

**Docket No. 21-7093 and 21-7095**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**In re Rail Freight Fuel Surcharge Antitrust Litigation, MDL No. 1869**

**Donnelly Commodities Incorporated et al.,**

*Plaintiff-Appellees,*

**v.**

**BNSF Railway Company et al,**

*Defendants-Appellants.*

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**Oxbow Carbon & Minerals LLC et al.**

*Plaintiff-Appellees,*

**v.**

**Union Pacific Railroad Company**

*Defendants-Appellants.*

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*On Appeal by Permission under 28 U.S.C. 1292(b) from Orders of the  
United States District Court for the District of Columbia  
Case Nos. 07-mc-489 (MDL 1869), 11-cv-1049, Hon. Paul L. Freidman*

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**BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AND THE  
AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION  
AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS**

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## CORPORATE DISCLOSURE STATEMENTS

The Association of American Railroads is an incorporated, nonprofit trade association. The Association of American Railroads has no parent company and is a nonstock corporation.

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The American Short Line and Regional Railroad Association is an incorporated, nonprofit trade association. The American Short Line and Regional Railroad Association has no parent company and is a nonstock corporation.

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## STATEMENT OF INTEREST OF AMICUS CURIAE<sup>1</sup>

*Amicus curiae* Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads, many smaller freight railroads, Amtrak, and some commuter authorities. AAR's members account for the vast majority of the rail industry's line haul mileage, freight revenues, and employment.

AAR engages in a variety of activities to promote safe and efficient railroad transportation. Because the North American railroad system is an integrated network in which railroads must constantly interchange equipment and freight, one of AAR's main functions is developing and maintaining industry standards, rules, guidelines, and processes that facilitate those interchanges.

*Amicus curiae* American Short Line and Regional Railroad Association (ASLRRA) is an incorporated, nonprofit trade association representing the small and mid-sized railroads operating throughout North America. These small businesses often provide a direct connection to the national network for large areas of rural and small-town America, thereby helping business and employment stay local.

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<sup>1</sup> Pursuant to FRAP 29(a)(4)(E), *amici* state that no counsel for any party authored this brief in whole or in part, no party, party's counsel, or any other person, other than *amici*, their members or their counsel, contributed money to fund preparing or submitting this brief. All of the parties have consented to the filing of this brief.

Both *amici* engage in public advocacy, and frequently appear on behalf of the railroad industry before Congress, the courts, and administrative agencies in matters of significant interest to their members. This advocacy includes participation as *amicus curiae* to represent the views of their members when a case raises an issue of importance to the railroad industry as a whole.

This is such a case. The court below issued an unduly restrictive interpretation of an important statute designed to facilitate the railroad industry's ability to provide competitive interline service to its customers. That ruling will chill the lawful collaboration that is essential for railroads to provide efficient interline service, not just for the railroad defendants but also for the many other railroads, large and small, that also frequently provide interline service to their customers. *Amici* do not get involved in their members' commercial activities. However, because *amici* work closely with their members on a host of issues related to the provision of interline service they are in a position to bring to this Court's attention information about the railroad industry that will assist the Court in understanding the problematic aspects of the ruling below.



## ARGUMENT

### **I. The Railroad Industry’s Competitiveness, an Essential Ingredient for a Strong National Economy, Depends on the Ability of Railroads to Interchange Traffic Efficiently.**

The inherent nature and structure of the U.S. railroad system requires railroads to both compete and collaborate on a daily basis, a fact expressly recognized by Congress in 1980 when it released the railroads from the regulatory shackles that had long hindered the industry’s competitiveness. Among numerous revisions made to existing law, Congress established a prophylactic evidentiary rule of admissibility in antitrust actions, covering discussion or agreements among railroads “concern[ing] an interline movement.” 49 U.S.C. §10706(a)(3)(B)(ii). Congress took this step to facilitate collaboration among two or more railroads providing a joint (interline) service to customers, by, as the District Court explained, “prevent[ing] rail carriers from facing antitrust exposure for lawful communications about interline traffic.” Op. at 13. Nonetheless, the District Court read that statute in an unduly restrictive way, holding that to be covered, “an interline movement must be an identifiable movement or movements with identifiable circumstances, such as a specific shipper, specific shipments, and specific destinations.” Op. at 40. The Court also interpreted the statute to mean that only evidence of discussions or agreements that solely concerned interline movements may be kept from the jury. Op. at 48-49.

That ruling is premised on a highly impractical and uninformed view of the nature of the collaboration that railroads must undertake to provide effective and competitive interline service to their customers. Indeed, the Court’s restrictive approach undermines the very policy the statute was intended to promote. The railroads are not advocating in this Court that they be permitted “to collaborate where they should compete,” Op. at 14, but only that their ability to collaborate where necessary—on interline movements—not be so arbitrarily restricted as to chill essential, procompetitive, and entirely lawful collaboration. To understand why and how railroads must work together in many circumstances in order to be competitive and efficient, it is necessary to appreciate the nature and structure of the railroad industry.

