BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte 788

Eliminating Regulatory Barriers to Competition: Review of Part 1144

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 Surface Transportation Board's ("STB" or "Board") Notice of Proposed Rulemaking ("NPRM") to repeal its regulations on *Intramodal Rail Competition*, 49 C.F.R. Part 1144.[1] As a trade organization whose mission supports competitive, safe, and reliable freight transportation, NITL commends the Board on its proposal to repeal Part 1144 which will modernize its regulatory framework by removing burdensome and ineffective regulations. Part 1144 imposes unreasonable burdens on shippers whose facilities are captive to a single railroad and who seek to use the reciprocal switching statute to access a second railroad to obtain competitive, efficient, and reliable freight rail transportation. Removing Part 1144 will create new opportunities for competition in the rail industry to be a key mechanism to improve rail service and solve freight rail challenges for the benefit of U.S. manufacturers, farmers, distributors of raw materials, and the American economy.

[1] *Eliminating Regulatory Barriers to Competition*, EP 788 (STB served Jan. 7, 2026) ("Proposed Rulemaking").

I. Background and Introduction.

NITL has been a leading advocate for reform of the STB's competitive access rules. In July 2011, NITL petitioned the Board to initiate a rulemaking to create a new set of rules for competitive switching that would replace Part 1144.[2] The proceedings before the Board in EP 711 lasted more than 13 years, and culminated in the promulgation of *Reciprocal Switching for Inadequate Services*, codified at 49 C.F.R. Part 1145.[3] NITL was a prominent participant during these proceedings, and intervened when the Board's Final Rule was challenged at, and ultimately overturned by, the Seventh Circuit.[4]

As NITL has argued since its 2011 Petition, the 1144 Rules, which were adopted decades ago in 1985, impose extremely burdensome standards that have unduly narrowed the Board's discretion when considering shippers' requests for competitive access remedies.[5] These standards have impeded shippers from obtaining meaningful relief, including reciprocal switching prescriptions, contrary to the intent of Congress. Indeed, since the promulgation of Part 1144, no reciprocal switch has *ever* been imposed by the Board, or its predecessor, the Interstate Commerce Commission.[6] More reciprocal switching agreements between Class I railroads will help restore competition in freight rail transportation, which has plummeted since passage of Staggers Act in 1980.

Repeal of Part 1144 is also consistent with this Administration's deregulatory initiatives. In 2025, President Trump issued Executive Orders to promote deregulation and unwind burdensome regulations that stifle free market competition. Executive Order 14192 directs

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[2] *Petition for Rulemaking of the National Industrial Transportation League*, EP 711 (STB filed July 7, 2011) ("NITL 2011 Petition").
[3] EP 711 (Sub-No. 2) (STB served April 30, 2024).
[4] *See Grand Trunk Corp. et al. v. Surface Transportation Board*, 143 F.4th 741 (7th Cir. 2025).
[5] NITL 2011 Petition, at 24.
[6] Proposed Rulemaking, at 7.

federal agencies to "alleviate unnecessary regulatory burdens placed on the American people."[7] 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."[8] Repeal of Part 1144 is consistent with both of these Executive Orders and the priorities of this Administration.

In May 2025, NITL submitted extensive comments with the Department of Justice's Anticompetitive Regulations Taks Force in which it advocated for repeal of the reciprocal switching regulations under Part 1144.[9] A few months later, NITL advocated for this policy change directly to the STB when it participated in the Board's Policy Review Process/Meetings.[10]

II. NITL Strongly Supports Repeal of Part 1144.

As explained in the NPRM, the Board may change an existing regulation or policy so long as it "provides a reasoned explanation for the change."[11] Further, any new policy must be consistent with its "statutory jurisdiction, authority, or limitations."[12] The Board has clearly satisfied these requirements based on its detailed explanation for its proposal to repeal the part 1144 rules.

