

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Docket No. EP 788

ELIMINATING REGULATORY BARRIERS TO COMPETITION: REVIEW OF PART 1144

ESSENTIAL MINERALS ASSOCIATION COMMENTS

The Essential Minerals Association (“EMA”) 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. EMA 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 their customers, including EMA members. 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 choices they direly need to combat service inadequacies by the Class I railroads and the lack of competition among them.

I. EMA'S INTEREST IN REPEAL OF PART 1144.

EMA is a trade association that represents companies that mine, process, and sell industrial minerals throughout North America. EMA represents a diverse set of member companies across the nation engaged in mining and processing ball clay, barite, bentonite, borates, calcium carbonate, diatomite, feldspar, industrial sand, kaolin, lithium, mica, perlite, potash, quartz, salt, soda ash, sodium bicarbonate, talc, and wollastonite, and other minerals. The industrial minerals produced by EMA member companies are the raw material feedstock that is incorporated into a broad range of products, including among other things, containers, foods, flat and specialty glasses, paint and coatings, ceramics, and a broad range of building products. Additionally, industrial minerals are used to make foundry molds and cores used to manufacture cars, SUVs, and trucks, railcars and almost all other items that have metal castings. EMA's member companies are experiencing tremendous difficulty in meeting the worldwide demand for their products as a result of poor rail service, the unreliability of which also raises the ultimate customer costs and hampers these North American companies competing in that global market. Rail carriers' unreliable service is unnecessarily so, and railroads' conscious choice to ignore customer needs is hurting EMA members and the U.S. economy as a whole; service will only deteriorate if carriers are not held accountable.

Industrial minerals are low margin, high volume products. Member companies are heavily dependent on a reliable and cost-effective rail transportation network and are major shippers with the major rails. Under the current process for the reciprocal switching, through routes, and through rates remedies, EMA members do not bring forward these types of cases and are often forced to modify operations to their detriment because no other viable options are present. This results in

negative impacts throughout the supply chain, ultimately hurting not only EMA members, but also their customers.

EMA appreciates that the STB has an important role in overseeing freight rail policies on rail shippers and is encouraged the STB is seeking ways to improve the competitive access remedies in line with the intent of Congress. EMA urges the Board to breathe new life into these remedies that have been underutilized for decades and to provide a method to counter the Class I railroads' lack of focus on the service needs of their customers and the unfair pricing for these services. Given the ongoing and universal experience of poor railroad service and runaway pricing, EMA is fully supportive of Board action to repeal Part 1144 which has been ineffective for decades. EMA notes that reliable service and fair rates are of particular importance for an industry structured around low margins and high volumes of products. EMA members work tirelessly to mine, process, and sell the industrial minerals on which so many other industries depend, and it is time the railroads are better incentivized even to approach that same standard.

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 form the basis of the need for repeal.

In 2016, the Board issued a notice of proposed rulemaking in Reciprocal Switching, 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 the Staggers Rail Act of 1980 ("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 if any 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 U.S. 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, as with 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, but it may also 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. The Staggers Act Clearly Intended to Introduce More Competition to Regulate the Rail Industry as the Board Proposes to Do Here.

The rail transportation policy established by the Staggers and the subsequent ICC Termination Act of 1995 (the "Act") places great importance on the promotion of competition in the rail industry: "[i]n regulating the rail industry, it is the policy of the United States government...to allow, to the **maximum extent possible**, competition and demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. § 10101 (1) (emphasis added). Congress emphasized the importance of competition in four additional sections setting out the policy underlying Staggers. *Id.* at (4), (5), (6), and (12). These provisions leave little doubt that Staggers and the Act intended to introduce competition as an alternative to regulation of rates and service.

Moreover, the legislative history of Staggers clearly supports the use of competitive access, such as reciprocal switching, to introduce more competition into the rail industry as a counterbalance to the railroads' general ability to set rates without regulatory interference. Title II of Staggers "is related to the key areas of the Interstate Commerce Act which involve railroad rates and inter-carrier practices. In general, the title assures railroads substantially more rate freedom than [was] afforded them under existing law" at that time. H.R. Rept. 96-1430, 96th Cong. 2d sess. 80 (1980). To balance this new-found ratemaking freedom, "[a] number of provisions

are included to foster greater competition by simplifying coordination, minor mergers procedures, entry and reciprocal switching agreements.” *Id.*

The Conference Committee Report on Staggers (“Committee Report”) provided in relevant part as follows:

Consistent with the new rail transportation policy of this Act, **the conferees intend that competition be recognized as the best control on the ability of railroads to raise rates.** The purpose of this legislation is to reverse the decline of the railroad industry, which has been caused, in part, by excessive government regulation. The conferees believe that **by allowing the forces of the marketplace to regulate railroad rates wherever possible** the financial health of the railroad industry will be improved and will benefit all parts of the economy, including shippers, consumers, and rail employees.

