`

NGFA-3

310608

ENTERED
Office of Chief Counsel
December 29, 2025
Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36783

UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY

-CONTROL-

NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY CORPORATION

COMMENTS ON COMPLETENESS OF APPLICATION

The National Grain and Feed Association ("NGFA") hereby provides its comments in response to the Decision served in this proceeding on December 19, 2025, which established December 29, 2025 as the deadline for parties to comment on whether the Application filed by Union Pacific Corporation, Union Pacific Railroad Company, Norfolk Southern Corporation, and Norfolk Southern Railway Company ("Applicants") contains the information required in 49 C.F.R. part 1180. Given the Application's filing date several business days before Christmas Eve, NGFA does not represent that it has conducted a thorough review of every one of the nearly 7,000 pages of the Application to identify every area in which it might be incomplete. However, based on its review to date, the NGFA asserts that the Application does not contain all of the information required by 49 C.F.R. part 1180, and that the Surface Transportation Board ("Board" or "STB")

should require Applicants to supplement the Application with certain additional information required by several critical aspects of the applicable regulations before it is accepted as complete.

I. Identity and Interest of NGFA

The NGFA, established in 1896, consists of grain, feed, processing, exporting and other grain-related companies that operate facilities handling U.S. grains and oilseeds. Its membership includes grain elevators; feed and feed ingredient manufacturers; biofuels companies; grain and oilseed processors and millers; exporters; livestock and poultry integrators; and associated firms that operate over 8000 facilities providing goods and services to the nation's grain, feed and processing industry. NGFA's membership includes cooperatives and private companies employing 175,000 Americans and supporting over 1.16 million associated jobs nationwide with an annual economic impact of $401.7 billion.

II. Comments on Completeness of Application

The *Major Rail Consolidation Procedures* promulgated by the Board in 2001 in Ex Parte No. 582 (Sub-No. 1) ("*2001 Rules*") codified several new merger policies that the Board would require future merger applicants to specifically address in their merger application to avoid further reductions to intermodal and intramodal competition, and to prevent the re-occurrence of the significant service failures that had occurred in the major railroad mergers that immediately preceded the *2001 Rules.* The Application falls short of the letter and spirit of the *2001 Rules* on these two critical subjects.

A. The Application's Provisions Concerning Enhanced Competition are Deficient

The *2001 Rules* are very clear that a major merger application must contain specific and detailed information about how the merger applicants will not only preserve existing competition

`

but also enhance it. Specifically, under 49 C.F.R. §1180.1(c):

> Although further consolidation of the few remaining Class I carriers could result in efficiency gains and improved service, the Board believes 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. Additional consolidations could also result in service disruptions during the system integration period. Accordingly, to assure a balance in favor of the public interest, merger applications should include provisions for enhanced competition . . .

While the Board specifically declined the invitations of stakeholders to define the term "enhanced competition," it nevertheless took pains to set out in the *2001 Rules* its expectations of the measures it expected applicants to consider and address when meeting this aspect of the rules. For example, the Board advised that:

> [c]ompetition can be enhanced in many ways. The focus of such a plan could be placed on enhancing intramodal (rail-to-rail) competition, for example, by the granting of trackage rights, the establishment of shared or joint access areas, the removal of "paper" and "steel" barriers, and other techniques that would enhance railroad-to-railroad competition.

2001 Rules at 17. The Board further advised that:

> [o]ur new rules reflect an intention on our part to offset, through conditions for competitive enhancements, those merger-related harms that cannot be directly or effectively mitigated. Such competitive enhancements could include, but would not be limited to, reciprocal switching arrangements, trackage rights, or elimination of 'paper barriers' on interchange by shortline carriers.

Id.

Finally, while the Board stated above that the emphasis should be on enhancing rail-to-rail competition, it also stated "In short, in any future consolidation cases, we will strive to remedy *every competitive harm that would stem from any proposal that we decide to approve.* We anticipate, however, that, to gain our approval, it likely would be necessary for applicants to offer to offset a difficult-to-remedy loss of competition with competitive enhancements." *Id.* at 20 (emphasis supplied). This statement is a recognition that a major rail consolidation after 2001

`

could cause competitive harm beyond just the loss of rail-to-rail competition and could also include harm to rail shippers, and indeed entire sectors of the United States' economy, through the elimination of markets and destinations for products and services.

