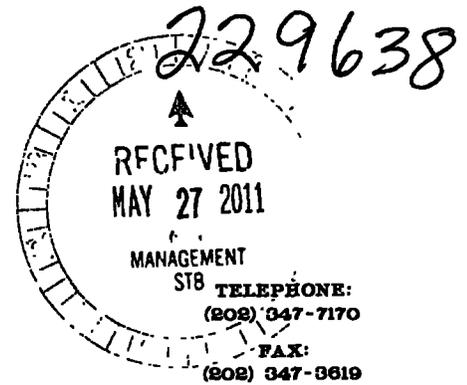


WILLIAM L. SLOVER
C. MICHAEL LOFTUS
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PETER A. PFOHL
DANIEL M. JAFFE
STEPHANIE P. LYONS
STEPHANIE A. ARCHULETA

OF COUNSEL
DONALD G. AVERY

SLOVER & LOFTUS LLP
ATTORNEYS AT LAW
1224 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036-3003



WRITER'S E-MAIL:
abk@sloverandloftus.com

May 27, 2011

BY HAND DELIVERY

Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

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Office of Proceedings
MAY 27 2011
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Re: STB Ex Parte No. 705, Competition in the Railroad Industry

Dear Ms. Brown:

Enclosed for filing in the above-referenced proceeding please find an original and ten (10) copies of the Reply Comments of the Concerned Captive Coal Shippers. We have provided an electronic copy of these Reply Comments on the enclosed disk. Finally, we have enclosed an additional bound copy of the Reply Comments to be date-stamped and returned to the bearer of this letter.

Thank you for your attention to this matter.

Sincerely,

C. Michael Loftus
Andrew B. Kolesar III
*Attorneys for the Concerned Captive
Coal Shippers*

Enclosures

229638



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

COMPETITION IN THE RAILROAD)
INDUSTRY) Ex Parte No. 705
)
)
)

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**REPLY COMMENTS OF
CONCERNED CAPTIVE COAL SHIPPERS**

By: C. Michael Loftus
Christopher A. Mills
Andrew B. Kolesar III
Slover & Loftus LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170

*Attorneys for the Concerned Captive
Coal Shippers*

Dated: May 27, 2011

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Verified Statement of Richard H. McDonald

Verified Statement of Thomas D. Crowley

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

COMPETITION IN THE RAILROAD)
INDUSTRY)

Ex Parte No. 705

**REPLY COMMENTS OF
CONCERNED CAPTIVE COAL SHIPPERS**

The Concerned Captive Coal Shippers (“Concerned Coal Shippers” or “CCCS”) hereby provide these Reply Comments in accordance with the Board’s Notice of Public Hearing served January 11, 2011 (“Notice”), as modified by its Decision served February 4, 2011.

INTRODUCTION

The Board instituted this proceeding to consider what, if any, measures it should take to modify its competitive access rules and policies. In their initial Comments dated April 12, 2011, the Concerned Coal Shippers advanced a series of proposals that would allow the Board to fulfill the goals of the Staggers Act and the ICCTA through the adoption of new competitive access regulations. Most notably, the Concerned Coal Shippers recommended that the Board adopt objective and readily ascertainable measures for determining whether a shipper is entitled to the prescription of an alternative through route pursuant to 49 U.S.C. § 10705. These objective tests relate to the revenue-to-variable cost (“R/VC”) levels associated with the current rail transportation service to a given shipper, and would provide a narrow and well-defined form of relief that would be

available where needed to provide adequate, and more efficient or economic, transportation.

In their opening Comments, the Association of American Railroads (“AAR”) and the various Class I carriers (collectively, the “Railroads”) stridently object to the Board’s consideration of any modification to the competitive access rules whatsoever. First, certain of the Railroads claim that the Board lacks the authority to modify its 1985 competitive access rules because Congress supposedly has “ratified” those rules. According to these Railroads, Congress’ decision to enact the ICCTA and Congress’ subsequent refusal to make any additional legislative changes to the Act collectively have deprived the Board of the discretion to revise its own regulations.

Beyond this question of agency authority, the entire set of Class I Railroads commenting in this proceeding insists that changes to the current competitive access rules are unwarranted as a matter of policy. Specifically, the Railroads claim that a transition to unfettered “open access” would devastate the rail industry, would hamper the interests of shippers, and would harm the nation’s economy. As described in greater detail below, the Railroads argue both that: (i) the Board should refrain from making *any* change to the competitive access rules; and (ii) switching to a system of *complete* open access would be devastating. The Railroads’ Comments lack any suggestion (or proof), however, that narrow proposals to refine the competitive access rules – such as those advanced by the Concerned Coal Shippers – would have an adverse impact on the industry. Notably, the Railroads also argue that any regulatory principle that forces a carrier to take action that it

has not chosen to take on its own initiative – such as accepting traffic in interchange – contradicts the efficient operation of the market.

In these Reply Comments, the Concerned Coal Shippers respond to each of the Railroads' principal arguments. First, the Concerned Coal Shippers demonstrate that the claims regarding constraints on the STB's authority to modify its regulations both overstate the significance of the "ratification" principle as a matter of law and are based upon improper factual inferences regarding the status quo that existed as of the 1995 enactment of the ICCTA. Rather than supporting a finding that Congress removed the Board's authority to modify its regulations, Congressional enactment of the ICCTA (or Congress' subsequent inaction with respect to various legislative proposals) instead demonstrates only that Congress intended to leave the development and administration of proper competitive access regulations firmly within the discretion of the agency itself.

Second, the Concerned Coal Shippers show that the Railroads' various policy arguments in opposition to changing the competitive access rules are flawed as well. On the basis of expert testimony presented by Mr. Richard H. McDonald and Mr. Thomas D. Crowley, the Concerned Coal Shippers demonstrate that the Railroads' operational and cost-based arguments are vastly exaggerated and inappropriate. The Concerned Coal Shippers also address the wide gulf between the narrow relief that they seek and the far broader "open access" relief that represents the principal target of the Railroads' Comments. The Railroads' straw-man arguments regarding the sweeping operational and cost impacts of open access are entirely irrelevant to the consideration of

the Concerned Coal Shippers' narrow proposals. The Concerned Coal Shippers respectfully submit that their effort to articulate a reasonable means of providing competitive access relief in limited circumstances represents a constructive approach of the nature the Board's notice instituting this proceeding appears to have sought. Railroad exaggerations and threats of imminent economic doom from any change to the status quo do not advance the Board's objective in this proceeding.¹

SUMMARY OF PROPOSALS

By way of background, the Concerned Coal Shippers briefly restate the proposals that they made in their initial Comments.

(1) The Concerned Coal Shippers request that the Board replace its competitive access rules at 49 C.F.R. § 1144 with rules that would provide objective and readily ascertainable standards for determining whether the prescription of a through route (including a through route that would short-haul a rail carrier) is desirable in the public interest and is needed to provide adequate, and more efficient or economic, transportation. Specifically, the Concerned Coal Shippers request that the Board

¹ In this same regard, the Railroads' repeated observations regarding the extent of their infrastructure investments do not provide a legitimate basis for opposing the relief proposed by the Concerned Coal Shippers. Carriers, of course, are not the only entities that are required to make substantial infrastructure investments; shippers likewise make enormous investments in their facilities. Even more importantly, the Railroads' supposition that any modification to the competitive access rules would jeopardize this investment in railroad facilities is simply unwarranted in light of the limited relief the Concerned Coal Shippers seek.

establish a bright-line standard of the nature of the Board's class exemptions that would be based upon the R/VC level – calculated using the STB's URCS Phase III costing program – for service from the subject origin to the subject destination under the existing routing. If the current carrier offers a rate for the existing route that exceeds the carrier's most recent single-year Revenue Shortfall Allocation Methodology ("RSAM") level,² that fact should trigger an automatic right to the prescription of an alternative through route under the standards of 49 U.S.C. § 10705(a)(1) and 49 U.S.C. § 10705(a)(2)(C), subject only to a demonstration that the new route would be operationally feasible.

(2) The Concerned Coal Shippers request that the Board establish a second bright-line standard to allow a shipper to obtain the prescription of an alternative through route where: (i) the alternative through route would be shorter than the current routing; (ii) the alternative through route constitutes a practicable means of handling the traffic; and (iii) the R/VC ratio for the existing route exceeds the existing carrier's most

² "RSAM measures the average markup that the railroad would need to charge all of its 'potentially captive' traffic in order for the railroad to earn adequate revenues as measured by the Board under 49 U.S.C. § 10704(a)(2)." *Simplified Standards for Rail Rate Cases – 2008 RSAM and R/VC_{>180} Calculations*, STB Ex Parte No. 689 (Sub-No. 1) at 1 (STB served July 27, 2010); *id.* ("Potentially captive traffic is defined as all traffic priced at or above the 180% R/VC level –which is the statutory floor for regulatory rail rate intervention.").

recent single-year “revenue-to-variable cost percentage above 180” or “ $R/VC_{>180}$ percentage.”³ See 49 U.S.C. § 10705(a)(2)(B).

(3) In either of the two foregoing situations, if the shipper first secures a rail transportation contract with the non-bottleneck carrier (for service from an origin already served by the bottleneck carrier), the Concerned Coal Shippers propose that the Board likewise apply these two trigger standards, albeit in a slightly modified manner. Specifically, the Board first should calculate an imputed rate for the bottleneck segment by subtracting: (i) the non-bottleneck carrier’s contract rate, from (ii) the bottleneck carrier’s rate for single-line service. If the R/VC ratio associated with that imputed rate for the bottleneck segment exceeds the bottleneck carrier’s most recent single-year RSAM value, then the shipper should be entitled to the prescription of an operationally feasible alternative through route using the contract service over the non-bottleneck segment. Moreover, where the origin-to-destination routing via the non-bottleneck carrier is shorter than the current single-line routing, then the trigger value for prescribing an alternative through route will be the bottleneck carrier’s most recent single-year $R/VC_{>180}$ value.

(4) Next, the Concerned Coal Shippers request that the Board adopt a rule permitting shippers to petition the Board for the prescription of an alternative

³ The $R/VC_{>180}$ benchmark “measures the average markup actually applied by the defendant railroad on its potentially captive traffic.” *Simplified Standards*, STB Ex Parte No. 689 (Sub-No. 1) at 2.

through route in situations in which they believe that facts exist that would justify relief under 49 U.S.C. § 10705(a)(2)(A). Specifically, a shipper should be permitted to seek relief on an expedited basis where a carrier has subjected the shipper to unreasonable discrimination (49 U.S.C. § 10741), where a carrier has failed to provide “reasonable, proper, and equal” facilities for interchange (49 U.S.C. § 10742), or where the prescription of a through route is necessary to effectuate other forms of competitive access relief (49 U.S.C. § 11102). The Board should not require a showing of anticompetitive conduct as a pre-condition to relief under Section 10705(a)(2)(A).

(5) The Concerned Coal Shippers further request that the Board adopt a rule that – in the absence of agreed-upon divisions between the carriers providing a prescribed alternative through route (and in the absence of a contract between the non-bottleneck carrier on the alternative through route and the shipper) – divisions for the alternative through route shall be set on the basis of a straight mileage pro-rate.

(6) The Concerned Coal Shippers also request clarification that the existence of an alternative through route prescribed under Section 10705 should not operate as a bar to a finding of market dominance on the pre-existing routing in a maximum rate case. Likewise, the existence of the pre-existing routing should not operate as a bar to a finding of market dominance on the prescribed alternative routing. Such a maximum rate case would proceed under the Board’s current standards, and the through route prescription trigger levels (*i.e.*, the RSAM level for relief under Sections

10705(a)(1) and 10705(a)(2)(C) and the R/VC_{>180} level for relief under Section 10705(a)(2)(B)) would not play any role in the determination of maximum rates.

Moreover, as confirmed in the *Bottleneck* decisions,⁴ if the shipper obtains a contract with the non-bottleneck carrier for service on the alternative route, the shipper is entitled to challenge the reasonableness of the rate on the bottleneck segment of the alternative routing.

(7) Finally, the Concerned Coal Shippers request that the Board ease the burden of proof under the competitive access regulations for shippers seeking terminal trackage rights or reciprocal switching, and clarify the scope and availability of such potential remedies as more fully addressed in the Concerned Coal Shippers' Comments.

REPLY COMMENTS

I. The Railroads' Interest in Avoiding Regulatory Oversight is Not a Sufficient Justification for Ignoring the Public Interest

The Railroads argue that the STB cannot, and in any event should not, take action that would modify the current competitive access rules in any respect. According to the Railroads, any regulatory directive in this regard would require a rail carrier to take action that it did not elect to take on its own initiative and therefore would improperly contradict the workings of the free market and notions of efficiency. *See* AAR

⁴ *Central Power & Light Co. v. Southern Pac. Transp. Co.*, 1 S.T.B. 1059, 1074-75 (1996) ("*Bottleneck I*"), *clarified*, 2 S.T.B. 235, 245 & n.15 (1997) ("*Bottleneck II*"), *aff'd sub nom. MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999).

Comments at 47 (“By requiring access, the regulator undertakes a decision that a market participant determined did not make economic sense and did not undertake.”); *id.* at 3 (“The notion of ‘facilitating’ competition involves disturbing the existing balance by trying to force additional competition through regulation rather than relying on market forces”); *id.*, Verified Statement of Robert Willig (“Willig V.S.”) at 17 (“If there were an efficient competitive alternative, the market would either support two independent facilities *or* the incumbent railroad, recognizing the efficiency of a competitive entrant, would have incentives to agree to a negotiated access agreement.”); *id.* (“[I]n markets where there is only one participant and no competitive concern, regulator-imposed access coercively mandates arrangements for sharing facilities that are not sufficiently efficient to have emerged from market forces.”).

This argument amounts to little more than the expressed preference of a regulated industry that it not be regulated. If an administrative agency may not require a carrier to act in a manner that is contrary to what the unrestrained market itself dictates as an efficient or optimal outcome, then the agency has little or no authority to act. While this line of argument may have tremendous appeal to rail carriers, it does not represent sound public policy and it is certainly not the policy reflected in Title 49.

The fundamental essence of administrative regulation is that it requires market participants to act in a manner that they may not have chosen on their own in order to advance a greater public interest; in other words, it *regulates* their conduct. Consequently, the fact that a regulatory policy may force a carrier to face competition on

a given movement or may require a destination monopolist to accept traffic in interchange when it would prefer to handle the traffic on an origin-to-destination basis is not a valid justification for opposing the policy.

The Railroads insist in their Comments that they support regulatory intervention in situations involving competitive abuse,⁵ but the past twenty-five years of experience under the current competitive access rules demonstrate beyond question that this support is without genuine meaning. If it is impossible for a shipper to demonstrate anticompetitive conduct or abuse, then the policy of allowing relief only in such circumstances is equivalent to the policy of entirely precluding competitive access relief.

