

**Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423**

247378

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In the Matter of	)	
	)	
Association of American Railroads--	)	Docket No. EP 752
Petition for Rulemaking	)	
	)	

**COMMENTS OF
THE COMPETITIVE ENTERPRISE INSTITUTE**

April 1, 2019

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Introduction

On behalf of the Competitive Enterprise Institute (“CEI”), I respectfully submit these comments to the Surface Transportation Board (“STB”) in support of Association of American Railroads--Petition for Rulemaking (“AAR Petition”).¹

CEI is a nonprofit, nonpartisan public interest organization that focuses on regulatory policy from a pro-market perspective.² This comment letter supports the AAR Petition to open a rulemaking proceeding to incorporate benefit-cost analysis into future STB rulemaking proceedings.

STB’s Proposed Competitive Switching Rule Demonstrates the Need for Benefit-Cost Analysis in Rulemaking Proceedings

In 2016, the STB opened a rulemaking proceeding that proposed to eliminate the longstanding anticompetitive conduct requirement from its rules governing mandatory reciprocal switching.³

Two Interstate Commerce Commission decisions—*Intramodal Rail Competition*, 1 I.C.C.2d 822 (1985) and *Midtec Paper Corp. v. Chicago & North Western Transportation Co.*, 3 I.C.C.2d 171 (1986)—formally established the anticompetitive conduct requirement. The regulation was adopted in the *Intramodal Rail Competition* proceeding and is presently codified at 49 C.F.R. § 1144.2(a)(1). It states that reciprocal switching would only be mandated if it “is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. § 10101 or is otherwise anticompetitive.”

The *Midtec* decision in the year following *Intramodal Rail Competition* interpreted the rule as requiring a showing that a carrier has either (1) “used its market power to extract unreasonable terms,” or (2) “shown a disregard for the shipper’s needs by rendering inadequate service” due to its monopoly position. Both of these interpretations of 49 U.S.C. § 11102(c) were upheld by the courts.⁴

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1. Association of American Railroads Petition for Rulemaking before the Surface Transportation Board, Docket No. EP 752 (Mar. 14, 2019), *available at* [https://www.stb.gov/Filings/all.nsf/d6ef3e0bc7fe3c6085256fe1004f61cb/e7463766ed1f5f98852583be004591fd/\\$FILE/247287.pdf](https://www.stb.gov/Filings/all.nsf/d6ef3e0bc7fe3c6085256fe1004f61cb/e7463766ed1f5f98852583be004591fd/$FILE/247287.pdf).
 2. *See* About CEI, <https://cei.org/about-cei> (last visited Apr. 1, 2019).
 3. Petition for Rulemaking To Adopt Revised Competitive Switching Rules; Reciprocal Switching, Notice of Proposed Rulemaking, EP 711 (Sub-No. 1), 81 Fed. Reg. 51,149 (Aug. 3, 2016) [hereinafter NPRM].
 4. *Baltimore Gas and Elec. Co. v. United States*, 817 F.2d 108 (D.C. Cir. 1987); *Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988).

The STB's stated rationale for eliminating the anticompetitive conduct requirement was the fact that shippers had not demonstrated anticompetitive harm to warrant mandated reciprocal switching in the last three decades, with the agency concluding that the anticompetitive conduct requirement "effectively operated as a bar to relief rather than as a standard under which relief could be granted."⁵ The STB provided no economic analysis to support this claim. Indeed, this dearth of analysis could just as easily be used to support the opposite conclusion: that the lack of successful demonstrations by shippers of anticompetitive abuse on the part of carriers effectively shows no such abuse exists and thus no relief is warranted.

The STB's actions in choosing to open the competitive switching proceeding demonstrate the need for incorporating robust benefit-cost analysis in agency rulemaking proceedings. Other independent agencies such as the Securities and Exchange Commission and Federal Communications Commission have recently made reforms to improve their economic analysis of regulations.⁶ The STB should follow suit to avoid the missteps of its past.

Conclusion

Thank you for the opportunity to comment on the AAR Petition. We urge the STB to promptly open the requested rulemaking proceeding.

Respectfully submitted,

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5. NPRM, *supra* note 3, at 51,152.

6. See Jerry Ellig, *Why and How Independent Agencies Should Conduct Regulatory Impact Analysis*, 28 CORNELL J.L. & PUB. 1 (2018).