

**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

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**Docket No. EP 788
Eliminating Regulatory Barriers to Competition: Review of Part 1144**

**COMMENTS OF THE
AMERICAN PETROLEUM INSTITUTE**

I. Introduction

The American Petroleum Institute (“API”) respectfully submits these comments in support of the Surface Transportation Board’s (“Board” or “STB”) Notice of Proposed Rulemaking in Docket No. EP 788 proposing to repeal 49 C.F.R. Part 1144 and restore the Board’s full statutory discretion under 49 U.S.C. §§ 10705 and 11102(c).

API represents nearly 600 member companies involved in all aspects of the oil and natural gas industry, including producers, refiners, petrochemical manufacturers, pipeline operators, and marine transporters. API members are significant rail shippers, moving crude oil, refined products, petrochemical feedstocks, plastics, liquefied petroleum gases, and other energy-related commodities across the national freight rail network. Reliable and reasonably priced rail transportation is critical to maintaining energy supply chains, protecting manufacturing competitiveness, and safeguarding consumer energy affordability. Many API members are captive rail shippers that depend on Class I railroads for the movement of crude oil, refined products, petrochemical feedstocks, and other energy commodities critical to the U.S. economy.

For the reasons set forth below, API supports full repeal of Part 1144. The anticompetitive conduct and standing requirements embedded in that rule have functioned for four decades as an unnecessary and extra-statutory barrier to relief. Repeal will not mandate switching or through routes in any particular case; rather, it will restore Congress’s intended case-by-case framework and allow the Board to evaluate competitive access requests under the statutory public interest and competitive service standards.

As the Board recognizes in its Notice of Proposed Rulemaking (“NPRM”), Part 1144 has effectively operated not as a workable standard for competitive access, but as a barrier to relief. For energy shippers, the consequences have been substantial: reduced leverage, limited competitive options, and diminished recourse when service failures or monopoly pricing occur.

II. Part 1144 Has Become an Unwarranted Barrier to Statutory Relief

A. The Anticompetitive Conduct Standard Is Not Statutorily Required

The NPRM correctly recognizes that nothing in 49 U.S.C. § 11102(c) or § 10705 requires a petitioner to demonstrate “anticompetitive conduct” as a prerequisite to relief. The statutory language authorizes the Board to require reciprocal switching agreements when such agreements are “practicable and in the public interest” or “necessary to provide competitive rail service.” Likewise, the Board may prescribe through routes when it considers them “desirable in the public interest.”

Part 1144’s anticompetitive conduct standard was not compelled by Congress. It was a policy accommodation negotiated in 1985 between certain shipper and railroad interests under industry conditions that no longer exist. The D.C. Circuit confirmed that the Interstate Commerce Commission’s (ICC) adoption of the anticompetitive conduct standard was a permissible policy choice—not a statutory mandate.¹ The statute itself authorizes competitive access remedies whenever they are “practicable and in the public interest” or “necessary to provide competitive rail service.” The additional requirement that a complainant demonstrate anticompetitive conduct therefore reflects a regulatory narrowing of agency discretion rather than a limitation imposed by Congress. A narrowing of discretion that was permissible in 1985 may be reversed when policy circumstances change. API agrees that the anticompetitive conduct test:

- Imposes a burden nowhere found in the statute.
- Requires proof of abusive behavior rather than market conditions.
- It has proven functionally insurmountable in practice.

Four decades of experience demonstrate that Part 1144 has not functioned as a workable framework for relief. The absence of petitions for relief over the last several decades is not evidence that competition concerns have disappeared; rather, it reflects the near-unattainable burden imposed by the rule. The Board is therefore well within its authority to repeal Part 1144 and return to case-by-case adjudication under statutory standards. As the Board correctly explains, neither 49 U.S.C. § 10705 nor § 11102(c) requires a showing of “anticompetitive conduct” before relief may be granted. Instead, the standard was a policy choice made in 1985—one that narrowed the Board’s discretion.

