

ENTERED
Office of Chief Counsel
July 6, 2026
Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42188

UNION PACIFIC RAILROAD COMPANY

v.

BNSF RAILWAY COMPANY

BNSF RAILWAY COMPANY'S MOTION TO DISMISS

Tyler White
Travis Owsley
Amber L. McDonald
BNSF RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2383

Timothy J. Strafford
Peter W. Denton
Anthony J. LaRocca
STEPTOE LLP
1330 Connecticut Ave. NW
Washington, DC 20036
(202) 429-3000

Andrew S. Tulumello
Chantale Fiebig
WEIL, GOTSHAL & MANGES LLP
2001 M St. NW, Suite 600
Washington, DC 20036
(202) 682-7000

Brian G. Liegel
WEIL, GOTSHAL & MANGES LLP
1395 Brickell Ave., Suite 1200
Miami, FL 33131
(305) 577-3100

Counsel for BNSF Railway Company

Dated: July 6, 2026

Table of Contents

I.	INTRODUCTION.....	1
II.	BACKGROUND	6
III.	ARGUMENT	7
	A. Counts 1 and 2 must be dismissed because there is no legal basis for an unreasonable practice claim challenging BNSF’s voluntary switching arrangements with UP.	7
	1. The unreasonable practice claims must be dismissed because the Board’s authority to regulate reciprocal switching arrangements comes exclusively from 49 U.S.C. § 11102(c).	7
	2. UP’s claims regarding transportation at Grand Island, Nebraska are outside the Board’s authority.....	13
	3. Count 1 must be dismissed because it is an improper rate challenge..	15
	4. Even viewing the facts in a light most favorable to UP, the Complaint provides no basis to conclude that BNSF’s switching tariff changes were “misleading.”	19
	B. Count 3 must be dismissed because the Complaint fails to present grounds for prescribing a reciprocal switch under Section 11102.	22
	1. Count 3 must be dismissed because UP does not even allege a compelling need for a prescribed reciprocal switch at the locations named in the Complaint.....	23
	2. Count 3 of the Complaint must be dismissed because UP fails to allege inadequate service that would justify prescription of a reciprocal switch.....	26
	3. Count 3 must also be dismissed because UP cannot meet the requirements for showing competitive abuse under Part 1144 and <i>Midtec</i>	30
IV.	CONCLUSION	34

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42188

UNION PACIFIC RAILROAD COMPANY

v.

BNSF RAILWAY COMPANY

BNSF RAILWAY COMPANY'S MOTION TO DISMISS

Pursuant to 49 C.F.R. § 1111.6 and 49 U.S.C. § 11701(b), BNSF Railway Company ("BNSF") moves to dismiss all counts of the Complaint filed on May 15, 2026 ("Complaint") by Union Pacific Railroad Company ("UP") in the above-captioned proceeding.

I. INTRODUCTION

This case involves a private dispute regarding operational issues between UP and BNSF that does not belong before the Surface Transportation Board ("STB" or "Board"). Putting aside UP's pejorative claims about BNSF's intent, the facts of the dispute are not complex. And the facts alleged in the Complaint, even if they were proved, do not make out a valid legal claim that justifies Board action. The Complaint is fatally flawed and should be dismissed.

UP complains about recent changes to the terms of voluntary reciprocal switching service that BNSF has agreed to provide at certain locations. BNSF updated its Switching Book 8005-E, which sets forth the fees to be paid by other

carriers when using BNSF switching services. The updates included removal of unit train switching rates at certain locations. The Complaint acknowledges that BNSF has continued to provide switching at those locations at rates applicable to non-unit trains.

Reciprocal switching at these locations reflects voluntary arrangements between the two railroads that are outside of the Board's statutory framework. The switching services at issue here are entirely voluntary and were not established in response to a merger condition or any request by a shipper for common carrier service. BNSF has no obligation to provide switching at these locations but provides those services as part of a much larger set of voluntary reciprocal switching arrangements that are identified in the Switching Book that is attached to the Complaint. The terms of those voluntary arrangements are not subject to regulation by the Board. UP knows this, because it has repeatedly argued to the Board that voluntary reciprocal switching is not subject to the Board's regulatory jurisdiction. But UP filed the Complaint anyway, burdening the Board with an inter-railroad dispute that does not belong here.

Counts 1 and 2 – Unreasonable Practices

Counts 1 and 2 of the Complaint allege that BNSF engaged in unreasonable practices, in violation of 49 U.S.C. § 10702(2). Count 1 complains that BNSF's removal of a discounted rate for unit train switching at certain locations forces UP to pay a higher switching rate at those locations. Count 2 claims that the failure to explicitly state that unit train switching at certain locations is not available somehow

misleads UP into thinking that unit train switching is still available—even though there is no published rate.

These claims of unreasonable practices should be dismissed. The unreasonable practice statute, 49 U.S.C. § 10702(2), does not apply to the voluntary reciprocal switching at issue here, as UP has itself previously argued on multiple occasions. The Board’s authority to regulate reciprocal switching exists only under the competitive access statutes and rules, which have certain conditions and limits that must be met, and not under the open-ended unreasonable practice statute. Moreover, it is well established that a complaint about the level of rates charged by a rail carrier—which is the essence of UP’s Complaint here—cannot be dressed up as an unreasonable practice claim to circumvent the statutory provisions dealing with rates, which UP has improperly done in the present case.

Recognizing the legal flaw in seeking regulation of BNSF’s rate-related actions under the unreasonable practice statute, UP invents an equally flawed claim that BNSF’s switching tariffs are misleading, a claim which is absurd on its face. As UP acknowledges in the Complaint, BNSF communicated with UP and customers for a month prior to implementing the changes in question. Nothing alleged in the Complaint would constitute a misrepresentation, much less one that would justify Board action.

Count 3 – Prescription for Reciprocal Switching

Count 3 of the Complaint alleges that the prescription of reciprocal switching is necessary to remedy allegedly anticompetitive acts by BNSF. But the allegations

in the Complaint, even if proved, would not support the prescription of reciprocal switching under the relevant standards.

Most important, UP's request for a prescribed reciprocal switch is fatally flawed because it has alleged no facts that show a compelling need for the extraordinary remedy of mandated switching.¹ Indeed, the facts alleged show that there is no compelling need. As the Complaint acknowledges, BNSF is continuing to offer switching services at every location complained about, at rates applicable to merchandise traffic. The Complaint does not allege that any shipper has lost access to UP as a result of the tariff changes. As UP well knows, the mere desire for a different service does not constitute a compelling need, and UP fails to provide any valid basis to conclude that there is a compelling need for a prescribed switch here.

