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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ELIMINATING REGULATORY
BARRIERS TO COMPETITION:
REVIEW OF PART 1144

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Docket No. EP 788

**COMMENTS OF THE
AMERICAN CEMENT ASSOCIATION**

The American Cement Association (“ACA”)¹ hereby submits these Comments in response to the Surface Transportation Board’s (“STB” or “Board”) Notice of Proposed Rulemaking (“NPRM”) served in the above referenced proceeding on January 7, 2026.

SUMMARY

It has now been almost 10 years since the Board proposed new rules to remove longstanding, unfair roadblocks preventing shippers from obtaining competitive service relief through carrier reciprocal switching arrangements as authorized under 49 U.S.C. § 11102(c)(1) as part of its EP 711 proceedings. While that initiative was unsuccessful, the Board now seeks to revise its regulatory standards to remove the anticompetitive conduct standard in Part 1144 that unfairly hinders the prescription of reciprocal switching, through routes, and through rates. ACA has long supported changes to the Board’s rules which unfairly block shippers from obtaining competitive access relief, and it supports the NPRM.

¹ As discussed further below, the American Cement Association was formerly known as the Portland Cement Association. The organization formally announced its rebranding on May 7, 2025.

ACA supports the removal of the anticompetitive conduct test from the Board's rules.

ACA, however, respectfully requests that in its final rules, the Board incorporate some changes and clarifications to make them stronger and better suited for actual use by cement shippers, including the following:

- In addition to eliminating the outdated and unnecessary anticompetitive conduct test from its Part 1144 rules, the Board should also remove this test from any other terminal access cases brought under 49 U.S.C. § 11102(a).
- ACA strongly supports the Board enabling exempt traffic, including hydraulic cement, to be subject to a prescribed reciprocal switching agreement, or a prescribed through route or through rate, and the Board should expressly incorporate this finding in its final rules.

ACA submits that the proposal, as revised, may prove beneficial for some cement shippers if the major railroads decide to aggressively compete for cement transportation business subject to Board-ordered reciprocal switching agreements.

IDENTITY AND INTEREST

The ACA - formerly the Portland Cement Association - is the leading voice for America's cement manufacturers. Founded in 1909, the association adopted its new name in May 2025 to reflect the industry's evolution beyond portland cement. Today, ACA members are increasing the production of blended cements that incorporate supplementary cementitious materials and emissions-reduction technologies to expand domestic manufacturing capacity.

Cement, the primary ingredient in concrete, is essential to building and maintaining the nation's infrastructure – from highways and bridges to airports, mass transit systems, water facilities, and residential and commercial buildings. Our products enhance energy efficiency in buildings, improve fuel efficiency on roads, and contribute to the resilience of

critical infrastructure. Cement and concrete manufacturing support over 600,000 American jobs and contribute more than \$100 billion to the U.S. economy annually.

Across the country, there are cement manufacturing plants in 34 states, with distribution terminals across the country. ACA members rely on the railroads to move hydraulic cement from manufacturing plants to distribution facilities to market. Frequently, there are no practical, feasible modal alternatives to railroad service to meet the business needs of ACA's members. Additionally, most cement manufacturing plants and terminals are captive to one Class I railroad. Accordingly, the majority of cement shipped in the United States is shipped by rail, making reliable, cost-effective rail service essential to the efficient and sustainable shipment of cement. ACA therefore has a strong interest in ensuring that outdated and unnecessary regulatory restrictions are removed to allow cement shippers to obtain competitive access and through routing and through rate relief in appropriate circumstances.

COMMENTS

A. The Anticompetitive Conduct Test Should Be Eliminated As Proposed

Under the Staggers Rail Act of 1980, Pub. L. No. 96-448, Congress granted the STB the authority to require a destination railroad to perform delivery service for shipments received in interchange with another carrier for a specified fee (i.e., reciprocal switching). 49 U.S.C. § 11102(c)(1) authorizes the Board to order carriers to enter into reciprocal switching agreements if the Board finds such agreements “to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service.” However, since 1985, no shipper has obtained any reciprocal switching relief due to rules requiring shippers

to demonstrate the incumbent carrier is engaging in anticompetitive conduct before such relief will be granted.

In the landmark *Midtec* decision, the STB's predecessor, the Interstate Commerce Commission ("ICC"), concluded that the public interest favors protecting railroads from intramodal competition, as such competition may hinder railroad efforts to obtain revenue adequacy.² Following the *Midtec* decision, and the ICC's adoption of the current access rules, no freight rail shipper has obtained any trackage rights or reciprocal switching access relief under the agency's highly restrictive standards and very few have even tried. In short, the STB has the clear statutory authority to afford competitive access relief for shippers as set forth by Congress under governing statutes. However, in practice, the Board's regulations and policies have precluded shippers from gaining competitive relief under these congressionally-authorized, but Board-rejected, competitive provisions.

