38. §1312.37(a)
39. §1312.39(h)
40. Part 1320 heading
41. §1320.1(a)
42. §1330.1
43. §1331.1(c)

Part 1080 - CONTRACTS, HOUSEHOLD GOODS FREIGHT FORWARDERS --MOTOR COMMON AND CONTRACT CARRIERS

2. The heading for Part 1080 is revised to read as shown above.

PART 1312- REGULATIONS FOR THE PUBLICATIONS, POSTING AND FILING OF TARIFFS, SCHEDULES AND RELATED DOCUMENTS

§1312.4 - [AMENDED]

3. Paragraph (b)(7)(v) of §1312.4 is amended by inserting the words "household goods" before the word "forwarder."

§1312.8 - [AMENDED]

4. Paragraph (c)(2) of §1312.8 is amended by removing the entry and address for freight forwarders, and by revising the heading preceding the address in the last entry to read "*All Other Modes*."

No. 39021

MIDTEC PAPER CORPORATION, *ET AL.* *v.* CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY (USE OF TERMINAL FACILITIES AND RECIPROCAL SWITCHING AGREEMENT)

Decided December 2, 1986

The Commission finds that the complainants have not shown the existence of an act that is contrary to the competition policies of 49 U.S.C. §10101a or otherwise anticompetitive. Imposition of reciprocal switching and use of terminal facilities is not shown to be in the public interest and is denied. The Commission concludes that a showing of market dominance need not be made in competitive access cases.

Edward D. Greenberg, Mark S. Kahan, and *William C. Sippel* for complainants.

Stuart F. Gassner and *Christopher A. Mills* for defendant.

John F. Donelan, John F. Donelan, Jr., and *Roy E. Olson* for American Paper Institute, Inc.

Peter Andress and *Richard S. M. Emrich* for *amicus curiae* The Andersons and International Minerals & Chemical Corporation.

David M. Levy, R. Eden Martin, and *J. Thomas Tidd* for *amicus curiae* Association of American Railroads.

John L. Oberdorfer, E. Thomas Smerdon, Jr., Scott N. Stone, and *David F. Zoll* for *amicus curiae* Chemical Manufacturers Association.

Constance L. Abrams, Cheryl A. Cook, Paul A. Cunningham, Robert M. Jenkins, III, and *David A. Hirsh* for *amicus curiae* Consolidated Rail Corporation.

Richard P. Kowalewski for *amicus curiae* Farmland Industries, Inc.

James E. Bartley, John M. Cleary, John F. Donelan, and *John F. Donelan, Jr.*, for *amicus curiae* The National Industrial Transportation League.

Mary Ann Johnson and *Nicholas J. Spaeth* for *amicus curiae* North Dakota Public Service Commission.

John F. Donelan and *John F. Donelan, Jr.*, for *amicus curiae* Procompetitive Rail Steering Committee.

Donald G. Avery, Kelvin J. Dowd, C. Michael Loftus, and *William A. Slover* for *amicus curiae* Western Coal Traffic League.

DECISION

BY THE COMMISSION:

I. INTRODUCTION

Complainants Midtec Paper Corporation (Midtec) and Soo Line Railroad Company (Soo) seek a Commission order to permit Soo to serve Midtec's paper mill at Kimberly, WI, by: (1) compelling use of the terminal facilities (terminal trackage rights) of the Chicago and North Western Transportation Company (CNW) under 49 U.S.C. §11103(a); and/or (2) imposing a reciprocal switching agreement between Soo and CNW under 49 U.S.C. §11103(c).

Midtec and Soo jointly filed a complaint on December 23, 1982.[1] They alleged that "Midtec's captive status" on CNW's line "subjects it to serious service and price disabilities" (Complaint, at 3). Similarly, on reopening they allege that because of CNW's "refusal to offer Midtec competitively based rates and services" Midtec was "severely disadvantaged in its markets and on the brink of financial disaster" (CRSVS at 4).[2] Midtec sought relief against "monopolistic" (CSVS, at 3) actions of the CNW. Defendant denies these allegations, contending that it has provided responsive and competitive rates and services, on its own, and in conjunction with Soo. It states that this service has allowed Midtec to compete and grow, and that there is no legitimate competitive or service reason for imposing the intrusion on its basic rights that relief under §11103 represents (CNW SVS at 3).

In a decision issued in 1985, we found that no relief was warranted.[3] Soo and Midtec sought judicial review[4] of that decision. Subsequently, we adopted rules for handling competitive access issues, including the prescription of reciprocal switching under §11103(c). Ex Parte No. 445 (Sub-No. 1), *Intramodal Rail Competition*, 1 I.C.C.2d 822 (1985) (*Intramodal*). The purpose of those rules was to provide additional guidance to shippers and small carriers on how to present protests and complaints requesting regulatory relief and to provide an

[1]The American Paper Institute, Inc. (API), was granted leave to intervene as a party on January 26, 1983.

[2]"CRSVS" is complainants' reply supplemental verified statement: "CSVS" is complainants' supplemental verified statement; and "CNW SVS" is defendant's supplemental verified statement.

[3]*Midtec Paper Corporation, v. CNW*, 1 I.C.C.2d 362 (1985) (*Midtec I*).

[4]*Midtec Paper v. I.C.C.*, No. 85-1476 (D.C. Cir., filed July 30, 1985).

appropriate framework for resolution of those disputes. The rules tell the parties what kind of evidence to submit, and indicate under what circumstances the agency will prescribe reciprocal switching. On November 14, 1985, we found that this case should be reopened and reconsidered in light of that decision in that rulemaking. We filed a motion with the court to remand this proceeding for that purpose; the court granted the motion (with conditions) on July 11, 1986.[5] We then requested further evidence and argument and set an expedited procedural schedule for its submission.[6]

In asking for remand of this proceeding, it was our intention to address the issues presented by complainants in the context of newly adopted *Intramodal* rules, and to consider the evidence of record, including such new matters as might be submitted under the evidentiary guidelines provided by those rules. We must note at the outset the disappointment with which we regard the additional evidence and arguments offered by complainants. There has been very little offered or argued in the framework set out by *Intramodal*. Nevertheless, we analyzed the record for what is now the second time, and did so in light of the newly adopted rules. This required that the conduct of respondent be scrutinized from a competitive standpoint. Consequently, we were attentive to the possibility of classical categories of competitive abuse: foreclosure; refusal to deal; price squeeze; or any

[5]The court's order required a decision or a status report within 60 days. If a decision was not issued within 90 days, complainants were allowed to petition the court for further relief.

[6]We also denied petitions to intervene filed by the Chemical Manufacturers Association (CMA) and the Consolidated Rail Corporation (Conrail), but authorized them to participate as *amici curiae*. Subsequently, *amicus* status was also granted to the National Industrial Transportation League (NITL), the Association of American Railroads (AAR), and the Procompetitive Rail Steering Committee (PRSC). Petitions for *amicus* status have also been filed jointly by The Andersons, Farmland Industries, Inc., International Minerals & Chemical Corporation, and the North Dakota Public Service Commission (The Andersons *et al.*) and by the Western Coal Traffic League (WCTL). The Andersons *et al.* filed both their petition and their argument on August 13, 1986, the due date for argument in favor of Midtec and Soo's position. WCTL filed its petition, without any argument, on August 21, 1986. We will grant *amicus* status because it will not unduly broaden or delay the proceeding.

