

BEFORE THE SURFACE TRANSPORTATION BOARD

311193
ENTERED
Office of Chief Counsel
April 24, 2026
Part of
Public Record

STB Docket No. EP 788

Eliminating Regulatory Barriers to Competition:
Review of Part 1144

Reply Comments of
the American Chemistry Council and The Fertilizer Institute

Jason D. Tutrone
Thompson Hine LLP
1919 M Street, NW Suite 700
Washington, DC 20036
(202) 331-8800

Jason.Tutrone@ThompsonHine.com

*Counsel for the American Chemistry
Council and The Fertilizer Institute*

Dated: April 24, 2026

	Page
I. The Board has clear statutory authority to repeal part 1144.....	4
A. The governing statutes grant discretionary authority that the Board narrowed and may restore.....	4
1. Repeal restores, rather than expands, the statutory framework.....	4
2. The Board does not need to offer a new statutory interpretation to replace the anticompetitive conduct standard.	6
3. Repeal does not deprive carriers of statutory protections for differential pricing.	7
B. Congress did not ratify the anticompetitive conduct standard.....	8
C. The record confirms that Part 1144 is a bar to relief, not functional regulation.	10
II. Railroad reliance interests do not justify preserving an obsolete rule.....	11
A. The Board has adequately considered reliance interests.....	11
B. Carriers cannot claim serious reliance interests under a statute whose competing policies were designed to be rebalanced over time.	12
III. The Board should commit to genuine case-by-case adjudication.....	16
A. Statutory standards and case-by-case adjudication address network efficiency concerns.	16
B. The Board should not adopt a “market failure” standard or require proof of anticompetitive conduct by another name.	17
C. The Board should not impose a “significant use” threshold or require proof of “demonstrably improved service” as prerequisites to relief.	19
D. The Board should continue to limit product and geographic competition evidence.	22
E. Contract traffic eligibility should be resolved in individual proceedings, not foreclosed categorically.	23
1. A categorical exclusion for contract traffic would recreate the very barrier that repeal of Part 1144 is intended to remove.....	23
2. The Board has authority to prescribe competitive access with a future effective date.	24
3. The Board can consider contract-traffic performance probative of common- carrier service inadequacy without regulating contract traffic.	25
IV. The record supports full repeal.	27
V. Repeal of part 1144 is irrelevant to the public interest standard governing the UP/NS merger.....	31
VI. Conclusion	33

The American Chemistry Council (“ACC”) and The Fertilizer Institute (“TFI”) (collectively, “Shipper Associations”) respectfully submit these joint reply comments concerning the Notice of Proposed Rulemaking in this proceeding, (the “NPRM”) which proposes to repeal part 1144 of the Board’s competitive access regulations.

The opening comments in this proceeding demonstrate overwhelming support for repeal from across the American economy—chemical manufacturers, petroleum refiners, grain and feed associations, aggregates producers, food and beverage shippers, coal consumers, short line railroads, and the U.S. Department of Agriculture, among others.

Railroad commenters, by contrast, lack a consistent position. Norfolk Southern argues that the anticompetitive conduct standard reflects the agency’s best reading of the statute and should be preserved. CSX Transportation, Inc. (“CSX”) says it “does not object in principle” to removing the regulatory text so long as statutory limits are reaffirmed.¹ BNSF Railway Company (“BNSF”) “does not oppose” repeal and supports Board intervention in cases of market failure.² Union Pacific Railroad (“UP”) likewise “does not oppose” repeal, while asking for extensive procedural requirements.³ And Canadian Pacific Railway Company (“CPKC”) urges the Board to keep Part 1144 or, at most, replace it with a new rule.⁴ This disarray confirms that the 1985 consensus underlying Part 1144 has irretrievably

¹ (CSX Comments 1.)

² (BNSF Comments 1.)

³ (UP Comments 1.)

⁴ (CPKC Comments 1.)

collapsed—on both sides of the bargaining table.

Shipper Associations urge the Board to finalize the repeal of part 1144 in its entirety, to resist the carriers’ various attempts to reimpose the anticompetitive conduct standard by other means, and provide a workable and efficient case-by-case process to consider competitive access remedies.

I. The Board has clear statutory authority to repeal part 1144.

A. The governing statutes grant discretionary authority that the Board narrowed and may restore.

CSX and Norfolk Southern contend that the anticompetitive conduct standard reflects the only permissible reading of the competitive access statutes and that abandoning it unlawfully expands regulatory power.⁵ These arguments misread both the statutory text and the agency’s own precedent. Repeal restores, rather than expands, the statutory framework. The Board also need not replace the anticompetitive conduct standard. And repeal does not deprive carriers of statutory protections for differential pricing.

1. Repeal restores, rather than expands, the statutory framework.

Repeal does not expand the Board’s authority—it removes a regulatory overlay the agency itself imposed. NS’s contention that the anticompetitive conduct standard under part 1144 is the “best reading” of the Board’s statutory limits⁶ is wrong. Under 49 U.S.C. § 11102(c)(1), the Board “may” order reciprocal switching

⁵ (See CSX Comments, App.; NS Comments 8-9.)

⁶ (NS Comments 5.)

when “practicable and in the public interest” or “necessary to provide competitive rail service.” Similarly, 49 U.S.C. § 10705 says the Board “may, and shall when it considers it desirable in the public interest,” prescribe through routes and joint rates. The statutory text does not contain any anticompetitive conduct limitation.

