

245827

ENTERED
Office of Proceedings
May 30, 2018
Part of
Public Record

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36197

UNION PACIFIC RAILROAD
—PETITION FOR DECLARATORY ORDER AND PRELIMINARY INJUNCTION—

BNSF's Reply to UP's Petition for Declaratory Order and Preliminary Injunction

Roger P. Nober
Jill K. Mulligan
Richard E. Weicher
Tyler R. White
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2383

Adrian L. Steel, Jr.
Andrew E. Tauber
Peter W. Denton
Jonathan Weinberg
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3237

COUNSEL FOR BNSF RAILWAY COMPANY

May 30, 2018

TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY	1
BACKGROUND	4
A. BNSF's and UP's Rights and Responsibilities Under the Contract.	4
B. Holding the Line Near Longview Junction Significantly Diminishes Line Capacity.	5
C. The New Third Mainline Was Not Intended to Relieve Congestion Caused by Setouts on the Line Outside Longview Junction.	6
D. History of Setouts on the Line During Service to Longview Junction	7
ARGUMENT	9
A. The Federal Arbitration Act Requires UP to Seek an Injunction from the Arbitral Panel Rather Than the Board.	9
B. The Board Should Deny the Petition on Prudential Grounds Because Consideration of UP's Claim Requires the Board to Interpret a Private Contract.	11
C. UP Has Failed to Carry Its Burden of Proving Its Entitlement to a Preliminary Injunction.	15
1. UP Has Not Proven a Likelihood of Success on the Merits	16
a. UP Is Not Likely to Succeed on the Merits of the Underlying Dispute	16
b. UP Is Not Likely to Succeed on the Merits of the Limited <i>Status</i> <i>Quo</i> Issue	17
2. UP Has Not Demonstrated Irreparable Harm.	20
3. An Injunction Would Harm BNSF And Its Customers.	22
4. The Public Interest Does Not Support an Injunction.	23
CONCLUSION	24

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36197

UNION PACIFIC RAILROAD
—PETITION FOR DECLARATORY ORDER AND PRELIMINARY INJUNCTION—

BNSF's Reply to UP's Petition for Declaratory Order and Preliminary Injunction

INTRODUCTION AND SUMMARY

On May 16, 2018, Union Pacific Railroad Company (“UP”) filed a Petition for Declaratory Order and Preliminary Injunction (the “Petition”) in the above-captioned proceeding. BNSF Railway Company (“BNSF”) respectfully requests that the Board deny the Petition.

Adjudicating UP’s extraordinary (and seemingly unprecedented) Petition would require the Board to violate its long-standing prudential policy against involving itself in contract interpretation. That is reason enough to deny the Petition. Administrative prudence aside, the contractual provision that UP claims entitles it to a preliminary injunction makes clear that, under the facts presented, UP can seek such relief only from an arbitral panel, not from the Board. Regardless, UP’s Petition fails on the merits. The Petition—which rests on an incomplete and inaccurate rendition of the facts—fails to establish that UP is likely to succeed on the merits in the underlying dispute and fails to establish that UP will suffer irreparable injury if an injunction is not issued. For each of these reasons, UP’s Petition should be denied.

First, the Board should decline to exercise its discretionary authority to issue a declaratory order and a preliminary injunction, because, by the terms of the very contract UP invokes, the contractual dispute at issue here must be addressed by the arbitral panel that will

resolve the parties' underlying dispute. The Federal Arbitration Act requires the Board to honor the parties' contract. Even if one were to ignore the contract's compulsory arbitration provision, UP does not cite—and BNSF is unaware of—a single instance in which the Board even considered, much less granted, a request for a preliminary injunction pending resolution of a dispute that, as here, is being properly adjudicated in another forum.

Second, UP asserts that consideration of its Petition does not require the Board to wade into contract interpretation. That is not so. Even if resolution of the Petition did not require the Board to construe the non-discrimination provision of the parties' contract to assess whether UP is likely to succeed on the merits in the underlying dispute (which will be resolved not by the Board but by a private arbitral panel), resolution of the Petition would at the very least require the Board to construe the contract's *status quo* provision while adjudicating the parties' disagreement as to what constituted the *status quo* at the time the parties' dispute first arose.

Finally, although UP bears the burden of adducing evidence to prove its entitlement to a injunction, it has not presented evidence sufficient to satisfy any—let alone each—prong of the preliminary injunction test. For example, UP has not proven that it is likely to succeed on the merits. Because the requirement that carriers on the Line adopt transportation service plans without daily planned switching on the mainline at Longview Junction applies to all carriers equally, UP cannot show that BNSF's enforcement of that requirement violates the non-discrimination provision of the parties' contract. Similarly, because UP is unquestionably able to service its customers without regularly blocking the mainline at Longview Junction—as it undeniably did before October 2017—UP cannot show irreparable injury absent an injunction.

The parties agreed in 2014 to implement service plans that did not call for routine switching on the mainline at Longview Junction. Following a transitional period, BNSF required

all users of the Line to implement such service plans. UP abided by this requirement for more than two years. It did so by running additional shorter trains rather than fewer longer trains. In October 2017, UP unilaterally introduced new service plans that called for regular UP switching on the mainline at Longview Junction. The result—suboptimal utilization of capacity and attendant congestion on the mainline—was precisely why the parties had agreed to end the practice in the first place.

UP asserts that the parties' 2014 arrangement was limited to the time it would take to construct a third mainline track in the vicinity of Longview Junction, and that the agreed-upon protocol would expire upon completion of that track. UP further asserts that completion of the third track rendered continuation of the parties' 2014 arrangement unnecessary because the third track purportedly added sufficient capacity around Longview Junction to accommodate routine mainline switching. As established below, neither assertion is true.

