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RECIPROCAL SWITCHING

**REPLY COMMENTS AND EVIDENCE
OF UNION PACIFIC RAILROAD COMPANY**

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Union Pacific Railroad Company submits these reply comments to address the opening comments of shippers who expressed support for the Board’s proposal to restructure the freight rail industry through the use of forced reciprocal switching.¹

I. INTRODUCTION AND SUMMARY

The forced switching regime proposed in the Notice of Proposed Rulemaking served July 27, 2016 (“NPRM”) would cause great harm to the rail industry and the shipping public, as the opening comments and evidence submitted by Union Pacific and other railroad parties showed. If implemented, the Board’s proposal would reverse the regulatory policies that we have relied on over many years in investing to rationalize our network and improve our service to customers. It would allow certain shippers to demand service that our network is not designed to provide. Accommodating those demands would degrade service to all customers and could cause service meltdowns. Our customers would also suffer harm because a forced switching regime would reduce the expected benefits, and thus the likelihood, of new capital investment in rail infrastructure.

¹ Union Pacific also joins in the reply comments submitted by the Association of American Railroads (“AAR Reply Comments”).

In their opening comments, shippers who support the Board's proposal do not address the impacts of a forced switching regime on railroad operations and investment. Nor do they identify lawful justifications for the Board's reinterpretation of its authority to order reciprocal switching. Instead, they embrace the Board's proposal as a way to obtain lower rates without proving that their existing rates are unreasonable. And they urge the Board to move even further towards providing all shippers with open access on demand.

The Board's proposed rules are unlawful and destructive. They should be withdrawn. The Board may order reciprocal switching as a remedy to correct competitive abuses and assure that shippers receive adequate service. It may not use reciprocal switching to regulate rates or restructure the railroad industry.

Our reply comments address (i) how shippers' comments help show that the Board is proposing an unlawful form of rate regulation; (ii) how shippers' proposals to further expand the scope of forced switching underscore flaws in the proposed rules; and (iii) how shippers' proposals regarding access pricing would promote inefficiency and undermine railroads' incentives to invest in infrastructure.

II. THE PROPOSED RULES CONSTITUTE AN UNLAWFUL FORM OF RATE REGULATION.

The shippers who support the Board's proposal failed to submit any evidence to justify the dramatic expansion of government intervention in the rail industry that would result from implementation of the proposed rules. Some shippers parrot the Board's proffered reasons for revisiting its forced switching policy—the infrequency of shipper requests for forced switching, railroads' implementation of agency-approved transactions to optimize their networks, and improvements in the rail industry's financial condition. But all of these factors show that the Board's current policies are working—railroads are complying with the law, improving the

efficiency of their operations, and pursuing the revenue adequacy objectives established by Congress. Shippers' comments reinforce the Board's failure to articulate a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted).

Shippers' comments make clear that their support for the proposed rules is based on an understanding that the proposal is designed to reduce the rates they pay without requiring them to prove their rates are unreasonable. However, the use of forced switching to regulate rates is not permitted under 49 U.S.C. § 11102(c) and would be contrary to the rail transportation policies enumerated by Congress in 49 U.S.C. § 10101.

A. Shippers Who Support The Proposed Rules Recognize That The Board's Proposal Is Designed To Reduce Rail Rates.

Shippers who support the proposed rules recognize the Board's proposal for what it is: a dramatic expansion of government intervention in the rail marketplace designed to reduce rates. Many shippers unabashedly support expanded use of forced switching as an alternative means of regulating rates.

- The Alliance for Rail Competition *et al.* say that the use of reciprocal switching orders to reduce rates is "entirely legitimate, given the shortcomings of rate case alternatives."²
- The Freight Rail Customer Alliance supports the Board's proposal "in fulfillment of the statutory requirement in 49 U.S.C. § 10701(d)(1), that rates for captive shippers 'must be reasonable.'"³
- Cargill similarly supports the proposal because it believes "[t]he idea that existing regulations constrain rates on captive traffic is unrealistic."⁴

² Opening Comments of Alliance for Rail Competition, *et al.* ("ARC Comments") at 10.

³ Comments of Freight Rail Customer Alliance at 1.

⁴ Comments of Cargill, Incorporated ("Cargill Comments") at 3.

- Sandy Creek Energy Associates, Brazos Sandy Creek Electric Cooperative, and Lower Colorado River Authority support the proposal because it creates an opportunity to drive rates below the statutory 180% revenue-to-variable cost ratio (“R/VC”) jurisdictional threshold in 49 U.S.C. § 10707(d)(1)(A) that protects the railroads’ ability to engage in differential pricing.⁵

Other shippers are slightly more circumspect. They claim that the proposed rules may improve rail service and provide access to additional markets, in addition to reducing rates.⁶ But none of these shippers identifies any specific service problem or explains why the current competitive access rules are insufficient to address any legitimate service issues. Nor do these shippers explain why their alleged concerns about market access are not addressed by the railroads’ statutory obligation to interchange traffic when they cannot provide origin-to-destination service. *See* 49 U.S.C. §§ 10703, 10705.⁷

Even the most cautious shippers abandon the pretext that the proposed rules are not just about reducing rates when they address access pricing. Shippers uniformly oppose the use of access pricing methods that include a measure of the serving railroad’s lost contribution in the switching fee, such as efficient component pricing (“ECP”). But if shippers were truly focused on improving rail service and access to markets, they would be willing to pay access prices that cover the incumbent’s lost contribution from the long-haul. ECP and similar pricing methods

⁵ *See* Initial Comments of Sandy Creek Energy Associates, Brazos Sandy Creek Electric Cooperative, and Lower Colorado River Authority (“Sandy Creek Comments”) at 3. Sandy Creek mistakenly describes the 180% R/VC jurisdictional threshold as “the Board’s policy.” *Id.*

⁶ *See, e.g.*, Comments of Diversified CPC International, Inc. (“Diversified CPC Comments”) at 6; Comments of Olin Chlor Alkali Products and Vinyls at 1; Comments of Runyon Industries, Inc. at 1; Comments of Shell Chemical LP at 1.

⁷ As discussed below in Part II.B, the use of forced switching simply to enhance competition between carriers—even if intended to increase service and access to markets, rather than reduce rates—would still be unlawful. *See Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1507 (D.C. Cir. 1988) (finding that Congress did not intend to authorize the use of forced switching “whenever such an order could enhance competition between rail carriers”).

would set access fees that allow competition through reciprocal switching when a competitor would provide more efficient service than the incumbent.⁸ Shippers oppose the use of ECP because it would likely preclude the substantial rate reductions they expect from implementation of the Board's proposal. Thus, when the Shipper Coalition erroneously claims that "application of ECP would prevent shippers from benefitting from the competition provided by reciprocal switching,"⁹ it reveals its understanding that the Board's proposal is designed to reduce rates, rather than improve service or access to markets. Other shippers openly connect their understanding of the Board's intent to reduce rates with their opposition to ECP. Cargill and Dow, for example, both say that adopting ECP "would completely undermine the very objective of reciprocal switching by setting an access fee that effectively ensures the shipper will pay the same price for the full origin to destination movement regardless of what carrier it uses."¹⁰

Shippers plainly support the Board's use of reciprocal switching orders to reduce rates, but using forced switching to regulate rates would be unlawful, as discussed below.

B. Shippers Who Support The Proposed Rules Fail To Reconcile The Board's Proposal With The Statutes Governing Rate Regulation and Reciprocal Switching.

Shippers who support the use of forced switching to reduce rates never even try to reconcile the proposed rules with statutory provisions that constrain the Board's authority to regulate rates. Those provisions grant a railroad the right to establish any rate it chooses in the first instance, *see* 49 U.S.C. § 10701(c); prohibit the Board from evaluating whether a challenged rate

⁸ Opening Comments and Evidence of Union Pacific Railroad Company ("Union Pacific Comments"), Verified Statement of Joshua D. Wright ("Wright VS") at 30-32.

