

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Docket No. EP 788

ELIMINATING REGULATORY BARRIERS TO COMPETITION: REVIEW OF PART 1144

EASTERN BERKS GATEWAY RAILROAD COMMENTS

The Eastern Berks Gateway Railroad of the Colebrookdale Railroad Preservation Trust (“EBG”) submits these comments in response to the Surface Transportation Board’s (“STB” or the “Board”) Notice of Proposed Rulemaking (“NPRM”) in “ELIMINATING REGULATORY BARRIERS TO COMPETITION: REVIEW OF PART 1144,” in conjunction with which the Board seeks public comment regarding its plan to repeal its regulations on “Intramodal Rail Competition,” which implement the agency’s statutory authority to prescribe reciprocal switching agreements, through routes, and through rates. EBG is grateful for the opportunity to share its thoughts and first-hand experience and agrees with the Board’s suggestion that the existing regulations, which curtail the Board’s ability to take discretionary action are no longer appropriate in light of Class I rail carriers’ inadequate service offerings for smaller customers and railroads. Repealing such regulation, as proposed, will allow the Board to consider the prescription of through routes, through rates, and reciprocal switching agreements, and will give rail shippers and small railroads choices they direly need to combat service inadequacies by the Class I railroads and the lack of competition among them.

I. EBG’S INTEREST IN REPEAL OF 1144

EBG is a short-line railroad located in Boyertown, Pennsylvania. It runs south from Boyertown to Pottstown, PA, over the 8.6 mile long Colebrookdale branch, where it interchanges with the Norfolk Southern Railway (“NS”). NS is the only railroad that serves EBG as an interchange partner. However, there is an interchange with CSX Transportation within 30 miles of EBG interchange point.

The railroad was operated by U.S. Rail Partners, when the Colebrookdale Railroad Preservation Trust took over the line. The tracks the railroad operates on are owned by Berks County.¹ The Berks County Redevelopment Authority reactivated the line, with EBG appointed to operate it beginning in October 2010. The railroad has successfully developed freight traffic on the line.

EBG is a community-centered, economic development enterprise whose objective is service-driven rather than profit-driven. Its mission is not to pay shareholders but rather to serve local businesses, thereby expanding the region’s industrial base.

EBG provides local switching services. It also offers car storage and car repair. It can also arrange loading/unloading services from the railcars directly to trucks along with warehousing and storage. It has at its disposal two transload yards with highway access. Other developable parcels are located near or adjacent to the railroad.

However, EBG has had difficulties with its sole Class I interchange partner in obtaining adequate service to move freight to and from its local customers because its interchange partner

¹ The inaugural run of passenger service geared towards tourism took place on January 17, 2014. The passenger line was ready for regular operation in October 2014 and is operated as the Colebrookdale Railroad.

does not want to provide service in certain circumstances. Unfortunately, in order to connect to the national rail network, EBG has no other interchange options available to it except through a reciprocal switch.

II. SUMMARY

As the Board is aware, we have been here before, and the Board has made substantial efforts in years past to address the same service failures and lack of competition that now underlie the need for repeal.

In 2016, the Board issued a notice of proposed rulemaking in Reciprocal Switching (2016 NPRM), EP 711 (Sub-No. 1) et al. (STB served July 27, 2016), under which the agency would exercise its statutory authority to require rail carriers to enter into reciprocal switching agreements under 49 U.S.C. § 11102(c). Due to developments in the freight rail industry since the Board's 2016 notice, including critical and ongoing service failures by rail carriers, the Board changed its focus in 2023 to reciprocal switching reforms for inadequate rail service. Therefore, the Board closed Docket No. EP 711 (Sub-No. 1) and proposed a new set of regulations that would supplement the Board's existing provisions on reciprocal switching in cases where the rail carrier is providing inadequate service.

In 2023, the Board began EP 711 (Sub-No. 2), issuing a new Notice of Proposed Rulemaking, and offering a new set of regulations that would provide for the prescription of a reciprocal switching agreement based on service to a terminal-area shipper or receiver failing to meet certain objective performance standards. Those proposed standards were intended by the Board to reflect a minimum level of rail service, below which regulatory intervention might have been warranted, considering shippers and receivers' need for reliable, predictable, and efficient rail service and rail carriers' need for a degree of operating flexibility. The Board proposed that,

when an incumbent rail carrier's service fails to meet the performance standards, the incumbent carrier lacks an affirmative defense, and the prescription of a reciprocal switching agreement would be practicable, it would be in the public interest to allow access to an alternate rail carrier through prescription of a reciprocal switching agreement, which would be consistent with the public interest prong of § 11102(c).