**A. The railroad industry quickly developed into an integrated nationwide transportation system.**

The railroad industry has played a prominent role in the development and growth of the United States and its national economy. The first intercity railroad in the United States—the 13-mile Baltimore and Ohio Railroad—was completed in 1830. Association of American Railroads, *A Short History of U.S. Freight Railroads* 1 (available at <https://www.aar.org/wp-content/uploads/2020/08/AAR-Railroad-Short-History-Fact-Sheet.pdf>). Growing along with the nation, the industry expanded quickly. By 1840, more than 2,800 miles of railroad were in operation; by 1850, over 9,000 miles; and by 1860, over 30,000 miles. Association

of American Railroads, *Chronology of America's Freight Railroads* (available at <https://www.aar.org/wp-content/uploads/2020/07/AAR-Chronology-Americas-Freight-Railroads-Fact-Sheet.pdf>).

In the early decades, railroads were concentrated in the eastern United States where the majority of people resided. In 1869, spurred by federal legislation, the industry became a transcontinental system when the Central Pacific and Union Pacific railroads linked up in Promontory, Utah. Indeed, the expansion and growth of the United States was bound up with the expansion and growth of the railroad industry. *See State of Calif. v. Cent. Pac. R.R.*, 127 U.S. 1, 39-40 (1888) (describing efforts by Congress, pursuant to its constitutional authority, to facilitate the “creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories”). Weathering turbulent economic times during the latter part of the nineteenth century, the industry’s growth continued, and by 1917, 1,500 railroads operated over more than 250,000 miles of track and employed 1.8 million people. *A Short History of U.S. Freight Railroads*, at 1.

Two key developments led to an integrated railroad system. In the early days of railroading, at the location where two railroads met lading being carried by one railroad was unloaded and transferred into the cars of the other railroad. “This resulted in waste of time and money, and the railroads themselves soon adopted the practice of permitting the loaded cars to pass from their own tracks to those of the

connecting roads.” *Chicago, Rock Island & Pac. Ry. Co. v. United States*, 284 U.S. 80, 90 (1931).

Similarly, early railroads used a number of different track gauges—the distance between the inside of the railheads. In 1863, as part of the planning for the transcontinental railroad, the federal government mandated that a standard gauge of four feet, 8.5 inches be used in that system. By 1887, nearly all railroads had adopted that standard gauge. Standardizing the gauge made it possible for cars on one line to interchange onto an adjoining line anywhere throughout the railroad network. *See* JOHN WESTWOOD AND IAN WOOD, *THE HISTORICAL ATLAS OF NORTH AMERICAN RAILROADS* 106-109 (2011).

As railroads became an important economic force during the second half of the nineteenth century, Congress aimed its first effort to comprehensively regulate an industrial sector at the railroad industry. Interstate Commerce Act of 1887, c.104, 24 Stat. 379. This regulatory scheme developed against the backdrop of a common law common carrier obligation which required railroads to “carry for all persons who applied,” at “reasonable” charges. *I.C.C. v. Baltimore & Ohio R.R.*, 145 U.S. 263, 275 (1892). This obligation was first incorporated into federal statute in 1906 and remains the law today. H.R. Rep. No. 96-1035, at 91 (1980); 49 U.S.C. §11101(a); *see also* 49 U.S.C. §10703 (“Rail carriers...shall establish through routes” and “rates and classifications applicable to those routes”); *United*

*States v. Pennsylvania R.R.*, 323 U.S. 612, 615 (1945) (“It has long been held...that...railroads may be compelled to establish through routes and to interchange their cars with each other.”)

**B. Because even the largest railroads do not span the entire continent, large and small railroads must work together to provide “interline” service to many customers.**

Over the years the railroad industry has evolved as a result of consolidations, acquisitions, bankruptcies, and the rationalization of systems. Today’s industry is composed of more than 600 railroads operating over nearly 140,000 miles of track, serving nearly every industrial, wholesale, retail, and resource-based sector of the economy. Association of American Railroads, *Railroad Facts* 3 (2020 ed.). The seven largest, classified as Class I railroads, account for the majority of railroad revenue, mileage, and employment, with the four largest each operating in over 20 states.<sup>2</sup> However, the smaller Class II and III railroads also play a vital role in the network. Many of the smaller railroads operate over lines that were spun off by larger railroads which, due to low traffic volume and other factors, were not profitable as part of a larger system. Operating on an entirely different scale, these “shortline” railroads typically interconnect with one or more larger railroads,

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<sup>2</sup> Railroads are classified as Class I, Class II, or Class III, based on their annual operating revenue. 49 C.F.R. Part 1201, 1-1.

providing access to many origins and destinations that the larger railroads do not directly serve.