⁹ Comments Submitted by the Shipper Coalition for Railroad Competition ("Shipper Coalition Comments"), Verified Statement of Thomas D. Crowley and Daniel L. Fapp at 29.

¹⁰ Cargill Comments at 7; Comments of the Dow Chemical Company ("Dow Comments") at 11.

is reasonable unless a shipper proves market dominance, *see id.* §§ 10701(d)(1), 10707; and set forth certain factors to be considered in determining the reasonableness of rates, *see id.* §§ 10701(d)(2), 10704(a)(2). Reciprocal switching orders under § 11102(c) play no role in the congressionally established framework for rate regulation. In fact, courts have *rejected* contentions that “section [11102] was intended to be an alternative means of obtaining rate relief.” *Midtec*, 857 F.2d at 1505; *see also Entergy Ark., Inc. v. Union Pac. R.R.*, NOR 42104, slip op. at 15 (served Mar. 15, 2011) (“[T]he competitive access rules were promulgated not to provide shippers with an alternative form of rate relief, but to offer a competitive remedy where a bottleneck carrier has exploited its market power.” (quoting *Central Power & Light Co. v. Southern Pacific et al.*, 1 S.T.B. 1059, 1068 (1996))).

Even when shippers try to disguise their goal of reducing rates by speaking in more general terms about using forced switching to “facilitate rail-to-rail competition,”¹¹ they fail to reconcile the Board’s proposal with statutory limits on the use of reciprocal switching orders. As the Board acknowledges in the NPRM, Congress intended forced switching to be a “remedy” for a wrong. NPRM at 15. Legislative history confirms that Congress intended reciprocal switching orders to provide “an avenue of relief” where a railroad was providing inadequate service. H.R. Rep. 96-1430, at 116 (1980) (Conf. Rep.) (explaining that reciprocal switching “provides an avenue of relief for shippers where only one railroad provides service and it is inadequate”). Congress did not intend to authorize the use of forced switching “whenever such an order could enhance competition between rail carriers.” *Midtec*, 857 F.2d at 1507.¹²

¹¹ *See, e.g.*, Shipper Coalition Comments at 2.

¹² One shipper argues that the Board is free to adopt the proposed rules because rail carriers are no longer subject to “the core economic difficulties that warranted” what it calls the “unusual regulatory elements of the Staggers Act and ICCTA.” Initial Comments of Ineos USA LLC (continued...)

Shippers supporting the Board’s proposal do not explain how the proposed rules identify situations in which there is a wrong to remedy—much less a wrong related to inadequate service. The proposed rules plainly go far beyond providing remedies for wrongful conduct. Prong 1’s open-ended balancing of “potential benefits” and “potential detriments” would permit the issuance of reciprocal switching orders whenever the Board perceives a net benefit from additional carrier access. Prong 2 requires a showing that the carrier has market dominance, but just as a showing of market dominance does not establish that a carrier is charging unreasonable rates, it does not establish that a carrier is engaging in any other conduct that makes forced switching “necessary.”

The Shipper Coalition is the only shipper party that even pauses to consider whether the Board’s proposed rules would constitute a lawful implementation of § 11102(c). It contends that Congress gave the Board “broad discretion” by using the terms “public interest” and “necessary” and leaving it “without any indication in the words of the statute or the legislative history as to how these broad terms were to be interpreted.”¹³ However, the Shipper Coalition acknowledges elsewhere in its comments that a reciprocal switching order is supposed to be one of the Board’s “competitive remedies”¹⁴ and characterizes such an order as “remedial in nature.”¹⁵ The Shipper Coalition even quotes the legislative history that describes reciprocal switching as “an avenue of

(“Ineos Comments”) at 3. However, even if the shipper were correct that railroads are now somehow operating under a different economic framework, which is not the case, the Board could not ignore the laws and policies established by Congress. The narrow adjustments that Congress made to the Board’s authority and processes in the STB Reauthorization Act of 2015, Pub. L. No. 114-110, 129 Stat. 2228 (2015), underscore that Congress continues to embrace the policy objectives of the Staggers Act and the ICCTA.

¹³ Shipper Coalition Comments at 17.

¹⁴ *Id.* at 8.

¹⁵ *Id.* at 37 (internal quotation omitted).

relief for shippers served by only one railroad *where service is inadequate.*”¹⁶ In discussing the Board’s discretion to order reciprocal switching, the Shipper Coalition makes the same mistake the Board made in the NPRM: it confuses (i) Congress’s grant of discretion to order reciprocal switching when a predicate for relief is found, with (ii) a grant of discretion to order reciprocal switching when there is no wrong to remedy.¹⁷ Congress did not grant the Board discretion to order reciprocal switching when there is no wrong to remedy.

C. Shippers Who Support The Proposed Rules Distort And Disregard The Rail Transportation Policy Factors Enumerated in 49 U.S.C. § 10101.

Even if the Board had discretion to order reciprocal switching when there is no wrong to remedy, which it does not, the agency still could not adopt rules that are inconsistent with the policy factors enumerated in 49 U.S.C. § 10101. However, shippers who support the Board’s proposed rules fail to reconcile the proposal with the policy goals set forth in § 10101.

The Board’s proposal is fundamentally inconsistent with the relevant policies in § 10101. Shippers who try to argue otherwise are forced to distort or disregard those goals. For example, shippers say that the proposal would allow their rates to be set though “competition.”¹⁸ But the proposal would have exactly the opposite consequence. As the Board has recognized, there is a critical distinction between the market-based “competition” favored in § 10101(1) and the “artificially forc[ed] competition” that would result if a railroad were ordered to provide a competitor with access to a shipper facility where market demand had not justified the competitor’s investment in the infrastructure required to serve that facility. *Central Power &*

¹⁶ *Id.* at 7 (quoting S. Rep. No. 96-470, at 42 (1979)) (emphasis added).

¹⁷ See Union Pacific Comments at 24-25.

¹⁸ See, e.g., Shipper Coalition Comments at 15; Dow Comments at 2; Cargill Comments at 3-4; Ineos Comments at 3.

Light Co. v. Southern Pacific et al., 2 S.T.B. 235, 239 (1997). Regardless of what shippers may say, if a Board order requiring an incumbent carrier to provide reciprocal switching to another carrier results in lower rates for a shipper, those lower rates reflect the results of regulation, not competition. Shippers turn logic upside down when they claim that implementation of new rules that force railroads to open their networks to their rivals under regulated access fees is consistent with “minimiz[ing] the need for Federal regulatory control over the rail transportation system.” 49 U.S.C. § 10101(2).¹⁹

Shippers also urge the Board not to worry about the proposal’s impact on differential pricing and revenue adequacy,²⁰ ignoring that the rate reductions that shippers anticipate from implementation of the new rules would plainly affect the policy of “allowing rail carriers to earn adequate revenues.” 49 U.S.C. § 10101(3). Indeed, as one shipper notes, the artificial competition the proposed rules would create would give shippers an opportunity to drive their rates below the 180% jurisdictional threshold that protects the railroads’ ability to engage in differential pricing.²¹

Shippers assert that the Board’s proposal is consistent with congressional policy “to ensure the development and continuation of a sound rail transportation system,” 49 U.S.C.

¹⁹ See, e.g., Ineos Comments at 3 (“[Ineos] wishes to obtain access via competitive switching to a second rail carrier. . . so that competition, not regulation, is available to it.”); see also Comments of the U.S. Department of Agriculture (“USDA Comments”) at 4 (“[C]ompetitive switching avoids much of the concern that exists with regulatory rate setting. The Board’s influence over rates would be limited only to the switch . . .”).

²⁰ See, e.g., Initial Comments of G3 Enterprises, Inc. (“G3 Comments”) at 9; Ineos Comments at 9; Sandy Creek Comments at 9.

²¹ See Sandy Creek Comments at 3. The U.S. Department of Agriculture demonstrates a startling lack of economic acumen when it asserts that the proposal would not present a threat to railroad revenues because the influence of a forced switching order on rates “would be limited only to the switch,” which accounts for “only a fraction of the full haul revenue.” USDA Comments at 4.