Contrary to UP's assertion, the parties' 2014 arrangement to implement new transportation service plans that halted regular switching activities on the mainline at Longview Junction was not merely a temporary protocol limited to the time it would take to construct a third mainline track. Construction of the third track near Longview Junction did not significantly affect operations on the two existing mainline tracks and thus was not a reason for the parties to have altered their switching practices. Moreover, construction of the third track was never intended to relieve the congestion caused by mainline switching outside Longview Junction. Funded in part by the State of Washington Department of Transportation, the third track was principally designed to allow fast moving passenger trains to clear the area without being held up by slower freight trains. Consistent with that limited purpose, the third track was built to the east of the two existing mainline tracks, away from the Longview Junction yard. Given the location

of the third track and the location of the switches that provide access to it, switching conducted on the mainline outside Longview Junction continues to cause congestion in the same way and to the same degree as it did prior to construction of the third track. In short, construction of the third track did not interfere with the parties' prior switching practices, was not the primary impetus for the parties' agreement to halt mainline switching at Longview Junction, and does not justify the extraordinary injunction that UP seeks.

UP may prefer to run fewer longer trains rather than additional shorter trains to possibly reduce its operating costs, but UP's preference to do so does not establish a basis for Board intervention.

BACKGROUND

A. BNSF's and UP's Rights and Responsibilities Under the Contract.

BNSF owns and operates a line of railroad running generally north-south between Vancouver, Washington and South Tacoma, Washington (the "Line"). See Exhibit A. UP operates on the Line pursuant to a 1909 contract between predecessors of UP and BNSF (the "Contract," attached as Exhibit 1 to the Petition). Under the Contract, BNSF has the exclusive right to "order and direct the movement of engines, cars and trains under such reasonable rules and regulations from time to time customary among railways as it may adopt." Petition, Ex. 1, Art. 1, § 4. The only constraint on BNSF's power to control movement on the Line is the requirement that any operational rules be "equal, just and fair as between all parties using the property and shall not unjustly discriminate against either." *Id.*

The Contract requires UP and BNSF to arbitrate any disputes between the parties regarding construction of the Contract or operations on the Line. Petition, Ex. 1, Art. 3, § 5. The Contract provides that "until the arbitrators shall make their award upon any question submitted to them, the business, settlements and payments to be transacted and made" under the Contract

“shall continue to be transacted and made in the manner and form existing prior to the arising of such question.” *Id.*

B. Holding the Line Near Longview Junction Significantly Diminishes Line Capacity.

As depicted on the track chart attached as Exhibit B, Longview Junction is located to the west of the Line at approximately MP 101.1, and is accessed from the Line’s Main 1 track via a northern switch and a southern switch. *See* Exhibit B. In the area surrounding Longview Junction, there are two other mainline tracks (Main 2 and Main 3) on the Line located to the east of the Main 1 track. BNSF, UP, and Amtrak each operate northbound trains and southbound trains on the Line. Some of those trains interchange traffic with Longview Switching Company (“LVSW”) at Longview Junction.

Given the northern and southern switch locations for Longview Junction, the crossover points between the mainline tracks, and the limited length of the new third mainline track (see below), any trains or cars that hold a mainline track during service to Longview Junction (“setouts”) will significantly reduce the Line’s capacity. BNSF, as owner and manager of the Line, must route through trains on the Line around any setout on the mainline tracks adjacent to Longview Junction. For example, whenever a setout occupies any portion of the Main 1 track between the crossovers between the Main 1 and Main 2 tracks located near the northern and southern switches to Longview Junction, only a single mainline track would be available for any through train on the Line (including Amtrak intercity passenger rail trains) to pass the setout cars. And a setout that blocks the crossover between the Main 1 and Main 2 tracks located south of the southern switch to Longview Junction forces single-track operations on the Line to extend several miles south of Longview Junction, due to limited crossovers further south of Longview Junction. Such cumbersome and inefficient operations are required for hours while a train holds the mainline.

C. The New Third Mainline Was Not Intended to Relieve Congestion Caused by Setouts on the Line Outside Longview Junction.

The third mainline track, completed in March 2017, did not significantly enhance the Line's capacity to accommodate setouts adjacent to Longview Junction. The third mainline track, Main 3, does not parallel the Main 1 and Main 2 tracks for the entire length of the Line. Rather, it functions as an approximately 4.5-mile siding running to the east of—and switching in and out of—the Main 2 track. *See Exhibit B.* Thus, contrary to UP's assertion, the third mainline track does not “increase[] capacity by one third at this location.” Petition 4. Indeed, it does little to reduce congestion on the Line caused by setouts resulting from switching activities conducted at Longview Junction.

That is unsurprising. The third mainline track was not intended to relieve the congestion caused by such setouts. Rather, it was specifically designed to accommodate increased and more reliable passenger service along the Line. BNSF constructed the third mainline track as part of a larger rail improvement program sponsored by the Washington State Department of Transportation (“WSDOT”), using, in part, federal funds provided by the Federal Railroad Administration (“FRA”) High-Speed Intercity Passenger Rail Improvement Program. The improvement program is intended to provide the traveling public with faster, more reliable, and more frequent intercity passenger rail service operated by the National Passenger Railroad Corporation (“Amtrak”). As WSDOT has explained, it intended the third mainline track to “separate[] freight and passenger train traffic, allowing passenger trains to move through the area more quickly and reliably.” WSDOT, *Kelso to Longview Jct*, available at <http://www.wsdot.wa.gov/Projects/Rail/KelsoLongviewJct>.

In particular, WSDOT's intended outcomes for the improvement program included (1) a ten-minute reduction in the run time shown in the public schedule for Amtrak trains operating

between Seattle, Washington and Portland, Oregon; (2) two additional daily round-trip intercity passenger trains operating between Seattle and Portland; and (3) improvement in service reliability on this corridor to 88%. Pursuant to a Service Outcomes Agreement entered into between Amtrak, WSDOT, and BNSF in connection with the improvement program, BNSF is responsible for managing the Line in order to realize such outcomes, including certain on-time performance objectives.

In short, the third mainline was constructed with public funds and was designed and intended to provide additional capacity for new intercity passenger train service and to increase reliability of that service, not to alleviate congestion resulting from freight carriers interchanging traffic at Longview Junction.