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[7] *Unleashing Prosperity Through Deregulation*, 90 Fed. Reg. 9065 (Jan. 31, 2025).
[8] *Ensuring Lawful Governance and Implementing the President's Department of Government Efficiency Deregulatory Initiative*, 90 Fed. Reg. 10583 (Feb. 25, 2025).
[9] *Comments of the National Industrial Transportation League*, Department of Justice Anticompetitive Regulations Task Force, Docket No. ATR-2025-0001 (May 27, 2025).
[10] *Chairman Fuchs Kicks Off Meetings on Improving Competition and Reducing Regulatory Barriers*, STB Press Release No. 25-26 (July 21, 2025).
[11] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).
[12] 5 U.S.C. § 706.

NITL supports each justification in the Board's proposal to repeal Part 1144, all of which are defensible under administrative law. NITL urges the Board to move forward with the repeal of its part 1144 rules and to consider petitions for competitive relief on a case-by-case basis under the applicable statutory provisions, namely, 49 U.S.C. §§ 10705 and 11102(c).[13]

The 1144 Rules constrain the Board's statutory discretion in a manner that is not appropriate based on today's highly concentrated rail market. The reciprocal switching regulations were promulgated at a time when there were over forty Class I rail carriers operating in the United States. Now there are only six. The Union Pacific Railway's proposed acquisition of Norfolk Southern evidences the potential for even further consolidation. If this merger is ultimately approved, it will extend freight rail bottlenecks, reduce shippers' service options, and create a railroad behemoth with massive market share and power.

Freight railroads have eliminated over-capacity and increased productivity, and are now as financially strong as ever.[14] But the drastic structural changes in the rail market since deregulation have caused more than 78% of rail customers to be captive to a single railroad who are forced to accept poor railroad service, and unrestricted pricing due to ineffective regulatory remedies for unreasonable rates.

NITL agrees that a full repeal of Part 1144 rules, as applied to both reciprocal switching and through route and rate prescriptions, is warranted. A full repeal would allow the Board to consider the prescription of reciprocal switching agreements, through routes, and through rates on a case-by-case basis under the applicable statutory standards. The extremely high burden to

[13] Proposed Rulemaking, at 10 (stating the legal standard necessary to justify repeal of existing regulations and policies).
[14] S. Rep. No. 114-52, at 2 (2015).

prove "anticompetitive conduct" required by the rules would be removed, and repealing the 1144 rules as to both avenues to competitive access is both timely, and necessary.

Under § 11102(c), the Board may order competitive relief to provide shippers with access to reciprocal switching arrangements. Under 49 U.S.C. §§ 10705, the Board may increase competitive access by prescribing new through routes and through rates.

Section 11102(c), permits the Board to force a rail carrier to enter into a reciprocal switching agreement upon a finding that such an agreement is "practicable and in the public interest, or where such agreements are necessary to provide competitive rail service." In passing Section 11102(c), Congress sought to "create competition between railroads [citations omitted] in those areas where reciprocal switching is 'feasible' and where only one railroad 'provides services and it is inadequate.'"[15] In other words, Congress supplied the standard for prescribing a reciprocal switching agreement.

Section 10705(a) permits the Board to "prescribe through routes, joint classifications, joint rates, the division of joint rates, and the conditions under which those routes must be operated" when it is in the public interest. If a prescription short hauls a carrier, the Board can only set a through route when inclusion of the lines would make the through route unreasonably long when compared with a practicable alternative that could be established, or when needed to provide "adequate, and more efficient or economic transportation."[16]

First, the plain statutory language of 49 U.S.C. § 11102 and § 10705 do not require a showing of an anticompetitive act. Both statutes provide a clear delegation of discretion to the Board, which may prescribe a through route or rate once it finds it is "desirable in the public

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[15] *Cent. States Enter., Inc. v. Interstate Commerce Comm'n*, 780 F.2d 664, 679 n.19 (7th Cir. 1985) (quoting H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 116 (1980)).
[16] 49 U.S.C. 10705(a)(2); *see also* Proposed Rulemaking, at 3.

interest,"[17] or reciprocal switching "when practicable and in the public interest" or "necessary to provide competitive rail service." The lack of specificity in the statute supports the conclusion that the Board can decide whether to exercise its authority to prescribe competitive access via adjudication or rulemaking.[18]