The limitation arises instead out of the discretion that the statutes afford the Board. Each uses permissive language to signal that they provide discretionary authority for the Board to act within the boundaries they identify. As the D.C. Circuit held in *Midtec Paper Corp. v. United States*,⁷ the Part 1144 rules “narrow the agency’s discretion.”⁸ They are “a reasonable accommodation of the conflicting policies set out in [the Board’s] governing statute.”⁹ But they are not the *only* reasonable accommodation.¹⁰

Because part 1144 is discretionary, CPKC’s framing of the repeal as “re-regulatory” is inaccurate.¹¹ The repeal removes an artificial regulatory limit on the competitive access remedies that Congress made available by statute, without replacement by any new regulation. Further, it shifts to the most minimally regulatory approach available by replacing an inflexible general rule with a case-by-case approach that allows cautious, specialized exercise of the Board’s power.

⁷ *Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988).

⁸ *Id.* at 1500.

⁹ *Baltimore Gas & Electric Co. v. United States*, 817 F.2d 108, 115 (D.C. Cir. 1987).

¹⁰ *See id.* (holding that the Board’s governing statute contains directives that “do not all point in the same direction”).

¹¹ (*See* CPKC Comments 2.)

Here, the best reading of the Board’s governing statute is that it delegates discretionary authority to the Board to prescribe competitive access. The Board needs only to stay within the boundaries that Congress fixed, exercising reasoned decision making.¹² Here, the Board is not changing those boundaries, it is merely restoring its authority to act within them.

2. The Board does not need to offer a new statutory interpretation to replace the anticompetitive conduct standard.

Norfolk Southern argues that the NPRM fails to offer a new statutory interpretation to replace the anticompetitive conduct standard and that the Board cannot proceed without a comprehensive replacement framework.¹³ But the Administrative Procedure Act does not impose such a limitation. As the Supreme Court has observed, “[n]ot every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations.”¹⁴

The Board’s approach is one that the Supreme Court contemplated in *SEC v. Chenery Corp.* There, the Court held that case-by-case adjudication has several benefits when compared with rulemaking, including that it may be better suited for addressing scenarios of “specialized and varying “ complexity, like those that

¹² *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395 (2024).

¹³ (NS Comments 5-6.)

¹⁴ *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947).

carriers contend arise with competitive access.¹⁵ Along these lines, the Court held in *NLRB v. Bell Aerospace Co.*,¹⁶ that an agency “has discretion to decide that the adjudicative procedures in [a] case may also produce the relevant information necessary to mature and fair consideration of the issues.”¹⁷ Competitive access disputes are “inherently fact-intensive and deeply dependent on local operational realities, competitive conditions, shipper needs, and network impacts.”¹⁸ The Board thus has reason to proceed with caution, “developing its standards in a case-by-case manner with attention to the specific character” of each situation.¹⁹

3. Repeal does not deprive carriers of statutory protections for differential pricing.

CSX and Norfolk Southern contend that expanded competitive access would undermine differential pricing, suppress investment, and function as backdoor rate regulation in violation of the Staggers framework.²⁰ This argument conflates part 1144’s repeal with eliminating a statutory protection.

Nothing in repeal alters the statutory framework protecting differential pricing. Part 1144 has no bearing on the rate reasonableness provisions of 49 U.S.C. § 10701(d), which permit differential pricing. It also does not overturn the statutory policy that the Board consider carriers’ need to differentially price traffic to achieve

¹⁵ *Id.* at 203.

¹⁶ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

¹⁷ *Id.* at 294.

¹⁸ (Am. Fuel & Petrochemical Mfrs. (“AFPM”) Comments 12.)

¹⁹ *Bell Aerospace*, 416 U.S. at 294.

²⁰ (See CSX Comments 3, 6; NS Comments 6, 11-12.)

revenue adequacy.²¹

As for the “backdoor rate regulation” argument, the statutory framework provides separate mechanisms for rate relief (49 U.S.C. § 10701) and competitive access (49 U.S.C. §§ 10705, 11102(c)). These are different tools that Congress afforded, and competitive access does not guarantee the same results as rate review.

B. Congress did not ratify the anticompetitive conduct standard.

Nothing in the ICC Termination Act (“ICCTA”)²² or its legislative history indicates that Congress intended to fix the anticompetitive conduct standard as a permanent boundary on the Board’s discretion to order competitive access. While CSX applies the doctrine of reenactment to claim that statements in the legislative history about not disrupting existing standards amount to permanent ratification of the anticompetitive conduct standard,²³ the doctrine cannot bear that weight.

CSX has not provided any legislative history affirming that Congress intended to permanently adopt Part 1144. For ratification of an agency decision to occur under the doctrine of reenactment, Congress must have affirmed the decision.²⁴ As evidence of affirmation, CSX cites a committee report on ICCTA that refused to adopt legislative changes to address shipper and small railroad concerns about competitive access.²⁵ It also cites a House committee report on ICCTA stating

²¹ See 49 U.S.C. § 10101(3).

²² ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995).

²³ (CSX Comments, App.)

²⁴ *Ass’n of Am. R.Rs. v. Interstate Commerce Comm’n*, 564 F.2d 486, 493-94 (D.C. Cir. 1977).

²⁵ (CSX Comments, App. at v.)

that the ICC’s authority over competitive access would be “transferred . . . under existing standards.”²⁶ At most, these statements could indicate that Congress did not disagree with the Board’s limitation on its discretion as a policy matter. The other legislative history that CSX points to is a statement that “[t]he Committee intends that the Panel continue the policy of granting railroads the maximum possible freedom to set rates, routes, and divisions, so long as these actions are not anticompetitive.”²⁷ But this underscores that any affirmation merely contemplated the Board’s *policy* choices, not the boundaries of its discretion.

