ACC-6 / ACD-6 / AFPM-6 / NITL-3 / TFI-6

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

# JOINT SHIPPER ASSOCIATIONS' MOTION FOR SUMMARY DENIAL

Jason D. Tutrone
Karyn A. Booth
Jeffrey O. Moreno
Thompson Hine LLP
1999 K Street, NW, Suite 600
Washington, DC 20036
(202) 336-8800
Jason.Tutrone@ThompsonHine.com
Karyn.Booth@ThompsonHine.com
Jeff.Moreno@ThompsonHine.com

*Counsel for Alliance for Chemical Distribution, American Chemistry Council, American Fuel & Petrochemical Manufacturers, The National Industrial Transportation League, and The Fertilizer Institute*

Dated: August 6, 2026

**TABLE OF CONTENTS**

The Alliance for Chemical Distribution ("ACD"), American Chemistry Council ("ACC"), American Fuel & Petrochemical Manufacturers ("AFPM"), The National Industrial Transportation League ("NITL"), and The Fertilizer Institute ("TFI") (collectively, "Joint Shipper Associations") hereby move the Surface Transportation Board ("STB" or "Board"), pursuant to 49 C.F.R. §§ 1117.1 and 1180.4(c)(8), to deny the Amended Railroad Control Application filed by Applicants[1] on April 30, 2026, as supplemented on July 7 and 27, 2026 (collectively the "Application"), for failure to present a *prima facie* case.

## I. STATEMENT OF INTEREST

Joint Shipper Associations represent rail customers across multiple industries, including chemical, fertilizer, petroleum, and manufacturing, that play crucial roles in the American economy. These customers rely on rail transportation extensively. Together, they ship millions of carloads annually and generate billions of dollars in freight revenue for the Class I railroads.

The proposed merger poses direct and substantial harm to these shippers. Many Joint Shipper Association members operate facilities that are captive to a single railroad and ship products that are primarily, if not entirely, dependent on rail transportation. This merger will deepen that captivity, eliminate what limited competitive options remain, and leave them exposed to service deterioration and rate increases with no recourse.

[1] Applicants are Union Pacific Corporation and Union Pacific Railroad Company (collectively "UP"), and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively "NS").

Joint Shipper Associations' members will bear the consequences of this transaction. They have a vital interest in preserving a competitive freight rail network.

## II. SUMMARY OF ARGUMENT

This merger is not in the public interest and should be denied. The benefits are negligible and the harms are substantial. The Application is replete with unsubstantiated and overstated benefit claims, conclusions presented as facts, analyses that ignore reality, meaningless promises, and inherent contradictions. Conversely, it is bereft of competitive enhancements, meaningful service assurance standards, and effective conditions. In sum, it is a document built on smoke and mirrors that is insufficient to establish a *prima facie* case as required by 49 C.F.R. § 1180.4(c)(8) – *i.e.,* it lacks sufficient evidence for the Board to apply the public interest criteria to this transaction or to support the findings necessary to determine that this transaction is in the public interest.

At a minimum, to establish a *prima facie* case, the Application must contain sufficient facts to enable the Board to rationally apply the public interest criteria at 49 U.S.C. § 11324(b). Through its rules and precedent, the Board assesses the public interest by balancing gains in public benefits – "such as improved service and safety, enhanced competition, and greater economic efficiency" – against "anticompetitive effects, potential service disruptions, or other merger-related harms,"[2] with the ultimate goal of "promot[ing] a competitive, efficient, and reliable national rail system."[3]

In 2001, the Board significantly revised its merger rules (the "2001 Merger Rules") to make future mergers harder to justify by placing a heavier burden on future merger applicants to demonstrate that their transactions meet the public interest standard.[4] It also imposed new requirements and reweighted others.[5] Among the more significant changes were a new focus on enhancing competition and assessing downstream and cumulative effects, the exclusion of benefits that could be obtained by alternative means, a more skeptical "show me" attitude towards benefit claims, and transitional service disruption plans. The 2001 Merger Rules codified the Board's concerns that any future mergers could have transformative, serious, and irremediable consequences for the rail industry, its customers, and the North American rail network.[6]

The Application assumes away all the concerns that underlie the 2001 Merger Rules. What is left is an application that is focused principally upon satisfying the pre-2001 merger rules, while paying lip-service to the current rules that actually apply to this transaction. This failure to seriously and completely address multiple elements of the 2001 Merger Rules leaves the Board without

---

[2] 49 C.F.R. § 1180.1(c).

[3] 49 C.F.R. § 1180.1(b).

[4] *Major Rail Consolidation Procedures*, 5 S.T.B. 539, 546 (2001).

[5] *Id.*

[6] *See id.* at 546-50, 555-59, 579-83.

sufficient facts to balance the public benefits and harms or to make the findings required to determine that this transaction is in the public interest. There are six criteria, in particular, that underscore this failure to present a *prima facie* case.

First, as demonstrated in Part IV.A.1 through 3, the Application does not permit the Board to consider the risk of vertical competitive harm. The Application categorically rejects the very notion underlying the 2001 Merger Rules that an end-to-end, vertical merger in the rail industry can cause competitive harm. It attempts to confine the Board's inquiry to geographic competition and presumes that any concerns over vertical foreclosure are misplaced. The Application does so despite Board precedent holding that vertical foreclosure risks in the rail industry are real; "presumptions" to the contrary – like the Applicants' conclusion as to the entire rail industry – are prohibited; and evidence that a transaction does not present foreclosure risks must be based on the specific facts of the transaction. The Applicants' stance that vertical foreclosure is implausible in the rail industry contradicts both that Board precedent and the Applicants' own position in rail merger proceedings for over two decades. The Applicants never mention or attempt to explain this undeniable fact. Furthermore, the facts of this transaction reveal substantial vertical foreclosure risks caused by the enormous and unprecedented expansion of the Applicants' long-haul opportunities on interline movements and the resulting short hauling of their interline partners – most significantly CSX and BNSF – that increases their costs, weakens them as competitors, and bestows even greater market power upon the Applicants. The Applicants make no effort to consider those facts. In sum, the Application fails to present a *prima facie* case because it: (1) relies upon a prohibited "presumption" that vertical rail mergers are not anticompetitive; (2) fails to present a rational reason for reversing the Board's precedent prohibiting reliance upon such "presumptions;" and (3) otherwise does not consider the obvious foreclosure risks presented by the facts of this transaction.

In addition, as demonstrated in Part IV.A.4., the Applicants concede facts that affirmatively demonstrate the vertical harm that they summarily deny, which constitutes an additional failure to present a *prima facie* case. Their "watershed" theory, which is the centerpiece of their public benefits argument, is that, when the interline carrier "serving the site near the gateway receives only a short-haul of what may be a movement of considerable distance, its share of a competitive rate may be insufficient to warrant its participation even though the total revenue associated with the movement may be remunerative."[7] The Applicants tout their merger as a solution to this problem and count that among the public benefits. But they fail to recognize that their merger only shifts this problem to other railroads – primarily BNSF and CSX – and their customers because UP's extended long haul routes deep into their service territories will leave them with short-distance hauls on interline routes from the new gateways to their customers.

<u>Second,</u> as demonstrated in Part IV.B., the Application is bereft of any enhancements to competition despite admonitions in the 2001 Merger Rules that,

[7] Amended App., Vol. 1, Joint Verified Statement of Kenny Rocker and Claude E. "Ed" Elkins (Rocker/Elkins V.S."), ¶ 66, *quoting Norfolk S. Corp. – Control – Norfolk & W. Ry. Co.*, 366 I.C.C. 173, 195 (1982).

due to "the scale of the transaction that we would be asked to approve in future major rail merger applications, we believe that offering some new or enhanced rail-to-rail competition or other competitive benefits is likely to be *necessary* to resolve substantial difficulties so as to tip the balance in favor of the public interest."[8] Although this transaction is the largest possible end-to-end merger in scope and the 2001 Merger Rules expressed particular concerns over such mergers, the Applicants blithely contend not only that there is no reason for concern, but also that this merger actually is pro-competitive. This contention derives substantially from their categorical assertion that vertical foreclosure is implausible in the rail industry and that the merger itself inherently enhances the Applicants' competitiveness against trucks and will trigger competitive responses from other railroads. Their position ignores the Board's description of competitive enhancements in the 2001 Merger Rules in terms of new intramodal options. It also would render the competitive enhancement requirement superfluous for nearly any vertical merger. That leaves, "Committed Gateway Pricing" ("CGP"), as the Applicants' sole proposal for a merger-specific competitive enhancement. But CGP is not an enhancement at all. Rather, it is a new variation of the types of proportional rate proposals that the Board has rejected in prior mergers as potentially harming competition. Thus, by definition, CGP cannot be an enhancement to competition. The absence of competitive enhancements to create new intramodal competition in the Application

[8] *Major Rail Consolidation Procedures*, 5 S.T.B. at 550 (emphasis added). *See also id*. at 552, 554, 557.

constitutes a failure to establish a *prima facie* case consistent with the 2001 Merger Rules.

Third, as demonstrated in Part IV.C., the Application does not meaningfully address the requirement in the 2001 Merger Rules to "explain how additional Class I mergers would affect the eventual structure of the industry and the public interest" and "discuss the likely impact of such future mergers on the anticipated public benefits of their own merger proposal."[9] After failing to address these questions to the Board's satisfaction in their first two attempts, the Applicants' July 27 supplemental submission in response to Decision No. 21 ("July 27 Supp.") continues to ignore the significant role that vertical foreclosure plays in this assessment, especially the ability of CSX to serve as an effective counterweight to NS for movements in the east and the inevitability of a neutral bottleneck carrier becoming an anachronism. By denying even the potential for vertical foreclosure, the Applicants attempt to avoid discussing the downstream and cumulative effects of such foreclosure on the rail industry as required by the 2001 Merger Rules. This is a failure to present a *prima facie* case because it deprives the Board of the information it needs to make the special findings necessary to apply its legal criteria.

