

**Before the
Surface Transportation Board**

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Office of Proceedings
January 10, 2020
Part of
Public Record

STB Docket No. EP 756

Market Dominance Streamlined Approach

**Reply Comments of
the American Chemistry Council, Corn Refiners Association, The Fertilizer Institute,
the National Industrial Transportation League, and the Chlorine Institute**

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January 10, 2020

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The American Chemistry Council, Corn Refiners Association, The Fertilizer Institute, the National Industrial Transportation League, and the Chlorine Institute (“Coalition Associations”) hereby submit their Reply Comments concerning the Notice of Proposed Rulemaking the Surface Transportation Board served in the above-captioned proceeding on September 12, 2019 (NPRM). These comments respond to the opening comments of railroad interests, primarily the Association of American Railroads (AAR), BNSF Railway, and Union Pacific Railroad.

The Board introduced market-dominance streamlining to address unnecessary burdens of the market-dominance inquiry that impose significant hardship on complainants and deter valid rate challenges. The Board’s streamlining approach would enable complainants to avoid submission of extensive market-dominance opening presentations in cases where they can establish six prima facie factors that indicate a complainant is reasonably likely to have a persuasive argument that the railroad possesses market dominance. In these cases, it also would prevent the market-dominance inquiry from becoming excessive on reply and rebuttal by subjecting them to a 50-page limit.

Consistent with streamlining’s purpose, the Coalition Associations included measures in their Opening Comments that would more broadly address unnecessary burdens without weakening the validity of the market-dominance inquiry. They proposed allowing use of the

prima facie factors to establish market dominance on an a la carte modal basis, which better reflects the modal-specific nature of the market-dominance factors.¹ They also proposed an optional bifurcated market-dominance procedure that could be used in all rate cases, at the complainant's option, in contrast to the more restrictive schedule that the Board has proposed just for Final Offer Rate Review cases. This procedure would impose a 30-page limit on narrative evidence (excluding certain exhibits) and provides for an expedited evidentiary schedule that would help focus the market-dominance inquiry. These restrictions would make the bifurcated process appropriate, and most attractive, in cases where the prima facie factors are likely to be used rather than in cases with more complex market-dominance issues.

Railroad proposals, in contrast, would strip market-dominance streamlining of its benefits, making it "streamlining" in name only. These proposals include measures to: limit the availability of streamlining to small cases involving small shippers; insert a burdensome inquiry into product and geographic competition; expand the scope of the market-dominance inquiry beyond the movement to which the challenged rate applies; and ease or eliminate page limits that prevent railroads from raising specious arguments that require extensive and costly rebuttal. Moreover, the railroad proposals are based upon flawed concerns over the economic validity of a streamlined inquiry, the competitive landscape for rail transportation, and the opportunity for railroads to defend against claims in a streamlined proceeding.

Part I of these Reply Comments explains why the Board should reject the railroads' proposal to limit streamlining to small cases by small shippers. Railroads claim this limitation is necessary to protect against determinations of questionable economic validity. They also imply

¹ The Board's proposal would require a complainant to satisfy all of the prima facie factors for all modes. Unless otherwise expressly limited elsewhere in these Reply Comments, the Coalition Associations refer to their modal-based approach when discussing the prima facie factors.

that this limitation would have little impact because streamlining is broadly unnecessary. These railroad claims are meritless because streamlining: imposes a heightened market-dominance standard; does not shift costs or the complainant's burden of proof to railroads; ensures railroads have a reasonable opportunity to make a defense by tying procedural limits to case complexity; and provides important benefits for all shippers.

Part II of these Reply Comments addresses various railroad proposals regarding streamlining procedures. The railroad proposal to broaden the streamlining inquiry beyond the movement to which the challenged rate applies conflicts with 49 U.S.C. § 10707(b) and ignores the important policy considerations underlying *DMIR*.² In addition, the railroad proposals would deprive shippers of a full opportunity for rebuttal, erect un rebuttable market-dominance screens that shippers must satisfy, ease or eliminate page limits, and improperly create an opportunity for surrebuttal through Administrative Law Judge (ALJ) hearings. Finally, the Coalition Associations generally do not object to the railroad suggestion that complainants make certain initial disclosures in streamlined proceedings but propose modifications to the railroad proposals to better define such disclosures within reasonable and less burdensome parameters.

Part III of these Reply Comments addresses railroad proposals concerning the prima facie factors. The Board should reject railroad proposals to increase the 500-mile highway-distance factor because these proposals misinterpret shipment data and the technological and legal landscape of the trucking industry. The railroad proposal to consider product and geographic competition would make streamlined inquiries at least as burdensome as existing inquiries. Moreover, AAR's proposed clarifications to verified statement requirements are unnecessary

² *Minn. Power, Inc. v. Duluth, Missabe & Iron Range Ry.*, 4 S.T.B. 64 (1999), *reconsideration decision* at 4 S.T.B. 288 (1999)).

considering the Coalition Associations' proposals in their Opening Comments. Finally, the Coalition Associations do not object to the railroad suggestion to add a pipeline factor.

Part IV of these Reply Comments explains that this is not the appropriate proceeding to address railroad proposals to abandon the Limit Price Test.

I. Streamlining should not be limited to small cases by small shippers.

The Board should reject proposals by AAR, BNSF, and UP to limit market-dominance streamlining to small shippers and cases.³ The railroads base these proposals on flawed assertions that streamlining reduces the economic validity of the market-dominance inquiry,⁴ deprives railroads of a reasonable opportunity to make a defense,⁵ and shifts costs to railroads.⁶ As if to reassure the Board that their proposals to limit streamlining to small shippers and cases will have few consequences, BNSF and UP claim that streamlining is generally unnecessary.⁷ The Board should not be fooled. BNSF and UP base this claim on unproven, inaccurate, or irrelevant assertions about the market-dominance inquiry and competition for rail traffic.

A. Streamlining does not reduce the validity of the market-dominance inquiry.

Railroads erroneously claim that streamlining reduces the economic validity of the market-dominance inquiry.⁸ They also wrongly claim that streamlining imposes additional costs upon them.⁹ In addition to these claims being wrong, the bifurcated schedule for presenting

³ See AAR Opening Comments 7, Nov. 12, 2019; BNSF Opening Comments 2, 10-11, Nov. 12, 2019; UP Opening Comments 13-15, Nov. 12, 2019.

⁴ *E.g.*, BNSF Opening Comments 9-10.

⁵ UP Opening Comments 15.

⁶ UP Opening Comments 14.

⁷ BNSF Opening Comments 2-8; UP Opening Comments 3-4.

⁸ *E.g.*, BNSF Opening Comments 9-10

⁹ UP Opening Comments 14.

market dominance evidence that the Coalition Associations proposed in their Opening Comments would address several of the railroad concerns.

Streamlining is available only where a complainant can satisfy a heightened market-dominance standard with its opening presentation by establishing prima facie facts that are strong indicators of market dominance. This is a heightened standard because a complainant still could prove market dominance in circumstances where the prima facie factors are not satisfied. A complainant who can satisfy those factors, however, has a high likelihood of proving market dominance with respect to each mode to which the pertinent factors apply.¹⁰ In those rare instances when market dominance may not exist despite satisfying the factors, the railroad has the opportunity on reply to rebut that presumption. Nothing in that arrangement undermines the economic validity of the market dominance inquiry in the least.

Streamlining also does not shift the burden of proof away from the complainant. Streamlining merely recognizes that a complainant has satisfied its burden of proof on market dominance for a specific mode when the complainant establishes the prima facie factors for that mode, absent a railroad reply. If the railroad does not rebut the complainant's opening presentation by demonstrating that the complainant's evidence is inaccurate or providing additional evidence of effective competition, the complainant will have carried its burden of proof. This is no different than what occurs under the traditional market dominance inquiry. Today, if the complainant presents evidence on opening that would persuade the Board to find market dominance, the complainant would always win the market dominance inquiry absent a reply from the railroad. If the railroad rebuts the complainant's opening market-dominance

¹⁰ See NPRM 9 (stating that complainants who can satisfy a factor “are reasonably likely to have persuasive arguments” for why the related transportation mode does not provide effective competition”).

presentation, the complainant must address the rebuttal or risk that the Board will find the complainant's presentation unpersuasive.

Railroads will have a fair opportunity to present substantive evidence in a streamlined proceeding despite their claim that the proposed page limits and procedural schedule are too restrictive. In particular, the page-limit and bifurcated evidentiary schedule for market dominance proposed by the Coalition Associations' Opening Comments¹¹ provides railroads with enough time and pages to respond to opening evidence that is predicated upon prima facie factors. Because that proposal subjects complainants' evidence to the same page and time limits, complainants are unlikely to select this bifurcated process in a complex market-dominance case. Otherwise, complainants would deprive themselves of the opportunity to make the more complete evidentiary presentation needed to carry their burden of proof. Similarly, a complainant is highly unlikely to select this bifurcated process in a case involving many lanes unless it can apply the prima facie factors across *all* the lanes.

The bifurcated market dominance procedural schedule that the Coalition Associations proposed in their Opening Comments addresses UP's concerns about the short time the Board's proposed schedule provides in Final Offer Rate Review cases.¹² Note that the Coalition Associations have proposed a bifurcated market dominance procedural schedule as an option for all cases, not just FORR as the Board has proposed. The Coalition Associations' proposal increases the Board's proposed discovery period by two thirds and includes a process for resolving discovery disputes. It also increases the time for the defendant to file a reply presentation after complainant's opening by 110%, from 10 days to 21 days.

¹¹ Coalition Associations Opening Comments 20-23, Nov. 12, 2019.

¹² UP Opening Comments 15.

Even if a railroad was subject to page limits and a shortened procedural schedule in a more complex market-dominance case, it would still have a fair opportunity to present substantive evidence. Because complainants must prove an absence of effective competition, a railroad need only identify a single effective transportation option to defeat a market-dominance claim, whereas complainants must successfully defend against all potential competitive alternatives. The page limits and procedural schedules that the Coalition Associations have proposed will provide railroads ample opportunity to focus their evidence on the most vulnerable aspects of a complainant's market-dominance presentation.

Railroad commenters have proposed that complainants who choose to use the streamlined market dominance procedures initially disclose certain information to the railroad defendant with the complaint.¹³ This information would be consistent with minimum discovery railroads are likely to demand and could address railroad concerns regarding their opportunity to respond to the complainant's market-dominance presentation. As explained more fully in Part II.D, the Coalition Associations do not oppose such an approach if the disclosures are reasonably defined.

B. Streamlining provides important benefits

Market-dominance streamlining is not “increasing the number of rate cases solely for the sake of increasing the number of rate cases.”¹⁴ If streamlining increases the number of cases, such increase will result from the elimination of unnecessary burdens from the market-dominance inquiry, not because such cases are illegitimate. These burdens serve no function other than to tax shippers for exercising their right to rate review.

¹³ AAR Opening Comments 11; UP Opening Comments 7-9.

¹⁴ UP Opening Comments 15.

1. Streamlining addresses unnecessary costs in both clear and complex cases.

Contrary to carrier claims, clear market-dominance cases often are not resolved efficiently. Carriers would have the Board believe that the litigation costs associated with clear cases are low because they often concede market dominance up front.¹⁵ But this is the exception to the rule.

Carriers rarely concede market dominance until the shipper has submitted extensive evidence.¹⁶ Why would they? If a complainant must develop market-dominance presentations on issues that the carrier does not intend to dispute, the complainant either will have fewer resources to apply towards the real issues in the case or will need to allocate more resources to its case. In fact, this is what occurred in *SunBelt*, which is the only example AAR provides of a railroad stipulating to market dominance.¹⁷ In *SunBelt*, the complainant challenged a rate from a facility that was on a navigable waterway, but extensive studies that the complainant provided in discovery clearly demonstrated that the investment to use barges was exceedingly high.¹⁸ Nevertheless, the railroad conceded market dominance only *after* the complainant filed its

¹⁵ AAR Opening Comments 7; CSX Transportation, Inc., (CSXT) Opening Comments 1, Nov. 12, 2019; UP Opening Comments 3-4.

