

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

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| In the Matter of |) | |
| |) | Docket No. EP 711 (Sub-No. 1) |
| Petition for Rulemaking To Adopt |) | |
| Revised Competitive Switching Rules; |) | 81 Fed. Reg. 51149 |
| Reciprocal Switching |) | |
| |) | |

**COMMENTS OF
THE COMPETITIVE ENTERPRISE INSTITUTE**

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Introduction

On behalf of the Competitive Enterprise Institute (“CEI”), I respectfully submit these comments in response to the Surface Transportation Board’s (“STB”) Notice of Proposed Rulemaking regarding Petition for Rulemaking To Adopt Revised Competitive Switching Rules; Reciprocal Switching (“NPRM”).¹ CEI is a nonprofit, nonpartisan public interest organization that focuses on regulatory policy from a pro-market perspective.² CEI previously filed numerous comments in both the Ex Parte 711 and Ex Parte 705 proceedings.³

Our comments develop the following points:

1. STB ignores legislative acquiescence to the anticompetitive conduct requirement; and
2. Eliminating the anticompetitive conduct requirement simply because anticompetitive conduct has not been found in three decades is arbitrary and capricious and contrary to the public interest.

I. STB Ignores Legislative Acquiescence to the Anticompetitive Conduct Requirement

In the Ex Parte 711 proceeding that considered the National Industrial Transportation League (“NITL”) petition, carriers CSX Transportation and Norfolk Southern Railway argued that Congress ratified the anticompetitive conduct requirement of 49 C.F.R. § 1144.2(a)(1) by passing the ICC Termination Act of 1995 without changing the reciprocal switching provision presently codified at 49 U.S.C. § 11102(c).⁴

STB rejected this argument, claiming in the NPRM that the railroads “do not cite any legislative history in which Congress even mentioned the agency’s interpretation of former § 11103 (now § 11102), much less voiced approval for it.”⁵ While STB may not be persuaded that the ratification doctrine applies in this case, it failed to adequately consider another form of legislative inaction, one which does apply and one for which there is ample evidence of congressional intent: acquiescence.

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1. Petition for Rulemaking To Adopt Revised Competitive Switching Rules; Reciprocal Switching, *Notice of Proposed Rulemaking*, EP 711 (Sub-No. 1), 81 Fed. Reg. 51149 (Aug. 3, 2016) [hereinafter NPRM].
 2. See About CEI, <https://cei.org/about-cei> (last visited Sep. 2, 2016).
 3. See, e.g., Comments of the Competitive Enterprise Institute in the Matter of Competition in the Railroad Industry, *Notice*, Docket No. EP 705, 46 Fed. Reg. 2748 (Jan. 14, 2011), available at [https://www.stb.gov/Filings/all.nsf/d6ef3e0bc7fe3c6085256fe1004f61cb/83d6a8e38b7e1e058525785a004d75dd/\\$FILE/229012.PDF](https://www.stb.gov/Filings/all.nsf/d6ef3e0bc7fe3c6085256fe1004f61cb/83d6a8e38b7e1e058525785a004d75dd/$FILE/229012.PDF); Reply Comments of the Competitive Enterprise Institute in the Matter of Petition for Rulemaking to Adopt Revised Competitive Switching Rules, *Notice of Public Hearing*, Docket No. EP 711, 78 Fed. Reg. 49721 (Aug. 15, 2013), available at [https://www.stb.gov/Filings/all.nsf/d6ef3e0bc7fe3c6085256fe1004f61cb/e0d2b99c94bf5e8485257b7a007252cc/\\$FILE/234311.pdf](https://www.stb.gov/Filings/all.nsf/d6ef3e0bc7fe3c6085256fe1004f61cb/e0d2b99c94bf5e8485257b7a007252cc/$FILE/234311.pdf).
 4. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803.
 5. NPRM, *supra* note 1, at 51154.

In *Bob Jones University v. United States*, 461 S. Ct. 574 (1983), the Supreme Court held that the income tax exemption for nonprofit religious, charitable, or educational corporations does not apply to educational institutions engaged in race-based discrimination. It noted that “[n]onaction by Congress is not often a useful guide, but the nonaction here is significant.”⁶

The Court stressed legislative acquiescence because ever since the Internal Revenue Service had first interpreted the charitable exemption as not applicable to racially discriminatory corporations in 1970, a vigorous public debate had taken place and numerous unsuccessful bills were introduced in Congress to reverse the IRS interpretation. “It is hardly conceivable that Congress . . . was not abundantly aware of what was going on. In view of its prolonged and acute awareness of so important an issue, Congress’ failure to act on the bills proposed on this subject provides added support for concluding that Congress acquiesced in the IRS ruling.”⁷

Just as in *Bob Jones University*, “the nonaction here is significant,” as the debate is certainly prolonged and Congress is acutely aware of the decades-old battle between rail carriers and shippers over railroad access rules.