Similarly, UP also knows, having recently argued to the Board and the courts, that a party seeking compelled use of terminal facilities must show that the existing service is inadequate. But UP says absolutely nothing about BNSF's service to the affected shippers, leaving the Board with no basis for determining whether there would be any justification for prescribing a switch in the first place. The Complaint does not even identify the through movements at issue, does not indicate whether BNSF provides any service over through routes, does not explain whether any shipper has asked BNSF to establish rates for such service, and does not identify how any

¹ See *Grand Trunk Corp. v. STB*, 143 F.4th 741, 744-45, 752 (7th Cir. 2025) (confirming that prescribed reciprocal switching requires "some actual necessity or compelling reason," not merely a showing that switching would be useful or desirable).

BNSF service is being carried out. The Complaint simply claims that UP does not like the switching service that BNSF is providing. But as a matter of law, that is insufficient to justify the prescription of a reciprocal switch. To plead a viable claim, UP must allege facts to show that BNSF's through transportation service is so inadequate as to justify the prescription of a reciprocal switch. The Complaint is completely silent on that question.

These fundamental flaws in UP's Complaint would justify dismissal of the request for prescription of a reciprocal switch even if the Board's rules did not require a separate showing of competitive abuse. But, as UP acknowledges, its request for a prescribed switch is also subject to the competitive abuse standard established in 49 C.F.R. Part 1144² and *Midtec*, which the Board and the courts have recognized further constrains the agency's discretion to prescribe switching. The first requirement to show an abuse of competition is to show that the rail carrier has abused its market power over the transportation at issue. Yet, the Complaint makes no allegations regarding BNSF's market power, let alone allegations that BNSF abused such power. As UP itself has argued recently, an abuse of market power must be reflected in an exclusion of a competitor from a market. But there clearly has not been an exclusion of UP from the market at issue here, as BNSF has continued to provide access to UP through its reciprocal switching tariffs.

² As discussed in Section III.B.3 *infra*, the pending EP 788 rulemaking does not change the pleading defects in Count 3. Unless and until the Board adopts a final rule repealing Part 1144, UP's request remains subject to the existing competitive-abuse framework established in Part 1144 and *Midtec*.

At bottom, UP's Complaint may have been a useful public relations play, but it is entirely devoid of factual and legal merit. The Complaint should be dismissed.

II. BACKGROUND

The facts relevant to this matter are not complicated. The Complaint focuses on recent changes to BNSF's Switching Book 8005-E, which sets out tariffs for reciprocal switching that BNSF provides at multiple locations. As described more fully in BNSF's June 25, 2026 Answer to the Complaint, the tariff changes included, among other things, clarification of which facilities qualify for unit train rates based on the operations required of BNSF to provide switching service at those locations. *See* Compl. Ex. C.

Following these changes, BNSF continues to voluntarily provide reciprocal switching to UP despite having no affirmative regulatory obligation to do so. No shipper has lost access to UP as a result of the updates to the switching tariffs, and the Complaint acknowledges that UP is continuing to provide line-haul transportation to the shippers identified by UP in the Complaint. *See, e.g.*, Compl. ¶¶ 41, 49, 58, 67. When UP told BNSF that it did not understand the rationale for the changes, BNSF offered to provide relevant information to assist UP. Instead, however, UP rushed to file a Complaint on May 15, 2026. UP specifically seeks an order compelling BNSF to charge UP switching fees as if the operations were simple "hook-and-haul" originations or deliveries of unit trains.

Throughout the Complaint, UP asks the Board to compel BNSF to undertake the operationally complex and costly switching operations to build or break down 90-

plus railcar unit trains—for UP’s benefit. For the reasons set out below, there is no legal basis for UP to invoke the Board’s regulatory authority to benefit from BNSF’s work and take advantage of BNSF’s terminal capacity and resources rather than expend its own.

III. ARGUMENT

A complaint must state the facts that are the subject of the alleged violations, and the Board may dismiss a complaint that does not state reasonable grounds for investigation and action. 49 U.S.C. § 11701(b). The Board will dismiss a complaint under Section 11701 when, viewing the alleged facts in the light most favorable to the complainant, the Board finds that there is no basis upon which it could grant the relief sought. *Evergy, Inc. et al. v. BNSF Railway Company*, NOR 42180, slip op. at 4 (STB served Nov. 14, 2024) (internal citations omitted). It is appropriate for the Board to dismiss this Complaint because UP has failed to allege any acts that provide a basis for the extraordinary relief it seeks.

A. Counts 1 and 2 must be dismissed because there is no legal basis for an unreasonable practice claim challenging BNSF’s voluntary switching arrangements with UP.

1. The unreasonable practice claims must be dismissed because the Board’s authority to regulate reciprocal switching arrangements comes exclusively from 49 U.S.C. § 11102(c).

Counts 1 and 2 of UP’s Complaint must be dismissed because they inappropriately challenge changes to BNSF’s Switching Book as unreasonable practices under 49 U.S.C. § 10702, while a more specific statutory provision establishes the Board’s authority regarding reciprocal switching. Board precedent

clearly shows that an unreasonable practice claim is inappropriate where a more specific statutory provision applies. *See, e.g., Entergy Arkansas, Inc. et al. v. Union Pac. R.R. et al.*, NOR 42104 (STB served June 26, 2009). The Board’s decisions are in accord with the “commonplace [canon] of statutory construction that the specific governs the general.” *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). That canon applies with particular force where Congress “has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.” *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (internal quotation marks and citation omitted).

In *Entergy*, a shipper brought an unreasonable practice claim challenging the reasonableness of an interchange commitment, but the Board held that Entergy’s challenge was not subject to the agency’s unreasonable practice authority because the more specific routing provision, 49 U.S.C. § 10705, applied. The Board stated that the “general nature of section 10702 makes it an inappropriate provision under which to establish the impropriety of an interchange commitment when there is a more specific provision that governs the behavior at issue and its effects.” *Entergy Arkansas, Inc. et al. v. Union Pac. R.R. et al.*, NOR 42104, slip op. at 1 (STB served June 26, 2009). In reaching its conclusion, the Board relied upon the deep line of precedent establishing this principle.³

³ *See, e.g., Maslin Indus. U.S. v. Primary Steel*, 497 U.S. 116, 131 (1990) (finding that “[l]abeling the carrier’s conduct an ‘unreasonable practice’ cannot disguise” a conflict with specific provisions); *DHX, Inc. v. Matson Navigation Company and Sea-Land Service, Inc.*, WCC-105 (STB served Dec. 15, 2004) (rejecting an attempt

The same principles articulated in *Entergy* and the cases upon which it relies dictate that Counts 1 and 2 be dismissed here. The Board and the courts have made clear that the Board’s general authority to regulate railroad practices under 49 U.S.C. § 10702 is inapplicable where Congress has provided that the agency has more specific statutory authority, such as in Section 11102, which provides the Board with specific authority to intervene and prescribe the conditions and compensation for reciprocal switching among carriers in certain circumstances.⁴

This principle has long been applied in the context of switching. *See Joseph A. Goddard Realty Co. v. N.Y., C. & St. L. R.R.*, 229 I.C.C. 497 (1938). In *Goddard*, the Interstate Commerce Commission (“ICC”) held that shippers could not challenge being closed to reciprocal switching as an unreasonable practice when they did not invoke a more specific statutory provision allowing the agency “under certain circumstances, to require one carrier to permit the use of its terminals by another carrier at reasonable compensation.” *Id.* at 502. The agency has also previously concluded that its authority “only applies to a switching arrangement that [the

to use “unreasonable practice” authority as an “end-run” around a repealed statutory remedy), *aff’d*, *DHX, Inc. v. STB*, 501 F.3d 1080 (9th Cir. 2007).

