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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36873

UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY
– CONTROL –
NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY

CPKC'S COMMENTS ON THE COMPLETENESS OF THE APPLICATION

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CPKC'S COMMENTS ON THE COMPLETENESS OF THE APPLICATION

Canadian Pacific Railway Company d/b/a Canadian Pacific Kansas City and CPKC, on behalf of itself and its U.S. rail carrier subsidiaries (collectively, "CPKC"),[1] urges the Board to reject as incomplete the Application filed in this docket on December 19, 2025. In several key respects, Applicants have not submitted the information required by the Board's 2001 Major Merger Rules, compelling rejection of the Application under the Board's rules so that "computation of the time periods" for this merger review proceeding can properly be based on a "revised application" that complies with the Board's requirements. 49 C.F.R. § 1180.4(c)(7).

INTRODUCTION

In these Comments, CPKC does not address the ways in which Applicants failed to satisfy their burden of proving that the merger they propose is in the public interest. *See* Decision No. 7 (served Dec. 19, 2025). Instead, CPKC addresses four reasons why the Board should reject the Application as incomplete.

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[1] CPKC's U.S. rail carrier subsidiaries include Soo Line Railroad Company; Central Maine & Quebec Railway US Inc.; Dakota, Minnesota & Eastern Railroad Corporation; Delaware & Hudson Railway Company, Inc.; The Kansas City Southern Railway Company; Gateway Eastern Railway Company; and The Texas Mexican Railway Company. CPKC refers to "Union Pacific" as UP herein. Unless otherwise indicated, other capitalized terms used herein follow Applicants' abbreviations. *See* App. Vol. I at 9-11 (Table of Abbreviations).

- *First*, Applicants have not supplied the Board or interested parties with the data that allegedly support the core set of claims upon which the entire Application is predicated: that the merger "will convert more than 2 million truckloads of traffic from long-haul trucking to rail." App. Vol. I at 14. Applicants' truck diversion analysis started with Transearch county-to-county truck flow data that Applicants have not provided with their workpapers, and it relied on truck rate data that Applicants obtained from DAT Freight & Analytics, which Applicants also have not provided with their workpapers. The Board's rules and its Decision No. 3 here (served Aug. 28, 2025) required that data to be made available with the Application so that the Board and interested parties can appropriately test the merits of Applicants' analysis.
- *Second*, Applicants have not submitted a complete copy of their Merger Agreement, brazenly withholding from disclosure two key pages delineating UP's promises to NS about conditions UP is obligated to offer or accept to secure regulatory approval for their proposed merger. The withheld Schedule defines the nature of the conditions that NS can sue to require UP to accept and also those that would allow UP to walk away from the merger, and thus likely reflects the best glimpse that the Board and interested parties will get of Applicants' own assessment of the scope of the anticompetitive harms their proposed merger would cause and the kinds of conditions that may be sought—but resisted by UP—to address those harms.
- *Third*, Applicants incorrectly disclaim an obligation to provide any serious analysis of the downstream effects of their proposed merger. As UP contended in

2000: "The important public policy questions in the next major Class 1 merger proceeding will focus on whether a North American railroad duopoly is in the public interest. The Board will choose between a future in which two huge transcontinental systems develop single-line services in isolation from each other and a future in which all remaining railroads strive to develop more efficient services over remaining interline routes. This is an important choice that can be made only once, because mergers are likely to be permanent."[2] The Board's rules require Applicants to address that "overriding public policy question"[3] at the outset, yet Applicants have failed to do so.

- *Fourth*, although Applicants have provided some economic analysis of the proposed merger's effects on competition, Applicants have—by their own admission—chosen not to provide the full assessment of horizontal competition that the Board has relied upon in far smaller mergers. That lack of rigor falls short of the robust analysis required by the Board's rules.

The Board should require Applicants to submit a revised application that corrects these deficiencies. If the Board chooses instead to accept the Application, it should require its immediate supplementation with the omitted information and data, and it should establish a schedule that takes account of Applicants' apparent aim to augment the Application's bare-bones analyses on rebuttal, after which other parties would have no meaningful opportunity to respond

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[2] Union Pacific's Reply Comments on Proposed Merger Rules, *Major Rail Consolidation Procedures*, Ex Parte No. 582 (Sub-No. 1) (filed Dec. 18, 2000) ("UP EP 582 Reply Comments") at 8. Excerpts are Exhibit 1 hereto.

[3] Union Pacific's Comments and Initial Proposals, *Major Rail Consolidation Procedures*, Ex Parte No. 582 (Sub-No. 1) (filed May 16, 2000) ("UP EP 582 Initial Proposals") at 4. Excerpts are Exhibit 2 hereto.

under Applicants' proposed schedule. The Board should take advantage of the full amount of time provided by Congress's one-year evidentiary period and provide non-applicants with a "sur-reply" opportunity to respond to new argument and evidence submitted by Applicants in their replies to Comments and Requests for Conditions. *See* CPKC Comments on Proposed Procedural Schedule (CPKC-5) (filed Nov. 13, 2025) at 16-21.

I. THE BOARD SHOULD REJECT THE APPLICATION BECAUSE APPLICANTS FAILED TO INCLUDE IMPORTANT DATA AND INFORMATION REQUIRED BY THE BOARD'S RULES AND ORDERS

Applicants make extraordinary claims. They claim that their proposed merger creates public benefits that will exceed $3 *billion* dollars "in a normal year." App. Vol. I at 21, 24. In large part, those claimed benefits flow from Applicants' assertion that the proposed merger would "convert more than 2 million truckloads of traffic from long-haul trucking to rail." *Id.* at 14.

But Applicants failed to provide to the public the data underlying those claims. Applicants' traffic projections are "based on the Joint Verified Statement of David Hunt and Matthew Schabas of Oliver Wyman." *Id.* at 27. Messrs. Hunt and Schabas relied on S&P Global Markets "Transearch" data on county-to-county truck flows and DAT Freight & Analytics data on average truck freight spot and contract rates. In direct violation of their obligations under the rules and the Board's decisions in this very case, Applicants have failed to make that information available to the public.[4]

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[4] The methodological appendix to the Hunt/Schabas testimony explains that the "truck traffic data for the truck-to-rail analysis came from the Transearch, S&P Global Markets, 2023 freight database, which includes essentially all freight flows within, into, and out of the United States with county-to-county geographic detail and commodities at a 4-digit STCC level, for seven modes of transportation." Hunt/Schabas V.S., § B.1.1., App. Vol. II at 408. The same appendix notes that these witnesses "estimate[d] the cost per ton-mile for a truck haul" using "data purchased from DAT Freight & Analytics ('DAT') which details average spot and contract rates for the 10,000 highest volume US dry van lanes for 2023." *Id.* at 454. Neither database is among Applicants' workpapers.

That is not the only significant omission. Relying on a baseless assertion of privilege, Applicants have withheld from the public the promises that UP made to NS about commitments UP would offer or accept to remedy the proposed merger's anticompetitive harms. It is a bad start to this process—and a worrisome precursor to the merits of Applicants' future privilege claims—that Applicants are seeking to hide what were likely among the most heavily negotiated commercial terms of their agreement.

Each omission is enough to reject the Application and require Applicants to re-file and re-start the clock to give the public sufficient time to prepare responsive comments.

A. Applicants Did Not Provide Essential Data Underpinning Their Truck Diversion Analysis

Under the Board's rules governing major mergers, Applicants must submit "impact analyses describing the impacts of the proposed transaction … on inter- and intramodal competition" and "the underlying data" informing those analyses. 49 C.F.R. § 1180.7(a). Building on that requirement, the Board ordered *in this proceeding* that, for "all evidentiary submissions filed" concerning Applicants' proposed merger, "[a]ll files *and data* should be fully accessible and modifiable by anyone authorized to view the evidence of the case." Decision No. 3 at 4, 7 (served Aug. 28, 2025) (emphasis added). Accordingly, the Board directed that "all documents *and evidence* referenced in a filing must be specifically cited and *included in the electronic workpapers*." *Id*. at 6 (emphasis added). Even more specifically, the Board instructed parties to provide "[a]ny raw tabular data or database tables used for traffic analysis." *Id*. at 7.

Despite these requirements and the Board's express warnings four months ago, Applicants failed to submit critical data underlying the traffic study presented in the Verified Statement of David T. Hunt and Matthew Schabas ("Hunt/Schabas V.S."). Missing from the workpapers submitted by Applicants is an S&P Global Markets "Transearch database" that

formed the basis for the claims in the Hunt/Schabas V.S. about expected truck-to-rail diversions. *See, e.g.*, Hunt/Schabas V.S., § 4.1.1., App. Vol. II at 332 (identifying "Transearch S&P Global Markets" as the source for its "2023 freight flow database for truck traffic"); *see id.* at 343-47, 408-10, 417-19, 434, 441-44, 478 (explaining use of Transearch in the traffic study methodology to calculate projected diversions). Also missing from the Hunt/Schabas V.S. workpapers are the "average spot and contract rates for the 10,000 highest volume US dry van lanes for 2023," which Messrs. Hunt and Schabas relied on to calculate price differences between shipping modes in projecting truck-to-rail diversions of merchandise/bulk traffic. *Id.* at 427-34; 454-58.