Another preliminary issue warrants mention. The Railroads' Comments abundantly confirm that the Board cannot depend upon individual carriers to compete in a manner that will benefit shippers. To the contrary, the Railroads are unanimous in their opposition to any regulatory structure that would give them the opportunity to win business currently served by another carrier. In light of this situation, the Concerned Coal Shippers respectfully submit that the proposals they have advocated represent a constructive means of fulfilling the purpose and goals of Section 10705 in a manner that does not depend upon the consent of a Class I carrier either to open its current service up

⁵ See, e.g., AAR Comments, Willig V.S. at 4 (“[W]here there is no competition in a market due to the costly nature of alternative sources of supply and due as well to high barriers to entry, . . . some degree of regulation may be warranted to control prices, prevent or remedy abuses of market power, and encourage the provision of additional supply.”); BNSF Railway Company (“BNSF”) Comments at 3-4.

to competition or to “invade” the competitive territory of another carrier (*e.g.*, by competing to provide service over a non-bottleneck segment). As the Railroads’ extensive Comments demonstrate, neither form of consent is likely in the current state of the industry. Shippers therefore must depend upon the agency to protect the public interest.⁶

II. Contrary to the Arguments of Certain Class I Railroads, the STB has the Authority to Adopt the CCCS Proposals

Certain of the Railroads argue in their Comments that the Board lacks any authority to modify its own competitive access rules as the result of Congress’ supposed “ratification” of the existing regulations. The Railroads making this claim include Norfolk Southern Railway Company (“NS”), CSX Transportation, Inc. (“CSXT”), and Canadian Pacific Railway Company (“CP”). *See* NS Comments at 14-29; CSXT Comments at 2-10, 26-29; CP Comments at 5-9, 43-51.

⁶ The Railroads’ opposition to any regulatory measures that would “force” them to compete or would introduce “artificial” competition is in stark contrast to the AAR’s own argument regarding the cause of the financial difficulties plaguing the industry in the 1970’s. Specifically, the AAR argues that the open routing and rate equalization requirements of the pre-Staggers era were problematic because under that regime, “railroads were *prohibited from responding to market forces by competing with one another . . .*” AAR Comments at 27 (emphasis added). In other words, the Railroads simultaneously contend that by prohibiting intramodal competition in the 1970’s, the agency contributed to financial turmoil in the industry, but that by facilitating intramodal competition through new competitive access rules at the present time, the agency likewise would contribute to the financial ruin of the industry.

These Railroads perceive Congressional ratification of the ICC's 1985 competitive access rules in two respects. First, they argue that Congress ratified the competitive access rules by enacting the ICCTA in 1995 without statutorily overruling either the agency's existing regulations or the D.C. Circuit's opinions relating to those regulations (*i.e.*, *BG&E* and *Midtec*). Next, the Railroads argue that by refusing subsequent requests to amend Title 49, Congress effectively has given further approval to the 1985 competitive access rules (and has approved the Board's handling of the bottleneck disputes).

According to these Railroads, Congress – by its action and subsequent inaction – actually has precluded the Board from making any changes to its own regulations. *See, e.g.*, NS Comments at 4 (“Statutory constraints *preclude the Board from altering* its competition-related rules”) (emphasis added); *id.* at 14 (“The Board’s existing forced interchange and forced access standards have been approved by Congress, and the *Board does not have authority* to alter these policies unless Congress acts”) (emphasis added); *id.* at 15 (“The Board *lacks the authority* to rewrite fundamental policies that Congress has explicitly endorsed and repeatedly refused to revise.”) (emphasis added); *id.* at 16 (“[A]n agency *does not have freedom to reverse itself* if Congress has approved of the previous interpretation.”) (emphasis added); CSXT Comments at 7 (“An administrative agency *does not have the power to materially change its rules and decisions* if Congress has approved of the previous interpretation.”) (emphasis added); CP Comments at 5 (“The Board’s current regulatory policies can be replaced only if

Congress chooses to alter the statutory framework upon which those policies are founded.”); *id.* at 43-44 (“Congress’s decision to re-enact the competitive access provisions of the Interstate Commerce Act in 1995 without modification effectively ratified the ICC’s *Midtec* approach. . . . This ‘ratification’ of the ICC’s interpretation of the Staggers Act provisions *can be reversed only by Congress.*”) (emphasis added). The Railroads’ claims in this regard are entirely unsupported and mistaken.

A. Tension Exists in the Various Railroads’ Comments Regarding the Extent of the Board’s Authority

As an initial matter, the Concerned Coal Shippers note that neither the AAR nor the other Class I carriers participating in this proceeding (*i.e.*, Union Pacific Railroad Company (“UP”), BNSF, or Kansas City Southern Railway Company (“KCS”)) advance this same ratification argument in their Comments. While the AAR observes that Congress has refrained from changing the competitive access rules by statute (despite being well aware of those rules), the AAR argues only that the Board “should not” modify its rules, rather than that the Board “cannot” modify those rules. *See* AAR Comments at 31. Stated differently, the AAR never adopts the NS/CSXT/CP argument that Congressional action or inaction has deprived the STB of the authority to modify its own rules. Since NS, CSXT, and CP are members of the AAR (and since their counsel appear on the signature block of the AAR Comments), it is reasonable to conclude that the AAR and the other Class I carriers were aware of – but were unwilling to advance – this “ratification” argument before the Board.

KCS goes one step further in its Comments, insisting that the Board “can make appropriate changes” to its existing processes and procedures in the future if those processes and procedures ultimately prove to be inadequate. *See* KCS Comments at 4. It is evident therefore that KCS does not share the NS/CSXT/CP view that the Board lacks the authority to make appropriate changes to its own regulations.

B. The Railroads’ Ratification Arguments Do Not Provide a Basis for Finding that the Board Lacks Authority to Modify its Own Regulations

Even beyond this tension in the various Class I Railroads’ legal arguments, the Railroads (*i.e.*, NS, CSXT, and CP)⁷ are wrong to insist the STB lacks the authority to modify its competitive access rules. In particular, the Railroads’ claim of a complete lack of authority to modify those rules misstates the nature of ratification. As the Supreme Court has explained, even the “unequivocal ratification” of an agency regulation does not “connote approval or disapproval of an agency’s later decision to rescind the regulation.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 45 (1983). In addition, the Railroads misconstrue the significance of the ICCTA and Congress’ subsequent inaction as a factual matter. Far from unequivocally determining that the Board lacked any authority to modify its regulations, Congress’ actions with regard to competitive access instead suggest that Congress intends the Board to continue to hold broad authority to administer the relevant statutes.

⁷ For the sake of simplicity, the Concerned Coal Shippers will refer to NS/CSXT/CP as “the Railroads” in this portion of their Reply Comments.

In that regard, the Railroads wrongly interpret Congress' 1995 enactment of the ICCTA as formally codifying the ICC's prior determination that anticompetitive conduct is a necessary prerequisite for an award of competitive access relief. It is far more reasonable to interpret Congress' enactment of the ICCTA as merely reflecting Congress' view that the agency should continue to have the discretion to interpret the very general language of 49 U.S.C. § 10705 in the manner the agency deems to be appropriate in a given circumstance. The Railroads advance an interpretation favorable to their position without ever even conceding the possibility of an alternative interpretation.

The Concerned Coal Shippers respectfully submit that the alternative interpretation is far more likely in view of the facts associated with: (i) the adoption of the competitive access rules themselves; (ii) the ambivalent nature of the D.C. Circuit's review of those rules; and (iii) the absence of any explicit language in the ICCTA formally incorporating the "anticompetitive conduct" standard into Section 10705. Stated differently, the Concerned Coal Shippers submit that the most reasonable interpretation of Congress' 1995 action and its subsequent inaction is that Congress intended to leave the administration of Section 10705 in the hands of the administrative agency (rather than to deprive that administrative agency of the authority to act).

1. The Railroads Misstate the Law Regarding Ratification and Misinterpret the Relevant Facts

The Railroads cite a number of cases in their overall discussions of ratification. Critically, however, careful scrutiny of the Railroads' specific claims regarding those cases shows that the Railroads advance only a single case that even arguably relates to the Railroads' key argument that subsequent Congressional action deprives an agency of the authority to modify its previously enacted regulations. In particular, the Railroads cite *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) in support of this claim.⁸ In the portion of the decision that NS and CSXT have seized upon in their Comments, the court stated that "Congress' tobacco-specific legislation has effectively ratified the FDA's previous position that it lacks jurisdiction to regulate tobacco." *Id.* at 156.

The Railroads' complete reliance on *Brown & Williamson* is misplaced. As described below, the facts of the instant matter lack any of the key elements from *Brown & Williamson*, and instead demonstrate that Congress had no intention of depriving the

⁸ For example, NS argues that "[w]hile in some cases an agency has the authority to alter a longstanding interpretation of its governing statute if the agency has sufficient grounds for such a reversal, *an agency does not have freedom to reverse itself* if Congress has approved of the previous interpretation." NS Comments at 16 (emphasis added) (citing *Brown & Williamson*, 529 U.S. 120). CSXT also relies heavily on the *Brown & Williamson* case to support its argument that the STB lacks the authority to modify its regulations. See CSXT Comments at 7 ("An administrative agency *does not have the power to materially change its rules and decisions* if Congress has approved of the previous interpretation.") (citing *Brown & Williamson*, 529 U.S. 120); see also *id.* at 7-8 (citing *Brown & Williamson*).

Board of the authority to modify its own regulations. To the contrary, Congress afforded broad discretion to the Board to administer Sections 10705 and 11102. The Board's role as an administrative agency includes the authority to respond to changes in the industry or otherwise to modify its rules when subsequent experience demonstrates that a change in approach is appropriate.

a. ***Brown & Williamson Does Not Support the Railroads' Claim that the Board Lacks the Authority to Modify its Own Regulations***

Although, as noted above, *Brown & Williamson* makes passing reference to the concept of Congressional ratification of agency action, the principal holding of the case stems from the Supreme Court's determination under the first prong of *Chevron* that Congress had directly spoken to the precise question in dispute. *See Brown & Williamson*, 529 U.S. at 133.⁹ According to the court, Congress' overall statutory scheme demonstrated that Congress had directly mandated that tobacco sales should remain legal but FDA jurisdiction would have contradicted that mandate. Consequently, the case does not present a situation – like the instant matter – where parties claim that Congress' simple re-enactment of a very broad delegation of authority (such as Congress' re-enactment of the very broad delegation of authority in 49 U.S.C. § 10705) prevents an agency from ever changing its prior approach to the implementation of a statute.

⁹ *See also id.* at 132 (the court first must determine whether Congress has “directly spoken to the precise question at issue”) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)); *id.* at 142-43.

Brown & Williamson relates to an effort by the FDA to exercise jurisdiction over tobacco products (*i.e.*, cigarettes and smokeless tobacco) after previously disavowing such jurisdiction. *Id.* at 145-46. In particular, on August 28, 1996, the FDA asserted jurisdiction over tobacco and issued a final rule determining under the Food, Drug, and Cosmetic Act (“FDCA”) that nicotine is a drug and that cigarettes and smokeless tobacco are delivery devices for that drug. *Id.* at 127. On the basis of this factual determination (and its assertion of jurisdiction), the FDA imposed strict regulations on the marketing of tobacco products to adolescents. *Id.* at 128. The United States District Court for the Middle District of North Carolina upheld the FDA’s regulations in part, but the Fourth Circuit reversed and found that the FDA lacked jurisdiction over tobacco products. *Id.* at 130.

In affirming the Fourth Circuit’s determination, the Supreme Court relied upon the fact that FDA jurisdiction under the FDCA logically would have required a prohibition on the sale of tobacco, but Congress elsewhere had indicated its intention to permit the sale of tobacco. As the court explained, the FDCA requires the FDA to determine if a drug is safe before it can be sold. *Id.* at 134 (“The FDCA requires premarket approval of any new drug, with some limited exceptions, and states that the FDA ‘shall issue an order refusing to approve the application’ of a new drug if it is not safe and effective for its intended purpose.”). The court also noted that the FDA already had found tobacco to be unsafe. *Id.* (“In its rulemaking proceeding, the FDA quite

exhaustively documented that ‘tobacco products are unsafe,’ ‘dangerous,’ and ‘cause great pain and suffering from illness.’”).

Consequently, the court reasoned that if the FDA were correct in its determination that it had the authority to regulate tobacco, it would have been obligated under the FDCA to ban tobacco entirely (notwithstanding FDA’s claims to the contrary), a result which the court found would be inconsistent with existing statutory law permitting the sale of tobacco. *Id.* at 137.¹⁰

On the basis of this anomaly, the Supreme Court concluded that Congress had “directly spoken” to the issue of the FDA’s jurisdiction over tobacco:

Considering the FDCA as a whole, it is clear that Congress intended to exclude tobacco products from the FDA’s jurisdiction. A fundamental precept of the FDCA is that any product regulated by the FDA – but not banned – must be safe for its intended use. . . . According to this standard, the FDA has concluded that, although tobacco products might be effective in delivering certain pharmacological effects, they are “unsafe” and “dangerous” when used for these purposes. Consequently, if tobacco products were within the FDA’s jurisdiction, the Act would require the FDA to remove them from the market entirely. . . . The inescapable conclusion is that there is no room for tobacco products within the FDCA’s regulatory scheme. If they cannot be used safely for any therapeutic purpose, and yet they cannot be banned, they simply do not fit.

¹⁰ As the court observed, “[a] provision of the United States Code currently in force states that ‘[t]he marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare.’” *Id.* (citing 7 U.S.C. § 1311(a)).

Id. at 142-43.

The other key factor in the court's determination under the first prong of *Chevron* was Congress' repeated enactment of legislation addressing the subject of tobacco and its associated health impacts, none of which contemplated an FDA role in that process. *Id.* at 143 ("In determining whether Congress has spoken directly to the FDA's authority to regulate tobacco, we must also consider in greater detail the tobacco-specific legislation that Congress has enacted over the past 35 years."); *id.* at 137 (noting that Congress had "*directly addressed* the problem of tobacco and health through legislation on six occasions since 1965") (emphasis added); *id.* at 143 ("Congress has enacted six separate pieces of legislation since 1965 addressing the problem of tobacco use and human health."). Contrary to the initial, general provisions of the FDCA regarding the scope of the FDA's jurisdiction, these six subsequent statutes each specifically and directly addressed the subject of tobacco:

Congress['] [actions] over the past 35 years preclude an interpretation of the FDCA that grants the FDA jurisdiction to regulate tobacco products. . . . Congress has enacted several statutes addressing the particular subject of tobacco and health, creating a distinct regulatory scheme for cigarettes and smokeless tobacco. In doing so, Congress has been aware of tobacco's health hazards and its pharmacological effects. It has also enacted this legislation against the background of the FDA repeatedly and consistently asserting that it lacks jurisdiction under the FDCA to regulate tobacco products as customarily marketed. Further, Congress has persistently acted to preclude a meaningful role for *any* administrative agency in making policy on the subject of tobacco and health.

Id. at 155-56 (emphasis in original); *see also id.* at 143-44 (describing the specific impact of each of the six subsequent statutes on the marketing of tobacco products, limitations on block grants related to the preclusion of tobacco sales to minors, and the duty of the Secretary of Health and Human Service to report to Congress every three years on research regarding the addictive property of tobacco).

b. **The Key Factors from *Brown & Williamson* are Absent from the Present Competitive Access Situation**

The central holding of *Brown & Williamson* is that under the first prong of *Chevron*, an agency must adhere to the jurisdictional limits placed upon it by Congress when Congress has “directly spoken” to a given issue. In *Brown & Williamson*, that direct expression took the form of: (i) Congress’ affirmation that the sale of tobacco was not to be prohibited; and (ii) Congress’ six separate statutes regarding tobacco, none of which contemplated a role for the FDA in regulating and/or prohibiting tobacco sales. Insofar as the *Brown & Williamson* case touches upon notions of ratification, the court’s ratification therefore must be understood in context as being synonymous with the type of direct Congressional treatment that satisfies the *Chevron* analysis.

