

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Docket No. EP 788

**ELIMINATING REGULATORY BARRIERS TO COMPETITION:
REVIEW OF PART 1144**

**OPENING COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

Thomas E. Zoeller
Hanna M. Chouest
Julianne C. Freeman
Norfolk Southern Railway Company
650 W. Peachtree St. N.W.
Atlanta, GA 30308
(470) 463-6314

Raymond A. Atkins
Allison C. Davis
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

*Counsel to Norfolk Southern
Railway Company*

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Norfolk Southern Railway Company (“NSR”) appreciates the opportunity to comment on the Notice of Proposed Rulemaking (“NPRM”) in the above-captioned proceeding, in which the Board proposes to rescind its regulations at 49 C.F.R. Part 1144 governing requests for competitive access under 49 U.S.C. §§ 11102 and 10705.

Since their adoption in 1985, the Part 1144 rules have provided the procedural framework for cases and, more importantly, explained the substantive standard for granting relief under the relevant statutes. While NSR supports periodic review of regulations and regulatory burden, NSR does not believe that rescission of the Part 1144 regulations is necessary.

NSR is concerned that the NPRM offers limited justification for wholesale rescission of these regulations, upon which the industry has relied for over 40 years. If the Board has concerns that certain provisions in Part 1144 have become outdated, the Board could implement targeted revisions to address those concerns, with the benefit of constructive public comment. While seeking procedural

flexibility in case-by-case adjudication is a worthy objective of the Board, there are legitimate concerns that the NPRM suggests an alteration of the Board's substantive interpretation of the statutory standard without explaining that interpretive change. That approach would deny the Board of the benefit of public comment regarding whatever its new substantive interpretation may be and what the law requires.

If the Board chooses to proceed with this rescission it should (1) clarify that rescission is targeted at providing procedural flexibility in how the standards are applied rather than prejudicing or foreclosing any substantive interpretation of the law; and (2) develop a more robust record on issues relating to through routes and through rates before taking any regulatory action.

I. NSR DOES NOT OBJECT TO SEEKING MORE PROCEDURAL FLEXIBILITY IN ADJUDICATIONS.

NSR does not oppose the Board's review of its own regulations or its consideration of whether targeted improvements may be appropriate. Nor is there an objection to one of the NPRM's goals, which appears to be seeking more procedural flexibility in adjudications. However, NSR is concerned that some of the proffered justifications—especially insofar as they purport to justify a substantive reinterpretation of the statute—may not fully support the proposed rescission.

First, the Board cites a “dearth of cases” under Part 1144 as a rationale for rescission. NPRM at 12. But, as NSR and the industry have previously explained,¹

¹ See, e.g., Opening Comments of Norfolk Southern Railway Co., *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1), at 17–19 (filed Oct. 26, 2016) (“NSR 711-1 Comments”);

the fact that cases are infrequently brought does not evidence a problem. There are a variety of regulatory remedies that the Board can prescribe that are infrequently invoked and one of the key goals of the Rail Transportation Policy is to minimize the need for federal regulatory control over the rail transportation system.

49 U.S.C. § 10101(2). Indeed, when the ICC enacted Part 1144, the agency explicitly stated that its aim was to develop rules to “minimiz[e] the need for regulatory intervention” because the governing statutes “evinced a Congressional interest in private dispute resolution and minimized Federal involvement.” *See Intramodal Rail Competition*, Docket No. EP 445 (Sub-No. 1), at 4 (ICC served Mar. 28, 1985).

The more reasonable inference to draw from the infrequent invocation of Part 1144 is that the market is functioning as intended. As is the case across different provisions in various regulatory regimes, regulated entities conform their conduct to avoid triggering it. Furthermore, industry participants enter into these arrangements voluntarily where they make economic sense. *See, e.g.*, NSR 711-1 Comments at 18. The absence of frequent resort to such relief therefore reflects successful regulatory design, not the imposition of an undue barrier to relief.

Second, the Board frames the existing Part 1144 rules as the vestige of a no-longer-existing agreement between the National Industrial Transportation League (“NITL”) and the Association of American Railroads (“AAR”). NPRM at 11. But

Opening Comments of the Association of American Railroads, *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1), at 24 (filed Oct. 26, 2016).

this overstates the role that consensus played in adoption of Part 1144. While it is true that the agency expressed support for industry-negotiated solutions, in adopting the final rule, the agency emphasized that it was not delegating its rulemaking authority to the parties proposing the agreement. Instead, the agency adhered to its “**first obligation** ... to implement and administer [the statutory] provisions in a manner consistent with” the statute. *See Intramodal Rail Competition*, 1 I.C.C.2d 822, 823 (1985) (emphasis added). In other words, the rules that the agency ultimately promulgated reflected the agency’s own best judgment.