D. History of Setouts on the Line During Service to Longview Junction

At various times over the last 109 years of joint service on the Line, BNSF's management of the Line permitted BNSF and UP to setout trains or cars on mainline track while interchanging traffic at Longview Junction. At a meeting on November 6, 2014, BNSF and UP reached an understanding to change their respective transportation service plans to not call for planned setouts on the Line while interchanging traffic at Longview Junction, in order to reduce congestion, increase train velocity, and generally enhance management of the Line.¹ Accordingly, BNSF and UP each revised their transportation service plans on the Line over the ensuing months to eliminate planned setouts at Longview Junction.

Contrary to UP's assertions (Petition 3-4), the parties' 2014 protocol was permanent, not temporary, and construction of the third mainline track was not the primary motivation for the

¹ While the Contract does not require BNSF to reach an understanding with UP regarding operating procedures, BNSF did so in this instance because BNSF values collaboration with all users of the Line when possible.

arrangement.² BNSF, exercising its right under the Contract to control movements on the Line, has occasionally permitted setouts on the Line near Longview Junction to effectively manage the Line when exceptional situations arise. However, BNSF has neither abrogated the parties' 2014 arrangement nor notified UP that UP could revise its service plans to include routinely planned setouts on a mainline track adjacent to Longview Junction. Indeed, for more than two years (and for more than seven months after completion of the third mainline track in March 2017), UP adhered to the parties' 2014 protocol by adopting service plans that allowed UP to run shorter trains and eliminate planned setouts while interchanging traffic at Longview Junction. *See* Petition 3.³

On October 21, 2017, UP unilaterally and without prior notice to BNSF changed its transportation service plans at Longview Junction such that UP would again regularly setout cars (up to 50 percent of each UP train) on a mainline track while interchanging cars at Longview Junction. On October 25, 2017, representatives from BNSF, UP, and LVSW held a teleconference during which BNSF, pursuant to its rights under the Contract as Line owner, told UP that—consistent with the parties' 2014 arrangement—UP must revert to using service plans that do not call for regularly planned setouts on the Line near Longview Junction.

Over the next six months, BNSF refrained from enforcing this service plan requirement to allow BNSF and UP to resolve the operational issues and to allow UP additional time to bring its transportation service plans back into compliance. During this period, UP set out cars on the Line twice daily at Longview Junction, resulting in the blockage of one of the mainline tracks for

² With limited short-term exceptions, construction of the Main 3 track did not impact operations on the Main 1 and Main 2 tracks.

³ BNSF permitted users of the Line (including UP) to implement transportation service plans that called for regular setouts on the Line while interchanging traffic at Longview Junction for a short period of time in 2017. Because this experiment resulted in unacceptable congestion on the Line, BNSF ended this practice after approximately two months.

an average of five hours per day, or approximately 21% of the time. Additionally, UP's switching operations during this period resulted in service interruptions on the Line, including where UP would leave a train on the Line after UP's crew had expired on their hours of service requirements. As dispatcher of the Line, BNSF managed the resulting congestion by slowing trains along the Line and conducting complex meet and pass maneuvers to avoid the UP cars setout on mainline tracks.

BNSF representatives communicated with UP representatives regularly during this six-month period, repeatedly insisting that UP resume compliance with the BNSF service plan requirement. On April 23, 2018, BNSF provided UP with a final warning and a ten-day deadline to change its service plans to eliminate the regular setouts. After the deadline expired on May 3, 2018, BNSF agreed to UP's request for additional time to change the UP service plans. After more than a week without improvement, BNSF resumed enforcing its service plan requirement on May 11, 2018. *See* Petition 4-6. On the same day, UP served its arbitration demand. On May 16, 2018, UP filed the Petition without advance notice to BNSF.

ARGUMENT

A. The Federal Arbitration Act Requires UP to Seek an Injunction from the Arbitral Panel Rather Than the Board.

UP claims that it is entitled to injunctive relief under Article III, Section 5 of the Contract. *Cf.* Petition 9; *see also id.* at 6. But Article III, Section 5 of the Contract explicitly provides that “[i]f **at any time** a question shall arise touching the construction of this contract, ... or concerning the observance or performance of any of its covenants, upon which the parties cannot agree, such question **shall be submitted** to” arbitration. Petition, Ex. 1 at 4-5 (emphasis added). Here, the parties’ disagree on what constituted the *status quo* “existing prior to the arising of” their dispute over BNSF’s enforcement of its service plan requirement (*see infra* at

17-19), and thus disagree over what the Contract’s stand-still provision requires of them pending a final arbitral award. In other words, there is “a question ... touching the construction” of the contract and the “performance of ... its covenants” “upon which the parties cannot agree.” Petition, Ex. 1 at 4-5. Therefore, the very clause under which UP seeks a preliminary injunction—Article III, Section 5 of the Contract—dictates that its request “shall be submitted to” arbitration. *Id.* at 5. Given the parties’ compulsory arbitration agreement and the particular facts of the present dispute, it would be inappropriate for the Board to issue an injunction in this case.⁴

Indeed, on the facts presented here, federal statute and Supreme Court precedent require UP to seek an injunction from the arbitral panel rather than the Board. Enacted in 1925, the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1 *et seq.*, “reflect[s] both a ‘liberal federal policy favoring arbitration’ and the ‘fundamental principle that arbitration is a matter of contract.’” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Rent-A-Center, West, Inc. v.*

⁴ BNSF acknowledges that in some cases courts have found that they may issue stand-still injunctions pending arbitration under certain circumstances. Yet this case is arguably unique in several respects. First, the parties disagree over what constituted the pre-dispute *status quo*. That distinguishes this case from *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430 (2d Cir. 1993), a case cited by UP (*cf.* Petition 9 n.8) where there was—and could be—no disagreement over what constituted the pre-dispute *status quo*. Second, here, as in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286 (8th Cir. 1984), a case denying an injunction pending arbitration, any purported loss suffered by UP as a result of BNSF’s enforcement of the ban on transportation service plans that anticipate routine mainline switching outside Longview Junction can be redressed through monetary damages, thus distinguishing the facts of this case from those in *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972), where the parties’ contract stipulated that any loss “cannot be fairly or adequately compensated by damages.” 468 F.2d at 1066 n.1; *cf. Hovey*, 726 F.2d at 1291 n.10. Finally, given UP’s admission (*see infra* at 11 n.5) that it remains “able to fulfill its common carrier obligations” notwithstanding BNSF’s enforcement of the operational protocol banning planned mainline switching outside Longview Junction, federal transportation policy provides no reason for the Board to intervene.

