PUBLIC COPY – SEALED MATERIAL DELETED

[ORAL ARGUMENT NOT YET SCHEDULED]

No. 12–7085

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re: Rail Freight Fuel Surcharge Antitrust Litigation - MDL No. 1869

BNSF Railway Company, et al.,
Petitioners

On Petition for Permission to Appeal
Pursuant to Federal Rule of Civil Procedure 23(f)

INITIAL REPLY BRIEF OF PETITIONERS

Carter G. Phillips
Counsel of Record
Joseph R. Guerra
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

Counsel for Petitioners

Additional Counsel on Inside Cover and Pages

John M. Nannes
Tara L. Reinhart
Sean M. Tepe
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7000

Saul P. Morgenstern
Jennifer B. Patterson
Amanda C. Croushore
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022
(212) 836-8000

Claudia R. Higgins
KAYE SCHOLER LLP
901 Fifteenth Street, NW
Washington, DC 20005
(202) 682-3500

Attorneys for Petitioner Norfolk Southern Railway Company

Maureen E. Mahoney
J. Scott Ballenger
LATHAM & WATKINS, LLP
555 11th Street, NW Suite 1000
(202) 637-2200

Tyrone R. Childress
David G. Meyer
JONES DAY
555 South Flower Street, 50th Floor
Los Angeles, CA 90071-2300
(213) 489-3939

Alan M. Wiseman
Thomas A. Isaacson
COVINGTON & BURLING LLP
1201 Pennsylvania Ave, NW
Washington, DC 20004-2401
(202) 662-6000

Attorneys for Petitioner Union Pacific Railroad Company

Randy M. Mastro
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4047

Theodore J. Boutros, Jr.
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

Andrew S. Tulumello
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500

Veronica S. Lewis
Robert C. Walters
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue Suite 1100
Dallas, TX 75201
(214) 698-3100

Samuel L. Sipe, Jr.
Linda Stein
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
(202) 429-3000

Attorneys for Petitioner BNSF Railway Company

Kent A. Gardiner
Kathryn D. Kirmayer
Shari Ross Lahlou
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2500

Attorneys for Petitioner CSX Transportation, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

*Authorities chiefly relied upon are marked with asterisks

STATUTES

GLOSSARY

AIILF	An index of rail cost factors that the Association of American Railroads made available in December 2003
BNSF	BNSF Railway Company
CSXT	CSX Transportation, Inc.
NS	Norfolk Southern Railway Company
RCAF	Rail Cost Adjustment Factor, a cost-escalation index maintained by the Association of American Railroads
UP	Union Pacific Railroad Company

Material Under Seal Deleted

INTRODUCTION AND SUMMARY OF ARGUMENT

As demonstrated in defendants' Opening Brief ("OB"), this Court should review and reverse the district court's order certifying an extraordinary class of over 30,000 railroad shippers seeking [ ] billion in treble damages. The certification ruling implicates two fundamental and unresolved legal issues—the extent to which a class can include uninjured members, and the level of scrutiny that must be applied to expert evidence on class certification. On both issues, the district court adopted improper standards, and the staggering damages award plaintiffs seek creates settlement pressures so coercive they all but guarantee that this Court will never be able to correct those errors on review of a final order.

First, relying on a Seventh Circuit decision that plaintiffs now conspicuously fail even to mention, the district court ruled that certification is permissible even though the class "'may include persons who have not been injured by defendants' conduct,'" as long as there are not a "great many" uninjured members and injury appears to be "widespread." Op. 67-68. Based on that lax standard, which conflicts with the more rigorous standards articulated by other circuits and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011), which requires proof that injury can be resolved for all or virtually all class members "in one stroke," the district court certified a massive class that includes many shippers who could not have been injured, and any attempt to weed out the uninjured would require highly

individualized evidence. Second, in evaluating plaintiffs' expert testimony, the district court adopted a mere "plausibility" standard, then failed even to apply this relaxed standard properly.

Unable to refute these legal errors, plaintiffs seek to recast them as factual disputes that were resolved in their favor. Br.1. Plaintiffs argue that the circuit split on the extent of class-wide injury is of no moment, because the district court found that fuel surcharges were "'applied uniformly, *to all or virtually all class members*.'" *Id.* at 2. But a finding that all class members *paid* a fuel surcharge does not establish that all class members were *injured* by that payment, as plaintiffs concede. Br.46. Those who would have paid the same surcharge in the absence of any conspiracy, who negotiated offsetting reductions, or who did not enjoy the benefits of rail competition in the first place, suffered either no injury-in-fact or no antitrust injury by virtue of their surcharge payments. Identifying which of the 30,000 shippers fall into these categories requires the particularized dispute resolution that is unsuitable for class adjudication.

Plaintiffs' only response is to cite the district court's conclusion that fuel surcharge programs were more "aggressive" and "widespread" during the class period. But it is undisputed that for substantial amounts of traffic, the fuel surcharge formulas used during the class period were identical to the ones used before the class period. And even when the formulas changed, that does not show

Material Under Seal Deleted

that all or virtually all class members were injured, let alone how many. Many shippers could not have been injured because they would have paid the same amounts or more under the indisputably legal surcharge formulas used prior to the alleged conspiracy. It is no answer to claim that the alleged conspiracy may have caused "widespread" injury to others.