On September 22, 1986, CNW moved to strike the WCTL statement filed on September 12, 1986, the due date for rebuttal by persons supporting complainants. In the alternative, CNW offered reply material responding to WCTL's statement. We will deny the motion to strike and accept the reply. On September 23, 1986, Midtec and Soo filed a reply to CNW's motion to strike. In their reply, complainants ask that the CNW material replying to the WCTL statement be stricken as untimely filed. We deny that request to strike.

other recognizable forms of monopolization or predation. We also considered whether there was any evidence of abuses under the competitive standards of the Rail Transportation Policy, including inadequate service or excessive prices. Under either approach, we found none. This is not to say that the record is devoid of disputes or that we find respondent to have been uniformly selfless and cooperative. To the contrary, we see evidence of hard bargaining with each party fully using the advantages afforded by law and circumstance. But since we do not find evidence of abuse, we are left with complainant Midtec's argument that it would benefit from the mandatory addition of a second railroad, and that complainant Soo is ready to fill that role.

Reduced to a desire for the service of a second carrier, complainants' plea is one of wide applicability. While the Staggers Act incorporated new emphasis on the importance of intramodal competition, we think it correct to view the Staggers changes as directed to situations where some competitive failure occurs. There is a vast difference between using the Commission's regulatory power to correct abuses that result from insufficient intramodal competition and using that power to initiate an open-ended restructuring of service to and within terminal areas solely to introduce additional carrier service.

We are fully aware that the behavior of the respondent railroad is likely to have been affected by the notoriety attending this proceeding. Complainant is concerned that unfavorable termination of this litigation will permit respondent free exercise of its market power. We are equally concerned that the outcome here might be misinterpreted. The Commission has in the past,[7] and will continue in the future, to mandate reciprocal switching and terminal access where a record warranting relief is before us. In the context of this proceeding, we have overruled portions of our original *Midtec* decision that have been perceived as an unwarranted barrier to such relief. Should the conduct of respondent railroad deteriorate, or should the behavior of any other

[7]*Delawre and H.R. Co. v. Consolidated Rail Corp.*, 366 I.C.C. 845 (1982); 367 I.C.C. 718 (1983); Finance Docket No. 29831, *Western Ky. Trucking Co., Louisville & Nashville R. Co. and Illinois Central Gulf R. Co.—Reciprocal Switching Agreement* (not printed) served May 9, 1983; Finance Docket No. 29908, *Delawre & Hudson Railway Company and New York Department of Transportation—Exemption for Use of Terminal Facilities* (not printed) served May 3, 1983; Finance Docket No. 30294, *Southern Pacific Transportation Co. v. Missouri Pacific Railroad Co., et al.* (not printed) served August 20, 1985 and December 10, 1985; and Finance Docket No. 30269, *Denver & Rio Grande Western Railroad Company v. Burlington Northern Railroad Company—Joint Use of Terminal Facilities (not printed) served April 24, 1984.*

carrier exhibit anticompetitive abuse or other offense to the standards of the Interstate Commerce Act, we will grant relief. But on this record, no such abusive conduct has been demonstrated. Our reasons for these conclusions are set forth below.

II. Factual Background

A. General.

Midtec, a subsidiary of Repap Enterprises, Inc., a Canadian corporation, operates a paper mill at Kimberly, WI, one of the "Fox Cities",[8] on CNW's Kaukauna branch line. Midtec receives shipments of raw materials, including pulpwood, woodpulp, coal, clay, limestone, fuel oil, and cornstarch. It ships its finished product, coated paper. Although Midtec is served directly by only one railroad, the CNW, it uses a combination of rail, motor, and water carrier service to transport various commodities. CNW interchanges traffic with Soo at Appleton, WI, and other more distant points and this traffic moves under various joint, combination or contract rates. Kimberly and Appleton are approximately eight miles apart[9] over CNW's Kaukauna branch.

The Midtec mill is within CNW's Appleton "yard limits,"[10] but not within CNW's Appleton "switching limits"[11] established by collective bargaining agreements between CNW and its employees. Operations are conducted at slow speeds with no timetables or prior authorization required and with sudden stops. Nevertheless, CNW currently uses road trains and road crews typical of line-haul service, rather than switch engines and yard crews generally used in switching or terminal operations. Kimberly is listed as a separate and distinct station from Appleton in CNW's tariffs.

When the record in this proceeding was reopened we noted that it was approximately three years old and in need of updating. The supplemental evidence on reopening revealed significant changes in Midtec's shipping patterns. This evidence is discussed in the Appendix.

[8]The ALJ found, and we agree, that the Fox Cities are a cohesive commercial area.

[9]The east end of the mill, where Midtec receives all existing rail traffic, is 7.9 miles from CNW's interchange with Soo at Appleton. The west end of the mill, which is equipped to receive rail shipments of pulpwood, is only 6.4 miles from CNW's interchange with Soo. CNW and Soo maintain adjacent rail yards at Appleton.

[10]Yard limits are not defined by tariff as are switching limits. They are established by a railroad for safety reasons.

[11]Switching limits are established by a carrier in its tariff as the area in which it holds out to provide switching services.

In sum, CNW delivered about 35.6 percent of Midtec's inbound raw materials, and originated about 61.5 percent of its outbound paper in 1982. In 1985, CNW's participation increased to 61 percent of inbound traffic and 63 percent of the outbound traffic. This indicates merely the relative share of the traffic handled by the various modes, not the extent to which and on what terms the Soo participates in rail traffic originated or terminated by CNW.

III. Relevant Standards

Under §11103(c), awarding reciprocal switching is discretionary. Nevertheless, under the rules adopted in *Intramodal*, we will award that relief if significant use will be made of it, and when switching is necessary to remedy or prevent an act that is either contrary to the competition policies of 49 U.S.C. §10101a or otherwise anticompetitive. Switching must also be practical and satisfy the criteria of §11103.[12]

Because this is the first reciprocal switching case decided under our new rules, a brief discussion of this practice is in order. Reciprocal switching[13] is one of several ways in which two or more rail carriers can cooperate to provide a through service to a shipper. (Other methods, discussed below, are through, joint, or combination rates, and trackage rights.) Reciprocal switching is the movement, for a fee, by one carrier of the car or cars of another between a point of interchange and a point on the first carrier's lines. The fee may be absorbed by the paying carrier or it may be passed on to the shipper. The paying carrier is enabled then to publish single line rates to origins and destinations not on its own lines. Such a single switching fee could be applied in connection with rates applying to all commodities coming and going over the branchline, regardless of their origin or destination.

