STB raises caution flags on potential Canadian Pacific acquisition of Norfolk Southern Railway

By Randy Gordon, President

In a Jan. 7 letter responding to questions posed on Dec. 22 by the House Judiciary Committee, the federal Surface Transportation Board (STB) raised several caution flags related to a potential acquisition of the Norfolk Southern Railway (NS) by the Canadian Pacific Railway (CP).

While prefacing its response with a statement that it “must exercise caution to avoid prejudging issues” that could arise if a merger application ultimately is submitted to the agency, the STB said that under its current merger rules adopted in 2001, the merger applicants are required to show that a proposed merger is in the public interest “by demonstrating that public benefits, such as improved service and enhanced competition, outweigh potential negative effects, such as potential service disruptions and harm that cannot be mitigated.” The agency further said its merger rules require the applicants to address whether the claimed benefits – the CP has asserted benefits of a potential CP-NS deal include single line service associated with an end-to-end merger – “cannot be achieved by means other than a merger.”

The STB statement also said that since no proceedings currently are underway to alter its 2001 merger rules, those rules most likely would be used to judge a CP acquisition of NS, including consideration of whether such a transaction improves service and enhances competition.
Importantly, the STB also said its merger rules direct the agency to consider likely future transactions that a CP-NS merger could trigger, and the “downstream impacts” such a transaction would have on the structure and further consolidation of the railroad industry. The agency noted that its merger rules require the “applicants…(to) initiate a commentary, to which other parties could respond, that would give us (STB) the information we need to rule on what could likely be the first step in an end-game situation in which only two or three competing transcontinental carriers would remain in North America.” The STB said it would consider how the applicants and other interested parties address how potential problems that the resulting structure of the rail industry could pose to “service, efficiency and competition….”

Finally, the STB letter noted it has not previously approved the type of “voting trust” among Class I railroads now reportedly being considered by CP, in which it would place CP into a voting trust and assign its current chairman and chief executive officer, Hunter Harrison, to manage the rail company that is to be acquired (in this case, the NS) while the transaction still is under regulatory consideration. The STB response cites three previous major transactions that have involved, to some degree, proposed management swaps – the Interstate Commerce Commission’s consideration of the 1983 proposed merger between the Southern Pacific Transportation Co., and Atchison, Topeka & Santa Fe Railway, in which the ICC expressed “deep reservations” about the management trust and imposed numerous conditions; the 1994 proposed acquisition of the Kansas City Southern Railway by the Illinois Central Railroad, in which the ICC “took the then-rare step of initiating a formal review process and seeking public comments”; and the 1998 proposed merger involving the Canadian National Railway and Illinois Central, in which the STB did not address the proposed management shift.

The STB cautioned that the STB’s 2001 merger rules create a change in its policy regarding voting trusts in major mergers, in that the agency now will “take a much more cautious approach regarding voting trusts….” The STB response states that it now “is required to conduct a more formal review of such voting trusts,” which includes an opportunity for public input, and a determination that the voting trust is consistent with the public interest.

“Therefore, should CP pursue a voting trust arrangement with NS in connection with a request for merger approval, the (STB) would consider issues related both to unlawful preapproval and to the public interest,” the STB said.

Meanwhile, the STB has received correspondence from several congressional delegations and individual members of Congress expressing concerns about a potential CP-NS merger:

- Ten members of the Illinois congressional delegation, led by Sen. Dick Durbin, D-Ill., expressed concerns in a Dec. 14 letter over the implications of granting the CP majority control of the Chicago terminal gateway, and how it might route trains through Chicago and other regions. The group asked that the STB carefully review any plans submitted to the agency, and assess the potential negative impact on the Chicago freight network, as well as the economic impacts on Illinois shipments.
The ranking member of the House Transportation and Infrastructure Committee, Rep. Peter DeFazio, D-Ore., and the ranking member of the committee’s Subcommittee on Railroads, Pipelines and Hazardous Materials, Rep. Michael Capuano, D-Mass., wrote in a Jan. 6 letter to the STB that they do not believe “this acquisition or hostile takeover, if CP chooses to go in that direction, is in the public interest, nor will it benefit rail shippers, workers and the standards set forth in the (STB’s) 2001 rulemaking on mergers and acquisitions.” The two congressmen continued: “Contrary to CP’s claims that a takeover of NS will increase competition and lead to more efficient operations, further consolidations in the railroad industry will only exacerbate shipper concerns. There are already strong indications that this merger will serve as a catalyst for even more consolidation in the railroad industry, thereby creating a duopoly, leaving shippers with fewer choices, less competition, and prolonged service disruptions.”

Twelve members of the Virginia congressional delegation, including Sens. Tim Kaine and Mark Warner, both D-Va., expressed “profound concern” about the CP proposal in a Dec. 16 letter to the STB.

Sen. Amy Klobuchar, D-Minn., a member of the Senate Commerce, Science and Transportation and Agriculture Committees, wrote on Dec.7 to the STB expressing concern over the impacts such a transaction could have on “concentration of the rail industry.”

NGFA’s Rail Shipper/Receiver Committee and Executive Committee have begun discussions on this important matter.