The NPRM proposes to expressly remove the anticompetitive conduct test to provide for a prescription of a reciprocal switching agreement, through routes, or through rates on a case-by-case basis, under the plain language of the statute. ACA strongly agrees that the arbitrary anticompetitive conduct test should be eliminated from the Board's Part 1144 competitive access rules.

B. Suggested Revisions and Clarifications to the NPRM

While ACA supports the proposed NPRM, it believes several modest revisions and clarifications should be made in the final rule.

² *Midtec Paper Corp. v. Chicago & N. W. Transp. Co.*, 1 I.C.C.2d 362 (1985), as superseded, 3 I.C.C. 171 (1986), *aff'd sub nom. Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988).

First, ACA respectfully submits that the Board should also eliminate the anticompetitive conduct standard from its 49 U.S.C. § 11102(a) terminal access requirements. The reasons for doing so include:

- Nothing in the text of 49 U.S.C. § 11102 or in the legislative history of the provision requires a finding that a rail carrier has engaged in anticompetitive conduct.
- The removal of the anticompetitive conduct test properly recognizes that the rail industry has changed dramatically since the rules were adopted in the 1980s, and takes into account the robust economic health of the rail industry and the reduced competitive options for many shippers.
- The STB may reasonably take such actions as a matter of law because it has provided a reasonable explanation for removing the anticompetitive conduct test, it has explained why removal is a permissible exercise of its jurisdiction, and the result constitutes a permissible construction of § 11102.

Accordingly, ACA urges the Board to adopt final competitive access rules that remove the anticompetitive conduct test in all competitive access cases, including terminal trackage rights cases.

Second, ACA urges the Board to expressly recognize that so-called exempt traffic, including hydraulic cement, is eligible for an order providing competitive access under 49 U.S.C. § 11102, and the prescription of through routes or through rates under 49 U.S.C. § 10705. The ICC exempted the transportation of hydraulic cement from regulation in 1995. *Rail General Exemption Authority – Exemption of Hydraulic Cement*, EP 646 (Sub-No. 34), 1995 WL 438371 (ICC served July 26, 1995) (“*Cement Exemption Decision*”); *see also Rail General Exemption Authority – Exemption of Hydraulic Cement*, 1 S.T.B. 875 (1996).

ACA understands that the Board has the authority to revoke an exemption at any time, and to order prescribed access under its proposed rules. Nevertheless, ACA stresses

that the entire justification for exempting hydraulic cement no longer exists, as the Board has previously recognized. *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704 (Sub-No. 1) (Board served March 23, 2016). (“*Cement Exemption Removal NPRM*”).

When the ICC first exempted hydraulic cement from regulation almost three decades ago, it based its decision on a finding that railroads faced “pervasive competition” in the transportation of hydraulic cement, that few rates exceeded the agency’s rate reasonableness jurisdiction, and that associated tariff filing requirements were potentially costly and burdensome. *Cement Exemption Decision*, 1995 WL 438371 at *4. Conditions have changed significantly. Cement manufacturers are shipping cement longer distances than ever before, and potentially burdensome agency tariff filing requirements have long been eliminated. Meanwhile, competition among railroads and alternative shipping options has shrunk.

Both the Board’s prior analysis and ACA’s independent analysis have demonstrated that rail shipping rates for cement have increased significantly, far above costs, the majority of all cement traffic is potentially captive, and cement rates have been increasing dramatically. *Cement Exemption Removal NPRM* (STB served Mar. 23, 2016); *Cement Exemption Removal NPRM*, Comments of the ACA (filed July 26, 2016); Reply Comments of the ACA (filed Aug. 26, 2016); Summary of Ex Parte Meetings Between ACA and Chairman Ann Begeman, Vice Chairman Patrick Fuchs, and Board Member Martin Oberman (filed June 21, 2019). These factors warrant removal of the hydraulic cement exemption in fulfillment of the national Rail Transportation Policy.

Respectfully, it is fundamentally unfair to require cement shippers to have to seek revocation of the exemption at the outset of a proceeding when the access remedies proposed in the NPRM are openly available to other similarly situated shippers. ACA suggests that the

final rules remove the regulatory exemption for purposes of any future access proceeding brought by a cement shipper under 49 U.S.C. § 11102 or 49 U.S.C. § 10705. ACA also urges the Board to finalize its long overdue *Cement Exemption Removal NPRM* as soon as possible, and permanently remove hydraulic cement as an exempt commodity.

CONCLUSION

ACA appreciates the opportunity to file these Comments and urges the Board to adopt final rules that are consistent with the views set forth above.

Respectfully submitted,

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