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Docket No. EP 788

ELIMINATING REGULATORY BARRIERS TO COMPETITION:
REVIEW OF PART 1144

REPLY 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 Reply Comments pursuant to the Board’s Notice of Proposed Rulemaking (“NPRM”) served on January 7, 2026, in the above-captioned proceeding proposing to repeal the Board’s Part 1144 regulations.

Several commenters and the Board’s NPRM argue that the proposed repeal of Part 1144 is a deregulatory action that will increase competition. Deregulation and increased competition are worthy goals that CPKC endorses. CPKC, however, is concerned that blanket repeal and replacement of the longstanding regulatory framework with a case-by-case approach would create uncertainty, invite regulatory interference, and could undermine the very market forces that Congress sought to promote.

Opening comments submitted by shipper groups reinforce CPKC’s concerns. Several commenters view repeal of Part 1144 as effectively removing any burden on the shipper to make a threshold showing of concrete harm to obtain regulatorily prescribed access. Shippers also see repeal as enabling backdoor rate regulation. Such views are inconsistent with the statutory

framework and court precedent which shippers largely ignore. Such views also conflate competition with regulatory interference.

CPKC continues to advocate that if the Board believes that the current standard is set too high, the Board should clarify the applicable standard in the context of a notice and comment rulemaking in which all interested persons could participate. This is particularly important with respect to the potentially disruptive prescription of joint rates and through routes, which has not been the topic of discussion in any other rulemaking or proceeding.

In these Reply Comments, CPKC also addresses shipper comments that advocate for a forced access regime untethered from statutory authority and precedent. Specifically, CPKC addresses comments that ask the Board to 1) use repeal of Part 1144 as a means to circumvent the ICC Termination Act of 1995's (ICCTA's) rate regulation framework; 2) expand access to exempt traffic—*i.e.*, to traffic for which the Board has already determined effective competition exists; 3) adopt a low threshold for regulatory relief in contravention of judicial and regulatory precedent and the statutory framework; 4) disregard the existence of product and geographic competition in considering requests for regulatory prescriptions of access; 5) adopt a presumption in favor of regulatory prescriptions that would relieve the party seeking the regulatory intervention of its burden of proof; and 6) extend reciprocal switching prescriptions beyond terminal areas in disregard of the statute and Board precedent addressing the issue. In each case, the result would invite regulatory interference and market distortion.

I. Competitive Access Remedies Should Not Become a Vehicle for Backdoor Ratemaking

Several shipper commenters have argued, expressly or by implication, that the Board should use competitive access prescriptions as a mechanism to reduce rates for captive shippers. For instance, the Freight Rail Customer Alliance and the National Coal Transportation Association

characterize the proposed regulatory reform as a means to achieve “lower rates.” Other commenters describe regulatory forced access as a tool to deliver “rate benefits” and “competitive pricing” to shippers. (Freight Rail Customer Alliance, National Coal Transportation Assoc. Op. Com. at 1; LyondellBasell Op. Com. at 1). These arguments reveal a fundamental misunderstanding of the purpose of competitive access remedies and, if credited, would transform the Board’s competitive access authority into an instrument of backdoor rate regulation.

As CPKC emphasized in its Opening Comments, “the Board must guard against such backdoor rate regulation.” CPKC Op. Com. at 3. This admonition finds firm support in governing precedent. The D.C. Circuit held in *Midtec Paper Corp. v. United States* that the agency “may not order reciprocal switching for purposes of providing rate relief.” 857 F.2d 1487, 1502 (D.C. Cir. 1988). The purpose of competitive access remedies is to restore competitive market conditions where competition has demonstrably failed—not to set or reduce rates. These are fundamentally distinct concepts, and the Board must be vigilant in maintaining the distinction.

Congress established a comprehensive framework for shippers to obtain rate relief. As CSX correctly observed in its Opening Comments, competitive access proposals should not be permitted to serve as “an end run around Congress’s rate reasonableness framework.” CSX Op. Com. at 5.

II. The Board Should Reject Calls to Extend Competitive Access Relief to Exempt Traffic on a Blanket Basis

The American Cement Association (“ACA”) urges the Board to hold that exempt traffic, including hydraulic cement, should be eligible for competitive access prescriptions on a blanket basis without first revoking the applicable exemption. ACA Op. Com. at 4. Likewise, the Recycled Materials Association (“RMA”) contends that exempt traffic “must not be forgotten” and that the Board should take affirmative steps to extend competitive access remedies to exempt commodities.