In contrast, joint rates and combination rates are tailored by the carriers participating in them to account for the circumstances of particular commodities and movements. If we were to prescribe a reciprocal switching charge, that would alleviate any necessity for the two railroads to reach agreement on joint rates or through movements

[12]Section 11103(c) sets forth two criteria under either of which the Commission may require rail carriers to enter into a reciprocal agreement: (1) where it finds such agreements to be practicable and in the public interest; or (2) where such agreements are necessary to provide competitive rail service.

[13]The term "reciprocal switching" is a misnomer because reciprocal switching denotes reciprocity, a sharing of each other's traffic. A more accurate term for the Midtec/Soo proposal would be "forced switching."

of particular commodities. The disadvantage of prescribing reciprocal switching is that the agency, not the competitors, would set the charge, and that the carrier that owns the branchline would lose the ability to price its portion of the through service in response to the varying demands for different commodities or movements.

Terminal trackage rights raise similar considerations as reciprocal switching, except that one carrier gains the right to operate its trains over the line of another carrier. Nonetheless, the complaint here indicates that Soo is prepared to negotiate a pooling agreement under which the service would actually be provided by the CNW for a fee.[14] If conducted in this way, this service would be indistinguishable from reciprocal switching.

In determining whether switching is required, we will take into account all relevant factors. Our rules specifically requested evidence concerning the rates, costs, revenues, divisions, and efficiency over the routes in question (both before and after prescription of the remedy sought).[15] As will be discussed below, such evidence is especially relevant in this case because Soo already has access to Midtec's plant under various joint or combination rates, at least for some commodities. Complainants have not alleged that CNW has refused to grant access; rather they object to the terms under which it has been or will be granted. Specifically, they allege "a refusal to offer competitively based rates and services" (CSVS, at 2). Thus it is appropriate to focus on the terms under which through service has been offered and the quality of service that CNW has provided.

Similarly, under §11103(a), the Commission may require use of terminal facilities, including main-line tracks for a reasonable distance outside of a terminal, where it finds trackage rights to be practicable and in the public interest without substantially impairing the ability

[14]Complaint, at 5.

[15]Specifically, 49 C.F.R. §1144.5(a)(1)(i)-(iv) asks for:

(i) The revenues of the involved railroads on the affected traffic via the rail routes in question;

(ii) The efficiency of the rail routes in question, including the costs of operating via those routes;

(iii) The rates or compensation charged or sought to be charged by the railroad or railroads from which prescription or establishment is sought; and

(iv) The revenues, following the prescription, of the involved railroads for the traffic in question via the affected route; the costs of the involved railroads for that traffic via that route; the ratios of those revenues to those costs; and all circumstances relevant to any difference in those ratios; provided that the mere loss of revenue to an affected carrier shall not be a basis for finding that a prescription or establishment is necessary to remedy or prevent an act contrary to the competitive standards of this section.

of the rail carrier owning the facility to handle its own business. Although the rules in Intramodal do not specifically cover terminal trackage rights, the underlying public interest test in §§11103(a) and (c) is the same and, given the relationship between the issues and the remedies, we believe that the public interest analysis should be similar. We declined to promulgate rules to govern applications for terminal trackage rights in part because "[t]he joint rates, through rates and reciprocal switching mechanisms should be sufficient to provide shippers and carriers with ample competitive access where necessary," because few such cases had been brought, and because the agreement did not cover this subject (*Intramodal*, at 14).

We stated that requests for terminal trackage rights will be considered "on an individual case basis" (*id.*). In so doing, we think that a focus on anticompetitive conduct (or the imminent threat of it) by the carrier possessing the essential rail line is appropriate, but not necessarily exclusive.

IV. Discussion and Conclusions

A. Jurisdiction

CNW renews its argument[16] that the Commission lacks jurisdiction to grant the relief sought by Midtec and Soo (CNW SVS at 5-10). The Commission's jurisdiction under Section 11103 extends to: (1) requiring use of "terminal facilities,[17] including main-line tracks for a reasonable distance outside of a terminal" (49 U.S.C. §11103(a)); or (2) requiring rail carriers to enter into "reciprocal switching" agreements (49 U.S.C. §11103(c)). CNW contends that its rail line between Kimberly and Appleton does not constitute "terminal facilities" within the meaning of §11103. CNW also contends that its service between the Midtec mill and Appleton is not "switching" and that therefore the service cannot be required as "reciprocal switching."

CNW argues that its Kaukauna branch is not a terminal facility because the mill is outside its Appleton switching limits. Kimberly is a separate station from Appleton in CNW's tariffs so that service with Soo is provided under joint or combination rates (CNW SVS at

[16]The ALJ found that the CNW's Kaukauna line constituted terminal facilities and that the Commission had jurisdiction to resolve the case (*ID* at 9). The Review Board affirmed the Administrative Law Judge's finding (RB at 3-5). In *Midtec I* the Commission did not address the issue of its jurisdiction.

[17]It is not clear whether reciprocal switching can be required outside a terminal facility.

5-10). CNW further argues that the service that it provides to Midtec is not switching, but line-haul service because CNW uses road trains and crews typical of line-haul service rather than the switch engines and yard crews generally used in switching or terminal operations (*id.*). Midtec and Soo contend this fact is irrelevant and refer to other instances where road crews perform switching. They indicate that CNW has been trying to persuade its unions to permit this work to be done by yard crews.

The questions of what is a terminal area and what is switching are factual ones requiring consideration of all the circumstances surrounding a particular case. Admittedly, the facts here are somewhat mixed. The Commission addressed the question of what is a terminal area in *CSX Corp.—Control—Chessie and Seaboard C.L.I.*, 363 I.C.C. 518, 585 (1980):

> The Act does not define terminals or terminal facilities, but does say that "terminal areas" are areas within which carriers "transfer, collect or deliver" freight. 49 U.S.C. 10523 *** [s]ince our power to make the terminal facilities of one carrier available to another is remedial in nature, the term should be construed liberally *** In classifying a track as a terminal facility, we look to the use to be made of the track. (citations omitted)

To determine the use of the track, we should look at the type of service performed, not at what crews perform it. Here, the service CNW provides and will provide under any reciprocal switching agreement is typical origin and destination terminal switching. The operations all take place within CNW's Appleton yard limits and are subject to the special conditions established for yard operations. In addition, the service takes place within a cohesive commercial area. (That CNW recognizes the area as such is underscored by the fact that it charges its shippers a single rate for destinations within the area.)

The distance from the Midtec mill to the CNW interchange with Soo at Appleton (7.9 miles) is well within the range in which the Commission has found jurisdiction under §11103. For example, a rail carrier was granted terminal trackage rights under §11103(a) over 13.4 miles of branch lines to reach shippers on other branch lines near Buffalo, NY.[18] In addition, the Commission has imposed reciprocal switching under §11103(c) to serve the entire city of Philadelphia.[19]

[18]Finance Docket No. 29908, *Delaware & Hudson Railway Company and New York Department of Transportation—Exemption for Use of Terminal Facilities* (not printed), served November 10, 1982.

