

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**UNION PACIFIC RAILROAD
COMPANY**

v.

**BNSF RAILWAY
COMPANY**

Docket No. NOR 42188

**UNION PACIFIC RAILROAD COMPANY'S RESPONSE
TO BNSF RAILWAY COMPANY'S MOTION TO DISMISS**

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BNSF is attempting to shut down long-standing reciprocal switching access at multiple customer locations. It is doing so by drastically increasing switching rates and by simply refusing to accept unit trains for Union Pacific service despite having no exception in its tariff. BNSF's tariff changes were targeted at locations where customers had recently switched volume to Union Pacific and where there was no change in operational need. BNSF abused its market power to punish Union Pacific and the customers who shifted business to Union Pacific, and to force them back to BNSF. Each of these facts were pled in the Complaint, and they plainly "state reasonable grounds for investigation and action." 49 U.S.C. § 11701(b).

BNSF's Motion to Dismiss argues that even if every fact alleged in the Complaint were proven true, the Board would be powerless to act. That is incorrect, and the Board clearly has jurisdiction to investigate whether BNSF engaged in

anticompetitive and retaliatory actions designed to foreclose customer access to Union Pacific and to take appropriate remedial action. The Motion to Dismiss should be denied, and the parties should be permitted to conduct discovery and develop a full factual record for the Board to consider.¹

First, BNSF has a heavy burden to bear in order to prevail on its Motion to Dismiss: all alleged facts in the Complaint must be presumed to be true, and the Board may dismiss only if the Complaint states no reasonable grounds for investigation or action.

Second, the Board's unreasonable practices jurisdiction extends to voluntary switching arrangements in these circumstances. BNSF's abuse of market power is the heart of this Complaint, and the fact that BNSF chose a voluntary switching tariff as its vehicle for that abuse does not insulate it from its legal obligation to maintain reasonable practices. BNSF's claim that such arrangements are not "transportation" within the meaning of the Interstate Commerce Act is plainly wrong. And BNSF's further attempt to re-cast the Complaint as merely challenging the level of a switching rate or the failure to provide a switching service similarly fails.

Third, an interchange agreement between carriers is not a § 10709 contract precluding Board jurisdiction. BNSF's argument is disproven by the plain language of the statute, the legislative history, and the case law. And the notion that the

¹ Union Pacific will be separately responding to BNSF's motion to hold the proceeding in abeyance.

Board lacks jurisdiction over transportation that is moved pursuant to an interchange agreement would mean that the Board would have no authority over any traffic that was interchanged between railroads, which is not what Congress intended.

Fourth, the mere fact that an unreasonable practice involves a rate does not transform an unreasonable practice claim into a rate claim, as clearly shown by Board precedents such as *Central Valley Ag* and *SP/SSW Switching Charges*.

Fifth, in order to plead its claim that BNSF's tariff is misleading, Union Pacific is not required to establish an "overt misrepresentation," and BNSF's attempted factual arguments are not appropriate for consideration on a motion to dismiss.

Sixth, Union Pacific is proceeding under the competition prong of 49 U.S.C. § 11102(c) for a reciprocal switching prescription, not the public interest prong. Therefore, BNSF's claims that the Complaint fails to plead public interest elements should be rejected. Union Pacific alleged anticompetitive and retaliatory conduct, which more than adequately states a claim under § 11102(c).

Because Union Pacific's allegations form a reasonable basis for investigation on each Count of the Complaint, the Board should deny the Motion to Dismiss and allow this proceeding to move forward toward development of a full record.

I. Motions to Dismiss Are Disfavored, And Union Pacific Has Pled Facts Amply Sufficient to Make Out the Counts of the Complaint.

"Motions to dismiss are generally disfavored." *Cent. Valley Ag Grinding, Inc. & Cent. Valley Ag Transp., Inc. v. Modesto & Empire Traction Co.*, Docket No. NOR

42159, at 4 (STB served July 25, 2018) (“*Central Valley Ag*”). There is a good statutory reason for that. The Board is only authorized to dismiss a complaint if it “does not state reasonable grounds for investigation and action.” 49 U.S.C. § 11701(b). The congressionally prescribed rule then is that, if a complaint states reasonable grounds for investigation, the Board must allow that investigation to proceed and decide the case on a full record. In evaluating a motion to dismiss, the Board views all alleged facts in the light most favorable to the complainant. *Cent. Valley Ag*, at 4; *Consumers Energy Co. v. CSX Transp., Inc.*, Docket No. NOR 42142, at 1 (STB served June 15, 2015); *Montana v. BNSF Ry.*, Docket No. NOR 42124, at 2 (STB served Feb. 16, 2011).