Jackson, 561 U.S. 63, 67 (2010)). Barring extremely limited circumstances not present here, “courts”—and, by extension, other adjudicative bodies such as the Board—“must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms.” *Id.* Indeed, “[t]he ‘principal purpose’ of the FAA is to ‘ensur[e] that private arbitration agreements are enforced according to their terms.’” *Id.* at 344 (quoting *Volt Info. Scis., Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). Here, the Contract provides that any dispute over its interpretation and performance—including any dispute over the *status quo* provision—“shall be submitted to” arbitration. Petition, Ex. 1 at 5. The FAA requires the Board to respect the parties’ Contract—and to deny UP’s attempt to evade the Contract’s compulsory arbitration provision.

B. The Board Should Deny the Petition on Prudential Grounds Because Consideration of UP’s Claim Requires the Board to Interpret a Private Contract.

Even if the FAA allowed the Board to consider UP’s Petition, the Board should deny the Petition on prudential grounds. As UP notes (Petition 6 & n.6), the Board’s authority to issue a declaratory order under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 is discretionary.⁵ Exercising its

⁵ That the Board and the courts have concurrent subject matter jurisdiction over claims that a rail carrier has violated 49 U.S.C. § 11101(a) by not providing service upon reasonable request – *i.e.*, claims that a railroad has violated its “common carrier obligation” (*Pejepscot Indus. Park, Inc. v. Maine Cent. R.R.*, 215 F.3d 195, 205 (1st Cir. 2000)) – is immaterial. *Cf.* Petition 7-8. Although it makes the conclusory assertion that BNSF’s enforcement of the service plan requirement is “interfering with [UP’s] ability ... to carry out its common carrier obligations” (Petition 7), UP does not contend that the purported interference supposedly caused by the requirement prevents UP from fulfilling its common carrier obligations. In response to an interrogatory served by BNSF, UP has stated that “[s]ervice to customers is being adversely affected but Union Pacific has thus far been able to fulfill its common carrier obligations.” Moreover, UP admits that it abided by the parties’ 2014 arrangement through October 21, 2017. Petition 3. UP did not claim then, and does not claim now, that it failed to satisfy its common carrier obligations during that period. Having successfully fulfilled its common carrier obligations for more than two years under the parties’ 2014 operational protocol by running additional shorter trains rather than fewer longer trains, UP can continue to do so now. UP has presented no evidence to the contrary.

discretion, the Board regularly declines to issue declaratory orders when, as in this case, the dispute brought to it is better resolved by a different adjudicative body. *See, e.g., City of Sammamish, Wash.—Pet. for Dec. Order*, FD-36161, slip op. at 4 (STB served March 29, 2018) (denying a petition for declaratory order because “the dispute between the parties rests on a matter of state property law and may ultimately be resolved by the courts on state law grounds”); *Fillmore & W. Freight Service, LLC—Emergency Pet. for Dec. Order*, FD-35813, slip op. at 3 (STB served March 12, 2015) (denying a petition for declaratory order because state courts are resolving the issue, and because it would not “be appropriate[] for the Board to attempt to interpret the leases governing use of the Line”).

Reflecting its reluctance to tread where a dispute ultimately will be resolved by another tribunal, “it has been the Board’s policy not to intervene in matters subject to arbitration before they have been considered by an arbitrator.” *Can. Nat’l Ry., et al—Control—Wisc. Cent. Transp. Corp., et al, Petition for Injunctive Relief*, FD-34000, slip op. at 4 (STB served June 6, 2008). Just such a matter exists here. UP has given BNSF notice of the questions that it is demanding be arbitrated, and has proposed that the parties discuss the procedures that will govern the arbitration that will resolve this dispute. That process has been constructive in prior disputes, and BNSF agrees that is an appropriate way proceed here. Consistent with the Board’s long-held preference not to intervene in matters subject to arbitration, the Board should decline the Petition and allow UP to seek its requested injunctive relief through the arbitration (or from a court with jurisdiction over the matter).

BNSF has not identified a single example of the Board even considering—much less granting—a request for a preliminary injunction to maintain the *status quo* pending resolution of a dispute that is being adjudicated by another tribunal. That is likely because such injunctive

relief is available to plaintiffs from those other tribunals. In this case, the Board should deny the Petition and allow UP to seek its requested relief from the arbitral panel that will hear UP's claim.

Avoiding entanglement in the parties' dispute is especially appropriate on the facts presented. As UP admits (Petition 8), the Board has frequently declined to resolve disputes over the interpretation of private contracts, leaving such issues for courts or arbitrators to decide. *See, e.g., US Rail Corp.—Const. & Op. Exemption—Brookhaven Rail Terminal*, FD-35141, slip op. at 6-7 (STB served July 8, 2015) (“A dispute over the interpretation of a private contract is generally for the courts to decide.”). According to UP, the Board need not interpret the Contract to issue the injunction UP seeks. Petition 8. That is not so, even if—contrary to fact—the Board could avoid examining the merits of the underlying dispute. UP bases its claim for injunctive relief on Article III, Section 5 of the Contract. Under that provision, when a dispute is referred to arbitration, the business conducted pursuant to the Contract “shall continue to be transacted ... in the manner and form existing prior to the arising of such question.” Thus, at the very least, the Board would have to interpret Article III, Section 5 of the Contract and determine what is meant by the phrase “existing prior to the arising of such question.”