The truck-to-rail diversions projected by Messrs. Hunt and Schabas are the foundation for nearly the entire Application, from the new rail traffic underlying the Operating Plan to the Summary of Benefits Exhibit incorporating the new revenues and costs associated with that traffic. But instead of producing the underlying data that would allow the Board and the public to evaluate the Hunt/Schabas projections, Applicants withheld it. In the case of the Transearch data, Applicants directed interested parties to obtain that data directly from S&P Global, at extraordinary expense.[5] And, rather than producing the DAT Freight & Analytics data for all

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[5] The Hunt/Schabas V.S. Workpaper Index, which Applicants designated as Highly Confidential in its entirety, confirms that the Transearch data was not provided and notes that non-applicants must obtain it directly from S&P Global or obtain a license to review the data that Hunt/Schabas used. The relevant excerpt, from Tab "B. T2R," is reproduced below (red text in original):

{{ [redacted] }}

S&P Global quoted CPKC a fee of $399,000 to obtain the county-to-county Transearch data that underlies UP's Application. Applicants fail to provide any justification for their apparent decision to rely

10,000 U.S. dry van lanes that Messrs. Hunt and Schabas analyzed to calculate price differences between truck and rail merchandise freight, Applicants produced just {{ }} of that—a sample of only the top {{ }} lanes.[6]

Applicants' refusal to provide the critical data relied on and cited by the Hunt/Schabas V.S. violates the Board's major merger rules and explicit orders in this case. The Board accordingly should reject the Application as incomplete or, in the alternative, strike the Hunt/Schabas V.S. and all aspects of the Application that rely on its truck-to-rail diversion analysis.

B. Applicants Willfully Failed to Provide a Key Portion of Their Merger Agreement

Board rules required Applicants to include in the Application a "copy of any contract or other written instrument entered into, or proposed to be entered into, pertaining to the proposed transaction." 49 C.F.R. § 1180.6(a)(7)(ii). Applicants did not comply with this rule because they withheld all the schedules to their Merger Agreement, at least one of which—Schedule 5.8—sets forth the meaning of a key defined term upon which the substance of the agreement rests and which is directly relevant to this Application.

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on those data without obtaining from S&P Global a license that would allow Applicants to comply with the Board's rules and orders applicable to this proceeding.

[6] The Hunt/Schabas V.S. Workpaper Index confirms that Applicants are making available only a small fraction of the DAT Freight & Analytics data upon which Messrs. Hunt and Schabas relied. The relevant excerpt, from Tab "B.3 T2R - Merchandise," is reproduced below (red text in original):

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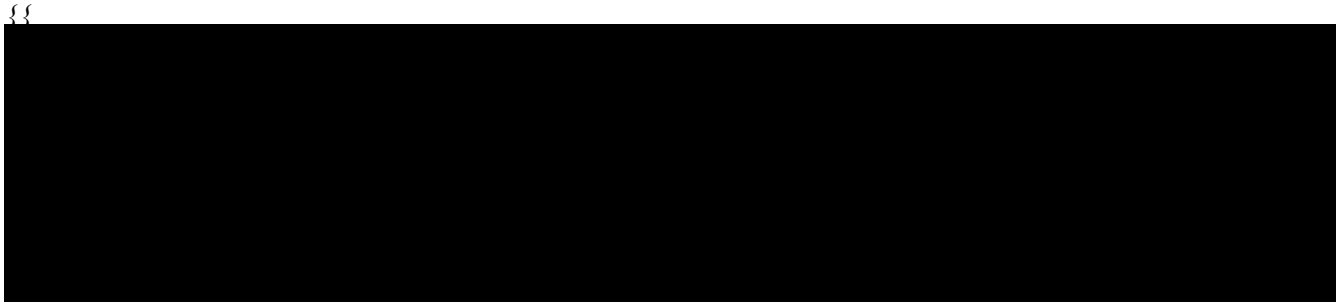

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Section 5.8(b) of the Merger Agreement states that UP is required to "use reasonable best efforts" to obtain regulatory approval of their proposed merger. Merger Agreement § 5.8(b), App. Vol. IV at 74. Section 5.8(c) then qualifies that obligation by stating that UP is not required to, among other things, agree to any "Non-Required Restriction (as such term is defined on Section 5.8(c) of the Company Disclosure Schedules)." *Id.* (underlining in original). The term "Non-Required Restriction," defined in the Company Disclosure Schedules, is then incorporated into the definition of "Materially Burdensome Regulatory Condition." Merger Agreement § 5.8(c), App. Vol. IV at 74-75. If a so-called "Materially Burdensome Regulatory Condition" is imposed, UP has the right to walk away from the merger. *See id.* § 6.3(e)-(f), App. Vol. IV at 87. These contractual provisions likely reflect the best glimpse that the public will get of Applicants' own assessment of the scope of the anticompetitive harms their merger will cause, and what conditions could conceivably remedy those harms. The omission obscures from the public one of the most material terms of the proposed merger.

We know that Applicants' failure to include Schedule 5.8 with their Application was not inadvertent. Applicants have willfully shielded that portion of their agreement from disclosure under a spurious claim of privilege. During discovery in this matter, multiple parties sought to discern the meaning of "Materially Burdensome Regulatory Condition."[7] Applicants ultimately produced two pages that are titled "Schedule 5.8," but the content of those pages is completely redacted, as shown in Figure 1 below:[8]

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[7] That agreement, minus the schedules, was filed with UP's mandatory SEC disclosures.

[8] UP Discovery Document UP_0000067 to -0000068. CPKC is redacting Figure 1 in its entirety because the pages produced by UP contain boilerplate "Highly Confidential" legends. (CPKC notes that UP's designation is obviously improper given that there could be nothing about Applicants' black rectangles that is entitled to protection under the Board's Protective Order.)

FIGURE 1
REDACTED VERSION OF SCHEDULE 5.8 PRODUCED IN DISCOVERY

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Applicants' failure to include with the Application material terms of their Merger Agreement—including perhaps the most material term other than the merger consideration—flouts this Board's rules. The Board has previously made clear that an "agreement" includes materials, like schedules, that are incorporated by reference. In *CN/KCS*, for example, the Board denied Canadian National's motion for approval of a voting trust agreement "as incomplete" because it did not include the merger agreement referenced therein. *Canadian National R.R. – Control – Kansas City Southern*, Finance Docket No. 36514, Decision No. 3 (STB served May 17, 2021) at 7 (determining that the "voting trust agreement attached to CN's motion for approval is incomplete, insofar as it identifies (as 'Exhibit A to Voting Trust Agreement') and includes multiple references to a merger agreement, which is not attached"). Similarly, in *CSX/Pan Am*, the Board explained that applications must include "copies of the most recent versions of *any agreements* (including amendments *and supplements*) that are *referenced in the*

Merger Transaction agreements." *CSX Corp. – Control – Pan Am. Sys. Inc.*, Finance Docket No. 36472 (STB served May 26, 2021) at 13 (emphasis added).

The Board's rules are consistent with analogous rules under the Hart-Scott-Rodino ("HSR") Act, which require parties proposing certain mergers to file with the Department of Justice and Federal Trade Commission a variety of information, including a complete copy of their agreement. 15 U.S.C. § 18a. The rules implementing the HSR Act provide that a complete HSR notification must include "all documents that constitute the agreement(s) related to the transaction, including, but not limited to, exhibits, *schedules*, side letters, agreements not to compete or solicit, and other agreements negotiated in conjunction with the transaction that the parties intend to consummate." 16 C.F.R. Part 804, App. B. at 9 (emphasis added). The FTC has provided express guidance that this rule requires the filing of *any agreement* among the parties—even if embodied in a side-letter among outside counsel, let alone part of the merger agreement itself. Specifically, "any agreement that alters the terms of the merger during the antitrust review process, regardless of *where* those commitments are written down. If there is an enforceable agreement that binds the parties to take actions related to antitrust clearance, it must be submitted as part of the HSR form."[9]

There is no plausible good faith claim of privilege at issue here. The attorney-client privilege "applies to a confidential communication between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757 (D.C. Cir. 2014) (citing RESTATEMENT

[9] FTC Bureau of Competition Guidance, "*'All' means All: Submit Side Agreements with an HSR Filing*" (Dec. 20, 2017) ("*FTC HSR Guidance*") (emphasis in original), *available at* https://www.ftc.gov/enforcement/competition-matters/2017/12/all-means-all-submit-side-agreements-hsr-filing. A copy of this guidance is Exhibit 3 hereto.

(THIRD) OF THE LAW GOVERNING LAWYERS §§ 68-72 (2000)); *see also In re Grand Jury*, 23 F.4th 1088, 1092 (9th Cir. 2021) (citation omitted). UP's and NS's contractual promises were not needed for their lawyers to provide legal services—those promises are part of a contract created to allocate economic risk. Nor was the Schedule maintained by either Applicant as "confidential," as it was shared between UP and NS, which were adverse parties to a contractual negotiation, as well as with UP's and NS's investment bankers, who were providing financial, not legal, advice.[10] *See In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982) ("[A]ny voluntary disclosure by the client to a third party breaches the confidentiality of the attorney-client relationship and therefore waives the privilege."). It borders on the frivolous to claim that any part of Applicants' Merger Agreement is privileged. Rather, it is a binding set of obligations that NS can sue to enforce if UP fails to comply, and NS has given no indication that it intends to abandon its contractual rights against UP. The fact that legal advice informed Applicants' negotiation and acceptance of the Merger Agreement—and UP and NS may desire to obtain regulatory approval for the agreement at lowest possible cost—does not convert any part of their

[10] Three investment banks state that they reviewed the Merger Agreement in formulating their fairness opinions without mentioning any allegedly privileged carve outs, further undermining any claims of confidentiality. *See* App. Vol. I at 567 (Morgan Stanley), 572 (Wells Fargo), 579 (Bank of America).

binding contractual undertakings in the Merger Agreement into privileged material[11] nor shield it from Board scrutiny.[12]

In any event, even if one imagined that Applicants might succeed in establishing that portions of their Merger Agreement could legitimately be withheld as privileged, the exclusion of those portions from the Application would still render their Application incomplete under Board rules. Whatever their motivation or justification, they would be shielding from Board and public scrutiny material terms of the agreement for which they are seeking approval and claiming to be in the public interest. That is not allowed.