**Flooding continues on the Mississippi River**

*By Sarah Gonzalez, Director of Communications and Digital Media*

The Mississippi River is cresting in parts of Mississippi and Arkansas this week, after widespread and unseasonal flooding shut down miles of The Big Muddy near St. Louis as well as portions of the Illinois River.

Some grain elevators in high water areas have had to temporarily close, slowing barge traffic carrying grains throughout the region. While these areas are now re-opening, they are operating under safety restrictions, meaning slower and smaller barges will clog traffic going down the Mississippi River. NGFA member companies report that the high-water levels likely will slow barge and vessel loadings for another week or two, and result in congestion of barges and vessels in the Gulf region during that time frame.

Meanwhile, floodwaters are moving downstream along the river, with high water levels expected for some locations in southern states.

The U.S. Army Corps of Engineers opened the Bonnet Carre Spillway on Sunday after heavy rain in the Mississippi Valley – marking the first time the spillway has been opened since 2011 and
the 11th time in history. Surging waters are expected to crest Tuesday in Arkansas City, Arkansas; Wednesday in Greenville, Mississippi; Friday in Vicksburg, Mississippi; and Saturday in Natchez, Mississippi, according to the National Weather Service.

NGFA President Randy Gordon conducted several interviews with various news outlets over the past couple of weeks detailing the consequences of widespread flooding to the grain, feed and processing industry, and pointing out the important role played by the inland waterways system within the U.S. transportation infrastructure.

The wet weather is attributed to El Nino - a weather phenomenon caused when warm water from the western Pacific Ocean flows eastward, sometimes causing catastrophic weather conditions - that is being compared to the 1997-1998 El Nino as the strongest on record.

**AAFCO to address feed safety, regulatory issues during Jan. 18-20 meeting**

**By Dave Fairfield, Vice President of Feed Services**

Industry representatives will join federal and state regulatory officials to examine key animal feed safety and regulatory issues during the upcoming meeting of the Association of American Feed Control Officials (AAFCO) on Jan. 18-20 in Charleston, S.C.

Feed regulatory officials from the Food and Drug Administration (FDA) are scheduled to provide an update on the agency’s on-going implementation of the Food Safety Modernization Act (FSMA). In addition, state feed regulatory officials will consider how to potentially adopt or by reference incorporate the new FSMA-related requirements into their respective state feed laws.

Meanwhile, members of the Food Safety Preventive Controls Alliance will conduct a session to further work on developing training and guidance materials to assist firms in complying with the requirements established by FDA’s new current good manufacturing practice and preventive controls regulations for animal feed and pet food. NGFA Senior Vice President of Feed Services David Fairfield currently serves as chair of the Alliance’s animal feed/pet food-related activities.

AAFCO is the professional organization of federal and state feed regulatory officials, with which the NGFA interacts extensively. Among other things, NGFA feed industry members and NGFA staff serve as non-voting advisers to key AAFCO committees, and will participate actively in the upcoming meeting.

**Other Issues:** Other significant issues on the agenda during the upcoming AAFCO meeting include:

- **Inspections:** The Inspection and Sampling Committee will discuss a pilot project intended to assist feed regulatory officials in developing inspection schedules that are based upon facility risk.

- **Training, Certification of Feed Inspectors:** The Education and Training Committee plans to continue work on implementing proficiency training and certification of inspectors that meet the requirements of FDA’s Integrated National Food Safety System initiative. It is anticipated that state inspectors at some point in the future will need such certification before conducting inspections on behalf of FDA.
• **Feed Ingredient Definitions and Approvals:** The AAFCO membership will vote to move from tentative to official ingredient definitions for: 1) distillers oil, feed grade; 2) bio-diesel derived glycerin; and 3) various pulse products. In addition, the AAFCO membership will vote on whether to accept new tentative definitions for: 1) dehydrated alfalfa meal or pellets and direct dehydrated alfalfa meal or pellets; 2) poultry by-products, poultry by-product meal, poultry, and poultry meal; and 3) fat product feed grade. The Ingredient Definition Committee also will consider modifying the feed term for “feed grade” and establishing new feed terms for “human grade” and “suitable for use in animal feed.”

• **Pet Food Issues:** The Pet Food Committee will consider, among other things, human food grade claims and carbohydrate claims for pet food products.

• **Feed Contaminants:** The Feed and Feed Ingredient Manufacturing Committee will continue its work to update the guidelines for contaminant levels permitted in mineral feed ingredients that are published in the AAFCO *Official Publication*.

The NGFA will report significant outcomes from the AAFCO meeting in the Jan. 26 edition of the *NGFA Newsletter*.

**What is your Congress up to during the week of Jan. 11?**

By Bobby Frederick, Director of Legislative Affairs and Public Policy

Welcome to the second session of the 114th Congress. Before outlining what’s in store this week and beyond, it’s worth recapping the policies Congress and the president achieved this past year important to the grain and feed industry.

**Signed into law in 2015:** Reauthorization of the U.S. Grain Standards Act; Trade Promotion Authority; Surface Transportation Board Reauthorization; a five-year, $305 billion highway bill; certainty on tax extenders; a country-of-origin labeling law fix; and prevention of $3 billion in crop insurance cuts.