¹⁶ Examples of where the carrier stipulated to market dominance or failed to contest it on reply include: Def.'s Joint Reply at II.A-5, *Ariz. Elec. Power Coop. v. BNSF Ry.*, NOR 42113 (STB served Nov. 22, 2011); BNSF Ry. Reply at II.B-1, *AEP Tex. N. Co. v. BNSF Ry.*, NOR 41191 (STB served Sept. 7, 2007); BNSF Ry. Reply at II-20, *W. Fuels Ass'n, Inc. v. BNSF Ry.*, No. 42088 (STB served Sept. 7, 2007).

¹⁷ See AAR Opening Comments 7.

¹⁸ See Complainant's Opening at II-B-20 to -28, *SunBelt Chlor-Alkali P'ship v. Norfolk S. Ry.*, NOR 42130 (STB served June 20, 2014).

opening evidence, despite SunBelt having submitted a request to the railroad to admit market dominance as part of the discovery process.¹⁹

Also, carriers have become adept at making clear market-dominance cases burdensome by creating a quagmire of absurd transportation alternatives. In *M&G Polymers USA, LLC v. CSX Transportation, Inc.*, NOR 42123 (STB served Jan. 7, 2013), involving captivity at the origin of an M&G Polymers USA, LLC, (M&G) polymer plant, CSX posited absurd scenarios that required the complainant to: transload the product at the plant from rail cars, which are essential for storage of the initial production, into trucks; transport the trucks to a transload facility on NS; transload back into rail cars at that facility; and, in some instances, even transload back into trucks again at the destination.²⁰ CSX could not point to any situations where any polymer shipper, much less M&G, routinely conducted any similar operation. Nor did CSX consider the needs or requirements of M&G's customers. Furthermore, although such operations would add significant costs to M&G's logistics supply chain, CSX claimed that these alternatives were effective competitive constraints because CSX's rates were within 20% of those very high costs. Although M&G ultimately proved market dominance on every lane involving such alternatives,²¹ it expended considerable time, money, and internal effort to prove what everyone in the polymer business instinctively knows: such options are absurd and would be considered only in the most extreme circumstances. The prima facie factors the Board has proposed would

¹⁹ NS Reply at II-3, *SunBelt Chlor-Alkali P'ship v. Norfolk S. Ry.*, NOR 42130 (STB served June 20, 2014).

²⁰ CSX Reply at II-41 to -42, *M&G Polymers USA, LLC v. CSX Transportation, Inc.*, NOR 42123 (STB served Jan. 7, 2013).

²¹ *M&G Polymers USA, LLC v. CSX Transportation, Inc.*, NOR 42123, slip op. at 32-34 (STB served Dec. 7, 2012).

have reached the same result more efficiently because they are good indicators that these types of hypothetical options are not effective alternatives.

As demonstrated in the Coalition Associations' Opening Comments, the benefits of streamlining should not be restricted to cases in which all six proposed factors are satisfied.²² In more complex market-dominance inquiries, the complexity often concerns a single transportation mode. Streamlining through mode-specific a la carte application of the prima facie factors will enable shippers to focus their resources only on the mode or modes where market dominance presents a close case. Specifically, a shipper can use the prima facie factors to establish market dominance concerning the modes where market dominance is clear while presenting more detailed evidence as to other modes. This will help the shipper avoid spending resources developing unnecessary evidence for these modes.

2. Reducing unnecessary market-dominance costs is important even in SAC cases.

The Board should reject the railroads' absurd contention that the Board should not concern itself with unnecessary litigation costs where the complainant can afford them. Union Pacific advances this notion, claiming that streamlining is not appropriate in stand-alone cost (SAC) cases because market-dominance costs have not discouraged shippers from bringing SAC cases and the cost to shippers of preparing initial market-dominance evidence should be lower than the cost to railroads.²³ Similarly, AAR suggests that streamlining should not apply to SAC cases because the value of these cases is high.²⁴

²² Coalition Associations Opening Comments 7-8.

²³ UP Opening Comments 14.

²⁴ AAR Opening Comments 7.

No shipper should have to incur unnecessary burdens, and their related costs, to challenge a rail rate. A shipper challenges a rate only where it believes the railroad has breached its statutory duty to charge reasonable rates. Because a complainant generally is responsible for its litigation costs even when it prevails, the costs associated with excessive litigation burdens effectively act as a premium that the complainant must pay to obtain what it was always entitled to: a reasonable rate. Ignoring excessive litigation burdens thus conflicts with the statutory directive that rail rates for traffic over which the carrier has market dominance must be reasonable.²⁵

Unnecessary litigation burdens also have been problematic for SAC complainants. Shippers have made clear that a key concern with SAC cases is their overall cost. Market dominance has become a major component of this cost because the market-dominance inquiry has become more complex, due in part to the railroad strategy of complicating the inquiry with far-fetched hypothetical alternatives and refusing to stipulate when market dominance is clear. This high cost counteracts part of the relief awarded when complainants win. When complainants lose, it is a multimillion-dollar penalty for making a good-faith claim²⁶ under what has become an unpredictable methodology.

Carload shippers are especially disadvantaged by unnecessary market-dominance burdens in SAC cases. As explained in the Coalition Associations' Opening Comments in *Final Offer Rate Review*, EP 755 (STB served Sept. 12, 2019), because their individual lane volumes are small, many carload shippers can only afford a SAC case by aggregating lanes encompassing many different commodities and origin-destination pairs. Market-dominance burdens

²⁵ See 49 U.S.C. § 10701(d)(1).

²⁶ Because the cost of litigating a SAC case is so high, shippers are highly unlikely to bring a rate case unless they are reasonably confident that they can prevail.

disproportionately affect these carload complainants because they must prove market dominance for each lane and commodity, despite small lane volumes and correspondingly small potential rate relief in any single lane. Furthermore, aggregating these low-volume lanes in SAC cases significantly increases the scope and complexity of the stand-alone railroad in addition to the market-dominance burdens.

Railroad indifference to unnecessary market-dominance burdens in a SAC case is perplexing because railroads have historically claimed that SAC cases are the gold standard for determining rate reasonableness. Reducing the burdens associated with the market-dominance presentation could make SAC cases more accessible, thereby reducing the likelihood that a railroad would have to defend its rate under a different standard. Assuming that SAC is the gold standard, which the Coalition Associations reject, the main disadvantage for railroads of increased access to SAC cases is that unreasonable rates are more likely to be challenged.

3. Large shippers should not have to incur the unnecessary costs that streamlining addresses.

Railroads propose that large shippers should not have access to streamlining, implying that these shippers can reduce the complexity of rate cases by including fewer lanes and leveraging competitive movements to avoid unreasonable rates on captive traffic.²⁷ Carload complainants do not have the luxury of challenging fewer lanes in the SAC world for all the reasons mentioned in the preceding section. In addition, they often have too few competitive lanes to leverage in their commercial negotiations. Regardless, the ability of large shippers to leverage their competitive traffic is irrelevant to whether the shipper should have to incur unnecessary burdens to challenge an unreasonable rate.

²⁷ See AAR Opening Comments 7; BNSF Opening Comments 10-11.

BNSF's suggestion that large shippers can leverage competitive movements to protect against unreasonable rates²⁸ is irrelevant and unproven. Shippers typically have few competitive lanes to leverage in comparison to captive lanes. Also, railroads have little reason to lower their rates for captive traffic in response to a shipper's attempt to leverage its competitive traffic. Margins on captive traffic are so high compared to those on competitive traffic that losing some competitive traffic is often more advantageous to railroads than lowering captive rates. For these reasons, shippers often find that railroads are willing to risk losing competitive traffic to keep margins from unreasonable rates on captive traffic. Indeed, the ratio of competitive to captive traffic is such that the railroads, rather than shippers, more typically leverage their larger universe of captive lanes to win the smaller universe of competitive lanes.

As demonstrated in the Coalition Associations' Opening Comments in EP 755, railroads use rate bundling to discourage rate challenges and extract higher rates from shippers. Under rate bundling, railroads often refuse to enter into a rate contract unless the shipper includes its captive traffic subject to unreasonable rates. Shippers who agree may pay slightly lower rates than they would under tariff but lose the opportunity to challenge the railroad's rates on their captive traffic. Shippers who refuse bundling are subject to tariff rates on all their traffic that are higher than the rates under a bundled contract. While these shippers may challenge the tariff rates on the captive traffic, the volumes often are not high enough to generate much relief in comparison to the incremental cost of including them in a rate case. Although these shippers may try to shift the competitive traffic away from the railroad, they rarely have enough competitive traffic to make this a concern for the railroad. Board action to enhance competition through reciprocal switching or other forms of bottleneck relief is needed to create the competitive balance that

²⁸ BNSF Opening Comments 10-11.

must exist to enable shippers to leverage their competitive traffic in commercial negotiations. Until that occurs, the leverage lies almost entirely with the rail industry.

Even if some large shippers can leverage their traffic to protect against unreasonable rates, the vast majority of large shippers cannot. Why should these shippers incur unreasonable burdens that streamlining could eliminate? As explained above, all shippers are entitled to reasonable rail rates. Unnecessary burdens dilute this right by functioning as a premium on a prescribed maximum reasonable rate.

4. The scope of existing competition does not reduce the importance of streamlining.

Streamlining remains necessary regardless of the competitive landscape. BNSF casts doubt on the necessity of streamlining with its claims of increased competition from trucks concerning various commodities.²⁹ If such competition exists, the prima facie factors are unlikely to be satisfied and, even when they are, the railroads will have the same opportunity that exists today to demonstrate otherwise in their reply evidence. Regardless of the accuracy of BNSF's claims, many commodities remain captive to rail. For example, chemical commodities are highly captive to rail, often because rail is safer than other modes for transporting large volumes of hazardous materials. Moreover, increased competition for certain traffic does not justify an inefficient market-dominance inquiry for traffic that is not subject to effective competition and relies upon rate remedies as an important check on railroad market power.

²⁹ BNSF Opening Comments 3-4, 7.

5. ICC experience with market-dominance presumptions is a poor predictor of whether streamlining will prove beneficial.

UP claims that the Interstate Commerce Commission's experience with market-dominance presumptions indicates that streamlining will have few benefits.³⁰ But the prima facie factors under the Board's streamlining proposal address the shortcomings of the presumptions that the ICC had adopted. Thus, when considering whether to adjust the scope of its streamlining proposal, the Board should not assume that the ICC's experience with presumptions precludes success.

From 1976 to 1981, the ICC used multiple rebuttable presumptions for finding market dominance, including:

- The "market share test," under which a rebuttable presumption of market dominance would arise "[w]here the proponent carrier has handled 70 percent or more of the involved traffic or movement during the preceding year."³¹
- The "cost test," under which a rebuttable presumption of market dominance would arise "[w]here the rate at issue exceeds the variable cost of providing the service by 60 percent or more."³²
- The "substantial investment test," under which a rebuttable presumption of market dominance would arise "[w]here affected shippers or consignees have made a substantial investment in rail-related equipment or facilities which prevents or makes impractical the use of another carrier or mode."³³

³⁰ UP Opening Comments 3-4.

³¹ 49 C.F.R. § 1109.4(g)(1) (1980).

³² 49 C.F.R. § 1109.4(g)(2) (1980).

³³ 49 C.F.R. § 1109.4(g)(3) (1980).

The ICC decided to repeal these presumptions upon finding that they did not enhance the accuracy of market-dominance determinations because they “placed too much emphasis on quantitative evidence which did not fully reflect the circumstances of any given movement.”³⁴ For example, the cost test was a poor indicator of the actual existence of market dominance because revenue-to-variable-cost ratios assist with determining where to look for market dominance but do not indicate whether traffic will move under a rate.³⁵ The market-share test was problematic because calculating market share was difficult, and a carrier with a high market share could be replaced easily.³⁶ The substantial-investment test was also a poor indicator of market dominance because an investment does not necessarily preclude the use of transportation alternatives.³⁷

The proposed prima facie factors do not arise from isolated, indirect measures of market dominance, like market share, R/VC ratios, and the presence of substantial investments. The factors based upon shipment characteristics and history of actual truck movements for the issue traffic strongly indicate whether truck competition is ineffective for the issue movement. The barge and buildout factors require evidence on multiple issues that directly relate to the feasibility of barge transportation and buildouts at the end-points of the issue movements. The intramodal-competition factor requires evidence specific to the issue traffic. Thus, the streamlining presumptions are far more accurate than the ICC’s abandoned presumptions.