The *2001 Rules* accordingly require merger applicants to include a robust and detailed plan for how they expect to enhance competition to address every competitive harm that could result from the merger, not just the loss of rail-to-rail competition. *See also* 49 C.F.R. § 1180.1(c)(2)(i) ("Applicants shall propose remedies to mitigate and offset competitive harms") and (iv) ("To offset harms that would not otherwise be mitigated, applicants should explain how the transaction and conditions they propose would enhance competition."). Moreover, NGFA asserts that the *2001 Rules* require applicants to include in their application a detailed discussion of whether they considered the other means to enhance competition specifically referenced by the Board (trackage rights, reciprocal switching, elimination of paper and steel barriers, construction of transload facilities, establishment of shared or joint access areas, etc.), and if not, why not. And if so, why the applicants rejected them.

In their Application, UP and NS have indicated compliance with the *2001 Rules'* requirement to submit a plan to enhance competition by proposing "a set of practical, targeted commitments designed to preserve and reinforce competition: protections for the three 2-to-1 shipper facilities; continued access through existing gateways; and a Committed Gateway Pricing [CGP] program to extend the merger's benefits to more customers." Application, Vol. 1, page 13. NGFA's review of the Application to date has not revealed any mention of any other proposed means to enhance competition, or of the other specific measures to enhance competition discussed in the *2001 Rules*.[1]

[1] The Application states in several places that the merger in and of itself will enhance competition, *see, e.g.*, Application, Vol. 1, page 13, 21. However, such representations should not

`

As to the foregoing three "commitments," only the CGP can be and is presented as a new proposal to enhance competition (*see* Application Vol. 1, page 15). This is because protecting 2-to-1 shipper facilities and preserving existing gateways fall into the category of preserving competition, not enhancing it. Whether the significantly restricted, qualified, and time limited CGP proposal actually enhances competition in compliance with the *2001 Rules* and the public interest remains to be seen. However, the presentation of such a spare discussion in the Application of the potential competitive harms caused by the merger, combined with Applicants' silence on all the measures recommended by the Board to enhance competition, are deficient under both the letter and spirit of the *2001 Rules*. The regulations instead require the Application to include a robust discussion of the broad potential competitive harms the merger may cause, and a plan to not only preserve existing competition but to enhance it moving forward should the merger be approved. The discussion should include an explanation of what measures to enhance competition were considered and why they were rejected, in particular the many potential measures specifically cited by the Board that could meet the new regulatory requirements. The Board should not permit the *2001 Rules* to allow merger applicants to include only a minimal discussion of these issues in their Application and put the onus on affected parties and the Board to completely identify and develop them further.

B. <u>The Service Assurance Plan is Deficient</u>

The Applicant's proposed Service Assurance Plan is also deficient in that it (1) fails to comply with the regulations' requirement for a process to compensate shippers for service failures, and (2) provides little information on back-up or contingency plans that would involve other rail carriers. The intent and policy purpose of the Service Assurance Plan provisions of the

---

be considered to be a "plan" to enhance competition required to be part of the Application as the *2001 Rules* require.

`

2001 Rules are clear: the Board expected service disruptions would occur in the next major merger and it was not going to be satisfied with promises from applicants about the benefits of a merger to the public without concrete consequences for the failure of such promises to come true.

The *2001 Rules* state "To ensure that applicants have no incentive to exaggerate [the] projected benefits to the public, the Board expects applicants to propose additional measures that the Board might take if the anticipated public benefits fail to materialize in a timely manner." Accordingly, Applicants must submit a precise, detailed Service Assurance Plan that provides the Board and industry stakeholders in advance with a specific standards and processes by which the Applicants can be held to account when the inevitable post-merger service disruptions occur.