§ 10101(4), “to foster sound economic conditions in transportation, *id.* § 10101(5), and “to encourage honest and efficient management of railroads,” *id.* § 10101(9).²² However, shippers provide no supporting evidence or analysis. They also fail to consider the many ways in which implementation of the proposed rules would harm rail service, create inefficiency, and discourage investment in rail infrastructure. Our opening comments address these issues in detail.²³

The Shipper Coalition tries to justify the Board’s proposal by complaining that the current reciprocal switching rules “frustrate the development of effective competition” and “are themselves a regulatory barrier preventing a new competitor from entering a market.”²⁴ But the current rules do not bar any railroad or any shipper from making a market-based decision to invest in developing competing rail service to a shipper facility. To the contrary, the current rules allow affected parties to obtain relief if an incumbent railroad acts in an anticompetitive manner to block a competitor from establishing competing service. In short, the current rules allow the competitive market to work, and the fact that they are rarely invoked confirms that railroads comply with the law.

²² See, e.g., Shipper Coalition Comments at 15, 21; Ineos Comments at 3; Sandy Creek Comments at 4.

²³ See Union Pacific Comments at 40-51; *id.*, Verified Statement of Jon T. Panzer (“Panzer VS”); *id.*, Verified Statement of Tomas C. Haley (“Haley VS”); *id.*, Verified Statement of Kevin M. Murphy (“Murphy VS”) at 7-13; *id.*, Wright VS at 10-18.

Our opening comments also explained that, by promoting operations that require extra car handlings and disrupt single-line service, the Board’s proposal is contrary to the policy “to operate transportation facilities and equipment without detriment to public health and safety,” 49 U.S.C. § 10101(8) and “to encourage and promote energy conservation,” *id.* § 10101(14). See Union Pacific Comments at 36. Shippers do not address these policies in their comments.

²⁴ Shipper Coalition Comments at 15.

The Shipper Coalition also argues that the Board’s proposal would be consistent with the policy in § 10101(12) to “avoid undue concentrations of market power.”²⁵ However, as discussed in our opening comments, the rail industry’s current structure reflects a series of ICC and Board decisions that restructured the U.S. rail network and delivered (and continues to deliver) enormous benefits to the shipping public, including stronger rail-to-rail competition and stronger competition between railroads and other modes.²⁶ As part of those decisions, the ICC and Board ensured there would be no “undue concentration of market power.” They carefully reviewed each merger and, where necessary, imposed conditions to ensure that no shipper would lose the benefit of rail-to rail competition. *See Major Rail Consolidation Procedures*, 4 S.T.B. 570, 573 n.12 (2000); *Central Power & Light*, 1 S.T.B. at 1071 n.18.

Union Pacific has invested tens of billions of dollars to rationalize and upgrade our network in reliance on the decisions approving the mergers that created today’s Union Pacific.²⁷ The Board cannot now repudiate those decisions by adopting rules that would effectively impose additional, costly, retroactive conditions on past mergers. *See, e.g., Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994) (noting that an agency rule is impermissibly retroactive if it “impose[s] new duties with respect to transactions already completed”); *Arkema Inc. v. EPA*, 618 F.3d 1, 9 (D.C. Cir. 2010) (agency “cannot, without Congress’ express authorization, use its new statutory interpretation to undo these completed transactions”).²⁸

²⁵ *Id.*

²⁶ *See* Union Pacific Comments at 7-14.

²⁷ *See* Union Pacific Comments at 14-18; *id.*, Haley VS at 2-3.

²⁸ The Board has long recognized that “absent some failure of a condition that we imposed or some specific reservation of jurisdiction through oversight or otherwise, it would generally not be appropriate for use to impose new conditions on our approval of a transaction that has already been consummated.” *Major Rail Consolidation Procedures*, 5 S.T.B. 539, 583 (2001); *accord* (continued...)

III. SHIPPER PROPOSALS TO EXPAND THE AVAILABILITY OF FORCED SWITCHING UNDERSCORE FLAWS IN THE PROPOSED RULES.

Shippers who support the Board's proposed rules focus their comments on convincing the Board to make forced switching even more easily available to an even larger number of shippers. Their proposals only serve to underscore basic flaws in the original proposal.

A. Shipper Efforts To Expand Forced Switching Under Prong 1 Highlight The Board's Disregard Of Congress's Intent That Reciprocal Switching Orders Serve As A Remedy For A Wrong.

The Shipper Coalition complains that shippers will have difficulty establishing a right to relief under the first prong of the Board's proposal, because the proposed test is a "blank slate."²⁹ Other shippers similarly complain about the proposed test's open-ended nature.³⁰ However, the Shipper Coalition and others urge the Board to turn the lack of clear guidance into an advantage for shippers by shifting the burden of proof, essentially requiring railroads to prove that forced switching is *not* in the public interest if shippers can identify any potential benefit.³¹

The shippers' proposed burden-shifting approach would be unlawful. A party seeking a reciprocal switching order under § 11102(c) has the burden of proof. *See* 5 U.S.C. § 556(d). The

Canadian Nat'l Ry., Grand Trunk Corp. & Grand Trunk W.R.R.—Control—Illinois Cent. Corp., Illinois Cent. R.R., Chicago, Cent. & Pac. R.R. & Cedar River R.R., 6 S.T.B. 492, 496 (2002) (“[O]nce the period for administrative reconsideration has passed, carriers that have decided to move forward with their transaction are entitled to rely on the assumption that the basic terms and conditions of administratively final decisions are not likely to be altered.”); *Guilford Transp. Indus., Inc.—Control—Boston & Maine Corp.*, 5 I.C.C.2d 202, 206 (1988) (discussing the “obvious” unfairness associated with imposing additional conditions “long after the control transactions were consummated and the consolidated operations were effected”).

²⁹ Shipper Coalition Comments at 24.

³⁰ *See, e.g.*, Cargill Comments at 5-6; Dow Comments at 4; Ineos Comments at 5-7; Sandy Creek Comments at 5-9.

³¹ *See, e.g.*, Shipper Coalition Comments at 23-29; G3 Comments at 6; Ineos Comments at 8; Sandy Creek Comments at 9.

NPRM appears to recognize that the burden belongs on shippers by providing that “shippers would . . . bear the burden of showing that reciprocal switching is needed.” NPRM at 19.³²

The open-ended nature of the test proposed in Prong 1 is inappropriate, but not for the reasons the shippers identify. As discussed in our opening comments, the Board cannot lawfully disregard the remedial and service-related elements of the statutory test for determining whether a reciprocal switching order is in the public interest.³³ The public interest standard in § 11102(c) does not involve an open-ended balancing of benefits and detriments. Rather, it provides for the use of reciprocal switching orders as “an avenue of relief for shippers where only one railroad provides service and it is inadequate.” H.R. Rep. 96-1430, at 116. Confirming the limited authority it was conferring, Congress told the agency what standard to apply—“the same standard the [ICC] has applied in considering whether to order the joint use of terminal facilities.” *Id.* Under that standard, shippers must show that their request for forced switching is based on “more than a mere desire . . . for something that would be convenient or desirable for them”; instead, they must show the existence of “some actual necessity or some compelling reason” for ordering reciprocal switching. *Jamestown, N.Y. Chamber of Commerce v. Jamestown, Westfield & Nw. R.R.*, 195 I.C.C. 289, 292 (1933). Congress did not grant the Board the power to order forced switching where there is no wrong to remedy.

³² The Shipper Coalition’s comments include detailed proposals for rules regarding discovery and the submission of evidence. *See* Shipper Coalition Comments at 26-31. We do not address those proposals here because they are predicated on impermissible burden-shifting and extend beyond the scope of the NPRM.

³³ *See* Union Pacific Comments at 24-28; *see also* Opening Comments of the Association of American Railroads at 7-12, 14-15.

B. Shipper Efforts To Expand Forced Switching Under Prong 2 Emphasize The Board's Improper Proposal To Equate Market Dominance With Unlawful Conduct.