³⁴ *Mkt. Dominance Determinations*, 365 I.C.C. 118, 120 (1981)

³⁵ *Id.* at 122.

³⁶ *Id.* at 123.

³⁷ *Id.* at 124.

II. Railroad procedural proposals concerning streamlining.

In their opening comments, railroads propose multiple procedural adjustments to the Board's streamlining approach that would increase the complexity of the streamlining inquiry, reduce access to rate review, undermine the benefit of the prima facie factors to narrow the complainant's opening presentation, increase page limits for straightforward cases, and provide an opportunity for surrebuttal. Railroads also propose expansion of initial disclosures in streamlined proceedings. As explained below, the Board should reject these proposals, except the initial disclosure proposal.

A. **DMIR is valid precedent that should apply to streamlined market dominance inquiries.**

AAR contends that the Board should not apply its "DMIR" precedent to the streamlined approach.³⁸ AAR is referring to the Board's decision in *E.I. du Pont de Nemours & Co. v. Norfolk S. Ry.*, NOR 42125, slip op. at 10-18 (served March 14, 2014) (citing *Minn. Power, Inc. v. Duluth, Missabe & Iron Range Ry.*, 4 S.T.B. 64 (1999), reconsideration decision at 4 S.T.B. 288 (1999)) ("*DuPont/NS*").³⁹ According to AAR, "the simplified market dominance process will not be workable as it applies to challenges to a portion of a joint-rate movement," if the DMIR precedent applies.⁴⁰ AAR's argument is an attempt to chip away at a Board determination, reached after extensive briefing in *DuPont/NS*, with which the rail industry disagrees. The *DuPont/NS* decision was correct, and there is no basis for not applying it to the streamlined approach.

³⁸ AAR Opening Comments 12-14.

³⁹ *Id.* at 2 n. 2.

⁴⁰ *Id.* at 14.

As a threshold matter, the Coalition Associations have proposed an alternative to the streamlined approach that permits a la carte application of the proposed prima facie factors in all cases and an optional bifurcated submission of market-dominance evidence. As a result, there would be no separate streamlined approach. AAR's argument, however, appears to apply to any approach that employs the prima facie factors in whole or in part. This reply rejects AAR's argument in both contexts.

AAR notably does not address any of the underlying rationale in the *DuPont/NS* decision, although it repeats several of the same arguments that the Board rejected. There is nothing about those arguments that merit different treatment when using any of the prima facie factors. The rationale remains the same.

The most significant rationale underlying the *DMIR* precedent is the statute itself. The Board must enforce the plain meaning of the statute as written. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms."⁴¹ To interpret the statute in a way that ignores the plain meaning would be unreasonable.⁴²

The market dominance statute, at 49 U.S.C. § 10707(b), reads as follows:

When a rate for transportation by a rail carrier providing transportation subject to the jurisdiction of the Board under this part is challenged as being unreasonably high, the Board shall determine whether the rail carrier proposing the rate has market dominance over the transportation to which the rate applies.
[underline added]

⁴¹ *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

⁴² *Shays v. FEC*, 337 F.Supp.2d 28, 51 (D.C. Cir. 2004). See also *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

When a shipper has challenged a Rule 11 tariff rate that applies to a single carrier's portion of a joint carrier movement, "the transportation to which the rate applies" refers only to that portion of the movement. No other transportation is mentioned or implied. "Where the statute speaks to the direct question at issue, we afford no deference to the agency's interpretation of it and 'must give effect to the unambiguously expressed intent of Congress.'"⁴³

In addition, Congress has plainly stated that, when the Board determines that "a rail carrier has market dominance over the transportation to which a particular rate applies", then the rate established "by such carrier for such transportation must be reasonable." 49 U.S.C. § 10701(d)(1) (emphasis added). As clearly mandated in this language, the market dominance analysis and the rate reasonableness analysis must cover the same transportation. In other words, Congress does not allow the Board to evaluate market dominance for an A-to-C movement to determine if rate reasonableness jurisdiction exists over an A-to-B movement. The plain language of the governing statutes prohibits divorcing market dominance from rate reasonableness.

AAR's position also would evaluate qualitative market dominance different from quantitative market dominance. The quantitative market dominance provision in 49 U.S.C. § 10707(d)(1)(A) uses the same language ("transportation to which the rate applies") as the qualitative market dominance provision of 49 U.S.C. § 10707(a) and (b). Hence, qualitative market dominance must be evaluated for the same segment as quantitative market dominance. There is no support in the statute or precedent for interpreting these two identical statutory phrases differently.

⁴³ *North Carolina v. EPA*, 531 F.3d 896, 906 (D.C. Cir. 2008) (internal citation omitted).

Even if the Board were to find some merit in AAR’s policy-oriented arguments, the Board must enforce the statute as written. “All the policy reasons in the world cannot justify reading a substantive provision out of a statute.” *North Carolina v. EPA*, 531 F.3d 896, 910 (D.C. Cir. 2008). An agency cannot ignore a statute’s plain language “simply because the agency thinks it leads to undesirable consequences in some applications.” *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 145 (D.C. Cir. 2006).

But AAR’s policy-oriented position also is flawed. Evaluating market dominance based on a whole-route movement as opposed to the portion of that movement to which the challenged rate applies would be impractical and confusing. This is illustrated by several examples that DuPont presented in its rebuttal evidence in *DuPont/NS*.⁴⁴ In addition, evaluating market dominance based on whole-route alternatives will allow bottleneck railroads to execute a price squeeze that robs shippers of the benefits they have negotiated in contracts with connecting carriers.⁴⁵ Rather than repeat those examples here, the Coalition Associations have attached excerpts from DuPont’s rebuttal evidence as Exhibit A.

In summary, AAR has not offered any acceptable justification for ignoring the DMIR precedent in the proposed streamlined market dominance approach or any approach that relies upon prima facie factors. The *DuPont/NS* rationale applies equally to any market dominance analysis. To hold otherwise would violate the statute, precedent, and sound policy.

B. Shippers must have a full opportunity for rebuttal.

AAR and UP assert that, if a complainant uses prima facie factors to establish market dominance and the railroad responds with additional evidence that it is not market dominant, the

⁴⁴ “Rebuttal Evidence of E.I. du Pont de Nemours & Co.,” Docket NOR 42125, at I-63 to 66 (filed April 15, 2013).

⁴⁵ *Id.* at I-59 to 63.

complainant should be prohibited from including contravening evidence in its rebuttal.⁴⁶ This would eviscerate streamlining and is unnecessary.

The benefits of streamlining flow from the availability of prima facie factors for a complainant's opening. Exactly what the complainant must submit on opening under the current process to carry its burden is unclear, and the risk of not addressing all conceivable alternatives is high. Consequently, the market-dominance inquiry has become unduly burdensome for complainants, in part, because the amount of evidence a complainant must submit on opening to carry its burden of proof must attempt to anticipate hypothetical transportation alternatives that railroads may raise on reply. If a complainant fails to offer evidence on opening pertaining to a potential hypothetical alternative, there is a strong chance that the complainant will be prohibited from using that evidence on rebuttal.⁴⁷ The prima facie factors address this unnecessary burden by establishing clear evidentiary thresholds that constitute a prima facie case absent railroad rebuttal. If a complainant who uses the factors would lose its ability to submit evidence on rebuttal in response to a railroad argument that effective competition exists, the factors would have no benefit.

Prohibiting a complainant from submitting new evidence in response to a railroad's arguments that it is not market dominant also is unnecessary. As the Coalition Associations suggested in their Opening Comments, the Board can ensure defendants have an opportunity to address evidence that complainants may submit on rebuttal by allowing the complainant only to submit rebuttal evidence that was disclosed by it in discovery. Since defendants would have had

⁴⁶ AAR Opening Comments 14-15; UP Opening Comments 5-7.

⁴⁷ See *Total Petrochemicals & Refining USA, Inc. v. CSX Transp. Inc.*, NOR 42121, slip op. at 12 (STB served May 31, 2013) (striking market-dominance evidence first introduced in complainant's rebuttal because complainant should have been aware of the potential need for the evidence on opening).

access to this evidence when developing their reply argument, they also would have had an opportunity to account for it on reply.

Finally, permitting complainants to introduce evidence shared in discovery on rebuttal would guard against railroad attempts to game the market-dominance inquiry by failing to account for evidence that contradicts its reply. Today, complainants address this issue by submitting voluminous opening evidence designed to address all potential arguments a railroad may raise. Under the streamlining approach, however, complainants will only submit the evidence necessary to satisfy the prima facie factors. Thus, if a complainant who uses the factors cannot introduce evidence on rebuttal that was produced during discovery, railroads will have a strong incentive to present reply arguments that do not account for contradictory facts known to the railroad.

C. Market-dominance screens for shippers are unnecessary.

The Board should dismiss as unnecessary and inappropriate Union Pacific's suggestion that the Board adopt minimum market-dominance screens that all shippers must satisfy before a railroad is even required to respond to a rate complaint.⁴⁸ Despite claiming these screens would provide guidance to shippers, Union Pacific fails to explain why this guidance is necessary. Far from bringing rate cases upon facts that are clearly insufficient for establishing market dominance, shippers are not challenging rates even when railroads do possess market dominance. Also, the screens would create an un rebuttable presumption of effective competition, which the Board has not even proposed for the prima facie factors.

Perhaps UP is suggesting that the market-dominance streamlining proposals will create a need for this guidance to avoid frivolous claims against carriers. But as explained in Part I.A, the

⁴⁸ UP Opening Comments 12-13.

prima facie factors constitute a heightened market-dominance standard given that a shipper still may be able to establish market dominance when those factors are not satisfied. Thus, the risk that shippers will bring rate cases using streamlined market-dominance procedures when railroads do not possess market dominance is quite low.

D. The Coalition Associations do not oppose appropriately-tailored initial disclosures.

AAR and UP have proposed that complainants make certain initial disclosures to railroads under streamlined procedures for Final Offer Rate Review cases.⁴⁹ The Coalition Associations do not object to reasonable initial disclosures for either the Board's proposal or their alternative bifurcated market-dominance procedure, if the disclosures do not impose unreasonable burdens on complainants. Any initial disclosure requirement must ensure the protection of confidential information that must be disclosed and enable complainants to defer production of items for which coordination with the defendant is necessary, such as electronic discovery documents, pending discussion with the defendant regarding the most efficient means of production.

Although the Coalition Associations recognize that initial disclosures may be worthwhile in a streamlined market-dominance inquiry, the Board should be mindful not to require initial disclosures that are excessive in relation to a railroad's needs. Many of the initial disclosure suggestions by railroads fall into this category by failing to balance the complainant's burden of producing information with the railroad's need for it. For example, AAR suggests that complainants should have to "disclose all of this information,"⁵⁰ referring to an explanation of how competitive options were evaluated and all studies of transportation alternatives that a

⁴⁹ AAR Opening Comments 11; UP Opening Comments 7-9.

⁵⁰ AAR Opening Comments 11.

complainant has ever performed. UP suggests that that complainants should be required to disclose “information regarding”⁵¹ any use of transportation alternatives or any studies or consideration of transportation alternatives, without defining the scope of such information. Disclosing studies of transportation alternatives and providing data on shipments where transportation alternatives have been used is reasonable; but providing additional information that relates to those studies and shipments is unnecessary and burdensome. Similarly, explaining the steps taken to evaluate transportation alternatives is unnecessary.