1. The Application does not Contain a Commitment to Arbitration of Service Claims that Complies with the *2001 Rules*

The *2001 Rules* "strongly encourage[]" applicants to make a commitment to submit all claims of service-related service failures to arbitration. *2001 Rules* at 41. They also urge applicants to devise an arbitration program that identifies "in advance levels of service failure that would be construed as a failure to provide common carrier service and to stipulate a system for compensating shippers that are harmed by such failures." *Id*. at 41-42. As explained by the Board, "with those standards in place, these disputes could be readily handled by an arbitrator if an affected shipper wishes to utilize such arbitration procedures." *Id.* Thus, the *2001 Rules* specifically contemplate that Applicants will propose an objective, easily administered dispute resolution process that permits payment of compensation to shippers for service failures to be easily calculated and payment "readily handled." Such a process dovetails with the extensive benchmarking requirements of the *2001 Rules*.

While the Application contains a proposal for submitting service claims to arbitration, the proposal falls short of a system that enables shippers to be compensated for the Applicants' failure

`

to meet pre-established and agreed-upon service levels. On the contrary, the Application proposes a vague and onerous "standard for relief" that requires a customer to incur the costs and other resources to demonstrate "(a) it suffered a substantial deterioration in service that was not cured by the railroad prior to the commencement of arbitration, (b) that merger implementation was the proximate cause of that substantial deterioration in service, and (c) that the substantial deterioration in service caused direct damages to the customer." *See* Volume 2, Appendix B, page 1021. Moreover, the proposal appears to further violate the 2001 Rules by eliminating any compensation for service failures if the merged railroad resumes providing service in the 30-day period after notice of arbitration is provided. *Id.* The Applicants should be directed to redraft and resubmit this aspect of the Application to comply with the letter and spirit of the *2001 Rules*.

2. **The Application is Devoid of Specifics on How Applicants Would Utilize Other Railroads During Post-Merger Disruptions**

The *2001 Rules* contain numerous provisions addressing the Board's desire that the applicant's Service Assurance Plan must "identify[] the precise steps they would take to ensure adequate service and to provide for improved service." §1180.1(h). These steps include an explanation of not *if*, but "*how* they would cooperate with other carriers in overcoming serious service disruptions on their lines during the transitional period and afterwards." §1180.1(c)(2)(iii)(emphasis supplied). However, the Application devotes only two paragraphs to this critical issue that together set forth only generic statements that the Applicants will "work with other carriers," and to "continue to seek cooperation when the combined company needs assistance . . ." to overcome serious service disruptions. Application, Vol. 2. Page 922. There is no explanation of, let alone any description of, "precise steps," that set forth specifically *how* the Applicants will utilize other railroads to help them overcome serious service disruptions post-merger "and afterwards." Such additional details are necessary because the *2001 Rules* require it,

`

but also because the process of how the cooperation of other railroads would be sought and executed is also not one-size-fits-all but will vary according to where such disruptions occur on the combined system and what railroads are available to provide alternative service.

The Application's generic promises that the Applicants will work with other railroads should service disruptions occur do not fulfill the requirements of the *2001 Rules*, and the Applicants should be required to amend their Application to provide a more fulsome discussion that meets the requirements of the 2001 Rules.

III. Conclusion

In summary, the NGFA submits that the Application is incomplete in at least the several areas discussed in these Comments and accordingly asserts that the Board should not accept the Application as complete until sufficient additional information on these topics is submitted in accordance with the *2001 Rules*.

Respectfully submitted,

/ss/ Thomas W. Wilcox
Thomas W. Wilcox
Law Office of Thomas W. Wilcox, LLC
1629 K. Street, NW, Suite 300
Washington D.C. 20006
(202) 508-1065
tom@twilcoxlaw.com

Counsel for the National Grain and Feed Association

December 29, 2025

`

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of December, 2025 a copy of the foregoing Comments were served on all parties of record on the service list for this proceeding by electronic mail.

s/ Thomas W. Wilcox

THOMAS W. WILCOX