

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Docket No. EP 788**

**ELIMINATING REGULATORY BARRIERS TO COMPETITION:  
REVIEW OF PART 1144**

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**REPLY COMMENTS OF  
NORFOLK SOUTHERN RAILWAY COMPANY**

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Dated: April 24, 2026

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Norfolk Southern Railway Company (“NSR”) appreciates the opportunity to reply to the comments submitted in response to the Notice of Proposed Rulemaking (“NPRM”) in the above-captioned proceeding, in which the Board proposes to rescind its regulations at 49 C.F.R. Part 1144 governing requests for competitive access under 49 U.S.C. §§ 11102 and 10705.

On opening, NSR explained its concern that the NPRM offers limited justification for wholesale rescission of Part 1144. NSR agrees with many of the concerns and suggestions raised by other railroads. For example, NSR shares the concern of Canadian Pacific Kansas City that rescinding Part 1144 would “invite *more regulatory interference*, not less.”<sup>1</sup> NSR also shares the preference for the Board to use formal rulemaking to clarify or change any statutory interpretations, because rulemaking is the best way for the Board to gather stakeholder input,

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<sup>1</sup> See Canadian Pacific Kansas City Comment, Docket No. EP 788, at 2 (filed Mar. 10, 2026); *see also id.* at 2–3.

address reliance interests, prospectively inform behavior, and avoid a period of regulatory uncertainty.<sup>2</sup>

NSR also raised concerns that the NPRM suggested a change in the agency's statutory interpretation of 49 U.S.C. §§ 11102 and 10705 without reasonably explaining such a reinterpretation. NSR agrees with CSX Transportation, Inc., that there is significant evidence of Congressional approval of the anticompetitive conduct standard.<sup>3</sup> Because the NPRM did not engage with the statutory text, history, or purpose of the provisions at issue, NSR urged the Board to clarify that rescission of Part 1144 would not prejudice or foreclose future arguments regarding the substantive statutory standard.

However, shipper interests urge the Board to do something more drastic. Rather than viewing elimination of the rules as a way to allow the Board to “consider parties’ legal and policy arguments and to identify relevant factors in the context of specific circumstances,” NPRM at 14, some commenters seek new substantive interpretations in an effort to obtain lower rates. Further, some commenters urge the Board to informally adopt substantive new rules and requirements. These suggestions would run counter to the Administrative Procedure Act (“APA”) and the Board’s expressed rationale for rescission in the first place: to decrease regulation and increase flexibility to operate on a case-by-case basis under the statute. The Board should reject these suggestions.

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<sup>2</sup> *See id.* at 4–6.

<sup>3</sup> CSX Transportation, Inc. Comment, Docket No. EP 788 at 7, App. (filed Mar. 10, 2026) (“CSX Comment”).

## **I. THE BOARD SHOULD REJECT EFFORTS TO REINTERPRET THE STATUTE IN THE CONTEXT OF THIS PROPOSED RESCISSION.**

The NPRM explained the purpose of rescission as allowing the Board the opportunity to address all “legal and policy arguments and to identify relevant factors in the context of specific circumstances” of individual adjudications. NPRM at 14; *id.* at 10, 12–13, 16. Yet, certain parties are seeking ill-advised proposals that would represent significant departures from precedent and sound policy.

As they have in the past, certain shipper interests make clear that they view forced access as an alternative path to rate regulatory mechanisms and a way to circumvent differential pricing, which the agency has described as “crucial to the viability of the industry.”<sup>4</sup> Given their desired outcome, they urge the Board to reinterpret its statutory authority. They argue that the statutory “bar should be set low” because the mere threat of a prescription will force railroads to lower rates.<sup>5</sup>

Other shipper interests contend that they are entitled to “competition enhancements”<sup>6</sup> and that having access to a single carrier should be a basis for relief.<sup>7</sup> Such proposals are unsound and inconsistent with the law. The D.C.

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<sup>4</sup> *Intermodal Rail Competition—Proportional Rates*, Docket No. EP 445 (Sub-No. 2), 1990 MCC LEXIS 70 at 7-8 (ICC Apr. 17, 1990).

<sup>5</sup> See Freight Rail Customer Alliance Comment, Docket No. EP 788, at 3, 4 (filed Mar. 10, 2026) (asserting both that “the bar should be set low here” and that the NPRM “has the potential” to “lower rates.”); see also Growth Energy Comment, Docket No. EP 788, at 2 (filed Mar. 10, 2026) (asserting that repeal of part 1144 “will improve ... rates for rail shippers”); The Fertilizer Institute Comment, Docket No. EP 788, at 4 (filed Mar. 10, 2026) (“The Fertilizer Institute Comment”) (asserting that through routes, through rates, and reciprocal switching prescriptions are “intended to ... reduce rates”).

<sup>6</sup> Recycled Materials Association Comment, Docket No. EP 788, at 2 (filed Mar. 10, 2026).