Fourth, as demonstrated in Part IV.D., the 2001 Merger Rules require applicants to identify which of their claimed benefits "are obtainable *only* through a

[9] 49 C.F.R. § 1180.1(i).

merger so that we can fairly weigh them against potential harms."[10] While acknowledging that some of their claimed benefits can be achieved by alternative means, they nevertheless credit the entirety of those benefits as merger specific. This failure to comply with the Board's rule, by definition, is a failure to present a *prima facie* case because it prevents the Board from accurately identifying merger benefits and weighing them against the harms.

Fifth, as part of the heavier burden that the 2001 Merger Rules impose upon merger applicants, the Board cautioned them not to exaggerate their benefit claims and to ensure their claims are "well-documented and reasonable."[11] The Board added that it will "take a more skeptical 'show me' attitude" when evaluating benefit claims.[12] As demonstrated in Part IV.E., a majority of the Applicants' benefit claims depend on truck-to-rail conversions that are poorly documented and rely upon unrealistic or demonstrably wrong assumptions rather than critical analysis. Those failures unquestionably mean that the public benefit claims in the Application are exaggerated. The Applicants' failure to recognize and attempt to account for the deficiencies of those assumptions in their analyses is a *prima facie* failure to comply with the 2001 Merger Rules that prevents the Board from accurately determining the public benefits.

---

[10] *Major Rail Consolidation Procedures*, 559 (emphasis added).

[11] *Id*. at 560.

[12] *Id*. at 549.

Sixth, as demonstrated in Part IV.F., the 2001 Merger Rules require applicants to suggest protocols for handling damage claims related to transitional service disruptions and favors commitments "to submit all such claims to arbitration…"[13] Although the Applicants propose an arbitration plan, that plan excludes exempt and contract traffic. Those restrictions effectively disclaim liability for most transitional service claims because far more traffic is exempt or covered by contracts than tariffs. This is far less than "all" claims as specified in the Rules.

The foregoing is not an exhaustive list of all the deficiencies in the Application, but they are the most impactful deficiencies of the greatest concern to the Joint Shipper Associations. The first deficiency demonstrates that the Application is inconsistent with Board precedent on the competitive harm of vertical mergers and does not justify deviating from it. The second and third deficiencies are derivative of the initial failure to assess vertical harm that further deprives the Board of critical information to apply its merger criteria. The fourth and sixth deficiencies demonstrate outright non-compliance with the 2001 Merger Rules. The fifth deficiency demonstrates the Applicants' multiple failures to present supported and well-documented public benefit projections in the Application. Individually and collectively, these deficiencies demonstrate the Applicants' failure to present a *prima facie* case sufficient to enable the Board to determine whether their transaction is in the public interest.

---

[13] 49 C.F.R. § 1180.1(d).

To be clear, the Joint Shipper Associations oppose this transaction for additional reasons on the merits. This is an unprecedented merger that will have unprecedented negative effects upon rail customers and radically transform the structure of the North American rail industry for the worse. The alleged benefits, as overstated as they are, are mostly associated with truck diversions that are possible, if at all, only for a subset of commodities that already is modal competitive. The members of the Joint Shipper Associations ship a multitude of products that are not modal competitive and, to the extent that trucks are an option, it is only in narrowly defined circumstances. Thus, they and other captive shippers like them will not be beneficiaries. Nor do they find the alleged benefits of new single line service to be compelling and certainly not at the expense of losing competitive options and weakening competitors. Furthermore, the Joint Shipper Association's members remain highly skeptical of the Applicants' claim that there will be no transitional service disruptions. That same promise has been made in every prior major merger proceeding and it has *never* held true. The Applicants' service assurance plan is neither reassuring nor meaningful and their proposed remedies for damages are so constrained that most traffic would not qualify and the Applicants give themselves so many "outs" that it is doubtful that even qualifying traffic would receive any damages.

The merger criteria discussed in this motion are the ones where the Application does not even present a *prima facie* case, warranting a prompt dismissal. The Board generously has afforded the Applicants three opportunities to present an Application that seriously engages with the 2001 Merger Rules. Each time, stakeholders have been required to commit significant resources to review and assess the Applicants' submissions. This becomes increasingly difficult because each submission must be compared and contrasted with all prior submissions. The Applicants have failed at all three attempts, and it is time for the Board to deny the Application rather than require stakeholders to continue expending resources on an Application that still does not meet the Board's threshold requirements. To do otherwise, the Board "would be remiss in allowing the proceedings to continue."[14]

## III. LEGAL STANDARDS

### A. A merger application must present a *prima facie* case.

Pursuant to 49 C.F.R. § 1180.4(c)(8), a merger application "must present a prima facie case." If it fails, the Board summarily denies it.[15] This protects the Board and interested parties from "unnecessary and wasteful" merger proceedings.[16]

Applicants can violate the *prima facie* requirement two ways. First, they can fail to disclose enough facts to, even if construed in their most favorable light, support a finding that their proposed merger is consistent with the public interest.[17]

---

[14] *R.R. Consolidation Procedures Expedited Processing*, 363 I.C.C. 767, 769-70 (1980).

[15] *Railroad Consolidation Procedures,* 363 I.C.C. 767, 770 (1980).

[16] *Id.* at 768.

[17] 49 C.F.R. § 1180.4(c)(8)(i).

At minimum, the facts must allow the Board to fulfill its statutory duties.[18] That includes enabling the Board "rationally to apply" the public-interest criteria at 49 U.S.C. § 11324(b) and under Board precedent.[19] To apply these criteria rationally, the Board must have sufficient facts for findings on each criterion.[20]

Second, they can disclose facts that affirmatively show their proposal harms the public interest.[21]

### B. The Board's 2001 Merger Rules Impose a "Heavier Burden" Reflecting Changed Industry Conditions.

Under 49 U.S.C. § 11324(c), merger applicants must show their proposed transaction is "consistent with the public interest." In 2001, the Board fundamentally revised its merger rules governing that standard to impose a "heavier burden" on merger applicants.[22]

The Board made this shift because its past rules had become "outdated and inadequate to address future major rail merger proposals."[23] Rail consolidation through the 1990s left few Class I railroads, caused significant service disruptions, and eliminated the excess capacity that once justified consolidation.[24] The Board's

---

[18] *Union Pac. R.R.—Control—Chicago & N.W. Holdings Corp.*, 9 I.C.C.2d 939, 950 (1993).

[19] *Id.*; *Rio Grande Indus., Inc.—Purchase & Related Trackage Rights—Soo Line R.R.*, 1990 ICC LEXIS 98, at *8 n.10 (ICC Mar. 30, 1990).

[20] *Id.*; *Union Pac.*, 9 I.C.C.2d at 950.

[21] 49 C.F.R. § 1180.4(c)(8)(ii).

[22] *Major Rail Consolidation Procedures*, 5 S.T.B. 539, 539, 546 (2001).

[23] *Id.* at 545.

[24] *Id.* at 546.

rules focused on greater economic efficiency and improved service as a merger's most likely and significant public-interest benefits, but opportunities for future mergers to produce them had become "limited."[25] Meanwhile, risks had grown. Future mergers present a risk of "significant service disruptions that could be nationwide in scope and would not be easily addressed"[26] and "anticompetitive effects . . . that are increasingly difficult to remedy"[27]. The Board held "substantial concern" that the industry was approaching an "end-game" scenario where future consolidation could leave only two North American transcontinental railroads.[28] In that scenario, the price for a merger's failure to produce an anticipated benefit "would be high."[29]

Against that backdrop, the Board made future mergers harder to justify. It added new elements to its public interest review and re-weighed others.[30] Among the changes, it placed "greater emphasis" on "enhancing competition while ensuring a stable and balanced rail transportation system."[31]

The Board also clarified that it would carefully scrutinize applicants' claims.[32] It adopted a "skeptical, 'show me' attitude toward claims of merger

---

[25] *Id.*

[26] *Id.* at 558.

[27] 49 C.F.R. § 1180.1(c)

[28] *Major Rail Consolidation Procedures*, 5 S.T.B. at 545, 549, 560.

[29] *Id.* at 560.

[30] *Id.* at 552.

[31] *Id.* at 546.

[32] *Id.* at 560

benefits and toward claims that no transitional service problems would occur."[33] Applicants cannot rely on optimistic projections and unrealistic assumptions.[34] They must prove their case with well-documented evidence.[35]

### C. The Heavy Burden Requires Multiple Substantive Showings.

Under the 2001 Merger Rules' heightened standard, "mergers serve the public interest only when substantial and demonstrable gains in important public benefits—such as improved service and safety, enhanced competition, and greater economic efficiency—outweigh any anticompetitive effects, potential service disruptions, or other merger-related harms."[36] To satisfy this standard, applicants must demonstrate the following:[37]

1. **That competitive harms have been offset.** Applicants must show they will "at a minimum preserve competitive and market options."[38] They must also "propose remedies to mitigate and offset competitive harms."[39] These requirements demand that applicants first identify the merger's anticompetitive effects.

---

[33] *Id.* at 549.

[34] *Id.* (cautioning "not to exaggerate" benefit projections).

[35] *See id.* at 560 (stating that the Board will determine whether benefits projections are well-documented and reasonable).

[36] 49 C.F.R. § 1180.1(c).

[37] This list is nonexhaustive.

[38] 49 C.F.R. § 1180.1(c)(2)(i).

[39] *Id.*

2. **The merger will enhance competition.** The Board's merger rules emphasize enhancing competition because future mergers risk transitional service disruptions, projected benefits that may never materialize, and competitive harm that cannot be effectively remedied.[40] "To offset harms that would not otherwise be mitigated, applicants should explain how the transaction and conditions they propose will enhance competition."[41]
3. **That cumulative impacts and downstream effects support approval.** The Board will not evaluate a major transaction in isolation.[42] Applicants must explain how additional Class I mergers would affect industry structure and the public interest.[43] They must anticipate rivals' reactions, measure claimed benefits against downstream consolidations, and show that proposed conditions would remain effective if the Board approves future transactions.[44]
4. **The claimed benefits cannot be achieved short of merger.** Applicants must show that "the particular benefits they are relying upon could [not] be achieved short of merger."[45] The Board favors "other private sector initiatives, such as joint marketing agreements and interline partnerships,"

---

[40] *Major Rail Consolidation Procedures*, 5 S.T.B. at 547.

