BEFORE THE

DEPARTMENT OF JUSTICE

Docket No. ATR-2025-0001

Anticompetitive Regulations Task Force

COMMENTS OF

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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The National Industrial Transportation League ("NITL" or "League") submits these comments in response to the Department of Justice's initiative to assist federal agencies in eliminating or revising laws or regulations that impose barriers to competition and make it difficult for American businesses to compete effectively. Specifically, the Antitrust Division requested input from the public as to existing laws and regulations that impose undue regulatory burdens on private enterprise and competition, with adverse downstream impacts on supply chains, and the production and delivery of goods in the United States and beyond.

As a trade organization whose mission supports competitive, safe, and reliable freight transportation, NITL's comments identify certain laws and regulations applicable to freight rail and ocean liner transportation that stifle competition, impose undue costs and burdens on private American enterprise, and needlessly restrain free market forces. Removal and/or modernization of these laws and regulations is needed to promote competitive, efficient, and reliable freight transportation services to the benefit of American business, consumers, and the economy at large.

I. Background

President Trump has issued Executive Orders to promote deregulation and unwind burdensome regulations that stifle free market competition. Executive Order 14192 directs federal agencies to "alleviate unnecessary regulatory burdens placed on the American people."[1] Executive Order 14219 directs agencies to "initiate a process to review all regulations subject to their jurisdiction" that "impose significant costs upon private parties that are not outweighed by public benefits" and "impose undue burdens on small business and impede private enterprise and entrepreneurship."[2] To that end, the Department of Justice launched an Anticompetitive

[1] *Unleashing Prosperity Through Deregulation*, 90 Fed. Reg. 9065 (Jan. 31, 2025).

[2] *Ensuring Lawful Governance and Implementing the President's Department of Government Efficiency Deregulatory Initiative*, 90 Fed. Reg. 10583 (Feb. 25, 2025).

Regulations Task Force "to advocate for the elimination of anticompetitive state and federal laws and regulations that undermine free market competition and harm consumers, workers, and businesses."[3]

The Anticompetitive Regulations Task Force acknowledged that laws and regulations in the transportation sector grant certain entities "antitrust immunities, outright monopolies, or safe harbors for conduct that undermines competition."[4] Because of these laws and regulations "Americans pay more for travel, fuel, and a variety of other products."[5]

II. NITL Identity and Interest

NITL was founded in 1907, and its member companies range from some of the largest users of the nation's transportation systems to smaller companies engaged in the shipment and receipt of goods. The League represents the "voice of the shipper" in transportation policy matters and its many members are manufacturers, distributors, and receivers of goods across a multitude of industries, including chemicals, agricultural, paper and forest products, petroleum, coffee, consumer goods, and more, who require competitive and efficient transportation services across all modes, including rail, truck, and ocean vessel. NITL strongly supports regulatory policies that promote competitive and efficient transportation systems that can satisfy its members' dynamic supply chain requirements.

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[3] *Justice Department Launches Anticompetitive Regulations Task Force*, Office of Public Affairs, U.S. Department of Justice (Mar. 27, 2025).

[4] *Id.*

[5] *Id.*

III. NITL Supports the Repeal of the STB's Competitive Access Rules (published at 49 C.F.R. Part 1144) As Applied to Reciprocal Switching Arrangements

A. The Part 1144 Regulations Have Impeded Pro-Competitive Reciprocal Switching Arrangements

In response to DOJ's inquiry, NITL supports, and asks the DOJ to advocate for, repeal of the Surface Transportation Board's ("STB") regulations governing freight rail reciprocal switching arrangements that are published at 49 C.F.R. Part 1144.[6] These regulations were intended to implement the pro-competitive reciprocal switching statute, codified at 49 U.S.C. § 11102(c), which states that the STB "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."[7] Instead, they have been an impediment to competitive rail service for 40 years.

"Reciprocal switching" enhances rail competition by allowing a rail customer who is serviced by only one railroad to gain access to a second nearby competitor railroad through the transfer or "switching" of a rail shipment within the terminal area at an origin or destination that is accessible to both railroads. The second carrier who gains access to the traffic via "switching" typically pays the incumbent carrier a fee. "A reciprocal switching agreement thus enables an alternate carrier to offer its own single-line rate or joint-line through rate for line-haul service, even if the alternate carrier's lines do not physically reach the shipper/receiver's facility."[8]

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[6] To be clear, the League supports the repeal of the 49 C.F.R. Part 1144 regulations *only* as to prescriptions of reciprocal switching arrangements and it does not advocate for repeal of those regulations to the extent they apply to prescriptions of railroad through rates or through routes. Further, the League's comments do not extend to the STB's new reciprocal switching rules that are limited to inadequate service and are published at 49 C.F.R. Part 1145.

