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**VIA E-FILING**

Chief of Case Administration  
Office of Chief Counsel  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423-0001

Re: **STB Ex Parte No. 788, Eliminating Regulatory Barriers to Competition:  
Review of Part 1144**

Dear Chief of Case Administration:

Enclosed please find BNSF Railway Company's Comments in response to the Board's Notice of Proposed Rulemaking served on January 7, 2026 in the above-referenced docket.

Respectfully submitted,

/s/ Timothy J. Strafford  
Timothy J. Strafford

*Attorney for BNSF Railway Company*

Enclosures

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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COMMENTS OF BNSF RAILWAY

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**I. Introduction**

BNSF Railway Company (BNSF) submits these comments in response to the January 7, 2026 Notice of Proposed Rulemaking (NPRM), in which the Surface Transportation Board (STB or Board) proposes to repeal its competitive access rules (CARs) at 49 Part 1144. As explained below, BNSF does not oppose the repeal of the CARs. The statutory scheme that will guide future cases is consistent with BNSF's long-held belief that Board intervention should be limited to instances of market failure, while also ensuring that in those instances where Board regulation is warranted, the remedies must be accessible, well-tailored, and effective for all stakeholders. Moreover, this statutory focus on market dynamics makes it imperative that the Board consider all relevant competitive forces when considering future requests for competitive access. BNSF further notes that this proposal comes at a pivotal moment for competition in the railroad industry, as Union Pacific Railroad Company (UP) and Norfolk Southern Railway Company (NS) seek to consolidate an unprecedented amount of market power through their proposed merger. For reasons that BNSF will address in the merger proceeding, the long-

term competitive harms of that transaction pose a significant threat to the U.S. economy and the American consumer. Nothing in the NPRM alters the Board's responsibility to prevent those harms in addressing the proposed merger.

## **II. Board intervention should be limited to instances of market failure.**

BNSF has long recognized that regulatory intervention by the Board is appropriate in instances of market failure.<sup>1</sup> The statutory framework that governs the Board and the railroad industry reflects Congress's longstanding goal and the directive that the Board promote competition by allowing market forces to govern railroad behavior to the maximum extent possible and to reserve regulatory interference for specific instances when market forces have not adequately protected shippers from abuse of market power.<sup>2</sup> For this reason, BNSF has consistently supported Board initiatives that would ensure that regulatory relief is available to shippers most affected by market failures.<sup>3</sup>

BNSF has advocated throughout prior proceedings regarding prescribed switching that the Board maintain an approach that allows markets to function and

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<sup>1</sup> See, e.g., BNSF Comments at 12, *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704 (Sub-No. 1) (filed July 26, 2016).

<sup>2</sup> 49 U.S.C. §§ 10101(1), (2); See, e.g., *MidAmerican Energy Co. v. Surface Transp. Bd.*, 169 F.3d 1099, 1105 (8th Cir. 1999) ("Congress believed that free competition for rail services would ensure that consumer demand dictated the optimal rate level, while facilitating enough long-term capital investment to maintain adequate service. Congress was also mindful, however, that the free market would protect consumers only if there was 'effective' competition.").

<sup>3</sup> See, e.g., BNSF Comments at 2-6, *Expanding Access to Rate Relief*, EP 665 (Sub-No. 2) (filed Nov. 14, 2016).

narrowly tailors regulatory interventions to remedy specific, identified problems.<sup>4</sup> BNSF does not oppose the repeal of the CARs because the repeal does not run afoul of those underlying principles. The NPRM notes that the repeal of the rules does not alter the statutory limitations on the Board's authority to order competitive access.<sup>5</sup> A case-by-case consideration of petitions for reciprocal switching governed by the statutory standards and applicable case law is in line with the Board's authority.

**III. In considering future requests for competitive access, the Board must consider all relevant competitive forces.**

Consistent with Congress's mandate that the Board should not intervene in functioning markets, the Board must consider all relevant competitive forces when deciding when regulatory intervention is warranted, including with regard to competitive access.<sup>6</sup> The Board has previously acknowledged that the competitive forces applied directly by other Class I railroads usually make access orders unnecessary, stating that "the Board expects, as a general rule, that there would be little benefit from prescribing reciprocal switching agreements for petitioners that have practical physical access to another Class I carrier that is capable of handling their service needs."<sup>7</sup> But the source of competitive constraints on a rail carrier is

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<sup>4</sup> See, e.g., BNSF Comments at 2-3, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, EP 711 (filed Mar. 1, 2013); BNSF Comments at 2, *Reciprocal Switching for Inadequate Service*, EP 711 (Sub-No. 2) (filed Nov. 7, 2023).

<sup>5</sup> NPRM at 4 n.6; NPRM at 10 n.18.

<sup>6</sup> See, e.g., BNSF Comments, *Streamlined Market Dominance*, EP 756 (filed Nov. 12, 2019).

<sup>7</sup> *Reciprocal Switching for Inadequate Service*, EP 711 (Sub-No. 2), slip op. at 23 (STB served Sept. 7, 2023).

often not obvious from a simple look at only the rail portion of a particular movement. Thus, the Board should consider all forms of competition when adjudicating any future petitions for prescribed switching or through routes.

In past proceedings, BNSF has detailed its real-world experience with significant market forces beyond direct origin-to-destination competition from other railroads that effectively discipline the rates and service that BNSF can provide to customers.<sup>8</sup> Transloading enables non-rail-served customers to take advantage of rail economics and service innovations. In many markets, there are extensive multimodal movements involving rail-truck, rail-barge, or rail-pipeline combinations, therefore a rail carrier's market power is heavily constrained by competition for the entire multimodal movement.