Id. at 89 (emphasis added). Undoubtedly, Congress intended competition to be the most effective and desirable way to protect shippers.

With respect to the way Congress intended for competition to be used remedially, the Committee Report stated:

The Senate authorized the Commission to require railroads to enter into reciprocal switching where it finds such agreements to be practicable and in the public interest. In many parts of the country, reciprocal switching agreements are in effect where carriers pick up and deliver traffic for other railroads. In areas where reciprocal switching is feasible, it provides an avenue of relief for shippers where only one railroad provides service and it is inadequate. The standard “practicable and in the public interest” is the same standard the Commission has applied in considering whether to order joint use of terminal facilities.

Id. at 116. *See also* S. Rept. 96-470, Cong. 1st sess. 41-42 (1979) (same).

Similarly, the discussion of reciprocal switching in the Report of the House Committee on Interstate and Foreign Commerce stated:

This section empowers the Commission to approve reciprocal switching agreements and joint service agreements upon the request of a carrier or shipper. In geographic areas where reciprocal switching is feasible, it provides competition to the benefit of shippers served. While the Commission now has the power to order the joint use of terminal facilities, its power to order reciprocal switching is less clear. In particular, reciprocal switching has been limited to situations where competition between rail carriers is not threatened. **The Committee intends for the Commission to permit and encourage greater competition.** Likewise joint service agreements should be encouraged in order to improve shipper service and efficiency.

The standard the Commission should use in approving agreements under this section should be where the requested action is “practicable and in the public interest.”

H. Rept. 96-1035, 96th Cong. 2nd sess. 67 (1980) (emphasis added).

The Senate Committee on Commerce, Science and Transportation Report emphasized the importance of enhanced competition:

The new railroad transportation policy established by this bill emphasizes the need for increased intramodal and intermodal competition, and section 203 [the Senate reciprocal switching provision] deals with intramodal competition among railroads... As the Government moves toward significantly less regulation of the services offered by railroads, the Government should encourage, rather than discourage, competition among railroads. Competition among railroads, or at least the realistic threat of competition, can serve as an important safeguard against inadequate service or unreasonably high prices.

S. Rept. 96-470, at 41 (1979). *See also* 126 Cong. Rec. H10079-87, 99 (daily ed. Sept. 30, 1980) (statement of Rep. Eckhardt) (“inclusion of provisions relating to entry and reciprocal switching which provide increased rail-to-rail competition”); 126 Cong. Rec. H5899-5914, 549 (daily ed. June 30, 1980) (statement of Rep. Madigan) (reciprocal switching “will introduce additional competition between railroads. Under reciprocal switching, one railroad is given the opportunity to have access to another railroad’s operating territory, thereby providing many shippers with competition in rail service that they presently do not enjoy.”). The point of this legislation is “to encourage intramodal competition.” S. Rept. 96-470, at 38.

Based on this clear and consistent language in the rail transportation policy and legislative history of Staggers, it is evident that Congress' intent was to encourage greater intramodal competition. As noted, Congress stated that "[c]ompetition among railroads, or at least the realistic threat of competition, can serve as an important safeguard against inadequate service or unreasonably high rates." S. Rept. 96-470, at 41. Congress provided that "wherever possible," competition should be used to control railroad rates. H.R. Rept. 96-1430, at 89. As a result, because railroads were given great freedom to set rates in Staggers, Congress applied a competitive counterbalance by making reciprocal switching more available to shippers under two accessible standards as the legislative history clearly provided. *Delaware & Hudson Ry. Co. v. Con. Rail Corp.—Reciprocal Switching*, 367 I.C.C. 718, 729 (1983). The STB in the NPRM is following the transportation policy and the legislative intent by proposing to introduce greater competition into rail markets by eliminating the narrow, unmeetable standard which Part 1144 has imposed over the decades.

IV. Conclusion

For the reasons described above, the Board should repeal Part 1144 as Congress intended by encouraging more competition. 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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