[19]*Delaware & H. Ry. Co. v. Consolidated Rail Corp.*, 367 I.C.C. 717 (1983).

CNW cites *Central States Enterprises, Inc. v. Seaboard Coast Line Railroad Company* (not printed), served May 15, 1984, *aff'd sub nom., Central States Enterprises, Inc. v. I.C.C.*, 780 F.2d 664 (7th Cir. 1985), (*Central States*) in which the Commission found that it did not have jurisdiction under section 11103(c) to impose reciprocal switching over a 1.4-mile line to allow service between separate stations not within a jointly served terminal and not within the same switching limits. In the instant case, however, it has been shown that Appleton and Kimberly are not truly separate stations. In addition, the terminal here is based in Appleton, where both carriers have rail yards.[20]

We conclude that CNW's line between its interchange with Soo at Appleton and the Midtec mill at Kimberly constitutes a terminal facility under §11103(a) and that the proposed CNW service is switching under §11103(c).

B. Standing

We disagree with the contention of CNW and supporting *amici* that neither Midtec nor Soo has standing. Midtec has shown that it would use Soo's service for a "significant portion" of its railroad transportation needs [49 C.F.R. §1144.5(a)(2)(i)] and Soo has shown it would use the reciprocal switching for a "significant amount" of traffic [49 C.F.R. §1144.5(a)(2)(ii)]. (CNW suggests that Midtec would use the availability of Soo service only to restrain CNW's rates.) Although Midtec and Soo do not present any projections of future traffic, they do provide examples of service Soo could provide to Midtec if relief were granted. (*See* at 5–7 above.) We think this constitutes a sufficient showing under the new rules.

C. Competitive Analysis

To the extent that *Midtec I,* at 364, stood for the proposition that market dominance is a jurisdictional prerequisite to obtaining relief in a competitive access controversy, that case is specifically overruled. The statutory market dominance test applies only to disputes concerning the maximum reasonable level of rates. The merits of allegations concerning refusal by a carrier to provide adequate access or service are governed by other provisions of the Interstate Commerce Act.

[20]We note also that the Court of Appeals affirmed *Central States* on the basis of the Commission's findings that reciprocal switching was not shown to be in the public interest or necessary to provide competitive rail service but did not fully support the finding of no jurisdiction.

As we implicitly recognized in *Intramodal*, however, there are rate issues in these cases other than maximum reasonableness that require our consideration. Consequently, we specifically indicated that evidence concerning rates, costs, revenues and divisions would be relevant. These are essential in determining whether access has been granted on reasonable terms.

The parties to the present proceeding have formulated these issues largely in accordance with traditional competitive analysis. Midtec claims that the CNW has market power and has exercised it to Midtec's disadvantage. CNW argues the converse, that the market is effectively competitive and that it has been responsive and competitive in order to maintain its market share.

The parties' competitive evidence is useful background information. In addition, that evidence can be helpful in determining whether anticompetitive conduct has occurred or is likely to occur. Because the existence of competition, or the lack of it in any given area, is not dispositive of this case, however, analysis of the competitive evidence is set out in the Appendix as background information, with consideration given to competitive forces (including intermodal, intramodal and geographic competition but not product competition which has been excluded by rule). As can be seen from the evidence in the Appendix, different commodities face varying degrees of competition.

D. Anticompetitive Conduct

The key issue in this case is whether CNW has engaged in or is likely to engage in conduct that is contrary to the rail transportation policy or is otherwise anticompetitive. The essential questions here are: (1) whether the railroad has used its market power to extract unreasonable terms on through movements; or (2) whether because of its monopoly position it has shown a disregard for the shipper's needs by rendering inadequate service.[21] These issues are just as relevant in determining whether the public interest requires reciprocal switching as in determining whether it requires terminal trackage rights. Both remedies are effective means of assuring carrier cooperation—when due to the intransigence of a monopoly carrier that cooperation has broken down—to assure that shippers receive adequate service.[22]

[21]We have examined the record on all commodities to determine whether CNW engaged in abusive rates or practices.

[22]The Conference Report of the Staggers Act notes that "where reciprocal switching is feasible, it provides an avenue of relief for shippers where only one railroad provides service and it is inadequate." H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 116 (1980).

Complainants have made general allegations about CNW's rates and specific allegations about its services. We will first deal with the general allegations. Midtec alleges that CNW has refused to offer it "competitively based rates and services," and that CNW's rates to Midtec are higher than those offered to other paper shippers with whom it competes. It also claims that CNW possesses an essential facility that CNW is refusing to make available on reasonable terms.[23] Soo claims that CNW has refused to negotiate trackage rights, reciprocal switching or "economically efficient joint rates." Midtec claims that because of these "monopolistic practices" it is on the "brink of financial disaster." On a slightly different track, complainants concede that CNW's conduct since the institution of their complaint has improved, but they argue strenuously that relief must be granted here to assure that this course continues.

As previously noted, our rules emphasize several categories of specific information for evaluating the types of allegations made here as they relate to a possible abuse of market power. These categories include the revenues of the involved railroads, the comparative efficiency of routings, the comparative cost/revenue ratios for the carriers, and the rates sought to be charged. Despite the fact that this proceeding was reopened specifically for consideration under the new rules, complainants, on whom the burden of proof rests, have not submitted any of the specific evidence called for. There are no numbers in the record to give substance to complainants' allegations.

In fact, the available evidence supports the conclusion that complainants' contentions are incorrect. CNW denies that its rates are higher to Midtec than to other shippers, and complainants have submitted no evidence to the contrary. Midtec has doubled its capacity since 1976, and has greatly expanded its markets in the last 5 years, despite vigorous new competition both from southeastern and foreign producers.

Further, CNW specifically controverts Midtec's allegation that it has had difficulty in getting CNW to improve its rates and services. To the contrary, CNW shows that it has been willing to work with Midtec to

[23]In this connection it cites *Illinois Bell Telephone Company v. Federal Communications Commission*, 740 F.2d 465 (7th Cir. 1984), *MCI Communications v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1132-1133 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983), and *Otter Tail Power Co. v. United States*, 417 U.S. 901 (1974). These cases stand for the proposition that the antitrust laws impose on a firm abusing its control of an essential or "bottleneck" facility the obligation to make the facility available on non-discriminatory terms. This prevents the firm from extending monopoly power from one stage of production to another or one market to another (*id.*, at 1132).

develop competitive rates, services, and equipment proposals to provide Midtec with efficient low-cost transportation service. CNW notes that its innovative action began in 1981 before this proceeding was instituted and is a result of the deregulatory influence of the Staggers Act and the existence of competition for Midtec's traffic.