[7] 49 U.S.C. § 11102(c)(1).

[8] STB Docket No. Ex Parte 711 (Sub No. 2), *Reciprocal Switching for Inadequate Service*, slip op, at 3 (April 30, 2024).

As explained herein, despite the clear intent of Congress to *promote* intra-modal competition in the rail industry via reciprocal switching arrangements, the Part 1144 regulations have operated to *stifle* rail competition by creating insuperable standards that have never resulted in a successful reciprocal switching prescription. These burdensome and ineffective regulations have prevented rail customers with access to a single rail carrier from addressing railroad market power through the benefits of competition from nearby alternative railroads.

The Part 1144 regulations were adopted 40 years ago, and they have failed to operate as intended, i.e., to address the harmful effects from the exercise of railroad market power by providing captive rail customers with access to a second carrier that can feasibly transport the traffic from a nearby terminal area. The failure to employ reciprocal switching to counter the lack of robust competition in the rail industry has diminished the competitiveness of many rail-dependent businesses who are forced to endure the monopolistic pricing practices and unreliable rail service, rather than innovation, reasonable rates and practices, and the many other benefits derived from competition.

i. *The Reciprocal Switching Statute Was Intended to Promote Rail Competition*

Congress adopted the reciprocal switching statute in the Staggers Rail Act of 1980. The broad language of this statute which emphasizes the public interest and need for competition, along with its legislative history, reveals that Congress intended for the STB to encourage competitive switching arrangements. For example, the House Report to the Staggers Act noted that "[t]he Committee *intends for the Commission to permit and encourage reciprocal switching as a way to encourage greater competition*."[9] Furthermore, the Staggers Act Conference

[9] H.R. Rep. No 96-1035, at 67 (1980) (emphasis added).

Committee Report stated that the reciprocal switching agreement provision in the Act, among others, was "included to foster greater competition."[10]

ii. The Part 1144 Reciprocal Switching Regulations Are Outdated

In the four decades since the reciprocal switching regulations were adopted by the Interstate Commerce Commission ("ICC") in 1985,[11] the freight rail market has consolidated significantly from over forty Class I rail carriers into just five Class I railroads. Freight railroads have eliminated over-capacity and increased productivity in their networks, and they are financially strong and highly profitable.[12] It is estimated that more than 78% of rail customers are now captive to a single railroad.[13] Despite these substantial market changes, including the dramatic loss of competition, the Part 1144 regulations have never been successfully applied to promote or restore rail competition via reciprocal switching arrangements.

The STB recently recognized the dramatic changes to the rail industry since deregulation occurred following the Staggers Act when it considered potential reforms to its reciprocal switching regulations, specifically noting that:

> In the 1980s, the rail industry was reeling from decades of inefficiency and serial bankruptcies. The significant changes since then include, but are not limited to, the improved economic health of the railroad industry and increased consolidation in the Class I railroad sector. In its report on the recently enacted Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110, 129 Stat. 2228, the Senate Committee on Commerce, Science, and Transportation noted that "[t]he U.S. freight railroad industry has undergone a remarkable transformation since the enactment of the Staggers Rail Act of 1980," and elaborated that "the industry has evolved and the railroads' financial viability has drastically improved." S. Rep. No. 114-52, at 1-2 (2015). Particularly relevant to reciprocal switching, the consolidation of Class I carriers and the creation of short

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[10] H.R. Rep. No. 96-1430, at 80 (1980).

[11] *See*, Ex Parte No. 445 (Sub-No.1), *Intramodal Rail Competition,* 1 I.C.C.2d 822 (1985).

[12] S. Rep. No. 114-52, at 2 (2015).

[13] Letter from Staff to Members, Subcommittee on Railroads, Pipelines, and Hazardous Materials (Mar. 2, 2022), https://docs.house.gov/meetings/PW/PW14/20220308/114465/HHRG-117-PW14-20220308-SD001.pdf (citing *Rail-Dependent Shippers,* Freight Rail Customer Alliance, https://railvoices.org/the-issue/rail-dependent-shipper/.

lines that may have strong ties to a particular Class I likely reduces the chance of naturally occurring reciprocal switching as carriers seek to optimize their own large networks. While this is not in itself problematic, it could lead to reduced competitive options for some shippers and thus should be considered.[14]

iii. *The Part 1144 Reciprocal Switching Regulations Are Burdensome and Unworkable*