<sup>7</sup> The National Industrial Transportation League Comment, Docket No. EP 788, at 6 (filed Mar. 10, 2026) (“NITL Comment”).

Circuit has squarely foreclosed the idea that reciprocal switching could be sustained “whenever such an order could enhance competition between rail carriers.” *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1507 (D.C. Cir. 1988).

As explained on opening, NSR does not object to the Board’s desire to seek more procedural flexibility in adjudications involving access requests. But that is not what certain parties are asking of the Board. Rather, they are asking for the Board to rescind rules *and* establish new substantive interpretations that are inconsistent not only with repeated congressional directives and agency and judicial holdings, but also with the purpose of this rulemaking.

*First*, the statute prohibits many of the shipper proposals. NSR explained in its opening comments how the agency consistently described the anticompetitive conduct standard as the best implementation of the statute. Further, as explained by NSR and others, Congress has ratified the anticompetitive conduct standard.<sup>8</sup> And as noted above, the court in *Midtec* has already explained that there is not “even the slightest indication that Congress intended ... to conform the industry more closely to a model of perfect competition” and that it is “entirely consistent with the purposes of the Staggers Act that the [railroad] may enjoy some degree of ‘market power’ ... without liability to compelled competitive access.” *Midtec*, 857 F.2d at 1507.

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<sup>8</sup> See, e.g., Norfolk Southern Railway Comment, Docket No. 711 (Sub-No. 1), at 39–45 (filed Oct. 26, 2016); CSX Comment, at Appendix (filed Mar. 10, 2026).

*Second*, shipper proposals would be inconsistent with the Board’s stated rationale in the NRPM, which is a rescission aimed at reducing (not increasing) regulation and ensuring flexibility (not instantiating new substantive positions). *See, e.g.*, NPRM at 16 (“this rule will be net deregulatory”); *id.* at 12–14 (explaining goal of developing “flexible” standards via adjudication with the benefit of parties’ arguments in the context of “specific circumstances”).

To the extent the Board does propose to do more than that, the APA does not allow it. As NSR explained on opening, the agency has long considered the anticompetitive conduct standard to be the best reading of the statutory provisions at issue. NSR Opening Comments at 6–9. While the Board may not be prohibited from rescinding its regulations, the NPRM does not provide a new substantive interpretation and it is prohibited from reinterpreting the statute without an APA-sufficient explanation. *See, e.g., Hall v. Baker*, 867 F.2d 693, 696 (D.C. Cir. 1989) (“[I]t is ... a familiar (and fundamental) tenet of administrative law that the failure to admit or explain a basic change in the interpretation of a statutory standard to be applied to conduct of the public undermines the integrity of the administrative process.” (cleaned up)).

And, in fact, even in the context of a future adjudication, the Board is not at liberty to issue a binding, prospective rule. The decision to proceed case-by-case inherently limits the agency to deciding the facts of the case in front of it. *Brown-Forman Corp. v. Nat’l Labor Rel. Bd.*, 169 F.4th 646, 660 (6th Cir. 2026). (“Adjudicatory authority is reserved for the problems that arise in a case, and any

articulated standard should address that particular problem rather than create a hard and fast or general rule.” (cleaned up)). If instead, the agency purported to issue a rule through adjudication, it would be an end run around notice-and-comment rulemaking. *Id.* at 659 (“[A]gencies are prohibited from using adjudication to engage in rulemaking.”). Such action would appear especially suspect given the Board’s prior attempts to use rulemaking to interpret the substantive provisions of 49 U.S.C. § 11102 in the past.<sup>9</sup> The agency should reject any suggestion from commenters that would flout notice and comment safeguards—which were “designed to assure fairness and mature consideration of rules of general application” and to “ensure that federal agencies are accountable to the public.” *Id.* at 663 (cleaned up).

These proposals simply underscore the wisdom of NSR’s request in its opening comments: that if the Board proceeds with rescission, it clarify that the final rule is understood as providing procedural flexibility through case-by-case adjudication but not as prejudging or foreclosing any substantive interpretation of what the statute requires. Such clarification is consistent with the Board’s stated goal of being able to address “legal and policy arguments” in the context of “specific circumstances” of individual adjudications. NPRM at 14; *id.* at 10, 12–13, 16.

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<sup>9</sup> See *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1) (STB served Sept. 7, 2023) (abandoning prior rulemaking proposal); *Reciprocal Switching for Inadequate Service*, Docket No. EP 711 (Sub-No. 2) (STB served Apr. 30, 2024) (struck down by *Grand Trunk Corp. v. STB*, 143 F. 4th 741, 749, 751 (7th Cir. 2025)).

Under that framework, parties would remain free to argue in individual cases the appropriate statutory standard that should apply in that individual adjudication.