II. THE BOARD SHOULD REJECT THE APPLICATION BECAUSE APPLICANTS' ANALYSIS OF "DOWNSTREAM" ISSUES DOES NOT COMPLY WITH THE 2001 MAJOR MERGER RULES

The Board's Major Merger Rules require Applicants to include in their Application an evaluation of the "[d]ownstream" implications of their proposed merger on the rest of the rail industry that "anticipate[s] whether additional Class I mergers are likely to be proposed in response to their own proposal and explain how, taken together, these mergers, if approved, could affect the eventual structure of the industry and the public interest." 49 C.F.R. § 1180.6(b)(12)(i). This includes a discussion of the "likely impact of such future mergers on the anticipated public benefits of their own merger proposal" and "whether and how the type or

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[11] Applicants also cannot shield the withheld portions of their Merger Agreement under the common-interest doctrine. *See generally In re Côte d'Azur Est. Corp.*, 2022 WL 17574747, at *12 (Del. Ch. Dec. 12, 2022) ("When parties are engaged in adversarial negotiation, they do not share a common interest sufficient to support privilege."); *In re JP Morgan Chase & Co. Sec. Litig.*, 2007 WL 2363311, at *5 (N.D. Ill. Aug. 13, 2007) ("Prior to the merger, these organizations stood on opposite sides of a business transaction. From a business standpoint and from a legal standpoint, the merger parties' interests stood opposed to each other. They had no common interest, and indeed, their interests were in conflict—each company wanted to get the best deal from the other company, and to the extent that one succeeded in its goal, the other suffered.").

[12] The FTC's HSR guidance similarly explains that "[s]ide agreements between merging parties are not covered by any privilege or protection (such as the attorney work product doctrine) and may not be withheld, even if the parties have signed a joint defense agreement." *See FTC HSR Guidance*, Exh. 3 hereto.

extent of any conditions imposed on their proposed merger would have to be altered, or any new conditions imposed, should we approve any future consolidation." *Id.* § 1180.1(i) (explaining that the Board must "consider the cumulative impacts and crossover effects likely to occur as rival carriers react to the proposed combination" because "there are so few remaining Class I carriers").

The Board added this requirement in 2001 because its experience "from the last round of mergers" in the 1990s demonstrated that "another merger involving two very large railroads would not likely be an isolated event, but instead would trigger responsive proposals that, if granted, could well lead to a transcontinental railroad duopoly," giving the Board "substantial concern." *Major Rail Consolidation Procedures*, 5 S.T.B. 539, 549, 581-82 (2001) ("*2001 Final Rules*"); *see also Public Views on Major Rail Consolidations*, Ex Parte No. 582 (Sub-No. 0) (STB served Mar. 17, 2000) at 3 ("Class I railroads have clearly stated that they would find it necessary to respond in kind, and there is a substantial possibility that, absent decisive action on our part, in the very near future, we will likely be left with the prospect of only two large railroads serving North America.").

Notwithstanding these requirements, Applicants reject any obligation to submit meaningful analysis of the downstream implications of their proposed merger. Applicants assert that they "cannot predict whether other Class I railroads may choose to pursue mergers" and assert future mergers "would not diminish the substantial public benefits of the proposed transaction." App. Vol. I at 50. The only support offered for this assertion is the Verified Statement of Mark A. Israel, who spends a scant three paragraphs repeating the same generic assertions without offering any support. *See* Israel V.S. ¶¶ 130-32, App. Vol. II at 194-95.

Applicants' assertion that it would be too "speculative," App. Vol. I at 49, to evaluate the effects of their proposed merger on future industry structure is disingenuous. It strains credulity to even suggest UP and NS have not both considered this issue in depth when evaluating their future business prospects as a merged enterprise.[13] More importantly, the Board has already rejected the view that an evaluation of the public interest implications of a future North American rail duopoly may be sidestepped as too speculative. When the 2001 Major Merger Rules were under development, UP declared without reservation that "the next major merger is likely to lead to creation of two transcontinental railroads."[14] UP argued that the Board should "require applicants to evaluate the effects on competition and the public interest of combining all Class I railroads in the United States and Canada into two North American Class I railroads." *Id.* And UP described the question of "whether a North American railroad duopoly is in the public interest" as "the overriding public policy question before the Board" in a proceeding like this one.[15] UP's perspective in 2001 is no less relevant today.

The Board proceeded to adopt the Rule in response to UP's compelling admonitions. Even though the Board made clear it did not require applicants to "present alternative merger benefit calculations based on specific alternative possible responses," the Board nonetheless insisted that Major Merger applicants would be required to "initiate a commentary, to which other parties could respond, that would give [the Board] the information [it] need[s] to rule on what could likely be the first step in an end-game situation in which only two or three competing

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[13] Indeed, Applicants note several times that BNSF and CSX may wish to combine to chase the supposed synergies that UP and NS perceive. *See, e.g.*, App. Vol. I at 50.

[14] UP's Opening Comments on Proposed Merger Rules, *Major Rail Consolidation Procedures*, STB Ex Parte No. 582 (Sub-No. 1) (filed Nov. 17, 2000) ("UP EP 582 Opening Comments") at 3 (Excerpts are Exhibit 4 hereto).

[15] UP EP 582 Reply Comments (Exh. 1 hereto) at 8; UP EP 582 Initial Proposals (Exh. 2 hereto) at 4.

transcontinental carriers would remain in North America." *2001 Final Rules*, 5 S.T.B. at 582. The Board specifically observed the need to assure that any merger proposal, taken together with its downstream implications, "would ultimately result in a rail industry structure that continues to provide at least the existing level of competitive options for shippers." *Id.* at 549.

Applicants have given the Board quite literally nothing to evaluate "an end-game situation in which only two or three competing transcontinental carriers would remain in North America." *Id.* The Application is thus incomplete, and the Board should reject it because it fails to address what is, in UP's own words, the "overriding public policy question" before the Board.

Applicants certainly understand that the public interest implications of an "end-game" rail duopoly will be hotly debated in this proceeding, and plan to present their more developed analysis only in response to the arguments that parties make in their Comments and Requests for Conditions. Under the procedural schedule Applicants (and the Board) have proposed, no parties would have an opportunity to respond to Applicants' real downstream analysis. That is why the 2001 rules require Applicants to provide more than a three-paragraph brush-off of these issues in their Application.

If the Board nonetheless concludes that Applicants' submission comports with the Major Merger Rules, Applicants' strategic choices highlight the need for a procedural schedule allowing parties to submit a sur-reply addressing the new arguments and evidence Applicants submit in their reply (and also admonishing Applicants that they may not sandbag parties by submitting more-developed analysis on issues later in the case on issues of plain import). Applicants' bare-bones opening salvo avoiding any real analysis of downstream effects highlights precisely the concern CPKC warned of in its Comments on the Board's proposed procedural schedule. *See* CPKC-5 (filed Nov. 13, 2025) at 18-19 (addressing downstream

effects specifically). If Ebenezer Scrooge was able to spend quality time with the Ghost of Christmas Future reviewing the grim consequences of his behavior, surely on the eve of Christmas 2025 Applicants could have offered a more thorough analysis of the Transcontinental Rail Duopoly their proposed merger portends.

III. THE BOARD SHOULD REJECT THE APPLICATION BECAUSE APPLICANTS' ANALYSIS OF IMPACTS ON HORIZONTAL COMPETITION DOES NOT COMPLY WITH THE 2001 MAJOR MERGER RULES

The Board should also reject the Application as incomplete for failure to provide the robust market impact analyses required for Major Merger applications. In 2001, in part in response to comments that UP and NS themselves made urging the need for enhanced scrutiny of further consolidation in the industry, the Board adopted more rigorous requirements for market analyses in applications seeking approval of major mergers like this one. The Board sought to "require[] merger applicants to bear a heavier burden in showing that a major merger proposal is in the public interest." *2001 Final Rules*, 5 S.T.B. at 546. This change was based on the Board's belief that "additional consolidation in the industry is also likely to result in a number of anticompetitive effects, such as loss of geographic competition, that are increasingly difficult to remedy directly or proportionately." 49 C.F.R. § 1180.1(c).

UP and NS were supportive of this increased scrutiny. In Comments submitted in 2000, UP "recommend[ed] that the Board establish a higher threshold for claims of merger benefits," and "question[ed] whether additional Class I consolidations will ever be in the public interest, even though mergers have provided important benefits in the past."[16] NS similarly agreed that "the Board should give greater scrutiny to claimed merger benefits, and require that there be

[16] UP EP 582 Initial Proposals (Exh. 2 hereto) at 2, 17.

significant net public benefits before the Board will approve a proposed transaction."[17] NS suggested that the Board should "approve major rail consolidation proposals only when the applicant carriers can persuasively demonstrate that the proposed transaction will generate net public benefits that are tangible, significant and likely." *Id.* at 3.

To implement this heightened scrutiny, the 2001 Rules "set[] minimum requirements to replace the discretionary guidelines that have been in use for market analyses in major transactions." *2001 Final Rules*, 5 S.T.B. at 599. Major applications must include "'full system' impact analyses" which "demonstrate the impacts of the transaction—both adverse and beneficial—on competition within regions of the United States and this nation as a whole (including inter- and intramodal competition, product competition, and geographic competition)." 49 C.F.R. § 1180.7(b). The rule further sets forth a variety of specific analyses that must be included in an application.[18] "Applicants (and any other party submitting analyses) must demonstrate both the relevance of the markets and issues analyzed and the validity of their methodology" and "[a]ll underlying assumptions must be clearly stated." *Id.* § 1180.7(a).

The analysis of horizontal competition presented in the Verified Statement of Elizabeth M. Bailey fails to satisfy the Board's new standards. Dr. Bailey's corridor analysis is limited to circumstances in which (a) both UP and NS currently serve the origin, or (b) both UP and NS

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[17] Comments of NS in Response to Advance Notice of Proposed Rulemaking, *Major Rail Consolidation Procedures*, STB Ex Parte No. 582 (Sub-No. 1) (filed May 16, 2000) at 3. Excerpts are Exhibit 5 hereto.