BNSF’s motion largely ignores these principles. Rather than demonstrating that Union Pacific’s allegations cannot support the relief sought, BNSF spends the bulk of its brief disputing the factual record and seeking legal determinations that can only be made after full merits proceedings. That is not what a motion to dismiss is for. Instead, the applicable standard asks only whether Union Pacific’s allegations, if proved, provide reasonable grounds for investigation and action.² As demonstrated below, Union Pacific has alleged specific facts that, if proved, would establish unreasonable practices in violation of 49 U.S.C. § 10702 and would support prescription of reciprocal switching under 49 U.S.C. § 11102(c).

² *Agrium U.S. Inc. v. Canadian Pacific Ry.*, Docket No. NOR 42145, at 3 (STB served Sept. 15, 2015) (“the Board may only dismiss a complaint that does not state ‘reasonable grounds for investigation and action’”).

II. The STB Has Jurisdiction Over the Unreasonable Practice Claims.

The Board's unreasonable practice authority under § 10702 reaches retaliatory and anticompetitive conduct carried out through voluntary switching tariff changes. That is what Union Pacific has alleged, and the Board has jurisdiction to investigate it.

BNSF attempts to parse the language of § 10702 in a way that would strip the Board of jurisdiction over transportation provided via voluntary reciprocal switching. That interpretation should be rejected. Without citing a single case, BNSF claims that the Board lacks jurisdiction over any “transportation” not “required by statute,” and therefore that a reciprocal switching tariff not specifically prescribed by Board order falls entirely outside the Board's regulatory authority.³ BNSF's argument ignores the “expansive definition of ‘transportation’ in 10102(9).” *Del Grosso et al.—Petition for Declaratory Ord.*, Docket No. FD 35652, at 6 (STB served July 31, 2017); *see* 49 U.S.C. § 10102(9). And, BNSF's reading would have potentially broad implications for the Board's jurisdiction and the scope of ICCTA preemption. *See, e.g.*, 49 U.S.C. §§ 10501, 10502. The notion that the Board's jurisdiction turns on whether rail transportation is “required” or “voluntary” is unsupported and should be rejected.

Next, BNSF argues that the unreasonable practices provisions of § 10702 cannot apply to BNSF's Switching Book because a more specific statutory provision

³ BNSF Motion to Dismiss, Docket No. NOR 42188 (filed July 6, 2026), at 10.

exists—specifically, § 11102.⁴ But the cases BNSF relies on for this argument do not support dismissal of Union Pacific’s Complaint. Broadly speaking, the principle those cases embody is that complainants cannot use general statutory provisions to evade the requirements of more specific statutory provisions. Here, however, Union Pacific is not seeking to evade § 11102. In fact, the Complaint specifically raises a claim under § 11102 in Count 3, in order to obtain switching access going forward at certain locations. Counts 1 and 2, by contrast, seek remedies for retaliatory and misleading actions that BNSF has taken which are contrary to law and which happen to involve a switching tariff.

What Union Pacific is challenging is not BNSF’s switch rate *per se*, or its failure to provide a specific type of switching *per se*. Rather, it is challenging BNSF’s act of abusing its market power by making specific changes to its switching tariff in an attempt to cut off shippers’ access to Union Pacific in retaliation for shippers having chosen that access. Even when a railroad is operating in an area where it ordinarily has a measure of discretion, an abuse of that discretion under the circumstances can be an unreasonable practice. *See, e.g., S&K Farms, Inc., et al. v. The Long Island Rail Road, et al.*, 357 I.C.C. 562, 569–70 (1978) (the act of nonrenewal of joint rates was found an unreasonable practice because in the circumstances it was an attempt to circumvent the specific orders of the ICC); *Kansas City Power & Light Co. v. Kansas City S. Ry.*, 361 I.C.C. 848, 851 (1979) (the act of increasing charge for partial absorption of switching rate, when considered in

⁴ *Id.* at 7–8.

conjunction with the failure to increase the amount it absorbed, was an unreasonable practice). That is precisely what Union Pacific alleges. BNSF abused its market power by acting with an anticompetitive intent to eliminate Union Pacific unit train access for multiple shippers, thereby forcing those shippers to exclusively ship their unit trains on BNSF. That conduct is an unreasonable practice.

None of the cases cited by BNSF support a different conclusion. In *Entergy*, for example, the Board held that, given the specific arguments and ultimate relief sought, the plaintiff must proceed under § 10705, which it had not invoked, because § 10705 provided a means to “remedy the precise problem about which Entergy complains.” *Entergy Arkansas, Inc. v. Union Pac. R.R.*, Docket No. NOR 42104, at 2 (STB served June 26, 2009). The same is not true here. Union Pacific *has* invoked § 11102 to obtain reciprocal switching prescriptions going forward for certain locations within terminal areas, but Union Pacific also seeks remedies for acts that are unlawful and currently causing harm. Because of BNSF’s conduct, right now shippers have fewer options, which impacts both their businesses and Union Pacific’s. Union Pacific and the affected shippers may be entitled to damages and reparations for this past and continuing conduct. A forward-looking prescription of switching under § 11102 would not remedy these past and present harms.