Product and geographic competition are also present in many rail markets, and these competitive forces can be highly effective in maintaining rates at reasonable levels and incentivizing good railroad service. Geographic competition occurs when buyers can choose among supply points served by different railroads or transportation modes. This choice prevents any single railroad from exercising monopoly power over movements from a particular origin. For example, a grain elevator may source from different growing regions, each served by different carriers, and a power plant may be able to receive coal from multiple mines served by other carriers. These geographic alternatives create competitive pressures even

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<sup>8</sup> See, e.g., BNSF Comments at 3-7, *Streamlined Market Dominance*, EP 756 (filed Nov. 12, 2019).

where direct rail competition is absent. Likewise, product substitution creates substantial competitive constraints on rail transportation. Where commodities are interchangeable in use, the origin served by one railroad competes against movements of other commodities by other carriers or competes with commodities supplied by other sources of transportation. For example, coal from the Powder River Basin not only competes with other coal sources but also competes with natural gas, wind, and solar resources for the same utility demand.

To avoid interfering with functioning markets, it will be crucial for the Board to consider all forms of competition when considering market dislocations that could give rise to prescribed switching or through routes.<sup>9</sup> The case-by-case approach outlined in the NPRM is well suited to consider the market forces associated with any particular request for competitive access, and will allow the parties to present evidence that the Board can evaluate under the statutory standards.<sup>10</sup> On the other hand, widespread use of access remedies that ignore real-world competitive forces would cause operational problems that negatively impact all shippers on BNSF's network.<sup>11</sup>

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<sup>9</sup> The NPRM notes that “the agency has indicated that it would ‘consider all types of competition’ in determining whether an agreement is ‘necessary to provide competitive rail service’ under section 11102(c).” NPRM at 4 n.7 (citing *Midtec Paper Corp. v. Chi. & N.W. Transp. Co.*, 1 I.C.C.2d 362, 369 (1985)).

<sup>10</sup> See NPRM at 13-14 (“Critically, by acting through adjudication here, the Board would have the opportunity to consider parties’ legal and policy arguments and to identify relevant factors in the context of specific circumstances.”).

<sup>11</sup> BNSF Comments at 2, *Reciprocal Switching for Inadequate Service*, EP 711 (Sub-No. 2) (filed Nov. 7, 2023).

**IV. The repeal of the CARs would not affect the Board’s responsibility to fully evaluate the proposed UP/NS transaction and prevent the creation of market power through the merger.**

Finally, the NPRM proposal is not occurring in a vacuum; the Board is proposing to alter its competitive access rules at the same time Union Pacific and Norfolk Southern are proposing the largest transaction in the history of the railroad industry—a transaction which will upend the current competitive landscape. Changes to the CARs should have no effect on the Board’s consideration of the proposed merger for at least two reasons.

First, the Board’s organic statute provides access remedies for specific instances of abuses of market power. The 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. In so doing, the Board’s role is to prevent the concentration of market power.<sup>12</sup> This responsibility is distinct and apart from the Board’s role in adjudicating disputes about violations of the statute that involve the abuse of market power. The Board should not allow market power to be created

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<sup>12</sup> Recently, the Board succinctly summarized those responsibilities in a letter to 47 Members of Congress that expressed concerns about the transaction. *See* Letter from Members Hedlund, Fuchs, and Schultz to Members of Congress, FD 36873 (Feb. 13, 2026) (noting *inter alia* that “[t]he Board must ensure that any approved transaction would promote a competitive, efficient, and reliable national rail system. 49 C.F.R. § 1180.1(b). . . [and] Applicants must propose conditions to mitigate and offset merger-related harms, and these conditions should not only preserve, but also enhance, competition. 49 C.F.R. § 1180.6(b)(10).”).

through a merger simply because of possible changes to the remedies to address abuses of that market power after the fact.<sup>13</sup>

Second, the repeal of the CARs would not in itself have any effect on the current state of competition in the railroad industry. In other words, there is no reason to believe that the repeal of the CARs would on its own increase or enhance competition. The NPRM states that “the Board anticipates that the standards for the granting of a switching or through route prescription would be further developed through case-by-case adjudication.”<sup>14</sup> This means that any changes in the industry that might result from the removal of the CARs would be incremental, focused on very specific situations, and not change the basic dynamics of rail competition. The repeal of the CARs should thus have no effect on the Board’s consideration of the competitive harms that a transcontinental monopoly carrier would create or on the burdens on the applicants in showing that their proposed transaction would enhance competition. The agency must evaluate the proposed transaction in light of the industry’s competitive landscape as it exists, based on facts as they are. The availability of access remedies in some circumstances in the future does alter this analysis.

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<sup>13</sup> For instance, a transaction that creates competitive harms in the form of undue market power would create conditions that would permit a merged carrier to charge unreasonably high rates. The fact that the Board has rate case procedures that would allow aggrieved customers to file cases would does not change the Board’s responsibility to deny a merger where the competitive harms exceed the public benefits. Instead, the Board would be required to focus on the negative effects of the merger in its review without assuming that those effects could be addressed by future litigation brought by unknown complainants.

<sup>14</sup> NPRM at 13 n.22.

## V. Conclusion

For the reasons set forth above, BNSF believes that repealing the CARs is consistent with BNSF's longstanding position that the Board should maintain an approach that allows markets to function and narrowly tailors regulatory interventions to solve specific, identified problems with the functioning of relevant markets. In addition, in any future litigation, the Board should ensure that it considers all relevant forms of competition and not focus only on direct intermodal or intramodal competition. Finally, regardless of any changes to the CARs, the Board should recognize that it has an independent statutory obligation to evaluate the competitive impact of the proposed merger between UP and NS and to deny the proposed merger if it concludes that the application has not shown that the transaction will enhance competition.

Respectfully submitted,

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