The present situation lacks any parallel that would come close to satisfying *Chevron*. Here, Congress has not passed any statute suggesting or directly speaking to an intention to preclude the jurisdiction of the Board over competitive access or requiring that anticompetitive abuse is a necessary prerequisite to the prescription of a through route. Similarly, Congress has not given some other agency jurisdiction over the subject

of competitive access, and Congress has not relied upon the unavailability of competitive access relief as part of its overall development of the statutory scheme governing rail transportation.

As the *Brown & Williamson* decision itself confirms, courts will afford substantial deference to agencies (as the entities most familiar with the “ever-changing facts and circumstances surrounding the subjects regulated”) in the absence of direct Congressional resolution of the question at issue:

[I]f Congress has not specifically addressed the question, a reviewing court must respect the agency’s construction of the statute so long as it is permissible. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 424, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999); *Auer v. Robbins*, 519 U.S. 452, 457, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). Such deference is justified because “[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones. *Chevron, supra*, at 866, 104 S.Ct. 2778, and because of the agency’s greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated, *see Rust v. Sullivan*, 500 U.S. 173, 187, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991).

Id. at 132.

This requirement of affording greater deference to agencies in the absence of specific Congressional direction is particularly appropriate in the instant proceeding. The two relevant statutes (*i.e.*, Section 10705 and Section 11102) each are stated in very general terms, and each calls for the application of administrative experience in order to ensure proper implementation. In the language of *Brown & Williamson* quoted above, it

is within the Board's discretion to resolve "the struggle between competing views of the public interest"

In this same regard, the court noted that "[d]eference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *Brown & Williamson*, 529 U.S. at 159 (citing *Chevron*, 467 U.S. at 844). In the case of Section 10705, the overriding standard for granting relief pertains to the very broad question of whether the prescription of a through route is "desirable in the public interest." 49 U.S.C. § 10705(a)(1). Moreover, the standards applicable to the prescription of through routes that would short-haul a carrier (*e.g.*, "unreasonably long," "practicable alternative," "adequate," "more efficient or economic") and to the other forms of competitive access relief (*e.g.*, "practicable and in the public interest," "necessary to provide competitive rail service") are phrased in a similarly broad manner. *See* 49 U.S.C. § 10705(a)(2); 49 U.S.C. § 11102(a) & (c).

Accordingly, these provisions of Title 49 give strong support to the view that the Board has wide latitude to tailor and/or modify its regulations to meet changing circumstances in the regulated industry or otherwise to address the Board's perception that existing regulations are not functioning in the manner originally intended. This broad statutory language is decidedly inconsistent with the central holding of the *Brown & Williamson* case; namely, the finding that Congress had directly spoken to resolve the question in dispute (and thus precluded the agency from advancing a contrary approach).

c. The Railroads Misinterpret the Facts Associated with the Enactment of the ICCTA

The present situation also fails to fit within the “ratification” theory that NS, CSXT, and CP advance in their Comments because the circumstances surrounding the passage of the ICCTA do not support the view that Congress intended to formalize the agency’s prior determination that anticompetitive abuse is a precondition to competitive access relief. Even if construed most favorably for the Railroads, the factual circumstances that existed when Congress enacted the ICCTA are ambivalent. A more even-handed reading of those facts strongly suggests that in 1995, Congress simply was interested in leaving the subject of competitive access within the discretion of the Board, rather than preventing the Board from taking any future action on the subject or specifically adopting the “anticompetitive” acts standard as a part of Title 49.

As the Concerned Coal Shippers explained in their initial Comments (*see* CCCS Comments at 48-49), the competitive access rules were not the product of extensive ICC analysis. To the contrary, the ICC merely adopted a joint proposal from certain industry participants (*i.e.*, NITL, AAR, and CMA) with the inclusion of certain elements of a competing industry proposal (*i.e.*, Railroads Against Monopoly). *See Intramodal Rail Competition*, 1 I.C.C.2d 822 (1985), *aff’d sub nom. Baltimore Gas & Elec. Co. v. United States*, 817 F.2d 108 (D.C. Cir. 1987).

The ICC’s decision lacks any depth of analysis, and there is no discussion of the precise contours of the “anticompetitive” acts standard. Likewise, the decision

lacks any discussion of what specific facts would be needed to demonstrate that a shipper is entitled to an access remedy under that standard. Instead, the decision simply reflects an agency's understandable inclination to defer to the solution proposed by industry participants. If anything, the *Intramodal Rail Competition* decision is notable for the extent to which the agency characterized the new rules as providing a substantial benefit to shippers. *See id.* at 831 (“In this proceeding, we are adopting a number of significant changes that should prove helpful to shippers by enhancing competitive access.”); *id.* at 837 (“The rules we are adopting here respond to many of the shipper and small carrier concerns and should facilitate efforts to ensure reasonable competitive access where needed. This in turn will give shippers more routing alternatives, while promoting competition among railroads.”).

At no point in its decision did the Commission insist that it was required by statute to impose an anticompetitive conduct standard, or in fact, to adopt any competitive access regulations at all. In other instances, Congress has required the agency, by statute, to develop regulations on a given topic. *See, e.g.*, 49 U.S.C. § 10701(d)(3) (“The Board shall, within one year after the effective date of this paragraph, complete the pending Interstate Commerce Commission non-coal rate guidelines proceeding to establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case.”); *former* 49 U.S.C. § 10705a(b)(2) (“The Commission shall, within 120 days after the effective date of the Staggers Rail Act

of 1980, complete a proceeding to define the term ‘reasonably expected costs’ as used in subparagraph (B) of this paragraph.”).

The separate commenting opinion from Commissioner Strenio confirms that the agency believed that its new rules would “amount[] to a giant stride forward in responding to complaints the Commission has received about a lack of access encountered by some shippers and carriers.” *Intramodal Rail Competition*, 1 I.C.C.2d at 838 (Commissioner Strenio, commenting). Commissioner Strenio added that in his view, the Commission had “substantially liberalized the conditions under which we will grant competitive access to shippers and competing carriers when requested.” *Id.*

Consequently, a fair interpretation of the enactment of the ICCTA (when viewed in light of the ICC’s adoption of the competitive access rules) is that Congress approved of the agency’s decision to adopt a “giant stride forward” in responding to complaints about a lack of competitive access; a decision that would “give shippers more routing alternatives, while promoting competition among railroads.” *Id.* at 837, 838. There is no basis from the language of *Intramodal Rail Competition* itself that would give rise to the impression that Congress intended to validate the agency’s decision to deprive shippers of any possibility of obtaining alternative through routes under Section 10705 (or reciprocal switching or terminal trackage rights under Sections 11102 and 11103). Instead, the relevant facts more clearly suggest that Congress simply intended the ICCTA to preserve the agency’s pre-existing authority with regard to competitive access.

The D.C. Circuit's review of the competitive access rules likewise fails to provide any basis for the argument that Congress intended to ratify a long-standing view that competitive access should be prevented in all circumstances. *See Baltimore Gas & Elec. Co. v. United States*, 817 F.2d 108 (D.C. Cir. 1987). Instead, the court merely responded to a party contending that the Commission should have adopted regulations that would mirror those of the telecommunications industry. Rather than suggest that Title 49 implicitly rejects such an approach, the court instead observed that "BG&E's position might well reflect sound economics, and might – we do not decide – be a reasonable interpretation of the statute" *Id.* at 115.¹¹ Ultimately, however, the court emphasized that its role was only to consider whether the Commission's actual regulations constituted a reasonable accommodation of the conflicting policies set out in Title 49. *Id.* at 115. The court found that those regulations (which the Commission had declared to be a substantial benefit to shippers) satisfied that minimum requirement.

The D.C. Circuit's *Midtec* case¹² likewise is insufficient to create the impression that Congress intended the ICCTA to prevent the Board from having any authority to modify the competitive access rules. The subject of through route prescription was not at issue in this case in any respect, and the treatment of reciprocal

¹¹ Notably, Congress did not respond to this judicial language by quickly issuing a statute clarifying that BG&E's position was not a reasonable interpretation of the statute. Congress' failure to act in this regard is no more or less persuasive than the congressional inaction that the Railroads identify in their Comments.

¹² *Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988).

switching and terminal trackage rights centered around the interpretation of the term “may” in the relevant sections of the statute. *See Midtec*, 857 F.2d at 1499, 1502-1503. The court’s 1988 determination that the agency had the authority to impose regulations under a permissively worded statute cannot be regarded as proof that in 1995, Congress intended that the agency was *required* to adhere to its “anticompetitive” conduct standard at all times in the future.

Accordingly, in assessing the factual background that existed at the time Congress passed the ICCTA, there is ample reason to conclude that the courts (and Congress) did not regard the existing competitive access rules as the only possible means of administering the relevant sections of Title 49, but instead, simply viewed those rules as one of a number of possible approaches that the agency could have elected to follow.

The Railroads have argued that Congress should be deemed to have been aware of the various agency and judicial decisions associated with the competitive access rules at the time it enacted the ICCTA (and to have intended to deprive the agency of future regulatory discretion as a result). Given the actual nature of those agency and judicial decisions (*i.e.*, little depth of analysis and the recognition that multiple approaches were possible), there is no reason to conclude that it was Congress’ intention to deprive the Board of any authority to modify the competitive access rules.

In fact, a review of the actual modifications made by the ICCTA shows that Congress did not make substantial changes to the key provisions of the statute in that regard. It would have been very simple for Congress to include language in the ICCTA

that would have replaced the public interest standard of 49 U.S.C. § 10705(a)(1) or the “adequate, and more efficient or economic” standard of 49 U.S.C. § 10705(a)(2) with language designed to limit STB discretion over the subject of through route prescription. The unquestionable fact that Congress declined to take such action supports the conclusion, by virtue of the same ratification principles that the Railroads rely upon in their Comments, that Congress did not intend to limit the STB’s discretion to modify its competitive access rules as it deems appropriate.

Similarly, Congress’ refusal to enact rail-related legislation in the years following the ICCTA⁶ (and following the issuance of the Board’s *Bottleneck* decisions) should not be deemed to restrain the Board from modifying its own regulations. The Railroads have failed to offer any authority in support of the proposition that Congressional inaction can deprive an agency of the ability to modify its own regulations.

Moreover, the courts have repeatedly cautioned against attempting to draw inferences regarding intent from Congress’ failure to act. *See, e.g., Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). In *Pension Benefit*, the Supreme Court considered a situation in which Congress considered, but did not enact, a provision that expressly would have authorized the Pension Benefit Guaranty Corporation (“PBGC”) to prohibit a specific form of insurance coverage known as follow-on plans. The court rejected the Court of Appeals’ reasoning on the basis of this inaction:

The Court of Appeals also relied on the legislative history of the 1987 amendments to ERISA effected by the Pension Protection Act This history reveals that Congress in 1987 considered, but did not enact, a provision that expressly would have authorized the PBGC to prohibit follow-on plans. *But subsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress. United States v. Price, 361 U.S. 304, 313, 80 S.Ct. 326, 332, 4 L.Ed.2d 334 (1960). It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law. See, e.g., United States v. Wise, 370 U.S. 405, 411, 82 S.Ct. 1354, 1358, 8 L.Ed.2d 590 (1962). Congressional inaction lacks "persuasive significance" because "several equally tenable inferences" may be drawn from such inaction, "including the inference that the existing legislation already incorporated the offered change." Id.*

Id. at 649-50 (emphasis added).

In the instant matter, the Railroads attempt to discern Congress' intent in the ICCTA, in part, on the basis of Congress' refusal to take subsequent action. As the Supreme Court recognized in *Pension Benefit*, this type of effort is "particularly dangerous" and "lacks persuasive significance." *Id.* at 650; accord *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968) ("[T]he views of one Congress as to the construction of a statute adopted many years before by another Congress have 'very little, if any, significance.'" (quoting *Rainwater v. United States*, 356 U.S. 590, 593 (1958))).

Neither Congress' passage of the ICCTA nor Congress' refusal to pass subsequent legislation provides any basis for the argument that the Board lacks the authority to modify its regulations. The more reasonable interpretation of those events

(or non-events) is that Congress intended for the administrative agency to continue to administer the statutory provisions regarding competitive access. Those statutory provisions give the Board broad discretion, and Congress has not precluded the Board from exercising that discretion or from modifying its existing regulations.

**2. The Railroads' Other Authorities
Likewise Fail to Support a Finding that the Board
Lacks the Authority to Modify its Regulations**

As noted above, the Railroads cite only one case (*i.e.*, *Brown & Williamson*) that actually addresses the question of whether subsequent legislative history can constrain an agency's authority to act. The Concerned Coal Shippers have demonstrated why that case should not constrain the Board's action in the instant proceeding.

CSXT, however, also cites *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986) for the same proposition that the Board lacks the authority to modify its competitive access rules, but that case has nothing at all to do with the subject of precluding agency action. *See* CSXT Comments at 8 (citing *Square D*). Specifically, CSXT argues that “[w]hen Congress has ratified an application or interpretation of statutes it has enacted, implementing agencies such as the Board *may not overrule or materially change those laws* except in response to further congressional action to change the law.” *Id.* (citing *Square D*).

As an initial matter, the language of CSXT's claim is nonsensical. Reviewing CSXT's claim in detail, CSXT states that the Board may not overrule or

materially change “those laws.” An agency, of course, has no authority to overrule or change a law at any time.

But even if one were to assume that CSXT intended to argue that the Board may not change its regulations following Congressional ratification, the *Square D* case that CSXT cites in support of this proposition is completely inapposite. In fact, *Square D* says nothing whatsoever about limiting the ability of an administrative agency to modify its own regulations. Instead, the case relates to an argument that the Reed-Bulwinkle Act and the Motor Carrier Act of 1980 implicitly rejected the ruling of *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922) regarding private antitrust actions. See *Square D*, 476 U.S. at 417-18. The Supreme Court refused to find such rejection because the legislative history revealed a clear congressional awareness of *Keogh*. *Id.* at 419-20. Significantly, however, the case does not include any discussion of an agency’s attempt to modify its regulations. Consequently, the Board should reject CSXT’s effort to rely upon this case in support of its claim that “implementing agencies such as the Board *may not overrule or materially change those laws* except in response to further congressional action to change the law.”

The Railroads’ other citation of case law is similarly inapposite. For example, NS attempts to support its ratification argument by relying upon language from the STB’s Gulf Coast Oversight proceeding issued in the years immediately after the approval of the UP/SP merger. In particular, NS argues that the Board has long recognized that it “cannot permit any arrangements that have the effect of forced

interchange or forced access unless and until Congress amends the Interstate Commerce Act to allow it.” NS Comments at 1-2 (emphasis in original) (citing *Union Pac. Corp. – Control & Merger – S. Pac. Rail Corp. (Houston/Gulf Coast Oversight)*, 3 S.T.B. 1030, 1032 (1998)).