BNSF’s reliance on *Joseph A. Goddard Realty Co. v. N.Y., C. & St. L. R.R.*, 229 I.C.C. 497 (1938), does not help its case. There, the ICC found that the parties had not even briefed the alleged violation of then-section 1, so the agency had to

presume that the complainant may have been alleging an unreasonable practice. *Id.* at 502. And the holding in *Goddard* was not—as BNSF claims—that the complainant should have invoked a more specific statutory provision, but rather that the section 1 relief it was seeking would have contradicted other parts of the statute. *Id.* at 503 (“In other words, we are asked to do under section 1 that which under section 15(4) we are directly prohibited from doing.”).

Similarly, neither *Maislin* nor *DHX* supports dismissal. In *Maislin*, the Court held that an ICC policy relieving a shipper of its obligation to pay the filed rate was “flatly inconsistent with the statutory scheme as a whole.” *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). It has no bearing on the Complaint here. And unlike *DHX*, Union Pacific is not attempting to make “an end-run around” a since-repealed statute. *DHX, Inc. v. Matson Navigation Co. and Sea-Land Serv. Inc.*, WCC 105 (STB served Dec. 15, 2004).

Board precedent establishes that its unreasonable practices jurisdiction extends to claims involving reciprocal switching. In the *SP/SSW Switching Charges on Carloads of Grain at Kansas City*, Docket No. 40178, 1989 WL 239591 (ICC served Oct. 24, 1989) proceedings cited by BNSF, the ICC instituted an investigation of railroads’ reciprocal switching terms and conditions based on concerns that certain SP tariff actions and subsequent retaliatory tariff actions by other carriers were unreasonable practices. The ICC never suggested it lacked authority over such actions merely because they involved switching tariffs. On the contrary, the ICC explained that the “investigation of railroad practices here has

been expanded to encompass the retaliatory actions taken by other carriers, such as the reduction of absorption of these charges,” and that to the extent an investigation concerned not “the level of the charges per se, but the claim that [the carrier] has engaged in an unreasonable practice regarding switching, it centers upon the protestants’ claims that [the carrier’s] actions are anticompetitive.” *Id.* at *2, *4 n.5; *see also Kansas City Power & Light*, 361 I.C.C. at 851 (finding an unreasonable practice pertaining to switching charges).

Here, too, the heart of Union Pacific’s Complaint is that BNSF took anticompetitive, retaliatory, and misleading actions that happened to be couched in a change to its reciprocal switching tariff. Notably, the words “retaliation” and “retaliatory” do not even appear in BNSF’s motion; instead, BNSF asserts that allegations about its motives should be “[p]ut[] aside.”⁵ But those motives are the core of the unreasonable practices claims, just as they were in *SP/SSW Switching Charges*. The fact that BNSF’s actions pertain to switching does not insulate BNSF from regulatory scrutiny.

BNSF’s other contentions are just as easily dispatched. BNSF alleges that it is under no common carrier obligation to provide specific unit train rates or service. True—as Union Pacific acknowledged in the Complaint. But Union Pacific is not alleging a violation of BNSF’s common carrier obligation or making a general allegation that all rail customers are entitled to receive unit train rates. However,

⁵ Motion to Dismiss, at 1.

that does not mean that a retaliatory action to remove unit train switching options that customers have relied upon for years is somehow insulated from Board review.

Finally, BNSF's attempt to manufacture an inconsistency with Union Pacific's positions in *Omaha Pub. Power Dist. v. Union Pac. R.R.*, Docket No. NOR 42173, falls flat.⁶ Union Pacific's asserted defenses and arguments in that case are not relevant and, in any event, not inconsistent with the arguments herein. In *Omaha Public Power District*, the complaint alleged that a particular switch rate was unreasonable. *Omaha Pub. Power Dist. v. Union Pac. R.R.*, Docket No. NOR 42173, at 1 (STB served Dec. 23, 2022). But here, Union Pacific is not challenging the level of the switching rate under § 11701, but rather a practice that happens to involve a switching tariff. Because the cases discussed above demonstrate that the Board can review such actions, BNSF cannot shield anticompetitive actions by a switching tariff and call it beyond the Board's reach.