⁴ Section 11102(c)(1) provides:

The Board may require rail carriers to enter into 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. The rail carriers entering into such an agreement shall establish the conditions and compensation applicable to such agreement, but, if the rail carriers cannot agree upon such conditions and compensation within a reasonable period of time, the Board may establish such conditions and compensation.

agency has] found is required (either to provide competitive rail service or to otherwise satisfy the public interest).” *SP/SSW Switching Charges on Carloads of Grain at Kansas City*, Docket No. 40178, slip op. at 6 (ICC served Oct. 24, 1989); *accord CSX Corp. et al.—Control—Conrail Inc. et al.*, FD 33388, slip op. at 3 n.6 (STB served Aug. 24, 1998) (“Our authority to adjudicate the conditions and compensation in reciprocal switching agreements is set forth at 49 U.S.C. 11102(c).”).

The language of Section 10702 mandates this approach. By its terms, 49 U.S.C. § 10702 does not apply to voluntary switching agreements among carriers. 49 U.S.C. § 10702 states that rail carriers must establish reasonable rates and classifications for “transportation and service it may provide *under this part*,” and reasonable rules and practices “related to that transportation.” (emphasis added). The phrase “under this part” is critical: it limits the Board’s rate and practice authority to transportation required by the statute, not to every voluntary commercial arrangement a carrier may choose to offer another carrier. That is, rail carriers must establish certain rates for transportation when required by the statute (such as in response to reasonable shipper requests for service), and the carrier’s rules and practices for that transportation must be reasonable. At the same time, voluntary arrangements for transportation that are not required by the statute are not subject to the Board’s regulation under Section 10702.

This conclusion is consistent with the limited agency regulation of switch fees that occurred prior to the ICC Termination Act (“ICCTA”), when the statute gave the agency authority to review and suspend filed tariffs. *See* former 49 U.S.C. §§ 10762-

64, 10707 (1994). As UP itself has noted, “Congress’s elimination of the pre-ICCTA tariff filing regime resolved the long-standing tension in favor of deregulation of voluntary switching by removing any basis for the Board to assert authority over charges for voluntary switching.” Union Pacific, Motion to Dismiss, *Omaha Public Power District v. Union Pacific*, NOR 42173, at 9 (filed Oct. 11, 2022); *see also* UP Reply, FD 35740, *BNSF and Musket v. UP* (filed June 6, 2013).⁵

Reciprocal switching arrangements that are not merger conditions or prescribed by the agency are not required by the statute. There is no statute that requires a rail carrier to provide switching services to another carrier unless ordered to do so under the specific methods provided under Section 11102.

And even if BNSF were obligated to provide switching—to be clear, it is not—BNSF would be under no common carrier obligation to provide specific unit train rates for another carrier’s benefit. Even when a carrier has an obligation to provide service “it is usually at the discretion of the carrier how it wishes to satisfy its duty to provide rates and service.” *MidAmerican Energy Co. v. STB*, 169 F.3d 1099, 1106 (8th Cir. 1999).

None of the foregoing should come as a surprise to UP. These are the same arguments that UP has repeatedly made to the Board. Indeed, it has been UP’s

⁵ In *Musket*, BNSF sought a Board declaration that UP was required to provide certain switching services. UP opposed the request and the case was ultimately dismissed. Subsequently, BNSF obtained access through the construction by a shortline of additional infrastructure. Thus, while BNSF originally sought regulatory intervention, BNSF’s experience in the *Musket* proceeding shows that the proper resolution of these switching disputes is generally through private arrangements and investment.

unequivocal position that the Board has no authority to do exactly what UP is now asking the Board to do in this case: regulate voluntary reciprocal switching arrangements between carriers. Just four years ago, UP recognized that “[r]eciprocal switching service involves an agreement between carriers It is different from common carrier service, which involves a relationship between a carrier and a shipper or a person acting on a shipper’s behalf.” UP’s Motion to Dismiss at 18, *Omaha Public Power District v. Union Pacific*, NOR 42173 (filed Oct. 11, 2022). And UP expressly argued, “[t]he STB has no jurisdiction over voluntary offerings by a carrier physically serving an industry to perform switching service for loading and unloading on behalf of another carrier on shipments having an immediately preceding or following line-haul movement via the other carrier.” UP Answer at 5, *Omaha Public Power District v. Union Pacific*, NOR 42173 (filed Aug. 11, 2022). UP’s own positions expressly foreclose the relief it now seeks to compel from BNSF.⁶

Because the Board’s unreasonable practices jurisdiction does not extend to the voluntary reciprocal switching arrangements at issue, Counts 1 and 2 should be dismissed.

⁶ UP’s Complaint confirms the same premise and acknowledges that UP “does not question the right of BNSF or any carrier to adjust the rates it charges to suit market conditions (so long as the rates are reasonable)” or “to change its tariff offerings to reflect operating needs.” Compl. ¶ 6. Although UP asserts that this is “not an ordinary case,” *id.*, that attempted caveat cannot supply Board jurisdiction over voluntary reciprocal switching arrangements.

2. UP's claims regarding transportation at Grand Island, Nebraska are outside the Board's authority.

Beyond these defects, the Board also lacks authority to consider UP's claims regarding rail transportation at Grand Island, Nebraska, because those claims concern transportation governed by an express contract between BNSF and UP. Section 10709 authorizes rail carriers to enter contracts for specific rail transportation and specifically removes the Board's authority over transportation that is governed by such contracts. 49 U.S.C. § 10709(c)(1) (transportation governed by contract "may not be subsequently challenged before the Board . . . on the grounds that such contract violates" the ICCTA). As the statute makes clear, "[a] party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract." *Id.* § 10709(b).

The Board has held that "[i]t is well established that, under 49 U.S.C. 10709(c)(1), transportation under a rail contract may not be challenged on the ground that it violates the Interstate Commerce Act, as amended by the ICC Termination Act of 1995." *Omaha Pub. Power Dist. v. Union Pacific R.R.*, NOR 42006, slip op. at 2 (STB served Oct. 17, 1997). The Board has likewise made clear that the "[i]ncorporation of tariff provisions into a contract does not alter this basic principle in any way." *Id.*; *see also Rail Fuel Surcharges*, EP 661, slip op. at 9 n.34, 13 (STB served Jan. 26, 2007) (similar).