Significantly, however, while the Board found that a shift to a complete open access system in Houston (*i.e.*, the “Consensus Plan”) would be inconsistent with the statute, the Board nevertheless imposed a more narrowly tailored system of shared and/or forced access in Houston in that same Oversight decision. *See Union Pac. Corp – Control & Merger*, 3 S.T.B. at 1031 (adopting a so-called “clear route” condition to enhance efficiency and facilitate the smooth movement of railcars through the Houston terminal). In particular, the Board imposed a system in Houston that would involve access by one carrier over another carrier’s lines:

Under the “clear route” condition, the neutral and highly efficient joint [UP/BNSF dispatching center] will have the authority through its Joint Director to route traffic through Houston over any available route, even a route over which the owner of the train does not have operating authority. *Thus, as a result of the Board’s decision, a BNSF train may be permitted to operate over track of UP; a UP train may be permitted to operate over track of BNSF; and a [Tex Mex] train may be permitted to operate over track of either UP or BNSF.*

Id. (emphasis added). In other words, the Board’s Oversight decision actually affords the very type of relief that NS argues that the case proves to be unavailable (*i.e.*, relief that has “the effect of [requiring] forced interchange or forced access”). Consequently, NS is

mistaken in citing this Oversight decision in support of the claim that the Board cannot permit “any” forced interchange or forced access arrangements.

While the Railroads cite a number of additional cases in their general discussions of ratification, those cases do not address – let alone resolve – the question of whether an agency lacks the authority to modify its own regulations, and the Railroads make no claim that these cases specifically address that topic.¹³

* * *

The Railroads’ argument that the Board lacks the authority to modify its own regulations – which is based solely upon *Brown & Williamson* – is incorrect. *Brown & Williamson* presents a vastly different factual situation (involving the long-term denial of jurisdiction by the agency itself and the repeated passage of statutes that assumed an absence of FDA jurisdiction) and does not support the view that the Board cannot modify its regulations regarding the proper interpretation of Section 10705 and Section 11102. On the basis of a proper interpretation of the relevant facts and law, the Board should

¹³ See *Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 170 n.5 (2001); *Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 476 U.S. 426, 437 (1986); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985); *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 782 n.15 (1985); *Bob Jones Univ. v. United States*, 461 U.S. 574, 600-601 (1983); *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Canada Packers, Ltd. v. Atchison, T. & S.F. Ry.*, 385 U.S. 182, 184 (1966); *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965); *Costanzo v. Tillinghast*, 287 U.S. 341, 345 (1932); *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915); *United States v. G. Falk & Brother*, 204 U.S. 143, 151 (1907).

reject the argument of NS, CSXT, and CP and proceed to a consideration of the policies associated with the Concerned Coal Shippers' proposal.

III. The Railroads' Arguments that the Board Should Refrain from Modifying its Rules are Irrelevant and Wrong Under Title 49

In their Comments, the Railroads argue that the Board should refrain from taking any action that would modify the existing competitive access rules. The Railroads insist that any modification of those rules would be improper and short-sighted. In particular, the Railroads contend that changes to the competitive access rules would discourage investment in railroads, would degrade service, and would have the effect of driving competitive traffic to other transportation modes and ultimately to increased rates for service to all rail shippers. The Railroads insist that their current financial health does not provide a justification for modifying the rules, and argue that the Board's current approach to addressing competitive access issues is, in large part, the cause of this financial success.

Notably, the Railroads base their claims in this regard on the assumption that the Board is considering a transition to a system of complete open access in which shippers obtain rates for service between any two points on a given carrier's system and have the ability to divert traffic back and forth between various routing options on a recurring yet unpredictable basis. These arguments are irrelevant and wrong.

A. The Board Should be Guided in this Proceeding by the Language of Title 49

Rather than relying upon the Railroads' dire predictions of financial harm or their claims that the current rules are functioning in an ideal and balanced manner, the most significant factor that the Board should consider in the instant proceeding is the congressional policy encompassed in the specific provisions of Title 49. In particular, Section 10705(a)(1) of Title 49 confirms that it is the obligation of the Board to prescribe alternative through routes when those through routes are desirable in the public interest, and Section 10705(a)(2) gives the Board the authority to short-haul a carrier in three different circumstances.¹⁴ As the Concerned Coal Shippers demonstrated in their opening Comments, through route prescription authority has been an important part of Title 49 for 100 years. Congress has fine-tuned that authority on many occasions over its lengthy history, but Congress has maintained the essential principle that the Board "may," and since 1920, "shall" prescribe alternative through routes where appropriate.¹⁵

¹⁴ Moreover, Section 11102(a) gives the Board the authority to "require terminal facilities, including main-line tracks for a reasonable distance outside of a terminal, owned by a rail carrier providing transportation subject to the jurisdiction of the Board under this part, to be used by another rail carrier if the Board finds that use to be practicable and in the public interest without substantially impairing the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business." 49 U.S.C. § 11102(a). Likewise, Section 11102(c)(1) authorizes the Board to "require rail carriers to enter into reciprocal switching agreements, where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service." 49 U.S.C. § 11102(c)(1).

¹⁵ In its Comments in this proceeding, BNSF asserts that "[t]he parties urging the Board and others to alter the competitive access provisions have never explained why the

Consequently, the Railroads' principal argument in their Comments is with Congress, not with the shippers who insist that the current competitive access rules have failed to fulfill Congressional intent. If the Railroads are not pleased with the continued existence of Section 10705 or Section 11102 (or the relief that those sections make available), they should attempt to convince Congress to eliminate or modify those portions of the statute. In the absence of such a Congressional modification, however, the Railroads lack a legitimate basis for opposing efforts to revise the Board's regulations in a manner that would more effectively facilitate the relief contemplated by the statute.

There is no question that the Commission intended its competitive access rules to provide a meaningful vehicle for alternative through route prescription, but it is equally beyond question that those regulations have failed to achieve that result. Contrary to KCS's suggestion in its opening Comments, twenty-five years of experience under a given set of regulations is more than sufficient time to determine that those regulations have failed to meet their intended purposes. *Cf.* KCS Comments at 4 (recommending that the Board allow for "several [additional] years" of experience under the current rules to evaluate whether they are operating properly). Under these circumstances, it is evident that the proper course of conduct for the Board is to find

STB's existing robust rate reasonableness remedies do not adequately address [shippers'] concerns." BNSF Comments at 3. The existence under Title 49 of both maximum reasonable rate prescription authority and through route prescription authority demonstrates that in Congress' view, rate reasonableness remedies alone are not adequate to regulate the industry fully and properly.

some means of implementing Section 10705 in a manner that fulfills the language and purpose of that section. The Concerned Coal Shippers respectfully submit that their proposals in this proceeding would achieve that objective in a direct, albeit narrowly limited, manner.

B. The Railroads' Arguments Regarding the Preservation of the Current Regulatory "Balance" are Factually Mistaken

The Railroads argue that it is essential for the Board to preserve the current regulatory "balance" associated with competitive access. *See, e.g.*, AAR Comments at 12 ("The Board's current approach to access regulation reflects a Congressionally mandated balance between the promotion of market forces in transportation markets and the protection against abuses of market power."); *id.* at 53-54 ("[The Board] should continue to implement the balanced regulatory scheme established by the Staggers Act . . .").

The Railroads' arguments in this regard operate from a faulty factual premise because there is no "balance" in the Board's competitive access rules. Instead, those rules have had the effect of absolutely precluding any competitive access relief. Moreover, the current implementation of the competitive access statutes was not "Congressionally mandated" in the Staggers Act or otherwise. Instead, the competitive access rules reflect the inclusion of legal standards outside the scope of what Congress imposed through the relevant statutes and it is those standards, not the statute, that have prevented shippers from obtaining the competitive access that Congress made available.

The Commission explained in its *Intramodal Rail Competition* decision that its new rules provided a substantial benefit to shippers that would “enhance” or “promote” competitive access and would give shippers additional routing alternatives. *See Intramodal rail Competition*, 1 I.C.C.2d at 831 (“In this proceeding, we are adopting a number of significant changes that should prove helpful to shippers by enhancing competitive access.”); *id.* at 837 (“The rules we are adopting here respond to many of the shipper and small carrier concerns and should facilitate efforts to ensure reasonable competitive access where needed. This in turn will give shippers more routing alternatives, while promoting competition among railroads.”). Moreover, Commissioner Strenio’s separate commenting opinion in the case displays a belief that the new rules would “amount[] to a giant stride forward in responding to complaints the Commission has received about a lack of access encountered by some shippers and carriers.” *Id.* at 838 (Commissioner Strenio, commenting); *see also id.* (the Commission has “substantially liberalized the conditions under which we will grant competitive access to shippers and competing carriers when requested.”).¹⁶

Similarly, Vice Chairman Simmons explained in his dissenting opinion in *Midtec* that the Staggers Act required competitive access as part of its fundamental trade-off between the rights of carriers and the rights of shippers:

¹⁶ The Railroads’ Comments appear to be premised on the view that the Commission was wrong in thinking that, under the Staggers Act, it should grant competitive access more freely.

Prior to the Staggers Act, rates on shipments of similar commodities moving from one region to another tended to be equalized. The Commission had within its power the authority to strike any rate complained of and entertain claims of discrimination between railroads' customers. As a result of the Staggers Act, rail carriers now have substantial ratemaking and routing flexibility. *In exchange for this freedom, the Act dictated that we liberalize use of reciprocal switching agreements and terminal trackage rights as a means of providing shippers with competitive opportunities. In reducing the use of the rate complaint as leverage, shippers were given the opportunity to enjoy liberal competitive access. This compromise, or tradeoff if you will, is at the heart of the Staggers Act. Consequently, our rules and policies should not be used as barriers to restrict competitive access.* This sentiment is contained in the Congressional record:

Simply stated, both provision[s] [§ 11103(c) and a new provision *easing* entry] will introduce additional competition between railroads. Under reciprocal switching, one railroad is given the opportunity to have access to another railroad's operating territory thereby providing many shippers with competition in rail service which they do not presently enjoy. (emphasis added).

126 Cong. Rec. H 5906 (Daily Ed., June 30, 1980). Further, the Joint Conference Committee of the Congress declared that the Congress intends for the competitive access provisions of section 11103(c) to provide "an avenue of relief for shippers where only one railroad provides service . . ." (H.R. Rep. No. 96-1430, 96th Cong. 2d Sess. 116 (1980)).

Midtec Paper Corp. v. Chicago and North Western Transp. Co., 3 I.C.C.2d 171, 186 (1986), *aff'd sub nom. Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988) (Vice Chairman Simmons, dissenting) (emphasis added).

It is evident that in 1985, the Commission genuinely believed that the competitive access rules should, and would, provide meaningful relief to shippers. Any other interpretation of the facts – namely, that the Commission understood its new regulations would operate as a bar to competitive access relief but hid that fact from the public – is entirely untenable. If the Commission intended its rules to provide a genuine benefit and if that intention has been frustrated entirely, then the Board should modify those rules.

It is this failure to fulfill the stated intention of the regulations that provides the most direct response to the Railroads' charge that nothing has changed that would justify the modification of the current rules. *See, e.g.*, AAR Comments at 12 (“Nothing has occurred since the ICC adopted the *Intramodal Rail Competition* rules that would justify a fundamental change in the Board’s current balanced approach to access policy.”) (footnote omitted). In particular, the development that justifies the modification of the Board’s current rules is that twenty-five years of experience have demonstrated that the agency’s stated intention and expectation in adopting those rules have been frustrated – as evidenced by the fact that no shipper has been able to obtain access to another carrier under these rules during that time. The Board is fully justified in relying upon that development as the basis for modifying its existing rules.

**C. The Railroads Direct their Claims of Harm
Toward the Subject of Complete Open Access**

Although the Railroads oppose *any* modification to the Board's current competitive access rules (however minor or narrow), the Railroads' claims of potential harm in this proceeding instead address the impact of a transition to a system of complete and unfettered open access.¹⁷ The Railroads insist that such open access would disrupt the stream-lined system design that they have worked many years to achieve, and would compromise the ability of the industry to operate in an efficient manner. *See, e.g.*, UP Comments, Verified Statement of Lance M. Fritz ("Fritz V.S.") at 17-28; NS Comments, Verified Statement of Mark D. Manion ("Manion V.S.") at 1-22; AAR Comments, Verified Statement of Edward A. Burkhardt ("Burkhardt V.S.") at 6-10. The Railroads also contend that such open access would have devastating financial repercussions, and ultimately would harm the very shippers who hope to benefit from reduced rates through recourse to open access relief. *See, e.g.*, UP Comments, Verified Statement of James R. Young ("Young V.S.") at 3-5, 11-20; AAR Comments, Verified Statement of William J. Rennie ("Rennie V.S.") at 15-21, 23-24.

It is important to observe, however, that the Concerned Coal Shippers have proposed a form of relief that is vastly different from what the Railroads contemplate

¹⁷ There is no claim or demonstration in the Railroads' Comments that a narrow form of relief (such as that proposed by the Concerned Coal Shippers) would have any adverse effect on the industry, let alone the same effect as a transition to complete open access.

with shippers obtaining open access in all situations. Contrary to this Railroad assumption, the Concerned Coal Shippers focus their request for relief principally upon the development of trigger thresholds that would define, in advance, precisely what a shipper would be required to demonstrate in order to obtain the prescription of an alternative through route (including a through route that would short-haul a carrier).

These proposed thresholds are tied to the Board's RSAM and $R/VC_{>180}$ calculations, and as such, reflect generous consideration of a railroad's need for adequate revenues in determining whether to permit access. Moreover, these high trigger thresholds confirm that only a small percentage of the Railroads' traffic would even be subject to the possibility of diversion. *See Crowley V.S.* at 12-13; CCCS Comments at 77, 82.

But not even all of the small amount of traffic moving above these thresholds would be diverted to an alternative routing because, as the Concerned Coal Shippers explained in their Comments, there are a number of factors that would influence whether an alternative routing would represent a realistic competitive alternative to the existing routing:

One would further expect that in many cases, the current routing may have physical advantages in terms of overall length that would allow the incumbent carrier to offer a better set of economic terms than any alternative. . . .

. . . Under the Concerned Coal Shippers' proposal, monopolist carriers would face an additional decision as to whether they wish to price their services below the alternative through route safe harbor (*i.e.*, that carrier's RSAM level) or

whether the carriers wish to seek greater revenues at the risk of having to “beat” competition. There may be situations, depending upon the relative advantages and disadvantages of each potential routing, that the bottleneck carrier would face little to no risk of losing its long-haul even if it were to price its services in excess of the RSAM level. For example, the bottleneck carrier may recognize that its current single-line route has a substantial length-of-haul advantage over any alternative through route Similarly, the bottleneck carrier may believe that stand-alone rate relief is not a realistic possibility for the alternative routing option (*e.g.*, due to low traffic density and/or unfavorable terrain), thus diffusing the competitive “threat” provided by the theoretical alternative.

CCCS Comments at 77, 79-80.

The Concerned Coal Shippers likewise explained that the same types of considerations could limit the diversion of traffic even in situations in which the alternative through route sought is shorter than the current routing:

As observed above with regard to the RSAM trigger for relief under Section 10705(a)(1) and Section 10705(a)(2)(C), a bottleneck carrier in a Section 10705(a)(2)(B) situation may believe that operational or “traffic density” difficulties associated with the proposed alternative routing (despite its shorter length) would limit the possibility that the shipper would pursue alternative through route relief. In such a circumstance, the bottleneck carrier likely would continue to price its services on the existing routing subject only to its concern regarding the possibility of the shipper filing a maximum rate reasonableness complaint.

