`

NGFA-5

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36873

UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY

-CONTROL-

NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY CORPORATION

COMMENTS ON APPLICANTS' SECOND RESPONSE TO DECISION NO. 21

The National Grain and Feed Association ("NGFA") hereby provides these brief comments in response to Applicants' Second Response to Decision No. 21, filed July 27, 2026 ("Second Response"). These comments follow submissions NGFA previously made in this proceeding in response to the completeness of the original Application filed on December 19, 2025, and the Amended Application filed on April 30, 2026. In its prior submissions NGFA expressed its view that the original Application, and subsequently the Amended Application, both lacked critical information required by several aspects of the merger regulations promulgated by the Board in 2001 in Docket No. Ex Parte No. 582 (Sub-No. 1) *Major Rail Consolidation Procedures* ("*2001 Rules*") in order to demonstrate the proposed merger was in the public interest. In its comments on the Amended Application, NGFA urged the Board to reject it.

`

In these comments, NGFA states again that, based on its review of the Second Response, the additional information and modifications supplied by Applicants in the Second Response still fall far short of the policies and directives of the *2001 Rules*. Indeed, in some cases the answers supplied by Applicants to the Board's questions in Decision No. 21 reinforce the prior reasons why their proposed transaction would not be in the public interest. As such, NGFA opposes the proposed merger and concurs with other parties of record who have recently asked the Board to deny the Amended Application.

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 Second Response

As explained by NGFA in its previous submissions, the *2001 Rules* codified several substantive new merger policies that the Board would require future merger applicants to recognize and specifically address in their merger application to avoid further reductions to intermodal and intramodal competition in the railroad industry, and to prevent the re-occurrence of the significant, if not catastrophic, railroad service failures that had occurred in the major railroad mergers that

`

immediately preceded the *2001 Rules.*

A. <u>The Second Response Confirms the Application Contains no Measures to Enhance Intramodal Competition</u>

The *2001 Rules* are 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 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. Primary among the measures was the enhancement of rail-to-rail competition. 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, the Board favored the fact that creating or enhancing intramodal competition permitted

`

competitive gains to "be realized immediately," and the Board assumed such benefits would include "passing on the beneficial results of their merger efficiencies to the shipping public." *Id*. at 17, 12-13. Consequently, the Board stated that "provisions for competitive enhancement will be given substantial weight as merger benefits and are likely to be extremely important to us in determining whether to approve a particular application." *Id*. at 17.

In the Second Response the Applicants have adopted a definition of "enhanced competition" that does not mention intramodal, rail-to-rail competition. Instead, they define it as requiring merger applicants to address "competitive harms such as the loss of geographic competition" and "transitional service disruptions that might temporarily negate shipper benefits." Second Response at 13-14, *citing* 49 C.F.R. §§ 1180.1(c) and (d). The exclusion of rail-to-rail competition from the definition of enhanced competition should prevent a *prima facie* showing by itself, but NGFA adds that the sole proposed means to enhance competition under the Applicants' definition – Committed Gateway Pricing – is not conceptually or actually a means to enhance competition between railroads. Rather, it is a proposed proportional rate formula that would, at most, temporarily preserve competitive options for a very limited subset of shippers, primarily certain grain shippers. It does not create new competition, enhance existing competition, or adequately address the broader competitive harms that would result from the transaction.

B. <u>The Second Response Affirms that the Service Assurance Plan is Facially Deficient</u>

In both its prior filings NGFA expressed its view that the Amended Application's proposed Service Assurance Plan was also deficient. This remains the case. The *2001 Rules* state "[t]o 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." 49 C.F.R. § 1180.1(c)(1).

`

Accordingly, Applicants must submit a precise, detailed Service Assurance Plan that provides the Board and industry stakeholders in advance with a written plan to which the Applicants can be held to account when any post-merger service disruptions occur. Specifically, the Service Assurance Plan must identify "precise steps [applicants] would take to ensure adequate service, and to provide for improved service." *Id*. at §1180.1(h)(1). The *2001 Rules* also require the Applicants to provide a detailed description of where the potential service disruptions might be. Further, in order to establish a baseline to which post-merger service can be compared "applicants will be required to provide service benchmarks, describe the extent to which they have entered into any arrangements with shippers and shipper groups to compensate for service failures, and establish contingency plans that would be able to mitigate any unanticipated service disruptions." *Id.*

The intent and policy purpose of the Service Assurance Plan provisions of the *2001 Rules* is clear: the Board expected service disruptions from 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 pre-established service benchmarks and concrete, objectively determined consequences for the failure of such promises to come true.