The ICCTA legislative history also confirms that Congress did not change the Board’s discretion by merely incorporating existing standards. The Conference Committee explained that its decision to maintain the statutory standard for market dominance and the current agency regulations implementing that standard did not change that “the agency has broad discretion to consider additional factors . . . and to revise and supplement its existing standards and regulations as appropriate.”²⁸ While this language referred to market dominance, it nevertheless confirms the general principle that maintaining existing standards is not equivalent to fixing the Board’s discretion.

Reading anything more into ICCTA legislative history would amount to a silent reconfiguration of the statutory landscape. It would effectively repeal the Rail

²⁶ (*Id.*)

²⁷ (*Id.* at vi.)

²⁸ H.R. Rep. No. 104-422, at 173 (1995) (Conf. Rep.).

Transportation Policy balancing as it applies to the Board's exercise of its discretion. Congress does not "hide elephants in mouseholes," especially without any change to the statutory text.²⁹

C. The record confirms that Part 1144 is a bar to relief, not functional regulation.

CPKC and Norfolk Southern contend that the "dearth of cases" under Part 1144 proves the standard is working as designed, not that it is too high.³⁰ This requires the Board to believe that in forty years—despite serious service issues and repeated shipper concerns over a lack of competition, declining service, and increasing rates—no shipper has suffered the kind of harm that Congress intended the competitive access provisions to address. The Board should reject this as inconsistent with the overwhelming weight of the evidence before the Board.

What the absence of cases really shows is that the anticompetitive standard is so onerous that no rational shipper would bear the cost of pursuing competitive access. The National Industrial Transportation League ("NITL"), which is the original shipper proponent of Part 1144, has asserted that the regulations "have never been successfully applied to promote or restore rail competition" and that "daunting precedent" under the anticompetitive conduct standard has deterred shippers from filing cases for over thirty years.³¹ The Private Railcar Food and

²⁹ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

³⁰ (*See* NS Comments 3 ("the market is functioning as intended"); CPKC Comments 4.)

³¹ NPRM 9-10.

Beverage Association (“PRFBA”) confirmed that “Part 1144 has not in practice provided a framework for relief but rather has been a bar to it.”³² AFPM noted that Part 1144 “replaced Congress’s intentionally open, case-specific framework with a rigid and often unattainable test.”³³ The Alliance for Chemical Distribution (“ACD”) reported that 61.8% of survey respondents would pursue a reciprocal switch if they had the option, but that “current regulations make it nearly impossible to do so.”³⁴

II. Railroad reliance interests do not justify preserving an obsolete rule.

CSX contends that “railroads have relied on the current regulatory framework to make significant investments in customer-serving facilities” and that “removing the Part 1144 regulations creates uncertainty.”³⁵ Norfolk Southern warns that “[r]escission would create a vacuum of guidance, leaving rail carriers with no basis for assessing either the likelihood that a prescription might be imposed or even the likelihood that a shipper would seek one.”³⁶ These concerns do not justify retaining Part 1144.

A. The Board has adequately considered reliance interests.

CSX and Norfolk Southern contend that the NPRM impermissibly defers consideration of reliance interests to future adjudication.³⁷ The Board can satisfy its

³² (PRFBA Comments 3.)

³³ (AFPM Comments 11.)

³⁴ (ACD Comments 3.)

³⁵ (CSX Comments 3.)

³⁶ (NS Comments 11-12.)

³⁷ (See NS Comments 11; CSX Comments 4 n.9.)

APA obligations by directly addressing reliance in the final rule.

The governing framework is well established. Under *Department of Homeland Security v. Regents of the University of California*,³⁸ the agency must “assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.”³⁹

The NPRM acknowledged the carriers’ reliance arguments and proposed that carriers “would be free to argue, and attempt to demonstrate, adverse impacts from a potential through route or switch prescription based on investments and other expenses they may have incurred in reliance on the anticompetitive conduct standard.”⁴⁰ The Board further noted that “[n]othing within section 10705 or section 11102(c) would appear to preclude the Board from declining to prescribe relief based on such reliance interests.” *Id.* (*quotations omitted*).

B. Carriers cannot claim serious reliance interests under a statute whose competing policies were designed to be rebalanced over time.

The carriers’ reliance interests are inherently attenuated because they have had no reason to expect that the Board would continue to apply its discretion consistent with part 1144 as the rail industry changes.

Two D.C. Circuit decisions put railroads on notice decades ago that part 1144 was just one permissible exercise of the Board’s discretion to prescribe competitive

³⁸ *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1 (2020).

³⁹ *Id.* at 33.

⁴⁰ NPRM 14.

access. *Baltimore Gas & Electric Co. v. United States*⁴¹ upheld the part 1144 but noted the Board could have struck a different balance.⁴² *Midtec* later confirmed that the Board may depart from part 1144 whenever it offers a reasoned justification consistent with the Staggers Act's purposes.⁴³

Beginning with *Baltimore Gas*, the D.C. Circuit upheld part 1144 as “a reasonable accommodation of the conflicting policies” in the Staggers Act but expressly left open the possibility that the Board could reach a different and equally permissible balance.⁴⁴ The statutory framework contemplates that the Board will periodically reassess how best to balance competing policies in light of changing industry conditions. The carriers’ reliance on one particular accommodation reached in 1985, under vastly different industry conditions, cannot foreclose the Board’s exercise of its statutory discretion to strike a different balance in 2026.

Midtec made that possibility explicit. The court held that the Board is not required to exercise its discretion to prescribe competitive access in a way that would be “unwise as a matter of policy.”⁴⁵ The Board may instead depart from part 1144 simply by providing “a reasoned analysis that is not manifestly contrary to the purposes of the legislation it administers.”⁴⁶ No carrier could reasonably rely on the

⁴¹ *Baltimore Gas & Electric Co. v. United States*, 817 F.2d 108 (D.C. Cir. 1987).