Id. at 82.

Consequently, any “harm” to the Railroads associated with the Concerned Coal Shippers’ proposals largely would be self-inflicted. The possibility of diversion would arise only where a carrier prices its services above the applicable trigger level, and

even in that small universe of shipments, the carriers still would enjoy the ability to price above the trigger levels where a potential alternative through routing does not present a realistic threat of diversion.

In his attached Verified Statement, Mr. Thomas D. Crowley addresses the limited scope of traffic potentially impacted by the Concerned Coal Shippers' proposals. Therein, he critiques Mr. Rennie's discussion of the impact of reducing all railroad rates to 180% of variable costs, and he explains that the financial impact of the Concerned Coal Shippers' proposals on the railroad industry would be much more modest. *See* Crowley V.S. at 9-13. Given the limited volume of traffic potentially impacted by the proposed changes, and given the fact that the Railroads would have the ability, through very modest constraints on pricing, to preclude access to alternative through routes, the financial consequence of the Concerned Coal Shippers' proposals bears no relationship whatsoever to Mr. Rennie's \$5.2 billion figure. *Cf.* AAR Comments, Rennie V.S. at 19-20.¹⁸

¹⁸ The concerns expressed by the American Short Line and Regional Railroad Association ("ASLRRA") regarding the potential impact of changing the Board's competitive access rules likewise are not an impediment to the relief the Concerned Coal Shippers seek. *See, e.g.*, ASLRRA Comments at 22-24 & Verified Statement of Carl D. Martland ("Martland V.S.") at 25-26. The ASLRRA explains in its Comments that most of its members are not involved in setting prices on through movements, but instead, are subject to marketing agreements with Class I carriers under which "the small railroad receives a contractual allowance from its interline connection and has no pricing discretion with respect to origin-to-destination pricing." *Id.* at 6. There is every reason to believe that the substantial revenues that Class I carriers could command before triggering a right to competitive access relief (*i.e.*, pricing above the RSAM or R/VC_{>180} levels) would allow the continuation of the allowance payments under such marketing

D. The Railroads are Wrong About Interline Operations and Costs

One of the key elements of the Railroads' argument regarding the impact of open access is the claim that interline movements are highly disruptive. In particular, the Railroads insist that the introduction of such two-carrier movements into the current system of railroad operation would create substantial uncertainty and would degrade overall service quality. They argue that giving shippers additional routing options would result in the conversion of many single-line movements into joint-line movements, and that transportation involving two carriers is necessarily less efficient and more costly than single-line service due to the need for an interchange. *See, e.g.,* AAR Comments at 51-52; UP Comments, Fritz V.S. at 24-26; NS Comments, Manion V.S. at 7-15. The Railroads insist that a change in the Board's competitive access regulations permitting more interline movements would hinder the Railroads' effort to streamline their system design.

As Mr. Richard McDonald explains in his attached Verified Statement, however, this argument mischaracterizes the actual nature of interline rail service and overstates the operational impact of interchanging traffic:

[J]oint-line service can be virtually as efficient as single-line service particularly for unit-train movements involving run-through operations. Railroads usually

agreements. Moreover, even where traffic would be subject to diversion to a different Class I carrier based on the current Class I carrier's pricing, there has been no demonstration that such diversion would preclude the short-line from continuing to participate in the through movement.

cooperate with each other to coordinate such movements efficiently, and with run-through power the exchange of trains between two carriers often is quite seamless. Most joint unit-train movements involve interchange points that are already crew-change points (the carriers participating in a joint run-through movement of unit trains operate their own crews on their respective portions of the movement), so crew efficiency is not an issue. If the railroads are interested in making the operation efficient (as they should be), they coordinate train arrivals at the interchange point so that the outbound carrier has a crew ready when the train arrives. The time required for a crew change and air test by the outbound crew (with a run-by inspection as the train departs) can be 20 minutes or less under normal circumstances, which is little different from the time required to change crews at a railroad's internal crew-change points.

McDonald V.S. at 4-5.

Mr. McDonald also explains that the Railroads' arguments regarding inefficiencies are inconsistent with actual experience. In particular, Mr. McDonald recounts the history of the WRPI/UP and WRPI/UP/CNW interline movements from the Powder River Basin ("PRB") in the 1980's and early 1990's. As Mr. McDonald explains, WRPI-UP "increased their market share of PRB coal originating at mines served by the Joint Line every year and had more than 50% market share by the time UP took over WRPI and CNW in 1995." *Id.* at 5. Moreover, even three carrier movements involving WRPI, UP, and CNW "were able to compete successfully with the single-line BN route between the PRB and Chicago when the utility switched from eastern to western coal" *Id.* at 6.

In his Verified Statement, Mr. Crowley addresses the related subject of interline costs. Specifically, Mr. Crowley shows that the efficiencies of interchange operations on unit train traffic are “evidenced by the level of interchange costs calculated using the STB’s URCS Phase III cost program.” Crowley V.S. at 5. Using this program, Mr. Crowley determined that interchange costs on a hypothetical UP/BNSF interline movement were \$0.40 per ton, and on a hypothetical NS/CSXT interline movement were \$0.52 per ton. *Id.* at 6. Mr. Crowley also explains that the ICC previously had used actual switching minutes to calculate interchange costs and as a result, calculated costs even lower than these URCS Phase III figures. *Id.* at 6-7; *see also id.* at 8 (“[T]he STB’s URCS Phase III costing system assumes that the carriers participating in interline coal movements will incur an interchange cost that they typically are able to avoid through the use of run-through power arrangements.”).

Finally, it is noteworthy that in their Comments, the Railroads do not quantify the incidence of direct single line movements, the potential for diversion to joint movements, or the cost impact of converting a single-line movement to a joint line movement. The possibility of increased interline movements therefore should not constitute an impediment to the relief proposed by the Concerned Coal Shippers.

E. The “Better” Service Standard for Section 10705 Relief

In its 1996 decision in the *Bottleneck* proceeding, the Board addressed the question of whether the existence of a contract for service over a non-bottleneck segment obligates a bottleneck carrier to quote a local rate for use in conjunction with the contract

rate. See *Central Power & Light Co. v. Southern Pac. Transp. Co.*, 1 S.T.B. 1059, 1070 n.17 (1996) (“*Bottleneck I*”), clarified, 2 S.T.B. 235 (1997) (“*Bottleneck II*”), *aff’d sub nom. MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999). The Board refused to find that bottleneck carriers automatically would be required to publish a local rate in such circumstances, instead holding that a shipper would be required to proceed under the competitive access rules in order to seek the prescription of an alternative through route. *Id.*

Nevertheless, the Board commented that it could foresee situations where contracts for service over non-bottleneck segments would make the proposed service over the non-bottleneck segment “better” than the service presently offered by the bottleneck carrier. *Id.* at 1069. The Board added that the bottleneck carrier’s foreclosure of that “better” service would warrant the prescription of an alternative through route. *Id.* (“Assuming the shipper presents sufficient facts in that regard, there is nothing in our competitive access regulations to preclude a competitive access remedy, and we are prepared to interpret the rules in a manner that will provide for relief in appropriate circumstances.”).

The Board addressed this “better” service standard again in its 2009 decision in *Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pac. R.R.*, STB Docket No. 42104, at 8 (STB served June 26, 2009) (“*Entergy 2009*”) in response to arguments raised by the complainant in that case. Specifically, the Board made reference to this standard in its discussion of Section 10705 and the absence of any detailed

precedent concerning the minimum showing required to obtain the prescription of an alternative through route. *Id.* In its 2011 decision in the same *Entergy* proceeding, the Board again commented upon the “better” service discussion in *Bottleneck I*, but explained that it would defer its resolution of the proper standard governing Section 10705 requests until the instant proceeding. *See Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pac. R.R.*, STB Docket No. 42104, at 7-8 (STB served March 15, 2011) (“*Entergy 2011*”).

In their Comments in the instant proceeding, the Railroads take strident exception to the Board’s 1996 suggestion that a showing of foreclosure of “better” service could provide sufficient justification for the prescription of a through route under Section 10705. *See, e.g.*, AAR Comments at 34-37; NS Comments at 12-14; CSXT Comments at 39-47. The Railroads argue, *inter alia*, that Board did not formally adopt the “better” service standard, that legal challenges to a “better” service standard would create a new period of uncertainty, and that the “better” service standard would be “impermissibly subjective.” *See, e.g.*, CSXT Comments at 45.¹⁹

The Concerned Coal Shippers have proposed a set of modifications to the Board’s competitive access rules that does *not* incorporate the “better” service standard as a means for obtaining a through route when a shipper first obtains a contract over a non-

¹⁹ CSXT fails to offer any explanation as to why the “anticompetitive” conduct or abuse standard that it supports is any less “amorphous” or “subjective” than the “better” service standard.

bottleneck segment of a through movement. Instead, the Concerned Coal Shippers have proposed the adoption of through route prescription rules based on objective and readily ascertainable standards. Nevertheless, the Board's 1996 comments regarding "better" service and the Railroads' reaction to those comments in this proceeding are instructive as to the proper approach to through route prescription.

As an initial matter, the Board's 1996 comments provide persuasive insight into the Board's view of its own authority to administer the competitive access statutes. Contrary to the Railroads' claims that the competitive access rules always have been – and always must be – understood as strictly precluding through route prescription in the absence of anticompetitive conduct or abuse, it is evident that fifteen years ago, the Board understood it had the discretion to interpret those rules (and the competitive access statutes themselves) in a more flexible manner. Stated differently, it is evident that the Board's understanding of the original intention of the competitive access rules varies dramatically from the rigid understanding that the Railroads advance in support of their ratification arguments. Based on its 1996 language, the Board believes that there could be a number of ways in which to evaluate whether to prescribe a through route under Section 10705. The Railroads' claims regarding the unchangeable meaning of the Board's competitive access rules (supposedly dating from the adoption of those rules) therefore lack factual support.

It is also appropriate in light of NS, CSXT, and CP's "ratification" arguments to consider the absence of post-1996 Congressional action regarding the

Board's "better" service language. As discussed in detail above, these three railroads insist that the Board lacks authority to modify its regulations because Congress ratified those regulations both through the adoption of the ICCTA and through its subsequent inaction. These railroads fail to explain, however, why this same ratification principle should not govern with respect to the Board's *Bottleneck I* reference to better service. In other words, if the reference to "better" service represents a blatant violation of the Board's authority under Title 49, then on the basis of the strict ratification theory, Congress presumably would have acted to correct the Board's error by amending Section 10705. Under the same reasoning advanced in this proceeding by the Railroads in support of ratification, it would have been straightforward for Congress to incorporate language into Section 10705 dispelling the suggestion that "better" service could satisfy the existing statutory standards.

The AAR's Comments also address the subject of the "better" service standard in a highly relevant manner. In particular, the AAR candidly acknowledges that the use of this more relaxed standard would be *consistent* with the actual language of Section 10705 (and therefore would be inappropriate in the AAR's view). The AAR states in this regard that if the Board were to apply a standard for through route prescription that only required a showing that the alternative through route is "better" or "more efficient," then the Board would be granting through route relief whenever the provisions of Section 10705 were satisfied, rather than imposing the additional non-statutory requirements that the AAR prefers:

. . . [A]pplying a standard that requires only a showing that an alternative through route is “better” or “more efficient” would be tantamount to revoking the Competitive Access Rules with respect to through routes. *Effectively, the Board would be prescribing a through route whenever the statutory limitation on its authority to short-haul a carrier could be satisfied, i.e., whenever the Board decides that the route to be prescribed “is needed to provide adequate, and more efficient or economic, transportation.” 49 U.S.C. § 10705(a)(2)(C). The “more relaxed standard” would completely occupy the field because it would never be necessary to show competitive abuse.*

AAR Comments at 36-37 (emphasis added) (footnotes omitted). Through its argument in this regard, the AAR actually has seized upon the precise reason for rejecting the current competitive access rules and instead adopting a set of regulations that more closely tracks the language and purpose of the statute. As the AAR itself confirms, the Board’s current regulations go well beyond the actual requirements of the statute and therefore have failed to implement the language of Section 10705 properly. Contrary to the practice under the current rules, the Board should – in the AAR’s description – provide through route relief “whenever the statutory limitation on its authority” is satisfied.

It also bears brief mention that CSXT’s argument regarding the “better” service standard includes a mistaken interpretation of the *Bottleneck* decision. Specifically, CSXT argues in its Comments that the *Bottleneck I* “evidentiary digression” in which the Board made reference to better service “does not make sense” because a “contract exception” to the *Bottleneck* rule already gives a shipper with a contract for service over a non-bottleneck segment the right to obtain a through route prescription. See CSXT Comments at 44 n.32 (“Because, under the contract exception, the

complainant would already obtain the relief it seeks – establishment of a local rate for the bottleneck segment of the interline movement – there would be no reason to pursue a forced access case and thus no occasion to present the terms of the other carrier’s contract.”). The *Bottleneck* decision, however, does not afford a shipper with a contract for service over a non-bottleneck segment the automatic right to an alternative through route. See *Bottleneck I* at 1070 n.17 (“[T]he fact that a contract may exist on one route segment of its preferred route would not relieve the shipper from having to make a case under the competitive access rules to obtain service over the other.”). CSXT’s effort to dismiss the Board’s “better” service explanation on these grounds is therefore mistaken.

In any event, the Concerned Coal Shippers reiterate that while they have not specifically proposed that the Board adopt the “better” service standard in its regulations, the Board’s discussion of that standard confirms that the Board does have the authority to modify the manner in which it administers Section 10705. The standards incorporated in the current competitive access rules do not appear in the statute itself, and the Board need not restrict its future administration of Section 10705 in a manner that has proven to be ineffective over the past twenty-five years.

CONCLUSION

For the reasons set forth above, the Concerned Coal Shippers request that the Board conclude that its competitive access rules should be amended, and issue a notice of proposed rulemaking proposing regulations incorporating the Concerned Coal Shippers' proposals.

Respectfully submitted,

CONCERNED CAPTIVE COAL SHIPPERS

By: 


C. Michael Loftus
Christopher A. Mills
Andrew B. Kolesar III
Slover & Loftus LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170

Dated: May 27, 2011

*Attorneys for the Concerned Captive
Coal Shippers*

Handwritten scribbles or marks, possibly illegible text or a signature.