1. The Applicants' Proposals for Resolving Service Disputes Remain Directly Contrary to the *2001 Rules*

As envisioned by the Board, an arbitration system that complies with the *2001 Rules* should "identify in advance levels of service failure that would be construed as a failure to provide common carrier service and … stipulate a system for compensating shippers that are harmed by such failures." *2002 Rules* at 41-42. Further, "[w]ith those service levels 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* contemplate an objective, "readily handled" dispute

`

resolution process that enables compensation to shippers for service failures to be easily calculated or stipulated.

In its prior comments NGFA pointed out how the Applicants' proposal for arbitrating service disruption liability fell short of the Board's expectations and the *2001 Rules*. Specifically, rather than propose a system whereby service claims to arbitration could be "readily handled" and compensation to shippers to be determined by measuring post-merger service against pre-established service levels, the Amended Application proposed to limit arbitration to questions of "whether the Carrier failed to provide reasonable service due to merger implementation problems during the statute of limitations period." Amended Application, Vol. 2, page 1141. The deterioration of post-merger rail service to a customer would be considered "reasonable" until it reached the level of "substantial deterioration," which the customer would then bear the heavy evidentiary burden to demonstrate before obtaining any relief. *Id.* Additionally, the Applicants' proposal would eliminate any compensation to a shipper for damages it incurs from "substantially deteriorated" rail service post-merger if the merged railroad merely "cures" the service issue within the 30-day period after notice of arbitration is provided. What level of deteriorated service would be considered a "cure" was not explained, but it would be "absolute defense" to liability for damages previously incurred which triggered the arbitration in the first instance.

In the Second Response, the Applicants responded to the Board's requests to clarify the arbitration proposal by defining "substantial deterioration in service" to be based not on pre-merger service benchmarks, but on the standard for emergency service in 49 C.F.R. § 1147.1(a); *id.* § 1146.1(a), which would mean "serious, localized railroad service problems," not "minor service disruptions." Second Response at 121-122. In doing so, the Applicants confirmed that their plan would permit service levels to deteriorate post-merger to a point just shy of "substantial

`

deterioration." Moreover, their proposal to litigate all service disruption disputes in individual adjudications at the Board on unspecified factual evidence instead of a "stipulated system for compensating shippers" or performance benchmarks is directly contrary to the letter and spirit of the *2001 Rules.*

Further, in response to the Board's question of what it would mean to "cure" a service deficiency after a notice of arbitration, the Applicants explained in the Second Response that whether the merged railroad has cured a service issue would necessarily depend on the nature of the service deficiency that gave rise to the claim and whether the carrier has restored service that is "reasonable under the circumstances." *Id*. at 124. This would again call for disputes to be resolved through application of a standard that is not tied to pre-merger service levels, and would also require customers to bear the expense and burden of an individual, fact specific adjudication before the Board to determine what level of service post-merger was "reasonable under the circumstances," again entirely removing pre-merger service benchmarks from the equation. Moreover, the customer would potentially endure "serious . . .service problems" for the duration of the litigation.

In summary, in addition to the other deficiencies outlined in NGFA's prior comments, the Applicants' arbitration proposal does not comply with the *2001 Rules*, rendering the Amended Application materially deficient as to a critical component of the *2001 Rules*.[1]

---

1. NGFA is limiting its comments on the Second Response to the scope of NGFA's prior two submissions. However, NGFA stresses that the Targeted Access Program and Rate ADR Program included in the Second Response also contain many of the same facial deficiencies of the service disruption dispute resolution proposal (renamed Damages ADR Program), including being time-limited, heavily conditioned in favor of Applicants, and again designed to require rail customers to commence and engage in costly and time consuming adjudicatory litigation before the Board to try to obtain relief.

`

III. Conclusion

In summary, NGFA submits that the Second Response does not correct the facial deficiencies of the Application and Amended Application in at least the several areas discussed in these Comments. The result is that for these and other reasons expressed by other parties, the Applicants have failed to present a *prima facie* case that their proposed merger is in the public interest in accordance with 49 C.F.R. §1180.4(c)(8). Accordingly, NGFA opposes the merger as proposed and believes the appropriate remedy at this stage of the process is for the Board to deny the Amended Application.

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

August 13, 2026

`

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 2026 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