[41] 49 C.F.R. § 1180.1(c)(2)(iv).

[42] 49 C.F.R. § 1180.1(i).

[43] *Id.*

[44] 49 C.F.R. §§ 1180.1(i), 6(b)(12).

[45] 49 C.F.R. § 1180.6(b)(11).

that "can produce many of the efficiencies of a merger while risking less potential harm to the public."[46] If alternatives exist, the merger fails this test.

5. **The claimed public benefits are real, quantified, and net-positive.** Applicants must "enumerate and, where possible, quantify the net public benefits their merger would generate."[47] They must also "identify, discuss, and, where possible, quantify the likely negative effects approval would entail."[48] If projected benefits fail to materialize, applicants must propose remedial measures the Board can impose.[49] Vague efficiency claims will not suffice.

6. **Applicants will maintain adequate service throughout the transition.** Applicants must prove they can integrate operations without harming shippers. They must submit a Service Assurance Plan identifying "the precise steps they would take to ensure adequate service."[50] It must provide service benchmarks, describe arrangements to compensate shippers for service failures, and establish contingency plans for unanticipated disruptions.[51] Applicants must also establish problem resolution teams to address post-merger service breakdowns promptly.[52]

---

[46] 49 C.F.R. § 1180.1(c)(1).

[47] 49 C.F.R. § 1180.6(b)(11).

[48] *Id.*

[49] *Id.*

[50] 49 C.F.R. § 1180.1(h)(1).

[51] *Id.*

[52] 49 C.F.R. § 1180.1(h)(3).

## IV. THE APPLICANTS FAIL TO PRESENT A *PRIMA FACIE* CASE ON MULTIPLE INDEPENDENT GROUNDS.

The Applicants engage with the 2001 Merger Rules on a superficial level and are dismissive of the very reasons the Board raised the public interest bar through the Rules. Instead, the Application more closely resembles a case submitted under the pre-2001 merger rules. The principal deficiencies in the Application are as follows:

- First, the Applicants have not sufficiently addressed vertical foreclosure threats for the Board to make a public interest determination because: (a) their position relies upon a now discredited argument that the economics of the rail industry precludes the likelihood of any vertical effects, despite the Board having reversed that position in its most recent major merger decision based in substantial part on the Applicants' own advocacy in support of that reversal; (b) the absence of any explanation for the Applicants' change of position that, in turn, might justify another reversal of the Board's position; and (c) an inherent inconsistency between the Applicants' argument and their public benefit claims. These deficiencies, in turn, have cascading effects that lead to additional deficiencies.

- Second, the Applicants have not proposed any enhancements to competition, which is a critical new focus of the Board for addressing the impacts of mergers in the 2001 Merger Rules, including vertical foreclosure concerns.

- Third, the Applicants have not presented the types of evidence on cumulative and downstream impacts that the 2001 Merger Rules require, including vertical foreclosure.

- Fourth, the Applicants have not distinguished between public benefits that can and cannot be achieved through merger alternatives, as the 2001 Merger Rules require.

- Fifth, the Applicants' estimate of merger benefits does not satisfy the "more skeptical 'show me' attitude" that the 2001 Merger Rules require.[53]

[53] *Major Rail Consolidation Procedures,* 5 S.T.B. at 549.

- Sixth, the Applicants have not proposed a loss and damage claims handling process for transitional service failures that complies with the 2001 Merger Rules.

In the following subparts, the Joint Shipper Associations detail how each of the foregoing deficiencies constitutes a failure to present a *prima facie* case either individually or cumulatively.

### A. The Applicants Have Not Presented a Prima Facie Case on the Anticompetitive Effects of Vertical Foreclosure.

The Applicants' failure to present a *prima facie* case begins with their dubious assertion that vertical mergers do not harm competition in the rail industry. The Board has expressly rejected presumptions that vertical mergers pose no competitive threat. Instead of analyzing the vertical foreclosure impacts of this transaction, the Applicants rely on the categorical assertion of their economic witness, Dr. Mark Israel, who opines that "the economic theories of foreclosure that have been developed in the literature are ill-matched for the railroad industry."[54] This assertion, without any analysis of the facts specific to this transaction, provides no basis for the Board to depart from its precedent, which Applicants themselves championed in prior proceedings. It is insufficient to establish a *prima facie* case.

---

[54] Amended App., Vol. 2, Errata Verified Statement of Mark Israel, ¶¶17 ("Israel V.S.").

### 1. The CPKC Decision forbids Applicants' categorical denial of vertical foreclosure harm.

The Board has plainly stated that vertical mergers can cause competitive harm and established a framework for analyzing that harm. In the CPKC Decision, the Board held that "[e]ven in mergers . . . without horizontal network overlap . . . potential adverse competitive impacts can include diminished service and/or increased prices on interline movements that have the effect of foreclosing efficient competitive options," and "expressly rejected the presumption . . . that a vertical combination will not result in competitive harm." [55] Although the Board stated that "merger applicants are free to argue that the facts in an individual proceeding" make foreclosure unlikely, it held that they may not rely on "a presumption" that end-to-end rail transactions do not harm competition.[56] Thus, a *prima facie* case must enable the Board to consider the risk of vertical competitive harm based on the specific facts of the proposed transaction.

Notably, the CPKC Decision applied the Board's prior merger rules, not the 2001 Merger Rules. Therefore, the Applicants have an even higher burden than the CPKC applicants.

Still, the Applicants rely on the very presumption of "no competitive harm" that the CPKC Decision forbids. Their only evidence on vertical competitive effects

---

[55] *Can. Pac. Ry. Ltd. – Control – Kans. City. S.*, Decision No. 35, FD 36500, slip op. at 65-66 (served Mar. 15, 2023) ("CPKC Decision").

[56] *Id*. at 47. *See also, id.* at 4 ("Even end-to-end mergers…can pose competitive risks, and indeed this decision overturns prior agency precedent that did not sufficiently recognize such concerns.").

is Dr. Israel's categorical opinion that "vertical foreclosure theories do not apply in the context of railroad pricing practices."[57] That opinion offers no empirical assessment of this transaction's facts or effects. It is a blanket denial that foreclosure concerns apply anywhere in the railroad industry. The Board's precedent does not permit Applicants to satisfy their burden through an industry-wide presumption.

### 2. The Applicants offer no justification for the Board to change its position, which Applicants' own advocacy helped establish.

To justify their industry-wide presumption of no vertical competitive harm, the Applicants must provide the Board a reason to reverse the holding of the CPKC Decision. That requires acknowledging the reversal they seek and providing a cogent basis for it. They have done neither.

In the CPKC Decision, the Board rejected a presumption of no vertical-merger harm for good reason. The Board recognized "that economic understanding regarding the potential for competitive harm from vertical combinations has continued to evolve."[58] It observed that modern economic literature, recent empirical economic studies, and 2020 federal vertical merger guidelines all recognize that vertical mergers can cause competitive harm.[59] It also recognized

[57] Amended App. Vol. 1, at 22, 52.

[58] CPKC Decision, slip op. at 46 [citations omitted].

[59] *Id.* [citations omitted].

testimony and evidence to this effect from both shippers and railroads, *including the Applicants*.

The Applicants barely engage with the CPKC Decision at all. The narrative portion of the Application never mentions the CPKC Decision in the context of vertical foreclosure. Dr. Israel references it once to note that "the STB has indicated that the conditions for vertical foreclosure may be present and questioned whether the merging railroad could foreclose competition post-merger."[60] His entire statement then takes the opposing position that vertical foreclosure does not apply, without challenging the Board's conclusions. Although his testimony effectively requires the Board to resurrect the presumption against vertical foreclosure that the CPKC Decision abandoned, he never acknowledges this or makes any effort to address the Board's rationale for abandoning it.

The Board's conclusions in the CPKC Decision rested on extensive testimony from UP's own witness in that proceeding, Dr. Steven Salop.[61] UP consistently has taken the same position in other merger proceedings as well; that is, until UP sought approval of its own vertical merger in this proceeding.[62] Now, through the

---

[60] Israel V.S., ¶ 16.

[61] CPKC Decision, slip op. at 178-79. *See also,* Union Pac. R.R. Co.'s Comments and Req. for Conditions, *Can. Pac. Ry. Ltd.–Control–Kan. City S.,* FD 36500 (Feb. 28, 2022) ("UP CP/KCS Comments"), 3-6, 21-32; Verified Statement of Steven C. Salop, Union Pac. R.R. Co.'s Comments and Req. for Conditions, *Can. Pac. Ry. Ltd. – Control – Kans. City S.*, FD 36500 (Feb. 28, 2022) ('Salop VS'), at 3-5, 7-27, B–1-D–6.

[62] *See, e.g.,* Union Pac. R.R. Co.'s Comments, *Kan. City S.–Control–Tex. Mex. Ry. Co.*, FD 34342 (Aug. 4, 2003), at 68 (vertical transactions can have significant anticompetitive effects when the merged entity can decrease service quality or increase rivals" costs); Union Pac. R.R. Co.'s Comments and Req. for Conditions, *Can. Nat'l Ry. Co. – Control – Iowa N. Ry. Co.*, FD 36744 (Apr. 29, 2024), at 4 ("As

testimony of Dr. Israel, UP has reversed course, taking a position that directly conflicts with the CPKC Decision and its own prior position. To justify that reversal of the CPKC Decision, the Applicants must acknowledge and explain their own change of position.[63] They have not.