Shippers also complain about the burden of establishing a right to relief under the second prong of the Board's proposal because of the supposed difficulty of proving market dominance. Several shippers even urge the Board to eliminate entirely the requirement that a shipper show market dominance to obtain forced switching, so that any shipper served by only one railroad could obtain access to a second railroad on demand.³⁴

The Board's use of a market dominance trigger for forced access is inappropriate for several reasons, but not for the reasons that shippers identify. An effectively irrebutable presumption that a forced switching order is "necessary to provide competitive rail service" whenever a railroad is found market dominant is inconsistent with the Board's statements that the shippers would be required to "bear the burden of showing that reciprocal switching is needed" and that there "would be no presumption of need." NPRM at 19. Moreover, any such presumption would be arbitrary and capricious, because there is no evidence that the existence of market dominance in the rail industry predictably results in abusive conduct or inadequate service. *See, e.g., Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1100-01 (D.C. Cir. 1998) (holding that an agency's evidentiary presumption is "only permissible if there is a sound and rational connection between the proved and inferred facts, and when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it." (Internal quotation omitted)).

³⁴ *See, e.g.*, ARC Comments at 10; Diversified CPC Comments at 8; G3 Comments at 7; Ineos Comments at 9-10; Sandy Creek Comments at 10-11; Opening Comments of the National Grain and Feed Association ("NGFA Comments") at 9-10; Joint Comments of Western Coal Traffic League and Minnesota Power ("WCTL/MP Comments") at 18-19.

The Board's use of a market dominance trigger is also inconsistent with Congress's recognition that railroads need to engage in differential pricing to achieve sustained revenue adequacy. Congress protected railroads' ability to charge differentially higher rates to shippers with less elastic demand by providing that "a finding of market dominance does not establish a presumption that [a challenged] rate exceeds a reasonable maximum," 49 U.S.C. § 10707(c), and by establishing a 180% R/VC jurisdictional threshold, *see id.* § 10707(d)(1). The proposed rules would undermine differential pricing by effectively restructuring rail networks to change market demand conditions, and by allowing shippers to drive rates below the jurisdictional threshold.³⁵ Differential pricing and revenue adequacy would be further undermined if shippers were not even required to prove market dominance to obtain access to an additional rail carrier.³⁶

Finally, although the Board asserts in the NPRM that the use of a case-by-case approach would allow the Board "a greater degree of precision when mandating reciprocal switching" and

³⁵ Sandy Creek argues that it should be entitled to seek forced switching at its plant, even though its rates are set at 180% of system-average URCS variable costs. *See* Sandy Creek Comments at 2-3. It alleges, without offering proof, that the use of system-average costs overstates the actual variable costs of unit-train service to its plant. *See id.* at 2. Union Pacific strongly disagrees with Sandy Creek's claim—in part because system-average URCS calculations plainly do reflect the efficiencies of unit-train service—but we will not burden the record in this proceeding with a lengthy discussion of URCS costing issues and the costs of moving coal to Sandy Creek's plant.

³⁶ The Shipper Coalition and Dow argue that the Board should adopt a special market dominance test for forced switching cases involving joint rates that addresses only the incumbent's bottleneck segment, rather than apply the agency's standard approach to market dominance in rate cases involving joint rates. *See* Shipper Coalition Comments at 43-45; Dow Comments at 8. The Board's acceptance of this argument would further undermine the ability of railroads to engage in differential pricing and would be inconsistent with the Board's *Bottleneck* precedent. *See Central Power & Light*, 1 S.T.B. 1059, *clarified*, 2 S.T.B. 235, *aff'd sub nom. MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999). As the Eighth Circuit explained, "requiring carriers to provide separately challengeable rates on bottlenecks would prevent them from exploiting bottlenecks and charging rates up to [stand-alone cost] for complete origin-to-destination service." *MidAmerican*, 169 F.3d at 1109. Such a restriction on a carrier's ability to engage in differential pricing "would impede the industry's efforts to achieve revenue adequacy, which is necessary for long-term capital investment and, ultimately, for a safe and efficient rail system." *Id.*

would “allow the Board to better balance the needs of the individual shipper versus the needs of the railroads and other shippers” (NPRM at 15), the Board’s use of a market dominance trigger would not provide an opportunity for exercising “precision” or “balancing.” Under Prong 2, the Board would order reciprocal switching upon proof of market dominance, without regard to the adverse impacts of forced switching on railroad investment, revenues, efficiency, or employees, and the impact on service and safety would not matter unless the impacts of a particular request would be so severe that the switching was “not feasible,” “unsafe,” or would “unduly hamper” service. NPRM at 19. The Board’s inability to consider adverse impacts of forced switching would become an even greater problem if eligibility were expanded under Prong 2.

C. Shipper Efforts To Expand Forced Switching Beyond Terminal Areas Underscore The Flaw In The Board’s Proposed “Reasonable Distance” Approach And The Harms From Giving Shippers Control Of Routing Decisions.

As Union Pacific explained on opening, the term “reciprocal switching” in 49 U.S.C. § 11102(c) refers to the switching of traffic between railroads in commonly served terminal areas.³⁷ Thus, traffic cannot be subject to a reciprocal switching order unless it originates or terminates in a terminal area and can be interchanged between railroads in that terminal area. A Board order requiring a carrier to interchange traffic with a railroad outside the terminal area in which the traffic originates or terminates could be accomplished only under § 10705(a)(2)(B) and (C).

On its face, however, the Board’s proposal does not limit the use of reciprocal switching orders to activities in a terminal area. The proposal says that forced switching could be available if there is or can be a working interchange within a “reasonable distance” of the shipper facility.

³⁷ See Union Pacific Comments at 55.

NPRM at 21. Shippers responded by urging the Board to adopt expansive definitions of the term “reasonable distance”—definitions that would result in unlawful applications of § 11102(c).

The Shipper Coalition, for example, urges the Board to define “reasonable distance” by looking to precedent under § 11102(a), a provision under which the Board may authorize one railroad to access another railroad’s tracks “for a reasonable distance outside a terminal.”³⁸ However, Congress’s express provision of a remedy that allows forced access to a railroad’s facilities for “a reasonable distance outside a terminal” in § 11102(a), but not in § 11102(c), makes even more clear that Congress intended § 11102(c)’s reciprocal switching remedy to allow forced access only *within* a terminal. *Cf. Nat’l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012) (“Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.”).

Other shipper parties also propose results-oriented definitions of “reasonable distance” that have no relation to terminal limits. The National Mining Association says that a “reasonable distance” should be at least 140 miles, because that is the distance between one of its member’s mines and an interchange with an alternative railroad.³⁹ The Western Coal Traffic League and Minnesota Power (“WCTL/MP”) urge the Board to establish a presumption that 10% of the distance of the line-haul movement is a “reasonable distance.”⁴⁰ The National Grain and Feed Association (“NGFA”) says it does not oppose a presumptive maximum distance of 100 miles, because it expects use of that distance to make reciprocal switching available to most agricultural shippers, “while still allowing individual shippers to argue for a longer distance on a case-by-

³⁸ Shipper Coalition Comments at 36-37; *see also* Cargill Comments at 9.

³⁹ National Mining Association Comments at 2.

⁴⁰ *See* WCTL/MP Comments at 16-17; *see also* Opening Comments of Northern Indiana Public Service Company (“NIPSCO Comments”) at 5 (proposing a 10% rule for unit train movements).

case basis.”⁴¹ All of these proposals are arbitrary and fail to recognize the difference between reciprocal switching under § 11102 and prescription of an interline route under § 10705(a).