The construction of that phrase is clearly contested. BNSF maintains that the *status quo* prior to the parties' current dispute was the parties' mutual compliance with their 2014 arrangement to change their respective transportation service plans to not call for planned setouts on the Line while interchanging traffic at Longview Junction. UP, by contrast, insists that the *status quo* was defined by its unilateral conduct beginning on October 21, 2017. Thus, before the Board could issue a *status quo* injunction, it would, at minimum, have to determine the proper

interpretation of Article III, Section 5 of the Contract. That alone is sufficient reason to deny UP's petition on prudential grounds.

In fact, the Board could not avoid examining the merits of the underlying dispute before issuing an injunction. Indeed, UP admits that, “[t]o obtain an injunction, Union Pacific must establish that ... there is a likelihood that it will prevail on the merits.” Petition 8. There is no way that the Board can evaluate the sufficiency of UP's showing without engaging in contract interpretation. For it to prevail on the merits, UP will have to prove that BNSF's enforcement of its service plan requirement violates the Contract—in particular, the provision requiring that BNSF's operational rules be “equal, just and fair as between all parties using the property and shall not unjustly discriminate against either.” Petition, Ex. 1, Art. 1, § 4.

UP does not claim that the BNSF service plan requirement is discriminatory on its face—nor can it, given that the requirement applies to all users of the Line, including BNSF. Rather, UP contends that the requirement has a disparate impact on UP. BNSF disputes that contention. But even if one were to accept it for purposes of discussion, it does not resolve a fundamental question of contract interpretation that must be answered before one can determine whether UP has a likelihood of success on the merits—namely, whether Article I, Section 4 of the Contract prohibits only BNSF rules that are overtly discriminatory or also prohibits facially neutral rules that supposedly have a disparate impact on one of the parties. That is precisely the sort of contract interpretation issue that the Board has historically sought to avoid.

Ignoring its concession that it must prove a likelihood of success on the merits before the Board could issue an injunction (*cf.* Petition 8), UP cites a lone case—*Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430 (2d Cir. 1993)—to suggest that “it would be entirely appropriate for the board to issue a decision on Union Pacific's injunction request without

addressing the merits of the underlying dispute.” Petition 9 & n.8. But *Nemer*, which turned on a fine distinction between ordering specific performance and granting injunctive relief, is an aberration.⁶ As another court has explained, “because specific performance is a request for equitable relief in the form of a ‘positive injunction,’ a party requesting specific performance must satisfy the four-factor test” for obtaining an injunction. *Apple, Inc. v. Motorola Mobility, Inc.*, 2012 WL 5416931, at *2 (W.D. Wis. 2012) (quoting *Chicago United Indus., Ltd. v. City of Chicago*, 445 F.3d 940, 945 (7th Cir. 2006)).

In other words, even if the Board construes UP’s Petition as a request for specific performance, UP must still demonstrate (among other things) a likelihood of success on the merits. This is at it should be, for absent a “substantial indication of probable success, there would be no justification for ... intrusion into the ordinary processes of [arbitration] and judicial review.” *Richard Best Transfer, Inc. v. Union Pac. R.R.*, NOR-42149, slip op. at 5 (STB served Dec. 22, 2016) (internal quotation marks omitted). As explained above, for the Board to evaluate the sufficiency of UP’s demonstration, it must engage in contract interpretation—something that the Board has, for good reason, been loathe to do.

C. UP Has Failed to Carry Its Burden of Proving Its Entitlement to a Preliminary Injunction.

If the Board does not deny the Petition on prudential or statutory grounds, the Board should deny the Petition because UP has failed to satisfy the burden of proof that the Board imposes on parties seeking a preliminary injunction.

The Board requires a party seeking a preliminary injunction to establish that (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be

⁶ *Nemer* would be of no help to UP even if it represented the governing rule on this issue, because it still requires the party seeking specific performance to “show the inadequacy of money damages” (992. F.2d at 435), which UP cannot do here. See *infra* at 19-22.

preliminarily enjoined, (2) it will suffer irreparable harm in the absence of a preliminary injunction, (3) other interested parties will not be substantially harmed by a preliminary injunction, and (4) the public interest supports the granting of the preliminary injunction. *See, e.g., Richard Best Transfer*, slip op. at 4. UP “bears the burden of persuasion on all elements required for such extraordinary relief.” *Ballard Terminal R.R.—Acq. & Op. Exemption—Woodinville Subdivision*, et al, FD-35731, et al, slip op. at 4 (STB served Aug. 1, 2013) (citations omitted). As established below, UP has not met that burden.

1. UP Has Not Proven a Likelihood of Success on the Merits

UP has not proven that it is likely to succeed on the merits, whether the merits are understood as those of the underlying dispute or those relating solely to the Contract’s *status quo* provision.

a. UP Is Not Likely to Succeed on the Merits of the Underlying Dispute

UP has failed to prove that it is likely to succeed on the underlying dispute over whether BNSF may exercise its right as owner to manage the Line and enforce its service plan requirement. Article 1, Section 4 of the Contract allows BNSF, as owner of the Line, to “order and direct the movement of engines, cars and trains under such reasonable rules and regulations from time to time customary among railways as it may adopt.” Such rules must be “equal, just and fair as between all parties using the property and shall not unjustly discriminate against either.”

UP argues that this non-discrimination clause prohibits BNSF from enforcing its service plan requirement because UP “is the only user of the Line affected by the rule.” Petition 10. This is not true. All users of the Line, including BNSF itself, must comply with and are affected by the requirement. Thus, like UP, BNSF was compelled to revise its transportation service plans to avoid planned setouts on the Line while interchanging traffic at Longview Junction. The service

plan requirement's facial neutrality, and the fact that its adoption forced BNSF to alter its operations in the same way that it required UP to alter its operations, means that UP is unlikely to succeed in its unjust discrimination claim.