CNW gives specific examples of its willingness to initiate and concur in joint rate proposals and rate reductions in tariffs or rail transportation contracts. For example, in August 1982, when Soo changed the Soo-CNW interchange for woodpulp traffic originating on the CP in British Columbia from Minneapolis to Appleton, CNW continued to participate in the routing (CNW SVS Hazen, at 7-9 and 17-18). Another example given by CNW of its willingness to accommodate Midtec and Soo involves movements of woodpulp from Quebec. When in 1981 the CP proposed routing this traffic to Soo with an interchange with CNW at Larch, MI, both Soo and CNW concurred. Later, Soo withdrew its concurrence and requested an alternative interchange at Appleton; CNW agreed to this change and shared in the traffic (*id.*, at 9-10). In addition, CNW cites numerous rate reductions for woodpulp and paper traffic that it has made to benefit Midtec (*id.*, Exhibit 1, and at 19–21). This is hardly the picture of a monopolist indifferent to the needs of its shipper.

Complainants attempt to document what they characterize as service inadequacies demonstrating anticompetitive conduct in their supplemental reply verified statement. Nonetheless, we find this evidence unconvincing. Midtec argues that it has gotten rate or service relief only because it has "pushed very hard to get it" or because "they (CNW) have decided to behave while this case is pending" (CSRVS Edgar, at 19). That Midtec has had to bargain hard to obtain what it seeks is no reason to complain. It is only when hard bargaining results in an abuse of market power and an insistence on terms that are unreasonable that we should intervene. Midtec has simply not shown that to be the case. In fact, the record is almost completely devoid of evidence concerning the terms under which through transportation was offered either before or after the institution of this complaint.

Midtec implies that CNW's service on inbound clay is inadequate. It claims that the routing that is used—Southern or SCL interchange with CNW at East St. Louis—is "somewhat circuitous." Midtec explains that for reasons of its own it has chosen this routing. It is undisputed that CNW stands ready and willing to interchange clay at Chicago, which is a direct and efficient routing. Apparently, Midtec interchanges at East St. Louis to put competitive pressure on the two origin

carriers, although it does not explain how this routing accomplishes that purpose. Nonetheless, CNW cannot be blamed for a circuitous routing which is not of its choosing and which it will remedy if asked.

Midtec also alludes to a recent instance where CNW announced that it planned to reduce service from twice to once daily because of a strike at another paper plant that is also on the Kaukauna Branch. But when Midtec complained of this proposal, CNW withdrew it. CNW currently provides service on the branch 6 days a week as opposed to the 5 day a week service provided by Soo at Appleton. From all appearances, CNW's service has been responsive and adequate.

Another service question concerns the placement of large boxcars for outbound movements of paper. CNW notes that to improve its service to Midtec it acquired seventy 100-ton boxcars, outfitted them with special doors, and dedicated them almost exclusively to serving that shipper. Midtec replies that, although the cars have been useful to it, they have only a 90 ton capacity, which is insufficient to fill orders made by various customers for outbound paper in 100 ton lots. While the capacity of the cars is in dispute, Midtec did not establish that CNW was indifferent to its needs for quality service by failing to supply car types which it requested.

The specific allegation of anticompetitive conduct that complainants mention most frequently pertains to movements of woodpulp by Soo for storage at Neenah (CSVS Larson, at 10–11). The woodpulp is subsequently delivered by CNW to Midtec. CNW has published an "attractive rate" (*id.*) out of Neenah that only applies when CNW is credited for a division of the joint rate into Neenah even though CNW does not participate in that portion of the service. Complainants have elevated form over substance here. It does not really matter whether CNW takes all of its compensation in the proportional rate or whether it obtains additional compensation by some other means. The real question is whether the overall compensation it receives is reasonable in light of the service it has performed. On the record here, we have no basis for finding that it is not. Complainants have not shown that it has abused market power here.

There remains the possibility that complainants have been unable to document anticompetitive conduct as required by our rules due to the posture of this case. Since the original complaint was brought in December of 1982, the railroad has had the opportunity to "clean up its act." Although it has not been shown that CNW's rates and practices prior to that time were unlawful, it has made what all parties agree are important concessions since that time. We repeat that this

Commission stands ready to grant relief on an expedited basis if necessary to remedy anticompetitive conduct by this railroad in the future.

We conclude that complainants have not met their burden of proof and that the complaint should be dismissed.

This decision will not have a significant effect on the quality of the human environment or the conservation of energy resources.

VICE CHAIRMAN SIMMONS, dissenting:

In the previous decision in this proceeding, I concluded that based upon the existing record Midtec had satisfied the standards of section 11103(a) and (c) and that, therefore, alternative relief under both of these subsections should have been granted. Nevertheless, the majority devised an ill-conceived requirement that a shipper seeking competitive access must demonstrate market dominance and rate unreasonableness as prerequisites for relief and dismissed the complaint. Exercising its right of appeal, Midtec sought review before the U.S. Court of Appeals. Faced with mounting criticism that this new standard was illogical, contrary to the statute, and totally inconsistent with clear Congressional intent, we asked the court to remand the *Midtec* case so that we could consider the complaint under the new guidelines promulgated in *Intramodal*. Complainant agreed to forego its appeal for the present in the belief the Commission would not use the new rules as obstacles to obtaining competitive access.

In considering the case anew, we granted CNW's request to reopen the record for submission of "new" evidence. To my dismay, the majority ignores the Administrative Law Judge's reasonable determination that CNW blatantly disregarded Midtec's transportation needs prior to the filing of a complaint. It now uses this "new" evidence, purportedly showing CNW's improved service with respect to Midtec since the complaint was filed, as justification for once again denying competitive access. This approach ignores CNW's past conduct. In my view, we should consider CNW's overall record as an indication of whether it will be responsive to Midtec's transportation needs once this complaint is dealt with. In any event, I maintain that subsections 11103(a) and (c) are not intended to focus simply on the carrier's alleged misconduct or punish a rail carrier with a monopoly for some acts which could be labeled anticompetitive. Rather, the statute requires that the issue we should address is whether the availability of another line-haul carrier has the potential for providing needed service and rate options to the affected shipper. This should also be the

approach under our *Intramodal* guidelines. Although the statute clearly does not provide for "competitive access on demand," the relevant inquiry is much broader than that undertaken by the majority.

Prior to the Staggers Rail 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 provisions [§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 has established that it is heavily dependent on rail service for inbound materials and that trucks are only used for very specific traffic. Motor carriers are simply not capable of moving most of the high volume, low value inbound raw materials. As distances increase, the role of trucks diminishes. Midtec also stated that it is difficult to obtain an adequate supply of trucks for most of this traffic, and that the trucking service that does exist is mostly of a backhaul nature which has proven to be unreliable. This point is important because complainant claims that the distance for its source of materials is steadily increasing and as the distance increases, the truck rate becomes extremely uncompetitive. As an example, Midtec pointed out that its

clay slurry transported from Georgia would cost 2 1/2 times more if it moved by truck rather than rail, and even if brought by truck the shipments could not be unloaded as Midtec has no facilities to receive clay slurry moving by truck.