To address these issues, the Coalition Associations propose the following initial disclosures, which are modified versions of those that Union Pacific has proposed, for streamlined market-dominance inquiries:

1. All shipments of the issue commodity by any mode made with any transportation provider other than the defendant railroad during the previous five years, including: the shipment date; transportation mode; origin; destination; identity of the person or entity that provided the transportation; and the rate charged for the transportation.
2. Any transportation contracts that the complainant or its affiliates could have used to transport the issue traffic between the issue origin and issue destination and intermediate transloading points during the previous five years.
3. All available studies or e-mail correspondence in complainant’s possession concerning transportation alternatives for movements of the issue commodity(ies) from each issue origin to the corresponding issue destination during the previous five years.

⁵¹ UP Opening Comments 7.

E. The Board should not permit railroads to request an ALJ hearing on market dominance.

Many railroad commenters insist that the Board permit railroads, not just complainants, to request an ALJ hearing on market dominance when streamlined market-dominance procedures are used.⁵² This is a thinly veiled attempt to obtain an opportunity for surrebuttal, which would be unfair to complainants who have the burden of proof.

The Board's proposal to grant only complainants the option of requesting an ALJ hearing is appropriate. It reflects the fact that complainants have the burden of persuading the Board that market dominance exists and, without an opportunity to rebut a railroad's argument, this burden could be insurmountable. Also, the only reason for a railroad to request an ALJ hearing is to further develop the market-dominance record *after* the complainant has made its rebuttal.

Contrary to AAR's claims,⁵³ streamlined market dominance does not provide shipper evidence with additional weight that would warrant allowing railroads to request an ALJ hearing. Through the establishment of prima facie factors, the Board's streamlining proposal merely recognizes that shipper evidence establishing the factors is sufficient to make a prima facie showing of market dominance in *any* case absent a contrary carrier reply. As explained in Part I.A, this evidence has the same weight under streamlined procedures as it does under the current market-dominance inquiry.

F. The Board should reject railroads' page-limit proposals.

The Board has proposed a 50-page limit on reply and rebuttal evidence (including exhibits) when using the streamlined market-dominance procedures. AAR accepts the 50-page limit, inclusive of exhibits, but would extend the limit by 10 pages for each additional case lane,

⁵² AAR Opening Comments 14; BNSF Opening Comments 15; UP Opening Comments 11.

⁵³ AAR Opening Comments 14.

up to a 100-page maximum.⁵⁴ UP asserts that no page limits should apply.⁵⁵ In their Opening Comments, the Coalition Associations proposed a 30-page aggregate limit on narrative evidence and verified statements (excluding certain exhibits) when a complainant chooses the optional bifurcated procedural schedule for market-dominance evidence that the Coalition Associations have proposed.⁵⁶ The Associations' lower page limit, as explained on opening, is comparable to the Board's 50-page proposal because it excludes most exhibits.

The Coalition Associations continue to believe their bifurcation proposal and a la carte modal application of the prima facie factors is superior and urge the Board to adopt that proposal in lieu of the proposal in the Notice. Due to the page limits, complainants typically would only choose the bifurcated approach when relying upon the prima facie factors. A complainant, however, could rely upon the prima facie factors without invoking the bifurcated approach, in which case no page limits would apply at all. The critical point is that whatever streamlined market-dominance procedures are ultimately adopted must balance the use of prima facie factors with page limits to concentrate reply and rebuttal evidence on key issues.

Where a complainant uses the prima facie factors to establish market dominance as a whole, there is a strong likelihood that market dominance exists, and the railroad likely will not need an extensive reply. The Coalition Associations' proposal enables complainants in this situation to invoke the bifurcated procedural schedule with page limits, which they are likely to do. Conversely, in complex cases where a complainant uses the prima facie factors to establish market dominance only concerning a single mode or where there are many case lanes, complainants and defendants will likely require a more extensive narrative presentation on

⁵⁴ AAR Opening Comments 15.

⁵⁵ UP Opening Comments 7.

⁵⁶ Coalition Associations Opening Comments 22.

market dominance and thus will not opt for the bifurcated process and will not be subjected to page limits. The Coalition Associations' proposal incentivizes complainants to forego the bifurcated procedural schedule and page limits in this situation because it subjects the complainants to the same page limits applicable to the railroads and even shorter periods to file their presentations despite complainants having the burden of proof.

Neither AAR's nor Union Pacific's proposal strikes a balance that preserves the benefits of the prima facie factors while providing a reasonable opportunity for railroads to assert a defense. Union Pacific ignores the problems with railroad replies altogether, arguing that "[r]ailroad replies would still have to contain all the same arguments and evidence as under the current approach."⁵⁷ While railroad replies would have to contain *some* of the same arguments and evidence, there is no reason why railroads must have an opportunity to raise the specious arguments that make the current approach unnecessarily burdensome, especially in cases that satisfy the prima facie factors. Because complainants must use objective evidence, like actual shipment data, to establish the prima facie factors, railroads should be able to rebut a prima facie factor with a short narrative and reference to exhibits containing the contrary evidence.

AAR's page-limit proposal also would not limit the submission of excessive evidence in streamlined cases. A streamlined case will probably never require AAR's 100-page reply and rebuttal maximum limit because streamlining is not suited for cases involving complex issues or a high number of lanes. Also, AAR's 50-page minimum limit far exceeds what would be necessary for reply and rebuttal under a more straightforward streamlined inquiry. AAR's proposal also does not clearly prohibit the use of verified statements and exhibits to present narrative.

⁵⁷ UP Opening Comments 10.

III. Railroad proposals concerning prima facie factors.

Railroads propose to increase the highway-distance factor, require a product- and geographic-competition showing, and require verified statements to satisfy unclear requirements. In addition, they suggest adding a factor addressing pipeline competition. Although the Coalition Associations do not object to a pipeline factor, they urge the Board to reject the railroads' other proposals. The increased threshold for the highway-distance factor is excessive and based on an improper analysis of traffic data. The addition of product and geographic competition would make the market-dominance inquiry at least as burdensome as it is today. Also, the railroads' suggested requirements for verified statements are unnecessary given the clear objective standards proposed by the Coalition Associations in their Opening Comments, are ambiguous, and appear to require content that is irrelevant to market dominance.

A. The Board should reject railroad calls for setting the highway-distance factor above 500 miles.

The Board should reject railroad suggestions to increase the highway-distance factor to 750 miles and that a 500-mile threshold would soon be obsolete.⁵⁸ Railroads base these suggestions on overly simplistic analyses of traffic data and a fundamental misunderstanding of the technological and legal landscape affecting the trucking industry. Also, close scrutiny of the railroads' support for their suggestions reveals facts bolstering the Coalition Associations' call for a 250-mile threshold.

To support a 750-mile threshold, railroads advance a flawed interpretation of the Commodity Flow Survey, published by the U.S. Census Bureau and Bureau of Transportation Statistics, and Transportation Statistics Annual Report 2018 published by the Bureau of

⁵⁸ AAR Opening Comments 9; BNSF Opening Comments 13-14; Canadian National Railway Co. (CN) Opening Comments 2; UP Opening Comments 12.

Transportation Statistics.⁵⁹ First, railroads ignore the average distance of 227 miles for truck shipments in the Survey, whereas the average distance of a rail shipment is 805 miles.⁶⁰ These statistics provide clear support for the Coalition Associations' 250-mile proposal.

Second, railroads use market share as a proxy for competition, arguing that truck market share exceeds or is comparable to rail market share upwards of 750 miles.⁶¹ As the ICC recognized long ago when it repealed its market-share presumption for market dominance with railroad support, market share is a poor measure of market dominance because calculating the appropriate market is difficult and the competitive implications of market share are case specific.⁶² In fact, the railroads' calculation of market share is not based on traffic over which truck and rail modes compete (i.e., the competitive market). Instead, railroads include all U.S. traffic in their market measure. This makes trucks appear to have a greater market share in part because trucks can physically access more U.S. traffic than rail.

Third, a comparison of Survey data regarding tonnage indicates that trucks lose their competitive edge over rail at 250 miles. When shipment miles increase to between 250 and 499 miles, rail tonnage increases by 36% while truck tonnage decreases by 44%. Truck tonnage continues to drop by 57% and 46% as mileage increases to between 500 and 749 miles and between 750 and 999 miles, respectively, but rail tonnage holds steady. This indicates that,

⁵⁹ See BNSF Opening Comments 13; CN Opening Comments 2-5.

⁶⁰ Bureau of Transp. Statistics, U.S. Dep't of Transp., et al., *2012 Commodity Flow Survey* tbl. 1a (2015) [hereinafter *CFS*], available at <https://www.census.gov/content/dam/Census/library/publications/2015/econ/ec12tcf-us.pdf>. Because the railroads rely on an aggregate of for-hire and private truck data in their comments, we used a shipment distance that is an aggregate of both data types.

⁶¹ BNSF Opening Comments 13; CN Opening Comments 4.

⁶² *Mkt. Dominance Determinations*, 365 I.C.C. 118, 123 (1981).

starting at 250 miles, shipments that can move by rail are handled by rail. Table 1, below, identifies truck and rail tonnage by mileage band reported in the Survey.

Table 1⁶³
CFS Tonnage by Distance

Distance	Truck		Rail	
	Tonnage (thousands)	Percent change	Tonnage (thousands)	Percent change
100-249 miles	933,051	N/A	200,459	N/A
250-499 miles	526,850	-44%	271,773	36%
500-749 miles	229,177	-57%	253,876	-7%
750-999 miles	123,767	-46%	247,553	-2%

Railroad concerns about the changing technological and legal landscape also do not stand up to scrutiny. AAR asserts that, as trucking companies experiment with platooning, remote operation, and autonomous trucks, the distances truckers can drive are increasing.⁶⁴ Yet none of these technologies are impacting the two factors that influence driving distance: driving speed and driving time. Truck speed limits have not changed, and although the driver may be in a different vehicle during some experiments, drivers are still necessary for each truck movement and still subject to the FMCSA's hours-of-service rules, which do not provide technology exceptions. As the Coalition Associations explained in their Opening Comments, even under the FMCSA's proposed liberalization of its hours-of-service rules, drivers will find it difficult to complete shipments exceeding 250 miles in a single day.⁶⁵ Technology advancement that will enable movements without a driver on a large scale, non-experimental basis are not expected anytime soon.

⁶³ CFS, *supra* note 60, tbl. CF1200A11, available at <https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t>.

⁶⁴ AAR Opening Comments 9.

⁶⁵ Coalition Associations Opening Comments 12.

Similarly, nothing indicates that changes to truck size and weight rules are expected in the near term. Although AAR suggests that ongoing lobbying efforts may soon result in legislation to allow larger trucks,⁶⁶ these lobbying efforts have been on-going for years without results.

Setting the highway-distance threshold high enough to exclude nearly every conceivable movement where a railroad may not have market dominance is neither desirable nor necessary. A threshold that is too high will effectively make streamlining unavailable where the railroad is highly unlikely to mount a successful market-dominance defense. In contrast, a lower threshold will ensure that streamlining is available where appropriate but should not lead to inappropriate market-dominance findings since the railroad will still have a fair opportunity to address why the factor is not adequate evidence of market dominance under the circumstances of that case.

B. The Board should not include a product- or geographic-competition factor.

The Board should reject railroad claims that the efficiency benefits of streamlining warrant consideration of product and geographic competition in streamlined proceedings.⁶⁷ Requiring complainants to establish an absence of product- and geographic-competition would simply replace the unnecessary burdens addressed by streamlining with new burdens. This will result in a market-dominance inquiry that is a greater barrier to rate review than the current inquiry. Additionally, railroad proposals to reduce the necessary product and geographic competition evidence on opening are ambiguous, likely impossible to satisfy, and do not prevent railroads from introducing more complex product- and geographic-competition issues on reply.

Consideration of product and geographic competition in the market dominance inquiry is unduly burdensome on litigants and the Board. The Board removed product and geographic

⁶⁶ AAR Opening Comments 9.