Further, the agency explained that its goal of making the rules “acceptable to as broad a section of the marketplace as is possible” was only intended because the agency believed that the “more support that exists for the adopted rules, the more effective they will be in minimizing the need for regulatory intervention.”

Intramodal Rail Competition, Docket No. EP 445 (Sub-No. 1), at 4. Thus, to repeal the rule *because of* that intended minimal intervention would frustrate one of its underlying purposes.

Third, and finally, the Board points to certain industry changes, such as line rationalization and consolidation, as having impacted the rail industry, while also noting financial improvements that the industry has seen in the last 40 years. From those assertions, the Board reasons that the concerns animating Part 1144 “are of far less concern today,” and thus the rules are “no longer warranted.” NPRM at 12. While there has been improvement since the rail industry was in financial crisis over 40 years ago, that turnaround is a success story for deregulation. Indeed,

the NPRM does not address the likelihood of a causal relationship between the agency's approach to regulation as reflected in Part 1144 and the health of the railroad industry. Nor does the NPRM address how the proposal could impact growth, notwithstanding the agency's recent concern about declining carload volumes.

II. PART 1144 REFLECTS THE AGENCY'S LONG-STANDING UNDERSTANDING OF ITS STATUTORY AUTHORITY.

According to the NPRM, because the agency has authority to act by adjudication, it has the authority to rescind its regulations. *See* NPRM at 13. That explanation aims to explain why rescission is within its regulatory prerogative. However, the NPRM suggests a change in the agency's longstanding substantive interpretation of the relevant statutory provisions.

As explained below, the requirement in Part 1144 that the Board must determine that competitive access "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," 49 C.F.R. § 1144.2(a)(1), (i.e., the anticompetitive conduct standard) is one that the agency has interpreted as being the best reading of Congress's intent.

And while the NPRM does not directly espouse a new statutory interpretation, it does suggest that the Board no longer believes that the anticompetitive conduct standard reflects the best reading of what the statute requires. *See, e.g.*, NPRM at 11 (describing the anticompetitive conduct standard as a "regulatory impediment to cases that might otherwise be meritorious under" the

statute). The NPRM does not, however, provide any explanation for that substantive conclusion, nor does it meaningfully engage with the statutory text, history, or purpose of the relevant provisions or the agency's prior justifications.

For the reasons explained below, NSR urges the Board to clarify that a final rule in this proceeding does not prejudge or foreclose future arguments regarding the substantive statutory standard.

A. The agency has long considered the anticompetitive conduct standard to be the best reading of the statute, not just a wise policy choice.

The Staggers Act was a pivotal change in how the agency regulates. It was predicated on a recognition that differential pricing was essential to the industry and a mandate that the ICC reduce intervention in functioning markets. As the D.C. Circuit has recognized, the Staggers Act reflected a Congressional choice to move “toward much greater reliance on market forces rather than regulation . . . but to temper that move [by] retaining regulation . . . to protect . . . from abusive railroad practices.” *Coal Exporters Ass’n of U.S., Inc. v. United States*, 745 F.2d 76 (D.C. Cir. 1984).

Before, during, and after the agency's adoption of Part 1144, the ICC interpreted the statute in light of the significant changes made by Staggers consistently. For example, contemporaneous with the passage of the Staggers Act, but prior to its adoption of the regulations at Part 1144, the ICC repeatedly described its analysis under former § 11103 (now § 11102) as relating to unlawful anticompetitive behavior. In denying a petition for rulemaking, the agency described the competitive access inquiry as involving whether the “competitive

circumstances” amount to “anticompetitive conduct” or “simply a reasoned and justifiable business response.” *See* Denial of Petition for Rulemaking, *Standards for Intramodal Rail Competition*, Docket No. EP 445, at 12 (ICC served July 7, 1983). The agency also emphasized that “use of existing market power” was allowed under the statute because it was not “anticompetitive per se.” *Id.* at 10. Further, the agency described the remedies under the Staggers Act as being available “should carriers abuse their new freedoms” in their “less-regulated environment,” which indicates that the agency saw prescriptions as a remedy for anticompetitive conduct. *Id.* at 14; *see also id.* at 11 (noting that remedies were available for “address[ing] individual wrongs”).

Then, the agency adopted Part 1144 and the anticompetitive conduct standard—not just as a negotiated agreement between industry participants—but instead pursuant to its own independent view of how best to implement the statute. *See Intramodal Rail Competition*, 1 I.C.C. 2d at 823.