Under the Part 1144 rules, the STB may prescribe reciprocal switching if it determines that the prescription "is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. 10101 or is otherwise anticompetitive, and otherwise satisfies the criteria of . . . 11102(c)."[15] In making its determination, the Board shall account for "all relevant factors," including the revenues of the involved railroads, the efficiency of the routes in question, the rates sought to be charged, and the revenues of the involved railroads after the prescription; and that the complaining shipper "has used or would use the . . . reciprocal switching for a significant amount of traffic."[16] The STB also considers intramodal, intermodal, and geographic competition.[17]

In the first case adjudicated under the Part 1144 regulations, the ICC denied Midtec Paper Corporation's request for reciprocal switching at its paper mill in Wisconsin. The majority found that, in determining whether reciprocal switching was "necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. 10101a or is otherwise anticompetitive," the agency would need to find "classical categories of competitive abuse: foreclosure, refusal to

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[14] Ex Parte 711 (Sub. No. 1), *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, slip op., at 9 (July 25, 2016).

[15] 49 C.F.R. § 1144.2(a)(1).

[16] *Id.*

[17] 49 C.F.R. § 1144.2(b). Upon review, the DC Circuit in *Baltimore Gas and Electric Company v. United States* affirmed the rules concluding that the regulations were a "reasonable accommodation of the conflicting policies" set out in the Staggers Act, but the court made clear that the agency's accommodation was not the only one possible. 817 F.2d 108, 115 (D.C. Cir. 1987).

deal; price squeeze" or "other forms of monopolization or predation"; or "inadequate service or excessive prices."[18] Whether or not "abuse" had occurred would involve an antitrust-type inquiry. The ICC rejected claims that the railroad had refused to offer competitive rates and services, due to insufficient evidence regarding unspecified revenues, costs, efficiency of the routings, etc., and the agency also rejected claims of service inadequacies.[19]

On review of the ICC's decision in *Midtec*, the appellate court held, that the ICC's new competitive access rules substantially narrowed the agency's discretion under the statute to grant competitive remedies.[20]

After *Midtec*, three other cases were filed at the ICC, resulting in three more denials of the shippers' attempts to address rail challenges through competitive reciprocal switching arrangements and other competitive access remedies.[21] Each of these cases further exemplifies the extreme hurdles to satisfying the Part 1144 standards. Moreover, in the nearly 30 years since the last decision was issued in 1996, and in the face of this daunting precedent, no other requests for reciprocal switching have even been filed, despite the dramatic reductions to rail competition following the mega-rail mergers of the 1990s.

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[18] *Midtec Paper Corp., et al. v. Chicago & North Western Transp. Co.*, 3 I.C.C.2d 171, 1986 ICC LEXIS 42 (1986).

[19] *Id.*

[20] *Midtec Paper Corp. v. United States,* 857 F.2d 1487, 1500 (D.C. Cir. 1988).

[21] *Vista Chemical Co. v. Atchison, Topeka & Santa Fe Ry.*, 5 I.C C.2d 331 (1989) (allegations of anticompetitive conduct based on unreasonably high rates require inquiries into both STB unreasonable rate and competitive access standards); *Shenango Inc., et al. v. Pittsburgh Chartiers and Youghiogheny Ry. Co*., 5 I.C.C.2d 995 (1989) (ICC rejected claims of anticompetitive conduct and rejected other rate and routing allegations); and *Golden Cat Div. of Ralston Purina Co.*, STB Docket No. 41550, slip op. (served Apr. 25, 1996) (in order to obtain competitive access on the basis of poor service, the service failures must be severe).

iv. Efforts to Modernize the Part 1144 Reciprocal Switching Rules Were Unsuccessful; And the STB's New Reciprocal Switching Rule Published at 49 C.F.R. Part 1145 Is Unduly Narrow

NITL led recent efforts to reform STB's reciprocal switching regulations. The League filed a *Petition for Rulemaking to Adopt Revised Competitive Switching Rules* in July of 2011 at the STB.[22] However, after 13 years of proceedings at the Board, and the expenditure of enormous resources by the League and other shipper organizations, the Board abandoned a feasible proposal published in Ex Parte 711 (Sub. No. 1) which would have modernized the Part 1144 rules to implement reciprocal switching to the full extent provided in the statute ("practicable and in the public interest" and "necessary to provide competitive rail service") in favor of a new, extremely narrow rule that limits reciprocal switching prescriptions to situations involving inadequate service (*see* STB Ex Parte 711-Sub. No. 2). The STB based its new rule solely upon the public interest standard in the statute, avoiding the equally important "necessary to provide competitive rail service" standard. [23]