B. Rail Industry Conditions Have Fundamentally Changed

The regulatory compromise underlying Part 1144 reflected an era of financial distress in the rail industry. In contrast, today’s Class I railroads are highly consolidated, financially stable, and, in most cases, revenue adequate.

¹ *Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988).

Since the Staggers Act, the number of Class I carriers has declined dramatically, and network rationalization, mergers, and operating model changes—particularly Precision Scheduled Railroading (PSR)—have transformed rail operations. PSR has improved certain efficiency metrics but has also reduced network slack capacity, eliminated surplus crews and locomotives, and heightened system fragility. API members have documented the resulting service variability, especially in first mile/last mile (“FMLM”) service, interchange delays, and unpredictable transit times in previous filings with the Board.

These structural changes have intensified captivity for many energy facilities. Refineries, petrochemical plants, and terminals are geographically fixed and often served by a single Class I railroad. For hazardous materials movements, trucking alternatives are often impractical or economically prohibitive. Pipeline alternatives may not exist for certain feedstocks or destinations. The economic reality is that many API members lack meaningful transportation choice. Under these modern market conditions, retaining a regulatory standard designed to protect financially fragile railroads is no longer justified.

III. Energy Shippers Are Among the Most Captive Rail Customers

Energy facilities are often geographically fixed and rail-dependent:

- Refineries receiving crude oil or feedstocks.
- Petrochemical facilities shipping hazardous materials.
- Fuel distribution terminals.
- Plastics and specialty chemical plants

Many such facilities lack dual service or practical intermodal alternatives. As documented in API’s First Mile/Last Mile filing and its Reciprocal Switching comments ²

- Carriers unilaterally alter service windows.
- Resource reductions degrade FMLM performance.
- Service variability increases fleet costs and demurrage exposure.
- Shippers lack meaningful recourse short of protracted litigation.

Repealing Part 1144 would not guarantee switching orders. It would simply allow the Board to consider the current market structure, the lack of competition, levels of service inadequacy, public interest impacts, and transportation efficiency — without requiring proof of intentional misconduct. That is consistent with Congress’s directive that competition itself is a safeguard against inadequate service and unreasonable rates.

² STB Docket EP 711.02 API Comments

IV. Case-by-Case Adjudication Is Appropriate and Consistent with the APA

API supports the Board's proposal to evaluate competitive access requests through case-by-case adjudication. This approach allows refinement of standards through precedent, permits consideration of carrier reliance interests, enables fact-specific economic analysis, and avoids rigid rules that may become outdated. Given the operational complexity of energy supply chains—particularly hazardous materials transportation—flexible adjudication is preferable to prescriptive rulemaking.

A. Repeal Should Apply to Reciprocal Switching and Through Routes

The Board seeks comment on whether repeal should apply only to reciprocal switching or also to through routes and through rates. API supports full repeal.

The anticompetitive conduct and standing requirements apply equally to switching and through routes. Both derive from the same 1985 compromise. Both have proven unused and ineffective. There is no policy justification for retaining regulatory barriers in one area while eliminating them in another. A unified return to statutory standards promotes coherence, predictability, and fairness.

B. Competitive Access Will Incentivize Private Solutions

The Board properly recognizes that increased access to adjudication may encourage negotiated outcomes without litigation. For energy shippers, even the credible possibility of a switching petition improves negotiating leverage, encourages service improvements, promotes better data transparency, and discourages unilateral service degradation. Competitive access does not guarantee restructuring. It restores balance.

Agencies possess discretion to regulate by rulemaking or adjudication. Returning to adjudication here allows the Board to:

- Develop precedent incrementally.
- Evaluate operational practicability.
- Consider shipper and carrier evidence.
- Guard against unintended systemic consequences.

The Board may issue guidance as appropriate, but rigid rulemaking is not necessary. A flexible adjudicatory framework is particularly suitable given the operational complexity of energy transportation, including hazardous materials movements and interchange coordination.