[18] Specifically, for major mergers the analyses must include "anticipated effects of the transaction on traffic patterns, market concentrations, and/or transportation alternatives;" "[a]ctual and projected market shares of originated and terminated traffic by railroad for each major point;" "[a]ctual and projected market shares of revenues and traffic volumes for major interregional or corridor flows by major commodity group;" and "[f]or each major commodity group, an analysis of traffic flows indicating patterns of geographic competition or product competition across different railroad systems, showing actual and projected revenues and traffic volumes." *Id.* § 1180.7(b)(1)-(4).

currently serve the destination, *see* Bailey V.S. ¶ 101, App. Vol. II at 58, and thus *completely ignores* any analysis of the effect of their proposed merger on the number of independent routes in corridors where UP and NS may serve different legs of the movement. Dr. Bailey acknowledges that she is breaking with Board practice, noting that "[t]he evaluation of prior railroad mergers has included analyses of the effect on the number of options that shippers have within corridors." *Id.* ¶ 101 n.95, App. Vol. II at 58. But, without any explanation, she simply states that her "approach differs." *Id*. This first-ever merger application under the 2001 Rules must present a *more robust* analysis of horizontal competitive effects, not a skinnied-down version that suits Applicants' attempt to avoid this obvious issue in their Application.

Equally significant, Dr. Bailey purports to analyze the impact of the proposed merger on geographic competition by performing a "50/10" screening analysis. CPKC will address elsewhere (if necessary and in due course) the merits of the merger's geographic competition impacts, but for present purposes CPKC addresses only the incompleteness of Dr. Bailey's (and Applicants') analysis. Simply put, there is no analysis. Dr. Bailey listed potential concerns and then stopped short of analyzing any of them, blithely asserting that "the scope for potential horizontal harm represented by the flagged carloads is small compared to the scope of the transaction's projected benefits." *Id.* ¶¶ 126-33, App. Vol. II at 71-75. In other words, Applicants are punting to other interested parties the job of addressing the flagged issues, among others, so that Applicants can address these concerns only on rebuttal. That is not the way the Board's processes are designed to or should work.

Applicants' gambit fails to comply with the new rigor of the Board's 2001 rules. The Board should reject the Application as incomplete. *See, e.g.*, *CSX Corp. – Control – Pan Am. Sys. Inc.*, Finance Docket No. 36472 (STB served May 17, 2021) at 2 (rejecting as "incomplete"

application that "fails to include the information needed to satisfy the Market Analysis requirement for a 'significant' transaction"). In addition, the Board should adopt a schedule allowing non-applicants to reply to any new evidence or argument filed by Applicants on their reply and admonish Applicants that they will not be permitted to "sandbag" other interested parties by deferring the kinds of analyses the Board's rules require until a later stage of the proceeding. *See* CPKC-5 (filed Nov. 13, 2025) at 15-21.

CONCLUSION

For the foregoing reasons, the Board should reject the Application as incomplete pursuant to 49 C.F.R. § 1180.4(c)(7)(ii), which provides that "[t]he Board shall reject an incomplete application." Following rejection, Applicants should be permitted to re-file a complete application with all required content, and the procedural schedule herein should commence when that material has been submitted and the Board deems it complete. Whether or not the Board rejects Applicants' incomplete filing, it should take note of Applicants' obvious intention to defer until later stages of this proceeding actual engagement on the key issues underlying the Board's public interest review. The Board should adopt a procedural schedule that takes advantage of the full amount of time provided by Congress's one-year evidentiary period and provide non-applicants with a "sur-reply" opportunity to respond to new argument and evidence submitted by Applicants in their replies to Comments and Requests for Conditions. *See* CPKC-5 (filed Nov. 13, 2025) at 16-21.

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Dated: December 29, 2025

REDACTED PUBLIC RECORD VERSION

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of December, 2025, I caused a copy of the foregoing CPKC's Comments on the Completeness of the Application to be served by email or by first-class mail, postage prepaid on all parties of record in this proceeding, the Secretary of Transportation, the Attorney General of the United States, and Administrative Judge Jenifer Soulikias.

/s/ *Dylan M. Aluise*

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Attorney for CPKC

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36873

UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY
– CONTROL –
NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY

EXHIBIT 1

***MAJOR RAIL CONSOLIDATION PROCEDURES*, EX PARTE NO. 582 (SUB-NO. 1)**
UP'S REPLY COMMENTS ON PROPOSED MERGER RULES (FILED DEC. 18, 2000)
(EXCERPTS)

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

UNION PACIFIC'S REPLY COMMENTS ON PROPOSED MERGER RULES

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December 18, 2000

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

UNION PACIFIC'S REPLY COMMENTS ON PROPOSED MERGER RULES

Union Pacific Railroad Company and Union Pacific Corporation (collectively, "UP") submit these comments in response to the November 17 opening comments.

INTRODUCTION

UP incorporates and adopts the Reply Comments of the American Association of Railroads ("AAR") and the National Railway Labor Conference filed today. It submits the following supplemental comments to address additional issues of particular concern to UP. We also remind the Board of several UP proposals that would address a frequent objection to the Board's proposals: several rules lack specificity.

UP will again present comments in the order of topics in the Board's Advance Notice of Proposed Rulemaking, served March 31, 2000. We will then discuss several proposals from passenger train operators and a handful of procedural issues.

One unique comment does not fit into that framework, however, so we address it first. KCS asks the Board to apply the future merger rules and policies to any oversight

proceeding still open when these rules are enacted. KCS, p. 20.[1] Under established principles and Supreme Court precedent, that would not be lawful.

KCS's interest is clear enough: having lost three attempts in the UP/SP proceeding to expand affiliate Tex Mex's rights to serve the Houston area,[2] KCS seeks a new avenue for a fourth attempt. Were the Board to apply its new rules to railroads subject to continuing oversight, KCS presumably would ask the Board to add new conditions to the UP/SP merger during the final year of Board oversight.[3]

The Board properly recognized that the new rules it is developing will apply only to future mergers. Notice of Proposed Rulemaking served Oct. 3, 2000 ("NOPR"), p. 9. The Board should not and cannot retroactively change the rules applicable to prior mergers. See, e.g., UP Opening Comments on Proposed Merger Rules, 6-7 & n.3. This is equally true for the four Class I railroads still subject to oversight proceedings: UP, CSX, NS, and CN/IC. As the Supreme Court said in Hughes Aircraft Co. v. United States ex rel. Shumer, 520 U.S. 939, 944-46 (1997), the presumption against retroactivity is "time-honored," and it is impermissible to apply a new rule to pending claims without express Congressional authority. See also Davey v. City of Omaha, 107 F.3d 587, 592-93 (8th Cir. 1997) (amendment to Title VII cannot be applied retroactively because Congress did not specifically declare the amendment would apply retroactively and it "attaches new consequences to prior conduct and significantly alters the legal

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1 Unless otherwise indicated, all citations are to comments filed on November 17, 2000.

2 Finance Docket No. 32760, Union Pac. Corp. – Control and Merger – Southern Pac. Rail Corp. ("UP/SP"), Decision No. 44 served Aug. 12, 1996, pp. 147-51; Decision No. 62 served Nov. 26, 1996; UP/SP, Decision No. 63 served Dec. 4, 1996, p. 4; Finance Docket No. 32760 (Sub-No. 26), Union Pac. Corp – Control and Merger – Southern Pac. Rail Corp [Houston Gulf Coast Oversight], Decision No. 10 served Dec. 21, 1998, pp. 10, 16-18.

3 The five-year UP/SP oversight period is scheduled to end three weeks after the Board issues its new merger rules.

terrain that employers must traverse"); Chenault v. United States Postal Service, 37 F.3d 535, 539 (9th Cir. 1994) (holding that "[r]egardless of whether a statute is 'substantive' or 'procedural,' it may not apply to cases pending at the time of enactment if the new statute would prejudice the rights of one of the parties.")

KCS also asks the Board to create a new rule stating that the Board will use its conditioning power to address in future mergers "harms to competition resulting from previous mergers involving the current merger applicants." KCS, p. 16.[4] UP agrees with KCS that when a merger undermines a condition imposed in a prior merger, the condition should be replaced. KCS, pp. 17 n.6, 28-29. In such situations, a new condition is appropriate because the second merger would otherwise adversely affect competition. But if KCS wants new conditions to address circumstances that did not justify conditions under the rules and precedents applicable to a prior merger, its request contravenes the principle against retroactivity. KCS's request also violates a principle KCS itself advocates: that the Board should impose conditions only to address effects of the merger before the Board. Id. at 11, 13.

In UP/SP, the Board reserved oversight jurisdiction only for the express purpose of determining "whether the conditions we have imposed have effectively addressed the competitive issues they were intended to remedy."[5] The Board said it would impose additional conditions only "if and to the extent, we determined that conditions already imposed were not

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[4] Assuming KCS is referring to recent mergers, its premise that mergers harmed competition is mistaken. Board and ICC conditions addressed all competitive harms from recent mergers.

[5] UP/SP, Decision No. 44 served Aug. 12, 1996, p. 146. See also Finance Docket No. 32760 (Sub-No. 21), Union Pac. Corp. – Control and Merger – Southern Pac. Rail Corp. [General Oversight] ("UP/SP Oversight"), Decision No. 16 served Dec. 15, 2000, p. 13.

effectively addressing competitive harms caused by the merger."[6] UP consummated the UP/SP merger in reliance on the conditions the Board imposed, not broader conditions KCS or others might prefer in the future. The Board may replace only conditions that fail, if any; it can do no more.

The Board has found for four years running that the conditions it imposed in UP/SP are effective. The competition provided by BNSF and (for traffic to and from Mexico) Tex Mex continues to flourish.[7] Unless those conditions suddenly and unexpectedly fail, the Board cannot change the conditions it imposed on the UP/SP merger without violating UP's rights.