Dow Chemical’s comments particularly illustrate how an improper definition of “reasonable distance” would allow shippers to obtain prescribed through routes in violation of § 10705 and potentially do great harm to rail operations. Dow operates a plant in Taft, Louisiana, served exclusively by Union Pacific. Union Pacific interchanges a substantial amount of Dow traffic originating in Taft with Norfolk Southern (“NS”), CSX Transportation (“CSXT”), and Canadian National (“CN”).⁴² The gateways that we use for interchange are based on routing protocols we have developed with these connecting carriers. The carriers use the routing protocols to concentrate traffic on selected routes to improve efficiency—by allowing cars to move in fewer, larger trains, with the fewest possible stops for switching or other work events—taking into account yard and line capacity, track conditions, geography, congestion, service capabilities, and other factors.

Dow argues that the Board should define “reasonable distance” such that Dow could force Union Pacific to provide “reciprocal switching” over nearly 30 miles of track between Taft and New Orleans.⁴³ Dow complains that Union Pacific moves most of Dow’s Taft traffic north to Union Pacific’s yard in Livonia, then to interchange points other than New Orleans.⁴⁴ Dow says that it wants “greater routing flexibility for its gateway traffic by opening routes through

⁴¹ NGFA Comments at 7.

⁴² Dow Comments at 6.

⁴³ *Id.* at 6-7.

⁴⁴ *Id.* at 6.

New Orleans if Dow could obtain better rates and service from CN, NS or CSXT, allowing them to handle these joint line moves over greater distances.”⁴⁵

However, the “routing flexibility” that Dow wants—the ability to select among possible interchange points—would require the prescription of a through route under § 10705(a)(2), not a reciprocal switching order under § 11102(c). *See Central Power & Light*, 1 S.T.B. at 1065 (“The carrier is not required to open an additional route through a different interchange simply because the shipper asks it to do so, without regard to the criteria of 49 U.S.C. [§] 10705(a).”).

Moreover, Dow’s discussion about routing more traffic via New Orleans illustrates precisely why shippers should not be allowed to make routing decisions: most shippers do not understand the details of railroad operations and thus could not appreciate the adverse consequences of their decisions. Dow appears to be operating under the misconception that Union Pacific routes some of Dow’s Taft traffic directly to New Orleans and could simply chose to route more Dow traffic directly to New Orleans. In fact, Union Pacific routes *all* Dow’s Taft traffic via Livonia—even cars we will interchange in New Orleans.⁴⁶ When Dow releases cars at Taft, those cars could be waybilled to any of more than a hundred different destinations. Union Pacific must sort Dow’s Taft traffic somewhere, and Livonia is the most efficient yard for that activity. Livonia is a system classification yard for traffic moving to and from Eastern Texas and Louisiana. In Livonia, we sort Dow’s traffic by destination and combine Dow’s traffic with other shippers’ traffic to build solid blocks of cars that we can move to other yards on our network, or over New Orleans and other gateways to other railroads’ major yards, without the need for the

⁴⁵ *Id.* at 7.

⁴⁶ The factual information in this paragraph and the next two paragraphs is being verified by Thomas C. Haley, Union Pacific’s Vice President – Network Planning and Operations.

additional sorting of cars at intermediate points. The ability to build solid blocks of cars that minimize the need to re-sort cars en route creates substantial efficiencies for us and our connecting carriers.⁴⁷ And the key to building solid blocks of cars and moving them farther without stopping is traffic density. Thus, even if Dow could force us to move more of its Taft traffic over the New Orleans gateway, we likely would still move the traffic through Livonia en route to New Orleans to include it in blocks with other cars moving to connecting carriers over New Orleans. Such a routing likely would be the most efficient way to handle Dow's traffic and other traffic over New Orleans, given all of the other traffic we must move over our network.⁴⁸

Furthermore, if Dow and other shippers could control which interchanges the railroads use, that would reduce or eliminate the efficiencies we currently achieve. If shippers could fragment traffic among gateways or shift gateways at will, we would not have the density or predictability required to implement efficient blocking plans.⁴⁹ We would be facing the same issues that we would face in developing efficient single-line service.⁵⁰ Our trains to gateways would have to stop more often at intermediate points to pick up and set out traffic before reaching the gateway. In addition, to build sufficient volume, the trains would likely have to carry traffic to a wider variety of destinations, which would mean more sorting for our

⁴⁷ See, e.g., Opening Comments of CSX Transportation, Inc. ("CSXT Comments"), Verified Statement of Cindy M. Sanborn ("Sanborn VS") at 5-7.

⁴⁸ If we were not permitted to move Dow's New Orleans cars through Livonia, the alternatives would be much less efficient for us and for our other customers with cars moving over the New Orleans gateway. For example, even if we could efficiently use our Avondale yard (between Taft and New Orleans) to integrate Dow cars into blocks we build in Livonia, which we could not do, that would mean added handling and an extra day of transit time for all of the cars we blocked in Livonia.

⁴⁹ See Sanborn VS at 7-8.

⁵⁰ See Haley VS at 6-8.

connecting carriers (and more sorting for us when we receive trains at gateways, because our connecting carriers would be facing the same circumstances).

Giving shippers the ability to route more traffic through the New Orleans gateway would be especially problematic.⁵¹ Union Pacific's current CEO, Lance Fritz, described in detail the difficulties of interchanging traffic in New Orleans in Ex Parte No. 705. His description remains true today. New Orleans is perhaps the least capable gateway for handling more traffic. "If a number of shippers were to reroute their traffic via New Orleans, rail service on the southern tier of the American rail system would break down in a matter of days."⁵² Union Pacific routes trains through New Orleans only when no alternative interchange makes sense. "[T]rains routinely sit for hours, and sometimes a day or more, before reaching a connecting carrier in New Orleans."⁵³ Union Pacific and our connecting carriers developed interchanges for interline trains in locations like Salem, Illinois, and Memphis, Tennessee, which involve little delay and save hours or even days of transit time, precisely to avoid more congested terminals, such as New Orleans.

Section 10705(a)'s standards for prescribing through routes correctly limit litigation of railroad operating decisions. The Board should not, and may not, override those standards by suggesting that it may issue reciprocal switching orders when the affected operations are not confined to a terminal area.

⁵¹ Dow is not the only shipper to suggest an interest in routing additional traffic via New Orleans. See, e.g., Comments of Occidental Chemical Corporation at 5, *Competition in the Rail Industry*, EP 705 (Apr. 12, 2011) (arguing that shippers should have a right to route their traffic via New Orleans); Comments of the Fertilizer Institute at 13, *Competition in the Rail Industry*, EP 705 (Apr. 12, 2011) (same).

⁵² Reply Comments of Union Pacific Railroad Company, Reply Verified Statement of Lance M. Fritz ("Fritz VS") at 7, *Competition in the Railroad Industry*, EP 705 (May 27, 2011). The relevant portion of Mr. Fritz's testimony is attached hereto as Exhibit A.

⁵³ Fritz VS at 7.

D. Shipper Efforts To Expand Forced Switching To Locations Where Infrastructure To Support Reciprocal Switching Does Not Exist Emphasize That The Proposed Rules Threaten Railroad Investment In Infrastructure.

Under the Board's proposed rules, the agency could issue a reciprocal switching order only if "there is or can be" a working interchange between the incumbent railroad and another Class I railroad. NPRM at 21. If no switching operations exist at the proposed interchange, the Board would determine that there "can be" a working interchange "only if the infrastructure currently exists to support switching." *Id.*

Several shippers urge the Board to expand the circumstances in which it could order forced switching by arguing that the Board should allow forced switching if the party seeking access agrees to pay for the facilities necessary to support the switching operation.⁵⁴ However, the Board's authority to require carriers to enter into reciprocal switching agreements presumes the existence of facilities to support reciprocal switching—that is, Congress did not authorize the Board in § 11102(c) to take railroad property or order carriers to make physical changes to their property to provide access to their competitors.⁵⁵

Even if the Board had the authority to take railroad property to allow others to construct interchange facilities, it should not override railroads' decisions regarding the most efficient and

⁵⁴ See, e.g., Shipper Coalition Comments at 40-41; ARC Comments at 9; Cargill Comments at 10; Dow Comments at 10-11; NGFA Comments at 8; NIPSCO Comments at 6.