RMA Op. Com. at 1. CPKC respectfully submits that these arguments are without merit and that the Board should firmly reject them.

The Board's exemption authority is an "important cornerstone" of deregulation.¹ The foundation of a commodity exemption is a determination by the Board that effective competition exists such that regulation is unnecessary. Exempt traffic is, by definition, traffic for which the Board has determined that market forces provide adequate discipline. Extending competitive access remedies to exempt traffic on a blanket basis would be internally contradictory: it would effectively concede that the competition underlying the exemption has failed while simultaneously maintaining the exemption itself.

Nor may the Board casually waive away its prior determination that the exemption is warranted as ACA and RMA ask. Rather, pursuant to 49 U.S.C. § 10502(d), the Board must make a specific finding that revocation "is necessary to carry out the transportation policy of section 10101 of this title." Thus, if a shipper or shipper organization believes that effective competition no longer exists for a particular exempt commodity, the appropriate remedy is to seek partial revocation of the exemption through a rulemaking proceeding or through an individual proceeding. It is not to circumvent the exemption framework by demanding blanket access to competitive remedies that presuppose the very regulatory jurisdiction from which the traffic has been exempted.

¹ *American Trucking Ass'n v. ICC*, 656 F.2d 1115, 19-20 (5th Cir. 1981) (quoting H.R. Rep. No. 96-1035, Report of the Committee on Interstate & Foreign Commerce, 96th Cong., 2d Sess. 60 (1980). ("Staggers Act Report H.R. 96-1035"). See also, e.g., *CMC Real Estate Corp. v. ICC*, 807 F.2d 1025, 1031 (D.C. Cir. 1986) (discussing history of Staggers Act exemption provision and its role as "important cornerstone" of the Act's "new flexible approach to regulating the rail industry"); *Simmons v. ICC*, 697 F.2d 326, 333 (D.C. Cir. 1982) (same).

III. Congress Intended a Standard That Requires a Showing of Genuine Competitive Failure and Concrete Harm

Several shipper commenters have urged the Board to adopt an interpretation of 49 U.S.C. § 11102(c) that would impose a low threshold for competitive access relief, requiring little or no showing of genuine competitive failure or concrete harm to a shipper. These arguments are contrary to the text, structure, and legislative history of the statute, and they disregard the guidance recently provided by the U.S. Court of Appeals for the Seventh Circuit.

As CPKC explained in its Opening Comments, the Seventh Circuit’s decision in *Grand Trunk Corp. v. STB*, 143 F.4th 741 (7th Cir. 2025), makes clear that the Board does not paint on a “blank canvas” when applying the competitive access provisions. CPKC Op. Com. at 4. The court held that “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,” and that this standard, rooted in a century of precedent, requires a meritorious claimant to demonstrate “inadequate service.” *Grand Trunk*, 143 F.4th at 749, 752. In other words, the Seventh Circuit has confirmed that the statutory scheme contemplates a meaningful, objective threshold before Board intervention is warranted—not the near-automatic access some shipper commenters advocate. Congress intended regulatory prescription of access as a tool to address discrete situations, not as a mechanism to affect structural change in the industry. If the Board were to repeal Part 1144, it should make clear that relief requires a shipper to show competitive failure resulting in concrete harm.

IV. Product and Geographic Competition Must Not Be Excluded from the Competitive Analysis

The National Industrial Transportation League (“NIT League”), TFI International (“TFI”), the American Chemistry Council (“ACC”), LyondellBasell, and other shipper commenters have urged the Board to categorically exclude evidence of product and geographic competition from

competitive access proceedings, or at a minimum to maintain the existing heightened evidentiary standard for such evidence. NIT League Op. Com. at 8; TFI Op. Com. at 5; ACC Op. Com. at 5; LyondellBasell Op. Com. at 4. Notwithstanding shipper concerns about the burdens of litigating product and geographic competition, categorically excluding these forms of competition from the Board's analysis is fundamentally inconsistent with the statute's design and would risk Board intervention in markets where effective competition already exists.

The foundation of the Staggers Act's regulatory framework is that competition—not government regulation—should govern railroad rates and service to the maximum extent possible. The first policy objective set forth in 49 U.S.C. § 10101 is “to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail.” Before the Board may intervene in the marketplace by prescribing competitive access, it must first determine that competition does not exist based on the available data. And that determination cannot be made accurately in the absence of economically recognized forms of competition that are, in fact, disciplining rates and service.