The CPKC Decision did not break from precedent; it advanced it. Far from a sudden departure, the decision was one more step in the Board's steady evolution toward recognizing competitive harm from vertical, end-to-end, mergers. In 2008, the Board recognized vertical effects from a proposed transaction based on "any possibility that CN might raise its rivals' costs by acquiring a line that currently provides neutral access to alternative line-haul railroads that compete with one another (including CN)."[64] In 2023, the CPKC Decision confirmed that vertical mergers can cause competitive harm. Just last year, the Board expressed concern in another merger proceeding that, following CN's acquisition of the IANR, the IANR no longer would be a neutral connection for other railroads, one that had "no

---

the Board has recognized, even end-to-end transactions create a risk of foreclosure.").

[63] NS espoused a similar position to UP. *See* Comments of Norfolk S. Ry. Co. & Req. for Conditions, *Can. Pac. Ry. Ltd.–Control–Kan. City S.,* FD 36500, 28 ("[E]ven efficiency-enhancing vertical mergers can cause discrete harm to competition and the public interest."), 28-32 (identifying competitive concerns over the worsening of interline alternatives) (filed Feb. 28, 2022).

[64] *Can. Nat'l Ry. Co.-Control-EJ&E* W. Co., FD 35087, Decision 16, slip op. at 15 (served Dec. 24, 2008). As detailed in the next section, "raising rivals' costs" is the principal competitive impact of this merger that concerns the Joint Shipper Associations and is the centerpiece of UP's opportunistic change of position.

incentive to try to direct its customers to one railroad over another."[65] This merger raises the same concerns on a much grander scale.

In contrast, the Applicants' change of position is sudden and abrupt, and unexplained.[66] Despite contrary Board precedent and their own prior testimony, the Applicants, through Dr. Israel, attempt to resuscitate the discredited theory that vertical mergers in the rail industry generally do not result in competitive harm. Dr. Israel dismisses any foreclosure concerns with the categorical assertion that "the economic theories of foreclosure that have been developed in the literature [including those that persuaded the Board in the CPKC Decision] are ill-matched for the railroad industry."[67] He also attempts to resurrect the one-lump theory by challenging the accepted determination that "harm from vertical mergers can arise because the merging firm obtains better information about the combined firm's costs . . . than it had pre-merger."[68] Through these and other statements, Dr. Israel implies that the Board was deceived in the CPKC Decision, including by UP's own witness:

> As noted above, an economist opposing this transaction may nevertheless be able to come up with a theory under which foreclosure is possible. In the economic literature on vertical contracting, nearly anything is theoretically possible given enough restrictions on the form of contracting and firm behavior. However, any such theory of foreclosure would at most apply to a very limited set of

---

[65] *Can. Nat'l Ry. Co.-Control-Iowa N.* Ry. Co., FD 36744, Decision 3, slip op. at 9 (served Jan. 14, 2025).

[66] *See* notes 61-62 above.

[67] Israel V.S., ¶¶16-17.

[68] Israel V.S., ¶18.

> cases…[and]…would depend on restrictions on firm behavior and other assumptions that do not fit the facts of the railroad industry.[69]

But neither Dr. Israel nor the Applicants engage with the CPKC Decision's rationale, related precedent, or the contrary position the Applicants championed for more than two decades. Although the Applicants may advocate for a change in the Board's position, they have not acknowledged that they are doing so nor explained their own change of position.

When an agency changes its position, it must "display awareness that it is changing position" and "show that there are good reasons for the new policy."[70] If the Board were to adopt the Applicants' new position that railroad pricing practices make vertical foreclosure implausible in the rail industry, it would have to explain its reversal from the CPKC Decision. For the Board to do so, the Applicants must first explain their own change of position because the Board relied extensively upon the Applicants' evidence and argument in the CPKC Decision. The Applicants' failure to do so deprives the Board of the facts it needs to reverse the CPKC Decision. That, in turn, precludes the Board from following its statutory obligation under 49 U.S.C. § 11324(b)(5) to consider the anticompetitive effects of this merger. In other words, the Application does not present a *prima facie* case.

---

[69] Israel V.S., ¶19.

[70] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (citations omitted).

### 3. The Application contains no transaction-specific vertical foreclosure analysis despite obvious foreclosure risks.

To establish that vertical foreclosure is unlikely, the CPKC Decision requires the Applicants to engage with the facts of their proposed transaction.[71] As discussed in the preceding sections, the Applicants fail to do this. They instead rely upon Dr. Israel's categorical opinion that "the economic theories of foreclosure that have been developed in the literature are ill-matched for the railroad industry."[72] Yet this merger plainly raises serious vertical foreclosure concerns on multiple levels, which the Applicants either categorically dismiss or completely ignore. Because they make no attempt to show, on the facts of this transaction, that there is not a threat of vertical foreclosure, they fail to satisfy the CPKC Decision's requirement for showing no vertical harm.

The potential competitive harm from this vertical merger is more than just theoretical. The Applicants tout their extended hauls as a merger benefit, while acknowledging the merger's unprecedented size and scope.[73] An undeniable consequence of the merger's unprecedented scope is that the combined UPNS may extend its long-haul routes deep into the eastern US on every eastbound move from

---

[71] CPKC Decision, slip op. 47.

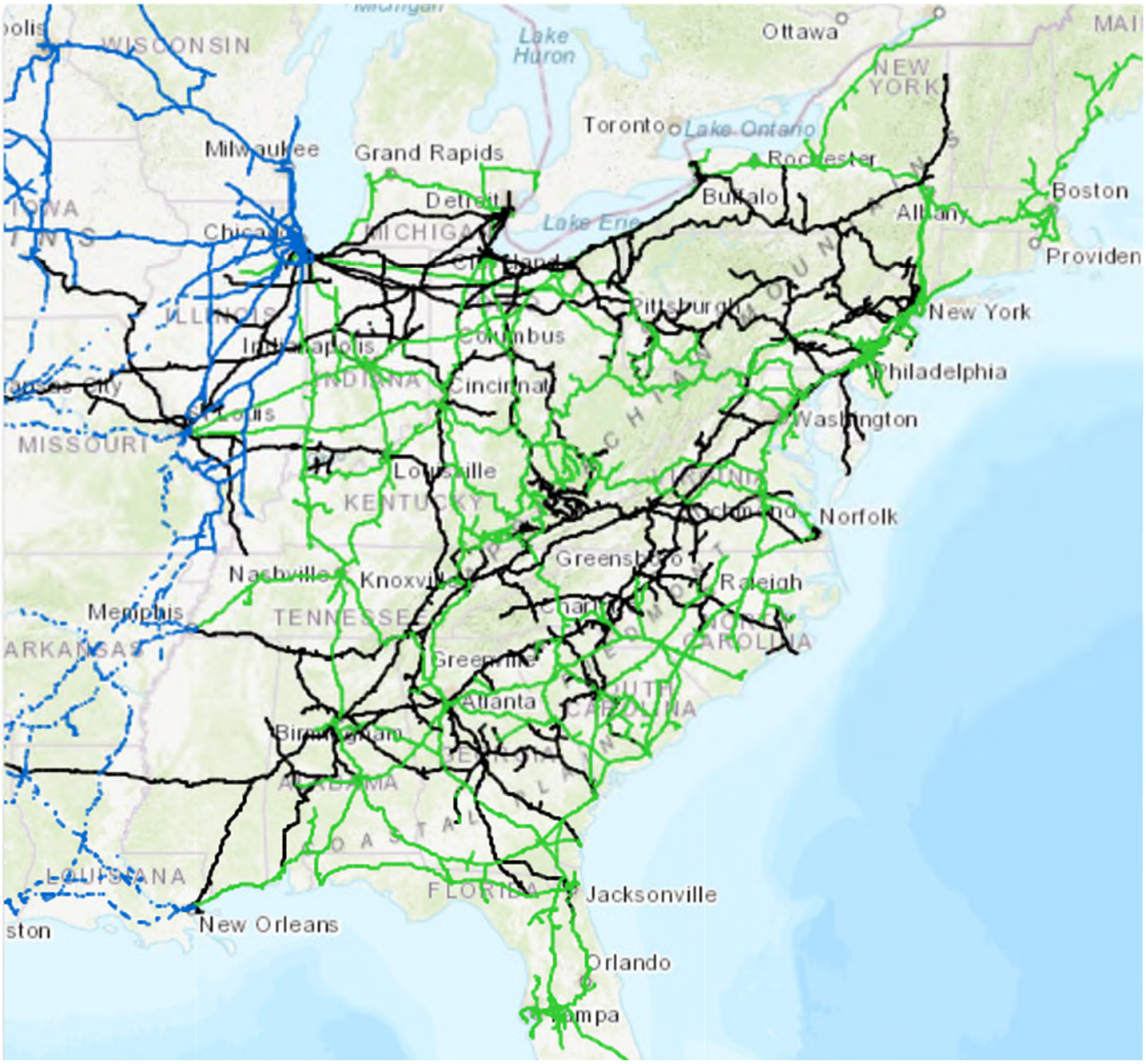
[72] Israel V.S., ¶¶16-17.

[73] Union Pacific Investor Pitchbook (June 2026), https://investor.unionpacific.com/static-files/19e3186c-6483-4888-b002-4d90721b8ecd (last visited July 29, 2026) (single-line service benefits touted 15 times); Union Pacific Press Release (July 29, 2025), https://investor.unionpacific.com/news-releases/news-release-details/union-pacific-and-norfolk-southern-create-americas-first (last visited July 29, 2026) ("This combination is transformational" and creates "First Transcontinental Railroad").

UP locations, and deep into the western US on every westbound move from NS locations. This will either reduce or eliminate the other Class I railroads' participation in those movements. The Application nowhere considers the effects of these extended long-hauls.

To illustrate the potential breadth and scope of the impact, consider the volume of traffic over which UP could acquire a longer haul at the expense of CSX. Figure 1 overlays the UP, NS, and CSX networks. The UP network is blue, NS is black, and CSX is green.

**Figure 1**




The NS and CSX networks overlap almost completely. That will allow UP to capture extended long-hauls for nearly the entire distance of most interline routes from pre-merger UP origins to CSX destinations. The extent to which UPNS could short haul CSX on nearly every interline route is substantial.[74] UPNS also could short haul

[74] Analysis of the 100% traffic tapes provided in this proceeding would permit the Applicants to identify the number of carloads and amount of revenue exposed to short hauling on routes from closed UP locations to open and closed CSX locations,

BNSF on interline routes from pre-merger NS origins to BNSF destinations, although the overlap between the UP and BNSF networks is less extensive.