III. Grand Island Is Not Outside the Board's Jurisdiction, Because Interchange Agreements Are Not 10709 Contracts.

The Board has authority over Union Pacific's Grand Island claims. Contrary to BNSF's argument, the 1996 interchange agreement between Union Pacific and BNSF governing their interchange operations at Grand Island is not a rail transportation contract under 49 U.S.C. § 10709.⁷ BNSF's argument is untethered from the text of the statute, its legislative history, and decades of consistent

⁶ *Id.*, at 12.

⁷ Motion to Dismiss, at 13–15.

interpretation by the agency, the courts, and the railroads themselves, including BNSF.

Section 10709 pertains to transportation contracts between rail carriers and their customers. *See, e.g.*, 49 U.S.C. § 10709(a) (“One or more rail carriers providing transportation subject to the jurisdiction of the Board under this part may enter into a contract with one or more *purchasers of rail services* to provide specified services under specified rates and conditions.”) (emphasis added); *id.* § 10709(e). The plain meaning of “purchasers of rail service” is customers (*i.e.*, entities that buy transportation), not other rail carriers that exchange traffic under interchange arrangements. Union Pacific is not a “purchaser[] of rail services.” Instead, as BNSF admitted numerous times in its Motion, Union Pacific is a competing carrier.⁸ The 1996 Grand Island interchange agreement is an operational agreement governing the terms on which two competing carriers exchange traffic at an interchange point; it is *not* a contract under which Union Pacific purchases transportation from BNSF. The plain language of the statute makes clear that inter-carrier interchange agreements are not covered under Section 10709.

Likewise, the legislative history leaves no doubt that Congress understood Section 10709 to apply to contracts between carriers and their customers. The Senate Report accompanying the Staggers Rail Act described the contract provision as “intended to clarify the status of contract rate and service agreements in an effort to encourage carriers *and purchasers of rail service* to make widespread use of such

⁸ *See, e.g.*, Motion to Dismiss, at 2, 10–12, 23–25.

agreements.” S. Rep. No. 96-470, 96th Cong., 1st Sess. at 24 (Dec. 7, 1979) (emphasis added). The Report made clear that the counterparties Congress had in mind were shippers: “Contracts will give the railroads assured levels of revenues and assure shippers of specified levels of service at known rates. . . . Contract provisions offer significant transportation benefits in that they allow for better planning on the part of both shippers and carriers and should improve car utilization and allocation of equipment and other resources.” *Id.* These statements confirm that the provision was designed to govern the relationship between carriers and the customers they serve, not the operational arrangements carriers make with one another.

BNSF identifies no case where Section 10709 has ever been applied to such an agreement. *Ameropan Oil Corp. v. Canadian Nat’l Ry.*, Docket No. NOR 42161 (STB served Apr. 17, 2019), and *Omaha Public Power District v. Union Pacific Railroad*, Docket No. NOR 42006 (STB served Oct. 17, 1997), both concerned a contract between a rail carrier and a *customer*—not an interchange agreement between two carriers. In *Ameropan*, the contract at issue governed CN’s provision of rail service to facilities in Chicago where Ameropan stored and distributed asphalt. *Ameropan*, Docket No. NOR 42161, at 1–2. In *OPPD*, the contract covered OPPD’s coal shipments from the Powder River Basin to its generating facility pursuant to a confidential rail transportation contract with BNSF. *OPPD*, Docket No. NOR 42006, at 1. Neither case provides any support for the proposition that Section 10709 reaches interchange agreements between competing carriers. In contrast, there are

a wealth of instances where courts, the Board, and railroads (including BNSF) use “shippers” interchangeably with “purchasers of rail service” in the 10709 context.⁹

Interchange and joint facility agreements between rail carriers are ubiquitous. They are couplings that link the national rail network, governing the terms on which carriers exchange traffic at hundreds of interchange points across the country. If every such agreement were a Section 10709 contract, the transportation governed by those agreements would be removed from the Board’s regulatory jurisdiction wholesale. The Board would be stripped of authority over the very inter-carrier arrangements that enable the rail system to function as a