Railroads in the United States are integral to international, as well as domestic, commerce. The U.S. railroad system links up with the railroad systems of Canada and Mexico, with a great deal of traffic being interchanged for cross-border transportation. Additionally, a substantial portion of rail shipments are bound to or from ports for export and import.<sup>3</sup>

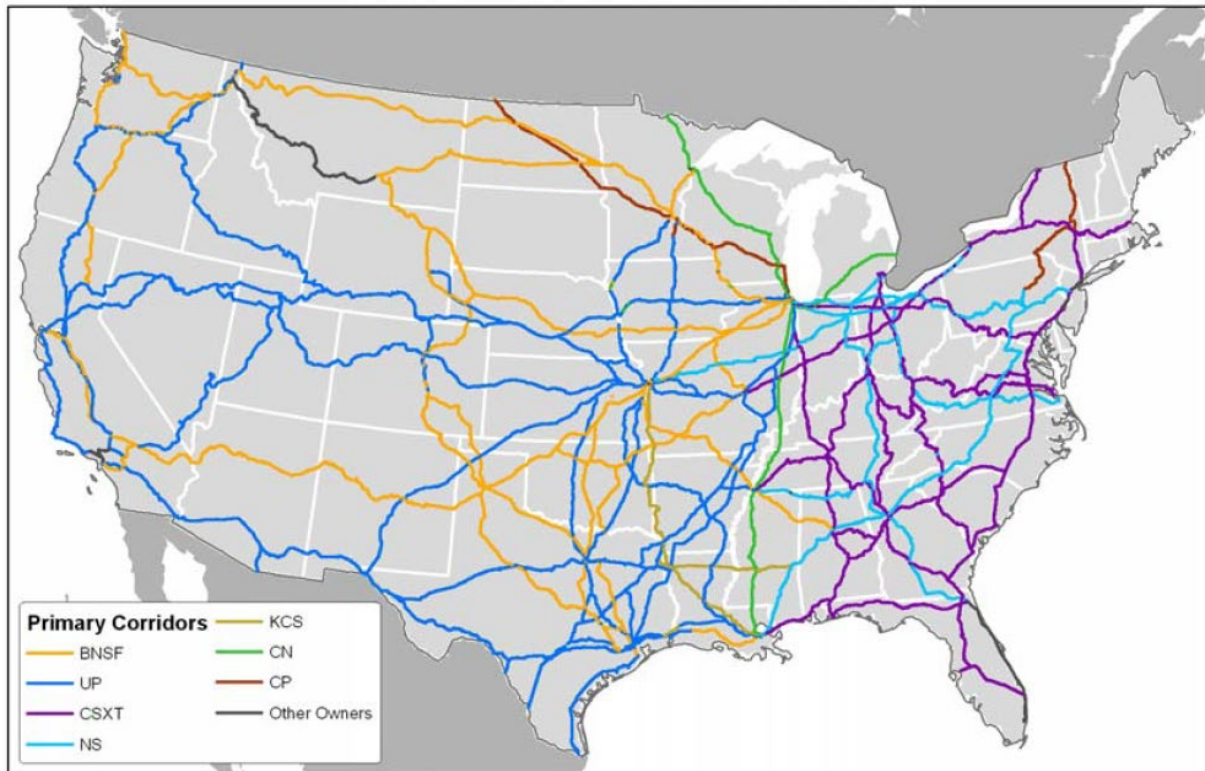
While the railroad industry has spanned the continental United States for over 150 years, no single railroad has ever done so, and that remains the case today. Moreover, even the largest railroads do not directly serve many origin and destination points in their own region. The National Network Class I Railroad map at page 5 of Appellants' brief, reprinted below, underscores those points. Despite the Class I railroads' extensive systems, it is obvious that their tracks do not reach many parts of the country. The map also highlights the railroad network's interconnectedness, showing major interchange points, such as Chicago, St. Louis, Kansas City, and Memphis, where multiple Class I railroads meet and head off in different directions, as well as numerous other locations where the lines of two

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<sup>3</sup> In 2014, international trade accounted for 35% of U.S. rail revenue, 27% of U.S. rail tonnage, and 42% of carload and intermodal shipments. Association of American Railroads, *Freight Railroads & International Trade 3* (March 2017) (available at <https://www.aar.org/wp-Content/uploads/2017/12/AAR-Freight-Railroads-International-Trade-Report-March-2017.pdf>).

Class I railroads interconnect. Though not shown on the map, many of the gaps in the Class I network are filled by Class II and III railroads.

**Figure I. National Network of Class I Railroads**



**Source:** Cambridge Systematics, Inc., National Rail Freight Infrastructure Capacity and Investment Study, September 2007.

**Note:** This map shows the Class I railroads in the United States. Not all lines shown are subject to the PTC implementation mandate.