In its Complaint, UP alleges the existence of a contract between BNSF and UP that governs the terms of transportation for JBS U.S.A. LLC at Grand Island,

Nebraska. Compl. ¶¶ 35, 36. UP alleges that “JBS’s facility is physically served by BNSF, and Union Pacific provides transportation to it through reciprocal switching. *Pursuant to a 1996 agreement* between Union Pacific and BNSF, the handoff occurs at Union Pacific’s yard in Council Bluffs, Iowa.” *Id.* ¶ 35 (emphasis added). UP then specifically alleges the material terms of that contract. UP alleges: “In that 1996 agreement, UP and BNSF agreed to relocate the former interchange point at Grand Island to Council Bluffs, and that neither party would pay any fee for the interchange location, *and that reciprocal switch charges would continue to be charged* at Grand Island.” *Id.* ¶ 36 (emphasis added).

Despite pleading that reciprocal switching at Grand Island is governed by a specific contract, UP nonetheless asks the Board to exercise authority and declare that BNSF’s reciprocal-switching policies at Grand Island amount to an unreasonable practice. *See* Compl. ¶¶ 2, 3, 23, 42, 86, 89. But the Board has no authority to adjudicate that dispute. More specifically, the Board “lacks regulatory authority over the terms and conditions related to that transportation, whether or not explicitly addressed in the contract.” *Ameropan Oil Corp. v. Canadian Nat’l Ry.*, NOR 42161, slip op. at 4 (STB served Apr. 17, 2019). The Board therefore has no authority to consider any of UP’s allegations regarding BNSF’s activity at Grand Island.⁷ The

⁷ Indeed, all of the voluntary switching relationships at issue in the Complaint are fundamentally voluntary, contractual arrangements between BNSF and UP that are not subject to the Board’s unreasonable practices jurisdiction. *See* 49 U.S.C. 10709. UP itself has argued that the reciprocal switching service it holds out voluntarily to provide “constitutes an offer to BNSF to provide switching service, which BNSF can accept by notifying UP when it has traffic to move pursuant to the

proper forum to resolve such disputes regarding contracts would be a court, not the Board.

3. Count 1 must be dismissed because it is an improper rate challenge.

Even if the Board concludes that it has authority to regulate voluntary switching arrangements beyond Section 11102, Count 1 must be dismissed because UP cannot evade the specific statutory provisions governing rates under the guise of an unreasonable practices claim. *See Union Pac. R.R. v. ICC*, 867 F.2d 646, 649 (D.C. Cir. 1989); *Am. Fuel & Petrochemical Mfrs. v. BNSF Ry.*, No. H-15-682, 2016 WL 6909286, at *3 (S.D. Tex. Mar. 11, 2016).

Challenges to the reasonableness of a rate are specifically governed by 49 U.S.C. §§ 10701 and 10707. One critical statutory mandate is that the Board may not reach the reasonableness of a rate unless it first finds that a carrier “has market dominance over the transportation to which the rate applies.” *Id.* §§ 10707(b)-(c). To establish market dominance, a party must prove qualitative dominance (*i.e.*, that there is “an absence of effective competition from other rail carriers” for the relevant transportation) and quantitative dominance (*i.e.*, that the challenged rate produces a minimum revenue-variable cost ratio of 180 percent). *Id.* §§ 10707(a), (d)(1)(A). Absent these specific showings, a rail carrier “may establish any rate for transportation or other service provided by the rail carrier.” *Id.* § 10701(c). Notably,

Circular, thus creating an agreement under which UP provides the service described in the Circular as BNSF’s agent and BNSF pays the established charge.” *See* UP’s Supplement to the Motion to Dismiss at 6, *Omaha Public Power District v. Union Pacific*, NOR 42173 (filed Nov. 29, 2022).

while “the Board’s regulation of *rates* is dependent on a determination that a rail carrier ‘has market dominance,’ . . . regulation of *practices* does not require any such finding.” *W. Coal Traffic League v. Surface Transp. Bd.*, 998 F.3d 945, 948 (D.C. Cir. 2021).

For decades, it has been well settled that parties may not indirectly evade the limits on the Board’s rate-review process. In *Union Pacific Railroad Co. v. ICC*, the D.C. Circuit held that the agency may not indirectly regulate the level of a carrier’s rates through an unreasonable practices claim. While there can be a “conceptual overlap between railroads’ ‘practices’ and their ‘rates,’” 867 F.2d at 649, when a challenged practice is “manifested exclusively in the level of rates that customers are charged,” *id.*, any attack on such practice may only be brought under the Board’s rate-reasonableness procedures, *id.*; see also *Am. Fuel & Petrochemical Mfrs.*, 2016 WL 6909286, at *3 (reaching the same conclusion). These decisions reinforce Congress’s clear decision to allow railroads to set their own rates except in cases where railroads have market dominance over the specific transportation at issue.

Despite this longstanding authority, Count 1 of UP’s Complaint is a clear attempt to avoid the specific requirements for challenging BNSF’s switching tariffs. UP’s Complaint specifically alleges that it is an unreasonable practice for BNSF to “dramatically increase a reciprocal switching tariff.” Compl. ¶ 83. The Complaint further alleges that BNSF’s switching tariffs “are not related to or proportionate to any increase in the costs of switching, any change in operational or network needs, or any change in the market for switching services.” *Id.* ¶ 89. These allegations make

clear that UP is challenging the current level of BNSF's switching tariffs and seeking damages and injunctive relief to remedy this supposed harm. *See id.* ¶ 92. Indeed, UP's core theory is that BNSF's rates are not sufficiently "related to or proportionate to any increase in the costs of switching." *Id.* ¶¶ 88-89. But the cost-to-price comparison is a classic component of the Board's rate-reasonableness analysis that occurs only after market dominance is established—not through an unreasonable-practice claim. UP's own Complaint expressly acknowledges that it "does not question the right of BNSF or any carrier to adjust the rates it charges to suit market conditions (so long as the rates are reasonable)" or "to change its tariff offerings to reflect operating needs." Compl. ¶ 6. UP attempts to distinguish this proceeding by asserting that "this is not an ordinary case" and speculating that BNSF intended to impair competition. *Id.* However, allegations regarding motive do not alter the substance of UP's claim: UP is challenging the level and justification of BNSF's switching charges, which are subject to the statutory requirements governing rate disputes.