Under the STB's new rule, a reciprocal switching prescription would require a finding of inadequate service, which is determined by a Class I railroad's failure to abide any one of three new service metrics created by the Board.[24] The new reciprocal switching service rule created a

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[22] *See* Ex Parte No. 711, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules* (July 7, 2011). The League's Petition for Rulemaking was filed as an outgrowth of the STB's own efforts to evaluate the impacts of substantial changes in the rail market, including consolidation, and a request for proposals to address a loss of rail competition. *See* STB Ex Parte No. 705, *Competition in the Railroad Industry* (Jan. 11, 2011).

[23] Ex Parte No. 711 (Sub No. 2), *Reciprocal Switching for Inadequate Service* (served April 30, 2024).

[24] *Id.*, slip op., at 7, 31-59. As part of the regulations, the STB ordered Class I railroads to submit service data on a continuing basis. This data would be made publicly available and used to track railroad performance in three areas: (1) timing in the arrival of line-haul shipment (service reliability), (2) consistent shipment times (transit times), and (3) on-time local pickups and deliveries (industry spot and pull). If a shipper or receiver demonstrates that the rail carrier failed to meet any one of these service performance standards, and in the absence of an affirmative defense, infeasibility, or undue impairment, the Board would prescribe a reciprocal switch. Once issued, a reciprocal switch would last anywhere from three to five years and would automatically renew unless the carrier petitioned the STB.

new Part 1145 in the Code of Federal Regulations, leaving the onerous and ineffective Part 1144 rules on the books.

The League sincerely appreciates the Board's work leading to the new Part 1145 rule, however, the truth of the matter is that League members do not view this rule as particularly useful or workable. This is because the service metrics do not equate to reliable or desirable service levels, and the rule excludes the majority of rail traffic which moves under rail contracts[25] and/or is exempt from regulation.[26] Moreover, the railroads have appealed the rule to the Seventh Circuit Court of Appeals and there is a realistic possibility that the rule may not withstand judicial review.[27] Even if the new Part 1145 rules survive judicial review, for the reasons stated, it will not have a meaningful impact in encouraging rail-to-rail competition via reciprocal switching because of their narrow scope and they are not designed to implement the "necessary to provide competition" standard in the statute.

Based on the foregoing, NITL strongly supports the repeal of the Part 1144 regulations only as to reciprocal switching arrangements authorized under 49 U.S.C. § 11102(c). As explained, these rules have operated to undermine Congress' intent that reciprocal switching arrangements be prescribed to counter losses of competition and remedy instances of unbalanced railroad market power over captive rail traffic. The repeal of these rules would remove the insuperable barriers to promoting rail-to-rail competition via reciprocal switching by allowing shippers whose facilities are captive to a single Class I railroad to seek a switching prescription in adjudications before the STB that are based on the broader standards in the statute that both

[25] 49 U.S.C. § 10709.

[26] 49 C.F.R. Part 1039.

[27] *Grand Trunk Corp. et al. v. STB*, No. 24-1811 (7th Cir. May 10, 2024).

Parts 1144 and 1145 ignore. This would allow case-by-case adjudications at the STB under the specific facts and circumstances. Notably, prior to the ICC's adoption of the Part 1144 rules in 1985, the ICC decided reciprocal switching cases based solely on its interpretation of the statute.[28]

The repeal of the Part 1144 reciprocal switching rules would allow captive rail shippers who are harmed by the exercise of railroad market power in the form of unreliable service, unreasonable practices and rates, take-it-or-leave it contract negotiations, or other rail challenges, to seek a reciprocal switching prescription that is "practicable and in the public interest" or "necessary for competitive rail service." It would also provide new opportunities for the benefits of competition to spurn innovation and improve rail service and customer relations, while replacing the need for complex, costly, and inefficient regulation of rail service, rates, and practices at the STB.

Accordingly, NITL strongly supports, and asks the DOJ Task Force to advocate for, repeal of the STB's Part 1144 regulations only with respect to reciprocal switching arrangements.

B. Promoting Rail Competition by Removing Barriers to Reciprocal Switching Arrangements Is Preferred to Government Regulation of Rail Rates

Deregulation of the rail industry fostered by the Staggers Act was designed to reduce regulation over rail traffic that had competitive intermodal or intramodal transportation alternatives where protection from railroad market power was unnecessary. But it also recognized that there would remain a sizeable portion of traffic that would suffer from a lack of competition because all other transportation options were either impractical or economically infeasible. In its wisdom, Congress provided the ICC with different tools to protect those captive shippers from railroad market power.