Furthermore, a prohibition on service plans that routinely call for setouts on a mainline track while serving a facility or a yard is "customary among railways," as UP itself tacitly admits. *See* Petition 11 n.9. As described above, the BNSF service plan requirement is also "reasonable" in this instance, because holding a mainline track during service to Longview Junction significantly constricts the already-congested Line's capacity. *See supra* at 5. In short, as owner of the Line, BNSF is "free to impose unilaterally a rule that precludes [UP] from performing such operations." Petition 11. Here, however, UP and BNSF reached a **mutual** understanding in 2014 to eliminate regularly planned setouts on the Line outside Longview Junction, and each party complied with this operational protocol for more than two years (including seven months after UP claims the arrangement was intended to expire), before UP decided to unilaterally change its service plans on October 21, 2017.

UP must show that "there is more than a mere possibility" of success on the merits of its case. *Richard Best*, slip op. at 4 (citation and quotations omitted). UP has failed to carry this burden.

b. UP Is Not Likely to Succeed on the Merits of the Limited *Status Quo* Issue

Perhaps recognizing that it cannot establish a likelihood of success on the underlying merits, UP argues that the Board, if it considers the merits at all, should limit its inquiry to whether UP has shown a likelihood of "prevail[ing] on the merits of whether the *status quo* must be maintained pending arbitration." Petition 10. UP offers no authority—and BNSF is aware of

no authority—for the proposition that the Board’s inquiry into the likelihood of success on the merits should ignore the merits of the underlying dispute.

In any event, UP has failed to establish that it is likely to succeed on the limited issue of UP’s and BNSF’s competing definitions of the *status quo*, which the Contract provides must be maintained pending arbitration. To properly analyze this issue, the Board must evaluate UP’s interpretation of Article 3, Section 5 of the Contract, which provides that “until the arbitrators shall make their award upon any question submitted to them, the business, settlements and payments to be transacted and made” under the Contract “shall continue to be transacted and made in the manner and form existing prior to the arising of such question.” For the purposes of a preliminary injunction analysis, the *status quo* refers to “the last uncontested status which preceded the pending controversy.” *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (citations and quotations omitted).

Without explicitly stating so, UP apparently claims that the *status quo* is UP’s implementation of transportation service plans that call for setting out cars on the Line while interchanging traffic at Longview Junction. *See* Petition 9-10. UP asserts that it performed such operations “for many, many years, with only a relatively brief hiatus to accommodate, in good faith, a BNSF construction project.” Petition 9. UP further asserts that it “resumed the switching operation as soon as possible after construction was complete” (*id.*), ignoring the fact that it continued to abide by the parties’ 2014 arrangement until October 21, 2017, or approximately seven months after construction of the Main 3 track was complete.

BNSF does not dispute that, prior to the parties’ 2014 arrangement, BNSF allowed both parties to implement service plans that called for setting out cars on the Line while interchanging traffic at Longview Junction. However, in 2014 BNSF and UP reached an understanding to end

this practice. As evidenced by UP's continued compliance with this protocol for seven months after completion of the third mainline track in March 2017, construction of the third mainline track was not the primary basis for the parties' 2014 arrangement and the parties understood that the protocol was permanent. Following UP's unilateral implementation of new service plans on October 21, 2017, BNSF notified UP that it was in violation of BNSF's service plan requirement, but suspended its enforcement of that requirement until May 11, 2018, in a good faith effort to allow UP additional time to bring its transportation service plans back into compliance with the requirement.⁷

Here, the "last uncontested status which preceded the pending controversy" is each party's voluntary and uncontested compliance with the parties' 2014 arrangement until UP's actions on October 21, 2017. Since that time, the parties have contested whether BNSF may enforce its service plan requirement and restrict UP (or any other user of the Line) from operating under service plans that call for regularly setting out cars on the Line while performing its switching operations at Longview Junction.⁸ Therefore, the *status quo* in this matter is UP's prior compliance with the parties' 2014 arrangement, not UP's service plans from October 21, 2017 to May 11, 2018 that failed to comply with the BNSF service plan requirement. UP has failed to establish a likelihood of success even on this narrow point.

⁷ As described above, BNSF has occasionally permitted setouts on the Line near Longview Junction in order to effectively manage the Line when exceptional circumstances arise. *See supra* at 8. This is entirely consistent with the BNSF service plan requirement, which relates to regularly planned setouts. BNSF also allowed each party a number of months after reaching their 2014 understanding to revise their respective transportation service plans accordingly. *See supra* at 8. Aside from a brief two-month period in 2017, *see supra* at 8 n.3, BNSF has not, however, permitted service plans that call for such setouts on a regular basis since that original ramp-up period.

⁸ Additionally, UP and BNSF dispute whether BNSF's enforcement of its service plan requirement falls within the "business, settlements and payments to be transacted and made" under the Contract, and, therefore, whether the requirement is subject at all to the Contract's *status quo* provision.

2. UP Has Not Demonstrated Irreparable Harm.

The Board will generally not grant a preliminary injunction “unless the requesting party can show that it faces unredressable actual and imminent harm that would be prevented by an injunction.” *Richard Best*, slip op. at 4. “The harm alleged must be both certain and great; it must be actual and not theoretical.” *Id.*

The Board has consistently held that “monetary or economic loss by itself does not constitute irreparable harm.” *Edwin Kessler—Petition for Injunctive Relief*, FD-35206, slip op. at 5 (STB served June 12, 2009) (citations and quotations omitted). For example, in *American Chemistry Council*, the Board considered shippers’ allegations that certain carrier restrictions would cause them to “suffer additional costs and some disruption of their business operations,” including “serious logistical disruptions,” and that “slower train speeds will require additional cars in service, which would lead to car shortages.” *Am. Chem. Council, et al v. Ala. Gulf Coast Ry. & RailAmerica, Inc.*, NOR-42129, slip op. at 4 (STB served May 4, 2012). The Board found that these harms were not irreparable because they constituted mere “[i]njuries in terms of money, time, and energy,” which are “economic in nature.” *Id.* at 4.