The majority cites Midtec's increased use of rail service as proof that CNW is cooperative and its service competitive. Actually, the reason for this increase in rail usage was Midtec's switch to wood pulp in lieu of pulp wood or roundwood, which had been gathered from nearby sources. Midtec's competitors have shifted to lower-costing wood pulp. Wood pulp is produced in Canada and large quantities are needed daily to keep Midtec's machines operating. Trucks cannot provide competitive service on wood pulp shipments because of higher costs and the fact that Midtec's facility is primarily designed for rail shipments.

The majority points to complainant's use of a Soo Line/motor carrier interchange arrangement (involving a short motor carrier transhipment to its Kimberly mill) in 1982 as evidence that intermodal competition can be an effective competitive check. The fault with this argument is that it ignores the fact that the arrangement proved both costly and inefficient. I submit that given complainant's raw material needs and it is plant design, this type of service is not a realistic constraint on CNW. Midtec pointed out that its facilities are equipped with just two truck unloading docks as contrasted with seven rail unloading docks, making it easier and far less costlier to unload and use far more pulp in a period of time from rail. Further, Midtec noted that its truck unloading docks are not near the paper machines necessitating additional expense and time to haul the shipments all over the plant. As a consequence of these plant operations, Midtec could not be expected to conduct the Soo Line/motor carrier arrangement for very long and compete. In the end, it proves to be no feasible constraint on CNW.

I would also point that if the market again returns to pulp, Midtec would obviously have to switch. The undisputed finding of the ALJ was that CNW did not care to transport this traffic. Because of the nearby sources, trucks proved capable. However, Midtec points out that in order to compete in the future it would have to find more distant sources for this material, and as the distance increase so will its reliance on rail. I suggest that CNW's unwillingness to transport the material in the past can be construed as evidence that it might not wish to do so in the future, forcing Midtec to rely again on inefficient Soo/truck combination.

In 1985, 63 percent of Midtec's outbound paper products were shipped on rail. The motor carrier portion moved only a short distance. As part of its strategy to remain competitive, complainant needs to be able to reach markets at even more distant locations. Because Midtec's outbound product moves in large quantities in multiple car lots, motor carriers cannot offer competitive rates and service. As an example, truck rates to Baltimore from the Kimberly plant would be 99 percent higher than the rail rate, while the truck rate to Raleigh, NC, is 68 percent higher than the rail rate. Accordingly, motor carriers cannot provide a sufficient constraint on CNW's behavior.

A Soo/motor carrier transloading arrangement is not feasible for complainant's outbound finished product because it moves in very large rolls which cannot be handled efficiently in a truck. Moreover, a Soo/truck move would leave the product susceptible to damage. Midtec's prior experience with a motor carrier/Soo arrangement in 1984 lends support to this claim, where some merchandise was damaged because of the extra handling in and out of trucks and led to rejection of shipments and damage claims. As this transportation method proves costly and, therefore, inefficient, CNW is again in a position to provide Midtec service on its terms only.

I believe that complainant has demonstrated that CNW can potentially make use of a price squeeze in times of a weak market because of Midtec's current dependence on this one rail carrier. Midtec stated that in a weak market for its products, it has to absorb higher transportation costs in order to maintain its market share in a highly competitive industry. Those competitors with multiple railroads and locations can force CNW to reduce rates, yet, Midtec has no such leverage. There is presently no incentive for CNW to offer the concessions to Midtec which it may offer Midtec's competitors. CNW may simply maintain higher rates with respect to Midtec traffic to make up for loss of revenue because of rate reductions to others, thus reducing the amount Midtec would receive despite its own efficiencies. I am not suggesting that CNW would charge rates so high as to stifle Midtec's ability to operate, but it could keep enough of the revenues to deny complainant the benefit of its efficiencies. Since it is documented that all paper producers—including the growing foreign market—are essentially at the same market price, the transportation component, which is a significant portion of the delivered price, determines competitiveness. In this context competitive access becomes crucial.

Although the majority has overruled that portion of its first decision which erected a "market dominance" barrier to grants of competitive access, today's decision reflects a similar apparent hostility towards the very concept of access. This is demonstrated in footnote 13 in the text, where the Midtec/Soo proposal is termed "forced switching." Meaningful competitive access means more than CNW's willingness to enter into joint rates with the Soo Line. In the context of section 11103(c), the word access must be accompanied by the word "competitive." With the Soo Line able to reach Midtec's facility, the marketplace would determine the service options available to the shipper. When we evaluate the competitive service test, we must determine whether granting relief would permit market forces to dictate the adequacy of service and the level of prices. This is true competitive access. It should not be necessary for a complainant to demonstrate that a railroad has refused to accept interchange or is unwilling to provide service upon request. Inadequacy of existing rail service involves a myriad of problems, such as a need for more competitive rates, alternative routing, more single-line movements, increased access to additional sources of car supply, and more rail participation in its traffic. It is in these areas where CNW has, in the past, come up short. Actions in the past may indeed be indicative of future activity and reliability.

Overall, Midtec has effectively demonstrated: (a) the non-existence of intramodal competition, (b) the highly restricted or limited role of intermodal competition in the paper industry generally, and in Midtec's plant specifically, and (c) the ineffectiveness of such geographic competition as exists to discipline CNW's behavior as it relates to Midtec in the future. On each of the three particulars, CNW has failed to rebut the evidence presented by Midtec. Defendant only presents unsubstantiated claims of geographic competition which even the majority refers to as inconclusive. Persuasive evidence of past service failures is summarily dismissed on the basis of CNW's current efforts to provide better service. The result is further protection of CNW's existing monopoly position.

I am disappointed in the majority's decision as I am sure are many of the shippers and railroads who supported the procompetitive standards of *Intramodal* and its emphasis on eased entry and marketplace initiatives. In this proceeding, the Commission had an opportunity to provide rail competition where none exists. Instead, by this decision, the Commission continues to ignore Congressional intent.

COMMISSIONER LAMBOLEY, dissenting:

At the outset I considered the possibility that this proceeding had now evolved into two distinct cases: the first being the original 1982 complaint seeking trackage rights and/or reciprocal switching remedies under 49 U.S.C. section 11103(a) and (b), which had been fully litigated in proceedings before the ALJ, the Review Board, appeal to the Commission, and ultimately, judicial review,[24] and the second being the one now before us on voluntary remand from the court which involves the development of a new and supplemented record coupled with the application of policy under the new guidelines adopted by the Commission in Ex Parte No. 445.[25]

However, on further reflection and review of the record, I find the essence of the case(s) unchanged. The shipper then, and now, is seeking statutory remedy and relief under Sections 11103(a) and (c) on basically the same operative facts; seeking pro-competitive relief for not only *price* but, and primarily, for *service* options as well. In my judgment, the shipper had sustained its burden of proof initially and was entitled to relief under either Sections (a) or (c). That remains my view.

Terminal trackage rights and reciprocal switching are pro-competitive statutory remedies, and are to be liberally construed for those purposes.[26] While Ex Parte No. 445 represents a Commission effort to address "competitive access", it is not, however, co-extensive with the remedial provisions of Section 11103. It is in fact, more narrow.