UP cannot avoid the specific statutory requirements for challenging BNSF's rates. These requirements are jurisdictional prerequisites: the Board has no jurisdiction "to inquire into the reasonableness of a challenged rate" absent a showing of market dominance. *Union Pacific*, 867 F.2d at 649. UP's bare allegation that BNSF had an improper purpose in setting rates does not change the analysis. *See, e.g.,* Compl. ¶ 83. A party cannot transform a rate case into an unreasonable practice case merely by alleging that the challenged rate was adopted for some improper

purpose or had some adverse competitive effect. A railroad's rate change will almost always have some effect on its competitors. If mere allegations about motive or competitive effect were enough to sidestep § 10707, the market-dominance requirement would be optional whenever a party alleged that a railroad strategically raised its rates. That result would nullify the requirements Congress established for resolving precisely these types of disputes.

UP's Complaint does not even try to satisfy the applicable statutory standards for rate challenges. For instance, the Complaint does not contain a single allegation establishing that BNSF has market dominance. On the contrary, the Complaint concedes that BNSF and UP "fiercely compete" for customer business and repeatedly acknowledges that UP's own share of business is growing at several of the disputed locations. *See, e.g.*, Compl. ¶¶ 12, 30, 41, 49, 58, 67, 76. If UP wanted to challenge the level of BNSF's switching tariffs, it should have pleaded facts establishing BNSF's market dominance under § 10707.⁸ UP's failure to do so is a critical pleading defect that is fatal to Count 1.

Allowing UP to perform an end run around this defect by framing its challenge as an unreasonable practice claim would undermine the "specific solution" Congress created for resolving rate disputes. *See RadLAX*, 566 U.S. at 645. For that reason, courts have explained that "form must yield to substance" when a "so-called practice is manifested exclusively in the level of rates that customers are charged." *Union*

⁸ UP's Complaint also fails to comply with the Board's regulations requiring parties challenging rates to identify the specific rate-reasonableness methodology being used to evaluate the challenged rates. *See* 49 C.F.R. § 1111.1(a).

Pacific, 867 F.2d at 649 (internal quotation marks omitted). The Board should therefore dismiss Count 1.

4. Even viewing the facts in a light most favorable to UP, the Complaint provides no basis to conclude that BNSF's switching tariff changes were "misleading."

Knowing that its first unreasonable practices challenge must fail, UP next raises the absurd claim that BNSF's alleged decision to stop accepting unit train traffic for switching while maintaining its switching tariff is "misleading" and constitutes an unreasonable practice. Compl. ¶¶ 101, 104. This claim is invalid on its face.⁹

At its core, Count 2 boils down to an assertion that BNSF did not include a footnote providing notice that it was eliminating unit train switching charges at certain locations in its switching tariff. But critically, UP alleges no affirmative misstatements, no hidden terms, and no discrepancies between the rules and definitions for switching contained in BNSF's Switching Book and how BNSF applies them in practice.

⁹ The requirement of a true misrepresentation is critical to avoid circumvention of the Board's limited authority to regulate rates. The regulation of an element of a rate, even by characterizing the concern as one involving a misrepresentation, raises the risk of regulating rates without meeting the statutory requirements. *See Rail Fuel Surcharges*, EP 661 (Sub-No. 2), slip. op at 5 (STB served Aug. 29, 2019) (then Member Fuchs commenting: "Because of the inconsistency in review standards, the Board might award relief on part of the rate (the fuel surcharge) even if it could not award relief on the overall rate. In effect, Rail Fuel Surcharges could be read as permitting the Board to award a form of rate relief to a complainant whose rate may be reasonable").

UP's allegations rise nowhere near the level of overt misrepresentation the Board requires to survive a motion to dismiss. UP does not allege facts claiming that BNSF made any abrupt about-face between the representations made in its Switching Book and the statements it has made to UP and its customers about the implementation of the changes. *See, e.g., Central Valley Ag. Grinding, Inc. v. Modesto & Empire Traction Co.*, NOR 42159, slip op. at 4-5 (STB served June 12, 2018) (allowing an unreasonable practice claim to proceed where carrier provided written assurances that it had no intention of interfering with service to customer's facility, but then quickly changed the services, limited the customer's access to tracks, and imposed entirely new fees and prepayment requirements as a condition of service). Nor has UP alleged that BNSF implemented its declared changes in a way "designed to avoid the type of response a carrier would likely receive if it were to honestly inform a shipper that a higher rate was being imposed." *Rail Fuel Surcharges*, EP 661, slip op. at 7 (STB served Jan. 26, 2007). Contrary to the conclusion drawn in *Rail Fuel Surcharges* that there was "no real correlation between the rate increase and the increase in fuel costs for that particular movement to which the surcharge is applied," *id.*, BNSF's switching tariff changes are tied to operational realities at the named locations in the Complaint, as BNSF explained to UP and its customers.

Moreover, the Complaint itself includes several allegations which confirm that BNSF discussed the operational changes with its customers and provided ample lead time to eliminate any potential disruption. BNSF's updated Switching Book was issued on April 1, 2026, and did not become effective until May 1, 2026, a month later

and after BNSF contacted its customers and UP to explain the changes. *See, e.g.*, Compl. Ex. C; Compl. ¶¶ 32-33, 51-52, 60-61, 69-70, 78-79. Because UP knows that BNSF has been fully transparent about the changes to its switching tariffs, it concocts fanciful allegations to suggest that BNSF's published Switching Book is misleading despite BNSF's repeated explanations of the changes to UP and its customers. First, UP alleges BNSF's Switching Book is misleading because "[t]he Current BNSF Tariff does not state that BNSF will not accept unit train traffic at individual locations," while "that tariff specifies that BNSF will not switch locomotives, maintenance cars, passenger cars, bi-levels, and tri-levels." *Id.* ¶ 98. But UP is comparing apples to oranges. The Switching Book's statement that BNSF will not switch certain kinds of cars, commodities, or traffic from certain origins, *see also id.*, is not an implied representation that it will switch unit trains, which are an entirely different classification involving different types of railcars, commodities, and origins. Indeed, a visual comparison of Switching Book entries for locations that retain unit train switching rates and the locations named in the Complaint makes clear where BNSF would continue to charge unit train switching rates and where it would not. *See, e.g.*, Compl. Ex. C at 15 (Grandview, Washington entry listing unit train reciprocal switching rates and Hastings, Nebraska entry listing highlighted, struck-through reciprocal unit train switching rates). Nor has BNSF prevented UP from marketing its services as "unit train" service to its customers, even at the named locations. *See* Compl. ¶ 99. Instead, BNSF has simply made clear that it will not allow UP to continue to take advantage of switching rates for unit train service when such service

is not possible at the named locations. Moreover, even UP's own Switching Book does not list below each served customer which locations will or will not serve unit trains.¹⁰

On the face of it, the Complaint fails to establish that BNSF's actions rise anywhere near the level of misleading conduct that the Board has required to allow complaints to proceed. The Complaint raises no factual issues of misrepresentation that would establish a violation of 49 U.S.C. § 10702. UP's claim is ultimately a rates challenge, not an unreasonable practices challenge, meaning UP has brought Count 2 under the incorrect mechanism for relief. Count 2 should be dismissed as a matter of law.