In *North Coast Railroad Authority*, two rail carriers petitioned the Board to enjoin a dispatcher from “prohibit[ing] the movement of certain freight.” *N. Coast R.R. Auth. & Nw. Pac. R.R. v. Sonoma-Marin Area Rail Transit District*, NOR-42148, slip op. at 2 (STB served Oct. 21, 2016). The Board found no irreparable harm because the petitioner carriers could still move their traffic “with some effort,” and the harm was therefore mere “inconvenience and associated monetary losses.” *Id.* at 4. The Board reasoned that, “although it requires extra work, traffic can move past the . . . interchange point,” and therefore, “Petitioners have not shown that there are no feasible alternatives” to the injunction. *Id.*

Although economic loss could be considered irreparable harm if its magnitude “threatens the very existence of the movant’s business” (*Richard Best*, slip op. at 4), UP does not claim—and certainly has not proven—that to be the situation here. In this case, UP “has not demonstrated that the possible loss of this one relatively small part of its business would result in irreparable injury to it.” *Fla. E. Coast R.R.—Abandonment—in Dade Cty., Fla.*, AB-70 (Sub-No. 2), 1988 WL 225913, at *2 (ICC served Feb. 18, 1988). Even as alleged by UP, the purported injury that it supposedly will suffer absent an injunction does not “involve[] the threatened loss of an entire business enterprise.” *Id.*

The economic harms alleged by UP align neatly with the facts of these preliminary injunction cases where the Board or the ICC declined to find irreparable harm. Complying with the BNSF service plan requirement purportedly causes UP to “use more trains, locomotives, and crews to move the same amount of traffic.” Petition at 12. Apparently, according to UP, such compliance also “exacerbate[d] already severe human resource constraints by placing additional strain on [UP’s] train crews.” *Id.* UP admits that the “direct injury” caused by these issues “might technically be measurable in dollars.” *Id.* UP then argues, without evidence or further analysis that “the indirect and secondary injuries for [UP] clearly rise to the level of irreparable injury.” *Id.* Absent evidentiary support from UP, the Board should find that, consistent with its precedent, UP has not met its substantial burden in proving that these alleged harms are irreparable.

UP also claims that “it is likely to lose [] customers” if UP must comply with the BNSF service plan requirement. Petition 12. UP served these customers pursuant to transportation service plans that complied with the parties’ 2014 arrangement prior to October 21, 2017, and UP has shown no reason why it cannot reinstate such service plans now. Moreover, any

reputational harms suffered by UP are the avoidable result of UP unilaterally refusing to continue to comply with the BNSF requirement.⁹

If the BNSF service plan requirement causes UP to use additional shorter trains rather than fewer longer trains per day, and an arbitrator later determines that BNSF cannot impose its requirement, then UP can be made whole through monetary compensation. In short, UP has not, and will not, suffer irreparable harms as a result of BNSF enforcing its service plan requirement.

3. An Injunction Would Harm BNSF And Its Customers.

UP must further establish that “other interested parties will not be substantially harmed by a preliminary injunction.” *Richard Best*, slip op. at 4. UP claims that “it is hard to imagine how any party will be harmed” by the Board enjoining BNSF’s right to enforce its service plan requirement during the pendency of the arbitration. UP further claims that it “strains credulity that *increased* capacity combined with *fewer* switching operations” would harm BNSF or any other party.

As BNSF demonstrated above, any trains or cars that are set out on the Line during service to Longview Junction will significantly reduce the Line’s capacity, necessarily causing congestion across the Line. *See supra* at 5. During the six-month period from October 2017 through May 2018 when UP did not comply with the BNSF service plan requirement, UP’s twice-daily work events at Longview Junction resulted in the blockage of one of the mainline tracks for an average of five hours per day, or approximately 21% of the time. *See supra* at 8-9.

BNSF further established that the recently-constructed third mainline track does not add capacity for switching movements at Longview Junction, but instead was designed to

⁹ UP further asserts, without proof, that shippers on the Line are being irreparably harmed. BNSF disputes this claim. Regardless, any harm suffered by UP’s customers is due solely to UP’s avoidable actions.

accommodate increased and more reliable through passenger service. *See supra* at 6-7. UP's refusal to comply with the BNSF service plan requirement has harmed BNSF by increasing congestion on the Line and by causing BNSF to devote significant resources to routing trains around cars set out on the Line near Longview Junction. Furthermore, as previously noted, UP's switching operations during the six-month period of UP's noncompliance with the BNSF requirement resulted in service interruptions on the Line, including where UP would leave a train on the Line after UP's crew had expired on their hours of service requirements. *See supra* at 9. UP has failed to meet its burden on this point.

Finally, if the Board does grant UP's petition and enjoins BNSF's right to manage the Line as owner of the Line under the Contract, the Board should require UP to stipulate that the arbitral tribunal that will hear the underlying dispute may award damages to BNSF if the tribunal determines that the Board entered the preliminary injunction in error.

4. The Public Interest Does Not Support an Injunction.

Finally, UP must establish that "the public interest supports the granting of the preliminary injunction." *Richard Best*, slip op. at 4. Once again, UP has failed to meet its burden. In support, UP argues that "[n]either BNSF nor any other parties will be harmed by a preliminary injunction." Petition at 14. Yet, as established above, BNSF, its customers, and Amtrak service would indeed be harmed by the Board enjoining BNSF from enforcing its service plan requirement, pursuant to BNSF's right under the Contract as owner of the Line. The service delays caused by UP's abrogation of the BNSF requirement materially affect the timeliness and quality of the service which BNSF (and UP) can provide to the public.

Additionally, as discussed above, the Line is shared not only by UP and BNSF, but also by Amtrak and its intercity passenger rail customers. In determining that the public interest is best served by faster, more reliable, and more frequent intercity passenger rail service on the

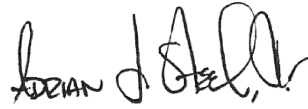
Line, WSDOT and the FRA provided funds to build a third mainline track on the Line in the vicinity of Longview Junction. *See supra* at 6-7. As explained, the third mainline track was not designed to alleviate congestion on the Line resulting from UP and BNSF blocking the mainline while interchanging traffic at Longview Junction, and any such freight congestion could negatively impact the passenger rail service that shares the Line. Granting the injunction will ensure such congestion returns to the Line.