V. Repeal of Part 1144 Will Promote Competition Without Mandating Relief

Repeal of Part 1144 does not guarantee that reciprocal switching or through routes will be prescribed. It merely restores the Board's ability to evaluate petitions based on statutory criteria rather than an extra-statutory threshold.

The statutory standards already require the Board to consider:

- Public interest
- Transportation efficiency
- Practicability
- Adequacy of service
- Competitive conditions
- Short-haul considerations

These safeguards ensure that relief will not be granted where it would undermine operational efficiency or economic viability.

Importantly, competitive access remedies often function as a negotiating catalyst rather than a frequently imposed remedy. The credible possibility of Board review can incentivize carriers and shippers to resolve disputes privately. In this way, restoring statutory discretion may reduce—not increase—litigation.

VI. Response to Arguments Anticipated from Opponents to the Proposal

API anticipates that opponents to the NPRM may oppose repeal on several grounds and we hold that the most common arguments leveraged on this issue lack merit.

A. Repeal Will Not “Restructure the Industry”

Opponents may argue that eliminating the anticompetitive conduct test would permit the Board to “restructure” the rail industry or mandate open access. That concern is overstated. The statute itself limits Board authority. Relief must be practicable, in the public interest, and consistent with statutory short-haul protections. Courts have confirmed that § 11102(c) does not authorize industry-wide restructuring. Case-by-case adjudication inherently guards against systemic disruption. Repeal simply restores the discretion Congress granted.

B. Revenue Adequacy and Investment Concerns Are Overstated

Opponents may contend that increased access to competitive remedies would suppress rates below compensatory levels and deter investment. This argument is inconsistent with current industry economics. Most Class I railroads are revenue adequate. Capital investment levels remain robust. Competitive access remedies would apply only in

defined, fact-specific circumstances. Moreover, the statute does not permit confiscatory outcomes. The Board retains discretion to ensure that any prescribed arrangements are economically reasonable and consistent with maintaining a sound rail transportation system. The existence of competition does not undermine investment; it promotes efficiency and service discipline.

C. Alleged Reliance Interests Do Not Justify Retaining an Obsolete Rule

Additionally, opponents may assert that railroads have structured operations in reliance on Part 1144. However, regulated industries operate under statutory frameworks that may evolve. This happens in the oil and gas industry on a regular basis at both the federal and state levels. The statute has always permitted the Board to prescribe switching and through routes.

No carrier could reasonably rely on the permanence of a discretionary regulatory narrowing. The Board is providing notice and an opportunity for comment. Future petitions will be adjudicated prospectively, and reliance arguments may be raised in individual cases if appropriate.

D. Service-Based Relief Is Consistent with Congressional Policy

Finally, the argument may be advanced that competitive access should be limited to cases of proven misconduct. Congress, however, emphasized competition—or the threat of competition—as a safeguard against inadequate service and unreasonable rates. Service concerns are not mythical; they are long-standing and documented.

Market structure and service inadequacy are legitimate considerations under the statutory public interest standard. Conditioning relief solely on proof of abusive intent is inconsistent with Congress's policy emphasis on competition.

VII. Conclusion

API strongly supports repeal of Part 1144. Restoring the Board's full statutory discretion will remove an outdated regulatory barrier. It will further align Board practice with Congressional intent reflecting modern rail market conditions. This modernization of the process will provide meaningful recourse for captive energy shippers and promote competition, and could serve to enhance competition, and economic efficiency. Finally, it is API's sincere hope that this will also help to address some of the ongoing and growing challenges with service reliability.

API urges the Board to finalize repeal of Part 1144 in its entirety and to implement a case-by-case adjudicatory framework consistent with 49 U.S.C. §§ 10705 and 11102(c).

API appreciates the Board's leadership in modernizing competitive access policy and stands ready to assist in further development of guidance or implementation frameworks.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Paul Hartman", is centered within a light gray rectangular box.

Paul Hartman
Director, Midstream Policy
American Petroleum Institute