I. DOWNSTREAM EFFECTS

The comments reveal a broad consensus that the Board should consider how responses to any Class I merger would affect the public interest.[8] The commenters, save only BNSF, CN, and WC[9] agree that "downstream" analysis is important to assure that the Board

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6 UP/SP General Oversight, Decision No. 10 served Oct. 27, 1997, pp. 2, 3-7; Decision No. 13 served Dec. 21, 1998, pp. 8-10; Decision No. 15 served Nov. 30, 1999, pp. 5-6; Decision No. 16 served Dec. 15, 2000, pp. 1, 6.

7 Tex Mex will be an even more effective competitor thanks to UP's agreement to sell it a more direct rail route south of Houston. Finance Docket No. 33914, Texas Mexican Ry.—Purchase Exemption—Union Pacific R.R., Decision served Dec. 11, 2000.

8 See Canadian Pulp and Paper Ass'n , p. 3-4; Committee To Improve Am. Coal Transp. ("IMPACT"), p. 18; CSX, p. 12; Council of Forest Indus. & Western Canadian Shippers Coalition ("COFI/WCSC"), p. 4; E. I. du Pont de Nemours and Co. ("DuPont"), p. 5; The Fertilizer Inst. and the Canadian Fertilizer Inst., p. 12; IMC Global Inc., p. 3; National Indus. Transp. League, p. 31; NS, p. 51; Ohio Rail Dev. Comm'n, p. 11; Port of Seattle, p. 2; PPG Indus., p. 3; Proctor & Gamble Co., p. 6; Shell Oil Co. & Shell Chemical Co., p. 11; Transportation Intermediaries Ass'n. ("TIA"), p. 2; U.S. Dep't of Agric. ("Agriculture"), p. 21; U.S. Dep't of Defense ("DOD"), p. 5; U.S. Dep't of Transp. ("DOT"), p. 20; Williams Energy Serv., p. 16.

9 See, e.g., BNSF, pp. 43-45 (opposing downstream analysis other than responsive mergers filed during the merger review); CN, pp. 16-20 (recognizing prospect of transcontinental duopoly but objecting to downstream analysis); WC, pp. 11-12 (objecting to downstream analysis).

fully understands the impact of the proposed merger. An almost equally broad consensus, however, believes that the Board's proposed rule on downstream merger applications (proposed § 1180.6(b)(12)) relies too much on speculation. BNSF and CN agree.

The proposed rule requires applicants to "anticipate what additional Class I merger applications are likely to be filed in response to their own application and explain how, taken together, these applications could affect the eventual structure of the industry and the public interest." Under another proposed rule, applicants must calculate public benefits "in light of the anticipated downstream mergers." Proposed § 1180.1(i). These rules require a rigorous downstream analysis, but if the applicants guess wrong, that analysis will have little value. The analysis may also ignore important public policy questions. And applicants may deny that any responsive merger is likely.

The important public policy questions in the next major Class I merger proceeding will focus on whether a North American railroad duopoly is in the public interest. The Board will choose between a future in which two huge transcontinental systems develop single-line services in isolation from each other and a future in which all remaining railroads strive to develop more efficient services over remaining interline routes. This is an important choice that can be made only once, because mergers are likely to be permanent. Asking applicants to predict and discuss specific future merger permutations could easily miss this central inquiry.[10]

While most commenters endorse downstream analysis and worry about speculation, they generally fail to offer alternatives for the Board to consider. Thus, the U.S. Department of Transportation ("DOT") recommends that "the STB should set forth more

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[10] For example, if BNSF and CN again propose to merge, they might confine their "downstream" analysis to a hypothetical UP/CP merger.

specifically what is required of applicants and how it will consider the evidence submitted." DOT, p. 21. In contrast, UP provided the Board with a simple yet instructive solution. The Board and applicants should evaluate the impact of a major Class I merger on the assumption that it is part of an "end game" resulting in only two major North American railroads. If the Board then approves a merger, it should condition the merger to protect the public interest in that final industry structure.[11] Thus, the Board should strike the last two sentences in proposed § 1180.1(i) and replace its proposed § 1180.6(b)(12) with the following language:[12]

> Applicants proposing a major transaction must evaluate the effects on competition and the public interest of combining all Class I railroads in the United States and Canada into two North American Class I railroads. Applicants need not identify specific combinations, but should evaluate the implications of an industry structure consisting of two major railroads.

II. SAFEGUARDING RAIL SERVICE

Commenters broadly applaud the Board's proposals to prevent the service problems that followed three recent large consolidations. The proposed rules call for detailed implementation and contingency planning, post-consummation monitoring, and problem-resolution mechanisms such as a Service Council of affected parties. Proposed § 1180.1(h). The Board also encourages applicants to negotiate service agreements with shippers and connecting carriers, and it offers its good offices to resolve problems informally. NOPR, p. 20.

Yet there are concerns about this framework. Numerous shippers, shipper groups, and federal and state agencies object that the Board fails to provide any financial remedy for

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[11] UP also reminds the Board of UP's related proposal to consolidate contemporaneous applications proposing major transactions into a single merger review proceeding.

[12] If a smaller Class I carrier believes that a specific transaction is unlikely to lead to downstream transactions, it could seek exemption from this rule.

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36873

UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY
– CONTROL –
NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY

EXHIBIT 2

***MAJOR RAIL CONSOLIDATION PROCEDURES*, EX PARTE NO. 582 (SUB-NO. 1)**
UP'S COMMENTS AND INITIAL PROPOSALS (FILED MAY 16, 2000)
(EXCERPTS)

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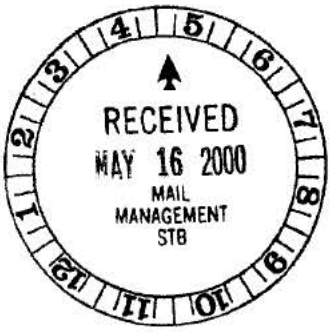

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

UNION PACIFIC'S
COMMENTS AND INITIAL PROPOSALS

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

UNION PACIFIC'S
COMMENTS AND INITIAL PROPOSALS

Union Pacific Corporation and Union Pacific Railroad Company (collectively "UP") appreciate the opportunity to offer comments in response to the Board's Advance Notice of Proposed Rulemaking served March 31, 2000 (the "ANPR").

As the comments in Public Views on Major Rail Consolidations establish, the Board's policies and rules regarding Class I rail mergers[1] must be revised. The Board's current rules are based on the outdated assumption that the railroad industry suffers from excess capacity -- a condition that no longer exists.[2] The shipping community's broad hostility toward additional mergers under current policies and regulations underscores the need for this revision.

UP questions whether additional Class I consolidations will ever be in the public interest, even though mergers have provided important benefits in the past.

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[1] We use the term "merger" to refer to mergers and other forms of consolidation and changes of control involving Class I rail carriers that are treated as "major transactions" under the Board's merger rules.

[2] As UP urged in its Comments in Ex Parte No. 582, the Board should strike from its rules the outdated first two sentences of 49 U.S.C. § 1180.1(a).

They helped eliminate the excess capacity that pre-Staggers Act regulation had forced the railroads to maintain. They combined traffic flows onto fewer routes and via fewer interchanges, allowing railroads to take advantage of economies of density. They helped the railroads achieve major productivity gains, many of which were passed along to shippers in the form of lower rates. And they provided homes for financially weak railroads that had little or no prospect of remaining viable on their own, including the Western Pacific, M-K-T, and Southern Pacific railroads.

Today the Board and stakeholders in rail transportation confront new realities that require a paradigm shift in the way we think about these mergers. The process of eliminating large-scale excess capacity in the rail industry is mostly complete. With far fewer railroads interacting, the opportunities for cooperation to achieve benefits traditionally ascribed to mergers are brighter than ever. For example, studies suggest that alliances are both increasing popular in American business and provide better returns on investment than mergers. Technology is about to alter this 165-year-old industry. More than one railroad has said publicly that e-commerce will "revolutionize" the railroad industry. Most important, additional Class I mergers would likely result in only two major railroads north of the Mexican border.

UP encourages the Board to develop policies and rules that are appropriate for considering merger proposals in this new environment. The Board should evaluate the impact of and need for any additional Class I mergers on the assumption that any such merger is part of an "end game" resulting in transcontinental mergers and only two major railroads in North America. It should condition any mergers it approves in a manner that

protects the public interest and shipper interests under that industry structure. Only by adopting this perspective can the Board develop realistic and consistent public policies.

UP will propose and discuss several potential rule changes designed to respond to some of the concerns its customers voiced in the Ex Parte No. 582 proceeding and to adapt the Board's rules to the prospect of transcontinental and trans-border mergers. Our proposals are detailed but should be considered as only initial concepts for further discussion. We expect to revise or reconsider them in response to comments from other parties.

UP discusses its proposals in the order of the topics listed in the ANPR, not in order of their importance.

I. Downstream Effects

When Burlington Northern Santa Fe and Canadian National notified the Board of their consolidation plans, the Board quickly recognized that their transaction would lead to "downstream" effects, including responsive merger applications likely to yield only two remaining North American rail systems. It promptly suspended the "one case at a time" rule set forth in 49 C.F.R. § 1180.1(g). Under the Board's ruling, parties in a BNSF/CN proceeding would have been expected to consider downstream effects.

UP believes the Board acted wisely, and it encourages the Board to impose the same requirements on all proposed Class I merger proposals. Any combination among the six largest remaining railroads in North America would be part of and would drive what many parties at the Board's public hearing described as the "end game" in rail consolidations. Before approving any additional Class I merger, the Board should consider whether the "end game" is in the public interest. This is the overriding public policy question before the Board.

UP offers two specific proposals. First, although we believe that there are still too many possible permutations to expect parties to address every imaginable combination of Class I carriers and that such an exercise would involve too much speculation, it is not too early to require parties to address in future applications whether a two-railroad North American rail system would be in the public interest. For example, applicants and other parties should address whether a single railroad serving Florida, the Northeast, Western Canada, and California would be manageable and responsive to its shippers. Second, to provide a more realistic analysis of proposals that reach the Board in the same time frame, the Board should announce now that it may consider such proposals in a single, combined proceeding.