⁹ See, e.g., *Babcock & Wilcox Co. v. Kansas City S. Ry. Co.*, 557 F.3d 134, 138 (3d Cir. 2009) (precursor statute “enabled shippers and carriers to sidestep federal regulation of transportation agreements by entering into private contracts”); *Interpretation of the Term “Contract” in 49 U.S.C. 10709*, Docket No. EP 669, at 2 (STB served Mar. 29, 2007) (“To ensure that shippers and railroads would be free to enter into rail transportation contracts ‘without concern about whether the ICC would disapprove a contract,’ in the Staggers Rail Act of 1980 (Staggers Act), Congress amended the statute to provide that railroads ‘may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions.’”); *Change of Pol’y R.R. Cont. Rates*, Docket No. EP 358-F (ICC served Nov. 9, 1978) (“contract rate is defined as a railroad freight rate arrived at through mutual agreement between a railroad ... and a shipper in which the railroad agrees to provide service for a given price and the shipper agrees to tender a given amount of freight during a fixed period”); BNSF Railway Company’s Responses to Board Questions, *Navajo Transitional Energy Co., LLC v. BNSF Ry. Co.*, Docket No. NOR 42178 (filed May 15, 2023), at 2 n.2 (“The Board has recognized that ‘Congress in the Staggers Act broadly “encouraged” *shippers* and carriers to transact their rail transportation service by contract.’ *Cent. Power & Light Co. v. S. Pac. Transp. Co.*, 1 S.T.B. 1059, 1070 (1996) (citing H.R. Rep. No. 96-1430 (1980)). As the Board has explained, ‘contracting provides a much better opportunity than common carriage for a rail carrier to address in detail a *shipper’s* particular service needs, to provide service tailored to those requirements, and . . . to qualitatively distinguish such service from that offered elsewhere.’ *Id.* at 1070; see also BNSF Suppl. Reply 18-20, May 5, 2023 (discussing the importance that Congress placed on the contract provisions of the Staggers Act).” (emphasis added)).

national network. That result would render vast swaths of the Board’s governing statute meaningless—a construction that the canon against surplusage forecloses. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’” (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001))).

Because the 1996 Grand Island interchange agreement is not a Section 10709 contract, BNSF’s Motion to Dismiss the Grand Island claims on that ground should be denied.

IV. Count 1 Is Not a Rate Reasonableness Challenge.

Union Pacific’s Count 1 challenges BNSF’s retaliatory and anticompetitive conduct. The fact that BNSF’s conduct was carried out through tariff changes does not transform an unreasonable practice claim into a rate claim.

The Board addressed this precise argument in *Cent. Valley Ag*. There, the defendant carrier sought dismissal of unreasonable practice claims on the ground that the complainant was “challenging the level of [the defendant’s] accessorial charges and [was] thus effectively bringing a complaint alleging unreasonable rates, not unreasonable practices.” *Id.* at 3. The Board rejected that argument: “[t]he mere fact that a dispute involves a rate does not make it an unreasonable rate challenge.” *Id.* at 4 n.7 (citing *N. Am. Freight Car Ass’n v. Union Pac. R.R.*, Docket No. NOR 42119 (STB served Mar. 12, 2015)). Just as the complainant did in *Central Valley Ag*, Union Pacific here challenges an unreasonable *practice*—the retaliatory and

anticompetitive manner in which BNSF restructured its switching tariffs—not the rate level that resulted.

BNSF’s reliance on *Union Pac. R.R. Co. v. ICC*, 867 F.2d 646 (D.C. Cir. 1989), is misplaced. The D.C. Circuit held in that case that where the challenged practice is “manifested exclusively in the level of [the] rates that customers are charged,” the claim must proceed as a rate reasonableness challenge. *Id.* at 649 (emphasis omitted). That limiting word—“exclusively”—is decisive here. Count 1 is not a challenge to a practice manifested “exclusively” in the level of BNSF’s switching charges. Rather, Count 1 challenges the reasons for and manner of the tariff changes: that BNSF acted in a retaliatory and anticompetitive manner in adopting tariff changes that bear no rational relationship to any legitimate purpose. *See* Compl. ¶ 90. Whether the rates themselves would pass muster under any particular rate reasonableness standard is simply not a question the Complaint raises, or one the Board needs to decide.

In *SP/SSW Switching Charges on Carloads of Grain at Kansas City*, Docket No. NOR 40178, at 2 (ICC served Oct. 17, 1989)—a case BNSF itself cites¹⁰—the ICC held that to the extent an investigation concerned not “the level of the charges per se, but the claim that [the carrier] has engaged in an unreasonable practice regarding switching, it centers upon the protestants’ claims that [the carrier’s] actions are anticompetitive.” Union Pacific is not asking the Board to find that BNSF’s switching rates are too high in absolute terms; it is asking the Board to find

¹⁰ Motion to Dismiss, at 10.

that BNSF raised those rates for retaliatory and anticompetitive reasons that the law does not permit.

That rates are involved in Count 1 does not convert it into a rate reasonableness case, and BNSF's argument to the contrary would have troubling consequences. If accepted, it would mean that any carrier could immunize anticompetitive retaliation from Board scrutiny simply by implementing it through a tariff change, then requiring its competitor to satisfy rate case elements like the market dominance threshold before the Board would even investigate. Congress did not design the statute to create that loophole, and the Board has declined to read it that way. *See Cent. Valley Ag*, at 4 n.7. Therefore, on this ground, BNSF's Motion to Dismiss should be denied.