As I observed in my separate expression when we adopted the rules of Ex Parte No. 445, a complainant's rights and remedies are governed by statute, and 445 rules do not obviate statutory protections or requirements. The thrust of Ex Parte No. 445 is rate prescription. In major part, it represents Commission approval of a negotiated agreement reached between the AAR and NIT League as to some, but not all, issues on this general subject matter. While addressing reciprocal switching in the rate context, the Commission *expressly rejected* the invitation to adopt rules regarding terminal trackage rights.[27]

[24]*Midtec Paper Corporation v. CNW*, 1 I.C.C. 2d 362 1985 (Midtec I).

[25]Ex Parte No. 445 (Sub-No. 1), *Intramodal Rail Competition*, served October 31, 1986.

[26]The remedy of reciprocal switching contained in subsection (c) was added by §223 of the 1980 Staggers Act to provide "an avenue for relief for shippers where only one railroad provides service." (H.R. Rep. No. 96-1930, 96th Cong. 2d Sess. 116 (1980)) The previous availability of terminal trackage rights was likewise continued. Similarly §221 (49 U.S.C. §10901) was added to ease competitive entry.

[27]On remand the majority now blurs any real distinction between terminal trackage rights and reciprocal switching.

In my view, Ex Parte No. 445, while referencing "all relevant factors" in its rule, nevertheless singularly operates on the negative side of the equation by focusing on negative conduct; that is to say, by requiring a finding of anti-competitive acts as the only premise for remedy. I do not believe 445 rules should be so confined. And more importantly, neither Section 11103 nor its precedent are so limited. In my view, the statutory remedy is positive. It seeks to ensure, protect and encourage a competitive market environment by either or both price and/or service options and is quite properly focused on the pro-competitive aspects of the national transportation policy.[28]

Thus, I believe that availability of statutory relief should not be limited to, and solely predicated on, a finding of anti-competitive acts by a carrier, but may as well be based on a shipper's demonstrable need for price and/or service options that are operationally feasible and practical, or necessary to provide competitive rail service.[29]

Our decision in such matters is a balancing test, weighing both benefits and burdens respectively. The importance of competitive access is enhanced when viewed in the larger context of abandonments, mergers and acquisitions, as well as the establishment of short lines and their opportunities to succeed.

The case before us has, in fact, been influenced by both abandonments and acquisitions. Both CNW's abandonments of rail lines and Soo's acquisition of the Milwaukee Road system have had obvious influence on markets available to Midtec.

Finally, I would observe that while I would grant relief to complainants, I am not unmindful of the post-complaint efforts of the Chicago North Western to respond to complainants' concerns. This positive, constructive approach will hopefully be continued and followed by others in their own circumstances, and make more market-based solutions possible. Indeed, in this case, its evident that litigation and the prospect for relief have had tempering influences. By contrast, I am concerned that the majority's present interpretation restructing the remedies available under section 11103 will have the opposite result.

[28]See 49 U.S.C. §10101a.

[29]See 49 U.S.C. §§11103(a) and (c). The majority, while declaring *market dominance* non-jurisdictional for relief, nevertheless weaves that issue back into the discussion and appendix, joined with a subtle but disclaimed product and geographic competition approach. Likewise, the majority emphasizes the limited circumstances of *inter*modal transportation, and seemingly ignores the clear *intra*modal competitive concern of statutory policy. Further, it is acknowledged that as a matter of fact, joint use and/or reciprocal switching are practicable.

It is ordered:

The complaint is dismissed.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre, and Lamboley. Vice Chairman Simmons and Commissioner Lamboley dissented with separate expressions.

APPENDIX

TABLE I

Midtec's Traffic (short tons)

Commodity	1982 Rail	1982 Motor	1985 Rail	1985 Motor
	Inbound			
Pulpwood (roundwood)	-	141,299	-	74,525
Woodpulp	74,691	65,527*	198,530	-
Coal	-	124,430**	-	115,396**
Clay	83,319	-	104,448	-
Limestone	13,718	-	12,063	-
Fuel oil	5,724	-	100	-
Corn starch	9,509	-	11,600	-
Other commodities	16,486	36,371	19,199	27,851
Total	203,447	367,637	345,940	217,772
Total Inbound (rail and motor)	571,074		563,712	
	Outbound			
Paper	163,711	102,682	172,425	102,033
Total Outbound (rail and motor)	266,393		274,458	

* By rail to Neenah/Menasha, WI, then by motor to Midtec.

** By water to Green Bay, WI, then by motor to Midtec.

Data complied from CVS Edgar, Tables 1-4, and CSVS Edgar, Tables 5-8.

A summary of the evidence concerning the movement of each commodity in Table I follows.

Inbound Traffic Movements

1. *Pulpwood.* This commodity moves exclusively by truck.

2. *Woodpulp.* Midtec's woodpulp now moves: (1) from New Brunswick, Canada, via the Canadian National Railways (CN) to Detroit, MI, then over the Grand Trunk Western Railroad Company (GTW) to Chicago, and finally over CNW to Midtec; and (2) from Ontario, Canada, over the Canadian Pacific (CP)[30] to Soo, then to CNW at Minneapolis, MN, Hermansville, WI, or Appleton. Some woodpulp is stored at warehouses at nearby Neenah for later moves to Midtec. Soo seeks reciprocal switching

[30]Soo's parent corporation.

to allow it to compete for the New Brunswick traffic at either the Detroit or Chicago Interchange, and it also seeks to replace CNW on the Ontario traffic.

By 1985, CNW participated in all of Midtec's inbound woodpulp traffic, 198,530 tons. Midtec's demand for woodpulp also increased substantially. In 1982, Midtec received inbound shipments of about 141,299 tons of pulpwood (roundwood) via motor carrier from origins within approximately 150 miles of its paper mill. (Pulpwood and woodpulp can be used more or less interchangeably by Midtec.) When the price for woodpulp dropped significantly, Midtec increased its rail shipments of woodpulp from Canadian origins and decreased its use of local pulpwood.[31]

In 1982, 74,691 tons of woodpulp arrived at Midtec's plant directly by rail via the CNW and 65,527 by truck. The truck movements involved delivery of shipments moved by rail over the Soo to Neenah/Menasha, which is 13 miles from Midtec's plant. Midtec claims that the transhipment was "preposterously inefficient" (CSVS, Edgar, p. 12), but complainants do not produce any evidence showing that the rail-motor service was inefficient or prohibitively costly to Midtec. The CNW maintains that these intermodal hauls demonstrate effective competition.

CNW benefitted by Midtec's use of Soo-CNW service under joint rates that diverted all traffic from intermodal movements. Soo alleges that it instituted this intermodal movement to provide Midtec with an alternative to CNW's inadequate service. CNW alleges, in turn, that it never received any complaints concerning its rates or service for woodpulp, and that on learning of the new service, it offered to join with Soo in all-rail rates, which it did.