The agency reaffirmed its view in *Midtec*. *Midtec Paper Corp. v. Chi. & N. W. Transp. Co. (Use of Terminal Facilities and Reciprocal Switching Agreement)*, 3 I.C.C.2d 171, 174 (1986). In briefing to the court, the ICC explained that “in *Intramodal*, the ICC interpreted the standard in [former] Section 11103(c) to be met only by a showing of an anticompetitive act.” Joint Brief for Respondents ICC and the United States of America, at 29, *Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988) (No. 87-1032) (“ICC Midtec Brief”). It continued to support that position, explaining that “the language of Section 11103(c) and the . . . central

philosophy of the Staggers Act” indicate that “regulation should be reserved for situations where it is needed to protect against abuses.” ICC Midtec Brief, at 25.

The court in *Midtec* agreed with these principles, reiterating its view of the agency’s limited prescription authority under the statute when it stated that the agency’s ability to order reciprocal switching could not be sustained merely “whenever such an order could enhance competition between rail carriers.” *Midtec*, 857 F.2d at 1507. Such an authority “could radically restructure the railroad industry,” and there is not “even the slightest indication that Congress intended the Commission in this way to conform the industry more closely to a model of perfect competition.” *Id.* As a result, the court found it “entirely consistent with the purposes of the Staggers Act that the [railroad] may enjoy some degree of ‘market power,’ enabling the railroad to price its services above marginal costs, without liability to compelled competitive access.” *Id.*

When Congress was considering the legislation that eventually became the ICC Termination Act of 1995, the ICC submitted to Congress the *ICC Regulatory Responsibilities Study*, a comprehensive report describing its view of its responsibilities under the Staggers Act. See Interstate Commerce Commission, *Study of Interstate Commerce Commission Regulatory Responsibilities Pursuant to Section 210(a) of the Trucking Industry Regulatory Reform Act of 1994* (Oct. 25, 1994), available at 1994 WL 639996. The Study described the way the ICC had interpreted the access provisions of the Staggers Act, explaining that “regulatory

intervention is now properly limited to those situations in which it is necessary to address a carrier's anticompetitive actions." *Id.* at *26 & n.152.

And Congress then confirmed that the agency's interpretation was correct. *See, e.g.*, H.R. Rep. 104-311, at 97–98 (1995) (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. 793, 810 ("The Committee intends that the Panel continue the policy of granting railroads the maximum possible freedom to set rates, routes, and divisions, so long as these actions are not anticompetitive." (emphasis added)).

B. The NPRM does not provide a new statutory interpretation.

The NPRM suggests that the Board has disclaimed the anticompetitive conduct standard, though it does not address this precedent. In suggesting that anticompetitive conduct is not required, the Board points only to portions of its 2016 NPRM² and select language in *Midtec*. NPRM at 10–11. But those references do not provide a substantive reinterpretation of the statute.

As an initial matter, the 2016 NPRM was never adopted and any statements in that proposal remain susceptible to all of the comments that were submitted in response to it. To the extent the Board purports to rely on the same reasoning here, NSR continues to have the concerns it expressed in 2016, including on Congressional intent and ratification.³

As to the citation to *Midtec*, the Board states that *Midtec* made clear that the reciprocal switching statutory provision "is cast in discretionary terms." NPRM

² *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1) (STB served July 27, 2016).

³ NSR 711-1 Comments at 5–22, 32–36, 39–45.

at 10 (quoting *Midtec*, 857 F.2d at 1499). But when *Midtec* used that language, it was in reference to the fact that the statute did not *require* the agency to prescribe reciprocal switching—hence, the word “may” and not “shall.” 857 F.2d at 1499–1500. The discretion to *refrain* from issuing a prescription says nothing about the statutory limits on the agency’s ability to *prescribe* reciprocal switching.

If the Board decides to adopt a new substantive interpretation of the statute, then it will have to explain why the Board would be abandoning its previous best reading of the purpose and requirements of the statute. It would also need to provide its reasoning for a new substantive reinterpretation. The NPRM does not proffer a new substantive reinterpretation. Thus, fairness and administrative law principles counsel that parties must remain free to argue in individual cases the appropriate statutory standard if the Board proceeds to remove Part 1144.

If the Board ultimately proceeds with rescission, the Board should clarify that its final rule is properly understood as providing procedural flexibility through case-by-case adjudication, not as prejudging or foreclosing any substantive interpretation of what the statute requires. In other words, rail carriers should remain free to argue, in individual adjudications, that the governing statutes require the anticompetitive conduct standard before relief may be granted.