⁴² *Id.* at 115.

⁴³ *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1500 (D.C. Cir. 1988).

⁴⁴ *Balt. Gas*, 817 F.2d at 115.

⁴⁵ *Midtec*, 857 F.2d at 1499.

⁴⁶ *Id.* at 1500.

permanence of a discretionary regulatory narrowing the D.C. Circuit had already flagged as revisable.⁴⁷

Additionally, part 1144 has been on the verge of major reform for the last 15 years. In 2011, the National Industrial Transportation League filed a petition to replace part 1144 with rules that expand the Board's discretion consistent with its statutory limits.⁴⁸ That proceeding wound its way to a 2024 final rule providing expanded access to reciprocal switching.⁴⁹ Even after the Seventh Circuit overturned the decision last year,⁵⁰ nothing in the court's decision suggested that part 1144 was cast in stone. In comments on the 2024 rule, several shipper stakeholders called for overturning the anticompetitive conduct test in part 1144.⁵¹ NITL, the ACC, and TFI reiterated these calls last year in public filings to the U.S. Department of Justice's Anticompetitive Regulations Task Force. With the continued existence of part 1144 in doubt for this long, railroads have had no reason to rely on their short- or long-term applicability. The Board is not required to immunize carriers from competitive access based on generalized investments that may not apply to specific cases.

CSX argues that railroads "can justify infrastructure investments that exceed

⁴⁷ (See Am. Petroleum Inst. ("API") Comments 6.)

⁴⁸ NITL, Petition, EP 711, July 7, 2011.

⁴⁹ *Reciprocal Switching for Inadequate Serv.*, EP 711 (Sub-No. 2) (STB served Apr. 30, 2024).

⁵⁰ *Grand Trunk Corp. v. STB*, 143 F.4th 741 (7th Cir. 2025).

⁵¹ NPRM 9.

immediate short-term returns when [the carrier] has an expectation that the customer volumes would support the investment over the long term.”⁵² Norfolk Southern similarly contends that “the regulatory regime surrounding competitive access implicates how railroads approach infrastructure and investment projects.”⁵³ But these arguments conflate the general existence of investments with reliance on the specific anticompetitive conduct standard. The carriers do not, however, demonstrate that any particular investment was made *because of* Part 1144. This is precisely the kind of question better resolved in individual adjudications, where the Board can assess whether specific investments were actually made in reliance on the regulatory framework and whether the public interest weighs in favor of protecting those investments.⁵⁴

Further, CSX and NS do not square their claim that part 1144 facilitates investment with the investments that carriers make in their competitive traffic. Shippers have commented to the Board that carriers are willing to make investments to serve traffic that is open to competition.⁵⁵ To secure these investments, carriers can and do use contract commitments and other nonregulatory mechanisms. Thus, part 1144 is unnecessary to protect carrier investment.

⁵² (CSX Comments 4.)

⁵³ (NS Comments 11-12.)

⁵⁴ *See* NPRM 14.

⁵⁵ *See, e.g.,* LyondellBasell Comments at 2, *Reciprocal Switching*, EP 711 (Sub-No. 1) (filed Feb. 14, 2022).

Repeal also does not strand investments, alter existing traffic patterns, or create new switching arrangements. It merely removes a regulatory barrier to the Board's consideration of future petitions. Any shipper seeking a switching prescription would still have to demonstrate that the arrangement is warranted based on the statutory standards. As ACC's opening comments acknowledged, repeal "does not ensure that shippers will gain greater access to competitive rail service options" and "significant uncertainties remain."⁵⁶ This candid assessment underscores that the disruption carriers predict is speculative.

III. The Board should commit to genuine case-by-case adjudication.

The Board should ensure that post-repeal adjudication reflects a genuine return to the statutory text rather than reimposition of part 1144's anticompetitive conduct standard under a different label or through procedural prerequisites that would recreate or expand the barriers repeal is designed to remove.

A. Statutory standards and case-by-case adjudication address network efficiency concerns.

Carrier concerns that repeal will harm network efficiency and introduce cascading service failures are misplaced.⁵⁷ The statutory standards require the Board to consider these issues in case-by-case adjudication. Under 49 U.S.C. § 10705(a), the Board's analysis involves several public interest factors, including economy, efficiency, feasibility, practicability, and the impact of a through route on

⁵⁶ (ACC Comments 5.)

⁵⁷ (See CPKC Comments 6-7; CSX Comments 5.)

all parties.⁵⁸ Reciprocal switching prescriptions under the “practicable and in the public interest” prong of § 11102(c) inherently require consideration of these practicability concerns. The Rail Transportation Policy further directs the Board to consider the overall efficiency and adequacy of the rail transportation system.⁵⁹ Network efficiency arguments are best understood not as reasons to retain Part 1144, but as factors the Board will weigh in every individual adjudication.

Also, repeal does not mandate switching in any particular case. It merely restores the Board’s discretion to evaluate petitions on their facts. As the Supreme Court held in *Bell Aerospace*, where problems “vary widely depending on the company or industry” and “any generalized standard could be framed which would have more than marginal utility,” the agency “has reason to proceed with caution, developing its standards in a case-by-case manner.”⁶⁰ The operational effects of switching vary enormously by location, and case-by-case adjudication is better suited to evaluate them than a rigid standard.

