

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 788

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ELIMINATING REGULATORY BARRIERS TO COMPETITION:
REVIEW OF PART 1144

OPENING COMMENTS OF CPKC

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Canadian Pacific Railway Company, d/b/a Canadian Pacific Kansas City and CPKC, and its U.S. rail carrier subsidiaries (collectively “CPKC”) submit these Opening Comments pursuant to the Board’s Notice of Proposed Rulemaking (“NPRM”) served on January 7, 2026, in the above-captioned proceeding.

The NPRM proposes to repeal the Board’s Part 1144 regulations that articulate the competitive abuse standard that must be met in order for the Board to use its regulatory authority to intervene in the market and prescribe reciprocal switching, through routes, and/or joint rates. The NPRM proposes to abandon this well-established standard in favor of a case-by-case approach from which the Board hopes, in time, will emerge a new standard governing shipper efforts to seek competitive access. For the reasons set forth in these Opening Comments, CPKC urges the Board not to repeal Part 1144, and if it chooses to adopt a standard that provides greater clarity to industry stakeholders regarding the demands of Section 11101, that it proceed via rulemaking.

Part 1144 has underpinned a stable regulatory framework upon which both rail carriers and shippers have relied for some four decades. Any repeal of Part 1144 in favor of a case-by-case approach to developing the new standard would engender greater uncertainty, and in light of the

Board's avowed aim of removing an "unnecessarily high barrier to statutory relief," it would in point of fact, invite *more regulatory interference*, not less. It would return the industry to a pre-Part 1144 state that proved satisfactory to neither shippers nor carriers.

If the Board believes that the current rule's requirement of competitive abuse is not an apt or clear articulation of what the statute requires, rather than repealing the rule altogether, the Board should clarify its regulations within the confines of the statutory framework and in accordance with legal precedent, and it should do so in the context of a formal rulemaking where all stakeholders can have input, not just those involved in a particularized dispute over access.

Further, the Board should limit any action to reciprocal switching. Repealing the standard as to through routes and joint rates could inflict significant operational harm on the rail network. Shipper proponents have not advocated for such repeal.

CPKC's comments address the potential prescription of forced competitive access outside the merger setting and reflect the regulatory landscape and the structure of the rail industry as it is today. Were the Union Pacific-Norfolk Southern merger approved and consummated, the fundamental transformation it would bring to the industry's structure may call for a different approach.

I. Repeal Would be Re-Regulatory, Not Deregulatory

The NPRM claims this action is "considered an Executive Order 14192 deregulatory action." NPRM at 16. While eliminating a regulation is technically deregulatory, the effect of repeal unleashing case-by-case adjudication unguided by standards is decidedly not deregulatory. The actual effect is to expand the Board's regulatory discretion and invite increased regulatory intervention; such discretion could be applied unevenly in the future.

In adopting Part 1144, the Interstate Commerce Commission was acting to fulfill the deregulatory purpose of Staggers and the 4R Act, both of which sought to reduce regulatory burdens on rail carriers and allow market forces to operate, which included freeing carriers to engage in differential pricing. Part 1144's anticompetitive conduct standard is consistent with this deregulatory purpose, limiting government intervention to cases of actual abuse. Repeal invites government intervention based on mere allegations of insufficient competition. This is the opposite of deregulation.

Indeed, the Board acknowledges that it expects repeal to trigger more cases. NPRM 16. The Board could see a flood of opportunistic and speculative claims as shippers seek to leverage the lack of standards against railroads regardless of the circumstance. Each case will require full adjudication under statutory standards that the Board asserts are "cast in discretionary terms." NPRM at 10. And if the Board orders relief, it likely will need to exercise its discretion to determine terms and conditions, including compensation payable to the incumbent. More cases plus more Board-exercised discretion equals more regulation, not less.

Some shippers may seek to leverage uncertainty to use the mere threat of initiating a Board action to extract concessions, including on rates.¹ Thus, repeal could imperil rail carriers' ability to engage in differential pricing, a cornerstone of deregulation's success in revitalizing and supporting the continued health of the rail industry. Rather than increase competition, it would increase regulatory interference and distortion in the market.

¹ The Board must guard against such backdoor rate regulation. *See Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1502 (D.C. Cir. 1988) (agency may not order reciprocal switching for purposes of providing rate relief).

II. If the Board Believes the Current Standard Sets Too High a Bar, It Should Clarify the Standard in a Rulemaking

Although the NPRM posits that the paucity of cases is evidence that the standard is too high, a lack of cases is a feature and not a bug of a well-set regulatory standard. It may simply indicate that the existing standard is working to deter competitive abuse and not necessarily that the standard is too high. Nevertheless, if the Board believes that certain language in Part 1144 is deterring shippers from bringing meritorious cases, the Board should clarify within the guardrails affirmed by the Seventh Circuit, the standard that must be met to trigger the Board's regulatory intervention. This clarification should occur within the context of a formal rulemaking.