Since the *Intramodal Railroad Competition* and *Midtec Paper Corp.* decisions formally established the anticompetitive conduct requirement, numerous bills have been introduced in Congress to amend 49 U.S.C. § 11102 to eliminate the requirement. Most notable was the Surface Transportation Board Reform Act of 1999 introduced by Rep. Jim Oberstar (D-Minn.), then the Ranking Member of the House Transportation and Infrastructure Committee.⁸ Section 104 of the bill included:

(b) Reciprocal Switching.--Section 11102(c)(1) of title 49, United States Code, is amended--

- (1) by striking “may” in the first sentence and inserting “shall”;
- (2) by inserting after “service.” the following: “In making this determination, the Board shall not require evidence of anticompetitive conduct by the rail carrier from which access is sought.”; and
- (3) by striking “may” in the last sentence and inserting “shall”.

Ranking Member Oberstar’s bill failed. It was reintroduced in 2001 and 2003 and failed both times.⁹ Sen. Jay Rockefeller (D-W.V.) introduced the Railroad Competition Act of 2001 with nearly identical language amending § 11102 to repeal the anticompetitive conduct requirement.¹⁰ Similar legislation was introduced by Rep. Richard Baker (R-La.) in 2003,¹¹ Sen. Conrad Burns (R-Mont.) in 2005,¹² Sen. Mark

6. *Bob Jones University v. United States*, 461 S. Ct. 574, 600 (1983).

7. *Id.* at 600-01.

8. Surface Transportation Board Reform Act of 1999, H.R. 3446, 106th Congress (1999).

9. Surface Transportation Board Reform Act of 2001, H.R. 141, 107th Congress (2001); Surface Transportation Board Reform Act of 2003, H.R. 2192, 108th Congress (2003).

10. Railroad Competition Act of 2001, S. 1103, Sec. 103, 107th Congress (2001).

11. Railroad Competition Act of 2003, H.R. 2924, 108th Congress (2003).

12. Railroad Competition Act of 2005, S. 919, 109th Congress (2005).

Dayton (D-Minn.) in 2006,¹³ and Rep. Oberstar and Sen. Rockefeller again in 2007.¹⁴ All of these bills failed.

Further, the language appears to originate in the failed Surface Transportation Board Reauthorization Act of 1999, introduced by Rep. Bud Shuster (R-Pa.), then the Chairman of the House Transportation and Infrastructure Committee, and cosponsored by Ranking Member Oberstar.¹⁵ Taken together, it is clear Congress believed its statute required the STB to find evidence of anticompetitive conduct before mandating reciprocal switching arrangements and that a majority of Congress opted not to amend the statute to eliminate the anticompetitive conduct requirement.

More recently, Sen. Tammy Baldwin (D-Wisc.) introduced the Rail Shipper Fairness Act of 2015,¹⁶ Section 3 of which would have amended § 11102 to include:

“(c) (1) Except as provided in paragraph (2), the Board shall require a Class 1 rail carrier to enter into a competitive switching agreement if a shipper or receiver, or a group of shippers or receivers, files a petition with the Board that demonstrates, to the satisfaction of the Board, that—

“(A) the facilities of the shipper or receiver for whom such switching is sought are served by rail only by a single, Class I rail carrier; and

“(B) subject to paragraph (4), there is, or can be a working interchange between—

“(i) the Class I rail carrier serving the shipper or receiver for whom such switching is sought; and

“(ii) another rail carrier within a reasonable distance of the facilities of such shipper or receiver.

“(2) Competitive switching may not be imposed under this subsection if—

“(A) either rail carrier between which such switching is to be established demonstrates that the proposed switching is not feasible or is unsafe; or

“(B) the presence of reciprocal switching will unduly restrict the ability of a rail carrier to serve its own shippers.

“(3) The requirement set forth in paragraph (1)(B) is satisfied if each facility of the shipper or receiver for which competitive switching is sought is—

“(A) within the boundaries of a terminal of the Class I rail carrier; or

“(B) within a 100-mile radius of an interchange between the Class I rail carrier and another carrier at which rail cars are regularly switched.”.

These conclusive presumptions are strikingly similar to those proposed by NITL in its Ex Parte 711 petition, but are even more extreme. Sen. Baldwin’s bill also failed.