Other legal errors infect the district court's treatment of defendants' declarations demonstrating that some shippers negotiated reductions in proposed rate increases in exchange for the inclusion of fuel surcharge provisions. The court found that later deposition testimony, which was consistent with the declarations, constituted contradictory "concessions" because the court proceeded from the legally mistaken view that only an overall rate reduction could offset the impact of the allegedly illegal surcharges. But in an environment of increased demand and tightening capacity with rapidly rising fuel costs, base rates would have risen regardless of any conspiracy, so reduced rate increases unquestionably could negate the impact of allegedly illegal surcharges. Moreover, base rates declined on [ ] of all shipments during the class period, and all-in rates declined on [ ] of such shipments. OB 46. Plaintiffs claim that the district court properly credited Dr. Rausser's conclusion that such decreases did not reflect "systematic" discounts. But that is the point: because discounts were *not* "systematic" (*i.e.*,

they followed no consistent pattern), individualized inquiries are needed to determine which shippers could properly be members of the class.

The court's rejection of defendants' showing that many sole-served shippers could not have suffered antitrust injury also rests on errors of law. The court stated that defendants' argument was "contradicted" by railroad executives' statements acknowledging that some sole-served shippers benefit from indirect rail competition, or that many sole-served shippers benefit from *other* forms of competition such as truck or barges. But *non-rail* competition cannot be affected by an alleged *railroad* conspiracy, and it is impossible to determine which sole-served shippers benefit from indirect rail competition without individualized inquiry that precludes class-wide resolution.

Ultimately, much of plaintiffs' argument is predicated on a tautology: defendants would not have conspired unless they thought the conspiracy would be effective; therefore, it must have injured the class. But even if plaintiffs could prove a conspiracy and some net benefit to defendants, that would not justify class certification. As *Wal-Mart* makes clear, plaintiffs have to show that common evidence can resolve not only whether the class as a whole paid too much, but *which class members overpaid, and by how much*.

In any event, in support of their conspiracy allegations, plaintiffs rely on evidence relating to interline service on through routes that require service on more

than one railroad. *See* 49 U.S.C. § 10703. Discussions between carriers about the rates for interline service are necessary and lawful. A conspiracy "may not be inferred from evidence that two or more rail carriers acted together with respect to an interline rate or related matter and that a party to such action took similar action with respect to a rate or related matter on another route or traffic," and "evidence of a discussion or agreement" concerning interline traffic "shall not be admissible." *Id*. § 10706(a)(3)(B)(ii). After defendants moved to exclude evidence of interline-related communications, the district court disclaimed reliance on it for the class certification ruling. Op. 20-22. Yet plaintiffs here seek to rely on evidence that the court below expressly declined to consider.

The rest of plaintiffs' argument on injury-in-fact and antitrust injury is based primarily on the regression analyses performed by their expert, Dr. Rausser. Plaintiffs suggest that the length of the district court's opinion and its numerous citations to Dr. Rausser's report demonstrate that the district court engaged in the "rigorous analysis" *Wal-Mart* requires. It does not.

The district court found that Dr. Rausser's models give rise to an inference that class members paid more for freight rail service than they would have absent the alleged conspiracy. But Dr. Rausser's so-called "structural break" in the relationship between all-in rates and fuel prices is an inevitable consequence of the dramatic rise in fuel prices during the class period. That rise in fuel prices

triggered fuel surcharge provisions more often and at higher levels than in the pre-class period when fuel prices generally were below the surcharge triggers. Dr. Rausser's analysis cannot be persuasive evidence of a conspiracy or injury unless one makes the illogical assumption that, absent any conspiracy, shippers would not have faced fuel surcharges or increased rates during a time period in which fuel prices *tripled.* Even Dr. Rausser conceded that higher fuel prices would have been reflected in all-in rates *somehow*, and yet his model assumes the opposite.

The court also concluded that the damages model provides a plausible measure of individual damages even though it would find damages for shippers who agreed to fuel surcharges *before* the conspiracy allegedly began, and would find damages that are approximately equal to and sometimes exceed the entire fuel surcharges paid—an illogical result given Dr. Rausser's admission that railroads would have recovered increasing fuel costs.

The certification of the class was based on improper Rule 23 standards that render the decision manifestly erroneous and warrant this Court's interlocutory review and correction.

ARGUMENT

I. INTERLOCUTORY REVIEW IS WARRANTED.

A. The District Court Erroneously Resolved Unsettled And Fundamental Issues Of Class Action Law.

Plaintiffs do not deny that this Court has not addressed the legal questions regarding (1) whether a class can include uninjured class members, and (2) the standard for evaluating plaintiffs' expert evidence. Nor do they deny that each inquiry is fundamental to the analysis in almost all class actions. Instead, they claim that the circuits are not really split on the first question, and that the district court subjected plaintiffs' expert to the evidentiary standard defendants requested, so any error was invited. Br.33-36, 58-59. Neither claim is correct.

1. There is a circuit split regarding the standard for dealing with uninjured class members. Although plaintiffs say that *Hydrogen Peroxide*'s requirement that all or virtually all class members be injured is mere dicta (Br.36, n.10), the Third Circuit disagrees. It explained that *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008), "*held*" that, when ruling on a motion for class certification, the court must "determine whether a plaintiff will be able to show antitrust injury for *all plaintiffs* with common evidence." *In re K-Dur Antitrust Litig.*, 686 F.3d 197, 220 (3d Cir. 2012) (emphases added), *petition for cert. filed*, 81 U.S.L.W. 3090 (U.S. Aug. 24, 2012) (No. 12-245). Likewise, the Eighth Circuit's statement that "damages to all class members must be shown to justify

the class action," *Blades v. Monsanto Co*., 400 F.3d 562, 571 (8th Cir. 2005), was not dicta. The court affirmed the denial of class certification in *Blades* because "parts of the extensive evidence … demonstrate that not every member of the proposed classes can prove with common evidence that they suffered impact from the alleged conspiracy." *Id.* Both decisions, moreover, are consistent with *Wal-Mart*, which makes it clear that uninjured persons may not be included in a class. 131 S. Ct. at 2561.