[28] *Del & Hudson Ry. v Consolidated Rail Corp. - Reciprocal Switching Agreement*, 367 I.C.C. 718, 721-25 (1981).

As discussed above, one of the most important tools in the Staggers Act that was intended to apply when a rail-dependent business is sole served and is experiencing challenges due to the exercise of railroad market power is reciprocal switching. The statute made grants of reciprocal switching an exception to the general rule that the origin railroad is entitled to its long-haul (*see* 49 U.S.C. § 10705(a)(2)(A)). This exception was intended to facilitate intramodal competition "when practicable and in the public interest" or "necessary to provide competitive rail service."[29]

Promoting competition to address unreasonable railroad practices and rates would facilitate the National Rail Transportation Policies "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;" "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers…;" "to reduce regulatory barriers to entry into and exit from the industry;" and "to avoid undue concentrations of market power," among others.[30] In other words, competition that exists pursuant to a reciprocal switch would significantly reduce, if not eliminate, the need for other regulatory protections from unreasonable rates and practices.[31]

Another tool Congress provided to the STB to address railroad market power, when neither inter- nor intra-modal competition is available, is authority to address unreasonable rates of monopoly rail carriers. The STB, however, and the ICC before it, has struggled to devise a rate case methodology that is both economically meaningful and accessible for most captive traffic.

[29] 49 U.S.C. § 11102(c)(1).

[30] 49 U.S.C. § 10101(1), (4), (7), and (12).

[31] Although regulation might still be needed to protect against unreasonable rates and practices of the bottleneck switching carrier via the reciprocal switch, any such regulation would be over the short switching distance instead of that carrier's greater distance long-haul route, thereby "minimize[ing] the need for Federal regulatory control over the rail transportation system" and, due to this much narrower scope of regulation, providing "fair and expedition regulatory decisions when regulation is required[.]" 49 U.S.C. § 10101(2).

In Ex Parte No. 347 (Sub-No. 1), *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985), the ICC implemented Constrained Market Pricing (CMP) regulatory principles through the Stand-Alone Cost (SAC) methodology, which was upheld by the courts. As the docket title implies, the ICC developed SAC for use by unit train coal shippers and, with a few exceptions, nearly all SAC cases have been brought by coal shippers or shippers of other commodities by unit trains. That is because the time, cost, and complexity of SAC cases have rendered such cases economical only when commodities are transported in volumes that typically occur only in unit trains that shuttle between a constant origin-destination pair over the course of a decade or longer. The reality, however, is that most captive shipments are comprised of manifest (i.e., carload) traffic that moves in much smaller volumes between many different origins and destinations that are constantly changing. Consequently, even a successful rate case predicated upon CMP cannot provide rate reductions that are sufficient to justify the time and cost of the case for such traffic.

Less than a year after adopting SAC, the ICC initiated Ex Parte No. 347 (Sub. No. 2), *Rate Guidelines – Non-Coal Proceedings* (served May 21, 1986), because "where the cost of preparing and presenting CMP evidence is prohibitive, simplified alternative procedures are needed."[32] The agency, however, struggled for over a decade to devise any such alternative until its initial adoption of the "Three Benchmark" methodology in Ex Parte No. 347 (Sub-No. 2), *Rate Guidelines – Non-Coal Proceedings*.[33] The STB only adopted that methodology after Congress compelled it by statute in 1995 to "establish a simplified and expedited method for

[32] Ex Parte No. 347 (Sub. No. 2), *Rate Guidelines – Non-Coal Proceedings*, 1987 ICC LEXIS 390, *2-3 (served Mar. 23, 1987).

[33] 1 S.T.B. 1004, 1006-10 (1996) (discussing the need for a simplified methodology) and 1010-12 (summarizing the decade long search process).

determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case."[34]

After another decade passed with only a single Three- Benchmark case (which settled before litigating), the STB revised its Three Benchmark methodology (for use in what the STB considered to be "small" cases) and created a second method called "Simplified-SAC" (for use in so-called "medium" cases).[35] Although shippers filed a handful of Three Benchmark cases in the first few years[36] and just a single Simplified-SAC case (that settled without litigation), this latest version of the Three Benchmark method quickly fell into disuse because shippers still considered it to be ineffective.

The STB continued to conduct inquires both into alternative methodologies and improvements to its existing methodologies.[37] Those years of investigation culminated in a new methodology called "Final Offer Rate Review" or "FORR." That methodology, however, was appealed by the rail industry and recently overturned.[38] Consequently, captive shippers of manifest traffic are still without a viable method for determining whether rail rates are reasonable.