B. The Board should not adopt a “market failure” standard or require proof of anticompetitive conduct by another name.

Several carriers have urged the Board, as a condition of repeal, to “clarify” the applicable standard in ways that would functionally reimpose the anticompetitive conduct requirement under a different label. BNSF, while stating it “does not oppose the repeal of [part 1144],” emphasizes that “Board intervention

⁵⁸ NPRM 3 n.4.

⁵⁹ 49 U.S.C. § 10101(4).

⁶⁰ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

should be limited to instances of market failure.”⁶¹ Norfolk Southern asks the Board to confirm that carriers “should remain free to argue, in individual adjudications, that the governing statutes require the anticompetitive conduct standard.”⁶² CPKC contends that the Board should “clarify its regulations within the confines of the statutory framework.”⁶³ The Board should not pre-adopt a “market failure” or “competitive abuse” standard as the governing test.

If the Board were to adopt a standard requiring proof of affirmative anticompetitive conduct, demonstrated market failure, or carrier “abuse” as a threshold prerequisite to relief, it would defeat the purpose of repeal. Part 1144’s anticompetitive conduct standard “replaced Congress’s intentionally open, case-specific framework with a rigid and often unattainable test.”⁶⁴ Reimposing that test under a different name would not constitute the “reasoned explanation for the change” that *Encino Motorcars, LLC v. Navarro* requires.⁶⁵ It would be the status quo dressed in the language of reform.

The NPRM recognized this risk, observing that “always requiring a petitioner to demonstrate the classical categories of competitive abuse, or some other type of abusive, anticompetitive conduct under the standards of the RTP—requirements

⁶¹ (BNSF Comments 2-3.)

⁶² (NS Comments 10.)

⁶³ (CPKC Comments 2.)

⁶⁴ (AFPM Comments 11.)

⁶⁵ See *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (stating that agencies may change policies if they provide a reasoned explanation).

that nowhere exist in section 10705 or section 11102(c)—presents a regulatory impediment to cases that might otherwise be meritorious.”⁶⁶ Post-repeal adjudication thus should apply the statutory standards as written: “practicable and in the public interest” and “necessary to provide competitive rail service.”

C. The Board should not impose a “significant use” threshold or require proof of “demonstrably improved service” as prerequisites to relief.

Union Pacific asks the Board to limit its discretion to prescribe competitive access to where it can “ensure that the remedy demonstrably improves service” and “the complaining party would use the remedy to meet a significant portion of its transportation needs.”⁶⁷ These limits would impose significant burdens on the party seeking access and are inconsistent with the purpose of the Board’s competitive access authority.

Congress removed the use requirement from the Board’s governing statute and retaining it in guidance or regulation would drastically narrow the competitive benefits that Congress sought to make available under the governing statute. Part 1144 required a petitioning shipper or carrier to demonstrate that it had utilized or would utilize the proposed switching arrangement “to meet a significant portion of its . . . transportation needs.”⁶⁸ The NPRM correctly noted that this “standing” requirement “corresponds to a statutory provision that no longer exists”—the

⁶⁶ NPRM 11.

⁶⁷ (UP Comments 1-2.)

⁶⁸ 49 C.F.R. § 1144.2(a)(2).

former 49 U.S.C. § 10707(c)(1)(B), which ICCTA repealed.⁶⁹ The requirement is “not necessary” as a prerequisite to a prescription under §§ 10705(a) or 11102(c),⁷⁰ and “could have the effect of locking out small businesses from seeking competitive-access relief.”⁷¹

Further, a use requirement would undermine the competitive incentive that reciprocal switching provides. The value of competitive access lies not solely in actual use of an alternative carrier, but in the competitive pressure that the availability of an alternative creates. A shipper need not divert all or most of its traffic to benefit from access to a competitive option. Even the credible threat of diversion can constrain incumbent carrier pricing and service. Requiring proof of significant anticipated use would undermine this competitive enhancement function.

Similarly, the Board should not require the shipper to demonstrate that a switch will improve service. This would impose a burden that is inconsistent with the statutory framework’s design. The statute authorizes reciprocal switching not only where “practicable and in the public interest” but also where “necessary to provide competitive rail service.” The latter prong does not require proof of inadequate service by the incumbent. While *Grand Trunk Corp. v. STB* held that the “public interest” prong requires a finding of inadequate service, the court’s

⁶⁹ NPRM 12-13.

⁷⁰ *Pet. for Rulemaking to Adopt Revised Competitive Switching Rules*, EP 711 (Sub-No. 1), slip op. at 26–27 (STB served July 27, 2016).

⁷¹ NPRM 13.

holding does not extend to the “competitive rail service” prong.⁷² Further, requiring a shipper to demonstrate improved service puts the cart before the horse. While a shipper may anticipate improved service, a reciprocal switch does not guarantee it. Any required showing of improved service will necessarily invite speculative disputes over service levels that will compound the burden of seeking competitive access.

More broadly, several railroad commenters appear to read *Grand Trunk* as imposing a uniform threshold finding of inadequate service across every competitive access request the Board may consider going forward. That reading overstates the decision. *Grand Trunk* addressed a specific Final Rule promulgated under one prong of one statute—the “practicable and in the public interest” prong of § 11102(c).⁷³ The court did not interpret the alternative “necessary to provide competitive rail service” prong of § 11102(c). Nor did *Grand Trunk* address § 10705, which the NPRM observes is “cast in even more discretionary language” than § 11102(c).⁷⁴ Whether and how *Grand Trunk* bears on any particular request is a question for case-by-case adjudication, not a basis to import a single threshold standard across the entire competitive access framework.

⁷² See *Grand Trunk Corp. v. STB*, 143 F.4th 741, 754 (7th Cir. 2025) (stating that the court interpreted the public interest standard as requiring a showing of inadequate service).