UP recommends that the Board replace 49 C.F.R. 1180.1(g) with the following provisions:

> (g) *Downstream effects.*
>
> (1) Applicants proposing a major transaction must evaluate the effects on competition and the public interest of combining all Class I railroads in the United States and Canada into two North American Class I railroads. Applicants need not identify specific combinations, but should evaluate the implications of an industry structure consisting of two major railroads.
>
> (2) The Board may, on its own motion or on request of an interested party, consolidate for hearing and decision any application proposing a major transaction filed before the date set for the filing of inconsistent applications in another pending proceeding arising out of another application proposing a major transaction.

II. Maintaining Safe Operations

UP is satisfied that current safety requirements in connection with Class I mergers adequately protect the public interest. The Board's safety compliance programs,

> The Board will evaluate on a case-by-case basis all claims that a proposed transaction would adversely affect competition by reducing the number of rail carrier alternatives serving an individual shipping point, an origin-destination corridor, or some other properly-defined transportation market. In evaluating such claims, the Board will not apply any rigid numerical standard based on the number of rail carriers serving the market before and after the transaction. Rather, the Board will examine all of the circumstances relevant to the competitive effects of the transaction, including such factors as the nature of the transportation service at issue; the effectiveness of the competition provided by each of the rail carriers serving the corridor, point or market; constraints on rail rates from intermodal, geographic or product competition; and the transaction's effects on the strength of competition among the serving rail carriers.

VIII. Merger-Related Public Interest Benefits

UP recommends that the Board establish a higher threshold for claims of merger benefits. The Board's existing rules indicate that it will "consider whether the benefits claimed by the applicants could be realized by means other than the proposed consolidation that would result in less potential harm to the public." 49 C.F.R. § 1180.1(c). In practice, however, the Board has been reluctant to find that particular claimed merger benefits could be achieved by means other than merger.[9] Recent changes in the structure of Class I railroads, advances in technology, and various innovations in cooperative relationships among rail carriers have made it much more likely that categories of public benefits historically associated with railroad combinations can be achieved via other means. These include:

- Alliances among connecting carriers, such as the KCS-CN-IC alliance;

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[9] See, e.g., Finance Docket No. 33556, CN/IC, Decision No. 37, served May 25, 1999, pp. 46-49; Finance Docket No. 32760, UP/SP, Decision No. 44, served Aug. 12, 1996, pp. 109-13.

- Industry initiatives, such as AAR's "Interline Service Management" program, which expects to resolve remaining data exchange issues this summer;

- Operational coordinations, such as CN and CP's recent agreement on directional running in British Columbia and the efforts currently underway to streamline operations in the congested Chicago terminal;

- Service initiatives, such as the recently announced NS-BNSF transcontinental intermodal trains; and

- Potentially revolutionary changes in railroading as a result of "business-to-business" e-commerce.

All hold the potential for achieving many of the types of public benefits that historically have been associated with railroad combinations.

Mergers should not be credited with benefits that are practicably achievable through other means that would not cause irreversible changes in the structure of the railroad industry. Indeed, mergers may impair benefits achievable through alternative arrangements. For example, the KCS-CN-IC alliance probably will be lost if BNSF and CN merge.[10] Accordingly, the Board should modify its rules to clarify that it will treat as public benefits only those benefits that can practicably be achieved only through mergers.

UP proposes replacing the last sentence of 49 C.F.R. § 1180.1(c), immediately preceding sub-part (1), with the following:

> The Board will treat as public benefits only those improvements in cost, efficiency, service, competitiveness, or other benefits that applicants demonstrate are incremental to the benefits that could practicably be achieved through means other than a major transaction. The Board will also consider whether, as a result of the applicants' pursuit of the proposed transaction, any improvements in cost, efficiency, service,

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[10] At the Ex Parte No. 582 hearing, Michael R. Haverty, President and Chief Executive Officer of the Kansas City Southern Railway predicted that, if BNSF and CN combine, "We do not feel that long term the CN-IC-KCS marketing alliance is going to survive."

competitiveness, or other benefits that would likely be achieved without the transaction would be reduced or lost as a result of the proposed transaction.

IX. Cross-Border Issues

UP believes that the Board should clarify two aspects of its rules as they relate to potential combinations involving non-U.S. carriers.

First, the Board's rules should explicitly acknowledge the extensive relationships among all aspects of the North American rail network by requiring, in the case of a proposed combination involving a carrier within the Board's jurisdiction that has foreign operations, that applicants submit with their application the same information for the foreign service as would be required if the participating carriers operated wholly within the United States. The Board cannot effectively carry out its obligation to evaluate whether a proposed Class I combination is in the national public interest unless it is able to evaluate all aspects of a transaction that affect the United States.

Because of the network characteristics of the railroad industry, changes brought about by a combination that directly affect one part of a railroad system can have significant indirect effects on other parts of the system or, indeed, on the entire North American rail network. This interrelationship was borne out clearly in connection with UP's 1997-1998 service difficulties, when congestion in the Houston area led "to a lengthy and damaging service breakdown dramatically affecting rail transport throughout the West."[11]

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[11] Finance Docket No. 32760 (Sub-No. 26), UP/SP Houston/Gulf Coast Oversight, Decision No. 10, served Dec. 21, 1998, p. 6.

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36873

UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY
– CONTROL –
NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY

EXHIBIT 3

FEDERAL TRADE COMMISSION BUREAU OF COMPETITION GUIDANCE, "*'ALL' MEANS ALL: SUBMIT SIDE AGREEMENTS WITH AN HSR FILING*" (DEC. 20, 2017)

Competition Matters

"All" means All: Submit side agreements with an HSR filing

By: Bruce Hoffman, Bureau of Competition | December 20, 2017

When preparing an HSR filing for a proposed acquisition, some practitioners counsel their clients not to submit binding agreements or side letters negotiated between the merging parties that reflect the parties' antitrust review obligations, risk-sharing commitments, and potential remedial measures. Some claim that these "side agreements" are ancillary to the main agreement, while others withhold such side agreements believing they are protected by a common interest privilege or as part of a joint defense agreement. Both positions are legally incorrect, and contrary to the requirements of HSR Rules.

The Instructions for Item 3(b) of the HSR Form clearly specify that filing parties must:

> "Furnish copies of *all documents* that constitute the agreement(s) among the acquiring person(s) and the person(s) whose assets, voting securities or non-corporate interests are to be acquired," [emphasis added].

The Instructions allow parties to exclude "schedules and the like," and the Premerger Notification Office has clarified that this exclusion applies to schedules and attachments to the transaction agreement that are not relevant to understanding the deal. It also allows the exclusion of multiple non-compete agreements when the same one went to every single individual as well as non-compete agreements that are continuing employment agreements when the acquired person is not a party to the agreement. The exclusion also applies to executive employment agreements if the acquisition is triggered by an executive compensation package.

But the parties may ***not*** exclude documents if they "contain ... other agreements between the parties or other important items of the transaction" -- meaning any agreement entered by the parties or their representatives that bears on the terms of the transaction and is binding on the parties ***must be submitted*** as part of the HSR filing. This includes any agreement that alters the terms of the merger during the antitrust review process, regardless of ***where*** those commitments are written down. If there is an enforceable agreement that binds the parties to take actions related to antitrust clearance, it must be submitted as part of the HSR form.

Side agreements between merging parties are not covered by any privilege or protection (such as the attorney work product doctrine) and may not be withheld, even if the parties have signed a joint defense agreement. Whenever side agreements are part of the transaction negotiations, they are part of the agreement between the parties and responsive to Item 3(b). Of course, analyses, recommendations, and strategy explanations that are not binding or enforceable by the merging parties need not be turned over pursuant to Item 3(b). Nonetheless, these materials may still be responsive to Items 4(c) or (d) and, if privileged, as with other privileged 4(c) or 4(d) materials, should still be listed in the privilege log. Specifically, the privilege log must comply with the detailed requirements in the HSR Instructions, which indicate that parties must state the factual basis supporting the privilege claim in sufficient detail to enable staff to assess the validity of the claim.

In order for parties to comply with the requirements of the HSR Act and Rules, they must complete their HSR forms accurately and submit all required documents. Remember that certifying to the veracity of the HSR Form must be done in the presence of a notary or contain language found in 28 U.S.C. § 1746 relating to unsworn declarations under penalty of perjury. Failing to comply with the HSR Act can lead to significant penalties, such as restarting the HSR waiting period and civil penalties of over $40,000 per day a party is in violation of the Act.

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BEFORE THE
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Finance Docket No. 36873

UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY
– CONTROL –
NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY

EXHIBIT 4

***MAJOR RAIL CONSOLIDATION PROCEDURES*, STB EX PARTE NO. 582 (SUB-NO. 1)**
UP'S OPENING COMMENTS ON PROPOSED MERGER RULES (FILED NOV. 17, 2000)
(EXCERPTS)

200426

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

UNION PACIFIC'S OPENING COMMENTS ON PROPOSED MERGER RULES

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

UNION PACIFIC'S OPENING COMMENTS ON PROPOSED MERGER RULES

Union Pacific Corporation and Union Pacific Railroad Company (collectively "UP") appreciate this opportunity to comment in response to the Board's Notice of Proposed Rulemaking ("NOPR"). The NOPR would revise the Board's merger rules to reflect the dramatic changes that have occurred in the rail industry since the existing rules were adopted two decades ago. Although the Board's proposed rules update the criteria for reviewing potential merger proposals, UP has significant concerns about a number of components of the proposed rules. UP joins in the comments of the Association of American Railroads ("AAR"), which address several of these topics.

In these Opening Comments, we describe UP's additional concerns and offer several suggestions for changes in direction or further refinement. We present UP's comments in the order of the topics listed in the Board's Advance Notice of Proposed Rulemaking, served March 31, 2000. For each topic, we review UP's initial positions,[1] summarize the Board's proposals in the NOPR, and offer comments and suggestions.