The district court, however, applied a different rule. Relying on *Kohen v. Pacific Investment Management Co.*, 571 F.3d 672 (7th Cir. 2009), the district court held that "[c]lass certification is not precluded simply because a class may include persons who have not been injured by the defendants' conduct." Op. 67 (internal quotation marks omitted). If plaintiffs show "widespread injury to the class," the court reasoned, class certification should be granted unless "it is apparent that a great many persons have not been impacted." Op. 67-68 (internal quotation marks omitted).

Plaintiffs make no attempt to defend the *Kohen* rule. (Indeed, their brief does not even cite the case.) Instead, they assert that any "subtly distinct phrases" used by different circuits have "no bearing on the certification decision here," because the district court found that defendants' allegedly conspiratorial fuel surcharges "were applied *uniformly, to all or virtually all class members*," and

plaintiffs' expert had a "workable" regression analysis that confirmed that injury can be proven with common evidence. Br.36 (emphasis in original) (citations omitted). Contrary to plaintiffs' suggestion, these findings (even if they were true) do not satisfy the "all or virtually all class members" standard applied outside the Seventh Circuit.

The finding that the allegedly conspiratorial fuel surcharges were applied to all class members is *not* the legal equivalent of a finding that all class members were injured. The Clayton Act provides a cause of action only to persons who have been "injured in [their] business or property *by reason of* anything forbidden in the antitrust laws." 15 U.S.C. § 15 (emphasis added). As explained in detail below, shippers who would have paid the same fuel surcharges (or higher ones) absent the alleged conspiracy, shippers who negotiated a corresponding reduction in base rates or obtained other favorable terms that offset the impact of the fuel surcharge, and sole-served shippers who did not enjoy the benefits of direct or indirect rail competition could not have suffered injury. *See* §II. Dr. Rausser conceded that base rates declined for thousands of shippers in the class, but in his view this did not matter because he found no "*widespread*" or "*systematic*" discounting of base rates. 1stRausser.Rep. 95; Rausser.Reply.Rep. 71-72 (emphasis added). The district court credited Dr. Rausser's assertion and, citing *Kohen*, concluded that "examples of such discounting are outliers, insufficient to

Material Under Seal Deleted

defeat a finding of predominance." Op. 113. The erroneous *Kohen* standard was thus critical to the certification decision.

2. Defendants consistently argued that the district court must subject expert opinions to "rigorous analysis," and that Dr. Rausser's models do not withstand rigorous scrutiny. ClassCertOpp. 25, 62-72; Def.Walmart.Br. 6, 9-10, 18-19; Def.Walmart.Reply 4-15. Although *Hydrogen Peroxide* emphasized that expert opinion should be subjected to "rigorous analysis," 552 F.3d at 323, the district court erroneously read that decision to justify reliance on Dr. Rausser's models as long as they are merely "plausible." OB 32-33. Defendants never argued for a "plausibility" standard, and plaintiffs' claim of invited error is groundless.

B. The Class Certification Decision Is Manifestly Erroneous And Creates A "Death Knell" For Defendants.

Plaintiffs strenuously oppose interlocutory review because they know it very likely is the only opportunity for review of the class certification ruling. They do not cite any example of a defendant taking a treble damages class action of this magnitude to trial; nor are defendants aware of any. *See also* Chamber of Commerce Amicus Br. 18-27. Plaintiffs question whether the [ ] billion damage award they seek would have any effect on defendants' financial positions, but Rule 23(f) does not require defendants to prove that a judgment would

Material Under Seal Deleted

bankrupt them.[1] A high likelihood of being forced to settle is enough. *See In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002). And, [ ] billion is a lot of hydraulic pressure toward settlement.

Finally, the decision to certify this class was manifestly erroneous. There are thousands of shippers who would not have been injured even if a conspiracy occurred, and they cannot be identified without individualized inquiry. Defendants are not here seeking review of the district court's fact-finding. Rather, defendants claim that several of the court's most critical findings are the product of legal error, and none provides a basis for concluding that injury can be adjudicated with common evidence without consideration of individualized circumstances.

Though defendants need satisfy only one of the *Veneman* prongs, they have met all three. This Court should grant the Petition and reverse the class certification order.

[1] Plaintiffs' reference to defendants' SEC filings (Br.34) overlooks that defendants' assessments of the materiality of the potential outcomes were based on their respective views of the merits of the case, which is a different analysis from whether even a small risk of a multi-billion dollar judgment would pressure a company to settle what it reasonably believes are meritless claims. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

II. REVERSAL IS REQUIRED BECAUSE, UNDER THE PROPER RULE 23 STANDARDS, INJURY-IN-FACT, ANTITRUST INJURY, AND DAMAGES CANNOT BE ESTABLISHED BY COMMON PROOF.

As our Opening Brief explained, *Wal-Mart* held that plaintiffs must be able to prove that injury is "*in fact*" a common question that can be resolved with common evidence in "one stroke." 131 S. Ct. at 2551. Plaintiffs respond that *Wal-Mart* addressed the commonality rather than the predominance requirement of Rule 23, and the commonality requirement is met here because the question of whether there was a conspiracy is a common question. Br.39-40. Defendants do not dispute that the existence of conspiracy is a common question; rather, the issue is whether antitrust injury and injury-in-fact can be shown with common evidence. On that issue, plaintiffs ignore the key point: *Wal-Mart* explains what it *means* for an issue to be "common" to the class, and that informs the analysis of whether common issues predominate.