V. Count 2 Properly Pled an Unreasonable Practice for the Misleading Tariff.

A motion to dismiss is not the place for the Board to weigh facts. The Board must accept the facts pled by Union Pacific as true, and those facts plainly state a claim under Count 2. BNSF argues that Count 2 must be dismissed because Union Pacific did not identify an "overt" or "true" misrepresentation when pleading that it is misleading for BNSF to be refusing to accept Union Pacific unit train at certain locations without indicating that in its new tariff.¹¹ But the alleged "requirement of a true misrepresentation" was invented by BNSF and is unsupported by precedent. BNSF also argues that as a factual matter its actions are not misleading.

¹¹ Motion to Dismiss, at 19–22, 19 n.9.

BNSF cites no case where the Board imposed the “overt” or “true” misrepresentation standard that BNSF claims is required.¹² BNSF’s reliance on *Rail Fuel Surcharges*, Docket No. EP 661 (STB served Jan. 26, 2007), is misplaced. Far from supporting BNSF’s position, that decision confirms that the Board has imposed no such requirement. In *Rail Fuel Surcharges*, railroads were charging fuel surcharges as a percentage of the line-haul rate. *Id.* Percentage-based fuel surcharges had support in prior ICC precedent, mirrored fuel surcharge practices in other modes like trucking, and were put in place in a time when fuel prices were spiking. Thus, there was no overt misrepresentation committed when a railroad published a tariff with a percentage-based fuel surcharge. But the Board found that calculating surcharges this way was a “misleading and ultimately unreasonable practice” because there was insufficient correlation between the fuel surcharge and the increase in fuel costs for the particular movement. *Id.*, at 6–7. Nowhere did the Board impose an overt misrepresentation requirement. In contrast, the Board recognized that “misleading conduct” and “misrepresentations” are two independent avenues under which a practice could be found unreasonable. *Id.*, at 7 (noting that “authority to proscribe unreasonable practices embraces misrepresentations or misleading conduct by the carriers” (emphasis added)).¹³

¹² *Id.*, at 19 n.9, 20.

¹³ BNSF’s citation to *Cent. Valley Ag*, at 4–5, is similarly unavailing. Motion to Dismiss, at 20. The Board there did not analyze whether a misrepresentation was made when denying the motion to dismiss the unreasonable practice challenge.

BNSF’s other avenue of attack against Count 2 is to ask the Board to make factual findings in its favor—something the Board cannot do at this stage. For example, BNSF alleges that it has operational reasons for not accepting unit trains at certain locations and that it has discussed as much with customers. BNSF claims that because it “has been fully transparent” about the tariff changes, its tariff is not misleading.¹⁴ Factual assertions like this cannot be used to combat a motion to dismiss—it is the facts alleged in the complaint that have to be taken as true. *See Cent. Valley Ag*, at 3. Moreover, BNSF does not directly respond to the core of Union Pacific’s allegation, which is that BNSF has imposed a block on reciprocal switching to Union Pacific unit trains that is not disclosed in its tariff. *See, e.g.*, Compl. ¶¶ 20–22.

BNSF’s argument that its tariff clearly identifies where BNSF removed unit train switching rates is neither here nor there. Count 2 is not about unit train switching rates but rather about the acceptance of unit train traffic. Specifically, BNSF will not allow Union Pacific to ship unit trains to or from customer facilities that are purportedly open to switching under the tariff. In any event, whether the tariff is clear or misleading is a factual determination for the Board to make after the submission of evidence and argument.

Finally, BNSF incorrectly claims that its tariff is no different than Union Pacific’s.¹⁵ However, it is BNSF’s tariff changes that are challenged, and those

¹⁴ Motion to Dismiss, at 20–21.

¹⁵ Motion to Dismiss, at 22.

changes must be evaluated by the Board after the submission of evidence and argument. Moreover, BNSF's characterization of Union Pacific's reciprocal switching circular is incorrect. Union Pacific's Reciprocal Switching Circular 8005 K includes a "Reciprocal Switching Capacity" provision that clearly notifies customers that switching capacity at particular locations may impact the number of cars that are switched, and also further identifies particular locations with such limitations.¹⁶

Because Union Pacific alleges facts sufficient to state a claim of an unreasonable practice in Count 2, the Board should deny BNSF's Motion to Dismiss Count 2.

VI. Count 3 Properly Alleges that BNSF Has Engaged in Anticompetitive Conduct Under the Competition Prong of the Statute.