[1] We attach as Appendix A "Union Pacific's Comments and Initial Proposals," filed May 16, 2000 in response to the Advance Notice of Proposed Rulemaking. This document contains the full text of UP's initial recommendations in this proceeding.

I. Downstream Effects

UP's Initial Position. UP endorsed the Board's commitment to consider the downstream effects of future major rail mergers. In its May 16, 2000 Comments and Initial Proposals (Appendix A), UP offered suggestions for implementing this commitment. UP warned that parties cannot realistically evaluate the effects of specific downstream Class I mergers because there are too many possible permutations. It therefore recommended that the Board require applicants to "evaluate the effects on competition and the public interest of combining all Class I railroads in the United States and Canada into two North American Class I railroads." Appendix A, p. 26. UP also proposed a rule requiring procedural consolidation of major merger applications filed contemporaneously. Id.

Proposed Rules. The Board's proposed rules would require merger applicants to address potential downstream effects of their proposal by predicting the specific transactions that others will propose in response. See proposed §§ 1180.1(i), 1180.6(b)(12). Proposed § 1180.6(b)(12) requires applicants to "anticipate what additional Class I merger applications are likely to be filed in response to their own application and explain how, taken together, these applications could affect the eventual structure of the industry and the public interest." The Board might impose additional conditions in the future if downstream mergers occur. Proposed § 1180.6(b)(12)(ii). The rules would require that applicants, "[w]hen calculating the likely public benefits that their merger will generate, . . . measure these benefits in light of the anticipated downstream mergers." Proposed § 1180.1(i).

UP's Comments. UP again endorses thorough consideration of downstream effects in future merger cases. As the Board has found, the next major merger is likely to lead to creation of two transcontinental railroads. NOPR, p. 8. Before approving another

major rail merger, the Board should determine whether this final round of railroad consolidations is desirable. Presumptively, this will be the central public policy issue in a future Class I merger proceeding.

a. Specific transactions

UP respectfully suggests that the focus on specific downstream mergers is misguided and requires predictions that no one can reliably make. Predicting how half a dozen large railroads will respond to a future merger proposal calls for excessive speculation. Even if a downstream merger of Railroads A and B seems logical, there is no assurance that the two railroads could negotiate an agreement. Moreover, the A-B merger will involve unpredictable voluntary conditions to address competitive concerns. How many people could have guessed in 1995 that UP and SP would negotiate more than 4,000 miles of trackage rights with BNSF and open up the I-5 Corridor to single-line competition? The Board's call for predictions of specific transactions therefore creates a high likelihood that applicants will make inaccurate guesses and that both the applicants' and the Board's merger analyses will miss the mark. Requiring applicants to calculate the financial benefits of these predications adds only an illusion of concreteness to the guesswork.

The Board's proposed rules demand unrealistic precision, while allowing applicants to avoid addressing the important public policy questions presented by a major rail merger. By allowing applicants to identify only downstream transactions that are "likely," the proposed rules leave applicants free to deny that any downstream merger is sufficiently likely to deserve study. Even though the evidence in this rulemaking already establishes that the next Class I merger is likely to trigger an "end game" that results in only two transcontinental railroads, the Board's proceeding might not address the impact of that end game on the public interest.

For example, if CN and NS were to plan a merger, they and other parties might reasonably assume that CSX and CP would follow suit in a mirror-image downstream merger. That guess could easily be mistaken, though, as there are many possible alternatives. For example, BNSF might mount a strategic acquisition of CSX. Building a public interest analysis, computing benefits, and designing conditions on the assumption of a downstream CSX-CP merger would be a waste of everyone's time if BNSF then acquired CSX. Meanwhile, the important questions associated with another wave of railroad mergers could go unanswered.

UP therefore urges the Board to revise its proposed rules to require a thorough evaluation of the implications of the two-railroad scenario in the manner proposed in Appendix A, pp. 25-26.

b. "Springing" conditions

The Board should not attempt to remedy the effects of downstream mergers by designing conditions that would spring into effect when a downstream merger occurs. The Board cannot impose post-merger conditions on transactions that have already been consummated unless it provides sufficient notice in its approval decision about those conditions. The Board will be unable to do so here. No one can predict with accuracy which specific downstream mergers are most likely to follow a proposed merger, much less how those downstream mergers will be designed and what settlements the applicants will propose. Any attempt to specify springing conditions in advance is doomed to fail. As a result, applicants would be unable to evaluate the costs and benefits of a proposed merger because they would not know what conditions the Board might eventually adopt in response

to a later merger. The Board's final decision regarding any merger must specify all conditions applicable to that merger.[2]

It is settled law that the Board cannot impose new regulations and conditions on consummated mergers, just as the Board cannot apply its proposed merger rules on railroad mergers consummated before the rules are adopted.[3] The Administrative Procedure Act[4] and fundamental principles of due process limit the Board's authority to apply new rules or new conditions retroactively. Retroactive application of new rules "would impair the rights a party possessed when he acted, increase a party's liability for past conduct, or *impose new duties with respect to transactions already complete*." Landgraf v. USI Film Products, 511 U.S. 244, 280 (1994) (emphasis added). Thus, any rule formulated in this proceeding can only have future effect. See 5 U.S.C. § 551(4) (defining a rule as "the whole or a part of an agency statement of general or particular applicability *and future effect* designed to implement, interpret, or prescribe law or policy or describing the organization,

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[2] The Board should, of course, conduct oversight proceedings to ensure that those conditions achieve their goals and may modify conditions as necessary to ensure their effectiveness.

[3] The Board's NOPR recognizes that the proposed rule changes would apply only to "future major railroad merger proposals." NOPR, p. 9. It is appropriate for the Board in a future merger case to examine whether the proposed merger adversely affects competition that was protected or enhanced by conditions imposed in a prior case. The Board can impose conditions on future mergers to protect that competition. For example, the ICC in the UP/MKT case required UP to reach an agreement substituting a new carrier with respect to the "North End" rights between Kansas City and Omaha/Council Bluffs that were granted to MKT in the UP/MP/WP merger. Union Pac. Corp., Union Pac. R.R. & Missouri Pac. R.R. – Control – Missouri-Kansas-Texas R.R., 4 I.C.C.2d 409, 452-58 (1988). Any attempt to apply the Board's new rules retroactively to a transaction approved prior to their adoption, however, would be unlawful.

[4] Ch. 423, 60 Stat. 237 (current version at 5 U.S.C. §§ 551-559, 701-706).

procedure, or practice requirements of an agency . . . .") (emphasis added). The Supreme Court made this clear in Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988), when it stated that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." Congress did not authorize the Board to use its merger authority to impose new substantive obligations on parties that chose to consummate a merger in light of the specific conditions imposed by the Board. To the contrary, the statute indicates that the Board has authority to condition a proposed transaction only in the context of deciding whether to approve that transaction, not thereafter. See 49 U.S.C. § 11324(c).

In future merger proceedings, the Board is unlikely to be able to specify downstream conditions with sufficient particularity to avoid violating these fundamental principles of due process. The rail industry's crystal ball is not clear enough to predict accurately the sequence of downstream transactions or how those transactions will be designed, much less to craft conditions appropriate for every permutation. Applicants cannot plan or implement mergers under the risk that an unanticipated future merger will cause the Board to impose major changes on an approved merger. The Board must identify all necessary conditions when it considers a proposed transaction so that the parties can understand what will be required of them when they decide to consummate.

II. Maintaining Safe Operations

UP's Initial Position. UP observed that the Board's safety compliance programs, administered in conjunction with FRA, are effective. Appendix A, pp. 26-27.

Proposed Rules. Pending completion of its joint rulemaking with FRA in Ex Parte No. 574, the Board would require merger applicants to work with FRA on a case-

> The Board will evaluate on a case-by-case basis all claims that a proposed transaction would adversely affect competition by reducing the number of rail carrier alternatives serving an individual shipping point, an origin-destination corridor, or some other properly-defined transportation market. In evaluating such claims, the Board will not apply any rigid numerical standard based on the number of rail carriers serving the market before and after the transaction. Rather, the Board will examine all of the circumstances relevant to the competitive effects of the transaction, including such factors as the nature of the transportation service at issue; the effectiveness of the competition provided by each of the rail carriers serving the corridor, point or market; constraints on rail rates from intermodal, geographic or product competition; and the transaction's effects on the strength of competition among the serving rail carriers.

VIII. Merger-Related Public Interest Benefits

UP recommends that the Board establish a higher threshold for claims of merger benefits. The Board's existing rules indicate that it will "consider whether the benefits claimed by the applicants could be realized by means other than the proposed consolidation that would result in less potential harm to the public." 49 C.F.R. § 1180.1(c). In practice, however, the Board has been reluctant to find that particular claimed merger benefits could be achieved by means other than merger.[9] Recent changes in the structure of Class I railroads, advances in technology, and various innovations in cooperative relationships among rail carriers have made it much more likely that categories of public benefits historically associated with railroad combinations can be achieved via other means. These include:

- Alliances among connecting carriers, such as the KCS-CN-IC alliance;

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[9] See, e.g., Finance Docket No. 33556, CN/IC, Decision No. 37, served May 25, 1999, pp. 46-49; Finance Docket No. 32760, UP/SP, Decision No. 44, served Aug. 12, 1996, pp. 109-13.

- Industry initiatives, such as AAR's "Interline Service Management" program, which expects to resolve remaining data exchange issues this summer;

- Operational coordinations, such as CN and CP's recent agreement on directional running in British Columbia and the efforts currently underway to streamline operations in the congested Chicago terminal;

- Service initiatives, such as the recently announced NS-BNSF transcontinental intermodal trains; and

- Potentially revolutionary changes in railroading as a result of "business-to-business" e-commerce.

All hold the potential for achieving many of the types of public benefits that historically have been associated with railroad combinations.