CERTIFICATE OF SERVICE

I hereby certify that this 27th day of May, 2011, I have caused copies of the foregoing to be served upon the following via first class mail, postage prepaid:

Louis P. Warchot, Esq.
Association of American Railroads
425 3rd Street, S.W., Suite 1000
Washington, D.C. 20024

J. Michael Hemmer, Esq.
Louise A. Rinn, Esq.
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179

Richard E. Weicher, Esq.
BNSF Railway Company
2500 Lou Menk Dr., 3rd Floor
Fort Worth, TX 76131-2828

Peter J. Shudtz, Esq.
Paul R. Hitchcock, Esq.
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

James A. Hixon, Esq.
John M. Scheib, Esq.
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

Paul Guthrie, Esq.
Patrick Riley, Esq.
Canadian Pacific Railway Company
401 9th Avenue, S.W.
Gulf Canada Square, Suite 500
Calgary, Alberta T2P 4Z4 Canada

W. James Wochner, Esq.
David C. Reeves, Esq.
The Kansas City Southern Railway
Company
P.O. Box 219335
Kansas City, MO 64121-9335

Theodore K. Kalick, Esq.
601 Pennsylvania Ave, N.W.
Washington, D.C. 20004

Samuel M. Sipe, Jr., Esq.
Anthony J. LaRocca, Esq.
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795

G. Paul Moates, Esq.
Paul A. Hemmersbaugh, Esq.
Terence M. Hynes, Esq.
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005

Michael L. Rosenthal, Esq.
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401

William A. Mullins, Esq.
Baker & Miller PLLC
2401 Pennsylvania Ave, N.W.
Suite 300
Washington, D.C. 20037

Keith T. Borman, Esq.
American Short Line and Regional
Railroad Association
50 F Street, N.W., Suite 7020
Washington, D.C. 20001-1564

Myles L. Tobin, Esq.
Fletcher & Sippel LLC
29 North Wacker Drive, Suite 920
Chicago, IL 60606-2875

Robert S. Rivkin, Esq.
Paul Samuel Smith, Esq.
U.S. Department Of Transportation
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

Christine Varney, Esq.
U.S. Department Of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Edward Avalos, Esq.
United States Department of Agriculture
1400 Independence Avenue, S.W.
Washington, D.C. 20250

John M. Cutler, Jr., Esq.
Andrew P. Goldstein, Esq.
McCarthy, Sweeney & Harkaway, P.C.
1825 K Street, N.W., Suite 700
Washington, D.C. 20037

Michael F. McBride, Esq.
Van Ness Feldman, PC
1050 Thomas Jefferson Street, N.W.
Washington, D.C. 20007

Thomas F. McFarland, Esq.
Thomas F. McFarland, P.C.
208 South Lasalle St Suite 1890
Chicago, IL 60604

Jeffrey O. Moreno, Esq.
Karyn A. Booth, Esq.
Sandra L. Brown, Esq.
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036

Charles A. Spitulnik, Esq.
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

Eric Von Salzen, Esq.
McLeod, Watkinson & Miller
One Massachusetts Avenue, N.W.
Suite 800
Washington, D.C. 20001

Thomas W. Wilcox, Esq.
GKG Law, P.C.
Canal Square, 1054 31st Street, N.W.
Suite 200
Washington, D.C. 20007-4492

Gordon P. MacDougall, Esq.
1025 Connecticut Avenue, N.W.
Suite 919
Washington, D.C. 20036-5444

Thomas C. Canter, Esq.
The National Coal Transportation
Association
4 West Meadow Lark Lane # 100
Littleton, CO 80127-2798

Robert G. Szabo, Esq.
Exec. Dir. & Counsel, Consumers United
For Rail Equity
1050 Thomas Jefferson Street, N.W.
6th Floor
Washington, D.C. 20007

Gregory Leitner, Esq.
Husch Blackwell LLP
736 Georgia Avenue, Suite 300
Chattanooga, TN 37402

J. Kevin Buster, Esq.
King & Spalding, LLP
1180 Peachtree Street, N.E.
Atlanta, GA 30309-3521

John Duncan Varda, Esq.
Dewitt, Ross & Stevens S.C.
Two East Mifflin Street, Suite 600
Madison, WI 53703-2865


Andrew B. Kolesar III

**VERIFIED STATEMENT
OF
RICHARD H. McDONALD**

VERIFIED STATEMENT OF RICHARD H. McDONALD

I. Background and Qualifications

My name is Richard H. McDonald. I am President of RHM Consulting, Inc., a consulting firm specializing in railroad engineering and transportation matters. My office address is 516 W. Shady Lane, Barrington, Illinois.

I graduated from the University of Illinois, College of Engineering with a Bachelor of Science degree in Engineering in 1957. I have also completed the following certificate programs: Railroad Engineering, University of Illinois, 1975; Management for Engineers, University of Iowa, 1976; Accounting for the Non-Accounting Executive, Wharton School, University of Pennsylvania, 1977; and Railroad Profit Strategy, Kellogg Center, Northwestern University, 1990. I have been an active member of the American Railway Engineering Association (the predecessor of the current American Railway Engineering & maintenance-of-Way Association, or AREMA) and the Chicago Maintenance of Way Club.

I have over 40 years of experience in railroad operations, primarily at the former Chicago and North Western Railway ("CNW") which is now part of the Union Pacific system. I began my railroad career in 1958 at the New York Central Railroad, where I held positions as Assistant Engineer, Roadmaster and Division Engineer (for both New York Central and Penn Central). In 1974 I left Penn Central and joined CNW,

where I held several positions of increasing responsibility in the Operating Department including Assistant Vice President–Division Manager, Assistant Vice President–Transportation, Vice President–WRPI; Vice President–Operating Administration; Vice President–Engineering, Vice President–Transportation, Vice President–Operations, and Vice President–Planning & Acquisitions.

As Vice President–WRPI from 1981 to 1984, I was responsible for all facets of CNW’s project to construct more than 100 miles of new railroad lines and associated facilities necessary to enable CNW to serve the Powder River Basin (“PRB”) mines reached via the so-called Joint Line, which is now jointly owned and operated by BNSF Railway Company (“BNSF”) and Union Pacific Railroad Company (“UP”). I was also responsible for implementing the operating plan for Western Railroad Properties, Incorporated (“WRPI”), which was the CNW subsidiary on whose behalf CNW constructed the PRB lines and operated them from the completion of initial construction in mid-1984 until CNW’s acquisition by UP in 1995. I was further responsible for the operating interface between CNW/WRPI and UP, with whom CNW/WRPI partnered in moving coal from the WRPI-served PRB mines, until 1994, when I retired from CNW.

I founded RHM Consulting, Inc. in 1994. Since that time I have successfully completed numerous assignments for railroads, shippers and public entities on related rail issues, including matters such as restructuring the Ferrocarriles de Mexico (“FNM”) into an independent, modern terminal switching company, improving coal delivery operations at power plants, numerous rail line construction and rehabilitation projects (including the proposed construction of a new line into the Powder River Basin

by the Dakota, Minnesota & Eastern Railroad), rail line abandonments, and rail line valuations. I have testified before the Board on rail operations in several stand-alone cost railroad rate cases, including STB Docket Nos. 42051, 42054 and 42057.

II. Assignment

I have been asked by the Concerned Captive Coal Shippers (“Coal Shippers”) to address the initial comments submitted in this proceeding by the Association of American Railroads (“AAR”), BNSF, UP and Norfolk Southern Railway Company (“NS”), to the effect that if the STB allows rail shippers more routing options or competitive access (reciprocal switching and joint use of terminal facilities), the result will be to introduce inefficiencies into the U.S. rail system by substituting “inefficient” joint-line service for “efficient” single-line service. I have not been asked to comment on any specific shipper proposal in this proceeding.

In connection with this assignment I have reviewed the AAR’s Initial Comments and accompanying verified statement of Edward A. Burkhardt (“Burkhardt VS”). I have also reviewed the Initial Comments submitted by BNSF and the verified statements of Lance M. Fritz submitted by UP (“Fritz VS”) and Mark D. Manion submitted by NS (“Manion VS”). I have also drawn on my considerable experience with both single-line operations and joint-line operations involving various rail carriers, in addition to CNW/UP joint service from the PRB prior to 1995.

As an initial matter, the comments of the AAR and railroad witnesses in this proceeding appear to assume that rail shippers are advocating open access to all parts

of the U.S. rail system, including open routing and the ability to require one carrier to grant trackage rights over any of its lines upon shipper demand. My understanding is that the changes proposed by shipper groups, and in particular the Coal Shippers, are much more limited than this. In any event, my testimony is limited to addressing the facts as to the relative efficiency of single-line versus joint-line service where a second carrier may be allowed to serve a shipper due to the imposition of a new through route, and the extent to which allowing some additional reciprocal switching or terminal area trackage rights for specific movements would be inefficient or disruptive.

III. Relative Efficiency of Single-Line vs. Joint-Line Rail Service

AAR, UP and NS claim that giving shippers additional routing options would result in conversion of many single-line movements into joint-line movements involving two rail carriers, and that transportation involving two carriers is necessarily less efficient and more costly than single-line service due to the need for an interchange. AAR Comments at 51-52; Fritz VS at 17, 25; Manion VS at 7-15. In reality, however, joint-line service can be virtually as efficient as single-line service particularly for unit-train movements involving run-through operations. Railroads usually cooperate with each other to coordinate such movements efficiently, and with run-through power the exchange of trains between two carriers often is quite seamless. Most joint unit-train movements involve interchange points that are already crew-change points (the carriers participating in a joint run-through movement of unit trains operate their own crews on their respective portions of the movement), so crew efficiency is not an issue. If the

railroads are interested in making the operation efficient (as they should be), they coordinate train arrivals at the interchange point so that the outbound carrier has a crew ready when the train arrives. The time required for a crew change and air test by the outbound crew (with a run-by inspection as the train departs) can be 20 minutes or less under normal circumstances, which is little different from the time required to change crews at a railroad's internal crew-change points.

My experience at CNW confirms this. All of the coal movements originated by CNW's subsidiary, WRPI, in the PRB were joint movements with UP, which moved the trains either to the destination power plant or water terminal, or to an interchange point with the terminating carrier. WRPI and UP interchanged coal trains at South Morrill, NE, and used run-through locomotive power on all such trains. As AAR's Witness Burkhardt (who was still with CNW when it commenced operations in the PRB) should know, WRPI/UP's joint operation of PRB coal trains in the 1980's and early 1990's was efficient and highly successful. This is evidenced by the fact that they increased their market share of PRB coal originating at mines served by the Joint Line every year and had a more than 50% market share by the time UP took over WRPI and CNW in 1995.

WRPI, UP and CNW also participated in a number of highly successful PRB coal movements that involved CNW east of Council Bluffs, IA, and which thus involved three carriers. These movements, which also involved the efficient use of run-through power, were routed WRPI-South Morrill-UP-Council Bluffs-CNW. In fact, these three carriers participated in moving coal trains to Chicago for interchange to an

eastern carrier, for final delivery to power plants in northwestern Indiana.

WRPI/UP/CNW were able to compete successfully with the single-line BN route between the PRB and Chicago when the utility switched from eastern to western coal, as evidenced by the fact that they were able to win the business at profitable rates. Under AAR's and the railroads' theory here, this should have been impossible.

Because rail carriers have an incentive to favor single-line hauls over joint hauls, I am not aware of many situations where single-line service has been converted to joint service, although it has happened. However, there are numerous situations where (for example) a power plant is served by a railroad that does not serve the coal origin, and the origin and destination carriers cooperate with run-through power and other arrangements to make a joint movement seamless and efficient. One example from my CNW days was the movement of nearly 10 million tons of PRB coal annually to Houston Lighting & Power's Parrish plant near Houston, TX. The originating carrier(s) – then BN or WRPI/UP – moved the coal trains to Fort Worth, TX, where they were interchanged to the Atchison, Topeka and Santa Fe (this was pre-BN/Santa Fe merger) for movement to the final destination.

CNW and UP also cooperated for interline movements of non-unit train transcontinental traffic (including large volumes of service-sensitive intermodal traffic) which CNW handled between Chicago and Council Bluffs/Fremont and UP handled between Council Bluffs/Fremont and the West Coast, or vice versa. This was a very efficient route and CNW/UP's service was excellent, as evidenced by their large market share notwithstanding competition from two separate single-line routes (ATSF and BN).

The railroads assert that non-unit train joint movements are much less efficient than unit train movements because of the need to block and classify cars. However, pre-blocking groups of cars is increasingly prevalent in the rail industry to minimize the need for intermediate classification and switching. Cars destined for a point on another railroad are usually blocked through to the destination carrier. For example, UP typically classifies eastbound transcontinental traffic at its large yard at North Platte, NE. It may block an entire train (or group of cars) for movement to an interchange partner – for example, during my time at CNW, UP would block traffic at North Platte that moved over CNW east of Council Bluffs for Conrail/Chicago, CSXT/Chicago, NS or CSXT/East St. Louis, *etc.* The receiving carrier picks up the block at the interchange point and moves it to destination or to one of its own yards for further classification, depending on the volume involved. Multiple blocks from different inbound carriers at interchange terminals such as Kansas City, Dallas/Fort Worth, Chicago, St. Louis, Memphis or New Orleans can easily be consolidated by the outbound carrier into a single train for efficient movement from the interchange point on its own lines.

To amplify, in the early 1990's UP regularly pre-blocked entire manifest trains for Conrail at North Platte, in three separate blocks, with CNW serving as intermediate carrier (the trains remained intact while moving on CNW until interchanged to Conrail at Chicago). Conrail similarly pre-blocked westbound trains destined to North Platte before they reached Chicago. UP, CNW and Conrail crews handled the trains in typical run-through fashion (step-on, step-off) and locomotive power was pooled by the three carriers. This was a seamless operation even though three Class I carriers were

involved in the movement. Due to mergers there are fewer Class I interchange partners today than there were in the early 1990's, but pre-blocking for connections is an increasingly common practice.

In short, non-unit train traffic usually requires classification and switching en route regardless of whether it moves single-line or joint-line, and with cooperation the carriers involved in a joint movement can minimize the number of times cars require classification or other switching through coordinated blocking practices.

IV. Reciprocal Switching and Terminal Trackage Rights

The railroads assert that additional "competitive access" in the form of Board-mandated reciprocal switching agreements and joint use of terminal facilities would result in inefficiencies and congestion due to increased switching and/or operations by two carriers on trackage owned and normally used by only one carrier in terminal areas. AAR/Burkhardt VS at 7; UP/Fritz at 20-23; NS/Manion VS at 16-18.

My understanding is that under current law the STB may require a carrier that serves a "captive" shipper in a terminal area to allow access by a second carrier in certain circumstances. The access can take one of two forms: reciprocal switching, and joint use of terminal facilities (essentially trackage rights in terminal areas). The railroads appear to focus their criticisms primarily on trackage-rights access, but I will briefly address reciprocal switching first.

Reciprocal Switching. Reciprocal switching involves a situation where the carrier that serves a captive shipper facility in a terminal area switches cars destined to or

from the facility on behalf of a second carrier, which moves the cars to or from the terminal area in line-haul service.¹ The second carrier's rate is for the through movement from the initial origin served by that carrier (for example) to the final destination and thus includes switching service by the carrier that actually serves the destination facility. The serving carrier charges the line-haul carrier a fee for providing the switching service.

Usually, a carrier that serves industries in a terminal area already provides switching service to such industries for non-unit train movements. To the extent the traffic is moved to or from the terminal by another carrier, the serving carrier simply switches the cars on behalf of the other carrier rather than for its own account. There is no net increase in switching for the particular traffic involved; the switching is simply performed for another carrier (and perhaps from a different yard or staging point). The statutory requirement that mandated reciprocal switching be "practicable" would appear to enable the STB to police situations where introducing switching service for a second carrier would unduly complicate the serving carrier's own operations.

Joint Use of Terminal Facilities. An alternative access remedy to reciprocal switching is joint use of terminal facilities (terminal trackage rights). I am advised by counsel that the STB has statutory authority to grant such trackage rights over "terminal facilities, including mainline tracks for a reasonable distance outside of a terminal" if it finds such trackage rights to be "practicable and in the public interest without

¹ The word "reciprocal" is an anachronism that harks back to pre-Staggers Act days when two carriers serving large terminals often opened each other's shipper facilities to switching of the other carrier's cars and published switching charges in their tariffs. Today few industries are "open" to such "reciprocal" switching.

substantially impairing the ability of the rail carrier owning the facilities . . . to handle its own business.”