⁶⁷ AAR Opening Comments 10; BNSF Opening Comments 12-13.

competition from the inquiry for this reason, stating that “there can be no question that the inclusion of these factors imposes substantial burdens on both the parties and this agency.”⁶⁸ These burdens arise for the Board because considering product and geographic competition involves complex and nuanced issues that require the agency to “delve deeply into industrial operations that are far removed from the industries [it] regulate[s].”⁶⁹ These burdens arise for litigants because litigating product and geographic competition requires extensive discovery, with cases often having involved hundreds of discovery requests on these factors.⁷⁰

The Board concluded that these burdens were excessive even though it had placed the burden of proving product and geographic competition upon the railroads. Although the Board had intended that this reallocation of the burden of proof would reduce discovery disputes and expedite market dominance, it concluded that objective had not been successful.⁷¹ In their opening comments, the railroads do not directly address the question of which litigant would have the burden of proof under their proposals, although AAR appears to place it on complainants.

The ambiguous product and geographic factors that railroad commenters propose do little to address the issues that made the consideration of product and geographic competition burdensome in past cases.

⁶⁸ *Mkt. Dominance Determinations—Prod. & Geographic Competition*, 3 S.T.B. 937, 946 (1998).

⁶⁹ *Id.* at 947.

⁷⁰ *See id.* (explaining that a case involving approximately 400 discovery requests was not unusual because “in many rate cases the number of discovery questions that have been posed . . . to develop evidence on product and geographic competition have numbered in the hundreds.”).

⁷¹ *Id.* at 941 n. 26.

- BNSF proposes a factor that simply requires “no product or geographic competition.”⁷²

While BNSF suggests that a certification from a knowledgeable shipper business representative would suffice to demonstrate the absence of product and geographic competition, without any objective thresholds for satisfying this factor and limits on the scope of a railroad’s reply, railroads would be able to open consideration of product and geographic competition into the complex, full-blown inquiry that the Board found unduly burdensome in *Market Dominance Determinations—Product & Geographic Competition*.

- AAR proposes that the Board require complainants to demonstrate they have shipped more than a significant percentage of the issue commodity to the issue destination, suggesting 75% over five years as a significant percentage.⁷³ But AAR provides no rationale for why 75% is significant in the context of geographic competition. Also, AAR does not explain how a complainant would be able to satisfy this factor if the complainant only operates at the origin and, thus, does not know the amount of the issue commodity received at the destination. Even if a complainant could demonstrate this factor, a railroad could rebut the complainant’s opening evidence with other evidence of product and geographic competition, resulting in the very same complex and burdensome inquiry on these issues that prompted the Board to foreclose this inquiry.

Further, none of these proposals reduces the need for litigants to engage in extensive discovery of product- and geographic-competition issues. Consistent with past cases involving product and geographic competition, railroads will likely pose numerous discovery requests so

⁷² BNSF Opening Comments 13.

⁷³ AAR Opening Comments 10.

they can raise all potential product- and geographic-competition issues on reply.⁷⁴ Faced with having to address product- and geographic-competition issues raised by railroads, complainants probably will choose the current market-dominance inquiry over a streamlined inquiry involving a la carte use of the prima facie factors.

The consequences of adding product- and geographic-competition factors far outweigh the benefits. A shipper is unlikely to challenge a rate that is effectively constrained by product and geographic competition because the cost of challenging the rate is high compared to the potential relief. Setting aside market-dominance costs, rate challenges are expensive. Full-SAC cases for carload shippers can approach \$10 million and cases under the Board's simplified methodologies cost hundreds of thousands. The relief available for rates that are truly constrained by product and geographic competition is likely a fraction of these costs, if anything.

C. AAR's proposed clarifications to the verified-statement requirements for the buildout and barge factors are unnecessary.

The Coalition Associations agree with AAR that the Board should clarify the information to be contained in verified statements supporting the barge and buildout factors, and they have proposed the scope of such information in their Opening Comments. But AAR's proposed clarifications concerning the content of verified statements are unnecessary or excessive in view of the Coalition Associations' proposed objective factors.

Requiring verified statements to contain an explanation of the steps taken to evaluate competitive options or explain how the possibility of a buildout was evaluated⁷⁵ is unnecessary. A complainant's internal evaluation of competitive options is irrelevant to whether competition existed. Additionally, it is unclear what would constitute a sufficient explanation of the

⁷⁴ The expedited schedule and page limits that Coalition Associations propose in their Opening Comments would likely have little impact on the scope of discovery.

⁷⁵ AAR Opening Comments 11.

complainant's evaluation of competitive options. Would a narrative of each action and its results suffice? What happens if a step is omitted? A more appropriate approach would require complainants to attest to objective facts that strongly indicate competitive options are infeasible or ineffective, like the approach Coalition Associations have proposed in their Opening Comments for the buildout and barge factors.

Also, whether AAR is suggesting that complainants perform feasibility studies to evaluate competitive options is unclear. To eliminate any question about whether these studies are necessary, the Board should clarify that they are not required. As the Coalition Associations explain in their Opening Comments, the feasibility of barges and buildouts can be demonstrated by objective facts that do not require a costly feasibility study.

D. Coalition Associations do not object to adding a pipeline factor.

Many railroads suggest that the Board should include a prima facie factor for pipeline competition.⁷⁶ The Coalition Associations do not object to a pipeline factor that can be established by objective evidence that reasonably indicates pipeline competition is not effective.

IV. The Board should not use this proceeding to address the Limit Price Test.

The Board should not accept railroad proposals to formally abandon the Limit Price Test in this proceeding.⁷⁷ Nor should the Board use this proceeding to endorse the use of the Limit Price Test. Because the NPRM did not mention the Limit Price Test, interested parties have not had a full opportunity to contemplate and comment upon the continued applicability of the Limit Price Test in the market-dominance inquiry.

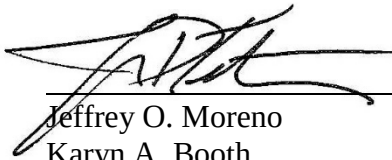
⁷⁶ AAR Opening Comments 10; BNSF Opening Comments 14-15; UP Opening Comments 12 n. 4.

⁷⁷ See AAR Opening Comments 16-17; CSXT Opening comments 3.

V. Conclusion

For the reasons set forth in their Opening Comments and these Reply Comments, the Coalition Associations urge the Board to adopt the streamlined market-dominance approach outlined in the NPRM, as modified by the Coalition Associations' proposals. These proposals further streamlining's promise by ensuring streamlining will be available to reduce unnecessary burdens in appropriate cases. In addition, they address railroad concerns by maintaining the burden of proof on the shipper, including appropriate prima facie factors that require a heightened evidentiary showing, and providing an opportunity for railroad reply that reflects case complexity.

Respectfully submitted,



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The Chlorine Institute

January 10, 2020

Exhibit A

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period of data from 2006-11.³³ When averaged over five years, these are hardly the extraordinary numbers that NS would have the Board believe.

g. The Board must apply its DMIR holding to this case.

At pages I-12 to 14 of its Opening Evidence, DuPont asserted that alternative transportation for the joint line issue movements must be between the origin or destination served by NS and the interchange point with the connecting carrier based upon the statute and precedent in the DMIR³⁴ and Bottleneck³⁵ decisions. NS raises three main points in opposition to this argument: the governing statutes,³⁶ the real-world impact of competition,³⁷ and prior agency decisions.³⁸ Even a moderate level of scrutiny, however, reveals that NS's position must be rejected.³⁹

1) The statute requires the Board to consider whether effective competition exists for the transportation to which the challenged rate applies.

The first NS argument is that DuPont has misread the statute and that the statute actually supports NS's position. But, NS has selectively quoted from the statute and legislative history to reach this conclusion and disregards the clear statements of Congressional intent and Board precedent.

³³ Most of those truck shipments occurred during a plant shutdown at Edgemoor in 2010, and the customer in Lane {{[REDACTED]}} also is one that can receive only trucks at one portion of its facility. Dup. Op. Narr. I-49.

³⁴ Minn. Power, Inc. v. Duluth, Missabe & Iron Range Ry., 4 S.T.B. 64 (1999) ("DMIR I"), reconsideration decision at 4 S.T.B. 288 (1999) ("DMIR II").

³⁵ Cent. Power & Light Co. v. S. Pac. Transp., 1 S.T.B. 1059 (1996) ("Bottleneck I"), clarified at 2 S.T.B. 235 (1997) ("Bottleneck II"), aff'd sub nom. MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999).

³⁶ See NS Reply II-B-59, -62, and -67 to -75.

³⁷ See NS Reply II-B-60 to -67, and -72.

³⁸ See NS Reply II-62 and -75 to -90.

³⁹ Nevertheless, recognizing the highly contentious nature of this issue, DuPont presented evidence of market dominance based upon both the bottleneck segment and the through routing of joint line movements. See Dup. Op. Narr. I-16 n.20, I-19 n.24.

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a) NS selectively quotes from the statute and legislative history.

NS claims that its position is supported by the governing statutes. Specifically, NS notes that 49 U.S.C. § 10707(b) uses the word “shall” in reference to intermodal competition. See, e.g., NS Reply II-B-59, -68. From this observation, NS makes the uncontroversial assertion that “the Board must make a jurisdictional market dominance finding for every rate challenge....” Id. at 68 (underline in original). DuPont, however, has not argued that the Board need not make a market dominance determination for any issue movement; rather, the pertinent question is whether that determination should be made for the “whole-route” through rail movement or just the bottleneck segment covered by the challenged rate. NS’s over-zealous focus on the word “shall” in its statutory quotations ignores a crucial point: simply considering whether effective intermodal competition exists is distinctly different from finding that such competition actually exists. DuPont agrees that a proper market dominance evaluation involves determining whether effective intermodal competition exists, and this is exactly what DuPont has done for every issue movement.

NS incorrectly asserts that DuPont believes “the Board is not allowed to consider any competitive alternative for a Rule 11 rate that does not deliver the commodity in a railcar at the precise point where NS would interchange the traffic in rail service.” NS Reply II-B-67 (underline in original). NS does not cite to the DuPont Opening for this assertion because DuPont made no such statement. DuPont’s Opening Evidence reveals that DuPont evaluated whether effective intermodal competition exists for every lane. Where the NS transportation covered by the challenged rate ends or begins at an interchange with another railroad, DuPont searched for transload locations at or within a reasonable distance of the interchange. For several such lanes that begin or end at an interchange, DuPont found possible transload locations at or

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near the interchange and evaluated the competitive effectiveness of those alternatives to the challenged NS transportation. See, e.g., Dup. Op. Narr. II-B-49 (Lanes B-99 and B-100), II-B-54 to -55 (Lane B-125), II-B-89 to -91 (Lanes B-9 and B-29).

Moreover, even when there are no existing facilities to complete the alternative transportation at the issue movement origin or destination, the defendant railroad is always free to propose construction of additional infrastructure to facilitate claimed effective transportation alternatives. The use of newly-constructed infrastructure could provide effective competition to a challenged tariff that covers transportation starting or ending at an interchange or transfer to another mode of transportation. As the Board well knows, proposal of new infrastructure is not unusual in market dominance determinations. See, e.g., FMC, 4 S.T.B. at 715 (defendant UP proposed pipeline construction); West Texas Utilities, 1 S.T.B. at 650-651 (defendant BN proposed rail line construction to competing railroad); Seminole Elec. Coop. v. CSX Transp., Inc., S.T.B. Docket No. 42110 (at pages II-24 to -50 of its Reply Evidence filed January 19, 2010, defendant CSXT proposed replacing rail service with combined rail, ocean barge, river barge, and conveyor belt transportation, which would require construction of new barge unloading facility, conveyor belt, and floating crane.). There was nothing preventing NS from making a similar effort for DuPont's traffic. Cf. DMIR II, 4 S.T.B. at 293 (rejecting railroad's assertion that the Board foreclosed the possibility of effective competition, and stating that the railroad "is not foreclosed from attempting to show that potential motor carrier competition from Keenan to Laskin effectively constrains the rate at issue").

In support of its position, NS has selectively quoted from the market dominance statute, ignoring use of the word "whether" and other key parts of the statute. See, e.g., NS Reply II-B-67 to -68. The full first sentence of 49 U.S.C. § 10707(b) reads:

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When a rate for transportation by a rail carrier providing transportation subject to the jurisdiction of the Board under this part is challenged as being unreasonably high, the Board shall determine whether the rail carrier proposing the rate has market dominance over the transportation to which the rate applies.