The competitive threat extends beyond the network overlap. The combined captive origins and destinations on UP and NS would give the merged entity a far greater concentration of closed industries than any of the other Class I carriers.[75] That could substantially increase the merged carrier's leverage in negotiations with customers to favor its long-haul routes over alternative interline routes by tying its rates on single-line routes to the customer's willingness to use the UP long haul routes on interline moves. This is an extension of the "bundling" problem shippers have long complained about.[76] UP thus would have both the motive and means to engage in vertical foreclosure over this traffic.

The threat to competition from UP's extended long hauls is two-fold: (1) UP could completely foreclose CSX and BNSF interline routes with UP on all moves

---

which is the universe of CSX traffic most vulnerable to foreclosure. The Applicants have not performed this analysis.

[75] The RSI open and prepay tables permit analysis of the number of closed UPNS stations relative to the other Class I railroads. The Applicants have not performed this analysis.

[76] In multiple Board proceedings, shippers have described a railroad's ability to exert market power by leveraging its captive lanes to also dictate terms for other traffic. *See, e.g.,* Opening Comments of The American Chemistry Council et al., STB Docket No. EP 755, *Final Offer Rate Review*, at 25-26 (filed Nov. 12, 2019); Written Testimony of Olin Corporation, Ex Parte No. 761, *Hearing on Revenue Adequacy,* at 16-18 (filed Nov. 26, 2019); Supplemental Comments of PPG Industries, STB Ex Parte 705, *Competition in the Railroad Industry*, at 2 (filed July 15, 2011); Comments of the American Chemistry Council et al., Ex Parte No. 676, *Rail Transportation Contracts Under 49 U.S.C. 10709*, at 24 (filed Feb. 5, 2009) (citing to other shipper comments on bundling).

that create a new UP-NS single line route to competitively served destinations, and (2) UP could short haul CSX and BNSF on all interline routes to CSX and BNSF destinations. Although the Application considers the first threat, it is silent on the second. Yet the second threat is more pervasive in scope and will have network impacts that redound well beyond just the directly affected movements. Also, unlike the first threat, which the Applicants claim as a public benefit because it would convert interline moves to single-line moves, the second threat offers no such benefit. The post-merger route will remain interline; only the interchange location will change.[77]

This redistribution of line-haul responsibility from the second competitive threat produces two simultaneous economic effects that the Applicants have not considered. First, CSX and BNSF will lose line-haul revenue as UPNS performs a larger share of the movement. Second, CSX and BNSF must recover substantially the same network fixed costs over fewer line-haul miles, increasing their average cost per remaining mile of service. While UP captures a larger share of the movement and line-haul revenue, and reduces its average operating cost through longer uninterrupted hauls, CSX and BNSF will experience the opposite: line-haul revenue erosion, reduced traffic density, higher cost per mile, and higher operating ratios across the traffic that remains on their networks. This is traffic that has no

[77] As discussed in the next section, the new interchanges will shift the alleged "watershed" problems from the Applicants and their customers to other Class I railroads and their customers, which exposes a vertical foreclosure harm that the Applicants summarily reject.

other option but those carriers for either all or a portion of their transportation needs (*e.g.,* single line traffic and interline traffic with the three other Class I railroads). CSX and BNSF would face a stark choice: increase rates on captive customers, substantially curtail services, or both.

Moreover, this effect becomes a self-reinforcing "death spiral." As more interline traffic diverts to UP long-haul routes, the impacts compound, driving more diversions. Even competitive traffic will abandon CSX as its costs increase and it is forced to raise rates or reduce service.

Economists call this harm "Raising Rivals' Costs" or "RRC." Dr. Salop, UP's expert witness in the CPKC merger, co-authored two seminal papers that introduced the RRC concept in the 1980s.[78] In a more recent paper, he explains:

> The RRC foreclosure paradigm generally describes exclusionary conduct that totally or partially "forecloses" competitors from access either to critical inputs or customers, with the effect of causing them to raise their prices or reduce their output, thereby allowing the excluding firm to profit by setting a supracompetitive output price, with the effect of harming consumers.[79]

---

[78] Steven Salop and David Scheffman. *Raising rivals' costs: Recent advances in the theory of industrial structure.* American Economic Review, 73(2), (1983), 267–271, ("It is better to compete against high cost firms than low cost ones. Thus, raising rivals costs can be profitable even if the rival does not exit from the market. Nor is it necessary to sacrifice profits in the short-run for 'speculative and indeterminate' profits in the long -run. A higher cost rival quickly reduces output, allowing the predator to immediately raise price or market share."); Steven Salop and David Scheffman, *Cost-Raising Strategies.* Journal of Industrial Economics, 36(1), (1987),19–34.

[79] Steven Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test,* 81 Antitrust L. J. 371-421 (2017).

In his CPKC testimony on behalf of UP, Dr. Salop specifically raised RRC concerns when he observed that,

> if a merged firm with a monopoly on one segment can divert traffic by reducing its own costs, then it normally also can divert traffic by raising its rivals' costs. Reducing its own costs allows the firm to gain traffic by decreasing its rates, while raising rivals' costs allows the firm to gain traffic by causing the rivals to increase their rates. After the merger, CPKC can raise rivals' costs by raising the rates it charges for interline movements with those rivals.[80]

Those concerns were instrumental in the Board's decision to abandon its prior "presumption" against competitive harm from vertical mergers. Applicants undoubtedly are familiar with the RRC concept, since it was a central tenet of UP's opposition to the CPKC merger. Yet they do not acknowledge, much less address, the prospect of such harm from their own proposed merger even though the threat is significantly greater.

Although the Applicants categorically deny that vertical foreclosure theories apply in the context of railroad pricing practices, in contradiction of their position in prior mergers, their fallback position is their pledge to adhere to the same open gateway commitments that the Board imposed upon the CPKC merger.[81] But they make no attempt to show that this commitment would be "effective" for their

---

[80] Salop V.S., ¶ 16. *See also, id.* ¶¶ 44-47, 62-70, 75-76.

[81] Amended App., Vol. 1, 22 & 52 ("any remote concerns about foreclosure or reductions in independent routings are addressed by Applicants' voluntary open gateway commitments.").

unprecedented and transformative transaction; they merely assume as much.[82] This transaction also is subject to the more stringent 2001 Merger Rules which set a higher bar and impose a heavier burden on the Applicants to demonstrate the effectiveness of proposed conditions precisely because, "as we approach the 'end-game,' the price for any failure would be high."[83] A mere assumption of effectiveness, without any explanation, thus cannot establish a *prima facie* case.

In addition, there are other obvious and significant differences between the CPKC merger and this transaction that the Applicants ignore. For example, the CPKC merger was end-to-end at a single location, Kansas City, and affected only north-south traffic along that one corridor. In contrast, UP and NS interchange at multiple locations, including every major east-west gateway, for much greater volumes of traffic. Those traffic volumes are far more consequential for interline carriers on east-west routes (*e.g.,* CSX, BNSF) than the north-south traffic affected by the CPKC merger. Therefore, Applicants' assumption that the CPKC open gateway conditions provide sufficient protections for this transaction is untenable and insufficient to present a *prima facie* case.

The Applicants' adoption of the CPKC open gateway commitments as adequate protection against foreclosure is another unexplained reversal of their position. In the CPKC merger, UP argued that these same conditions would be ineffective. Strikingly, UP Executive Vice President, Kenny Rocker, who explained

---

[82] *Major Rail Consolidation Procedures*, 5 S.T.B. at 546-47 (requiring "effective plans to keep open major existing gateways").

[83] *Id.* at 560.

in detail why this open gateway commitment was "illusory and unenforceable" in the CPKC merger, now characterizes the identical conditions as "robust and readily enforceable."[84] A *prima facie* case must explain this additional opportunistic "about-face" before the Board can give it any credence.

In sum, the Applicants make categorical assertions through Dr. Israel that railroad pricing practices make vertical foreclosure implausible. They assume that the CPKC open gateway commitments will address any exceptions. And they ignore the greatest threat to competition: interline rail diversions attributable to extended long hauls. They do all this contrary to both precedent and their own prior positions, without acknowledgment or explanation. This silence leads to only one conclusion: this is an opportunistic change of position because UP is on the other side of this transaction. The Board should not give any credence to such a sudden reversal,[85] especially since it lacks the very support the Board would need to make its own corresponding reversal of its position on vertical merger harm.

---

[84] *Compare* Verified Statement of Kenny Rocker & John Turner, Union Pac. R.R. Co.'s Comments and Req. for Conditions, *Can. Pac. Ry. Ltd. – Control – Kans. City S.*, FD 36500 (Feb. 28, 2022), 17-20, *with* Rocker/Elkins V.S. ¶ 163.

[85] Several legal doctrines support this conclusion. First, federal courts have refused to allow parties to switch positions under the doctrine of judicial estoppel. *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) ("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests change, assume a contrary position"). The doctrine is meant to guard against litigants "playing fast and loose." *Scarano v. Central Railroad Co.*, 203 F.2d 510, 513 (3d Cir. 1953). Similarly, under the sham affidavit doctrine, a party cannot create an issue by submitting contradicting sworn testimony without offering persuasive reasons for the correction. *Daniel v. Johns Hopkins Univ.,* 118 F. Supp. 3d 312, 318 (D.D.C. 2015). These doctrines counter any opportunistic change of position and are particularly relevant here when UP's expert, Dr. Israel, has previously had his opinions and conclusions rejected for lack

To show that this merger will not lead to vertical foreclosure, the Applicants must address the facts of their transaction. As demonstrated in this section, the Applicants are or should be familiar with the vertical foreclosure possibilities from the extended long-haul opportunities that this merger will provide them. Despite this, they do not analyze that potential in their traffic diversion analyses and, therefore, do not consider it in their economic analyses. Consequently, they have failed to make a showing that would allow the Board to determine that this merger does not present vertical foreclosure harm.