⁷³ *Id.* at 748.

⁷⁴ NPRM 10.

D. The Board should continue to limit product and geographic competition evidence.

BNSF argues that the Board should evaluate “all competitive forces” and claims that “product and geographic competition are also present in many rail markets.”⁷⁵ This would significantly increase the burden of a competitive access proceeding on the litigants and the Board despite being unnecessary under the Board’s governing statutes. The Board should decline this invitation.

First, the Board’s 2016 switching notice of proposed rulemaking explained that consideration of product and geographic competition “is not statutorily required and imposes a substantial burden on the Board and parties.”⁷⁶ Second, the Board determined in the market dominance context that “the harm to the shipper community from continuing to consider such evidence can be substantial and irreparable.”⁷⁷ Third, allowing railroads to litigate product and geographic competition in competitive access cases would create precisely the procedural quagmire the Board has sought to avoid, forcing shippers into costly economic battles over purported product or geographic substitutes.

Allowing railroads to routinely introduce product and geographic competition evidence would be “taking a step backwards by increasing the burdens and complexity involved in case-by-case adjudications.”⁷⁸ The Board should reaffirm its

⁷⁵ (BNSF Comments 3-4.)

⁷⁶ *Pet. for Rulemaking to Adopt Revised Competitive Switching Rules*, EP 711 (Sub-No. 1), slip op. at 27 (STB served July 27, 2016). (internal quotes omitted).

⁷⁷ *Mkt. Dominance Determinations*, 3 S.T.B. 937, 949 (1998).

⁷⁸ (NITL Comments 9.)

rationale for restricting such evidence under part 1144 and clarify that it will continue to apply these protections.

E. Contract traffic eligibility should be resolved in individual proceedings, not foreclosed categorically.

The Board should decline the invitation by Grand Trunk Corporation (“CN”) to declare categorically that traffic moving under transportation contracts is ineligible for the prescription of reciprocal switching agreements or through routes.⁷⁹ Whether and how 49 U.S.C. § 10709 affects a particular request for competitive access turns on the scope and terms of the contract at issue, the relationship between contract and common carrier movements at the facility in question, and the precise nature of the relief sought. Those are fact-intensive questions that the case-by-case adjudicatory framework the NPRM proposes to restore is uniquely suited to resolve.⁸⁰ A blanket exclusion announced in this rulemaking would forfeit that flexibility before any concrete case is presented and would risk extending § 10709 beyond what its text requires.

1. A categorical exclusion for contract traffic would recreate the very barrier that repeal of Part 1144 is intended to remove.

The Board has recognized that part 1144 has “effectively operated as a bar to relief rather than as a standard under which relief could be granted,” leaving “a dearth of cases” over four decades and no prescriptions ever issued under its

⁷⁹ (See CN Comments 2-3.)

⁸⁰ NPRM 13-14.

framework.⁸¹ A categorical exclusion for contract traffic would restore this dynamic. A substantial amount of captive traffic moves under contract, frequently on terms that reflect the absence of any competitive alternative. Removing that traffic from the Board's consideration in every future case-by-case adjudication would recreate, in functional terms, the same insuperable barrier the Board has identified and ensure that the shippers most in need of competitive access remain unable to obtain it. The Board should not replace one categorical bar to relief with another.

2. The Board has authority to prescribe competitive access with a future effective date.

Nothing in 49 U.S.C. § 11102(c) or § 10705 requires that a prescription take effect immediately, and both provisions are “cast in discretionary terms.”⁸² A forward-looking prescription that becomes operative only when the shipper's contract expires would furnish the shipper with meaningful competitive leverage in future negotiations without disturbing the existing contractual relationship or imposing any additional duty during the contract term.⁸³ The Board should preserve its flexibility to fashion such prospective remedies in appropriate cases on the facts presented, rather than disclaim that authority categorically here.

⁸¹ NPRM 8, 12.

⁸² *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1499 (D.C. Cir. 1988); *see also* NPRM 10 (observing that § 10705 “is cast in even more discretionary language” than § 11102(c)).

⁸³ *See FMC Wyo. Corp. v. Union Pac. R.R.*, FD 33467, slip op. at 3 n.7 (STB served Dec. 16, 1997) (recognizing the Board's authority to **require a carrier to establish a common carrier rate that would be available when a contract expires** in a matter of weeks).

3. The Board can consider contract-traffic performance probative of common-carrier service inadequacy without regulating contract traffic.

Section 10709 imposes two operative bars: subsection (b) prohibits imposing on a contracting party any “duty in connection with services provided under such contract other than those duties specified by the terms of the contract,” and subsection (c)(1) provides that a contract and “transportation under such contract” shall not be subject to Part A of 49 U.S.C. subtitle IV. Neither bar is triggered when the Board prescribes competitive access for common carrier traffic and considers, as part of the evidentiary record, how the carrier is performing at the same facility or in the same terminal area, including under contract. The carrier’s contract duties remain whatever the parties bargained for, and the prescription operates solely on the carrier’s common carrier traffic. As an operational matter, carriers generally do not segregate infrastructure, crews, locomotives, yards, or operating practices between contract and common carrier movements at a shared facility. Contract-traffic performance thus is often the most direct evidence of whether common carrier traffic at that facility faces inadequate service, or will face inadequate service when contract volumes convert to common carriage upon contract expiration.