**C. Interline service, which is provided over a complex network, constitutes a significant share of the railroads' business.**

Given the industry's structure, not only is interchanging traffic a legal obligation, it also is a practical necessity if railroads are to remain a viable national transportation system. An obvious feature of the rail network is that two, and sometimes more, railroads must work together to move freight between many origins and destinations. On a daily basis traffic is interchanged between the large

eastern and western railroads, between the large railroads in each region, and between the large railroads and numerous smaller railroads, in a wide array of combinations.

Though the number varies somewhat from year-to-year, “interline” moves constitute around a third of all railroad shipments, accounting for a huge volume of rail movements.<sup>4</sup> In 2019, 9.3 million interline shipments originated or terminated in the United States—7.4 million carloads and 1.95 million intermodal units.<sup>5</sup> Most interline shipments involved two railroads, but at least 17 percent involved three or more railroads.

Interline traffic moves through a highly complex network. In 2019, 10.7 million interchanges occurred, involving 1,344 junctions where two or more railroads interchanged traffic. Because major junctions, like Chicago, consist of multiple interchange locations, the number of distinct locations where railroads interchanged traffic was even greater—about 3,740 in 2019. In Chicago alone, 2.3 million shipments were interchanged, with just three different pairs of large railroads accounting for nearly 1.3 million interchanged shipments.

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<sup>4</sup> The data on interline railroad shipments provided in this section is derived from information on the movement of rail cars from origin to destination reported to AAR subsidiary, Railinc Corp., by over 500 railroads.

<sup>5</sup> Intermodal traffic refers to shipments that move on at least two modes of transportation, primarily in containers—which also can be transported on ship or truck—but in some cases in trailers.



A nationwide network that includes several hundred railroads translates to numerous interchange combinations. In 2019, Class I railroads delivered freight at 2,705 interchange locations (including border locations); at 1,129 of those locations, delivery was made to another Class I railroad, and at the remaining locations to Class II and III, and switching, railroads. Class I railroads received freight at 1,908 interchange locations, while smaller railroads received freight at 1,832 interchange locations. Clearly, interline railroad operations involve not just interchange between two Class I railroads, but also the frequent participation of small railroads.

**D. The discussions and agreements in which railroads must partake to provide competitive and efficient interline service cover a host of subjects and often cannot practically be limited to an identifiable circumstance or solely to an interline movement.**

Interline rail service does not come in only one flavor. It may involve infrequent carload shipments to a small customer, with a Class III railroad originating or delivering the shipment. Or it may involve frequent, dedicated intermodal trains moving over the lines of two Class I railroads from a western port to a populated region in the east. In any event, the network's complexity requires railroads to collaborate effectively and efficiently about interline shipments originating at myriad locations, involving a host of commodities, shippers, destinations, and types of service. That collaboration must address numerous commercial, operational, and other issues, both at a micro and macro

level. Regardless of the particulars, it is vital that interline service provided by railroads be seamless to the customer, *i.e.*, that by all appearances the service is being provided by one carrier from beginning to end, because that is what trucks, railroads' main competitors, can do.

1. The process by which interline rail rates and other key terms of service are developed and applied runs the gamut. To begin, discussions about rates must cover not just the basic transportation rate and any applicable surcharges and other ancillary charges, but also how revenue is to be divided between the participating railroads, and billing and collection responsibilities. Rates and other commercial terms may vary based on the commodity, the length of haul, the type of car used, and the volume of traffic, among other things. Or they may be more generally applicable.

With respect to some segments of business, rates are customized to a particular shipper, typically through a private contract rate. However, to be competitive with other transportation modes, railroads providing interline service must be able to offer attractive rates to a range of customers upon request. Therefore, tariff rates need to be developed that apply, not to a specific shipper or shipment, but to a class of commodities or equipment types, or to shipments using particular routes or junctions. These rates may be formulaic in nature, *i.e.*, if certain general conditions or parameters are met, a particular rate applies. To the

extent discussions and agreements between interlining railroads involve the development and application of general prices, they would not, as the District Court would require, be limited to identifiable circumstances because they apply in many circumstances.

2. Beyond establishing rates, interline partners must collaborate on the non-price aspects of an interline move. Those terms often take on heightened importance when railroads are competing for new interline business or facing stiff competition to retain existing business. In those situations, the participating railroads must not only offer the customer an attractive price, they also must offer a service that meets a customer's expectations more effectively than the competition. For example, some customers may always need their shipments to be delivered on a tight schedule; others, facing more variable (perhaps seasonal) demand, may need less-regular deliveries and also may require some shipments to be stored for a period prior to final delivery.

Winning or retaining business may call for creating a new service offering that appeals to a single large customer or to a number of customers with varied needs who are located along a particular rail corridor. This may require an analysis of the market at both ends of the move, expected traffic volumes, and whether the participating railroads will have the power (locomotives) and capacity to meet the customer's needs. Collaboration may be needed about the most effective way to

allocate responsibility for the different aspects of the service. Sometimes each railroad may use its own locomotives for its portion of the move. In other situations, rather than switching locomotives at the interchange point, the locomotives of the delivering railroad will continue to pull the train on the line, and with the crew, of the receiving railroad. Interline partners also must agree on the best way to market their joint service. Even when everything is in place, they will only remain so until changing market conditions might call for revisions to a price or service.