Finally, contrary to UP's argument, the Rail Transportation Policies actually weigh against the Board granting an injunction. An injunction would neither "minimize the need for Federal regulatory control over the rail transportation system," "foster sound economic conditions in transportation," nor "encourage honest and efficient management of railroads." 49 U.S.C. § 10101(2), (5), and (9). Instead, the public interest supports the Board declining to intervene in a private contractual dispute between two carriers over whether the owner of a rail line can set reasonable operating rules in furtherance of efficient and effective management of the transportation network.

CONCLUSION

For the reasons stated herein, BNSF respectfully requests that the Board deny the Petition.

Respectfully submitted,



Adrian L. Steel, Jr.
Andrew E. Tauber
Peter W. Denton
Jonathan Weinberg
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3237

Roger P. Nober
Jill K. Mulligan
Richard E. Weicher
Tyler R. White
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2383

Counsel for BNSF Railway Company

Dated: May 30, 2018

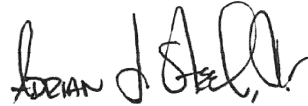
VERIFICATION

I, Sarah W. Bailiff, AVP Contracts & Joint Facilities for BNSF Railway Company, declare under penalty of perjury that I have read the foregoing BNSF's Reply to UP's Petition for Declaratory Order and Preliminary Injunction and that the facts and information set forth therein are true and correct. Further, I certify that I am qualified and authorized to file this Verification. Executed on May 30, 2018.


Sarah W. Bailiff

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 2018, copies of the foregoing BNSF's Reply to UP's Petition for Declaratory Order and Preliminary Injunction have been served by e-mail on counsel for UP.

A handwritten signature in black ink, appearing to read "Adrian L. Steel, Jr.", written over a horizontal line.

Adrian L. Steel, Jr.

Exhibit A

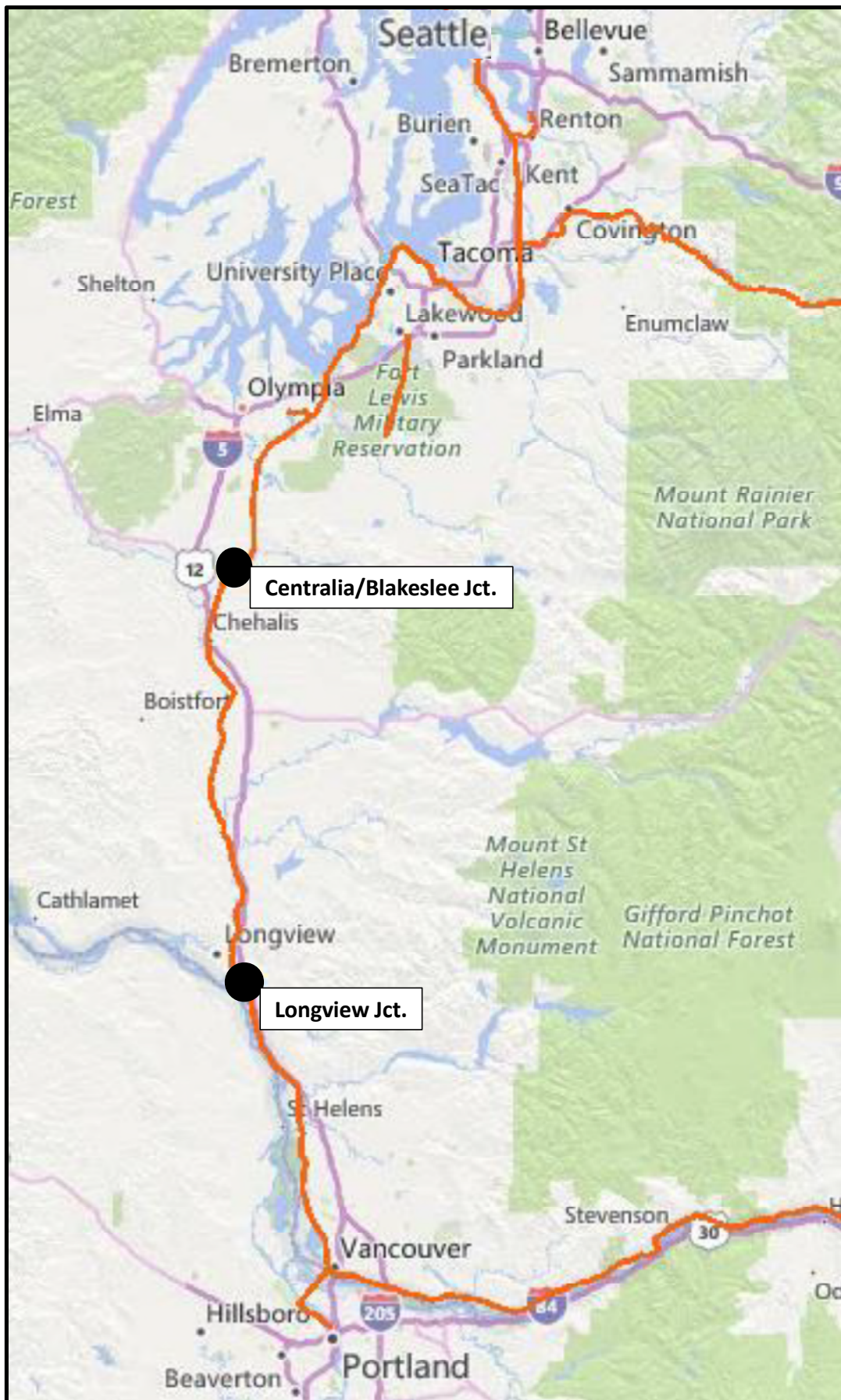


Exhibit B