Even before *Wal-Mart*, the consensus holdings of courts nationwide was that, in antitrust actions, individual issues predominate and class certification is inappropriate unless plaintiffs show that the existence of the price-fixing conspiracy *and injury* are "common" questions. *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 311-12; *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 105 (2d Cir. 2007); *Blades*, 400 F.3d at 566. Complex individualized damages questions weigh heavily against certification as well. *See, e.g.*, *Behrend*

v. Comcast Corp., 655 F.3d 182, 204 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 24 (2012). *Wal-Mart* adds to this precedent by clarifying that, for injury to be a common question, it must be "capable of classwide resolution" with common evidence, "in one stroke." 131 S. Ct. at 2551. *Wal-Mart* also clarified that statistical evidence of widespread injury does not demonstrate the existence of a common question if for each member of the class there is no "common answer to the crucial question *why was I disfavored*." *Id.* at 2552. The district court did not follow those legal principles here.

A. Shippers Who Would Have Paid The Same Fuel Surcharges Absent Any Conspiracy Were Not Injured, And Individualized Evidence Must Be Considered To Determine Who They Are.

Defendants' Opening Brief demonstrated that injury-in-fact and damages cannot be adjudicated on a class-wide basis. Rate-based fuel surcharges have long been used in the rail industry, and their use was increasing prior to the class period. Fuel prices were volatile and increasing. The economy was strong, demand for freight rail service was increasing, and capacity was tight. OB 1-13. This evidence shows that large numbers of class members would not have suffered injury because they would have paid the same (or higher) fuel surcharges regardless of any alleged conspiracy, and individualized proof is needed to determine who they are. *Id.* at 33-48.

Plaintiffs' principal response is that this evidence is irrelevant because the district court found that the fuel surcharges used during the class period were applied uniformly "'*to all or virtually all class members*'" and were "*nothing like*" the fuel surcharges that were used earlier. Br.1-2 (emphasis in original); *see also id.* at 20, 43. The new fuel surcharges, plaintiffs repeat again and again, were more "aggressive" (because they were triggered at lower fuel price thresholds), and more "widespread" (because they were applied to more shipments) than the fuel surcharges that were used earlier. *Id.* at 1-2, 20-21. Even if this characterization were generally correct,[2] plaintiffs' argument still fails.

First, a shipper that would have paid the same fuel surcharge absent the alleged conspiracy suffers no actual injury, regardless of whether the conspiracy enabled the railroads to impose surcharges on *other* shippers. The Clayton Act

> leaves no room for awarding damages to some amorphous 'fluid class' rather than, or in addition, to one or more actually injured persons. It likewise does not permit any person to recover damages sustained not by him but by someone else who happens to be a member of such class.

Windham v. Am. Brands, Inc., 565 F.2d 59, 66 (4th Cir. 1977) (en banc). To include uninjured shippers in the class would "contravene the mandate of the

[2] Plaintiffs concede that there was *no change* in the fuel surcharge formula applied to some intermodal traffic. *Cf.* OB 13, n.1 (discussing BNSF public intermodal fuel surcharge, NS non-public fuel surcharge for domestic intermodal traffic, and UP's public intermodal fuel surcharge formula) *with* Br.49, n.21.

Rules Enabling Act that the Rules of Civil Procedure 'shall not abridge, enlarge or modify any substantive right.'" *Id*. (footnote omitted); *see also,Wal-Mart*, 131 S. Ct. at 2561 (same). Thus, the district court's finding that fuel surcharges became more "widespread" does not show that all class members were injured by the alleged conspiracy.

Second, the fact that *some* of the new surcharge formulas were more "aggressive" in the sense that they had a lower "trigger price" cannot be a source of injury to all class members given the fuel prices that existed during the class period. Under both the old and new WTI-based formulas used by CSXT and NS, there was a 2% surcharge when WTI was $28/barrel. The challenged new formula added surcharges if WTI was $23.01-$27.99/barrel, but *WTI was above $28/barrel throughout the class period*. OB 10. In practice, the more "aggressive" trigger price had no effect on shippers. OB 15; 1stRausser.Rep. 57.

Third, this lack of actual injury is not limited to shippers who paid rate-based fuel surcharges before the class period. Dr. Rausser admitted that some shippers who did *not* pay a fuel surcharge prior to the class period would have paid one during the class period absent the alleged conspiracy. *See* 1stRausser.Dep. 94-95; 2dRausserDep. 120-22. The undisputed evidence that fuel surcharge coverage was growing in the railroad industry prior to the class period, and rising fuel prices

Material Under Seal Deleted

were leading to the imposition of fuel surcharges in other industries, reinforces that conclusion. OB 9-17.

Plaintiffs try to blunt the force of this evidence by claiming that much of the trend toward increased fuel surcharge coverage occurred in "early 2003 when Plaintiffs allege Defendants were conspiring." Br.45. Dr. Rausser found, however, that the alleged conspiracy began in the beginning of July, 2003, and the Court accepted that date. *See* 1stRausser.Rep. 42 (fuel surcharges before July 2003 were adopted "without agreement or coordination"); 1stRausser.Dep. 25 (conspiracy began in "[t]he beginning of July 2003"); Op. 95 (alleged conspiracy "began in *mid-2003*") (emphasis added). Regardless, Dr. Rausser showed that the percentage of NS shipments with a surcharge (the only defendant he studied) rose from [ ] in January 2002 to [ ] in January 2003, long before the earliest allegedly conspiratorial communication. Def.Class.Cert.Opp.Slide Isaacson7.