The Board’s earlier concern about consideration of contract performance, expressed in the now-vacated Part 1145 rulemaking, does not extend to this context. There, the Board reasoned that “creating numerical standards that apply to contract performance, and prescribing reciprocal switching when performance fell short of the standards, would be tantamount to subjecting the contract

transportation to” § 11102(c), and that compliance with those categorical thresholds would impose an extra-contractual “duty” implicating § 10709(b).⁸⁴ No comparable mechanism exists under repeal of part 1144. Case-by-case adjudication under §§ 11102(c) and 10705(b) establishes no benchmark to which contract service must conform. It does not change the carrier’s contract obligations, and the only consequence of a prescription is access for an alternate carrier as to common carrier traffic. The agency has long considered contract-related evidence as background, without offending § 10709.⁸⁵

In fact, there are several scenarios in which the Board could consider contract-performance evidence in case-by-case adjudication under §§ 11102(c) and 10705 without regulating contract traffic. For example, the Board would not be regulating contract traffic where it considers contract-performance evidence that has a concrete operational nexus between the contract service and the common carrier service for which the prescription is sought, like shared yards, lines, locomotives, crews, or scheduling within the same terminal area. Because each prescription rests on a developed record, the Board can determine in any particular case whether the relief would, in operation, impose a contract-specific duty or

⁸⁴ *Reciprocal Switching for Inadequate Serv.*, EP 711 (Sub-No. 2), slip op. at 108, 109 (STB served Apr. 30, 2024).

⁸⁵ *See Midtec Paper Corp. v. CNW*, 3 I.C.C.2d 171, 183 (1986) (treating the carrier’s willingness to “initiate and concur in joint rate proposals and rate reductions in tariffs or rail transportation contracts” as evidence the carrier was not “a monopolist indifferent to the needs of its shipper”); *Vista Chem. Co. v. Atchison, T. & S.F. Ry.*, 5 I.C.C.2d 331, 338 (1989) (treating contract evidence as “background against which to evaluate the defendant’s conduct.”)

subject contract transportation to Part A, and can exclude the evidence, discount its weight, or deny relief where § 10709 so requires. That case-by-case discipline is the very advantage the NPRM identifies in restoring statutory adjudication, and it is incompatible with the categorical pre-determination CN urges the Board to adopt in this rulemaking.

IV. The record supports full repeal.

Several railroad commenters suggest that the repeal of part 1144 should not apply to prescriptions of through routes and through rates. But the arguments supporting repeal as to reciprocal switching apply with equal force to through-routes and through-rate prescriptions, and partial repeal would create an unjustified regulatory asymmetry. Thus, full repeal is warranted.

The NPRM recognized this parallelism, observing that “[s]eemingly all of the Board’s reasons given above for repealing part 1144, and replacing it with a case-by-case adjudicatory approach under the governing statutory provisions, apply just as much to through route and through rate prescription as they do to the prescription of reciprocal switching agreements.”⁸⁶ The anticompetitive conduct and standing requirements “were the product of a consensus among railroads and shippers that no longer exists and a statute that has since been significantly amended.”⁸⁷

Further, the anticompetitive conduct standard applies uniformly across all three forms of competitive access under Part 1144. The regulation provides for the

⁸⁶ NPRM 14.

⁸⁷ *Id.*

prescription of a through route, through rate, or reciprocal switching agreement only where “necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. 10101 or is otherwise anticompetitive.”⁸⁸ The “significant use” standing requirement likewise applies to through routes no less than to reciprocal switching.⁸⁹ There is no textual or structural basis in Part 1144 or the governing statutes for applying different standards to different forms of competitive access. If the anticompetitive conduct standard is an “unnecessarily high barrier to statutory relief” as to reciprocal switching,⁹⁰ it is equally so as to through routes and through rates.

Also, the record on through routes and through rates mirrors the record on reciprocal switching. The agency has never prescribed a through route or through rate under Part 1144’s framework.⁹¹ The single through-route prescription the Board has issued in recent decades was in a proceeding where the parties agreed that Part 1144 did not apply.⁹² That exception demonstrates that part 1144 is an insuperable barrier to through-route and through-rate prescriptions.

Additionally, the 1985 consensus between NITL and AAR leading to part 1144 encompassed through routes, through rates, and reciprocal switching as an

⁸⁸ 49 C.F.R. § 1144.2(a)(1).

⁸⁹ *See* 49 C.F.R. § 1144.2(a)(2).

⁹⁰ NPRM 12.

⁹¹ NPRM 15.

⁹² *See Canexus Chems. Can. L.P. v. BNSF Ry.*, NOR 42131 (STB served Feb. 8, 2012).

integrated package.⁹³ The marketplace acceptance that justified that package no longer exists. NITL “agrees that a full repeal of Part 1144 rules, as applied to both reciprocal switching and through route and rate prescriptions, is warranted.”⁹⁴ AFPM “supports the Board’s NPRM proposing to eliminate Part 1144 in its’ [sic] entirety.”⁹⁵ API noted that “[t]he anticompetitive conduct and standing requirements apply equally to switching and through routes. Both derive from the same 1985 compromise.”⁹⁶ The breadth of this support—across chemicals, fertilizer, energy, agriculture, food and beverage, and other industries—confirms that marketplace consensus favors full repeal.

Much of part 1144’s original text concerning through routes and joint rates has already been effectively abrogated. ICCTA’s termination of tariff requirements and joint rate and through route cancellation provisions rendered the suspension-and-investigation provisions of Part 1144 obsolete.⁹⁷ What remains is the anticompetitive conduct standard and associated procedural restrictions, which are equally unworkable for through routes as for reciprocal switching. Retaining these vestigial provisions for through routes while repealing them for reciprocal switching would preserve barriers with no independent statutory basis.