B. Count 3 must be dismissed because the Complaint fails to present grounds for prescribing a reciprocal switch under Section 11102.

As explained above, the Board does not have authority to regulate the terms of a reciprocal switching arrangement under the reasonable practices statute, 49 U.S.C. § 10702(2). Instead, Congress crafted a separate statutory provision—49 U.S.C. § 11102(c)—that provides the Board with limited authority to impose reciprocal switching arrangements under narrow circumstances.

UP's Complaint implicitly recognizes that the Board's authority to regulate reciprocal switching is limited by Section 11102, and UP expressly invokes that provision in Count 3's request for a prescribed reciprocal switch. Because the

¹⁰ See *UP 8005 Switching Circular*, available at <https://c02.my.uprr.com/wtp/pricedocs/3627575V14.pdf>.

Complaint ignores several statutory requirements for obtaining reciprocal switching, it is legally deficient and should be dismissed.

1. Count 3 must be dismissed because UP does not even allege a compelling need for a prescribed reciprocal switch at the locations named in the Complaint.

Compelled reciprocal switching is an extraordinary remedy. Such a remedy requires a rail carrier to use its property to benefit a competitor. As courts have recognized, “a rail carrier generally can refuse to allow another carrier to access its tracks,” and while railroads may voluntarily enter reciprocal switching arrangements, “absent a Board order, they are not required to do so.” *Grand Trunk Corp. v. STB*, 143 F.4th 741, 744-45 (7th Cir. 2025). Prescription of reciprocal switching does not merely regulate the terms of a carrier’s existing obligations, it creates an affirmative obligation that the carrier otherwise has no legal duty to provide.

Given that prescription of reciprocal switching is a significant regulatory intervention, it is subject to a high threshold of proof. Section 11102(c) states that the Board may authorize prescription only where reciprocal switching is “practicable and in the public interest, or where such agreements are necessary to provide competitive rail service.” 49 U.S.C. § 11102(c).

Under longstanding case law, this standard limits the agency’s authority to situations involving compelling circumstances. As explained by the Seventh Circuit in *Grand Trunk*, the statutory standard “draws its meaning from the ICC precedent

that preexisted the Staggers Rail Act,”¹¹ and “brings the old soil with it.” 143 F.4th at 748-49. Under that doctrine—confirmed by *Central States* and *Midtec*—the standard has long required a showing of “some actual necessity or compelling reason.” *Id.* at 749-50.¹² This standard is often described as the “compelling need” test, and it is an important threshold requirement that must be satisfied before the Board can prescribe reciprocal switching.¹³

Moreover, a “compelling need” must be just that—*compelling*. The governing standard has never been satisfied merely by showing that the prescribed reciprocal switching would be useful, efficient, or commercially preferable for the competing railroad. For nearly a century, the agency has stated that the “expression ‘in the public interest’ means more than a mere desire on the part of shippers or other interested parties for something that would be convenient or desirable to them,” and that “some actual necessity or some compelling reason must first be shown before we can find such action in the public interest.” *Jamestown, N.Y. Chamber of Commerce*

¹¹ Congress directed that the standard for prescribing reciprocal switching “is [to be] the same standard the Commission has applied in considering whether to order the joint use of terminal facilities [under § 11102].” *Grand Trunk Corp. v. STB*, 143 F.4th 741, 748–49 (7th Cir. 2025).

¹² See *Central States v. I.C.C.*, 780 F.2d 664, 680 (7th Cir. 1985); *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1492, 1502 (D.C. Cir. 1988).

¹³ The statute has two textual prongs for the prescription of a reciprocal switch, a “public interest” prong and a “necessary to provide competitive rail service” prong. But as the Board noted in EP 711, “[t]he ICC, through its decisions in *Intramodal Rail Competition* and *Midtec Paper Corp.*, essentially consolidated those two prongs into a single standard, which requires shippers to demonstrate anticompetitive conduct by the railroad.” *Reciprocal Switching*, EP 711 (Sub No. 1), slip op. at 15-16 (STB served Jul. 27, 2016). In any event, the “necessary” for competitive rail service prong explicitly states that a switch prescription must be “necessary.”

v. Jamestown, Westfield & Nw. R.R., 195 I.C.C. 289, 292 (1933) (emphasis added). And UP has made this same argument in its own efforts to resist reciprocal switching. See UP Comment at 13, EP 711 (Sub-No. 1), *Reciprocal Switching* (filed Jan. 13, 2017) (citing *Jamestown* and arguing that compelled switching cannot rest on “mere desire” for something “convenient or desirable”).

Later cases have cemented that distinction. The case law makes clear that regulatory intervention is justified only to address a genuine compelling need, not merely where a party seeks more favorable commercial terms or improved competitive positioning. See, e.g., *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1492 (D.C. Cir. 1988) (requiring a showing of “some actual necessity or compelling reason”); see also *Midtec Paper Corp. v. Chicago and North Western Trans. Co. (Midtec II)*, 3 I.C.C.2d 171, 174 (1986) (Commission explaining that where a claim is “[r]educ[ed] to a desire for the service of a second carrier,” it is insufficient to justify compelled access, and distinguishing between correcting competitive abuses and introducing additional carrier service). Consistent with this history, *Grand Trunk* confirms that a regulatory regime permitting switching without a demonstrated and compelling need “rests on legal infirmity.” *Grand Trunk*, 143 F.4th at 752.

UP does not even try to meet that standard in the Complaint. The Complaint acknowledges that BNSF continues to provide voluntary switching access to UP so that UP can provide service to its customers. See, e.g., Compl. ¶¶ 44, 54, 63, 72. There cannot be a compelling need for a reciprocal switch when BNSF is already providing a switch at rates applicable to other merchandise traffic. There is no allegation in

the Complaint (nor could there be) that BNSF's switching service has driven UP from the market or has precluded UP from serving the relevant shippers. The Complaint states only that UP would like to have a different switching service than the one currently provided by BNSF. But a mere desire for a more favorable switching rate does not constitute a "compelling need" that justifies the extreme remedy of prescribing a reciprocal switching arrangement. Because UP does not (and cannot) allege a compelling need for a prescribed reciprocal switch, Count 3 should be dismissed.

2. Count 3 of the Complaint must be dismissed because UP fails to allege inadequate service that would justify prescription of a reciprocal switch.