Plaintiffs also contend that "increased customer resistance to fuel surcharges would follow from increases in fuel prices," so there "is no basis to presume" that shippers would have agreed to fuel surcharges during the class period "absent collusion." Br.44. But defendants have not asked for any sweeping presumption that the prior fuel surcharges would have been imposed on all shipments absent the

Material Under Seal Deleted

alleged conspiracy.[3] Instead, defendants have argued that the prior industry practice, market conditions, and the growing use of fuel surcharges in other industries during the class period provide strong evidence that *many* shippers would have agreed to fuel surcharges, and individualized evidence is needed to identify who they are. OB 37-48.

Finally, plaintiffs suggest that an antitrust trial brought by an individual shipper would involve only evidence common to all the members of this class. Br.48. That is simply not true. Although the portion of the trial dealing with the existence of the alleged conspiracy might involve common proof, the portion dealing with proof of injury and damages would not. Defendants would present individualized evidence that the shipper was not injured because it would have paid the same (or higher) fuel surcharge, or at least the same all-in rates, regardless of any alleged collusion. This could include evidence of the parties' negotiating history and prior contracts, the other shipping options available to the shipper, the shipper's volume of traffic, the marginal cost to the railroad of providing the transportation service, the shipper's willingness to accept risk of price fluctuations, and the shipper's ability to pass increased transportation costs onto its own

[3] Indeed, plaintiffs acknowledge that the challenged fuel surcharges were *not* applied to all freight rail shipments during the class period. Br.45 (stating that fuel surcharge coverage reached [ ]of shipments during the class period). All class members paid surcharges simply because that is how the class is defined.

Material Under Seal Deleted

customers. Willig.Rep. 44, 85. As *Wal-Mart* explains, a class cannot be certified on the premise that defendants will be precluded from presenting such relevant evidence at trial.[4] 131 S. Ct. at 2561.

B. Individualized Evidence Is Needed To Determine Whether Shippers Who Bargain To The Bottom Line Suffered Any Injury.

Certification was also improper because the class includes large, sophisticated shippers who negotiated over total price and gained offsetting concessions that preclude a finding of harm. The district court dismissed evidence of such offsets as rare, or because it was "contradicted" by later deposition testimony stating that the negotiations led only to reduced rate increases. These findings rest on clear legal errors.

The district court's finding that offsetting concessions were "rare" is inconsistent with undisputed evidence that base rates decreased for at least [ ] of class-period shipments, and *all-in* rates decreased on at least [ ]. OB 46.

[4] Plaintiffs criticize our reliance on *McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), for the proposition that the need for such individualized proof renders class certification inappropriate. *McLaughlin*, they argue, was a RICO case involving reliance, which is not an element of a Sherman Act claim. Br.47 & n.19. That is no distinction. Causation is an element of a Clayton Act damages action, and plaintiffs must establish that class members paid a surcharge because of the challenged conduct and not for other reasons. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981). Where this cannot be shown with common evidence, class certification is inappropriate. *In re Hotel Tel. Charges*, 500 F.2d 86, 89 (9th Cir. 1974) (class certification inappropriate in alleged conspiracy to increase room rates at 600 hotels where defendants might rebut plaintiffs' evidence by showing what "each hotel's . . . charge would have been in a competitive market").

Material Under Seal Deleted

Plaintiffs contend that the district court did not ignore this evidence, but instead "'credit[ed] [Rausser's] determination … that there was no evidence of *systematic* discounting.'" Br.52 (quoting Op. 113 (emphasis added)); *id.* at 53 (Rausser showed "there was no *systematic* discounting of base rates to offset the impact of coordinated fuel surcharges") (emphasis added). This explanation serves only to highlight the district court's error.

Defendants need not introduce evidence of *systematic* discounting of base rates to show that injury cannot be determined on a common basis. Rather, the evidence of widespread reductions in base rates and all-in rates, and the absence of any common systematic way to explain them, renders it impossible to establish through common proof "that the conspiracy '*raised* the entire price of the product above an ascertainable competitive level,'" Br.51 (emphasis added), for *all or virtually all* class members.

The district court committed a similar legal error in dismissing defendants' evidence concerning individual negotiations. In asserting that defendants' declarations were "contradicted by … subsequent deposition testimony" (Op. 89), the district court incorrectly assumed that defendants' declarants were claiming that shippers negotiated a reduction of *prior* all-in rates. The declarants, however, made no such claim. For example, NS vice president Listwak stated that [ ] [ ] offered to pay the fuel surcharge "if NS

Material Under Seal Deleted

would reduce its *proposed* base rate by [ ]." Listwak-Decl.¶15 (emphasis added). A *proposed* base rate is not the *prior* base rate. Listwak's acknowledgement at his deposition that the reduction in the *proposed* rate resulted in a smaller overall rate increase than NS originally sought thus did not "contradict" his declaration.[5]

The district court's contrary finding rests on the mistaken view that, to demonstrate the absence of injury, defendants had to show that price concessions from the *prior* base rates entirely negated any fuel surcharge increase. Op. 107-09. But defendants are entitled to prove that economic conditions would have caused base rates to rise for many shippers during the class period even in the absence of any alleged conspiracy. In an environment of legitimately rising base rates, *reduced increases* in base rates could offset the impact of an allegedly illegal fuel surcharge, and there is no way to determine, through common evidence, which shippers avoided injury and which did not.