3. Interlining railroads also must discuss and reach agreement on the timing and logistics of supplying and switching cars. In an industry that utilizes over 1.5 million pieces of rolling stock to perform its core service, logistics is a matter of the highest importance.<sup>6</sup> Simply put, to effectively serve customers railroads need to have the right cars, in the right place, at the right time. If cars remained on the line of a single railroad at all times, car movement and placement would be relatively simple.

But that is not how the network operates. Interlining traffic also means interchanging cars. For some car types, multiple railroads are parties to ICC-approved agreements under 49 U.S.C. §11322, that allows them to centrally

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<sup>6</sup> In 2019, there were 1.67 million freight cars in the North American fleet, composed of seven major car types. *Railroad Facts* at 53, 54.

distribute empty cars, and provides antitrust immunity for that activity. 49 U.S.C. §11321. *E.g.*, Interstate Commerce Commission, *Railroad Car Service Pooling Application (Boxcars)*, Fin. Docket No. 30969 (1987). However, most empty cars move under more general “car service” rules or other arrangements. Thus, when railroads provide interline service they need to discuss and agree how to get the right cars, to the right place, at the right time, a matter that often transcends individual shipments, commodities and destinations.

Often, there is more than one way to get from a rail origin to destination, necessitating discussions about how to route shared traffic, including preparing for contingencies that may require rerouting, such as floods, washouts, or unanticipated congestion on the line. Less than optimal routing can lead to delayed shipments and missed slots at yards, situations that must be avoided in a highly competitive transportation market.

Collaboration on operational and logistical issues often cover large volumes of shipments and is essential to providing competitive interline rail transportation service. Routing, capacity, and asset utilization all impact the cost structure of providing the transportation service. In order to offer a competitive rate, interlining railroads must work together to provide both a commercially and operationally viable service by making efficient use of their routes and assets, spread over many shipments and customers.

For example, shipping crude oil from Canada to the Gulf of Mexico called for collaboration between the Union Pacific Railroad and two other Class I railroads. First, Union Pacific and a Canadian railroad had to determine whether a viable business opportunity existed. After receiving the shipments at an upper midwest interchange point, Union Pacific moved them to another interchange point where a third railroad provided delivery to points in Texas. The final leg of the shipment required coordination between Union Pacific and the third railroad about capacity issues—the ability to handle the anticipated volume of shipments at destination—and how to coordinate the flow of cars in both directions.

Norfolk Southern has also worked with a Canadian railroad, in this case to create a service for crude oil shipments from Canada to the eastern United States. Offering a competitive service required extensive discussions on capacity and routing-related issues aimed at optimizing the use of locomotives, a very expensive, but obviously essential, asset needed to provide rail service.

Union Pacific was involved in another three-railroad arrangement to move freight from Mexico to various destinations in the southeastern United States. The Mexican leg of the trip, which included stops to pick up additional freight, had to be coordinated to meet delivery windows to line up with Union Pacific's outbound trains at the interchange point. The railroads also had to coordinate the northbound

and southbound flows; the business only works economically if the shipments heading into the U.S. could be offset by shipments heading to Mexico.

Norfolk Southern has partnered with other railroads in two joint ventures to provide customers with options neither partner could provide separately. The former, an arrangement with a small railroad in the northeast, has enabled Norfolk Southern to offer a second competitive rail option in that region. The latter arrangement enabled Norfolk Southern to connect with another railroad serving the west coast, facilitating an interchange with the western railroad at a far more efficient junction than otherwise would have been the case. Making these enterprises work required the railroads to have macro-level discussions on potential business, and the number of cars and locomotives that would be needed to handle that business.

These are but a few examples of the collaborations by interline partners involving significant segments of business, which required extensive planning and coordination to enable the railroads to offer transportation service that was attractive to multiple customers. As in numerous other situations, the challenges the railroads needed to discuss and resolve to make this business work were not limited to a specific shipper, shipment, or destination. Had such individualized discussions been required, the business surely would have gone elsewhere.

4. Some of the briefing below suggests that the Interline Settlement System (ISS) serves as a substitute for discussions and agreements on prices between interline railroads. *E.g., Statement of Interest for the United States in Support of No Party Regarding the Meaning of 49 U.S.C. § 10706(a)(3)(B)(ii)*, at 15 (filed July 13, 2020). That view misapprehends the scope and purpose of ISS, a centralized computer application, developed and operated by AAR’s subsidiary, Railinc Corp., that railroads use to “concur” about rates and divisions on interline moves in which they participate. However, the “deals” which are confirmed through ISS are the result of agreements reached by interline partners outside of ISS and preceding any “settlement” through ISS.