WCTL/MP take an even more extreme position, arguing that the Board could require an incumbent carrier to make infrastructure investments necessary to support forced switching. See WCTL/MP Comments at 14.

⁵⁵ By contrast, in 49 U.S.C. § 10901(d), Congress expressly permitted the Board to authorize construction on a railroad's property in the absence of an agreement—but even then, only in very specific and very limited circumstances. See, e.g., *Holrail LLC—Construction & Operating Exemption—In Orangeburg & Dorchester Counties, SC*, FD 34421, slip op. at 5 (STB served Feb. 12, 2007) ("Had Congress meant to provide for a new competitor to access the private property of an incumbent rail carrier to that degree, it presumably would have discussed such a significant change."), *aff'd sub nom. Holrail, LLC v. STB*, 515 F.3d 1313 (D.C. Cir. 2008).

effective uses of their property. As discussed in our opening comments, in many locations along our network, capacity expansions are extremely challenging given the absence of available land, and the difficulty of modifying existing yard configurations or operations.⁵⁶ If existing capacity is taken to install interchange track, it will not be available for other uses, such as yard expansions, that we will need in the future to transport more freight and serve more shippers on the capacity constrained portions of our network.

IV. SHIPPER PROPOSALS REGARDING ACCESS PRICING WOULD PROMOTE INEFFICIENT USE OF RECIPROCAL SWITCHING AND UNDERMINE INCENTIVES TO INVEST IN RAIL NETWORKS.

If the Board intended its proposed rules to remedy market failures and competitive abuses related to rail service and market access, rather than to reduce rates, it would have no difficulty in offering guidance on access pricing principles: it would make clear that access pricing must replicate market outcomes. In the reciprocal switching context, a market outcome would mean compensating the incumbent railroad for (i) its actual costs to provide the switching, and (ii) its opportunity cost of providing the switching—that is, the incumbent’s lost contribution to fixed costs from the traffic being switched.⁵⁷ Unless the access price compensates the incumbent for both its actual costs to provide service and its lost contribution, the carrier could be forced to choose between subsidizing line-haul service provided by a less efficient rival and reducing its own rates to retain the traffic. And, in either case, the carrier would lose the contribution from demand-based differential pricing that is essential for railroads to recover their substantial joint and common costs and support reinvestment in their networks.

⁵⁶ See Union Pacific Comments at 47; *id.*, Panzer VS at 6-7.

⁵⁷ See Union Pacific Comments at 51-52; *id.*, Murphy VS at 28; *id.*, Wright VS at 28-29.

Shippers do not agree on any particular approach to access pricing, but they uniformly oppose the concept that access prices should replicate market outcomes. Indeed, they support the proposed rules because they would erode demand-based pricing, as discussed above in Part II.B. Shippers thus urge the Board to adopt principles designed to drive down their rates without regard for efficiency or whether railroads will continue to reinvest in their networks.

For example, several shippers endorse the Board's suggestion that access prices could be developed using a variant of the agency's SSW Compensation methodology.⁵⁸ That methodology might provide a workable starting point, but modifications would be required to compensate the incumbent fully for its lost contribution.⁵⁹ The SSW Compensation methodology was designed to establish trackage rights rates where two carriers were already serving a market. Thus, while it attempts to provide the incumbent with a reasonable return on the assets used by the incumbent's rival, there was no reason to address the incumbent's loss of contribution caused by the creation of artificial competition. Here, lost contribution is a critical issue.⁶⁰ But shippers that endorse variants of SSW Compensation reject the idea of compensating the incumbent for its lost contribution.⁶¹

⁵⁸ See, e.g., Shipper Coalition Comments at 50-53; Cargill Comments at 7; Dow Comments at 11.

⁵⁹ See Union Pacific Comments at 52; *id.*, Wright VS at 37.

⁶⁰ Railroads have repeatedly explained why access schemes that would provide incumbents with a reasonable return on only the bottleneck segment of a through route would not allow railroads to use demand-based differential pricing to recover the joint and common costs of their networks and thus support reinvestment in needed network facilities. See, e.g., *Central Power & Light*, 1 S.T.B. at 1072 n.21; CSXT Comments, Verified Statement of Robert Willig at 11-14.

⁶¹ See, e.g., Shipper Coalition Comments at 53-54; Cargill Comments at 7-8; Dow Comments at 11-12.

The Shipper Coalition submitted a more specific proposal for developing a variant of SSW Compensation, but its proposed methodology ignores lost contribution, and it would not even (continued...)

Other shippers support less sophisticated methodologies, including methodologies that would not even provide incumbents a reasonable return on the assets used to provide switching. For example, NGFA complains that an SSW Compensation-based methodology would be too “costly and complex.”⁶² It supports the use of a vaguely defined “methodology that entails the examination of cost of service, market conditions and other defined factors.”⁶³ G3 Enterprises argues that incumbents should not recover more than their variable costs of switching, which would effectively require incumbents to provide massive subsidies to competitors, who would pay nothing for the infrastructure necessary to serve the shipper facility.⁶⁴ Several shippers propose using a “fully allocated cost” standard as a ceiling,⁶⁵ even though the agency has repeatedly “rejected the use of a fully-allocated cost standard for pricing railroad service as arbitrary and economically unsound.” *Intramodal Rail Competition*, 1 I.C.C.2d 822, 835 (1985). Regardless of the details of their proposals, these shippers also reject the idea that incumbents should be compensated for lost contribution.

NGFA claims that the Board ruled that carriers were not entitled to compensation for lost contribution in *Omaha Public Power District–Petition Under 49 U.S.C. 10901(d)*, FD 32630

compensate incumbents fully for performing the switch and providing the assets used for the switch, as discussed in the AAR Reply Comments.

⁶² NGFA Comments at 15.

⁶³ *Id.* at 16.

⁶⁴ See G3 Comments at 8. G3 also rehashes its unsuccessful arguments in a case involving access to a G3 facility in Finance Docket No. 32760. G3’s petition for review of the Board’s decision in that case is now pending in the Ninth Circuit. See *G3 Enters., Inc. v. STB*, petition for review docketed, No. 15-70597 (9th Cir. Feb. 26, 2015). G3’s comments mischaracterize the facts and the Board’s decision, but we will not burden the record with a detailed response because that case is not relevant to the NPRM.

⁶⁵ See, e.g., Ineos Comments at 12; Sandy Creek Comments at 13.

(STB served Aug. 1, 1996).⁶⁶ However, that case involved a different statute that addresses a different issue—*i.e.*, the terms under which one carrier may cross another carrier’s line when constructing its own line to a shipper facility. Congress’s intent in enacting the crossing statute was to prevent an incumbent carrier from blocking a competitor that was responding to market demand by investing in the infrastructure needed to establish its own service to a shipper facility. The Board implemented that intent by adopting a compensation standard designed to “place the new entrant on the same footing as a new competitor that did not have to cross an existing railroad.” *Omaha Pub. Power Dist.*, slip op. at 5.

This proceeding involves situations in which markets are not signaling a demand for additional investment, competitors are not investing in new infrastructure, and incumbents are not simply having their lines crossed. This proceeding involves situations in which incumbents would be required to provide service to competitors using their own assets where there was insufficient market demand to justify a second carrier to invest in the infrastructure necessary to serve a shipper. The Board’s proposal is not at all analogous to the circumstances addressed in the compensation rules developed to implement § 10901(d).

Under § 11102(c), the Board may not simply impose an access price or a pricing formula when it orders reciprocal switching. Rather, it must afford the affected railroads the opportunity to agree on the applicable “conditions and compensation.” 49 U.S.C. § 11102(c)(1). However, if the Board addresses access pricing in this proceeding, it should make clear that incumbent railroads are entitled to access prices that cover both their actual costs to provide switching and their lost contribution.

⁶⁶ See NGFA Comment at 16-17.