Such offsets are not hypothetical. Of the several examples cited by defendants, plaintiffs focus on negotiations between [ ] and CSXT in 2006. Br.51. CSXT sought a fuel surcharge *and* a [ ] increase in prior base

[5] Other declarations likewise acknowledged that negotiations involved proposed rate increases. *See* Duggan-Decl.¶16 (BNSF agreed to a mechanism that "would back [ ] fuel surcharge down by the same percentage that the base rate increased"); Garin-Decl.¶12 (BNSF "agreed to trade rate increases for inclusion of a fuel surcharge" on some [ ] traffic).

Material Under Seal Deleted

rates, but obtained the fuel surcharge only by agreeing to a base rate *decrease* of [ ]. McNulty-Decl.¶10; McNulty-Dep.147-48. Plaintiffs note that the net result of the negotiation was a [ ]percent increase in all-in price. Br.51. Yet at a time when market forces and cost increases were raising base rates, CSXT had to cut the base rate to include the fuel surcharge. This is an example of a "reduced offset nullif[ying] the impact of a fuel surcharge." *Id.*[6]

Finally, the district court erred in believing that common impact can be shown simply because an alleged conspiracy raised "the starting point from which negotiations for discounts began." Op. 107. Whatever the validity of this concept in other contexts, in a class of 30,000 members that includes some of the largest and most sophisticated shippers in the nation, "[t]oo many factors play into an individual negotiation to allow an assumption … that any price increase [in an initial offer] … will always have the same magnitude of effect on the final price paid" by all class members. *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 29 (1st Cir. 2008).

C. Individualized Evidence Must Be Considered To Determine Whether Certain Shippers Suffered Antitrust Injury.

Certification was also improper because the class includes thousands of sole-served shippers, many of whom either cannot establish that the alleged conspiracy

[6] *See also* Piacente-Dep.99-101; Piacente-Decl.¶6 (identifying negotiation in which CSXT agreed to lower a customer's base rates to secure a fuel surcharge).

caused them antitrust injury, *i.e.*, injury from a loss of competition, or can do so only through individualized evidence. Plaintiffs' claims to the contrary are groundless.

Defendants' expert explained that sole-served shippers do not necessarily benefit from rail-to-rail competition (Willig.Rep. ¶132)—testimony bolstered by numerous STB findings and STB filings by named plaintiffs. OB51-52 & n.14. Thus, defendants' showing is neither "speculat[ive]" nor lacking in "actual evidence." Br.54. Plaintiffs fault defendants for failing to identify *specific* sole-served shippers who could not have been injured by the alleged conspiracy. Br.7. But the district court itself recognized that *plaintiffs* bear the burden of proving "by a preponderance of the evidence that railroads are affected by competitive constraints" when dealing with sole-served shippers. Op.74. n.13. As defendants have explained (OB 50-53), plaintiffs cannot discharge this burden using common evidence, and defendants would be entitled to offer individualized rebuttal evidence regardless.

Plaintiffs repeatedly mischaracterize or ignore defendants' point. First, defendants did not argue that "competitive constraints on sole-served shippers were *limited* to non-rail modes of transportation." Br.55 (emphasis added). Defendants explained that non-rail competition does not matter for this purpose, because a conspiracy to fix railroad rates cannot reduce non-rail competition. The

district court seemed not to understand that important legal point, because the finding that all sole-served shippers benefit from competition (like the testimony the court relied on) clearly refers to both rail and non-rail competition. Op. 72.

Second, defendants did not "simply ignore the district court's finding that their assertions about sole-served shippers were 'contradicted by the statements of defendants' own executives.'" Br.54 (quoting Op. 72.) Instead, defendants explained why that finding is plainly wrong. The recognition by railroad executives that some sole-served shippers benefit from indirect "product" or "geographic" rail competition (Op. 72-73 (citing CorrectedHDEx-36, HD Ex 66)), does not "contradict" defendants' antitrust injury argument. To the contrary, defendants have consistently acknowledged that indirect rail competition can exist for shippers in particular circumstances. *See* ClassCert-Tr. 220-21 ("that is certainly true"); OB 51 ("Such competitive constraints can be real"). Defendants' point (which the district court failed to address) is that, because indirect rail competition is not common, let alone universal, determining whether any individual sole-served shipper benefits from indirect rail competition requires a detailed inquiry into the specific shipper, product, and location involved. ClassCert-Tr. 221; OB 52. The inquiry is so fact-intensive that the STB refuses to undertake it when deciding whether there is "an absence of effective competition"

for a specific shipment. *See Ass'n of Am. R.R. v. STB*, 306 F.3d 1108, 1109 (D.C. Cir. 2002).[7]

The necessity of such highly individualized determinations is fatal to any claim that common evidence can be used to establish which sole-served shippers could have suffered antitrust injury from the alleged conspiracy. Plaintiffs claim that the allegedly unlawful surcharge was imposed on all shippers. They cite evidence that defendants did not consider imposing a higher surcharge on sole-served shippers; that one sole-served shipper negotiated out of a fuel surcharge before the conspiracy; and that, "in aggregate," sole-served shippers did not pay higher prices than other shippers. Br.54-56. None of this establishes that *all or virtually all* sole-served shippers enjoyed the benefits of indirect rail competition. This evidence, therefore, does not obviate the need for individualized inquiries to determine whether each sole-served shipper actually benefitted from indirect rail competition at particular locations.

[7] Because defendants argued below that the existence of indirect rail competition requires individualized showings (ClassCert-Tr. 221), plaintiffs' claim of waiver (Br.57) is baseless. Defendants are entitled to support this argument by citing decisions of this Court that discuss STB practices. Nor can the STB practice be dismissed as an irrelevant "specialized regulatory inquiry." Br.57. The regulatory regime is relevant precisely because it recognizes that sole-served shippers may not have effective competition. Plaintiffs have no response to the many cases in which sole-served shippers claimed, and the STB found, an absence of effective competition. OB 51, n.13 & 52, n.14.