Second, the justifications for promulgating Part 1144 are no longer present. In promulgating Part 1144 the Board relied on the fact that the rules were "acceptable to as broad a section of the marketplace as possible."[19] NITL was then, and is now, part of that marketplace. However, NITL (and many other rail customer groups) strongly support the repeal of Part 1144 based on significant market and statutory changes that have transpired since the rules were adopted in 1985. Thus, this justification is no longer present.[20]

Third, achieving relief via Part 1144 has been nearly impossible, and repealing these rules would remove the insuperable barriers to promoting rail-to-rail competition. If repealed, shippers whose facilities are captive to a single Class I railroad could seek a switching prescription in adjudications before the STB that are based on the broader and more flexible statutory standards. The Board could return to the Interstate Commerce Commission's practice of deciding reciprocal switching cases based solely on statutory interpretation.[21] The repeal of Part 1144 would open opportunities for relief to rail shippers that are harmed by concentrated railroad market power using case-by-case adjudications. As intended by Congress, shippers faced with persistent service problems and unreasonable practices could pursue a competition-based remedy. Access

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[17] Proposed Rulemaking, at 10.
[18] *Id.* at 11.
[19] *Id.* (quoting *Intramodal Rail Competition (Original 1144 NPRM)*, EP 445 (Sub-No. 1), slip op. at 4 (ICC served Mar. 27, 1985)).
[20] Proposed Rulemaking, at 11.
[21] *Del & Hudson Ry. v. Consolidated Rail Corp.—Reciprocal Switching Agreement*, 367 I.C.C. 718, 721-25 (1981).

to the Board would be immediate with the repeal of Part 1144. 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.

Fourth, the Part 1144 Rules are obsolete. On multiple occasions, the Board has recognized the sea change in the rail industry since the promulgation of the competitive access standards. In 1998, the Board stated that "[g]iven the changes that have taken place in the rail industry since 1980, we will also consider whether to revise the competitive access rules with respect to competitive issues that are not related to quality of service."[22] Thirteen years later in its decision initiating Ex Parte No. 705, the Board concluded that "it is time for the Board to consider the issues of competition and access" in light of the "improving economic health of the railroad industry, increased consolidation of the Class I railroad sector, the proliferation of a short line railroad network, and an increased participation of rail customers in car ownership and maintenance . . . ."[23] And finally in 2016, the Board repeated this refrain and asserted that "the consolidation of Class I carriers and the creation of short 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."[24] The Board should act on these observations, and remove regulatory barriers that have benefitted railroads at the expense of U.S. manufacturers and farmers, and the American economy.

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[22] *Review of Rail Access and Competition Issues*, EP 575, 3 S.T.B. 82, 98 (1998).
[23] *Competition in the Railroad Industry*, EP 705, slip op. at 3 (STB served Jan. 11, 2011).
[24] *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, EP 711 (Sub-No. 1), slip op. at 9 (STB served July 27, 2016) ("2016 Switching NPRM").

III. NITL Supports Efficient Case-by-Case Adjudications.

NITL supports the use of efficient STB procedures for case-by-case adjudications that will avoid complex, protracted, and costly litigation. Repealing Part 1144 allows the Board to consider prescriptions of reciprocal switching agreements, through routes, and through rates, on a case-by-case basis. This process would be grounded in the Board's well-established authority to implement its statutory mandates through adjudication, rather than rulemaking. Parties would present arguments in an adversarial proceeding relying on the statutory standards in 49 U.S.C. §§ 10705(a) and 11102(c). As the Board explicitly states in its proposal, an adversarial proceeding "lends itself to the in-depth analysis of unique fact patterns required by the statute."[25] The Board observed that one of the "'two basic principles' that drove adoption of part 1144" was because of a "lack of 'broad' support in the marketplace for more defined standards."[26] Through case-by-case adjudication, both parties are present before the Board, which gives the Board the opportunity to scrutinize each parties' legal and policy arguments in the context of specific circumstances.[27]