After reviewing numerous comments from stakeholders, the Board adopted new regulations providing for the prescription of reciprocal switching agreements as a means to promote adequate rail service through access to an additional line haul carrier. Railroads and others brought suit in the U.S. Court of Appeals for the Seventh Circuit for judicial review of the Board's decision. That Court concluded that the Board had exceeded its statutory authority under *Staggers* in EP 711 (Sub-No. 2) That remanded proceeding remains pending before the Board. Now, in light of the Seventh Circuit's ruling last year, the Board is here proposing a new approach to protect rail shippers from carrier service problems and competition issues, by repeal of Part 1144.

As the Board notes, “[i]n the 40 years since its adoption, part 1144 has been rarely invoked, and the agency has **never issued a prescription** under its framework” (emphasis added). *See*, NPRM at 7. The Board further notes that shippers across the country representing the breadth of American industries have long asserted that, by requiring a showing of anticompetitive conduct, Part 1144 imposes an insurmountable standard. *Id.*, 7-8. In conjunction with EP 711 (Sub No. 1), the Board correctly identified a problem: shippers had been experiencing terrible service without a viable competitive alternative, but there had also been a “dearth of cases” against carriers whose risible service was stymying American industry. *See, id.* (internal quotations omitted). With that in mind, the only fair conclusion was that large rail carriers had failed rail shippers, *but so too had the regulation that should have held those carriers to account*. In other words, Part 1144 has not

in practice provided a framework for relief but rather has been a bar to it. *Id.* at 7 (internal quotations omitted). Amid changes to the rail industry, which include the ever-greater consolidation of Class I rail carriers, the termination of many Class I rail jobs, and increasing rates on shippers in tandem with same, the Board appropriately recognizes that the anticompetitive conduct standard does not make sense today. Moreover, if the Part 1144 standard makes it impossible for captive shippers to show anticompetitive practices among *the railroads*, then it is that standard that is broken.

As the Board noted, shippers, shipper associations, and other affected parties continue to maintain that the anticompetitive conduct standard in part 1144 impedes relief and must be repealed. *See, id.* at 9. In response to a U.S. Department of Justice (“DOJ”) initiative launched to investigate anticompetitive state and federal laws and regulations, for example, the National Industrial Transportation League emphasized the part 1144 regulations “have never been successfully applied to promote or restore rail competition” in the 40 years since their adoption, and that given “daunting precedent” under the anticompetitive conduct standard, no requests for such an arrangement have been filed in the last 30 years. *See, id.* The American Chemistry Council argued that “the Board can provide significant regulatory relief and reduce barriers to competition simply by rescinding the [part] 1144 regulations,” thereby “creat[ing] a clean slate for shippers to seek reciprocal switching under the Board’s statutory authority.” *See, id.* at 8 (internal citations omitted). As the Fertilizer Institute stated, “the anticompetitive conduct standard is a regulatory barrier to achieving the congressionally established objective of competitive rail service and to advancing the Administration’s goal of increasing competition and growing American business.” *See, id.* (internal citations omitted).

III. COMMENTS

A. Repeal is Necessary to Make Rail Service Efficient Again.

The Board stated in its Decision related to EP 711 (Sub-No. 2) (STB served Apr. 30, 2024), “[t]here is a clear public interest in adequate rail service,” noting 49 U.S.C. 10101’s references to “an ‘efficient’ and ‘sound’ rail system that can ‘meet the needs of the public.’” *See, EP 711 (Sub-No. 2) Decision* at 6. The Board further recognized a need for “incentivizing Class I railroads through competition to achieve and maintain higher service levels on an ongoing basis.” *See, id.* at 6. Importantly, the rail environment *without* repeal is not hypothetical – it is the inefficient failed service offerings that shippers must endure today in light of the competitive structure of the Class I rails. In the alternative environment post-repeal, when rail shippers and others have the ability to choose a different rail carrier, all are incentivized to get freight moving. The current inefficiencies in rail service have been greatly exacerbated by Precision Scheduled Railroading (“PSR”) which Class I rail carriers have characterized as allowing them to *increase* efficiencies, but in tandem with which, they instead have lengthened single trains, and foisted even more service disruptions on rail shippers who have been given no choice but to take poor service over no service at all. It is time for repeal, so that Class I rail carriers have reason to move goods more efficiently and effectively.