First, the Board's assertion that Part 1144's requirement of competitive abuse "presents a regulatory impediment to cases that might otherwise be meritorious" under the language of the statute may be inconsistent with the recent observation by the Seventh Circuit that application of the competitive access provisions would not paint "on a blank canvas." *Grand Trunk v. STB*, 143 F. 4th 741, 748 (7th Cir. 2025). "The statute authorizing the Board to order reciprocal switching, 49 U.S.C. § 11102(c), requires 'some actual necessity or compelling reason' to do so." *Id.* at 749, 752. This standard, rooted in a century of precedent, requires a meritorious claimant to demonstrate "inadequate service." *Id.* at 749-754. Part 1144 balances the statutory rail transportation policy including the policy "to minimize the need for Federal regulatory control over the rail transportation system." 49 U.S.C. § 10101(2). The statute thus requires a showing that an incumbent carrier has abused its market power by providing inadequate service. The competitive abuse standard would seem in line with those standards by limiting regulatory intervention to instances where it is necessary to address demonstrable market failures. Repeal would not wipe this canvas clean.

To the extent the Board is concerned that specific aspects of the current rule have deterred the bringing of meritorious cases—*e.g.*, by implying that rail carrier conduct must fall within antitrust-style conduct categories—the Board should solve such a problem through clarification rather than repeal. Any clarification of the standard is best made in a notice and comment rulemaking, which has several important advantages, and avoids key pitfalls of the NPRM’s ad-hoc adjudication approach. Rulemaking ensures broad stakeholder input on complex and consequential issues, enabling the Board and stakeholders to evaluate the anticipated impact of proposed standards on competition, investment, and the industry as a whole. Such input is critical given the potentially profound impact on network fluidity and long-term health of the rail industry. It allows for proper consideration of the “serious reliance interests” that the Board must consider when changing an existing policy, *i.e.*, before repeal. NPRM at 10 *quoting Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016). It is also the best way to adhere to the Board’s underlying “basic principles” of consistency with statutory requirements and acceptability to “as broad a section of the marketplace as possible.” NPRM at 5. Formal rulemaking is more likely to result in a predictable framework that informs carrier and shipper behavior going forward. And by seamlessly replacing or clarifying the standard, a rulemaking avoids an interim and indefinite period of regulatory uncertainty—uncertainty which could discourage investment by carriers in potentially shared facilities, potentially harming network capacity, fluidity, and service quality, to the detriment of all stakeholders.

By contrast, experience shows that developing standards on a case-by-case basis involves significant expense and uncertainty. Indeed, the ICC originally attempted a case-by-case approach, acknowledging that there “will continue to be uncertainties, dislocations, and problems for individual shippers and carriers.” NPRM at 5. That approach proved unsatisfactory, leading to the

stakeholder-negotiated Part 1144 framework. *Id.* Although NITL now asks the Board to undo portions of that bargain, repealing Part 1144 and replacing it with the uncertainty of case-by-case adjudication reverts all involved parties to a status quo ante that was broadly unacceptable.

III. Through Routes and Joint Rates Should Not Be Included in Any Repeal

The NPRM specifically requests comments on whether the Board should “partially repeal part 1144 as it applies to reciprocal switching but leave the regulation in place as to the prescription of through routes and through rates.” NPRM at 14. Although the reasons set forth above provide ample reason not to proceed with even a partial repeal of Part 1144, CPKC urges the Board to adopt this alternative if such repeal nevertheless proceeds.

Many of the arguments above apply with equal or greater force to through routes and joint rates. Repealing Part 1144 as to through route and joint rate prescriptions would have even more far-reaching implications. Such prescriptions could have an even greater impact on the entire network structure, potentially altering traffic flows and restricting carrier routing flexibility with profound impacts on network efficiency and fluidity. NITL wisely “do[es] not advocate for repeal of [Part 1144] to the extent they apply to prescriptions of through rates or through routes.” NPRM at 15. If the shipper proponents do not seek repeal, the Board should not do so *sua sponte*.

Conclusion

The proposed repeal of Part 1144 would replace the settled competitive abuse standard with uncertainty as to what circumstances would warrant relief from the Board by leaving that determination to be made on a case-by-case basis. The result will be both increased regulation and harmful uncertainty for all stakeholders. Any clarification of the standard would be best made in a rulemaking proceeding and should continue to require a showing of competitive harm that has caused concrete harm to a shipper in order for the Board’s intervention to be invoked. At minimum,

through routes and joint rates should be excluded from any repeal. Accordingly, CPKC requests that the Board recast the NPRM to seek input on a new standard or, alternatively, adopt only a partial repeal limited to reciprocal switching subject to a concrete replacement standard to Part 1144.

Respectfully submitted,

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