Although some may consider terminal trackage rights a more intrusive option than reciprocal switching, such trackage rights actually can be less intrusive than reciprocal switching for unit-train traffic. This is because the tenant carrier would simply move an entire train to or from the shipper’s facilities, using its own locomotives and crews (and using the owning carrier’s tracks in the terminal area), with no need for origin or destination switching. Moreover, there should be no question of operations by the tenant carrier causing additional congestion on the owning carrier’s tracks because one carrier or the other must be involved in delivering or picking up the train at the shipper’s facilities. In other words, to the extent a second carrier handles the traffic, the owning carrier would not be handling it (due, for example, to competitive bidding) so there would be no net increase in the number of trains operating over the trackage involved. The owning carrier is afforded additional protection from undue congestion by the language quoted above to the effect that the second carrier’s operations may not “substantially impair . . . the ability of the rail carrier owning the facilities . . . to handle its own business” over the trackage involved.

UP Witness Fritz and NS Witness Manion seem to imply that having to share trackage with another carrier is always disruptive, but carriers usually coordinate their joint operations carefully and without problems. U.S. rail carriers routinely grant each other trackage rights over their lines as a voluntary matter. If trackage rights were the problem these witnesses claim, it is unlikely there would have been the large-scale

exchanges of trackage rights that were part and parcel of the BN/Santa Fe and UP/SP mergers and the Conrail control transaction. In any event, in the context of this proceeding it should be kept in mind that the trackage rights under discussion are limited to terminal areas. Wholesale grants of line-haul trackage rights on shipper demand are not implicated by the statutory "competitive access" provisions as I understand them, nor to my knowledge have any shippers proposed this.

VERIFICATION

I, Richard H. McDonald, verify under penalty of perjury that I have read the foregoing Reply Verified Statement and know the contents thereof; and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.


Richard H. McDonald

Executed on: May 12, 2011

**VERIFIED STATEMENT
OF
THOMAS D. CROWLEY**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**COMPETITION IN THE RAILROAD
INDUSTRY**

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Ex Parte No. 705

Verified Statement

of

**Thomas D. Crowley
President**

L. E. Peabody & Associates, Inc.

On Behalf of

CONCERNED CAPTIVE COAL SHIPPERS

Dated May 27, 2011

I. INTRODUCTION

My name is Thomas D. Crowley. I am an economist and President of L. E. Peabody & Associates, Inc., an economic consulting firm that specializes in solving economic, transportation, marketing, financial, accounting and fuel supply problems. I have spent most of my consulting career of over forty (40) years evaluating fuel supply issues and railroad operations, including railroad costs, prices, financing, capacity and equipment planning issues. My assignments in these matters were commissioned by railroads, producers, shippers of different commodities, and government departments and agencies.

As a part of my work, I presented testimony before the Interstate Commerce Commission ("ICC") in Ex Parte No. 347 (Sub-No. 1), *Coal Rate Guidelines - Nationwide*, the proceeding that established Constrained Market Pricing and the Stand-Alone Cost constraint for determining maximum reasonable railroad rates for captive traffic. I also submitted testimony before the Surface Transportation Board ("STB" or "Board") in Ex Parte No. 657 (Sub-No. 1), *Major Issues In Rail Rate Cases*, the proceeding that modified the application of the stand-alone cost test. I also developed and presented numerous pieces of testimony utilizing the various formulas employed by the ICC and STB (both Rail Form A and the Uniform Railroad Costing System ("URCS")) to develop variable costs for rail common carriers. In this regard, I was actively involved in the development of the URCS formula, and presented evidence to the

ICC analyzing the formula in Ex Parte No. 431, *Adoption of the Uniform Railroad Costing System for Determining Variable Costs for the Purposes of Surcharge and Jurisdictional Threshold Calculations*.

As a result of my extensive economic consulting practice and my participation in maximum-rate, rail merger, and rule-making proceedings before the ICC and the STB, I have become thoroughly familiar with the operations, practices and costs of the rail carriers that move traffic over the major rail routes in the United States. A copy of my credentials is included as Exhibit_(TDC-1) to this Verified Statement.

I have been asked by counsel for the Concerned Captive Coal Shippers (“Concerned Coal Shippers” or “CCCS”) to comment on the cost to interchange unit coal trains between two railroads, the historic treatment of interchange costs, and the limited universe of rail traffic which the Concerned Coal Shippers’ proposals even arguably could impact.

My comments are discussed below under the following topical headings:

II. Background

III. Unit Coal Train Cost of Interchange

IV. Historic Treatment of Interchange Cost For Through Movements

V. Railroad Traffic Moving at Revenue to Variable Cost Ratios
Greater than RSAM or $R/VC_{>180}$

VI. Conclusions

II. BACKGROUND

In its Notice of Public Hearing served January 11, 2011, in Ex Parte No 705, *Competition in the Railroad Industry* (“Notice”), the Board expressed its intention to examine issues related to the current state of competition in the railroad industry and possible policy alternatives to facilitate more competition, where appropriate. The Board advised that the proceeding is intended as a “public forum to discuss access and competition in the rail industry, and with a view to what, if any, measures the Board can and should consider to modify its competitive access rules and policies.....”¹

As fully explained in their Opening Comments, the Concerned Coal Shippers requested that the Board establish two “bright-line standards” of the nature of the Board’s class exemptions that would be based upon the revenue-to-variable cost (“R/VC”) ratios for rail service from the subject origin to the subject destination under the existing routing.² The variable cost portion of these R/VC ratios would be calculated using the STB’s URCS Phase III costing program. The two proposed standards would apply to shipments that produce R/VC ratios greater than the Board’s annual determination of the Revenue Shortfall Allocation Methodology (“RSAM”) ratios³ or those produced by the Board’s “revenue to variable/cost percentage above 180” (“R/VC_{>180}”) ratios.⁴ Assuming the rate charged for a given movement exceeds the

¹ Notice at 5.

² See CCCS Opening Comments at 3-7 and 72-94.

³ RSAM measures the average markup that the railroad would need to charge its potentially captive traffic in order for the railroad to generate profits that result in the railroad being considered revenue adequate. Potentially captive traffic is all traffic that generates a R/VC ratio equal to or greater than 180% using the URCS Phase III cost model.

⁴ R/VC_{>180} measures the actual average markup of all potentially captive traffic handled by the railroad each calendar year.

RSAM level (or exceeds the $R/VC_{>180}$ level in situations where an alternative route is shorter than the current route), the Concerned Coal Shippers propose that the shipper be entitled, upon request, to prescription of an alternative through route.

In their Comments, the AAR and the individual Class I railroads go to great lengths to describe the likely catastrophic impact of any changes to the 1985 competitive access rules. The railroads' comments imply that changes designed to implement the relevant provisions of Title 49 of the United States Code in a more appropriate manner would only deteriorate the financial condition of the railroads by imposing additional costs and lowering revenues. In their Comments, the Class I railroads ignore any possible benefits associated with greater competition and lower prices, such as the potential for an increase in traffic and revenues. The most notable example of such benefits, of course, was the introduction of competition for rail service from the Powder River Basin ("PRB"). As the STB is well aware, the introduction of this competition led to a tremendous growth in traffic, continuing improvements in efficiency and productivity, reductions in prices, and tremendous benefits for the rail industry and the many shippers who came to depend upon PRB coal.

III. UNIT COAL TRAIN COST OF INTERCHANGE

The Opening Comments of AAR Witness Burkhardt, Norfolk Southern Railway Company ("NS") witness Manion, and Union Pacific Railway Company ("UP") witness Fritz attempt to demonstrate that the capital and operating costs incurred by railroads in performing interchange operations are extensive regardless of the traffic involved, i.e.

the interchange of single carload traffic or unit train traffic. The railroads' Opening Comments also suggest that any additional interchange traffic will result in extraordinary additional expenses, cause snowballing delays and catastrophic inefficiencies throughout their systems.⁵

The bleak picture painted by these railroad witnesses does not distinguish between additional interchange traffic moving through traditional gateways and traffic moving through new gateways, nor does it distinguish between traffic moving in carload and multiple car shipments and traffic moving in unit train shipments, which most frequently move in run-through service between the participating railroads. Instead, the railroads attempt to portray the situation as one where traffic moving via an alternative route would move in single shipments through facilities which are not currently used, or are rarely used, as interchange locations between railroads. In other words, the railroads would have the STB believe that access to any alternative route would result in a flood of single car shipments moving through entirely new interchanges.

The fact of the matter is most unit train operations involve run-through operations where the locomotive power stays with the train and a valid inspection certificate is provided by the delivering railroad. Therefore, the interchange quite literally is nothing more than a crew change operation. The crew of one railroad steps off the train and the crew of the second railroad steps on.

The efficiencies of unit train operations are evidenced by the level of interchange costs calculated using the STB's URCS Phase III cost program. Using this program, I

⁵ See AAR Comments at 51-52; Fritz VS at 17-28; Manion VS at 7-15.

determined the interchange cost per ton for a western unit coal train shipment and an eastern unit coal train shipment. For the western coal shipment, I assumed a 1,500-mile unit coal train shipment comprised of 135 shipper-provided rail cars and 120 tons lading per car, moving 750 miles from the origin on UP and then 750 miles on BNSF to destination. For the eastern unit coal train shipment, I assumed an 800-mile move comprised of 110-railroad-provided rail cars with 110 tons lading, originating on NS and moving 400 miles and then moving 400 miles on CSXT to destination. The interchange costs that I calculated were \$0.40 per ton for UP/BNSF and \$0.52 per ton for NS/CSXT.⁶ These interchange costs are only a small portion of the total URCS Phase III variable costs for the two hypothetical unit train shipments of \$15.01 per ton and \$13.78 per ton for western and eastern unit coal train shipments, respectively.

IV. HISTORIC TREATMENT OF INTERCHANGE COST FOR THROUGH MOVEMENTS

Further evidence of the insignificance of interchange costs related to unit coal train shipments is the historic treatment of interchange costs by the ICC. Currently, the STB's URCS Phase III procedures use the *X270*⁷ procedures, i.e., 50 percent of system average, to adjust interchange costs for unit train movements. In the maximum rate cases before and after the Staggers Act, the ICC preferred to utilize actual interchange switching

⁶ See Exhibit TDC-2 for details of my calculations.

⁷ Ex Parte No. 270 (Sub-No. 4), *Investigation of Railroad Freight Rate Structure Coal*, 345 I.C.C. 227, 228 ("X270").

minutes per car when that information was known.⁸ The actual interchange minutes per car for unit train interchanges in these cases were substantially less than the 50 percent adjustment developed in *X270*.

In cases where the ICC specifically reviewed run-through power for interchange movements for unit coal trains, the ICC eliminated the interchange switching costs altogether. For example, in *Santee Cooper*⁹, both the shipper and the railroads based variable costs on 25 minutes per train, in each direction, to account for the interchange switching at St. Paul, Virginia. The ICC stated that interchange cost "...is no longer applicable and is omitted from the restatement".¹⁰ According to the ICC, the interchange switching minutes were not applicable because the "record indicates that locomotives and cars, the entire trains, are now running through from origin to destination on the St. Paul route."¹¹

In *Moapa*¹², shipper Nevada Power Company ("NPC") made no allowance for interchange switching costs in its variable cost calculations. "NPC states that its study indicates that the issue service provided by the railroads is run-through service at Provo, Utah".¹³ The ICC rejected the railroads' attempt to include switching minutes at Provo and considered the "...data derived from NPC's study the better evidence on this

⁸ See, for example, I.C.C. Docket No. 36180, *San Antonio, Texas, Acting By and Through Its City Public Service Board v. Burlington Northern, Inc., Et Al.*, Served October 14, 1976; I.C.C. Docket No. 37226, *Incentive Rates on Coal – Axial, CO to Coletto Creek, TX*, served January 15, 1980; and I.C.C. Docket No. 39082, *Arkansas Power & Light Company, Et. Al. v. Burlington Northern Railroad Company Et. Al.*, served June 26, 1984.

⁹ I.C.C. Docket No. 37338, *South Carolina Public Service Authority v. Clinchfield Railroad Company Et Al.*, served June 22, 1981 ("*Santee Cooper*").

¹⁰ (*Santee Cooper*, page 19).

¹¹ (*Santee Cooper*, page 19) (emphasis added).

¹² I.C.C. Docket No. 37038, *Bituminous Coal – Hiawatha, Utah to Moapa, Nevada*, decided October 3, 1989, 6 I.C.C.2d 32-33 ("*Moapa*").

¹³ (6 I.C.C.2d 32) (emphasis added).

record...”¹⁴ According to the ICC’s findings in these cases, the STB’s current practice of including an interchange cost equal to 50 percent of system average interchange costs clearly overstates the cost of performing unit-train run-through interchange operations.

The Concerned Coal Shippers have requested that the STB confirm that a shipper will be permitted to file a maximum rate reasonableness case regarding the rate imposed on a prescribed alternative through rate. Under the standard STB approach to maximum rate reasonableness cases, defendant carriers automatically receive at least an 80% mark-up¹⁵ on their costs since the Board’s jurisdictional threshold is based on 180% of the variable costs of the actual movement in question. Significantly, however, the STB’s URCS Phase III costing system assumes that the carriers participating in interline coal movements will incur an interchange cost that they typically are able to avoid through the use of run-through power arrangements. Accordingly, the defendant railroads in a maximum rate case challenging the rate on a prescribed through route would automatically obtain at least 180% of the assumed Phase III interchange cost as pure profit. As a consequence, carriers actually would obtain a windfall in relation to their actual costs in cases challenging rate levels on interline movements.

¹⁴ (6 I.C.C.2d 33).

¹⁵ In stand-alone and simplified stand-alone cases, the maximum rate is based on the greater of the jurisdictional threshold (180% R/VC ratio) or the Maximum Mark-up Methodology (“MMM”) R/VC ratio times the railroad’s URCS Phase III variable costs.

**V. RAILROAD TRAFFIC MOVING AT REVENUE TO
VARIABLE COST RATIOS GREATER THAN RSAM OR R/VC>180**

In their Comments in this proceeding, the Concerned Coal Shippers proposed a limited form of relief involving the prescription of alternative through routes in situations in which rates on existing traffic exceed RSAM or R/VC_{>180} levels. The most recent STB statistics available demonstrate that those figures substantially exceed the STB's jurisdictional threshold of 180% of variable costs as shown in Table 1 below:

Table 1		
<u>Most Recent RSAM And R/VC_{>180} Mark-up Percentages - 2008</u>		
<u>Railroad</u>	<u>2008 RSAM</u>	<u>2008 R/VC_{>180}</u>
(1)	(2)	(3)
1. BNSF	242%	221%
2. CSXT	282%	246%
3. GTC	290%	250%
4. KCS	331%	236%
5. NS	238%	266%
6. SOO	319%	230%
7. UP	257%	232%

Source: Ex Parte No. 689 (Sub-No. 1), *Simplified Standards for Rail Rate Cases – 2008 RSAM and R/VC_{>180} Calculations*, at 3 (STB served July 27, 2010).