As a result, and over this 40-year history, the STB is no closer to protecting a large portion of captive rail traffic from railroad market power. It is reasonable to question if any such methodology is a realistic hope. The STB's current rate case methodologies are simply

[34] 49 U.S.C. § 10701(d)(3).

[35] Ex Parte No. 646 (Sub-No. 1), *Simplified Standards for Rail Rate Cases* (served July 28, 2006).

[36] STB Docket Nos. 42099, 42100, 42101, *E.I. du Pont de Nemours and Company v. CSX Transp., Inc.* (Dec. 17, 2007; Jan 14., 2008; Jan. 22, 2008; and Jan. 31, 2008); *see also U.S. Magnesium v. Union Pac. R.R.*, STB Docket No. 42114 (served Jan. 27, 2010).

[37] *See generally Final Offer Rate Review; Expanding Access to Rate Review*, 84 Fed. Reg. 48,872, 48,872-74 (Sept. 17, 2019) (discussing efforts by the STB to expand access to challenging the reasonableness of a rail rate).

[38] *Union Pac. R.R. v. STB*, 113 F.4th 823 (8th Cir. 2024).

unworkable and have failed to provide captive shippers of carload traffic with effective protection against unreasonably high rail rates as Congress intended.

While the Staggers Act has been a tremendous success for the rail industry, the benefits Congress intended to address railroad market power over captive shippers have not been realized. NITL members would much rather have more competitive options than more regulation. Reciprocal switching is an existing statutory tool to accomplish that purpose.

For all traffic where the bottleneck segment is just a short distance to an interchange point with a connecting railroad, reciprocal switching would permit competition that already exists, but for the long-haul rule, to regulate both rates and services. This is plainly within the intent of Congress, which authorized the STB to require reciprocal switching "where it finds such agreement to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service."[39]

In view of the lack of effective rate regulation protections for captive shippers after four decades, the competition that reciprocal switching would allow is even more critical. Accordingly, NITL strongly supports the removal of the existing barriers to competitive reciprocal switching arrangements, which can be accomplished by repealing the burdensome and obsolete reciprocal switching regulations published at 49 C.F.R. Part 1144.

IV. Ocean Transportation Laws and Practices That Undermine Competition

A. NITL Supports the Repeal of Ocean Carrier Antitrust Immunity

The ocean transportation market for container shipping is currently concentrated in a relatively small number of large, global shipping firms. The concentration is the result of decades of mergers, acquisitions, and departures occurring under the grant of anti-trust immunity to ocean

[39] 49 U.S.C. § 11102(c).

common carriers both in the United States and around the globe. In the United States, agreements among ocean common carriers that are filed with the Federal Maritime Commission ("FMC") are afforded antitrust immunity under the Shipping Act of 1984 (*see* 46 U.S.C. § 40307).[40]

The activities that may be jointly coordinated and agreed upon between or among ocean common carriers, under the protection of the Shipping Act's antitrust immunity, include highly sensitive competitive information, such as:

- Discussing, fixing, or regulating transportation rates;
- Pooling or apportioning traffic, revenues, earnings, or losses;
- Allotting ports or regulating the number and character of voyages;
- Regulating the volume or character of cargo to be carried;
- Engaging in exclusive, preferential, or cooperative working arrangements;
- Controlling, regulating, or preventing competition in international ocean transportation; or
- Discussing and agreeing on any matter related to a service contract.[41]

Ocean carriers have continuously filed a variety of ocean carrier agreements with the FMC for decades. More recently, these agreements have moved away from collective ratemaking that used to occur under ocean carrier conference agreements. Today, ocean carriers coordinate their services under agreements known as global Alliances. Collectively, the various ocean carrier Alliances control a substantial percentage of vessel capacity in the U.S. transpacific and transatlantic trades.[42] The Alliances engage frequently in vessel sharing activities and coordinate on other activities impacting service, such as sailings and capacity, subject to FMC monitoring and oversight.

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[40] Immunity from antitrust enforcement has been provided to ocean liner carriers since the Shipping Act of 1916.

[41] 46 U.S.C. § 40301(a).

[42] *60th Annual Report for FY 2021*, Federal Maritime Commission (April 2022), at 21, https://www.fmc.gov/wp-content/uploads/2022/04/60thAnnualReport.pdf ("Collectively, the three global alliances had market shares of 91 percent in the transpacific and 89 percent in the transatlantic trades in the first half of 2021[.]").