III. THERE ARE IMPORTANT RELIANCE INTERESTS TO BE CONSIDERED IN THIS RULEMAKING.

The Board acknowledges its obligation to consider reliance interests. NPRM at 10. And the Board acknowledges that rail carriers assert such reliance on the Board’s existing framework. *Id.* at 14. But the Board has not yet fully addressed

such reliance as having any bearing on its rescission proposal. Instead, it defers its consideration of reliance to a future adjudication where it suggests that rail carriers “would be free to argue” about reliance. *Id.* But the APA requires the Board to consider reliance interests at the point of rulemaking, not at some hypothetical point in the future.⁴

The industry has relied on both the existence of a clear rule and the substantive standard for forced access that it espoused. Rescinding the rule could unsettle that reliance whether a carrier is ever ultimately subjected to a prescription under the case-by-case approach. Rescission would create a vacuum of guidance, leaving rail carriers with no basis for assessing either the likelihood that a prescription might be imposed or even the likelihood that a shipper would seek one (shippers being similarly unguided as to when a prescription request might succeed). Additionally, to the extent the Board’s proposal appears to depart from the anticompetitive conduct standard, that would threaten railroads’ agency in avoiding prescription by allowing factors beyond the rail carrier’s control to influence the likelihood of prescription.

Railroad reliance interests are serious if the Board attempts to effectuate a change in the substantive statutory standard. The regulatory regime surrounding competitive access implicates how railroads approach infrastructure and investment projects, given the need for predicting future contributions earned from

⁴ Further, even if a promise to consider reliance interests in the future were sufficient, the Board did not make that promise, instead merely noting that “[n]othing . . . would appear to preclude the Board from declining to prescribe relief” on that basis. NPRM at 14.

traffic on a line. Depending on the substantive standard, rail carriers may need to take a more conservative approach to investments to account for the potential for changing traffic flows and traffic volumes. The Board heard extensive comments on this subject in the now-closed Docket No. EP 711 (Sub-No. 1).

If the Board takes the substantial reliance interests at play into account during this rulemaking process, it may find a narrower approach to be appropriate. If the Board clarifies in a final rule that its rescission does not effectuate a substantive reinterpretation of the statute, the Board would avoid disrupting the decades of reliance on the anticompetitive conduct standard. It would then be contending with a more manageable subset of reliance interests—that is, the industry’s reliance on the existence of a settled rule and the stability it provided. By refraining from reinterpreting the statute in this rulemaking, the Board would be better positioned to accomplish its goal of developing its statutory application through a case-by-case approach.

IV. THE BOARD SHOULD DEVELOP A MORE ROBUST RECORD ON ISSUES RELATING TO THROUGH ROUTES.

Following the Staggers Act, the agency has interpreted the through route statute to permit regulatory intervention when necessary to address a carrier’s anticompetitive actions and Congress has confirmed that understanding. *See, e.g.*, H.R. Rep. 104-311, at 97–98 (1995) (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. 793, 810 (“The Committee intends that the Panel continue the policy of granting railroads the maximum possible freedom to set rates, routes, and divisions, so long as these actions are not anticompetitive.”). While the NPRM proposes to completely

rescind Part 1144, the Board also specifically sought comment on partially repealing Part 1144 so as to leave regulations in place as to the prescription of through routes and through rates. For all of the reasons explained above, NSR believes that rescission is not necessary—including for through routes and through rates.

The Board’s only explanation for rescinding the rules as to through routes is that “[s]eemingly” all of its cited reasons for repeal would apply equally to through routes and through rates. NPRM at 15. But as explained above, the proffered justifications may not fully support the proposed rescission.

Unlike reciprocal switching, the Board has not explored issues relating to through routes and through rates in hearings and extensive public comment. Indeed, in its 2016 NPRM, the Board specifically proposed changes only to reciprocal switching and not through routes, noting that there had not been a “record built” with regard to through routes and through rates. 2016 NPRM at 26. The Board has not explored issues relating to through routes and through rates in the intervening decade either. Against that backdrop, the Board should consider developing a more robust record on issues relating to through routes and through rates before taking any regulatory action.

V. CONCLUSION.

NSR appreciates the opportunity to comment on the Board's proposal. The existing rules at Part 1144 reflect the agency's longstanding and carefully considered interpretation of its statutory authority, have provided important stability and predictability to the industry for decades, and remain consistent with the Rail Transportation Policy's goal of minimizing unnecessary regulatory intervention.

Should the Board proceed to a final rule, NSR encourages the Board to proceed carefully and to clarify that any rescission is intended to have a procedural effect without prejudging the standards that would apply in a specific adjudication. Taking a more measured approach would ensure fairness, respect reliance interests, and remain faithful to the statutory standards Congress enacted.

Respectfully submitted,

/s/ Raymond A. Atkins

Raymond A. Atkins

Allison C. Davis

SIDLEY AUSTIN LLP

1501 K Street, N.W.

Washington, DC 20005

(202) 736-8000

*Counsel for Norfolk Southern
Railway Company*

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