In addition to UP's threshold failure to allege a compelling need for a prescribed switch, the Complaint also fails to satisfy the requirement of showing that the challenged service is inadequate. In *Grand Trunk*, the Seventh Circuit clarified that the "compelling need" standard also encompasses a showing that the existing service is inadequate. Drawing on longstanding ICC precedent and legislative history, the court explained that the statutory standard requires "evidence that the service provided by the incumbent carrier is inadequate" and held that "the inadequacy of the existing service is a necessary finding the Board must make before it can impose a reciprocal switching agreement." *Id.* at 752. In other words, a finding of inadequate service is not merely one factor among many; it is "a prerequisite to regulatory intervention." *Id.*

UP is familiar with this requirement, too. In a recent Eighth Circuit reply brief, UP argued that a “‘finding of inadequate rail service’ is always step one—’a necessary prerequisite.” Reply Br. for Pet. at 10, *Union Pac. R.R. v. STB*, No. 25-2919 (8th Cir. Mar. 19, 2026) (quoting *Grand Trunk Corp. v. STB*, 143 F.4th 741, 751 (7th Cir. 2025)).¹⁴

Once again, the Complaint utterly fails to satisfy this threshold requirement. A reciprocal switch can only be prescribed under the statute if the incumbent’s through service to the shippers at issue is inadequate. *Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988). If the incumbent is providing, or can provide, adequate *through* transportation for the shipper whose traffic is at issue, then there is no basis for prescribing a reciprocal switch. But UP’s Complaint says absolutely nothing about BNSF’s through transportation service. The adequacy of that service is completely ignored. The only service that UP considers in the Complaint is the switching service that is voluntarily being provided by BNSF. UP’s exclusive focus on the switching service is legally and logically flawed.

As explained in *Midtec*, the relevant transportation that must be assessed before determining whether to prescribe reciprocal switching is the through

¹⁴ UP recently acknowledged this threshold requirement for compelled use of terminal facilities again at oral argument before the Eighth Circuit, stating: “[A]s the Seventh Circuit explained last year in *Grand Trunk*, the inadequate service finding is the initial threshold requirement for terminal trackage rights” Oral Argument at 04:24-04:48, *Union Pac. R.R. Co. v. Surface Transp. Bd.*, No. 25-2919 (8th Cir. Jun. 9, 2026), audio recording. In the same oral argument, UP further stated that before the Board can cause a constitutional taking through compelled access, “it must find inadequate service.” *Id.* at 00:00:28-00:00:41.

transportation that BNSF provides (or would provide if requested by the shipper), not BNSF's voluntary switching service. In *Midtec*, the D.C. Circuit upheld the ICC's decision not to prescribe a reciprocal switch, noting that there was no evidence about the through transportation service being provided, so there was no way to determine whether any deficiency or competitive failure of the through transportation justified the prescription of a switch. *Id.* at 1494-95 (affirming dismissal of the complaint where "the record [was] almost completely devoid of evidence concerning the terms under which through transportation was offered . . . either before or after the institution of [the] complaint").

The same situation exists here. UP has not alleged that BNSF has refused to provide any through transportation requested by a shipper. Because the record is "devoid of evidence" regarding BNSF's through transportation service, UP cannot establish the inadequate-service requirement as a matter of law. *Id.* A reciprocal switch could only be prescribed if there was something anticompetitive or inadequate about the incumbent railroad's through transportation that would justify prescription of a switch. The *Bottleneck* Rule also makes clear that the focus of the Board's prescription inquiry must be on the incumbent carrier's through service, not the service that the incumbent provides with a voluntary switch.¹⁵ If a switch is

¹⁵ Under the *Bottleneck* Rule, BNSF has no common carrier obligation to switch traffic to UP where it can serve the challenged facilities from origin to destination. See, e.g., *Central Power & Light Co. v. Southern Pacific et al.*, 1 S.T.B. 1059 (1996), *clarified*, 2 S.T.B. 235 (1997), *aff'd sub nom. MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999). It has long been understood that carriers are not required to open facilities to reciprocal switching where the effect would be to short-

prescribed, the incumbent railroad would be forced to provide less than the long haul even though the *Bottleneck* Rule entitles it to provide only the through movement. And if the service that the incumbent railroad provides on the through movement is adequate, there would once again be no basis for the Board to order reciprocal switching.

The *Vista* decision also mandates this result. In *Vista*, the Commission held that an incumbent's refusal to offer a reciprocal switch cannot be treated, on its own, as an abuse of competition. See *Vista Chem. Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 5 I.C.C.2d 331, 340 (1989) (a railroad's "simple refusal to lower the local rate thus giving up its long haul and reducing its revenues is not anticompetitive per se any more than is its refusal to accord reciprocal switching rights directly or through its intraterminal switching tariff, or through a transit tariff."). A railroad has no obligation to offer any switching voluntarily, so the "mere failure to make further rate concessions through reciprocal switching, low local rates, or transit rates is simply not anticompetitive conduct that would warrant relief." *Id.* *Vista* makes clear that where a railroad can refuse to offer any switching service, there is no abuse of competition when it voluntarily offers reciprocal switching on terms that its competitor dislikes.

haul themselves under 49 U.S.C. § 10705. See *Northwest Metal Products v. Chicago, Milwaukee, St. Paul & Pacific Railroad*, 272 I.C.C. 1 (1948) ("Failure of a railroad to provide for interchange of traffic and to publish charges therefor has been held to be not unreasonable when the necessary effect of the establishment of such switching arrangements would be, as in the instant proceeding, to compel the railroad to turn over traffic to its competitor and thus short haul itself.") (citing *inter alia City of Sheboygan, Wisc. v. Chicago & N.W. Ry. Co.*, 227 I.C.C. 472, 748).

Finally, even if the relevant inquiry involved the adequacy of the switching service that BNSF currently provides (which it does not), UP's Complaint fails to allege that the service is inadequate. The allegations in the Complaint describe dissatisfaction with BNSF's voluntary switching tariff and UP's preferred service; but the Complaint does not allege that BNSF has refused to provide rail service to any shipper, that BNSF's service is deficient, or that any shipper is unable to move traffic by rail. Dissatisfaction with an existing service alone is not enough to support the sweeping remedy of prescribed switching. *See Central States*, 780 F.2d at 676-78 (upholding denial where the complainant sought "something convenient" and "a competitive rail service already exists").

3. Count 3 must also be dismissed because UP cannot meet the requirements for showing competitive abuse under Part 1144 and *Midtec*.