While there can always be room for improvement, the policy progress in 2015 shows renewed energy and drive to get policies across the finish line on Capitol Hill. This is likely due to a combination of legal deadlines, one-party control in Congress, congressional leadership changes and an administration in its final two years.

**What to watch for in 2016:** Conventional wisdom may say that nothing gets done in an election year, but Congress will convene for at least 28 weeks this year and there are many opportunities to convey NGFA policy interests and perhaps enact new policies into law. Also, do not underestimate the potential to get things done during the lame-duck session in November and December. Tax rate changes and revenue investment in the Inland Waterways Trust Fund were achieved in the past two lame-duck sessions.

**Specific Policy Areas:**

**Biotech labeling:** Congress is mulling over policy proposals that would provide federal pre-emption over mandatory state GMO labeling laws as the July implementation date for the Vermont’s labeling law approaches. The divisive debate over labeling of biotech foods is still a
top priority for agricultural policy makers in both the House and Senate and for USDA. Agriculture Secretary Tom Vilsack will be hosting a meeting this week with stakeholders in an effort to reach a consensus.

Meanwhile, Campbell Soup Co. announced it will label all of its products made with genetic engineering and expressed its support for the federal government to mandate national GMO labeling. While this marks a major departure from the rest of the conventional food industry, the company emphasized that it will continue to use ingredients made through biotechnology and is confident in their safety.

**Water Infrastructure:** House Transportation and Infrastructure Chairman Bill Shuster, R-Pa., and Water Subcommittee Chairman Bob Gibbs, R-Ohio, are pushing to complete a Water Resources and Development bill (WRRDA) every two years. They will have the opportunity to continue highlighting water infrastructure issues and expediting processes with the Army Corps of Engineers when their committee starts work on WRRDA early this year.

**Trade:** Congress granted the president “fast track” trade approval, or Trade Promotion Authority, last year and now all eyes are on whether the Trans Pacific Partnership accord can be approved. In addition, negotiations will proceed regarding trade with Cuba and the Transatlantic Trade and Investment Partnership with the European Union.

**CFTC Reauthorization:** The House passed its version of legislation reauthorizing the Commodity Futures Trading Commission last June, and there is talk that this could receive a strong look in the Senate. At issue are funding levels and scrutiny of Dodd-Frank provisions.

**Child Nutrition Reauthorization:** Bipartisan consensus and movement are expected.

**Farm Bill:** It’s never too early to strategize for the next farm bill, right? Watch for the House and Senate to continue conducting hearings and discussions on the future of American farm policy.

**This Week:** The House is in session this week and will focus on Iran sanctions and vote on a joint resolution (S J Res 22) disapproving of the EPA’s "waters of the United States” rule.

The Senate is in session and will focus on judicial nominations and start work on legislation that would audit the Federal Reserve. The President gives his final State-of-the-Union address tonight.

**NEW! Trivia**

Please e-mail your answer to bfrederick@ngfa.org

- Which president gave the longest (in words) State of the Union address? Which president gave the shortest (in words) State of the Union Address?
- Bonus: Why WON’T there be a State of the Union address next year (2017)?
NGFA’s 2016-17 Committee Apprentice Program open for applicants

By Todd Kemp, Vice President of Marketing and Treasurer

NGFA active-member firms are invited to nominate employees to participate in the 2016-17 “NGFA Committee Apprentice Program” designed to help develop future industry and association leaders.

The program identifies early-career and newer employees of NGFA-member firms to serve a one-year apprenticeship on an NGFA committee. The program’s dual goals are to engage early-career/newer employees from various levels of NGFA-member firms and to assist them in developing expertise in committee issues and policy matters important to the industry. The program primarily focuses on candidates with two to three years – but less than five years – of experience in the grain, feed and processing industry.

A limited number of apprentice positions are available – generally, one to three per committee, based on committee size. Apprentices are expected to participate fully in all committee activities, including meetings, conference calls and email exchanges. Apprentices are encouraged to learn the committee’s issues thoroughly and to participate actively in discussions. However, apprentices do not have a vote on committee matters.

As with all committee members, funding of travel to committee meetings and other expenses incurred during participation in the program are the responsibility of the individual or company. Generally, most committees meet twice annually including once during the NGFA annual convention, and program participants are invited to a two-day “experience” in Washington, D.C., focused on NGFA’s representation role for the industry and how the association interacts with Congress, regulatory agencies and other organizations.

Prospective apprentices are required to complete a short application with an explanation of their experience level and interest in a particular NGFA committee. In addition, applicants submit a brief resume or biographical statement and a short letter of recommendation from a supervisor or manager at their NGFA-member employer. Selections are made based on qualifications and with an eye toward diversity among different types and sizes of companies.

The deadline for applications is Jan. 22. Following a brief screening and selection process involving NGFA senior staff and NGFA committee chairs, successful candidates will be invited to participate beginning March 13 at the NGFA convention in San Diego. The program year will run through the 2017 NGFA annual convention in New Orleans.