### 4. The Applicants' own "watershed" theory exposes the competitive harm they deny.

The single largest components of the Applicants' estimated $6.385 billion of public benefits annually are $1.784 billion of net revenue from truck and rail traffic diversions and $3.504 billion in shipper truck-to-rail savings.[86] These benefits are principally attributed to truck-to-rail conversions in the so-called "watershed region," which Applicants define as "any county within 250 miles of four gateway cities: Chicago, IL; St. Louis, MO; Memphis, TN; and New Orleans, LA."[87] The Applicants, however, appear unaware that their extended bottlenecks from this merger would create the very type of "gateway watershed problem" that they claim

---

of credibility and bias for relying on "scenarios designed and selected" by his client. *United States v. Am. Airlines Grp. Inc.*, 675 F. Supp. 3d 65, 103 (D. Mass. 2023), *affirmed United States v. Am. Airlines Grp. Inc.*, 121 F.4th 209 (1st Cir. 2024).

[86] *See* FD 36873, Decision No. 21, slip op. 8 (served May 28, 2026) ("Decision No. 21").

[87] Amended App., Vol. 2, Verified Statement of David T. Hunt ("Hunt V.S."), 19-20.

their merger solves in the "watershed region," but on a much larger scale elsewhere on the national rail network.

In describing the "watershed" problem, UP witness Mr. Rocker and NS witness Mr. Elkins jointly observe that:

> Where rail networks meet, short-haul handoff lanes are particularly disadvantaged. There is not a precise demarcation – these watershed markets can fluctuate based on the region, commodity type, and other features. For simplicity, we define watershed markets where UP or NS would haul less than 250 miles before or after interchange. These markets are characterized by short-haul handoff lanes that sit right on the fault lines between the Class I railroad networks. Neither carrier owns the full trip, so no one can offer single-line service.[88]

Quoting the former Interstate Commerce Commission, they also point out that:

> Since the carrier serving the site near the gateway receives only the short-haul of what may be a movement of considerable distance, its share of a competitive rate may be insufficient to warrant its participation even though the total revenue associated with the movement may be remunerative.[89]

According to Messrs. Rocker and Elkins, the problem "in a nutshell: staggering opportunities but poor rail market share because the artificial divide between rail networks limits how far we can go."[90] Their solution to unlocking these watershed markets is "integration."[91]

---

[88] Rocker/Elkins V.S., ¶ 15.

[89] Rocker/Elkins V.S., ¶ 66, *quoting Norfolk S. Corp. – Control – Norfolk & W. Ry. Co.*, 366 I.C.C. 173, 195 (1982).

[90] Rocker/Elkins V.S. ¶ 71 ("staggering opportunities but poor rail market share because the artificial divide between rail networks limits how far we can go").

[91] Rocker/Elkins V.S. ¶ 72.

There is nothing about the gateway watershed problem that is unique to the watershed region as defined in the Application. The alleged problem that Applicants identify exists for all interline movements wherever the origin or delivering carrier has a short haul (*e.g.,* <250 miles) before or after an interchange. Notably, this merger will create new "gateway watershed problems" in other regions of the country for nearly every movement from captive UP locations to captive CSX locations and from captive NS locations to captive BNSF locations because "[n]either carrier owns the full trip, so no one can offer single-line service."[92] Today, both interline carriers on those routes benefit from their long haul when connecting through the Mississippi River gateways. Post-merger, the UPNS extended long-hauls could reduce the BNSF and CSX segments for nearly all of these moves well below the 250 mile demarcation that the Applicants use to define watershed moves.

The Applicants thus are using this merger to solve the gateway watershed problem for *their* customers near the Mississippi River gateways by creating *new* watershed regions for BNSF and CSX customers at gateways further east and west. In other words, this merger will increase the number of watershed locations on those carriers to the detriment of them and their customers. The Applicants' own "watershed" claims affirmatively demonstrate that this merger will cause competitive harm. It also exacerbates their failure to consider cumulative and downstream effects as discussed in Part IV.C. below, which constitutes an additional *prima facie* failure.

---

[92] Rocker/Elkins V.S., ¶ 15.

### B. The Application Proposes No Competitive Enhancements.

This merger is precisely the type of transaction that prompted the Board to emphasize in its 2001 Merger rules the need for enhanced competition as an important public interest benefit. The Board anticipated that large-scale Class I mergers "would likely create some anticompetitive effects that would be difficult to mitigate through appropriate conditions, and that transitional service disruptions might temporarily negate any shipper benefits."[93] To offset these harms, "applicants should propose conditions that would not simply preserve but also enhance competition."[94] Despite this unambiguous "call[] for applicants to provide a plan for enhancing competition,"[95] the Application is remarkably bereft of any enhancements at all.

The Board's rationale for emphasizing enhanced competition in its public interest analysis underscores the need for competitive enhancements here. Efficiency benefits—the very benefits upon which the Applicants rely—"may take several years to be realized by the carrier, and in some cases somewhat longer to flow through to the shipping public."[96] Competitive benefits are different. Unlike efficiency benefits "that are more uncertain or may take longer to be achieved and even longer to flow through to the public, competitive gains can be realized

[93] 49 C.F.R. § 1180.1(d).

[94] *Id.*

[95] *Major Rail Consolidation Procedures*, 5 S.T.B. 539, 554 (2001).

[96] *Id.*

immediately."[97] For this reason, "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."[98] The Board's logic is clear: efficiency gains may never arrive, but competitive enhancements take effect almost immediately.

The Applicants resist this logic. They contend the Board's emphasis on competitive enhancements was motivated by just two concerns: temporary service disruptions and reduced geographic competition.[99] That reading is too narrow. The Board stated that, unlike its prior rules, "[t]his new competition need not be limited to remedying specific competitive or other harms that are threatened by the merger."[100] In addition, the Board intended for enhanced competition to be a tool to address *all* types of "merger-related harms that cannot be directly or effectively mitigated."[101] As discussed in Part IV.A. above, this includes harm, such as foreclosure, that the Applicants deny is even possible in the rail industry, contrary to the Board's precedent. The Applicants' cramped interpretation cannot be squared with the Board's discussion of enhanced competition in *Major Rail Consolidation Procedures*.

---

[97] *Id.*

[98] *Id.*

[99] Amended App., Vol. 1, 23; July 27 Supp. 13-14, 25.

[100] *Major Rail Consolidation Procedure*s, 5 S.T.B. at 554.

[101] *Id.* at 547.

Although the Board has not defined "enhanced competition," it has provided numerous examples of the types of actions that it would consider to be enhancements. All of those example are of new intramodal (rail-to-rail) competition.[102] For example, the Board stated that it was "asking applicants to offer competitive enhancements – as applicants did in both UP/SP and in CSX/NS/CR."[103] Those enhancements included thousands of miles of trackage rights, extensive competitive access rights for the trackage rights carriers, and shared asset areas. The Board also identified the removal of paper barriers as an enhancement.[104] The Application, however, does not contain a single proposal to enhance competition through the creation of new rail competitors for any traffic.

Instead, the Application identifies six actions that the Applicants contend "enhance" competition, none of which create new competitors.[105] But labeling something as enhancing competition does not make it so. The Board itself recently expressed its opinion that the Applicants had proposed just a single enhancement, "Committed Gateway Pricing," or "CGP," a description that the Joint Shipper Associations believe is an overly generous characterization.[106]

---

[102] *See id.* at 546-47, 550, 554, 569.

[103] *Id.* at 569.

[104] *Id.* at 554.

[105] Rocker/Elkins V.S., ¶¶ 153-81.

[106] Decision No. 21, slip op. 21 (served May 28, 2026) (referring to CGP as "the sole competitive enhancement Applicants propose").

The Applicants' principal claim of enhanced competition conflates enhanced efficiency with enhanced competition. They contend the merger itself enhances their ability to compete with trucks and other railroads through their new single line service offerings.[107] But if that was what the Board intended by "enhanced competition," every end-to-end merger would qualify, rendering the enhanced competition requirement meaningless. Further, Applicant's claimed single line service benefits are precisely the type of uncertain benefits that competitive enhancements were meant to counterbalance.[108]

The Applicants characterization of CGP as an enhancement to competition also does not withstand scrutiny.[109] CGP does not create any new alternatives. It more closely resembles the types of proportional rate proposals sought as conditions in prior mergers to keep gateways open on commercially reasonable terms, but rejected by the Board as potentially harming competition.[110] A condition that harms competition cannot be a competitive enhancement.

The Applicants cannot present a *prima facie* case without genuine competitive enhancements. Competitive enhancements are integral to the 2001

---

[107] Rocker/Elkins V.S., ¶¶ 154, 156-58.

[108] The Applicants' reliance upon the CPKC Decision for the proposition that "the Board recognized that mergers can enhance competition even without special competition-enhancing conditions…," is misplaced. July 27, Supp. 25-26. When the Board held that the CPKC merger "will in fact enhance competition by creating a stronger competitor against BNSF, UP, and CN," it was not referring to the type of "enhanced competition" contemplated in the 2001 Merger Rules because the CPKC merger was not decided under that standard. CPKC Decision, slip op. at 48.

[109] Rocker/Elkins V.S., ¶¶ 173-81.

[110] CPKC Decision, slip op. at 58-60.

Merger Rules.[111] They put downward pressure on shipping prices, create new rail service options, decrease the number of captive shippers, and generally provide benefits typical of a competitive marketplace. The Applicants propose nothing that does this. Without serious proposals that actually create such competition for rail shippers, the Applicants have not presented a *prima facie* case.

### C. The Applicants' Analysis of Downstream and Cumulative Effects Ignores the Merger's Most Significant Downstream Effect.

