS-direct service and moving in joint NS-CSX service, respectively.

{{

}}

Today, NS hauls coal directly to Belews Creek from Williamson, WV, over a route that is 306 miles. If the power plant availed itself of the NITL proposal, CSX would originate the traffic at Martin, KY (a CSX served origin near Williamson, WV) and interchange it at Winston-Salem, or if granted the rights deliver directly to the plant. That route would be 576 miles. Thus, forced access would result in a more than 85 percent longer route by track miles, excluding any additional dwell and handlings. Importantly, it may not even be possible to interchange unit coal trains at Winston-Salem without substantial additional track capacity.

IV. Existing capacity constraints limit the ability to interchange traffic on demand.

Interchanges may operate well under current conditions, but depending on the location of the interchange, the amount of track capacity at and near the interchange site, the location of the railroads' yards, and other factors, many interchanges could not operate efficiently in the face of an increase in switching volume. NS's interchange with CSX in Decatur, Alabama, which Mr.

Manion discussed in EP 705, is an example of a location that faces capacity constraints under current conditions. *See* Manion Statement at Appendix B. Increased switching volumes at Decatur or other capacity constrained interchanges would at a minimum increase intermediate dwell time for shipments that previously moved in single-line service and likely result in dwell times increasing for all traffic moving in the vicinity of the interchange. Increased dwell consumes car and track capacity.

Every car dwelling at or in the vicinity of each interchange requires enough track to sit on while awaiting interchange, as well as an extra factor to permit the car to be switched around. As a general rule, we assume each car length to be 60 feet per car and we add a factor of 67% to the track length of the cars for which capacity is sought to accommodate that car's handling. Of course, additional track footage is just one of a number of different capital improvements that may be required for increased switching capacity based on the conditions at individual interchange locations. New infrastructure also may be needed just to maintain current levels of fluidity as more traffic is forced over an interchange. Additional locomotives, cars, and crews may be needed to offset the reduced efficiency from reversing years' worth of effort to eliminate handlings, lengthen hauls, and increase train lengths.

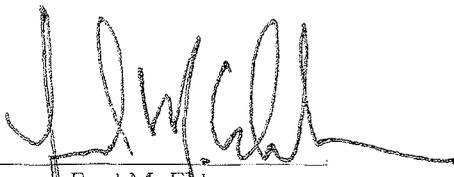
Conclusion

The Board has asked for empirical analyses to help it evaluate the NITL's one-size-fits-all proposal on mandatory switching, but it is difficult to conduct an accurate empirical analysis due to the ambiguities within the proposal. We know that the NITL proposal will increase number of handlings, which will decrease velocity and most likely will be accompanied by a decrease in our service composite metric because we understand the relationship between the number of intermediate handlings and LHMpD. We also know that inefficiencies introduced at various interchange locations throughout the system will affect all traffic handled in the vicinity of the affected interchange locations and will ripple through the network. Thus, the decreases in LHMpD that would result from NITL's proposal would affect many customers across the system – not just customers in the immediate vicinity of the complainant. Further, additional capacity -- track, cars, locomotives, and crews – would be needed to maintain current service levels. Quantifying precise costs associated with mandatory switching could vary widely because each interchange location has unique physical and operating characteristics.

Verification

I, Fred M. Ehlers, verify under penalty of perjury that I am Vice President Network & Service Management of Norfolk Southern Corporation, that I have read the foregoing document and know its contents, and that the same is true and correct to the best of my knowledge and belief.

Executed on 2/28/13



Fred M. Ehlers

{{EXHIBIT A}}

{{FILED UNDER SEAL}}

{{EXHIBIT B}}

{{FILED UNDER SEAL}}

{{EXHIBIT C}}

{{FILED UNDER SEAL}}

{{EXHIBIT D}}

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