B. Repeal is Necessary to Make Rail Service Affordable Again.

Customers with few or no practical alternatives to the railroad—captive shippers—are asked to pay a greater proportion of fixed costs.” In other words, even before factoring in PSR and broader rail trends, just making shippers captive to one railroad, in itself, foots them with unreasonable costs in many circumstances with little recourse. Meanwhile, real rates have increased by approximately one-third in just four years, from 2022 to 2026, triple the rate of

inflation. In tandem with those unjustified rate increases and deteriorated service over the years, the large railroads fired thousands of American rail workers, focused on increasing profits at the expense of rail shippers and the American businesses who depend on them. From 2021 to 2025, CSX's workforce decreased from 17,250 to 16,500; Union Pacific from 32,494 to approximately 30,000, and Norfolk Southern from 18,011 to about 17,000. It is time for repeal, so that Class I railroads' unreasonable behaviors considering their competitive powers are brought under control.

C. Repeal is Necessary to Promote American Business and Execute the Administration's Broader Goals.

As the Board stated in its Decision related to EP 711 (Sub-No. 2), “[i]nadequate rail service can substantially impair rail customers’ ability to operate their businesses, resulting in substantial harm to the United States economy as a whole.” *See, EP 711 (Sub-No. 2) Decision* at 6. It noted its “recognition that inadequate rail service can critically and adversely affect the national economy,” and that the *status quo* of Board regulation was failing to meet that aim. *See, id.* When rail shippers do not have choice and rail carriers are protected from giving it to them, businesses moving their goods by rail must seek alternatives or simply accept that their every endeavor will take more time and cost more money.

Put differently, American industry cannot succeed if it cannot rely on rail to move freight efficiently and affordably, so they may provide US consumers with the goods they need. Moreover, the country cannot achieve the laudable infrastructural goals of President Trump’s Administration if rail carriers are allowed to prioritize profit over country. Allocating some \$1.5 billion in funding for competitive grants, this Administration has partnered with private business to bring America’s roads, cities, and energy projects into the 21st century after decades of infrastructural neglect. Moreover, the unreasonable rates charged by railroads generally cause an increase in prices for

consumer goods during a time when inflation is problematic. Without repeal, the Class I railroads have made clear they will derail the Administration's efforts by providing poor and overly costly service that hurts rail shippers immediately and all Americans in the long-term.

D. Repeal May Even Increase Revenue for Railroads.

We anticipate that, like any corporation poised to lose the perceived advantages of monopoly, large freight railroads will oppose repeal. However, logic counsels that repeal, over time, will not only not harm their economic interests, it may even *increase* their revenues. Allowing rail shippers a choice, and thereby improving service and promoting affordable rates, is likely to increase rail traffic. Put differently, although competition might result in lower rates on an individualized basis, it is basic economics that new customers will be drawn to rail carriers when the service is better and cheaper, and that likewise existing customers will be inclined to increase the traffic they send by rail. The aggregate profit of such increased traffic is likely to offset any per-shipment loss to the carriers. Moreover, it is a stark reminder of the need for repeal that, in its absence, railroads' chosen method for increasing their profits has been to prevent competition and fire the American rail worker, rather than simply improve their service offerings.

E. EBG Seeks Repeal to Remedy its Inability to Obtain Adequate Service for its Shippers.

As noted, EBG only interchanges with one Class I railroad. However, it is close to an interchange point with another Class I railroad. At present, it is beholden to its incumbent carrier and has had great difficulties in obtaining adequate service for its captive shippers. While generally smaller railroads like EBG have sought to be exempt from these reciprocal switching rules in past proceedings out of fear that their serving railroad may cherry pick some of the smaller railroads more profitable shippers via a reciprocal switch, which EBG supports, EBG also wants to be able to protect itself and its shippers from unreasonable behavior from the Class I railroad that

essentially has exclusive control over its success². Without repeal here, EBG feels as if its burden to successfully run its small railroad will be insurmountable without some type of regulatory tool that ensures adequate and reasonable service from its Class I interchange partner.

IV. Conclusion

For the reasons described above, the Board should repeal Part 1144. Doing so will make rail service efficient again, will make rail service affordable again, and it will allow American businesses and the Trump Administration to rebuild American infrastructure and keep inflation under control.

Respectfully submitted,

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² Moreover, Class III railroads generally have competition from truck due to their smaller size and shorter haul distance which makes a reciprocal switch remedy for its traffic unlikely to fix a competition problem.