In their Opening Comments, the railroads argue that competitive access relief – which they interpret as unfettered open access – would have a substantially adverse impact on railroad revenues. In order to provide some quantification of this anticipated impact, the AAR submits the expert testimony of Mr. William J. Rennieke (“Rennieke V.S.”). In his statement, Mr. Rennieke states that:

“Proposals to change current STB policy on rail pricing all have the purpose of lowering railroad rates still further. Most proposals would accomplish this objective by weakening the railroads’ ability to set prices for the 34 percent of rail shipments that are defined as “potentially captive” because they generate revenues above 180 percent of variable cost.”¹⁶

Mr. Rennie’s comment is misleading and irrelevant. Review of the source of Mr. Rennie’s information shows that his statement confuses the meaning of his own statistics. In particular, the “34 percent of rail shipments” figure identified by Mr. Rennie is really 34 percent of railroad *revenues* not shipments. The source of Mr. Rennie’s data is an STB 2008 commodity revenue report.¹⁷ Mr. Rennie’s Exhibit VI-1 shows that 34% is the “Share of Total Revenues Generated by Traffic with R/VC Ratio $>_{180}$.”¹⁸ This revenue therefore equals 34 percent of total railroad revenue, it does not equal 34 percent of railroad shipments. Since, by definition, the railroads’ highest-rate shipments generate an above-average share of the total railroad revenues, there is a smaller percentage of shipments moving at rates above the jurisdictional threshold than Mr. Rennie contends.

Mr. Rennie also argues that competitive access would deprive the industry of \$5.2 billion annually, which he calculates as the incremental revenue that railroads earn on rate levels over 180% of variable costs. In this regard, Mr. Rennie states that “To provide one estimate of the size of the problem this could create, if the rates for all traffic currently moving under rates subject to regulation (rates with an R/VC ratio or

¹⁶ See Rennie V.S., page 19 (emphasis added).

¹⁷ STB’s Commodity Revenue Stratification Report for 2008, Summary of Revenues and URCS Variable Costs by Two-Digit STCC and Revenue-to-Variable Cost Ratio Category.

¹⁸ See Rennie V.S., page 19.

>180) were reduced by forced access to rates with an R/VC ratio equal to 180, the railroad industry would lose \$5.2 billion annually in revenue”.¹⁹

Mr. Rennie’s \$5.2 billion figure has no relevance whatsoever to the relief that the Concerned Coal Shippers actually seek. It is understood that at the time of preparing its Comments, the AAR was not aware of the Concerned Coal Shippers’ proposals. Nevertheless, it is critical to observe the tremendous gap between the jurisdictional threshold and the RSAM and R/VC_{>180} figures. As the figures cited above demonstrate, RSAM levels in the most recent year available (2008) range from 242% to 331%. R/VC_{>180} levels ranged from 221% to 266% for that same year.

I am not aware of any publically available specific quantification of the amount of rail traffic moving at rates above the RSAM level, or the incremental revenues obtained by Class I carriers for such movements. Based upon my experience in the industry, however, it is my impression that the percentage of railroad movements with rates in excess of RSAM must be very small. And with reference to the \$5.2 billion incremental figure cited by Mr. Rennie, I would expect the incremental revenue on those “above-RSAM” movements to be far, far smaller than this \$5.2 billion amount.

In addition, there is information available in the Christensen Study²⁰ on which to draw some conclusions regarding the small number of shipments falling into this category. Specifically, the Christensen Study includes data from the carload waybill sample regarding the percentage of tons and ton-miles moving at R/VC levels greater

¹⁹ See Rennie V.S., pages 19-20.

²⁰ Laurits R. Christensen Associates, Inc., “*Analysis of Competition, Capacity, and Service Quality*,” Vol. 2, Revised Final Report (November 2009), at 11-25.

than 180% and greater than 300% both in 2000-2001 and 2005-2006 as shown in Table 2 below:

Table 2			
Percent Of Tons And Ton-Miles By R/VC Category			
2000-2001 Vs. 2005-2006 Carload Waybill Sample Data			
<u>Period</u> (1)	<u>R/VC between</u> <u>180 and 300</u> (2)	<u>R/VC >300</u> (3)	<u>Subtotal R/VC</u> <u>> 180 percent</u> (4)
A. <u>PERCENT OF TONS BY R/VC CATEGORY</u>			
1. 2000-2001	28%	6%	34%
2. 2005-2006	25%	9%	34%
B. <u>PERCENT OF TON-MILES BY R/VC CATEGORY</u>			
1. 2000-2001	19%	2%	21%
2. 2005-2006	16%	4%	19%

The Christensen Report demonstrates that only a small percentage of tons and ton-miles move at rates in excess of 300% of variable costs. For example, only four percent of railroad ton-miles in 2005-2006 were associated with movements at rates in excess of 300% of variable costs. By way of comparison, RSAM levels in 2005 were 284% for BNSF, 341% for CSXT, and 379% for UP. Consequently, it is evident that very small percentages of these carriers' traffic in 2005 would have exceeded the RSAM level (i.e., far less than four percent of ton-miles for CSXT and UP). Reducing the rates on those very small percentages of traffic down to RSAM levels would have only a modest impact on the carriers' overall revenues. Moreover, since the relief that the Concerned Coal Shippers requested would, in all likelihood not result in rate reductions

in all cases of rates exceeding the RSAM figures²¹, it is clear that the railroads' warnings of downward economic spirals from complete open access have no relevance to the Concerned Coal Shippers' proposals.

Finally, it is appropriate to note that while shippers do not have access to information that would identify the specific incremental revenue amounts associated with traffic moving at rates over RSAM or R/VC_{>180} levels, it is undoubtedly the case that the STB has access to this type of information when preparing its annual RSAM and R/VC_{>180} calculations. In order to attempt to quantify the impact of the Concerned Coal Shippers' proposals, the STB therefore could evaluate the data in its own files.

VI. CONCLUSIONS

As a practical matter, the railroads do not incur meaningful variable interchange service costs when unit coal train traffic is moved between railroads. To the extent that the STB prescribes rates based on the URCS Phase III costing model for a captive interline movement, the variable interchange costs included in the model translate into pure profits for the involved railroads.

Finally, it is evident that the relief sought by the Concerned Coal Shippers would not have the economic impact of reducing all rates to the STB's jurisdictional threshold. Instead, the impact of these proposals is far more modest. Although shippers do not have access to this information, the STB has the ability to evaluate the impact of these proposals using the data in its files.

²¹ See CCCS Opening Comments at 77-82.

STATEMENT OF QUALIFICATIONS

My name is Thomas D. Crowley. I am an economist and President of the economic consulting firm of L. E. Peabody & Associates, Inc. The firm's offices are located at 1501 Duke Street, Suite 200, Alexandria, Virginia 22314, and 760 E. Pusch View Lane, Suite 150, Tucson, Arizona 85737 and 21 Founders Way, Queensbury, New York 12804.

I am a graduate of the University of Maine from which I obtained a Bachelor of Science degree in Economics. I have also taken graduate courses in transportation at George Washington University in Washington, D.C. I spent three years in the United States Army and since February 1971 have been employed by L. E. Peabody & Associates, Inc.

I am a member of the American Economic Association, the Transportation Research Forum, and the American Railway Engineering and Maintenance-of-Way Association.

The firm of L. E. Peabody & Associates, Inc. specializes in analyzing matters related to the rail transportation of coal. As a result of my extensive economic consulting practice since 1971 and my participating in maximum-rate, rail merger, service disputes and rule-making proceedings before various government and private governing bodies, I have become thoroughly familiar with the rail carriers that move coal over the major coal routes in the United States. This familiarity extends to subjects of railroad service, costs and profitability, railroad capacity, railroad traffic prioritization and the structure and operation of the various contracts and tariffs that historically have governed the movement of coal by rail.

STATEMENT OF QUALIFICATIONS

As an economic consultant, I have organized and directed economic studies and prepared reports for railroads, freight forwarders and other carriers, for shippers, for associations and for state governments and other public bodies dealing with transportation and related economic problems. Examples of studies I have participated in include organizing and directing traffic, operational and cost analyses in connection with multiple car movements, unit train operations for coal and other commodities, freight forwarder facilities, TOFC/COFC rail facilities, divisions of through rail rates, operating commuter passenger service, and other studies dealing with markets and the transportation by different modes of various commodities from both eastern and western origins to various destinations in the United States. The nature of these studies enabled me to become familiar with the operating practices and accounting procedures utilized by railroads in the normal course of business.

Additionally, I have inspected and studied both railroad terminal and line-haul facilities used in handling various commodities, and in particular unit train coal movements from coal mine origins in the Powder River Basin and in Colorado to various utility destinations in the eastern, mid-western and western portions of the United States and from the Eastern coal fields to various destinations in the Mid-Atlantic, northeastern, southeastern and mid-western portions of the United States. These operational reviews and studies were used as a basis for the determination of the traffic and operating characteristics for specific movements of coal and numerous other commodities handled by rail.

STATEMENT OF QUALIFICATIONS

I have frequently been called upon to develop and coordinate economic and operational studies relative to the acquisition of coal and the rail transportation of coal on behalf of electric utility companies. My responsibilities in these undertakings included the analyses of rail routes, rail operations and an assessment of the relative efficiency and costs of railroad operations over those routes. I have also analyzed and made recommendations regarding the acquisition of railcars according to the specific needs of various coal shippers. The results of these analyses have been employed in order to assist shippers in the development and negotiation of rail transportation contracts which optimize operational efficiency and cost effectiveness.

I have developed property and business valuations of privately held freight and passenger railroads for use in regulatory, litigation and commercial settings. These valuation assignments required me to develop company and/or industry specific costs of debt, preferred equity and common equity, as well as target and actual capital structures. I am also well acquainted with and have used the commonly accepted models for determining a company's cost of common equity, including the Discounted Cash Flow Model ("DCF"), Capital Asset Pricing Model ("CAPM"), and the Farma-French Three Factor Model.

Moreover, I have developed numerous variable cost calculations utilizing the various formulas employed by the Interstate Commerce Commission ("ICC") and the Surface Transportation Board ("STB") for the development of variable costs for common carriers,

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with particular emphasis on the basis and use of the Uniform Railroad Costing System (“URCS”) and its predecessor, Rail Form A. I have utilized URCS/Rail form A costing principles since the beginning of my career with L. E. Peabody & Associates Inc. in 1971.

I have frequently presented both oral and written testimony before the ICC, STB, Federal Energy Regulatory Commission, Railroad Accounting Principles Board, Postal Rate Commission and numerous state regulatory commissions, federal courts and state courts. This testimony was generally related to the development of variable cost of service calculations, rail traffic and operating patterns, fuel supply economics, contract interpretations, economic principles concerning the maximum level of rates, implementation of maximum rate principles, and calculation of reparations or damages, including interest. I presented testimony before the Congress of the United States, Committee on Transportation and Infrastructure on the status of rail competition in the western United States. I have also presented expert testimony in a number of court and arbitration proceedings concerning the level of rates, rate adjustment procedures, service, capacity, costing, rail operating procedures and other economic components of specific contracts.

Since the implementation of the Staggers Rail Act of 1980, which clarified that rail carriers could enter into transportation contracts with shippers, I have been actively

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involved in negotiating transportation contracts on behalf of coal shippers. Specifically, I have advised utilities concerning coal transportation rates based on market conditions and carrier competition, movement specific service commitments, specific cost-based rate adjustment provisions, contract reopeners that recognize changes in productivity and cost-based ancillary charges. I have also reviewed, analyzed and evaluated both UP's Circular 111 and BNSF 90068 rate levels and other terms and conditions on behalf of coal shippers.

I have been actively engaged in negotiating coal supply contracts for various users throughout the United States. In addition, I have analyzed the economic impact of buying out, brokering, and modifying existing coal supply agreements. My coal supply assignments have encompassed analyzing alternative coals to determine the impact on the delivered price of operating and maintenance costs, unloading costs, shrinkage factor and by-product savings.

I have developed different economic analyses regarding rail transportation matters for over sixty (60) electric utility companies located in all parts of the United States, and for major associations, including American Paper Institute, American Petroleum Institute, Chemical Manufacturers Association, Coal Exporters Association, Edison Electric Institute, Mail Order Association of America, National Coal Association, National Industrial Transportation League, North America Freight Car Association, the Fertilizer Institute and Western Coal Traffic League. In addition, I have assisted numerous

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government agencies, major industries and major railroad companies in solving various transportation-related problems.

In the two Western rail mergers that resulted in the creation of the present BNSF Railway Company and Union Pacific Railroad Company and in the acquisition of Conrail by Norfolk Southern Railway Company and CSX Transportation, Inc., I reviewed the railroads' applications including their supporting traffic, cost and operating data and provided detailed evidence supporting requests for conditions designed to maintain the competitive rail environment that existed before the proposed mergers and acquisition. In these proceedings, I represented shipper interests, including plastic, chemical, coal, paper and steel shippers.

I have participated in various proceedings involved with the division of through rail rates. For example, I participated in ICC Docket No. 35585, *Akron, Canton & Youngstown Railroad Company, et al. v. Aberdeen and Rockfish Railroad Company, et al.* which was a complaint filed by the northern and mid-western rail lines to change the primary north-south divisions. I was personally involved in all traffic, operating and cost aspects of this proceeding on behalf of the northern and mid-western rail lines. I was the lead witness on behalf of the Long Island Rail Road in ICC Docket No. 36874, *Notice of Intent to File Division Complaint by the Long Island Rail Road Company.*

Hypothetical Unit Train Variable Costs Based on URCS Phase III

A. <u>Inputs</u>	<u>Item</u> (1)	<u>Joint Line</u>		<u>Joint Line</u>		<u>Joint Line</u>	
		<u>BNSF/UP</u> (2)	<u>BNSF/UP</u> W/O Interchange (3)	<u>BNSF/UP</u> W/O Interchange (3)	<u>NS/CSXT</u> (4)	<u>NS/CSXT</u> W/O Interchange (5)	<u>NS/CSXT</u> W/O Interchange (5)
1. Carrier		BNSF/UP	BNSF/UP	BNSF/UP	NS/CSXT	NS/CSXT	NS/CSXT
2. Miles		750/750	750/750	750/750	400/400	400/400	400/400
3. Shipment Type		IF/IR	IF/IR	IF/IR	IF/IR	IF/IR	IF/IR
4. Number of Cars		135	135	135	110	110	110
5. Tons Per Car		120	120	120	110	110	110
6. Commodity		11212	11212	11212	11212	11212	11212
7. Type of Movement		Unit Train	Unit Train	Unit Train	Unit Train	Unit Train	Unit Train
8. Car Ownership		Private	Private	Private	Railroad	Railroad	Railroad
9. Type of Car		Uneq. Gondola	Uneq. Gondola	Uneq. Gondola	Uneq. Gondola	Uneq. Gondola	Uneq. Gondola
B. <u>Variable Costs (2009)</u>							
10. Variable Cost Per Ton <u>1/</u>		\$15.01	\$14.61	\$14.61	\$13.78	\$13.26	\$13.26
11. Interchange Portion of Cost <u>2/</u>			\$0.40	\$0.40			\$0.52

1/ 2009 STB URCS released 12/17/10
2/ Line 10 column (2) less column (3) and Line 10 column (4) less column (5)