As BNSF explained in its Opening Comments, consistent with Congress's mandate that the Board should not intervene in functioning markets, the Board must consider all relevant competitive forces when deciding whether regulatory intervention is warranted. BNSF Op. Com. at 3.

If the Board were to grant competitive access prescriptions without assessing whether market-wide competitive conditions already discipline rates and service through product or geographic alternatives, it could find itself intervening in functioning markets, which is precisely the outcome Congress sought to avoid. Even when a particular shipper's circumstances are different from those of most shippers of a particular commodity, it is necessary to examine the

economic evidence relevant to competitive conditions affecting that particular shipper. For example, if it remains correct that truck alternatives sufficiently discipline railroad pricing and other conduct for movements of lumber, the fact that a particular lumber receiver may not be served by truck at all should not control so long as that receiver competes in the same lumber markets as others who continue to have truck access. To exclude alternative forms of transportation from consideration would be to substitute the Board's judgment for market forces in a manner inconsistent with the statute's design. A shipper that faces effective geographic or product competition may prefer to have access to an additional rail carrier, but that preference does not mean that competition has failed

CPKC recognizes that the Board has expressed concerns about the burdens associated with litigating product and geographic competition. These concerns can and should be addressed through appropriate procedural safeguards, such as requiring a responding railroad to provide early notice of its intent to present such evidence, as the NPRM contemplates. The solution to legitimate procedural concerns is procedural reform—not the wholesale exclusion of relevant competitive evidence that the Board needs to fulfill its statutory mandate.

V. The Burden of Proof Should Rest with the Party Seeking Relief

The National Grain and Feed Association ("NGFA") has urged the Board to adopt a rebuttable presumption that any requested reciprocal switching arrangement is "necessary to provide competitive rail service," effectively shifting the burden of proof to the incumbent railroad to demonstrate why a prescription should not be granted. NGFA Op. Com. at 2. Similarly, the USDA has suggested that, if the Board deems a shipper's request to have merit, the burden of proving that the costs of a reciprocal switching solution would outweigh the benefits should rest

with the railroad respondent. USDA Op. Com. at 1. These arguments are contrary to established legal standards, Board precedent, and sound policy.

As CN correctly observed in its Opening Comments, at least with respect to reciprocal switching, precedent is clear that the burden is on the petitioner. *See Midtec*, 3 I.C.C.2d at 182 (burden of proof rests on party seeking terminal trackage rights or reciprocal switching). This allocation of the burden of proof is consistent with Board precedent and the general principle under the Administrative Procedure Act that the party seeking relief bears the burden of demonstrating that it is entitled to such relief. *See North Am. Freight Car Ass’n*, NOR 42144, slip op. at 14 (STB served Jan. 15, 2025); 5 U.S.C. § 566(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”).

The statutory language of 49 U.S.C. §§ 11102(c) and 10705 authorize the Board to prescribe competitive access remedies upon making certain findings, *i.e.*, that the relief is “practicable and in the public interest” or “necessary to provide competitive rail service.” These findings require affirmative determinations, and the party seeking the Board’s intervention should bear the burden of establishing the factual and legal predicates for that intervention.

NGFA’s proposal for a rebuttable presumption in favor of granting access would invert the statutory scheme. Under NGFA’s approach, the mere filing of a petition would effectively establish a *prima facie* entitlement to relief, and the railroad would bear the burden of demonstrating why competitive access should not be prescribed. This proposal is also inconsistent with the rail transportation policy at 49 U.S.C. § 10101(2), which directs the Board “to minimize the need for Federal regulatory control over the rail transportation system.” A presumption in favor of regulatory intervention is the antithesis of minimizing the need for such intervention.

From a policy perspective, shifting the burden to railroads would further invite speculative and opportunistic claims. If petitioners need not demonstrate that competitive access is warranted before a railroad must mount a defense, the resulting uncertainty and litigation burden would further undermine the regulatory stability that has supported railroad investment and network development for decades. The Board should confirm that petitioners bear the burden of proving their entitlement to relief, which is consistent with the statute, established precedent and sound administrative practice.

VI. Reciprocal Switching Relief Is Properly Limited to Terminal Areas

Olin Corporation has argued that the Board's authority to prescribe reciprocal switching under 49 U.S.C. § 11102(c) is not limited to terminal areas, asserting that "[n]owhere in 49 U.S.C. § 11102(c) is the remedy so restricted." Olin Op. Com. at 6. Olin contends that references to "terminal area" should be removed in the context of reciprocal switching and that the Board should instead permit reciprocal switching "within a reasonable distance from carrier interchanges." CPKC respectfully submits that Olin's reading of the statute is incorrect.