One of the more significant additions to the 2001 Merger Rules is the requirement that Applicants "explain how additional Class I mergers would affect the eventual structure of the industry and the public interest," "discuss the likely impact of such future mergers on the anticipated public benefits of their own merger proposal," and "discuss whether and how the type or extent of any conditions imposed on their proposed merger would have to be altered, or any new conditions imposed, should [the Board] approve any future consolidation(s)."[112] The Board explained the need for this addition "[b]ecause from this point on any proposed major transaction would have a significant effect on the structure of the entire industry . . . ."[113] The Applicants initially gave short shrift to this requirement because they "cannot predict" downstream merger proposals.[114] The

[111] *See Major Rail Consolidation Procedure*s, 5 S.T.B. at 546 ("Our shift in policy places greater emphasis in the public interest assessment on enhancing competition while ensuring a stable and balanced rail transportation system.").

[112] 49 C.F.R. § 1180.1(i).

[113] *Major Rail Consolidation Procedure*s, 5 S.T.B. at 582.

[114] Decision No. 21, slip op. 11.

rule, however, does not require them to "predict" how other carriers will react, but rather, as quoted above, to "explain" and "discuss" the impact of any such mergers that might occur.

In Decision No. 21, the Board recognized this deficiency and stated that it "can fully analyze the effect of major mergers on the current landscape only if Applicants provide 'preliminary evidence about the evolving structure of the industry that would likely result from their proposal and others like it; if they address the merits of such a structure; if they provide their views on how to deal with potential problems that structure could cause to service, efficiency, and competition.'"[115] Despite this admonition, the Applicants' July 27 supplemental submission in response to Decision No. 21 ignores the single most significant downstream effect upon the very fabric of the national rail network. The failure is fatal to Applicant's *prima facie* case.

This significant and undeniable downstream effect, identified in Part IV.A.3. above, is the potential for vertical foreclosure that the Applicants' extended hauls will enable because of this merger by short hauling CSX and BNSF on interline routes. Regardless of whether the Applicants agree that their extended hauls pose anticompetitive concerns, they do not dispute that they expect to divert traffic from the other Class I railroads as a result. The more traffic that they divert, the greater the harm to the other railroads, especially CSX and BNSF, their customers, and the

[115] Decision 21, slip op. 30-31 *quoting Major Rail Consolidation Procedures*, 5 S.T.B. at 582.

national rail network. While all rail mergers lead to some traffic diversions, the potential magnitude and scope of such diversions from this merger are unprecedented. Yet the Applicants fail to consider the ramifications for those carriers, their customers, and the national rail network from any diversions that would shorthaul CSX and BNSF on post-merger interline routes.

It does not require much foresight to anticipate that CSX and BNSF may have no choice but to merge themselves to compensate for the effects of being short hauled by UP on their interline routes so that they too can obtain longer hauls from their captive origins to UP destinations. Indeed, if the Applicants believe their own claim that their merger benefits cannot be achieved through alternative means to a merger,[116] a BNSF/CSX merger would be inevitable. That merger might offset some of the BNSF and CSX losses from this UP/NS merger, but it would threaten the last vestiges of rail competition for all shippers. Specifically, it would result in two transcontinental railroads that will provide single line service between all locations within their networks and maximize their long hauls to all locations captive to the other carrier's network. The very notion of a neutral bottleneck carrier will become an anachronism. The Applicants do not engage with this outcome at all.

The alternative is equally troubling. CSX faces greater traffic and revenue reductions than BNSF because its network overlaps more extensively with NS than BNSF overlaps with UP. BNSF might not seek a merger, as it has stated, potentially stranding CSX without a merger partner to offset the harm from a

---

[116] Amended App., Vol. 1, 41.

UPNS merger. That raises serious questions about CSX's future ability to continue as an effective competitive counterweight to NS for movements in the east. Thus, Applicants must also consider the possibility of no further mergers at all.[117] They do not.

The Applicants cannot hide behind their open gateway commitments in response to these potential outcomes. When *both* carriers have strong incentives to protect long-haul routes, it is difficult to envision how any gateway commitment could preserve competition over route segments that might otherwise be competitive. Further, as discussed in Part IV.A.3. above, the Applicants fail to explain how open gateway commitments from mergers decided under the pre-2001 rules suffice under the more stringent 2001 Merger Rules. Without that explanation, they cannot present a *prima facie* case.

Either outcome above would completely restructure the rail industry as it has existed for decades. This is precisely what the Board had in mind when it declared, as justification for this new requirement, that "we need to look down the road and determine whether approving not just the immediate proposal that may be before us, but others like it, would ultimately result in a rail industry structure that continues to provide at least the existing level of competitive options for shippers, and continues to make railroads pass on most of the beneficial results of their

[117] *See Major Rail Consolidation Procedur*es, 5 S.T.B. at 546 ("Our shift in policy places greater emphasis in the public interest assessment on enhancing competition whil*e ensuring a stable and balanced rail transportation syst*em.") (emphasis added).

merger efficiencies to the shipping public."[118] Both outcomes are readily foreseeable and far from speculative. Yet, the Applicants chose not to consider what these outcomes could mean for the rail industry. The Applicants' avoidance of that discussion constitutes failure to present a *prima facie* case under the 2001 Merger Rules.

### D. The Applicants Fail to Identify Which Public Benefits Require a Merger and Which Do Not.

Another significant addition to the 2001 Merger Rules is that, "when evaluating the public interest, the Board will consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation" because "private-sector initiatives, such as joint marketing agreements and interline partnerships, can produce many of the efficiencies of a merger while risking less potential harm to the public."[119] Although the Board recognized that some benefits may only be achieved through a merger, it also observed that:

> [T]his does not mean that *all* of the claimed benefits require a merger for their accomplishment, nor does it address shipper concerns that a carrier might seek to gain enhanced market power through a merger, while claiming that this harm would be offset by efficiencies that could actually be achieved by means short of merger. We need to have a full awareness of which of the claimed benefits are obtainable only through a merger so that we can fairly weigh them against potential harms. Accordingly, we believe that it is appropriate for us to require applicants to address the question of whether the particular merger

[118] *Major Rail Consolidation Procedure*s, 5 S.T.B. at 549-50.

[119] 49 C.F.R. § 1180.1(c).

> benefits upon which they are relying could be achieved by means short of merger.[120]

The Applicants have failed to present a *prima facie* case because they ignored this directive. They allege only that they cannot achieve the entirety of their claimed benefits without a merger. But that sidesteps the question the Board expressly posed: "which of the claimed benefits are obtainable <u>only</u> through a merger?"[121] This evasion allows the Applicants to credit all their claimed public benefits to the merger, which contravenes the 2001 Merger Rules' express purpose. The result is a fundamental failure to present a *prima facie* case because the Board cannot accurately assess the marginal public interest impact that specifically originates from the merger.

### E. The Applicants' Traffic Diversion and Public Benefit Estimates Fail the Board's "Show Me" Scrutiny.

When adopting the 2001 Merger Rules, the Board "strongly caution[ed] applicants not to exaggerate their benefit projections," demanded projections that are "well-documented and reasonable,"[122] and announced its intent "to take a more skeptical 'show me' attitude toward claims of merger benefits."[123] As observed in Part IV.A.4., above, rail and truck traffic diversions constitute the principal component of the Applicants' benefit estimate. Yet even a cursory examination of their methods and assumptions reveals that the diversion estimates are

---

[120] *Major Rail Consolidation Procedure*s, 5 S.T.B. at 559 (emphasis in original).

[121] *Id.* (emphasis added).

[122] *Major Rail Consolidation Procedure*s, 5 S.T.B. at 560.

[123] *Id.* at 549.

systematically exaggerated and poorly documented. The Applicants have not made a *prima facie* showing of public benefits under the 2001 Merger Rules.

First, the truck-to-rail diversion model rests on a false premise: that county-level rail availability equates to practical rail accessibility for *all* truck shippers within that county. If one rail station exists in a county, the model assumes every truck shipper in that county can be served by rail, regardless of whether any shipper or receiver has a physical rail connection. Likewise, the model presumes that existing transload capacity is available, economically accessible, and operationally capable of handling substantial new traffic. Because every truck-to-rail diversion requires rail connectivity or transload capability at both origin and destination, the model's failure to account for these threshold requirements guarantees overstated diversion estimates and inflated public benefit projections.

Second, the diversion model treats single-line service as the *only* driver of modal conversion. Rail shippers have consistently explained in multiple Board proceedings that service consistency and predictability matter far more, and that even single line service suffers from inconsistent and unpredictable local service (*i.e.,* first-mile, last-mile) and transit times that undermine rail's ability to compete with trucks.[124]

---

124 *See, e.g.,* Reply Comments of The Coalition Associations, Docket No. EP 711 (Sub-No. 2), *Reciprocal Switching for Inadequate Service*, at 40 (filed Dec. 20, 2023) (explaining the importance of consistent and predictable rail service); Comments of Charles Ingram Lumber Co., Docket No. EP 742, *Public Listening Session Regarding CSX Transp., Inc.'s Rail Service Issues*, at 2 (filed Sept. 26, 2017) (explaining how inconsistent rail service caused a customer to switch to trucks); Comments of The Dow Chemical Company, STB Docket No. EP 711 (Sub-No. 1),

Third, for products that readily can be transported by truck and rail, there often are very clear factors that dictate one mode or the other. For example, some receivers do not order single shipments in rail car quantities, whereas a truck typically has only a quarter of the capacity of a railcar, which makes it more efficient for serving low-volume receivers. Also, trucks are preferred in emergency situations where speed is the number one priority and even the fastest possible rail transit time would be too long and unpredictable. Both scenarios potentially explain low-volume truck routes in the Applicants' traffic diversion data, which would render them unrealistic prospects for diversion to rail. Yet, the Applicants include them in their diversion model anyway.