The requirements of a compelling need and inadequate service are mandatory prerequisites to any prescription of a reciprocal switch under the statute. Even if the Board's current rules did not further constrain the Board's discretion to prescribe a reciprocal switch by requiring a showing of competitive abuse, no prescription could be justified without establishing a compelling need for such a prescription and inadequate service by the incumbent justifying the use of the Board's prescription authority. But UP's Complaint fails on both requirements—even without a showing of competitive abuse. As UP acknowledges, its Complaint invokes the Board's authority under the current Part 1144 threshold. Although the Board has proposed repealing Part 1144, the Part 1144 and *Midtec* threshold remains in effect unless and

until the Board adopts a final rule altering it. *Eliminating Regulatory Barriers to Competition: Review of Part 1144*, EP 788 (STB served Jan. 7, 2026) (“EP 788”). However, as discussed above, UP’s Complaint fails even under the proposed EP 788 rulemaking because it cannot meet the statutory standard. EP 788 proposes case-by-case adjudication under the applicable statutory standard, not automatic reciprocal switching whenever a competitor is dissatisfied by voluntary switching terms. EP 788, slip op. at 1, 13-14.¹⁶

Under the existing rules, a complaining party must allege that the incumbent has market power and has abused that market power. Part 1144 states that the Board may prescribe a reciprocal switching agreement only where “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(a)(1). The Commission in *Midtec II* defined the anticompetitive conduct inquiry to meet Part 1144 as follows: “(1) whether the railroad has used its market power to extract unreasonable terms on through movements; or (2) whether because of its monopoly position it has shown a disregard for the shipper’s needs by rendering inadequate service.” *Midtec II*, 3 I.C.C.2d at 181; *see also Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1495

¹⁶ UP’s own EP 788 Comments are consistent with this point, noting that a prescription should be issued only where it would “demonstrably improve a shipper’s service product” based on objective measures and would not “impair a railroad’s ability to serve existing shippers or undermine operational efficiency.” UP Comment at 1, *Eliminating Regulatory Barriers to Competition: Review of Part 1144*, EP 788 (filed Mar. 10, 2026). Here, UP’s Complaint does not plead comparable objective, case-specific facts showing that the requested prescription itself would improve service or avoid operational impairment.

(D.C. Cir. 1988).¹⁷ Both elements require a preliminary finding of market power. Further, the complaining party must also allege that the incumbent has abused that market power.¹⁸ And the Complaint fails to satisfy these requirements as well. As an initial matter, the Complaint does not allege that BNSF has market power, and on the competitive abuse requirement, the Complaint relies entirely on its accusation of anticompetitive *intent*, without alleging that any BNSF conduct has had an anticompetitive effect.¹⁹

Nowhere in the Complaint does UP allege that BNSF has market power over a relevant transportation service. There is not a single allegation that BNSF has market power, no description of the transportation service over which BNSF allegedly has market power, and no evidence that might, if proven, demonstrate the existence of market power. In fact, as discussed above, the Complaint acknowledges that BNSF

¹⁷ Although the Board has proposed to repeal Part 1144, that proposed rulemaking has not displaced the current regulation. Further, the NPRM’s description of current law confirms the point relevant here: under existing Part 1144, a petitioner must demonstrate affirmative anticompetitive abuse, not merely market power or a preference for additional competitive access. *Eliminating Regulatory Barriers to Competition: Review of Part 1144*, EP 788 (STB served Jan. 7, 2026).

¹⁸ See, e.g., *Shenango Inc v. Pittsburg Chartiers & Youghiogheny Ry.*, 5 I.C.C.2d 995, 1001 (1989) (“[A] finding of market dominance does not show that the carrier has behaved anticompetitively, nor is it grounds in itself for imposing a competitive access remedy Rather, it relates to the structure of the market in which the carrier operates and the potential for market abuse power, not to the carrier’s actual conduct.”).

¹⁹ The competitive access rules only apply to facilities located in terminal areas. Recognizing this, UP selectively notes that “[m]ultiple customer facilities . . . are located within a terminal area, including the facilities located in Saginaw, TX; Lincoln, NE; and Island Park, IA (‘Affected Terminal Customers’),” Compl. ¶ 108, omitting that the Complaint also challenges tariff changes at Hastings, Havelock, and Grand Island—locations UP does not plead as terminal-area facilities..

and UP “fiercely compete” for business. *Supra* Section III.A.3. The only reference in the Complaint to “market power” at all is a claim that BNSF’s “conduct constitutes an abuse of market power.” Compl. ¶ 8. But such a conclusory assertion, unsupported by any specific factual allegations, cannot be enough to sustain the Complaint.

Nor has UP alleged a competitive abuse that would support a reciprocal switch prescription. The conduct alleged to be an abuse of competition—changes to reciprocal switching rates and practices—falls well short of anticompetitive abuse. The caselaw applying Section 11102 has recognized that profit-maximizing conduct, even when it involves significant rate increases, does not establish abuse of market power. *See, e.g., Shenango*, 5 I.C.C.2d at 1003 (rejecting a challenge to a 300 percent rate increase, explaining that “the fact that it was raised by a large amount at one time does not establish that [the carrier] is behaving anticompetitively.”). As in *Shenango*, allegations of increased rates or less favorable economic terms do not, without more, establish anticompetitive conduct under *Midtec* or 49 C.F.R. § 1144.2(a). At most, these allegations describe changes in pricing and the scope of switching service, not the exercise of market power in an abusive manner.

Foreclosure of a competitor is one type of competitive abuse that could support prescription of a reciprocal switch. *Midtec II*, 3 I.C.C.2d at 173. But UP clearly has not been foreclosed from access to the shippers at issue through reciprocal switching. The only allegation relating to foreclosure is that BNSF acted to change the reciprocal switching terms with an intent to foreclose competition. But vague speculation about

possible future consequences based on anticompetitive intent cannot support an inference of foreclosure, much less justify the prescription of a reciprocal switch. Indeed, UP acknowledges that BNSF continues to provide reciprocal switching and the Complaint itself contains a myriad of examples where UP states that its business is expanding in the challenged locations. *See supra* Section III.A.3. At most, the Complaint alleges dissatisfaction with the terms of BNSF's voluntary switching arrangements. But mere dissatisfaction with BNSF's terms of service is plainly insufficient to establish competitive foreclosure. The competitive access provisions of the statute are not an invitation to investigate rail carriers' intent. The extraordinary remedy of forced switching must be based on conduct that has or might have an anticompetitive effect. Because the Complaint is completely silent on the effect of the conduct at issue, except to acknowledge that BNSF has not precluded UP's access to shippers, Count 3 should be dismissed.

IV. CONCLUSION

For the foregoing reasons, BNSF respectfully requests that the Board dismiss UP's Complaint.

Tyler White
Travis Owsley
Amber L. McDonald
BNSF RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2383

Respectfully submitted,

/s/ Timothy J. Strafford
Timothy J. Strafford
Peter W. Denton
Anthony J. LaRocca
STEPTOE LLP
1330 Connecticut Ave. NW
Washington, DC 20036
(202) 429-3000

Andrew S. Tulumello
Chantale Fiebig
WEIL, GOTSHAL & MANGES LLP
2001 M St. NW, Suite 600
Washington, DC 20036
(202) 682-7000

Brian G. Liegel
WEIL, GOTSHAL & MANGES LLP
1395 Brickell Ave., Suite 1200
Miami, FL 33131
(305) 577-3100

Counsel for BNSF Railway Company

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing *BNSF Railway Company's Motion to Dismiss* to be served electronically or by first-class mail, postage prepaid, on all parties of record in this proceeding.

/s/ Tara A. Woods

Tara A. Woods
Attorney for BNSF Railway Company

July 6, 2026