Crucially, the sentence clearly is limited to “a rate” established by “a rail carrier providing transportation subject to the jurisdiction of the Board.” Thus, the rate must be a tariff rate and the rail carrier must be providing common carriage service. When such a challenge is made, the Board then determines “whether” the rail carrier “proposing the rate”—meaning the tariff rate—has market dominance over “the transportation to which the rate applies”— meaning the tariff rate transportation.

Where DuPont has challenged an NS tariff from Point A to Point B, and DuPont has a contract rate with another railroad from Point B to Point C, the “transportation” to which the NS rate “applies” is simply the Point A to B movement. The market dominance inquiry applies to the common carriage governed by the challenged tariff rate. No other transportation can be inferred from the plain language of the statute. Given this lack of ambiguity, the Board must enforce the statute as written. “[I]n interpreting a statute a court should always turn to one cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” Conn. Nat’l Bank v. Germain, 503 U.S. 249, 253-254 (1992). Thus, because the NS tariff does not apply to any other transportation, the market dominance analysis covers only the A-B movement.

NS also ignores 49 U.S.C. § 10701, which further supports DuPont’s position. The language of that statute reads:

If the Board determines, under section 10707 of this title, that a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by such carrier for such transportation must be reasonable.

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49 U.S.C. § 10701(d)(1). Again, the plain language of the statute makes clear that the term “transportation” in § 10701(d), just as in § 10707, applies to the service provided under the challenged tariff. No other transportation is mentioned or implied. “Where the statute speaks to the direct question at issue, we afford no deference to the agency’s interpretation of it and ‘must give effect to the unambiguously expressed intent of Congress.’” North Carolina v. EPA, 531 F.3d 896, 906 (D.C. Cir. 2008) (internal citation omitted).

Finally, NS’s position would create an unwarranted dichotomy between the Board’s evaluation of quantitative and qualitative market dominance. Under 49 U.S.C. § 10707(d)(1)(A), the Board is directed to find that the “carrier establishing the challenged rate” does not have market dominance over “the transportation to which the rate applies” if the carrier can prove that the challenged rate results in an R/VC percentage less than 180%. The phrase “the transportation to which the rate applies” is precisely the same language that Congress used in 49 U.S.C. § 10707(b) to describe qualitative market dominance. If, as NS contends, this phrase refers to all possible movement of the commodity in any “whole-route” in which the challenged tariff plays a part, then the R/VC calculation would require evaluating the variable costs of non-party railroads, motor carriers, and any water carriers that a shipper might use in combination with a challenged rail rate. Of course, parties to rate cases do not calculate the quantitative market dominance in this way, revealing yet again that NS is incorrect in its effort to re-write the plain statutory language governing market dominance.

b) The Board must enforce the plain meaning of the statute.

The Board must enforce the plain meaning of the statute as written. “It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making

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body which passed it, the sole function of the courts is to enforce it according to its terms.” Caminetti v. United States, 242 U.S. 470, 485 (1917). To interpret the statute in a way that ignores the plain meaning would be unreasonable. Shays v. FEC, 337 F.Supp.2d 28, 51 (D.C. Cir. 2004). See also Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

Even if the Board were to find some merit in one of NS’s policy-oriented arguments, the Board must enforce the statute as written. “All the policy reasons in the world cannot justify reading a substantive provision out of a statute.” North Carolina v. EPA, 531 F.3d 896, 910 (D.C. Cir. 2008). An agency cannot ignore a statute’s plain language “simply because the agency thinks it leads to undesirable consequences in some applications.” Friends of the Earth, Inc. v. EPA, 446 F.3d 140, 145 (D.C. Cir. 2006).

NS’s response to the plain statutory language is two-fold. First, NS claims that its interpretation of market dominance is necessary because Congress did not define market dominance to be:

competition from other rail carriers or modes of transportation for the transportation to which a rate applies and only for that transportation.

NS Reply II-B-74 (emphasis in original). The folly of NS’s position is obvious. Congress has already fully defined market dominance in § 10707(a), but NS wants Congress to add an extra phrase to simply say “and only this.” Where a term is already defined, there is no need for the phrase proposed by NS, which could be used for every definition in every statute in the entire U.S. Code. If Congress had drafted the statute in accord with the NS proposal, then parties in unrelated disputes over other parts of the Interstate Commerce Act, and, indeed, the entire U.S. Code, could make similar arguments—contending that the definitions drafted by Congress are open to interpretation unless they have the magic language “and only this” appended at the end.

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The Board should reject NS's attempt to inject a "magic language" requirement to definitions drafted by Congress.

Second, NS cites to the legislative history. NS Reply II-B-73. As an initial matter, resort to legislative history is unnecessary because the statutory language is abundantly clear. "When the words of a statute are unambiguous, then... 'judicial inquiry is complete.'" Conn. Nat'l Bank, 503 U.S. at 254 (internal citation omitted). See also Gatewood v. Wash. Healthcare Corp., 933 F.2d 1037, 1040-1041 (D.C. Cir. 1991) (enforcing plain language of statute despite uncertainty in legislative history).

Even considering the legislative history, however, reveals that NS presents partial quotations in a highly misleading manner. NS claims that the original market dominance definition was simply "the absence of effective competition", and that the phrase "transportation to which a rate applies" was added to the statute only as clarifying language "to mak[e] clear that it is the proponent carrier or carriers proposing the rate that must have market dominance." NS Reply II-B-73. NS claims this language cannot be interpreted to limit the market dominance analysis to alternatives only for the challenged tariff transportation.

A closer look at the cited materials reveals that this legislative history actually undercuts NS's argument. The original market dominance definition was not simply "the absence of effective competition", but, instead, the following:

"Market dominance" means with respect to a carrier subject to this Act, the ability to charge as a consequence of the absence of effective competition, from the carriers or from other modes of transportation, a rate that unreasonably exceeds the cost of providing the service involved.

Special Procedures for Making Findings of Market Dominance as Required by the Railroad Revitalization Act and Regulatory Reform Act of 1976, 353 ICC 873, 941 (1976). This early draft confirms that, contrary to the inference suggested by the NS Reply, Congress only intended

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the market dominance inquiry to apply to the transportation covered by the tariff rate being challenged. Market dominance was defined in this draft as being the ability of “a carrier subject to this Act” to charge “a rate that unreasonably exceeds the cost of providing the service involved.” The definition clearly does not encompass the “whole-route” rate, or the tariff rate in conjunction with other transportation providers participating, by contract, in a whole-route transportation movement. It is unequivocally limited to the ability of the defendant railroad to charge a rate unreasonably exceeding its costs for “the service involved.”

NS also contends that the addition of the language “for the traffic to which a rate applies” was only intended “to mak[e] clear that it is the proponent carrier or carriers proposing the rate that must have market dominance.” NS Reply II-B-73. Again, NS has omitted part of the relevant passage, which is:

The Commerce Committee and the staff redrafted the market dominance provision into the form in which it appeared in section 103 of S.2718 reported by the Committee to the Senate on November 26, 1975. This version continued to reject the DOT concept of rate flexibility embodied in the no-suspend zone proposal, and responded to ICC concerns by defining market dominance in terms of “an absence of effective competition for the traffic to which a rate applies from other carriers or modes of transportation,” and by making clear that it is the proponent carrier or carriers proposing the rate which must have market dominance.

Special Procedures, 353 ICC at 942-943 (internal footnotes omitted) (emphasis added). In contrast to NS’s contention, the phrase “for the traffic to which a rate applies” was added in response to unspecified “ICC concerns.” Furthermore, some undefined aspect of the new definition was similarly intended to respond to a second ICC concern “by making clear that it is the proponent carrier or carriers proposing the rate which must have market dominance.” The latter is not the reason for the former, as NS contends; they are separate responses to different ICC concerns.

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One of the goals of Special Procedures was to define the relevant market for the purposes of the market dominance determination. After reviewing comments from railroads, shippers, the Department of Justice, the Department of Transportation, and others, the ICC decided to focus on the part of the statute that defines market dominance as “an absence of effective competition from other carriers or modes of transportation for the traffic or movement to which the rate applies.” 353 I.C.C. at 904. The ICC concluded that:

the appropriate market is the market for transportation services which directly compete with the service outlined in the tariff under consideration. Limiting consideration to direct carrier competition is consistent with the express language of the legislative definition, and is essential to making practical determinations in a short time period.

353 I.C.C. at 904. The ICC rejected numerous requests to consider a broader definition of the market at issue because the statute is limited to the “the traffic or movement to which the rate applies.” Id.

In conclusion, the ICC stated:

There is no language in the legislation which would warrant the extension of the phrase “the traffic or movement to which the rate applies” beyond transportation services which are comparable to that described in the issue tariff.

Id. at 905. In short, NS’s attempt to parse the statutory language and the legislative history necessarily fails, and even backfires, upon close inspection.

c) Segregation of market dominance and rate reasonableness is not supported by the statute.

The NS position would impermissibly separate the market dominance analysis from the rate reasonableness analysis, so that the market dominance phase would include the challenged rate in conjunction with any contract rates that might be used, while the rate reasonableness phase would include only the challenged rate. Segregating the analysis in this manner would

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mean that different rates are the subject of the two main parts of a rate case, thus resulting in untold problems and complications.

The plain language of the governing statutes prohibits divorcing market dominance from rate reasonableness. Congress has plainly stated that, when the Board determines that “a rail carrier has market dominance over the transportation to which a particular rate applies”, then the rate established “by such carrier for such transportation must be reasonable.” 49 U.S.C.

§ 10701(d)(1) (emphasis added). As clearly mandated in this language, the market dominance analysis and the rate reasonableness analysis must cover the same transportation. In other words, Congress does not allow the Board to evaluate market dominance for an A-to-C movement in order to determine if rate reasonableness jurisdiction exists over an A-to-B movement.

The Board has previously rejected the exact same segregation argument advanced here by NS. See DMIR II, 4 S.T.B. at 292. See also Atchison, Topeka & Santa Fe Ry. v. ICC, 580 F.2d 623, 634 (D.C. Cir. 1978) (“As a matter of strict logic, the phrase ‘for the traffic or movement to which a rate applies’ would seem to exclude from consideration competition that manifests itself in the form of ‘traffic’ or ‘movement’ *other* than that to which the rate in question applies.”) (emphasis original).

Not only is NS seeking to separate the market dominance and rate reasonableness portions of the case, but the NS position would require separation of qualitative market dominance from quantitative market dominance. NS would have the Board evaluate qualitative market dominance on the basis of transportation involving a combination of the challenged tariff and separate contract movements, but NS would have the Board evaluate quantitative market dominance based only on the transportation under the challenged tariff. See NS Reply Part II.A and Reply Exhibit II-A-3 (calculating R/VC ratios for quantitative market dominance based only

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on the transportation under the challenged tariff). There is no support in the statute or precedent for this type of divergent treatment of the two elements of market dominance.

In fact, the quantitative market dominance provision in 49 U.S.C. § 10707(d)(1)(A) uses the same language (“transportation to which the rate applies”) as the qualitative market dominance provision of 49 U.S.C. § 10707(a). Hence, qualitative market dominance should be evaluated for the same segment as quantitative market dominance. NS has not presented any rational basis for interpreting these two identical statutory phrases differently.

d) The Board cannot consider the contract service and rate because they are outside its jurisdiction.

The Board does not have jurisdiction over rail transportation pursuant to a contract. 49 U.S.C. § 10709. Given that rail contracts are “beyond” the Board’s “regulatory purview,” the Board does not “consider the movement prior to the interchange point for rate complaint purposes,” including evaluation of market dominance. DMIR II, 4 S.T.B. at 293. See also Rail Transportation Contracts Under 49 U.S.C. 10709, S.T.B. Ex Parte 676, slip op. at 2 (served Jan. 22, 2010) (“Congress expressly removed all matters and disputes arising from rail transportation contracts from the Board’s jurisdiction in section 10709(c)”). This same jurisdictional bar forms the underpinnings of the Bottleneck doctrine, as described by the Board:

Plainly we are without rate reasonableness jurisdiction over the rates of any rail transportation provided by contract. Regulation of the entire through route - even if the contract rate were simply treated as a given that cannot be changed - would indirectly result in review of the contract rate, and Congress has declared the rates for that portion of the through-route service to be beyond our reasonableness jurisdiction.