The focus on capacity management became more apparent following the financial crisis in 2008-09, when ocean carriers began to collectively engage in "slow steaming." Today, and as addressed in Section B below, the increasing use of blank sailings is employed to reduce available capacity and, arguably, drive up freight rates. Although external factors, including the COVID-19 pandemic and geo-political events, have caused port congestion and service interruption, the liner carriers appear increasingly resigned to engaging in capacity withdrawals as a more routine matter to address fluctuations of supply and demand, despite the highly disruptive impacts on their customers.

When major supply chain disruption in the ocean cargo network occurred during the COVID-19 pandemic, NITL worked diligently with Congress in enacting the Ocean Shipping Reform Act of 2022 ("OSRA22"). Although OSRA22 resulted in certain targeted reforms to address demurrage and detention charges and vessel space challenges, service reliability in the liner trades is at historical lows,[43] and significant concern remains regarding the ocean transportation industry structure that justifies repeal of antitrust immunity for ocean carriers. Notably, the European Commission recently decided not to extend antitrust immunity via its block exemption to ocean liner carriers.[44]

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[43] *2024 schedule reliability largely within 50%-55%*, Sea-Intelligence – Press Release (Jan. 28, 2025), https://www.sea-intelligence.com/images/press_docs/GLP-Jan2025/20250128_-_Sea-Intelligence_GLP_Press_Release_-_January_2025.pdf (showing that service reliability has not returned to pre-pandemic levels).

[44] In 2024, the European Commission, the executive body of the European Union, refused to extend the legal framework that exempted ocean common carriers from European Union antitrust rules because the framework "no longer promotes competition in the shipping sector." *Commission decides not to extend antitrust block exemption for liner shipping consortia*, European Commission Press Release (Oct. 9, 2023), *available at* https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4742; *see also Commission Staff Working Document Evaluation*, European Commission SWD(2023) 670 (Oct. 10, 2023) *available at* https://competition-policy.ec.europa.eu/document/accc620c-a097-428e-995b-2181c12789c5_en (justifying removal of antitrust protections for ocean common carriers).

NITL recognizes that value can be achieved through common carrier operating agreements, including certain "alliance" or "consortia" agreements that allow for the sharing of vessel space. But these agreements must also facilitate efficiencies for the benefit of the shipping public and allow natural economies of scale where smaller carriers combine resources that improve service capability and viably compete against larger carrier entities. Moreover, antitrust immunity is not a legal necessity for the existence of these agreements or, put another way, U.S. antitrust laws do not preclude ocean common carrier vessel sharing or similar agreements. The continued protection of ocean common carriers operating under the cloak of antitrust immunity is therefore unnecessary and, NITL believes, is deleterious to the promotion of a robust ocean transportation market that best serves the international maritime trade of U.S. businesses.

Access to reliable ocean transportation is a cornerstone to the viability and success of many U.S. enterprises, large and small. To continue the participation and growth of U.S. businesses on the global stage, NITL looks for and supports competitive and dependable service from ocean common carriers, which it believes can be best achieved without the grant of antitrust immunity.

B. Ocean Carrier Blank Sailings Adversely Impact the Competitiveness of US Importers and Exporters

A "blank sailing" occurs when an ocean common carrier skips a route or port call that usually occurs in its regular schedule. Carriers typically use blank sailings in response to a port closure, congestion, or reduced demand for service to a port. By reducing overall capacity for ocean transportation through blank sailings, ocean common carriers can artificially inflate ocean rates paid by U.S. shippers. This effectively "squeeze[s] businesses that are shipping smaller volumes but still paying premium rates."[45] In short, carriers remove capacity in response to reduced demand but keep prices the same.

Although blank sailings can soften market fluctuations and stabilize rates by preventing them from decreasing too dramatically when demand falls to the benefit of the carriers, their shipper customers, and ultimately consumers in the United States, prove to be the losers each time. The supply chains of shippers are severely disrupted by an often abrupt and artificial reduction in ocean transportation capacity, resulting in shipment delays, inefficiencies, and higher costs. Furthermore, shippers must pay higher rates than the market would otherwise allow but for the pulling of capacity out of the market. These elevated rates prevent shippers from reducing the costs of their products which are, ultimately, passed on to the U.S. consumer.

The FMC and the Department of Justice are well aware of the use of blank sailings by ocean common carriers and the adverse impacts on competition.[46] In 2022, the FMC released a report which outlined the concerns from U.S. shippers and other stakeholders in the supply chain.[47] According to the report, one of the areas of most concern was "the supply chain bottlenecks due to unresolved operational problems, including disruption of information

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[45] *Surge in Blank Sailings Signals*, Merchant Mariner Information (May 8, 2025), https://merchantmarinerguide.com/blog/f/surge-in-blank-sailings-signals.