## **II. THE BOARD SHOULD REJECT CALLS TO ADOPT NEW RULES OR GUIDANCE.**

Despite the nature of the NPRM (a rescission of rules), some commenters ask the Board to adopt what would amount to new rules that would limit evidence and prejudice factors relevant to future cases. Those requests include the establishment of a standard set of facts, adoption of rebuttable presumptions, procedural deadlines, discovery limits, bans on product and geographic competition, and even methodologies for compensation.<sup>10</sup>

NSR is not addressing each of the many shipper proposals that were suggested because none are appropriate for this rulemaking. And certainly none of them would be logical outgrowths from the NPRM. *See Envtl. Integrity Project v. Env't. Prot. Agency*, 425 F.3d 992, 996 (D.C. Cir. 2005). NSR notes, however, that many of these proposals are deeply problematic. Indeed, some of them are inconsistent with the statute and could not even be accomplished without a

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<sup>10</sup> *See, e.g.*, The Fertilizer Institute Comment at 4 (requesting preambulatory “guidance on a standard set of facts the Board expects shippers to present”); National Grain and Feed Association Comment, Docket No. EP 788, at 3 (filed Mar. 10, 2026) (suggesting that a reciprocal switching arrangement “should proceed from the rebuttable presumption that the requested reciprocal switching arrangement is ‘necessary to provide competitive rail service,’” along with other “Procedural Suggestions” including timelines to limit railroads’ discovery); NITL Comment at 8 (“NITL strongly urges the STB to eliminate consideration of product and geographic competition”); Freight Rail Customer Alliance Comment, Docket No. EP 788, at 3–4 (filed Mar. 10, 2026) (suggesting specific compensation methodology); North America Freight Car Association Comment, Docket No. EP 788, at 3 (requesting that adjudicatory standards “should prioritize” benefits to shippers over the “incumbent railroad’s ‘revenue needs’”).

separate rulemaking to modify other existing regulations. For example, one party asks the Board to “expressly recognize” in its final rule that exempt traffic—for which the agency has made findings under 49 U.S.C. § 10502 and has adopted rules in Parts 1039—be subject to regulation through agency prescriptions.<sup>11</sup> Such an action would not be a “clarification” but rather a radical substantive change requiring revocation findings under the statute and changes to existing rules. If the Board wants to explore any of these suggestions, it should do so in the context of formal rulemaking or, where appropriate, on a case-by-case basis in the context of specific facts.

For similar reasons, the Board should not adopt a “non-binding guidance document” based on the comments provided in this proceeding. *See* NPRM at 13 n.22. Some shipper commenters appear to want established rules, which cannot be accomplished through non-binding guidance. *See, e.g., Wilgar Land Co. v. Dep’t of Labor*, 85 F.4th 828, 837–38 (6th Cir. 2023) (an adjudicator “would commit legal error by treating [interpretive rules] as binding in an individual case.” (cleaned up)).

Further, in these circumstances in particular, it is not clear why a non-binding guidance document would be needed or useful. The Board’s intent is to evaluate issues going forward in the context of specific facts on a case-by-case basis—something that cannot be accomplished through a guidance document issued outside of an adjudication. In the past, when the Board has decided to issue a

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<sup>11</sup> *See* American Cement Association Comment, Docket No. EP 788, at 5–7 (filed Mar. 10, 2026).

guidance document, it has articulated a particular need for the guidance document and wisely sought public comment on the proposed guidance. That notice-and-comment opportunity has proven invaluable, leading to modifications in the proposed guidance or even declining to issue the guidance at all. *See, e.g., Policy Statement on Demurrage and Accessorial Rules and Charges*, Docket No. EP 757 (articulating need for and adopting guidance document after notice and comment); *Policy Statement on Implementing Intercity Passenger Train On-Time Performance*, Docket No. EP 728 (withdrawing proposed guidance). Here, the Board suggests in a footnote the possibility of guidance but has not proposed anything that would be included in such a document or offered any need for one. Given the Board's stated aim of developing its approach to these issues through adjudications with the benefit of considering legal and policy arguments in specific circumstances, *see* NPRM at 14, issuing a sub-regulatory guidance document would work against these goals.

It would also work against the purported deregulatory effect of the NPRM. *See* Exec. Order No. 14192 (including guidance documents in the definition of a "regulation" for the purpose reducing regulatory proliferation). The Board should be mindful of concerns raised regarding the use of guidance documents, consistent with Executive orders. *See, e.g.,* Exec. Order No. 13891 (2019) ("[A]gencies have sometimes used this authority [to issue guidance documents] inappropriately in attempts to regulate the public without following the rulemaking procedures of the

APA”); Exec. Order No. 13892 (2019) (“Guidance documents may not be used to impose new standards of conduct on persons outside the executive branch.”).<sup>12</sup>

### III. CONCLUSION

Should the Board proceed to a final rule, NSR encourages the Board to honor its rationale for rescission by rejecting requests to drastically reinterpret the statute or issue prospective guidance for future adjudications. NSR further renews its request that the Board clarify that its rescission does not foreclose or prejudice any future arguments about statutory standards.

Respectfully submitted,

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<sup>12</sup> Though these orders were revoked in 2021, (Exec. Order No. 13992), the revocation order was rescinded in 2025, (Exec. Order No. 14,148).