Finally, several shippers urge the Board to state that shippers may challenge switch fees agreed upon by the railroads.⁶⁷ However, § 11102(c) does not authorize such challenges—it gives the Board authority over the compensation terms only “if the rail carriers cannot agree upon such . . . compensation within a reasonable time.” 49 U.S.C. § 11102(c)(1).⁶⁸ If a shipper uses § 11102(c) to obtain a rate from an alternate carrier and ships traffic under that rate, then “[t]he shipper’s only interest is that the charge shall be reasonable as a whole.” *Great N. Ry. v. Sullivan*, 294 U.S. 458, 463 (1935); accord *Central Power & Light*, 1 S.T.B. at 1073; cf. *Omaha Pub. Power Dist. v. Union Pac. R.R.*, NOR 42006, slip op. at 2-3 (STB served Oct. 17, 1997) (dismissing a complaint by a shipper seeking to challenge a switching charge because the switching service was “plainly a part of the transportation covered by the contract between [the line-haul carrier] and the shipper”).

V. CONCLUSION

Shippers’ comments supporting the Board’s proposal help demonstrate that the proposed rules would unlawfully use forced switching to regulate the rail industry’s rates and structure. The Board should withdraw the proposed rules and terminate this proceeding.

⁶⁷ See Cargill Comments at 8; Dow Comments at 12; NGFA Comments at 13-15; NIPSCO Comments at 6.

⁶⁸ See also USDA Comments at 8 (“While USDA recognizes that the Board only has jurisdiction over access fees in the instance when railroads do not agree . . .”).

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January 13, 2017

VERIFICATION

I, Thomas C. Haley, Vice President – Network Planning and Operations for Union Pacific Railroad Company, declare under penalty of perjury that I have reviewed the foregoing document and that the factual information presented therein regarding Union Pacific's service to the New Orleans gateway is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on January 13, 2017.

/s/ Thomas C. Haley

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 705

COMPETITION IN THE RAILROAD INDUSTRY

REPLY VERIFIED STATEMENT

OF

LANCE M. FRITZ

those commenters could see into the future what they advocate, they would shudder at the deteriorating service and the exploding costs that they and other shippers would experience.

I explained, with examples, how opening little-used interchanges and rerouting traffic would wreck efficient through-train operations, squander investments that Union Pacific has made in today's routes, and impose new capital and operating costs that would reduce our ability to make the investments that would truly benefit the rail network and our customers. I focused in particular on how increasing interchanges within terminals, which a number of people seem to think is not worth worrying about, would cause congestion and operations conflicts that could melt down some of the nation's largest terminals, such as Houston. Interchanges within terminals are costly and slow. They require capacity that does not exist.

The Board should ignore "don't worry about it" comments from those who have not thought about the impact of all the new interchange movements, delays, and costs that their proposals would create. At Union Pacific, we learned that lesson in 1997-1998. One factor that caused Houston and the entire Union Pacific network to experience a service crisis was that both shippers and Union Pacific decided to shift large volumes of traffic from SP routes to Union Pacific routes before we could make the two systems operate as one (with crew agreements, information technologies support, and directional operations).

A. Interline Routing Protocols

A few shippers highlight their disregard of railroad operations and efficiencies by attacking our use of interline routing protocols. They say that railroads use routing protocols to "extend" bottlenecks or employ inefficient routes for self-serving purposes. These complaints are inaccurate. As I previously explained, railroads use interline routing protocols to concentrate traffic on selected routes to improve efficiency, taking into account capacity, track conditions,

geography, congestion, service capabilities, and other factors. The concept of “extending” bottlenecks makes no sense, because neither railroad will allow the other to obtain an unreasonable economic advantage by extending its routes – and thereby expanding its revenues – at the other railroad’s overall expense. The suggestion that eastern and western railroads use routing protocols to increase fuel-surcharge revenues is also mistaken, because the East-West protocols preceded development of fuel surcharges by various railroads. Union Pacific-Norfolk Southern and Union Pacific-CSX routing protocols were developed at the time of the Conrail breakup in the late 1990s, when we had to decide how to adjust our operations to the new eastern rail systems.

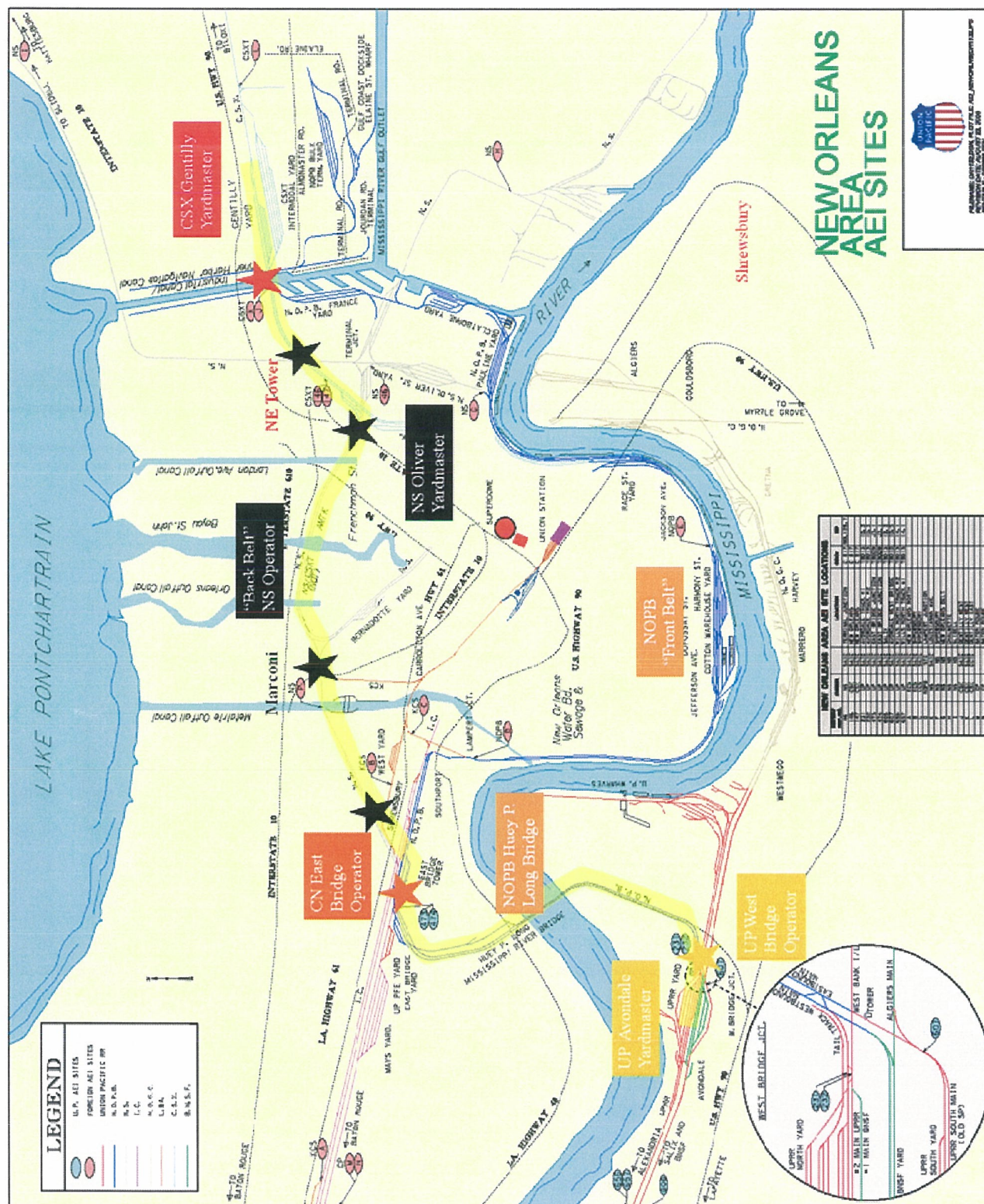
Imposing customer selection of interchange points would do severe damage to rail service. For example, Occidental Chemical and The Fertilizer Institute argue that more shipments should be routed via New Orleans, instead of gateways further north. New Orleans should be the poster child for why shipper routing selections could wreck the rail network. New Orleans cannot handle more trains, and many New Orleans interests are fighting to curtail current use of this gateway. If a number of shippers were able to reroute their traffic via New Orleans, rail service on the southern tier of the American rail system would break down in a matter of days.