As the NPRM itself recognizes, "'reciprocal switching' refers to transfers between rail carriers that take place within the terminal area in which the shipment originates or ends and that are incidental to a line haul." NPRM at 3 n.5. This definition is rooted in a long history of Board and ICC precedent. The ICC held that "[r]eciprocal switching occurs at stations or terminals served by more than one carrier. A common station or terminal area is, therefore, a prerequisite for such switching." *Cent. States Enters., Inc. v. Seaboard Coast Line R.R.*, NOR 38891, slip op. at 2 (ICC served May 15, 1984), *aff'd sub nom. Cent. States Enters., Inc. v. ICC*, 780 F.2d 664, 675 (7th Cir. 1985).

Olin’s reliance on older precedent defining reciprocal switching as taking place within a “defined [geographic] area” does not support its argument. The cases Olin cites predate the Staggers Act and the adoption of the current statutory framework. *See Absorption of Switching to or from High Point, N.C.*, 319 I.C.C. 522, 525 (1963), and *Switching & Minimum Carload Charges, Houston, TX*, 351 I.C.C. 146, 173 (1975). These cases also describe switching within defined districts or areas, which are functionally terminal areas. Moreover, in both cases the ICC emphasized the reciprocal, or mutual, nature of reciprocal switching arrangements, defining reciprocal switching as “a mutual scheme of carriers for effecting switching deliveries within a switching district or other defined area, whereby each carrier party thereto reciprocates in substantial degree with the other.” *High Point*, 319 I.C.C. at 522; *Houston*, 351 I.C.C. at 173. Such mutuality does not exist outside terminal areas and does not exist in the context of prescribed switching. Accordingly, the authority Olin cites does not support the proposition that the Board may prescribe reciprocal switching at any distance from a carrier interchange.

Further, Congress expressly authorized relief to include “for a reasonable distance outside a terminal” but only in the context of terminal trackage rights under § 11102(a). Subsection (b) which addresses reciprocal switch includes no such language.

Expanding reciprocal switching beyond terminal areas would fundamentally alter the nature of the remedy, transforming it from a localized mechanism for addressing market failures at shared terminals into a broad-based tool for restructuring routing patterns across the rail network. This is precisely the kind of “radical restructuring” that the D.C. Circuit warned against in *Midtec*, 857 F.2d at 1507, and that Congress did not intend. The Board should reject Olin’s argument and confirm that its reciprocal switching authority under § 11102(c) is limited to terminal areas.

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

In its Notice of Proposed Rulemaking, the Board noted that the NIT League had not sought repeal of Part 1144 with respect to through routes and joint rates, but nevertheless the Board would propose that possibility. In their opening comments, the NIT League and several other commenters now take the opportunity to advocate extending repeal to through routes and joint rates. The record, however, contains little substantive discussion or evidence as to the implications of such action, either favorable or unfavorable.

The implications of repeal are in fact far reaching and re-regulatory. Repeal, particularly repeal without clarification regarding the standard for obtaining relief, would invite regulatory interference with carrier operating decisions regarding how traffic is routed over the network and carrier rates and divisions. If the Board were to entertain NIT League's now-broadened request, it should do so only by a rulemaking proceeding to fully examine the impacts on the rail network of through route/joint rate prescriptions.

In addition to being re-regulatory, the competition case for repeal simply has not been made.

Conclusion

For the reasons set forth above and in CPKC's Opening Comments, CPKC urges the Board to reject the shipper arguments identified herein. The competitive access provisions of the statute contemplate a meaningful standard that requires a showing of genuine competitive failure and concrete harm before the Board may intervene in the marketplace. Competitive access remedies should not serve as a vehicle for backdoor rate regulation, should not be extended to exempt traffic on a blanket basis, and should not be adjudicated under a presumption in favor of granting access.

Product and geographic competition should be part of the Board's analysis, and reciprocal switching must continue to be confined to terminal areas as Congress intended.

Any clarification of the standard should be made in a rulemaking proceeding and should continue to require a showing of competitive harm that has caused concrete harm to a shipper for the Board's intervention to be invoked. CPKC remains committed to constructive engagement with the Board and all stakeholders to ensure that the competitive access framework serves its intended purpose: restoring competitive market conditions where competition has genuinely failed, consistent with the statutory mandate and the public interest.

Respectfully submitted,

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