III. CERTIFICATION MUST BE DENIED BECAUSE PLAINTIFFS' EXPERT PROOF CANNOT WITHSTAND RIGOROUS ANALYSIS AND DOES NOT ESTABLISH THAT INJURY OR DAMAGES IS A COMMON QUESTION.

Although plaintiffs claim that the district court evaluated Dr. Rausser's models under some unspecified "demanding standard" (Br.58-60), the opinion makes it clear that the court applied the "plausibility" standard (*e.g.*, Op. 36-38), and concluded that Dr. Rausser's regression analysis "presents a theory of proof that is plausible . . . ." *Id.* at 41. That legal error alone calls for reversal. Moreover, Dr. Rausser's models are deeply flawed and do not provide even a "plausible" method of common proof. OB 54-64. Dr. Rausser's models are essential to plaintiffs' efforts to show impact using common proof. Br.46. The district court's reliance on Dr. Rausser was therefore manifest error.

A. Dr. Rausser's Regressions Do Not Attempt To Analyze *Why* Particular Shippers Paid Fuel Surcharges.

Dr. Rausser's regression models show that all-in rates were more responsive to changes in the price of fuel after mid-2003 than in the three preceding years. That is hardly surprising, since prior to mid-2003 fuel prices were lower and generally below the surcharge triggers, so fuel surcharges were triggered more often and resulted in higher fuel surcharges during the class period than before. OB 54-56.

Plaintiffs respond that Dr. Rausser's regression analysis controls for changes in fuel prices, and while higher rail prices are to be "expected" in an "environment of rising fuel costs," the "historic *relationship* between fuel costs and prices should not have become decoupled at the onset of the conspiracy." Br.66. But a fuel surcharge provision is *designed* to alter the relationship between fuel prices and rates that otherwise exists in a contract. The "relationship" between fuel prices and all-in rates will always be different when fuel prices are above a surcharge trigger than when they are below the trigger, just as the "relationship" between your mobile phone bill and total minutes talked changes once you exceed your standard monthly allotment. *See* WilligRep. 144-45; LahlouSlide 37.

This phenomenon cannot be a "persuasive" inference that shippers paid supra-competitive rates (Op. 131) unless one assumes that absent any conspiracy, fuel surcharges would have disappeared after mid-2003 and all-in rates would not have responded to the tripling of fuel prices during the class period to any greater extent than they responded to the less pronounced price fluctuations before mid-2003. Those assumptions are completely implausible in light of the longstanding use of fuel surcharges in the industry, the steep rise in fuel prices, and the increasing demand for freight rail service. Indeed, even Dr. Rausser acknowledged that some class members would have "paid a fuel surcharge or a higher base price given the economic forces that existed absent the conspiracy." 1stRausser.Dep.

94-95; *see also* 2dRausser.Dep. 120-22. Yet his model does not even attempt to identify which individual shippers would have had the same fuel surcharge provisions but for any alleged conspiracy.

Even on its own terms, Dr. Rausser's proposed inference would not foreclose defendants' right to present competing, individualized evidence about why particular shippers paid fuel surcharges. In a class of 30,000 shippers those individualized issues would inevitably predominate at trial—and a class cannot be certified on the premise that defendants will be precluded from offering individualized rebuttal proof. *Wal-Mart*, 131 S. Ct. at 2561.[8]

B. Dr. Rausser's Damages Model Cannot Measure Causation Because It Predicts "Damages" For Shippers Who Could Not Have Been Injured By Any Conspiracy.

Plaintiffs do not dispute that a model that generates substantial damages for lawful conduct fails professional standards. *See* Br.67. Nor do they dispute that Dr. Rausser's model generates substantial overcharge "damages" for legacy shipments made under contracts entered before July 1, 2003, the date Dr. Rausser

[8] Plaintiffs accuse defendants of suggesting "that it is impossible to model pricing in the rail-freight industry using well-established multiple regression analyses," a result they consider improper because regression analyses are "'commonly used as a basis for certifying a class.'" Br.62 (quoting Op. 35.) The problem here is not regression analysis, but the illogical premise that, absent the alleged conspiracy, all-in rates should have responded to the historic increases in fuel prices during the class period exactly as they had responded to the less pronounced fuel price fluctuations between 2000 and 2003.

Material Under Seal Deleted

testified the conspiracy began. *See* 1stRausserDep. 25; OB 59-60. This defect—which the district court did not address even though defendants raised it repeatedly below (*see* OB 61)—reveals that Dr. Rausser's damages model is fundamentally unreliable. The district court's finding that the model is a "plausible" theory of proof is therefore clearly erroneous, and its reliance on the model in certifying the class is manifest error.

Plaintiffs attempt to salvage the model by speculating that there may have been conspiratorial activities prior to July 1, 2003. Br.67. But before Dr. Willig identified this defect in the damages model, Dr. Rausser repeatedly stated that contracts entered before July 1, 2003 were formed "*without agreement or coordination*." 1stRausserRep. 42 (emphasis added); *see also* OB 67. And even if contracts executed during the Spring of 2003 could have been impacted by a conspiracy that was allegedly still in its "formative stages" (Br.67), plaintiffs do not explain how that could account for the entire [ ]overcharge that Dr. Rausser calculated for the class of legacy shipments, which includes contracts entered years earlier. Rausser.Reply.Rep. 99, n.227. That Dr. Rausser chose not to re-run his model based on plaintiffs' vague new conspiracy dates speaks volumes.