ISS was created to address problems that occurred after deals were made, not as a substitute for collaboration between interline partners. In a paper environment, the process of settling revenue divisions on interline moves was fraught with errors, leading to time-consuming and resource-intensive disputes, as well as inaccurate billing of customers. ISS addresses those problems by providing interlining railroads an electronic means of communicating rates and divisions, concurring to those rates and divisions, and resolving discrepancies in advance of billing and settlement.<sup>7</sup> However, to get to the point where rates and divisions can

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<sup>7</sup> Railinc, *Guide for Railroads* 36 (2021) (ISS “provides the rail industry a method to settle interline revenue via EDI [and] was designed to streamline past



be communicated through ISS, the railroads involved in the move still need to work together on their shared interline business to determine how to price it—in addition to discussing and agreeing on the non-price aspects of the transportation. ISS provides a mechanism to confirm that the railroads are on the same page once a rate/division has been negotiated/established, so the settlement goes smoothly, without errors. But ISS does not take the place of the processes that are necessary to establish interline rates.

It also has been suggested that AAR Accounting Rule 11 offers a viable alternative to interline rates. *See, e.g., Statement of Interest for the United States*, at 14-15. Under Rule 11, “each carrier separately negotiates the rate for its portion of an interline movement directly with the shipper, and then collects that rate directly from the shipper with little or no carrier-to-carrier discussion of prices.” *Id.* at 15. Obviously, this is a completely different product from the customer’s perspective. While there may be reasons for utilizing Rule 11 in some situations, it is hardly a recipe for seamless service, as the customer must negotiate rates with multiple railroads and pay multiple bills, for what ostensibly is a single origin-to-destination move. Moreover, even if a shipment is handled under Rule 11, that

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industry practices and significantly increase the efficiency and overall quality of interline settlements” by providing “the industry with a means to identify waybill errors before they result in settlement disputes.”) (available at <https://public.railinc.com/sites/default/files/documents/GuideforRailroads.pdf>).

does not obviate the need for the railroads providing the transportation to discuss and agree on many of the non-price matters relevant to the service.

5. Because each railroad's ability to satisfy its customers' needs depends on its interline partner(s)' ability to do the same, they must work together to meet the challenges of providing attractive interline transportation options to customers. Often this is in competition with trucks that do not face the same interlining issues. The sheer volume and types of railroad customers (and potential customers), origin-destination pairs, and junction and interchange locations would render it unfeasible—indeed, virtually impossible—to effectively compete for interline business by engaging in highly compartmentalized and microlevel discussions that are limited to “a specific shipper, specific shipments, and specific destinations.”

Of course, the same cars, locomotives and crews that are used to move interline traffic also are used to move single-line (local) traffic. Therefore, many of the variables, features and logistics required to offer interline rail transportation services exist in the markets where interline partner railroads directly compete with each other. Many of the costs incurred in providing transportation service, such as the cost of fuel (which is relevant to this case), do not change from interline to single-line service. Indeed, from the customer's perspective, whether the transportation service is provided by one railroad, or multiple, railroads, is likely irrelevant as long as its price and service requirements are met. Therefore, it is

unrealistic to expect that interline discussions would never include subjects that are relevant to both interline and single-line moves.

Section 10706(a)(3)(B)(ii) is simply a nod to a key and unique feature of the railroad network. Railroads must collaborate and cooperate if they are to compete effectively against other modes in a highly competitive transportation market. Reading Section 10706 in a restrictive manner will compel railroads to make the unappealing choice of radically altering the way they create and provide interline service or living with the prospect that evidence reflecting their lawful communications may be spun into a narrative aimed at convincing a jury of the existence of an anticompetitive conspiracy. Even though much of the collaboration by interline partners involves operational rather than commercial issues, the protections of Section 10706 are still necessary. Operational discussions and agreements often address capacity and routing issues, and the level of service that can be provided. Just as evidence of lawful discussions about interline rates might be used to allege a price-fixing conspiracy, evidence of lawful discussions about operational issues relevant to interline service might be used to allege a conspiracy to limit supply or service.

That cannot be what Congress intended when it markedly revised existing law, including by enactment of Section 10706, to enhance the railroad industry's competitiveness. In fact, the railroad industry's diminished ability to compete

effectively at the end of the 1970s is what brought about wholesale changes to the regulatory scheme, of which §10706(a)(3)(B)(ii) is a small, but vital, piece. That background and history are relevant here.

## **II. Congress Deregulated the Railroad Industry to Improve Its Competitiveness Against Trucks and Other Transportation Modes.**

### **A. Heavy-handed regulation weakened the industry financially and made it increasingly difficult for railroads to compete with trucks.**

Railroads remained the preeminent form of surface transportation throughout the nineteenth century and into the early decades of the twentieth century. However, with the advent of motor vehicles the transportation landscape began to change, and with it the financial health of the railroads. Commenting on the impact of publicly-funded highways, a prescient Supreme Court explained that

[t]he new highway, paralleling lines of the railway and intended for rapid moving motor vehicles, will, through competition for both freight and passenger traffic, seriously decrease rail traffic and deplete the railway's revenue and net earnings...Trucks, some of them 70 feet in length...will compete for the most profitable classes of freight.

*Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405, 426 (1935).

These changes eventually caught the attention of Congress. S. Rep. No. 96-470, at 5 (1979) (“Other modes of transportation—in part because of their technological advances, in part because of the provision of government infrastructure—provided increasingly tough competition for the railroads.”)

The impact of new competition on the railroad industry was exacerbated by the Interstate Commerce Commission's (ICC) pervasive regulation during the first

three quarters of the twentieth century, which took a heavy toll on the railroad industry, both financially and in terms of its physical plant. The ICC exerted great control over rail rates, making it difficult for railroads to respond to changing market conditions. H.R. Rep. No. 96-1035, at 115 (“The degree to which railroads are regulated adversely affects their ability to compete with other modes of transportation”...by weakening their “ability to be price competitive in capturing or retaining traffic.”) The Senate concluded that

[t]he causes of the change in railroad circumstances from one of financial strength at the end of the 1920’s to financial uncertainty at the end of the 1970’s are found in the historical development of the railroad industry itself, in government policies, in competing transportation technologies, and in the changing national economy.

S. Rep. No. 96-470, at 4.

Federal regulation combined with increased truck competition sent the industry into decline. *See* H.R. Rep. No. 96-1035, at 96-99. The railroads’ share of intercity freight fell, return on investment was weak, and significant bankruptcies followed. S. Rep. No. 96-470, at 3 (finding that “[a]fter adjusting for inflation, railroad ordinary income today is one-quarter of its 1947 level” and noting the “bankrupt or near bankrupt roads in the Midwest and Northeast”). The House of Representatives summarized the consequences of this condition:

Low earnings and cash flow levels have led railroads to cut back on needed capital expenditures and to reduce maintenance on existing plant facilities and rolling stock. The subsequent reduction in asset

quality has resulted in a deterioration in the railroad's ability to offer quality service and compete with other transportation modes.

H.R. Rep. No. 96-1035, at 96; *see also Midamerican Energy Co. v. Surface Transp. Bd.*, 169 F.3d 1099, 1105 (8th Cir.), *cert. denied*, 528 U.S. 950 (1999) (The ICC's "strict regulatory framework...resulted in an industry chronically plagued by capital shortfalls and service inefficiencies.").

Congress took particular note of the railroad industry's declining fortunes vis-à-vis trucks. Despite strong economic growth in the United States after World War II, "railroads [ ] carried 9 per cent fewer tons in 1977 than they did in 1947." H.R. Rep. No. 96-1035, at 110. At the end of the 1970s, in absolute terms, "trucks [ ] carr[ied] almost 50 percent more tonnage than the railroads," compared to 1947, when "railroads were hauling almost three times as much tonnage as the motor carriers." *Id.* Congress found that "in an economy that has almost tripled in size during the last 30 years, America's railroads have seen their tonnage carried fall by nearly 10 per cent and their ton-miles of freight moved increase by less than 1 per cent per year." *Id.* at 111.

Not only did the construction of roads with public money provide a right-of-way for trucks, expansion of the highway system also enabled trucks to exploit an inherent advantage. A single truck can travel between any origin-destination pairs (as long as there are paved roads between them). In many cases, however, a single railroad cannot. Railroads fund, build, and maintain their own rights-of-way and

can only go as far as those rights-of-way extend. Therefore, in contrast with a truck, the only way a single railroad can deliver freight between many origins and destinations is by collaborating with one or more connecting railroads.

**B. The Staggers Act eliminated the regulatory barriers that were hindering the railroads' ability to compete effectively.**

In 1980 Congress chose what has proven to be a wise course to address the railroad industry's problems, embarking on a deregulatory route by enacting the Staggers Act, Pub. L. 96-448, 94 Stat, 1927 (1980), and in 1995 building on that effort through the ICC Termination Act (ICCTA), Pub. L. 104-88, 109 Stat. 803.<sup>8</sup> While oversight by the federal government remains through the ICC-successor Surface Transportation Board (STB), railroads today have far more ability to respond to the market by deciding what routes to use, what services to offer, and what rates to charge. Railroads and their customers have the ability to enter into confidential contracts, 49 U.S.C. §10709, and the procedures for abandoning or selling unneeded rail lines have been greatly streamlined. 49 U.S.C. §10903; 49 C.F.R. Part 1152. As a result, the industry rebounded. *Midamerican Energy Co.*, 169 F.3d at 1106 (“Congress’s decision to deregulate the railroad

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<sup>8</sup> When considering ICCTA fifteen years later, Congress concluded that “[t]he Staggers Act has produced a renaissance in the railroad industry.” H.R. Rep. No. 104-311, at 91 (1995).

industry...has led to more efficient routes, increased profits, better service, and an enhanced ability to attract capital investment.”)