Section 49 U.S.C. § 11102(c) sets forth two distinct avenues under which the Board has discretion to prescribe reciprocal switching agreements: "where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service." § 11102(c) (emphasis added). Reciprocal switching thus may be prescribed either under the "public interest" prong (requiring proof of a compelling need for the switch) or under the competitive rail service prong (requiring proof of anticompetitive conduct). BNSF's

¹⁶ *UP Reciprocal Switching Circular*, at 3, available at <https://c02.my.uprr.com/wtp/pricedocs/3627575V14.pdf>; see also *id.* at 17 nn. 9 & 10 (identifying particular facilities with capacity constraints limiting the number of cars per switch).

Motion to Dismiss Count 3 reflects a fundamental misunderstanding of the statutory framework and existing case law.

BNSF spends much of its brief arguing that Count 3 must be dismissed because the Complaint fails to allege a “compelling need” or “inadequate service,” citing *Grand Trunk* and other cases. But *Grand Trunk*’s holding is limited to the public interest prong of the statute, as the decision that it overturned was promulgated exclusively under the public interest prong. *See Grand Trunk Corp. v. STB*, 143 F.4th 741, 748 (7th Cir. 2025); *see also Reciprocal Switching for Inadequate Serv.*, Docket No. EP 711 (Sub-No. 2), at 6 (STB served Apr. 30, 2024); *id.* at 138 (Primus concurring) (“the Board is adopting rules that do nothing with respect to the statute’s competitive rail service prong”).

Union Pacific’s Complaint does not invoke the public interest standard. Instead, the Complaint relies exclusively on the competition prong of the statute. *See* Compl. ¶¶ 107, 109–110. BNSF’s allegation that Union Pacific was required to plead compelling need *and* inadequate service *and* anticompetitive conduct thus conflates the two distinct statutory standards. Union Pacific does not need to plead elements for claims it is not making.¹⁷

Having invoked the competition prong of § 11102(c), Union Pacific was required to plead the elements of that claim, which Union Pacific did. Specifically,

¹⁷ BNSF’s misunderstanding of § 11102 permeates its reply. Its citations to Union Pacific briefing and argument in a terminal trackage rights case are likewise misplaced because, there, Union Pacific is challenging an order issued under § 11102(a), for which the standard is “practicable and in the public interest.”

the Complaint alleges that BNSF's tariff changes were "imposed in retaliation for the customers' utilization of Union Pacific" and that BNSF thus engaged in "an act that is contrary to the competition policies of 49 U.S.C. § 10101 or is otherwise anticompetitive"—consistent with the current regulatory standard in Part 1144—and that switching is necessary to provide competitive rail service. Compl. ¶¶110, 112.

BNSF's reliance on *Vista Chem. Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 5 I.C.C.2d 331, 340 (1989), in which complainant sought reciprocal switching pursuant to the Board's rules at Part 1144, is likewise misplaced.¹⁸ First, *Vista Chemical* was decided not at the motion to dismiss stage but rather after the submission of the evidentiary record. The Board considered the record as a whole and "all of the evidence presented by the parties" in making its determination that relief was not appropriate. 5 I.C.C.2d at 337. Second, the holding in *Vista Chemical* was based on the fact that complainant was challenging the "simple refusal" and "mere failure" to lower rates. *Id.* at 340. In that case, the agency rightly concluded that a "mere refusal to offer reciprocal switching" was insufficient to be deemed anticompetitive. *Id.* But that is not what Union Pacific is alleging. Instead, Union Pacific's Complaint alleges that BNSF's tariff changes were "imposed in retaliation for the customers' utilization of Union Pacific;" that they were intended to "make Union Pacific's service for the affected customers noncompetitive, and thus to force shippers to use BNSF service;" that they were "made in order to cut off competitive

¹⁸ Motion to Dismiss, at 29.

options for shippers that have chosen to take advantage of their access to Union Pacific’s service;” and that BNSF’s actions constitute “an abuse of market power.” Compl. ¶¶ 4, 6, 8, 106–117.

BNSF attempts to frame the relevant legal standard for the anticompetitive conduct prong as narrowly as possible, pointing to a stray reference in *Midtec Paper Corp. v. Chi. & N.W. Transp. Co.*, 3 I.C.C.2d 171 (1986), to claim that the Board must make “a preliminary finding of market power” in order to find anticompetitive conduct.¹⁹ But it is the Board’s rules that set out the standard: “necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. 10101 or is otherwise anticompetitive.” 49 C.F.R. § 1144.2. In assessing the evidence in *Midtec*, the agency did not require an antitrust-style inquiry into market power. The agency instead looked at the evidence “from a competitive standpoint.” *Midtec Paper Corp.*, 3 I.C.C.2d at 173. It was “attentive to the possibility of classical categories of competitive abuse: foreclosure; refusal to deal; price squeeze; or any other recognizable forms of monopolization or predation.” *Id.* at 173–74. It also considered whether there was any evidence of “abuses under the competitive standards of the Rail Transportation Policy.” *Id.* at 174.