New Orleans has been a major congestion point for decades, and it is the single worst congestion point affecting the Union Pacific system today. Because of extreme delays and capacity constraints, trains routinely sit for hours, and sometimes a day or more, before reaching a connecting carrier in New Orleans. For example, during April 2011, the highest priority eastbound train from Union Pacific to CSX, the ZLCAT from Los Angeles to Atlanta, averaged

14.2 hours – more than a crew shift – within New Orleans after leaving Union Pacific control.

And that is our fastest train on the route.

The following map illustrates the rail complexity in New Orleans, highlighting the primary “Back Belt” route in yellow.

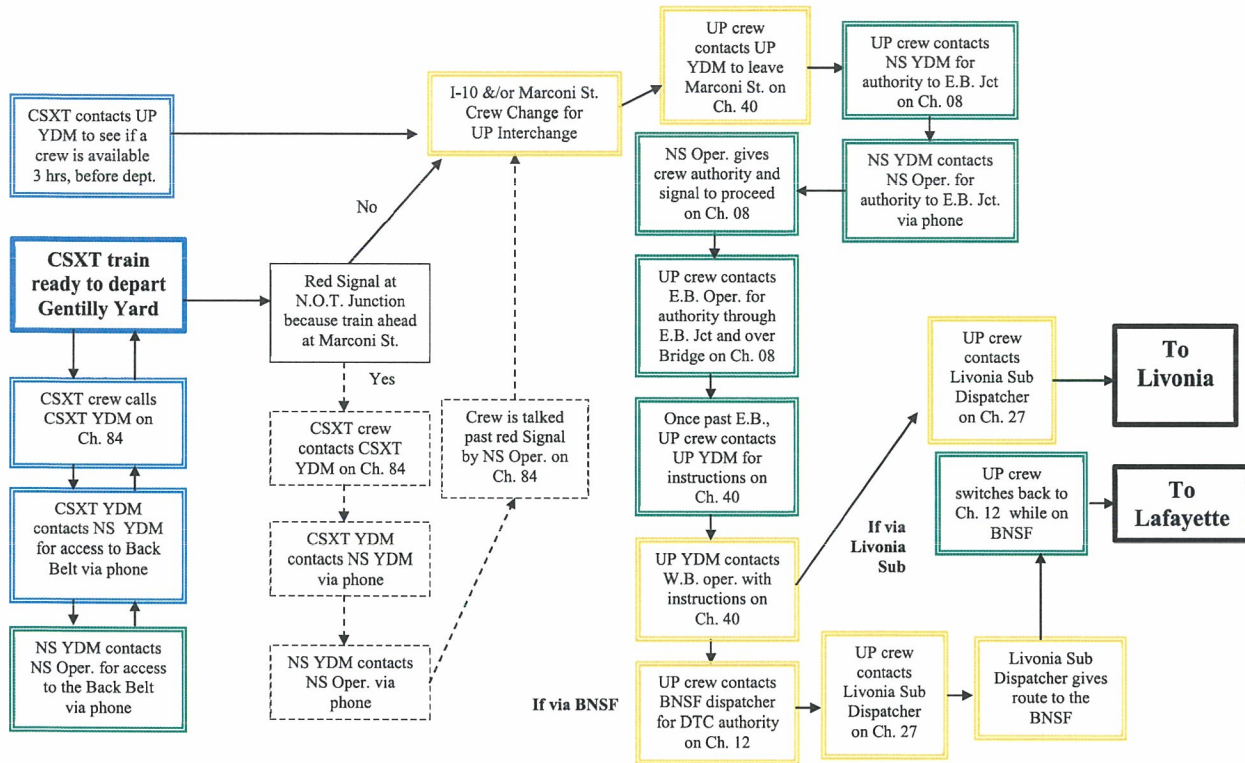


Starting from the west, the massive Huey P. Long Bridge over the Mississippi River provides the only route connecting Union Pacific and BNSF on the west side of the river with NS, CSX, KCS, and CN on the east. The bridge is owned by a city-owned entity called the New Orleans Public Belt (NOPB), which often finds itself caught between the demands of five competing carriers for use of the bridge and related trackage. In addition, the independent NOPB has its own ideas about how to run the bridge. For example, NOPB recently proposed shutting down one of the two tracks over the bridge for a few hours in the evening to operate a dinner train to the top of the bridge for passengers to enjoy the view – a proposal that would force freight railroads to divert traffic to other gateways.

The double-track bridge feeds into a railroad called “the Back Belt,” the primary interline route through New Orleans, a portion of which is single track. Trains exiting the bridge must immediately cross busy CN and KCS tracks serving New Orleans. Once beyond that hurdle, trains must get clearance to use the Back Belt. Moreover, NS and CSX sometimes cannot accept Union Pacific trains, causing added delay. The alternative route on NOPB, the Front Belt, is hopelessly circuitous and delay-prone, and traverses the most popular tourist attractions in New Orleans, next to the French Quarter.

Moving a train across New Orleans also confronts many barriers. As the following chart shows, to move a train from CSX to Union Pacific via the Back Belt requires calling ten or eleven contacts to obtain movement authority and involves 13 to 16 communications steps, every one of which can be a source of delay.

CSXT to UP Interchange via Back Belt – Communication Process



Note: There are 8:00am, 15:00 and 22:00 conference calls between UP, CSXT, NS and BNSF to discuss daily interchange plans. NS Operator is in Birmingham, AL (E.B. = East Bridge Jct., W.B. = West Bridge Jct.)

		(via Livonia)	(via Lafayette)
Number of people involved	-	10	11
Number of communication steps	-	13	16

Meanwhile, public officials (including some in Washington) and several citizen groups oppose any additional train operations on the Back Belt. At the same time, there is strong opposition, including from more than a dozen shippers and the New Orleans Board of Trade, to any use of the Front Belt for through-train movements. Even without changing the competition rules, the Board and the nation already face a major challenge in maintaining, much less expanding, this gateway of national significance for rail traffic. The Board should consider New Orleans a warning flag for this proceeding, although it is only one example.

In contrast, in recent years the Class 1 railroads have developed interchanges for interline through trains in locations like Memphis or Salem, Illinois, which involve little delay and save hours or even days of transit time. Union Pacific and its connecting carriers created the

rural Illinois gateways at great cost over many years and designed their service plans to avoid more congested terminals. Union Pacific and other railroads need to retain the right to determine interchange points to maintain fluid operations that benefit all shippers.

B. Expanded Terminal Access Would Reduce Productivity and Service

A number of commenting parties appear to believe that increasing inter-carrier switching, especially in rail terminals, is innocent or minimally intrusive. This is a mistake that can cause severe damage to the national rail network. Mr. Manion of Norfolk Southern and I have already explained that interchanges are inherently inefficient. They delay rail cars and require railroads to use more capacity in terms of rail cars, locomotives, crews, and track to move a given volume of traffic. They require additional work, and all of this increases cost. As the New Orleans example shows, forced interchanges may add switching demands where there is no rail capacity, crippling service. If shippers can decide whether, where and when a railroad must hand-off cars to another, the national rail network will become unmanageable.

Reciprocal switching has less visible impacts as well. Union Pacific works closely with its customers to ensure that car flows are compatible with our capacity and with theirs. For example, it does no one any good to jam 30 shipments into a busy terminal when the customer can unload only four cars per day. We must control car flows to keep the customer supplied, without delaying its goods or congesting our facilities. When reciprocal switching is imposed, the railroad serving the customer no longer participates in the line haul and loses both visibility of shipments and the ability to control how many cars are coming via the connecting carrier. The serving carrier is forced to become the “buffer,” whether or not it has any buffering capacity. We cannot see the shipments coming, and have no ability to plan for them. This is an especially serious problem if empty cars pile up for shippers, and the shippers – contrary to OT-5