Bottleneck I, 1 S.T.B. at 1074. Therefore, the Board can only evaluate market dominance within the scope of its statutory jurisdiction, which does not include portions of a through movement that are under contract.

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NS attempts to avoid this holding by narrowly focusing upon just the issue of geographic competition;⁴⁰ but, the Bottleneck holdings are not predicated upon geographic competition. Although the Board referred to “geographic competition” to support its conclusion in DMIR, it also cited to the Bottleneck decision in tandem. See DMIR, 4 S.T.B. at 292 (“The position advocated by DMIR is contrary to both our *Bottleneck* and *Product and Geographic II* decisions.”). The Board also held that the governing statutes mandate this result. Id. Thus, the Board has clearly and unequivocally applied this jurisdictional limitation to its market dominance review. See DMIR II, 4 S.T.B. at 292 n.13 (“For a separately challengeable bottleneck-segment rate, transportation alternatives between the ‘same origin and destination points’ (*Product and Geographic Competition II* at 10, 12) must necessarily refer to those between the interchange point at which the bottleneck carrier obtains the traffic and the point of delivery.”).

2) NS’s claims about the “real-world” impact of competition are based on hyperbole and ignore “real-world” implementation problems.

The second major point made by NS is that “real-world” evidence shows that whole-route alternatives act as effective competition for NS’s bottleneck tariff rates. See NS Reply II-B-60 to -67, and -72. The various aspects of NS’s “real-world” argument do not withstand scrutiny.

a) The NS position is contrary to precedent.

In an argument supported by its witness Mark Burton, NS asserts that, in the “real world”, shippers are only concerned with “the ultimate total costs of transportation as a whole—

⁴⁰ See, e.g., NS Reply II-B-62 and 75-78

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not the costs of individual segments.” NS Reply II-B-66 (emphasis in original).⁴¹ Consequently, according to NS, the market dominance inquiry should focus on the cost of the whole route, not the cost of the tariff rate being challenged. NS Reply II-B-66 to -67. The NS position is contrary to precedent.

As stated by the D.C. Circuit:

The Great Northern holding—and the broader principle that the reasonableness of rates is to be assessed on a through basis—was based on an understanding that “[t]he shipper’s only interest is that the charge shall be reasonable as a whole.” This is no longer the case. By permitting a shipper to enter into contracts that are beyond review of the Board, the Staggers Act entitles a contracting shipper to—as FMC puts it—“the benefit of its bargain.” Were its position to prevail, Union Pacific would be in a position to recover for itself the “benefit” of FMC’s bargain with CSX, as it could set a rate that allowed it to obtain the difference between a reasonable through rate and the FMC-CSX contract price.

Union Pac. R.R. v. S.T.B., 202 F.3d 337, 342 (D.C. Cir. 2000) (internal citations omitted; underline added) (“Union Pacific”). The foregoing rationale applies equally to the market dominance and rate reasonableness portions of a bottleneck rate challenge.

Through its “whole-route” competition argument, NS seeks to immunize its rates from Board review whenever DuPont has successfully obtained a favorable contract for the transportation beyond the interchange point with NS. In other words, NS seeks to raise its rates so that it recovers for itself the benefits obtained by DuPont. This fact can be illustrated by a simple example. NS’s basic market dominance position has been that market dominance cannot exist if (1) the alternative mode is physically feasible, and (2) the through rate of the alternative mode is no more than 20% greater than the through rail rate. Let’s assume that the through rail rate from point A to C is \$10,000, of which \$5,000 is the challenged rate from point A to B and

⁴¹ NS uses the term “costs” here, but, from the context, it appears that NS is actually referring to the transportation rates charged (which may be considered “costs” incurred by the shippers to engage in their businesses), not the costs of the carriers to provide the relevant transportation services.

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\$5,000 is a contract rate from point B to C. Next, assume that a physically feasible direct truck alternative from point A to C is \$12,000. Because the alternative rate is not greater than 20% of the through rail rate, NS would conclude that there is no market dominance. Although the through rate differential is 20%, NS could increase its rate by \$2,000, or 40%, before a lower truck rate might threaten the loss of traffic.⁴² In other words, NS could take for itself at least a portion of the competitive bargain negotiated by DuPont in its bottleneck contracts by increasing its rate up to the point where the through rail rate appears to be competitive with the direct truck rate, thus immunizing its exercise of market power from challenge through the market dominance determination even before the Board can consider rate reasonableness.

Similarly, if DuPont were to successfully obtain a reduction in its B-to-C contract rate from the afore-mentioned \$5,000 per car to \$3,000, then NS's position would enable NS to raise its tariff rate to \$9,000 (which would raise the through rate up to the level of the \$12,000 direct truck rate), and such a dramatic increase would be completely immunized from Board review by NS's interpretation of market dominance. NS could take for itself the benefit of any favorable contract rate that DuPont obtains for the B-to-C movement.

As part of its Opening Evidence, DuPont showed that this is exactly what NS is trying to do. The history of NS rates and connecting railroad rates, for all but a handful of issue movements, showed that NS's rates on joint-line movements increased dramatically (generally high double digits or even triple digits in cumulative percent gain) over just two years, from 2009-11, while the connecting carriers' rates have gone up only slightly (single digits or low double digits in cumulative percent gain) or even decreased in some lanes. See DuPont Op. Ex. II-B-3; Dup. Op. Wp. "Case Lane Rate History." As a consequence of those NS rate increases,

⁴² This percentage will increase or decrease depending upon the proportion of the challenged rate to the through rate. This example uses an even split between the rail carriers in order to avoid biasing the result in either direction.

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alternative transportation rates that were well above NS's 20% threshold before NS increased its rates are now similar to, or even below, the through rail rate today, thus creating the illusion of effective competition after NS already has exercised its market power to take for itself the benefits of DuPont's negotiated contract bargain.

NS's attempt to immunize its rates from review even though it is the sole carrier transporting products between Points A and B, and even where no effective competition exists between Points A and B, has enabled NS to raise its rates so high as to absorb much, if not all, of the competitive benefit achieved by DuPont with its contract service from Point B to Point C under the "one lump" theory. W. Res., Inc. v. STB., 109 F.3d 782, 784 (D.C. Cir. 1997) (the one-lump theory is "the proposition that there is only one monopoly rent to be gained from the sale of an end product") (internal quotation omitted). See also Kansas City S.—Control—The Kansas City S. Ry., 7 S.T.B. 933, 949 (2004). NS is attempting to force a quasi-vertical integration with the connecting carrier contract transportation service provided to DuPont and, consequently, create and then take monopoly profits for the entire A-B-C transportation.

This is what the court in Union Pacific said the carrier may not do. Like UP before it, NS seeks to take for itself the benefit of DuPont's contractual bargain with non-party railroads. By claiming lack of market dominance, NS seeks to completely insulate its rate from Board review; thus, preserving for itself all the benefits of competition and contract service on the non-bottleneck segment by raising the NS bottleneck rate. Cf. FMC Wyo. v. Union Pac. R.R., 2 S.T.B. 766, 771 (1997) ("there are substantial benefits that derive from a transportation contract that another carrier should not be able to negate").

This would eviscerate the Bottleneck contract exception. Bottleneck II, 2 S.T.B. at 245 ("because we lack jurisdiction to review the reasonableness of the terms associated with the

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portion of the movement covered by the [non-bottleneck] contract, the rate provided by the bottleneck carrier in these circumstances...would be separately challengeable on rate reasonableness grounds”). See also MidAmerican Energy Co. v. STB, 169 F.3d 1099, 1107 (8th Cir. 1999) (court states that “the Board’s decisions explicitly provide...three potential avenues of recourse” including the option for bottleneck shippers to “obtain contracts for service over the competitive segments of rail”). NS’s position would impermissibly give NS the differential pricing profits for an entire movement consisting of a captive tariff rate segment and a competitive contract segment, thus erasing the benefits of the Bottleneck contract exception. Cf. Bottleneck II, 2 S.T.B. at 246 (noting that the AAR proposal would “impermissibly allow the bottleneck carriers to avoid competition”).

b) NS’s proposal would be impractical and cause confusion.

NS asserts that competition to a challenged tariff rate occurs when a shipper uses direct truck or truck-rail transportation to substitute for a whole route consisting of the challenged tariff rate and a contract rate. See, e.g. NS Reply II-B-60 to -61 and -72. In effect, NS wants to completely separate and segregate the market dominance and rate reasonableness phases of the case, so that they apply to completely different transportation movements. This is a recipe for confusion and chaos.

As an example, NS points to Lane B-6, which covers NS transportation of Anhydrous Methylamines (“AHM”) from Belle, WV to the interchange at E. St. Louis, IL.⁴³ See NS Reply II-B-72. There are seven other lanes for which the NS transportation is identical; transportation of AHM from Belle to E. St. Louis is also covered by Lanes B-10, B-11, B-14, B-36, B-39, B-40, and B-43. See Dup. Op. Narr. II-B-103. At E. St. Louis, the AHM can be interchanged to

⁴³ Although the Third Amended Complaint states that interchange is in Kansas City, the more common interchange point for Lane B-6 is E. St. Louis, as both DuPont and NS have stated. See Dup. Op. Narr. II-B-103 and NS Reply II-B-145.

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BNSF (Lanes B-10, B-36, B-40, or B-43) or interchanged to UP (Lanes B-6, B-11, B-14, or B-39).⁴⁴ Under NS's plan, the Board would evaluate market dominance separately for each of these lanes, even though the NS transportation under the challenged tariff ends at E. St. Louis for every lane. In NS's view, its market dominance over the Belle to E. St. Louis movement could exist some of the time, but not exist at other times, depending upon what happens to the AHM after the NS transportation ends. In other words, at the end of this proceeding, there could be a prescribed rate some of the time for NS movements from Belle to E. St. Louis, but not at other times. Such a scenario would not only create implementation problems, it would also impermissibly cause the Board's jurisdiction to extend to contract transportation movements.⁴⁵

The situation for Titanium Dioxide would be even more complicated in NS's world. NS transports Titanium Dioxide for DuPont from Edge Moor, DE to Chicago over a total of seven lanes. See Lanes A-11, B-51, B-57, B-58, B-63, B-65, and B-68.⁴⁶ At Chicago, the Titanium Dioxide can be delivered directly by NS to DuPont's customer (Lane A-11), interchanged to Canadian National Railway (Lanes B-51, B-58, and B-68), interchanged to BNSF (Lane B-57), or interchanged to Union Pacific (Lanes B-63 and B-65). The A-11 destination is a Chicago transload facility known as Superior Carriers, at which the Titanium Dioxide is transloaded to trucks and then transported to a wide range of DuPont's customers in a multi-state area. See NS Reply II-B-130 to -131. DuPont pays the transload and trucking expense for these movements.

⁴⁴ In Lane B-14, the AHM is further interchanged to the Louisiana & North West Railroad in McNeil, AR.

⁴⁵ Another example involves transportation of Dimethyl Formamide ("DMF"), for which there are three issue movements: Lanes B-4, B-21, and B-35. All three issue movements have the same NS bottleneck rate from Belle, WV to E. St. Louis, IL. However, NS has only challenged market dominance for Lane B-35. Under NS's view, it is theoretically possible that the Board could find the same rate for the same NS movement unreasonable on Lanes B-4 and B-21, but reasonable due to an asserted lack of market dominance on Lane B-35.

⁴⁶ NS has not challenged market dominance for three of the seven Edgemoor-Chicago movements of Titanium Dioxide. See Lanes B-57, B-63, and B-65.

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NS has provided a market dominance analysis of all recent DuPont customers served from the Superior Carriers transload facility. See NS Reply WP “Lane A11 Analysis.xls;” see also NS Reply II-B-131. NS alleges that the combined rail-truck movement from Edge Moor to Chicago to the DuPont customers can be entirely replaced by direct truck transportation from Edge Moor to all 19 DuPont customers served from the Superior Carriers facility. In support of its position, NS has estimated the direct truck rate for each of these 19 movements. See NS Reply WP “Lane A11 Analysis.xls.”