NITL strongly urges the STB to eliminate consideration of product and geographic competition in adjudicating requests for reciprocal switching agreements, through routes, and through rates. As the Board well knows, evidence of product and geographic competition involves complicated issues and is not required by statute.[28] Requiring parties to produce and

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[25] Proposed Rulemaking, at 13 (quoting *Standards for Intramodal Rail Competition*, EP 445, slip op. at 12-13 (ICC served July 7, 1983).
[26] Proposed Rulemaking, at 14 (quoting *Intramodal Rail Competition (Original 1144 NPRM)*, EP 445 (Sub-No. 1), slip op. at 4 (ICC served Mar. 27, 1985)).
[27] *Id.* (quoting *FDA v. Wages & White Lion Invs., LLC*, 604 U.S. 542, 568 (2025)).
[28] Proposed Rulemaking, at 13; *see also* 2016 Switching NPRM, at 27 (noting that consideration of product and geographic competition is not statutorily required and imposes a "substantial burden" on the Board and parties) (*citing Mkt. Dominance Determinations—Prod. & Geographic Competition*, 3 S.T.B. 937 (1998)).

analyze such burdensome evidence would, therefore, be inconsistent with Congressional intent and the Board's objectives to adjudicate competitive access relief based on the broad and flexible statutory standards.

In the NPRM, the Board stated: "Under the case-by-case approach, however, any rail carrier wishing to present such evidence in an individual proceeding should indicate that it intends to do so early on so that the Board may consider whether and to what extent the evidence may be presented."[29] NITL *strongly* disagrees that the Board should consider evidence of product and geographic competition even if notified early by the RR respondent. Allowing railroads to introduce evidence of product and geographic competition would be taking a step backwards by increasing the burdens and complexity involved in case-by-case adjudications of competitive access remedies. As the Board has long recognized, "the harm to the shipper community from continuing to consider such evidence can be substantial and irreparable."[30] When the Board determined to remove consideration of product and geographic competition in market dominance proceedings it specifically noted that:

> [B]oth larger shippers and smaller shippers are unanimous in their representations that the prospect of engaging in substantial threshold litigation relating to product and geographic competition is an overwhelming obstacle that dissuades shippers from bringing valid rate complaints to the Board. In other words, it appears that the burdens associated with litigating product and geographic competition issues may serve to deny captive shippers with valid claims access to the Board and thus their only avenue of rate relief.[31]

Those exact concerns and adverse effects would apply to adjudications of shippers' requests for reciprocal switching, through routes, or through rates if the Board allows railroads to introduce evidence of product and geographic competition. Thus, the Board should not do so,

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[29] Proposed Rulemaking, at 13.
[30] *Market Dominance Determinations—Product & Geographic Competition*, EP 627, slip op. at 13 (STB served Dec. 21, 1998).
[31] *Id.*

and it should clarify in its final rule repealing part 1144 that it will not consider evidence of product and geographic competition in case-by-case adjudications of the remedies authorized under §§ 11102(c) and 10705(a).

IV. Repeal of Part 1144 Rule Should Not Impact Class I Merger Conditions.

Finally, NITL believes that repealing Part 1144 should not influence the factors the Board considers when imposing conditions in merger transactions involving Class I railroads. Conditions to address competitive harm caused by rail mergers, or the need for competitive enhancements, should be addressed separately based on the specific merger impacts, as laid out in the Board's 2001 Merger Rules. Rail merger conditions needed for approval of a merger transaction typically must be implemented immediately, and not from individual case-by-case adjudications. This is especially important given the unknown standards and parameters that will inevitably emerge as the case law in reciprocal switching, through routes, and through rate prescriptions develops. In short, it would be inappropriate for the Board to rely on future case-by-case adjudications as a possible means of addressing rail merger impacts and, thus, competitive access relief and merger conditions should remain independent of one another.

V. Conclusion

NITL greatly appreciates the opportunity to submit these comments, and urges the Board to repeal, in full, Part 1144 for the reasons stated above.

Respectfully submitted,

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