⁹³ See NPRM 5-6; *Intramodal Rail Competition*, 1 I.C.C.2d 822, 823, 839-41 (1985).

⁹⁴ (NITL Comments 4.)

⁹⁵ (AFPM Comments 2.)

⁹⁶ (API Comments 4.)

⁹⁷ NPRM 11; *see also* Removal of Joint Rate Cancellation Regs., 67 Fed. Reg. 61,290 (Sept. 30, 2002).

Carriers opposing full repeal argue that through-route prescriptions could have more far-reaching network implications than localized reciprocal switching and that the Board has developed no separate record on through routes.⁹⁸ CPKC further argues that since NITL initially “do[es] not advocate for repeal of [Part 1144] to the extent they apply to prescriptions of through rates or through routes,” the Board should not act *sua sponte*.⁹⁹ These arguments should be rejected.

First, the EP 788 rulemaking itself constitutes the requisite notice-and-comment proceeding. The NPRM specifically requested comment on partial versus full repeal,¹⁰⁰ and commenters on all sides have now addressed the question. When the NPRM explicitly asks whether full repeal is appropriate, a final rule adopting full repeal satisfies the logical outgrowth doctrine.

Second, the carriers’ network-impact argument goes to the merits of individual through-route petitions, not to whether the anticompetitive conduct standard should govern. The statutory standards for through-route prescriptions under § 10705(a) already require the Board to consider the public interest, and the agency has historically considered under that standard efficiency, feasibility, impact of the route on the parties involved, and other factors.¹⁰¹ If through-route prescriptions have greater network implications, the statutory standards require the Board to consider them in individual adjudications, which is a more targeted

⁹⁸ (See CPKC Comments 6; NS Comments 13.)

⁹⁹ (CPKC Comments 6 (internal quotations omitted).)

¹⁰⁰ NPRM 14-15.

¹⁰¹ 49 U.S.C. § 10705(a)(1)-(2); NPRM 3 n.3.

approach than a categorical bar.

Third, the fact that NITL initially proposed only partial repeal does not constrain the Board's independent judgment. NITL's opening comments in EP 788 ultimately endorsed full repeal.¹⁰²

V. Repeal of part 1144 is irrelevant to the public interest standard governing the UP/NS merger.

The Board should not suggest that the proposed rule mitigates potential competitive harms associated with the proposed Union Pacific/Norfolk Southern merger.¹⁰³ The Board's authority to prescribe competitive access remedies under 49 U.S.C. §§ 10705 and 11102(c) is entirely distinct from its authority to approve, condition, or deny railroad consolidation transactions under 49 U.S.C. chapter 113, subchapter II. The merger review framework requires the Board to evaluate whether a proposed transaction is consistent with the public interest¹⁰⁴ and to impose conditions that "mitigate or offset harm to the public interest," including competitive harms, created by the transaction itself.¹⁰⁵ Repeal of Part 1144 does not alter this obligation. As BNSF correctly observed, "[t]he availability of competitive access remedies does not affect the Board's statutory responsibilities to protect the public interest in a major merger proceeding by preventing the creation of excessive market power in the first place."¹⁰⁶ The Board should not allow market power to be

¹⁰² (NITL Comments 4.)

¹⁰³ (*See* ACC Comments 5.)

¹⁰⁴ 49 U.S.C. § 11324(c).

¹⁰⁵ 49 C.F.R. § 1180.1(c)(2)(i), (d).

¹⁰⁶ (BNSF Comments 6.)

created through a merger simply because access remedies *might* be available after the fact.

This position commands broad consensus. NITL urged that “repealing Part 1144 should not influence the factors the Board considers when imposing conditions in merger transactions.”¹⁰⁷ ACD “strongly urges the Board to make these considerations separately.”¹⁰⁸ LyondellBasell cautioned that “case-by-case adjudications makes competitive-access prescriptions a localized remedy for specific competitive harms, not a solution to large-scale loss of competition.”¹⁰⁹ Even CPKC, which opposes repeal, acknowledged that the current regulatory landscape does not address the “fundamental transformation” a merger would bring.¹¹⁰

Post-repeal competitive access prescriptions are inherently localized and individualized remedies. They address specific service or competitive deficiencies at specific facilities through specific switching or routing arrangements. They are not designed to address the system-wide competitive harms that a major consolidation transaction can produce. Those harms cannot be undone through piecemeal, case-by-case litigation. As BNSF noted, “there is no reason to believe that the repeal of [part 1144] would on its own increase or enhance competition” because “any changes in the industry that might result from the removal of [part 1144] would be

¹⁰⁷ (NITL Comments 10.)

¹⁰⁸ (ACD Comments 4.)

¹⁰⁹ (LyondellBasell Comments 5.)

¹¹⁰ (CPKC Comments 2.)

incremental, focused on very specific situations.”¹¹¹ The Board should make clear in the final rule that the availability of post-repeal competitive access remedies is not a factor in its evaluation of any pending or future merger transaction.

VI. Conclusion

Part 1144 has blocked rail-to-rail competition for forty years. The Board should restore the discretion Congress gave it and let the statutory standards work. For these reasons, ACC and TFI respectfully urge the Board to move forward expeditiously to repeal part 1144 in its entirety and provide a workable and efficient case-by-case process to consider competitive access remedies.

Respectfully submitted,

/s/ Jason D. Tutrone
Jason D. Tutrone
Thompson Hine LLP
1919 M Street, NW Suite 700
Washington, DC 20036
(202) 331-8800

Jason.Tutrone@ThompsonHine.com

*Counsel for the American Chemistry
Council and The Fertilizer Institute*

Dated: April 24, 2026

¹¹¹ (BNSF Comments 7.)