In NS’s view, the Board can and should evaluate each of these 19 movements separately. If the Board went down this path, it is entirely possible that market dominance could exist for some of the 19 movements, but not others. The direct truck alternative rates that have been proposed by NS range from a {{[REDACTED]}} savings compared to the whole-route rail (tariff) plus truck (contract) transportation rate to a {{[REDACTED]}} increase. Id. Because NS contends that shippers only care about the “cost competitiveness of a freight shipment as a whole,”⁴⁷ NS is plainly arguing that the Board should find market dominance for only some of the customers served through the Superior facility in Lane A-11, not all of the them.

Within just Lane A-11, then, a prescribed rate could exist for some NS transportation from Edge Moor to the Superior facility in Chicago, but NS would have rate freedom for other movements to the same exact facility. This is a recipe for disaster, and implementation would be impossible. DuPont does not even know the ultimate customer destination of the Titanium Dioxide when a rail car departs Edge Moor for the Superior facility. Moreover, the Titanium Dioxide in a single rail car could be destined to four different DuPont customer facilities after transloading at Superior occurs.⁴⁸ Some of the four customer facilities could be considered

⁴⁷ See NS Reply II-B-62.

⁴⁸ A single truck can transport approximately one-fourth of the amount in a single rail car.

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subject to effective competition, while others could be subject to a Board-prescribed rate. Of course, if DuPont does not know the ultimate destination of Titanium Dioxide (or if the commodity in the rail car is destined to more than one customer), there would be no way to know what rate NS should charge for the Edge Moor-Chicago movement. NS's position is a formula for chaos.

The whole concept of market dominance is based on the view that a railroad keeps its rate at a reasonable level when it is subject to effective competition. However, if neither DuPont nor NS knows the customer facility to which the Titanium Dioxide is destined, then how or why is NS to know that it is subject to effective competition and, therefore, should set its rate for that rail car at the prescribed level? Yet, this is exactly the sort of existential abyss to which NS's arguments ultimately lead.

3) Precedent supports DuPont's position.

In an effort to buttress its argument, NS cites to a few ICC and Board decisions, but the purported support either pre-dates the Bottleneck decisions and/or did not directly address the relevant issue. Precedent that is directly on point confirms that the market dominance inquiry should be enforced as written in the statute: that the determination of whether "effective competition" exists under 49 U.S.C. § 10707 requires evaluating possible alternatives to the transportation covered by the challenged tariff.

a) The precedent cited by NS does not support its position.

NS asserts that the ICC previously "held that direct whole-route competitive alternatives...are intermodal competition." NS Reply II-B-78. In support of this assertion, NS cites to Dayton P&L, 1 I.C.C. 2d 375 (1985), and CF Industries, Inc. v. Koch Pipeline Co., 4 S.T.B. 637, 638 (2000). But neither case actually held that whole route competitive alternatives constitute intermodal competition for contract exception rates under the Bottleneck decisions.

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The Dayton P&L case was decided over a decade before the Bottleneck decisions. Because the rail transportation at issue was over a single rail carrier and ended at a barge transload facility, it did not directly implicate the Bottleneck contract exception as the challenged NS Rule 11 rates do.

The CF Industries case was a pipeline case involving transportation from production facilities in Louisiana to storage terminals throughout the Midwest. The defendant proposed barge transportation to different destination storage terminals from the pipeline destination terminals (except for Palmyra, which was served by both pipeline and barge) and contended that the ability of retailers, which purchase ammonia from storage terminals, to purchase from either the pipeline-served issue destination or the barge-served alternative destination constituted effective competition. Although this is not intermodal competition, the parties' evidence, and hence the Board's decision, addressed it as such.

Ultimately, it was not necessary for the Board to address whether this alternative was intermodal competition because it did not affect the final market dominance determination. The Board found that effective intermodal competition existed for only one pipeline destination point — Palmyra, Missouri. CF Industries, 4 S.T.B. at 647-648. Crucially, the effective barge competition ended at the same exact destination as the issue pipeline movement to Palmyra, which made it the only issue movement that truly had an intermodal alternative between the same origin and destination. Id. at 647 (“CF’s Palmyra storage terminal...can directly receive AA from both Koch’s pipeline and barge”). For all of the other issue movements, the Board rejected the defendant’s evidence of a competitive alternative as unpersuasive. That determination was true regardless whether it was labeled “intermodal” or “geographic” competition.

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Because both Dayton P&L and CF Industries were contested when the agency also considered geographic competition, the need to strictly distinguish intermodal from geographic competition was not so important because of the extent to which geographic competition and intermodal competition can overlap. See, e.g., DMIR II, 4 S.T.B. at 292 n.13 (rejecting relevance of pre-Bottleneck decision regarding product and geographic competition because “[t]hat decision...which was issued long before the *Bottleneck* decisions, did not need to distinguish cases in which a rate must necessarily be confined to the bottleneck segment of a through movement”). It is much more important to recognize that distinction today because now the Board only considers intermodal competition in its market dominance assessment.

Finally, the fact that the complainants in both cases failed to raise an issue does not show that NS is correct regarding the interpretation of 49 U.S.C. §§ 10701 and 10707. Neither the ICC nor the Board makes the parties’ arguments for them, and DuPont is not bound by the concessions or litigation strategy chosen by parties from prior cases. The failure of other parties to object to consideration of transportation alternatives that are not actual substitutes for “the transportation to which the rate applies” does not prevent DuPont from raising this issue. Proceedings before the Board are adversarial in nature. Otter Tail Power Co. v. Burlington Northern & Santa Fe Railway, S.T.B. Docket No. 42071, slip op. at 2 (served Dec. 13, 2004). Each party is the master of its own litigation strategy, and arguments not raised are waived. See, e.g., BNSF Ry. v. STB, 453 F.3d 473, 479 (D.C. Cir. 2006). The Board does not make the arguments for the parties, but only responds to the arguments made. Cf. United States v. Mitchell, 518 F.3d 740, 749 (10th Cir. 2008) (“Ours is an adversarial system of justice. The presumption, therefore, is to hold the parties responsible for raising their own defenses.”); United States v. Rivas-Macias, 537 F.3d 1271, 1281 (10th Cir. 2008) (“Absent extraordinary

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circumstances, our adversarial system of justice imposes an abiding duty on each party to take the legal steps necessary to protect his or her own defenses”), citing Cotto v. United States, 993 F.2d 274, 278 (1st Cir. 1993).⁴⁹

b) The attempt to distinguish DMIR is unpersuasive.

NS unsuccessfully attempts to lessen the impact of the Board’s DMIR precedent, but the only result of NS’s argument on this issue is to emphasize the holding of DMIR. DMIR involved a challenge by Minnesota Power, Inc. (“MPI”) to a Dakota, Missabe, and Iron Range Railway Company (“DMIR”) tariff rate from the Keenan, Minnesota interchange point to MPI’s Laskin Energy Center (“LEC”) at Colby, Minnesota. DMIR, 4 S.T.B. 64. The coal that was interchanged to DMIR at Colby originated on BNSF from the Powder River Basin (“PRB”) pursuant to a contract between BNSF and MPI. See DMIR II, 4 S.T.B. at 291.

On the issue of market dominance, DMIR claimed that effective competition was provided by BNSF rail service from the PRB to Cohasset, Minnesota (site of another MPI facility) to enable transloading to truck for final transportation to LEC. DMIR, 4 S.T.B. at 66. The Board rejected this claim in ruling on a motion to compel, finding that it violates the fundamental principle that intermodal competition concerns only those “alternatives between the points to which the rate applies”, meaning the Keenan to LEC transportation. Id.

DMIR sought reconsideration, but the Board again rejected DMIR’s position, finding that “evidence as to a trucking alternative from any point other than Keenan may not be considered.” DMIR II, 4 S.T.B. at 292.⁵⁰ The Board stated that the position advocated by DMIR was contrary

⁴⁹ NS also cites to a variety of cases regarding the meaning of the term “geographic competition.” See, e.g., NS Reply II-B-75 to -78. These cases are irrelevant to the real issue at play – the meaning of 49 USC §§ 10701(d)(1) and 10707(b), and whether consideration of “effective competition” to transportation under the challenged rate should include alternatives extending beyond the challenged tariff transportation.

⁵⁰ The fact that DMIR sought reconsideration of the Board’s initial decision belies NS’s attempts to describe the holding in that decision as dicta. NS Reply II-B-81 to -82. Clearly that holding was central to the outcome or the defendant would not have sought reconsideration.

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to the Bottleneck and the Product and Geographic II⁵¹ decisions. Id. “[I]n addressing the market dominance issues in this ‘bottleneck’ rate case, we...consider evidence of truck competition only for the bottleneck-segment portion of the through movement.” Id. at 288-289 (internal citations omitted).

It would have been difficult for the Board to have been any more clear in its two decisions on this issue, but NS claims that the Board did not mean what it said. NS bizarrely argues that DMIR is somehow distinctive because the railroad there could have posited appropriate alternative transportation for just the transportation covered by the challenged tariff. NS Reply II-B-82. Of course, there is nothing stopping NS from doing the same in this case.

NS also claims that the Board should have “justified” its decision in light of Dayton P&L. NS Reply II-B-83 to -84. But the DP&L case did not involve a bottleneck rate in combination with a contract rate, did not involve interchange between two railroads using Rule 11 rates, was contested when geographic competition was permissible in the market dominance analysis (thus rendering the distinction between geographic and intermodal competition less important), and occurred a decade before the Bottleneck decisions. As such, the circumstances were so different, and the legal landscape had changed so dramatically, that there was nothing to justify. Cf. DMIR II, 4 S.T.B. at 292 n.13 (rejecting relevance of pre-Bottleneck decision regarding product and geographic competition because “[t]hat decision...which was issued long before the *Bottleneck* decisions, did not need to distinguish cases in which a rate must necessarily be confined to the bottleneck segment of a through movement”).

NS also claims that the Board should have used notice and comment rulemaking if the Board intended to change the definition of “geographic competition.” NS Reply II-B-84 to -87.

⁵¹ Market Dominance Determinations, 3 S.T.B. 937 (1998), *petitions for reconsideration and clarification denied*, 4 S.T.B. 269 (1999).

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This argument is largely irrelevant. The key issue is not what the phrase “geographic competition” means, but the correct application of the plain language in the governing statutes, 49 U.S.C. §§ 10701 and 10707, as well as adherence to the judicially-approved Bottleneck cases. Regardless of the term used when a railroad claims that effective competition exists due to an alternative that replaces both transportation under the challenged tariff and also transportation under a separate contract, this claim must be rejected as improper under the statute, under the Bottleneck decisions, under the DMIR decisions, and under the myriad other sources cited herein.

In addition, NS asserts that the Board misinterpreted the statute in DMIR. NS Reply II-B-87 to -91. With this final argument, NS has come full circle – from the initial support of DMIR as rightly-decided, but distinctive⁵² to skepticism⁵³ and finally to opposition.⁵⁴ This final argument about the propriety of the DMIR decisions is nothing more than a continuation of NS’s fixation on the term “geographic competition” and a rehash of NS’s prior assertions in trying to avoid the plain language of the market dominance statute. DuPont has already refuted all of NS’s arguments on these points earlier in this Rebuttal.

h. The Limit Price Methodology confirms the extent of NS’s market dominance.

In M&G Polymers USA, LLC v. CSX Transportation, Inc., Docket No. NOR 42123 (served Sept. 27, 2012) (“M&G Decision”), the Board proposed a new quantitative methodology, termed the “Limit Price Methodology” (“LPM”), that would supplement the market dominance determination. That decision, however, was only a preliminary decision, subject to the Board’s evaluation of comments submitted by multiple parties on November 28, 2012. Before the Board

⁵² NS Reply II-B-82.

⁵³ NS Reply II-B-83 to -87.

⁵⁴ NS Reply II-B-87 to -91.