Rate, cost, and revenue details concerning the CNW-Soo joint rate are not provided. Complainants argue that the joint rate resulted from the pressure brought to bear on CNW by the filing of this case. In contrast, CNW believes it is "a classic example of how a railroad has used the tools available under deregulation to reduce rates and improve service in order to keep the products of an important shipper competitive in the face of pervasive and acknowledged geographic and intermodal competition" (CNW SVS, p. 14).

Although the evidence available is certainly not conclusive, it appears that there is some truck competition for this traffic. Complainants have raised sufficient doubt, however, to cause us to review CNW's conduct carefully for the possibility of anticompetitive conduct.

3. *Clay.* Midtec's clay traffic originates in Georgia and moves only by rail over either the Southern Railway System (Southern) or the Seaboard Coast Line Railroad (SCL). It is currently routed to East St. Louis, MO, where it is interchanged with CNW. Midtec states that a faster routing is available over Southern to Cincinnati, OH, over the Norfolk and Western Railway Company to Chicago, and over CNW to Midtec. Midtec, however, has chosen not to route traffic over that route. Since its acquisition of the Milwaukee Road, Soo is able to interchange with Southern and SCL at Louisville, KY. With the relief sought, Midtec hopes to be able to use this routing.

Complainants testify that there is no intermodal competition for inbound clay traffic, and that it is not susceptible to truck transport. The CNW does not rebut these contentions concerning clay movements.

4. *Coal.* Midtec's coal shipments represent almost 20 percent of its total inbound traffic. The coal moves exclusively by water carrier from West Virginia and Kentucky to Green Bay, WI, and from there by truck to Midtec. CNW notes that prior to 1977 it carried coal from Illinois to the mill by interchanging with the Illinois Central Gulf

[31]Product competition will not be considered under the *Intramodal* rules.

Railroad (ICG) at Chicago, but that Midtec does not use this movement now. CNW also notes that it recently offered Midtec a reduced joint rate for the ICG-CNW movement, but was unsuccessful in obtaining the traffic. Since its acquisition of the Milwaukee Road, Soo can originate coal in Indiana. If relief is granted, it states that it will offer single-line service to Midtec to compete with the existing water-motor intermodal service. There is no evidence, however, that Soo has sought to negotiate a joint rate with CNW to divert this traffic from its present barge-motor routing.

As with pulpwood, rail is not a factor for coal shipments. Complainants have not suggested that CNW has any market power here, or that its actions have impeded diversion of these movements back to rail. Given the fact that CNW does not now participate in this traffic, it appears that it would have a very strong incentive to negotiate joint or contract rates with Soo that would generate needed revenue for both carriers.

5. *Cornstarch.* Midtec's cornstarch traffic moves exclusively by rail. Soo recently became involved in this traffic when it gained a cornstarch origin at Muscatine, IA. In 1985, Soo carried about 5 percent (7 of 155 carloads) of Midtec's cornstarch traffic under a joint rate with the CNW. Soo interchanges this traffic with CNW at either Appleton or Fond du Lac, WI. Soo hopes to increase its share of the traffic by replacing CNW if relief is granted. The record contains no evidence as to whether this product can be moved economically by motor carrier competition.

6. *Limestone and Fuel Oil.* Limestone and fuel oil arrive at Midtec exclusively by rail. The shipment of fuel oil dropped from 5,724 tons in 1982 to a negligible 100 tons in 1985. Shipments of limestone have decreased slightly. Complainants have introduced no evidence regarding the extent to which rail transportation of these products is or is not subject to effective competition.

7. *Other Inbound Commodities.* This category, which includes alum, latex, titanium, and potato starch, moved in 1985 (except for potato starch) by both rail and truck, as noted below:

TABLE II
Inbound Receipts-Tons

Commodity	Rail	Motor
Alum	2,186	9,713
Latex	8,568	4,212
Titanium	3,581	2,022

The record thus shows significant rail-motor competition for all of the above commodities. Complainants offer no discussion of the effectiveness of the intermodal competition.

Outbound Movements

Midtec's outbound paper traffic moves by motor carrier to population centers in the north central States and by rail carrier to points nationwide. Midtec's paper reached 90 destination cities in 1982, and it increased its market penetration in the highly competitive paper industry to 157 cities in 1985.[32] Midtec states that with access to an additional origin carrier it will be able to decrease its rates and thus its costs, enabling it to compete in additional markets or to increase its profit margin.

Midtec used rail transportation for 63 percent and motor carriage for 37 percent of its outbound paper traffic in 1985. Midtec notes that although a large amount of paper moves by truck, it does so only on relatively short movements, and that it prefers rail

[32]CVS, Edgar, Table 4, and CSVS, Edgar, Table 8.

for longer movements. Complainants note that the truck rate to Landover and Rockville, MD, is 70 percent higher than the existing railrate (CRSVS Edgar, p. 11). (Midtec shipped 12,000 tons of paper to points in Maryland, Virginia, and North Carolina in 1985.) Thus it appears that, although motor movements do provide effective competition on shorter hauls, for more distant points they do not.

The principal competitive evidence concerns not motor competition but geographic rail competition and the feasibility of rail-motor movements. CNW raises the issue of competition with rail-motor movements. Midtec notes that its paper is transported in very large rolls that allegedly cannot be handled efficiently by motor carrier because they are susceptible to damage from transloading. Although Midtec used a combined motor-rail service offered by Soo in September 1984 for 4 shipments, it was dissatisfied with the resulting damaged and rejected shipments. From this experience it concludes that intermodal service is not effective. CNW counters that Midtec has been using the rail-motor service that it offers with its motor carrier subsidiary, 400 Express, to move paper from Kimberly by rail to CNW's intermodal facility at its Priviso freight yard west of Chicago, and then by motor to a printing plant in the Chicago area. CNW sees that service as satisfactory. We find the evidence of both sides inconclusive.

Nonetheless, the evidence of geographic competition for outbound movements of coated paper is quite convincing. Complainants have explained that "manufacturers compete on a delivered price basis" and that "[p]rices for comparable paper products around the country tend to be similar" (CSVS, Edgar, at 4-5). Midtec competes with two nearby producers of coated paper—Consolidated Papers, Inc., at Stevens Point and Wisconsin Rapids, WI, and Mead Corporation at Escanaba, MI—and with other producers in Maine, New York, Maryland, and the Southwest. And the delivered price offered by those shippers reflects a competitive rail transportation input because Stevens Point is served by 2 carriers, Escanaba by 5, and Mead by 3. Despite the fact that the coated paper market is extremely price sensitive, Midtec has been able to maintain its sales in what it describes as a "weak market" (CSVS Edgar, at 5). During the past 5 years foreign producers have increased their share of the market from 1 percent to 10 percent (*id.*, at 7). Further, the Southeast is a rapidly expanding area with respect to the production of fine paper. Yet, Midtec expanded its output substantially during the period prior to the complaint, and it increased the destinations it serves from 90 in 1982, to 157 in 1985 (*id.*, at 17-18).