Mergers should not be credited with benefits that are practicably achievable through other means that would not cause irreversible changes in the structure of the railroad industry. Indeed, mergers may impair benefits achievable through alternative arrangements. For example, the KCS-CN-IC alliance probably will be lost if BNSF and CN merge.[10] Accordingly, the Board should modify its rules to clarify that it will treat as public benefits only those benefits that can practicably be achieved only through mergers.

UP proposes replacing the last sentence of 49 C.F.R. § 1180.1(c), immediately preceding sub-part (1), with the following:

> The Board will treat as public benefits only those improvements in cost, efficiency, service, competitiveness, or other benefits that applicants demonstrate are incremental to the benefits that could practicably be achieved through means other than a major transaction. The Board will also consider whether, as a result of the applicants' pursuit of the proposed transaction, any improvements in cost, efficiency, service,

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[10] At the Ex Parte No. 582 hearing, Michael R. Haverty, President and Chief Executive Officer of the Kansas City Southern Railway predicted that, if BNSF and CN combine, "We do not feel that long term the CN-IC-KCS marketing alliance is going to survive."

competitiveness, or other benefits that would likely be achieved without the transaction would be reduced or lost as a result of the proposed transaction.

IX. Cross-Border Issues

UP believes that the Board should clarify two aspects of its rules as they relate to potential combinations involving non-U.S. carriers.

First, the Board's rules should explicitly acknowledge the extensive relationships among all aspects of the North American rail network by requiring, in the case of a proposed combination involving a carrier within the Board's jurisdiction that has foreign operations, that applicants submit with their application the same information for the foreign service as would be required if the participating carriers operated wholly within the United States. The Board cannot effectively carry out its obligation to evaluate whether a proposed Class I combination is in the national public interest unless it is able to evaluate all aspects of a transaction that affect the United States.

Because of the network characteristics of the railroad industry, changes brought about by a combination that directly affect one part of a railroad system can have significant indirect effects on other parts of the system or, indeed, on the entire North American rail network. This interrelationship was borne out clearly in connection with UP's 1997-1998 service difficulties, when congestion in the Houston area led "to a lengthy and damaging service breakdown dramatically affecting rail transport throughout the West."[11]

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[11] Finance Docket No. 32760 (Sub-No. 26), UP/SP Houston/Gulf Coast Oversight, Decision No. 10, served Dec. 21, 1998, p. 6.

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36873

UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY
– CONTROL –
NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY

EXHIBIT 5

***MAJOR RAIL CONSOLIDATION PROCEDURES*, STB EX PARTE NO. 582 (SUB-NO. 1)**
COMMENTS OF NS IN RESPONSE TO ADVANCE NOTICE OF PROPOSED RULEMAKING,
(FILED MAY 16, 2000)
(EXCERPTS)

198601

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF NORFOLK SOUTHERN IN RESPONSE TO ADVANCE NOTICE OF PROPOSED RULEMAKING

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DATED: May 16, 2000

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF NORFOLK SOUTHERN IN RESPONSE TO ADVANCE NOTICE OF PROPOSED RULEMAKING

Pursuant to the Board's Advance Notice of Proposed Rulemaking ("ANPR"), served March 31, 2000, Norfolk Southern Corporation and Norfolk Southern Railway Company (jointly, "NS" or "Norfolk Southern") respectfully submit these comments on the issue of proposed modifications to the Board's policies and rules governing proposed major rail consolidation transactions.[1] These comments are supported by the attached Verified Statement of James W. McClellan, Senior Vice President of Planning for Norfolk Southern.

INTRODUCTION AND SUMMARY

NS welcomes this opportunity to present its views regarding possible changes in the policies, standards and procedures under which the Board would assess all future major rail mergers for consistency with the "public interest." *See* 49 U.S.C. § 11324(c). Railroad mergers have played an important role in improving the financial health of the rail industry, fostering sound conditions for capital investment in needed rail infrastructure and making possible better and more competitive transportation service at lower cost to shippers. As the record of the recent hearings

[1] In places, NS uses the term "merger" as a shorthand reference to all mergers, consolidations, acquisitions of control and other combinations involving two or more Class I rail carriers coming within the prior-approval requirements of 49 U.S.C. §§ 11321-11326.

in Ex Parte 582 makes clear, however, it is both appropriate and necessary that the Board now pause and take a fresh look at railroad merger policy and its impact on the future structure and health of the rail industry. This reassessment is particularly opportune in light of the changing structure of the North American rail system, the prospect of another, probably final, round of major consolidations creating two large, U.S. transcontinental railroad systems, and the serious service disruptions that have attended recent rail consolidations.[2]

Norfolk Southern believes that, in order effectively to address the current conditions and challenges facing the U.S. railroad industry, a revised merger policy for major rail combinations should include the following key elements:

- **Raising the Bar** -- In light of the size and balanced structure of the major rail systems today and increased concern whether additional consolidation will deliver the same level of public benefits as those achieved from previous consolidations, it is appropriate for the Board to impose a higher threshold for approval of major rail consolidation proposals. The Board should establish as a general policy that it will approve major rail consolidation proposals only when the applicant carriers can persuasively demonstrate that the proposed transaction will generate net public benefits that are tangible, significant and likely.

- **Improving Rail Service** -- The disappointing service record of the rail industry, including the service disruptions that have occurred during the implementation of recent major rail consolidations, point to the need to give much greater emphasis to the effects of a proposed major rail consolidation on the quality of service to shippers, during both the short-term post-merger implementation period and beyond. It is widely acknowledged, and NS agrees, that the railroads as a group need to improve the service they provide to their customers. The Board's revised merger guidelines should incorporate this policy objective by requiring merger

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[2] As Norfolk Southern's CEO, David Goode, testified during the recent hearings in Ex Parte 582, any major railroad consolidation proposal (such as the proposed BNSF/CN combination) would likely require prompt strategic responses by other railroads, thereby triggering in relatively short order another round of responsive major rail consolidation transactions. 3/7/00 Tr. 191-92, 196-97.

applicants to demonstrate that a proposed major rail consolidation will materially improve service.

- **Promoting Infrastructure, Capacity and Investment** -- Closely related to the issue of service is the imperative need for the Board to foster sound conditions for the railroads to maintain, expand and adjust the capacity of the rail network through adequate capital investment in the rail infrastructure constituting their core networks. Without adequate capital investment and expansion of capacity at the correct locations, the quality (even existence) of rail service over the longer term will be threatened. In reviewing a proposed major rail consolidation, therefore, the Board should examine the effects of the transaction on infrastructure, core capacity and investment, giving significant weight to transactions that will promote infrastructure investment and expansion of capacity and scrutinizing the applicants' capital investment plans. At the same time, the Board should assess whether a requested condition (to address claimed competitive harm or otherwise) would unreasonably diminish the railroads' incentive or ability to make needed capital investments.

- **Scrutinizing Claimed Merger Benefits** -- Consistent with the general approach of "raising the bar" to approval of major rail consolidations, the Board should give greater scrutiny to claimed merger benefits, and require that there be significant net public benefits before the Board will approve a proposed transaction. Recent changes in the evolving structure of the rail industry have raised concerns that some types of benefits previously relied on to justify a merger may in fact be achievable today by means short of formal merger (including inter-carrier alliance or marketing agreements). To address these concerns, the Board should apply more rigorously its existing policy that benefits achievable other than through formal merger or consolidation should not be considered as merger-related benefits in the public interest calculus.

- **Preserving Effective Rail-to-Rail Competition** -- The Board should continue and scrupulously apply its policy of imposing conditions to ensure that major rail consolidations will not result in a loss of direct rail competition for particular shippers. The Board should codify recent practice in dealing with so-called "2-1" shippers by requiring that, absent unusual circumstances, applicants proposing a major rail consolidation should present the Board with a plan to ensure that shippers whose facilities are directly served by two railroads prior to the proposed transaction will not be left with only one serving railroad following the transaction. Whether a merger-related reduction from three to two in the number of railroads serving a particular facility should be considered a transaction-related

competitive harm warranting relief should be an issue considered in individual cases based on the specific evidentiary record presented. Other competitive-impact issues, including attempted rebuttal of the "one-lump" doctrine, should similarly be open to evidentiary examination in individual proceedings.

- **Maintaining Efficient Gateways** -- As the railroad industry and shipping public face the prospect of transcontinental rail mergers that may leave the U.S. with only two large coast-to-coast systems, the issue of maintaining major gateways -- particularly at the traditional Midwest and Mississippi River interchanges (*i.e.*, Chicago, Kansas City, St. Louis, Memphis and New Orleans) -- has received renewed attention. In order to address these legitimate concerns while safeguarding against the re-introduction of the disastrous inefficiencies experienced with the now discredited *DT&I* gateway protective conditions of the past, NS proposes that major rail consolidation applicants be required to keep open certain efficient gateways used today for significant freight traffic flows. This goal could be accomplished by requiring that railroad applicants commit to establish, upon request by exclusively served rail shippers that made substantial pre-merger use of designated major connections with other carriers, common carrier or contract rates for interline service via the designated gateways in conjunction with another available railroad capable of moving the shipper's traffic beyond the gateway.

- **Facilitating Private Sector Resolution of Disputes** -- The Board should continue its practice of encouraging private sector resolution of disputes involving railroad services and operations, and minimizing regulatory intervention whenever possible. For this reason, the Board should not adopt new policies that would undermine the significant progress that the railroad industry has already made in addressing the concerns of rail labor over labor contract override issues and of short-line and regional railroads over "paper barriers" and service issues.

The purpose and proper focus of this rulemaking proceeding are to develop new policies and rules for assessing the effects of proposed major rail consolidations. It should not be used as a vehicle for effectuating fundamental changes in the economic regulation of railroad rates and services -- issues that go well beyond the subject of railroad mergers (and their effects) and implicate broader policy issues that are more appropriately addressed (if at all) by Congress. In