Nor can these results be dismissed as irrelevant because legacy shipments are excluded from the class. Br.67-68. These shipments are excluded because there is no plausible way that a conspiracy could have affected the terms of

contracts entered before it began. The legacy contracts therefore provide a straightforward test for determining if Dr. Rausser's model distinguishes between "losses resulting from unlawful, as opposed to lawful, competition," as any valid damages model must do. *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir. 1975). Dr. Rausser's damages model fails this test, so class certification is improper. *See, e.g., In re Plastics Additives Antitrust Litig.*, No. 03-CV-2038, 2010 WL 3431837, at *17 (E.D. Pa. Aug. 31, 2010) (where court is "presented with evidence showing that Plaintiffs' proposed method of proof demonstrates impact where there in fact was none," certification should be denied).

C. The Damages Model Defines An Implausible But-For World.

Dr. Rausser's damages model is also deficient because it generates damages that are often equal to, and sometimes exceed, the entire surcharges actually paid. OB 62-65. Plaintiffs' explanation of why this is permissible does not withstand scrutiny.

Plaintiffs start from the premise that defendants were recovering their increased fuel costs through increases in their base rates or cost escalation clauses, such as the RCAF, which had a fuel component. They then assert that when the fuel surcharges were added to a contract, the railroads engaged in "double-dipping" (*i.e.*, shippers would pay twice for fuel-cost increases), so the overcharge could "approach or exceed the fuel-surcharge level." Br.69. This explanation is

directly at odds with plaintiffs' allegations about the nature of the alleged conspiracy.

Plaintiffs' theory below was that the RCAF was an "impediment" to "widespread fuel-surcharge application" because shippers might view them in combination as "double-dipping." Br.14-15. Thus, plaintiffs allege that defendants stopped using the RCAF and instead used the AIILF (a different index without a fuel component) plus a fuel surcharge. *Id.* at 15. Moreover, plaintiffs "do not allege that defendants conspired to fix each base rate separately." Op. 77. Indeed, Dr. Rausser expressly conceded in his deposition that "'*all of the injury comes from the fuel surcharge*.'" *Id.* (quoting 1stRausserDep. 98) (emphasis added).

Thus, under plaintiffs' own theory of the case, damages should never exceed the amount of the fuel surcharges. To the extent that damages are approximately equal to fuel surcharges, the model assumes that the railroads would not have been able to recover incremental increases in fuel costs *in any way* but for the alleged conspiracy. As Dr. Rausser himself acknowledged, that is not what would be expected. *See, e.g.*, 1stRausserDep. 177-78 (stating that he "would expect" rail prices to reflect the incremental cost increases caused by rising fuel prices).

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the Court should exercise its discretion to grant review, and should reverse the certification of the class.

Respectfully submitted,

January 31, 2013

s/ Carter G. Phillips
Carter G. Phillips
Counsel of Record
Joseph R. Guerra
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Petitioners

John M. Nannes
Tara L. Reinhart
Sean M. Tepe
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7000

Saul P. Morgenstern
Jennifer B. Patterson
Amanda C. Croushore
Kaye Scholer LLP
425 Park Avenue
New York, NY 10022
(212) 836-8000

Claudia R. Higgins
Kaye Scholer LLP
901 Fifteenth Street, NW
Washington, DC 20005
(202) 682-3500

Attorneys for Petitioner Norfolk Southern Railway Company

Maureen E. Mahoney
J. Scott Ballenger
LATHAM & WATKINS, LLP
555 11th Street, NW Suite 1000
(202) 637-2200

Tyrone R. Childress
David G. Meyer
JONES DAY
555 South Flower Street, 50th Floor
Los Angeles, CA 90071-2300
(213) 489-3939

Alan M. Wiseman
Thomas A. Isaacson
COVINGTON & BURLING LLP
1201 Pennsylvania Ave, NW
Washington, DC 20004-2401
(202) 662-6000

Attorneys for Petitioner Union Pacific Railroad Company

Randy M. Mastro
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4047

Theodore J. Boutros, Jr.
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

Andrew S. Tulumello
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500

Veronica S. Lewis
Robert C. Walters
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue Suite 1100
Dallas, TX 75201
(214) 698-3100

Samuel L. Sipe, Jr.
Linda Stein
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
(202) 429-3000

Attorneys for Petitioner BNSF Railway Company

Kent A. Gardiner
Kathryn D. Kirmayer
Shari Ross Lahlou
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2500

Attorneys for Petitioner CSX Transportation, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 6,987 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionately spaced typeface using the 2007 version of Microsoft Word in 14-point Times New Roman font.

s/ Carter G. Phillips
Carter G. Phillips
Counsel of Record
Joseph R. Guerra
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

CERTIFICATE OF FILING AND SERVICE

I certify that on this 31st day of January, 2013, service of two copies of the foregoing Initial Reply Brief of Petitioners – Non-Confidential Version has been made by first-class mail, postage pre-paid, on the following:.

Michael D. Hausfeld
Hausfeld LLP
1700 K Street, NW Suite 650
Washington, DC 20006
(202) 540-7200

Stephen R. Neuwirth
Quin Emanuel Urquhart & Sullivan LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
(212) 849-7000

It is further certified that on this 31st day of January, 2013, the undersigned has caused an original and fourteen copies of the foregoing Initial Reply Brief of Petitioners – Non-Confidential Version delivered via Overnight Mail to the Clerk of the United States Court of Appeals for the District of Columbia Circuit.

s/ Carter G. Phillips
Carter G. Phillips
Counsel of Record
Joseph R. Guerra
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000