Whether there is sufficient evidence to show that BNSF has engaged in any type of anticompetitive conduct is an issue of fact for the Board to decide on a full record. At this pleading stage, Union Pacific has alleged anticompetitive conduct. And Union Pacific specifically alleged “an abuse of market power.” Compl. ¶ 8. The

¹⁹ Motion to Dismiss, at 32.

Complaint thus does not concern, as BNSF claims, “mere” changes to switching rates and practices.²⁰ The alleged anticompetitive conduct is retaliatory conduct (manifested in changes to rates and practices) intended to prevent customers from using Union Pacific. These allegations form a reasonable basis for investigation and can only be addressed on the merits after the development of a full record.

BNSF’s Motion acknowledges—as it must—that foreclosure is a type of competitive abuse but contends that speculation about “possible future consequences” cannot support an inference of foreclosure or justify switching.²¹ BNSF cites no cases for this proposition. Instead, it bizarrely refers to past instances where customers expanded their use of Union Pacific at the challenged locations. But the whole point of the Complaint is that customers’ decision to increase their use of Union Pacific, in reliance on their longstanding reciprocal switching access, is what motivated BNSF to foreclose those customers’ access to Union Pacific. It is not speculative, for example, to believe that eliminating Union Pacific unit train access to grain customers while maintaining BNSF unit train service to those customers would result in the foreclosure that BNSF intended.

BNSF also implies that the Complaint is deficient by not providing “evidence” or making particular allegations.²² But these arguments miss the mark. The

²⁰ See Motion to Dismiss, at 34.

²¹ *Id.*

²² See, e.g., Motion to Dismiss, at 32 (claiming that the Complaint does not “allege that BNSF has market power over a relevant transportation service” and that the Complaint provided “no evidence that might, if proven, demonstrate the existence of market power”).

evidentiary phase will come later. At this stage, the Board's regulations require complaints only to identify complainants and defendants, set forth "briefly" the facts upon which it is based; include "specific reference to pertinent statutory provisions and Board regulations," and advise the Board and defendant "in what respects these provisions and regulations have been violated." 49 C.F.R. § 1111.2(a). The Complaint meets all of these requirements, appropriately informing the Board and BNSF as to the underlying facts and statutory and regulatory provisions which Union Pacific alleges BNSF has violated.²³

BNSF also points to the Board's pending rulemaking in Docket No. EP 788.²⁴ But that docket is not relevant, given that the Board has not finalized any action and the rules at Part 1144 govern. Even if Part 1144 were repealed, Union Pacific's Complaint is brought under 49 U.S.C. § 11102(c) and could easily proceed under the case-by-case adjudication proposed in that rule. It is disingenuous for BNSF to suggest that Union Pacific is seeking "automatic reciprocal switching whenever a competitor is dissatisfied by voluntary switching terms."²⁵ Union Pacific is proceeding via case-by-case adjudication, raising specific allegations that a prescription is warranted under the competition prong of the statute. Union

²³ To the extent BNSF in places suggests that certain assertions are unsupported by specific factual allegations, the appropriate relief to request is a motion to make more definite under 49 C.F.R. § 1111.6. That too, however, would have failed. Union Pacific's Complaint is consistent with the regulations and case law and adequately apprises BNSF and the Board of the allegations and relief sought. *Cf. NAFLA v. Union Pacific R.R. Co.*, Docket No. NOR 42144 (STB served Dec. 21, 2015).

²⁴ Motion to Dismiss, at 31.

²⁵ *Id.*

Pacific's comments in the EP 788 proceeding are not inconsistent. There, Union Pacific made certain observations about when a prescription should enter if it is imposed as "a remedy designed to address service problems." UP Comment, *Eliminating Regul. Barriers to Competition: Review of Part 1144*, Docket No. EP 788, at 1 (filed Mar. 10, 2026). But again, Union Pacific's Complaint herein is based not on service problems but rather anticompetitive conduct by BNSF.

BNSF is correct that forced reciprocal switching is an extraordinary remedy. But it is also the appropriate remedy when a carrier has engaged in anticompetitive conduct. The Complaint alleges that BNSF has done that, and indeed the circumstantial evidence surrounding BNSF's abrupt tariff changes strongly suggests it. The Board should deny the Motion to Dismiss and allow the development of an evidentiary record that it can use to apply the statutory standard.

CONCLUSION

Because Union Pacific's allegations establish a reasonable basis for investigation and action, the Motion to Dismiss should be denied in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of July, 2026, the foregoing document was served by first-class mail or email on all parties of record in this proceeding.

/s/ Sydney A. Volanski

Sydney A. Volanski