When the Staggers Act was enacted, interline railroad traffic constituted 70 percent of railroad shipments. H.R. Rep. 96-1035, at 41. In crafting its deregulatory efforts, Congress surely understood that facilitating the effectiveness of interline railroad transportation was essential to achieving a more competitive and financially stable industry, and that that required railroads to “talk to competitors about interline movements in which they interchange.” H.R. Rep. No. 96-1430, at 114 (1980). Though subsequent railroad consolidations have converted some interline moves into single line moves, interline shipments remain, and will continue to be, a significant component of railroad traffic. *See supra*, Part 1.C. Facilitating that traffic, by allowing railroads to collaborate efficiently with connecting lines in a manner that reflects the realities of the railroad network, free from the fear that such collaboration will be used as evidence of anticompetitive behavior, remains as important today as it was forty years ago. Therefore, the “procedural protections” for “lawful discussions and resulting rates,” *id.*, which Congress’ recognized railroads needed to compete effectively, must be enforced in a way that achieves their essential purpose.



### **III. The Surface Transportation Board Encourages Agreements Between Railroads That Both Compete and Collaborate Because They Are Procompetitive and in the Public Interest.**

The Staggers Act “stimulated an explosion of service and marketing alternatives that would not have been possible under the Kafkaesque regulatory regime of the pre-Staggers era.” H.R. Rep. No. 104-311, at 91. These “alternatives” have taken on greater significance as the STB has raised the bar for approval of railroad mergers.<sup>9</sup> In 2001, the STB announced that it disfavors consolidations that reduce shippers’ transportation alternatives unless they offer substantial and demonstrable public benefits, 49 C.F.R. §1180.1(a), advising that it “will consider whether the benefits claimed by the applicants could be realized by [other] means...such as joint marketing agreements and interline partnerships.” *Id.* at §1180.1(c).

Reviewing an acquisition application prior to codifying this policy, the STB emphasized the value of agreements between railroads that “both compete[ ] on some movements and cooperate[ ] on others.” *Canadian National Ry. Co., Grand Trunk Corp. and Grand Trunk Western R.R., Inc.—Control—Illinois Cent. Corp., Illinois Cent. R.R., Chicago Cent. and Pac. R.R. and Cedar River R.R.*, 4 S.T.B. 122, 149 (1999). The STB considered an Alliance Agreement the acquiring

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<sup>9</sup> The STB has authority to approve, and place conditions on, railroad mergers. 49 USC § 11323.

railroad had entered into with a third railroad that contemplated “the coordination, by [the three railroads]...of marketing, operating, investment, and other functions” and sought “to improve [the three railroads’] interline service by enabling the Alliance railroads to offer single-transaction, through-priced movements and expanded routing options.” *Id.* at 135. The STB described the Alliance Agreement as a “voluntary agreement among the three railroads to facilitate cooperation on an ongoing basis concerning through routes, including quality of service, joint rates and contracts, and revenue divisions for rail movements using these routes.” *Id.* at 145. Noting that “[t]his type of agreement is entered into regularly by rail carriers,” the STB found that this agreement in particular “should be able to enhance the attractiveness of these movements to shippers...through service coordination among the participants.” *Id.* The STB concluded that the agreement was “not likely to reduce competition between applicants and” the third railroad. The STB explained that its practice was “to encourage [such] agreements in merger proceedings” because they “can be procompetitive and beneficial” and are “in the public interest.” *Id.* The STB noted that “competing railroads are required by [law] to cooperate in the formation of through routes and rates.” *Id.* at 149.

The agreement the STB found to be beneficial and in the public interest in the *Canadian National* consolidation proceeding is but one of a great many that are

utilized by different combinations of railroads, in different parts of the country, serving numerous shippers, which, like the agreement in *Canadian National*, cover “quality of service, joint rates and contracts, and revenue divisions,” as well as “marketing, operating, investment and other functions.” In a railroad landscape where the regulator has set a high bar for consolidations of large railroads, collaborative efforts between railroads inevitably will remain an important method of providing seamless and efficient transportation to many customers. No doubt a great deal of discussion and agreement must take place on an ongoing basis to ensure that these agreements achieve their procompetitive goals. *See supra*, Part 1.D. It is hard to imagine that such discussions concerning interline movements could be effective if they had to be limited to “a specific shipper, specific shipments, and specific destinations,” lest they run the risk of being used as evidence of an anticompetitive conspiracy in an antitrust action.

## CONCLUSION

This Court should vacate the District Court's order and remand to reconsider the evidence at issue in Defendants' motion consistent with this Court's interpretation of Section 10706.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because it contains 6,472 words. Excluding portions exempted by Fed. R. App. P. 32(f) and D.C. Rule 32(e)(1), according to the count of Microsoft Word.

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)–(6) because it has been prepared in a proportionally spaced typeface in 14-point font.

*/s/ Kathryn D. Kirmayer*  
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