[46] The Department of Justice and Federal Maritime Commission are both tasked with promoting competition in the ocean common carrier industry. In pursuit of this common goal, the Department of Justice and FMC signed a memorandum of understanding in 2021 to "share information related to, and cooperate in, the enforcement of antitrust and other laws . . . for the purpose of improving each agency's effectiveness in carrying out its respective legal responsibilities." ***Memorandum of Understanding Between The Federal Maritime Commission and The** Antitrust Division*, Department of Justice (July 12, 2021), ***available at*** https://www.justice.gov/archives/opa/press-release/file/1411101/dl.

[47] Fact Finding 29 Final Report, Federal Maritime Commission, at 5 (May 31, 2022), https://www2.fmc.gov/readingroom/docs/FFno29/Fact%20Finding%2029%20Final%20Report.pdf/.

concerning 'blank sailings.'" One of the recognized effects of these blank sailings is a "lack of container availability due to constrained capacity."[48]

The FMC also recognized that Global Vessel Sharing Alliances/Agreements, which authorize ocean common carriers to share vessels, exchange space, and coordinate scheduling and utilization, can have the highest potential of anticompetitive effects of ocean transportation. By pooling their resources, ocean common carriers can control more of the available capacity. Because of this, the FMC monitors and scrutinizes them the most heavily, and stated that additional changes may be necessary to alleviate the anticompetitive concerns that are inherent in these types of agreements.[49]

The issue of blank sailings persisted through the pandemic,[50] and continue to the present day but at an even greater rate.[51] In early April 2025, approximately 60,000 twenty-foot equivalent units ("TEUs") were scheduled to be blanked for the last few weeks of April.[52] However, the number of containers to be blanked rose to 250,000 TEUs then eventually 367,000 TEUs in response to the tariff announcement.[53] Despite the drop in demand, there was not a

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[48] *Id.* at 11.

[49] *Id.* at 43-44.

[50] *See, e.g.*, Knowler, G., *Alliances outline extensive blank sailings for Q3*, Journal of Commerce (June 3, 2020), https://www.joc.com/article/alliances-outline-extensive-blank-sailings-for-q3-5204851 ("The withdrawal of such significant amounts of vessel supply [i.e., blank sailings] has kept spot rates way above levels seen at the same time last year.").

[51] *Surge in Blank Sailings Signals*, Merchant Mariner Information (May 8, 2025), https://merchantmarinerguide.com/blog/f/surge-in-blank-sailings-signals ("According to recent reports, blank sailings in April and May 2025 have surpassed levels seen during the early months of the COVID-19 pandemic, underscoring the severity of the slowdown.").

[52] *Trans-Pacific blank sailings soar as ocean shipments plunge*, Freight Waves (April 21, 2025), https://www.freightwaves.com/news/trans-pacific-blank-sailings-soar-as-ocean-shipments-plunge.

[53] *Id.*

commensurate drop in ocean rates. Such a significant rise in scheduled blanked sailings has not been seen since the earliest days of the pandemic.[54]

Accordingly, in addition to supporting the repeal of ocean carrier antitrust immunity, NITL supports further investigation by DOJ and the FMC into the anticompetitive effects blank sailings have on the ocean transportation market, and how global alliances may contribute to the increasing occurrence of blank sailings.

V. Conclusion

NITL greatly appreciates the opportunity to submit these comments to the Department of Justice's Anticompetitive Task Force and urges the Task Force to advocate for changes in freight rail and ocean liner laws and regulations consistent with these comments.

Respectfully submitted,

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[54] *Surge in Blank Sailings Signals*, Merchant Mariner Information (May 8, 2025), https://merchantmarinerguide.com/blog/f/surge-in-blank-sailings-signals ("According to recent reports, blank sailings in April and May 2025 have surpassed levels seen during the early months of the COVID-19 pandemic, underscoring the severity of the slowdown."); *Blank Sailings, Rate Volatility, and the Operational Implications for Global Trade*, Alba Wheels Up (May 8, 2025), https://albawheelsup.com/trade_news/blank-sailings-rate-volatility-and-the-operational-implications-for-global-trade/ ("[C]arriers have withdrawn a significant number of scheduled sailings on the transpacific eastbound route to manage overcapacity and limit further pricing collapse. This has created a market where published rates remain relatively stable, but service reliability continues to erode.").