Given sustained, repeated activity in Congress attempting and failing to amend 49 U.S.C. § 11102(c) to eliminate its anticompetitive conduct requirement, “it is hardly

13. Railroad Competition Act of 2006, S. 2921, 109th Congress (2006).

14. Railroad Competition and Service Improvement Act of 2007, H.R. 2125, 100th Congress (2007); Railroad Competition and Service Improvement Act of 2007, S. 953, 100th Congress (2007).

15. Surface Transportation Board Reauthorization Act of 1999, H.R. 3163, Sec. 6, 100th Congress (1999).

16. Rail Shipper Fairness Act of 2015, S. 853, 114th Congress (2015).

conceivable that Congress . . . was not abundantly aware of what was going on.” Congress has been given a meaningful opportunity to express disapproval of the *Intramodal Railroad Competition* and *Midtec Paper Corp.* interpretations, yet has repeatedly and consistently rejected attempts to do so over the last three decades. Thus, STB erred in ignoring Congress’s acquiescence to the anticompetitive conduct requirement and is unlawfully attempting to reinterpret the statute in a manner inconsistent with congressional intent.

II. STB Cannot Eliminate the Anticompetitive Conduct Requirement Merely Because It Has Failed to Find Anticompetitive Conduct

STB claims that “[t]he sheer dearth of cases brought under § 11102(c) in the three decades since *Intramodal Rail Competition* despite continued shipper concerns about competitive options and quality of service, suggests that part 1144 and *Midtec Paper Corp.* have effectively operated as a bar to relief rather than as a standard under which relief could be grants.”¹⁷ The NPRM also states that “improved economic health of the railroad industry and increased consolidation in the Class I railroad sector”¹⁸ justifies its proposed reversal of the anticompetitive conduct requirement. STB’s reasoning is flawed for three reasons.

First, STB is essentially proposing to rewrite the law of Congress to find guilt where none exists. The fact that no evidence of anticompetitive conduct has been found in 30 years should be cause for celebration, not a witch hunt. STB is absolutely correct that despite the lack of anticompetitive conduct, shippers still “express[] concerns about competition.”¹⁹ But shippers have an incentive to seek the lowest rates for the best service possible, and have demonstrated time and time again they are willing to politically manipulate the market if they can extract short-run favorable treatment from carriers. Instead of proposing to unlawfully acquiesce to shipping interest demands, STB should recognize the shippers’ conduct for what it is: socially harmful rent-seeking.

Second, to demonstrate anticompetitive conduct, *Midtec* requires 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.²⁰ By implication, both of these criteria provide clear guidance as to what constitutes effective competition. Without a clear definition of what constitutes anticompetitive conduct, determining what constitutes effective competition becomes a whimsical and arbitrary bureaucratic exercise.

Third, while it is true the post-deregulation railroad industry has seen dramatically improved fortunes and Class I railroads have consolidated, STB fails to define the criteria and parameters by which it evaluates industry health over time. Interestingly, STB fails to note recent changes in the industry that directly contradict its rosy assessment. Coal,

17. NPRM, *supra* note 1, at 51152.

18. *Id.*

19. *Id.*

20. *Midtec Paper Corp. v. Chicago & N.W. Transp. Co.*, 3 I.C.C.2d 171 (1986), *aff’d sub nom* *Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988).

petroleum, petroleum product, and intermodal traffic have sharply declined over the last year, leading to a significant decrease in overall traffic.²¹ This has led railroads to reduce capital expenditures,²² something that will be made even worse if STB succeeds in eliminating the anticompetitive conduct requirement. This also raises the question: how bad must industry performance be, and for what duration, for STB to consider *reinstating* the anticompetitive conduct requirement in the future?

Conclusion

Continuing down the path laid out in the NPRM would constitute a dangerous re-regulatory action, one Congress has rejected and precisely the type of agency conduct under STB's predecessor that led to the near-collapse of the railroad industry prior to the enactment of the Staggers Act. For these reasons, we urge STB to withdraw this proposed rule.

Respectfully Submitted,

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21. Association of American Railroads, *Freight Rail Traffic Data*, <https://www.aar.org/data-center/rail-traffic-data> (last visited Sep. 2, 2016).

22. *See, e.g.*, Jeff Stagl, *Class Is reveal 2016 capex plans*, PROGRESSIVE RAILROADING (Feb. 2016), http://www.progressiverailroading.com/rail_industry_trends/article/Class-Is-reveal-2016-capex-plans--47239.