Fourth, the diversion model assumes that shippers who have sunk investments in trucking operations, established carrier relationships, and supply chains that are optimized around truck transportation, can be persuaded to abandon those investments, sink new investments into rail infrastructure, and reconfigure their entire supply chain based on a promise of new single line rail service that *might* improve rail transit times by just 24 hours. A telling example of this unreasonable expectation is the model's inclusion of private trucking in its

---

*Reciprocal Switching*, at 10 (filed Feb. 14, 2022); Testimony of Frank Chirumbole (Integrated Supply Chain Olin Corporation), Docket No. EP 754, *Oversight Hearing on Demurrage and Accessorial Charges*, at 8 (filed May 8, 2019); Comments of the American Petroleum Institute, Docket No. EP 767, *First-Mile / Last-Mile Service,* at 2, 5-7 (filed Dec. 17, 2021); Comments of Bunge North America, Inc., Ex Parte No. 665, *Rail Transportation of Grain*, at 6-7 (filed Oct. 30, 2006); Written Statement of the National Grain and Feed Association, Docket No. EP 742, *Public Listening Session Regarding CSX Transp., Inc.'s Rail Service Issues*, at 3-4 (filed Nov. 2, 2017).

diversion estimates without explaining why a shipper who has invested in private fleet operations would abandon those assets for rail within just three years. The model's failure to account for such factors is further evidence that exaggerated truck diversion estimates are inherent in the Applicants' analyses.

Fifth, neither the truck diversion nor the public benefit estimates consider the costs that shippers frequently must incur to switch transportation modes. Applicants wrongly assert, without any evidence, that their "projected benefits are not dependent on shipper investment" and "no shipper investment is necessary to accommodate projected growth traffic.[125] To the extent that their projections include traffic diversions of bulk commodities tendered by the Joint Shipper Association members, those assertions are categorically false.

Shippers often construct their facilities around one mode or the other, and to the extent they have infrastructure for multiple modes, there is finite capacity for each mode. This means that any significant volume shift could require additional infrastructure investment (*e.g.,* siding, loading/unloading spots, storage) at one or both ends of the movement before increasing rail shipments.

While origin and destination infrastructure investment needs are situational, a near universal and categorical investment required to convert truck volumes to rail is to lease or purchase rail cars. The overwhelming majority of products that Joint Shipper Association members transport by rail are in private rail cars, predominantly covered hoppers and tank cars. Because the Applicants do not even

---

[125] July 27 Supp., 101, 103.

offer to provide tank cars and, because covered hoppers routinely double as storage, these shippers cannot rely upon the Applicants' rolling stock, despite Applicants' contrary representation.[126] Therefore, it is axiomatic that the Applicants' projected benefits are dependent upon some shipper investment. Because the Applicants' public benefit and truck diversion estimates do not account for that cost, they have not presented a sufficient picture to establish a *prima facie* case. Indeed, Applicants have not even fully or accurately answered Decision No. 21's Question PB-5 in their July 27 supplemental submission.

Sixth, the Applicant's truck diversion estimates ignore other transactional costs associated with rail transportation beyond just the line-haul rate. These can include switching, demurrage, and storage costs, which could reduce or eliminate any cost savings of rail over truck transportation. The Applicants could have estimated such costs based on what their own customers typically pay for such services but did not attempt to do so. This also contributes to exaggerated traffic diversion and public benefit estimates.

Seventh, the model assumes that even low-volume truck lanes can readily convert to rail, without considering whether there is sufficient density from other rail movements on those routes and at local serving facilities to justify the Applicants' investment in local switching, industrial tracks, crews, customer support, and service frequency. The model implicitly assumes that, if modal

[126] *Id.*, 101 ("Applicants presently have the locomotives and rolling stock necessary to handle all expected traffic.").

conversion is theoretically possible, it also can be implemented operationally and commercially. Removing an interchange through single line service does not create traffic density. Therefore, if those lanes historically have lacked sufficient density to support rail service, it is reasonable to ask why eliminating a single interchange would fundamentally change the underlying economics. The Applicants' failure to consider these factors further indicates that their traffic diversion estimates are exaggerated.

* * *

The foregoing factors demonstrate the inevitable conclusion that the Applicants' traffic diversion and public benefit estimates are exaggerated, unreasonable, and insufficiently documented. The Applicants' failure to recognize and attempt to account for those factors in their analysis fails to present a *prima facie* case that satisfies the more skeptical "show me" standard for public benefits claims under the 2001 Merger Rules.

### F. The Applicants' Service Assurance Plan Excludes Most Potential Traffic, Contravening the Purpose of the 2001 Merger Rules.

In the 2001 Merger Rules, the Board expressly declared that conditions are appropriate to offset the potential harm caused by transitional service disruptions.[127] With respect to claims arising from such disruptions, the Board adopted the following rule at 49 C.F.R. § 1180.1(h)(5):

> Service failure claims. Applicants must suggest a protocol for handling claims related to failure to provide

[127] 49 C.F.R. § 1180.1(d).

> reasonable service due to merger implementation problems. Commitments to submit all such claims to arbitration will be favored.

The Board added this requirement in response to extensive transitional service disruptions following several prior mergers that crippled the applicants' networks for long periods and had spill-over effects for the national rail network. The brunt of those disruptions was felt by rail customers, including members of the Joint Shipper Associations, who suffered enormous damage with little or no recourse to recover their damages from the applicants.

Although the Applicants agree to arbitrate some claims, their commitment is riddled with restrictions that render it meaningless.[128] To be meaningful, Applicants must accept liability for <u>all</u> damage claims caused by or arising from transitional service disruptions, including to contract and exempt traffic, and any arbitration program must extend to all such claims. Instead, the Applicants' arbitration program "applies only to non-exempt commodities shipped under tariff service (not contract service or exempt commodities, unless otherwise agreed)."[129] These restrictions effectively disclaim liability for most transitional service disruption claims because the vast majority of traffic is either exempt or covered by contracts.

---

[128] *See,* Application, Service Assurance Plan, Vol. 2, App. B.

[129] *Id.*, App. B, § 6.1.

Applicants blithely assert that contract and exempt customers can pursue contract remedies or revocation of the applicable exemption.[130] Neither customer group, however, has bargained for this merger and many oppose it. And, because even tariff customers have existing tariff remedies absent this condition, the Applicants' distinction of contract and exempt traffic on the grounds that they already have remedies is illogical. The purpose of this merger rule is to protect all shippers regardless of their traffic's status as tariff, contract, or exempt. Given that railroads seldom accept much, if any, responsibility for service claims in their contracts or their tariffs, it is essential that Applicants accept such liability for transitional service disruption claims as a merger condition if the Board is to fulfill the objective of the 2001 Merger Rules.[131] Otherwise, those restrictions will exclude most potentially affected movements, which contravenes the very purpose of 49 C.F.R. § 1180.1(h)(5) to address "all such claims" for merger-related service disruptions.

Any argument that the Board lacks jurisdiction over contract and exempt traffic misses the point. The Applicants can accept such a condition, and the Board can decide that, absent such condition, this merger is not in the public interest. For example, there is precedent for including contract traffic in merger conditions when the applicants in the UP/SP merger agreed to release 50% of contracted traffic to

---

[130] July 27 Supp. 126-27.

[131] For any contract customer who may have a robust contract remedy, any condition could require them to elect between their contract or merger condition remedy to avoid double liability.

enable BNSF to compete immediately for business on its newly obtained access and trackage rights.[132] And when UP experienced an epic service meltdown following its acquisition of SP, the Board ordered UP to allow shippers under contract to shift traffic to other carriers.[133]

The Applicants cannot present a *prima facie* case under the 2001 Merger Rules on transitional service disruptions when their proposal excludes most of the traffic that would be affected.

## V. CONCLUSION

For each and all of the foregoing reasons, the Joint Shipper Associations ask the Board to deny the Amended Application for failure to present a *prima facie* case in accordance with 49 C.F.R. § 1180.4(c)(8).

First and foremost, the Application does not present facts sufficient for the Board to assess vertical foreclosure harms based on the facts of this transaction in accordance with the Board's precedent in the CPKC Decision but, instead, relies upon the very presumption of "no harm" that the Decision rejected. In addition, the Applicants' own "watershed" theory constitutes actual evidence of vertical foreclosure harm from this merger. These two factors demonstrate that, as to the merger criteria of anticompetitive effects, the Application fails *both* prongs of the *prima facie* test.

---

[132] *Union Pac.Corp. et al. – Control and Merger – Southern Pac. Rail Corp. et al.*, 1 S.T.B. 233, 420 (1996) (broadened the scope of contract traffic to which the applicants' agreement applied).

[133] *Joint Petition for Service Order*, STB Service Order No. 1518, 2 S.T.B. 725, 725-26 (1997).

That initial failure leads to additional failures to present a *prima facie* case as to other merger criteria focused upon enhancing competition and evaluating the downstream effects of possible future mergers. The Applicants don't present any enhancements to competition because they erroneously reject the possibility of vertical foreclosure. Their one claimed enhancement, CGP, does not create any new intramodal options consistent with the 2001 Merger Rules. Similarly, the Applicants' rejection of vertical foreclosure means that they also do not consider the downstream effects of such foreclosure.

Next, the Application inexplicably violates the 2001 Merger Rules by not distinguishing between merger benefits that can only be achieved through a merger and those that could be achieved through alternative means. Because only the former benefits are included in the Board's balancing test, the Application does not present a *prima facie* case that enables the Board to assess the public interest.

The Application also does not present well-documented and reasonable traffic diversion estimates because it assumes facts that are demonstrably wrong or unrealistic, inevitably exaggerating the public benefit estimates. The Applicants' failure to recognize and account for those factors has denied the Board sufficient evidence to assess the public interest.

Finally, the Application establishes a program for handling damage claims from transitional service disruptions that does not adhere to the objective of the 2001 Merger Rules to address "all" such claims. The exclusion of contract and exempt traffic effectively denies a majority of all rail traffic a remedy for transitional service disruptions, which cannot support a finding that this transaction is in the public interest.

The foregoing are not the only objections or concerns that the Joint Shipper Associations have with this transaction. They are just the ones that they believe constitute a failure to present a *prima facie* case and, therefore, warrant the immediate denial of the Amended Application.

Respectfully submitted,

/s/Jason D. Tutrone
Jason D. Tutrone
Karyn A. Booth
Jeffrey O. Moreno
Thompson Hine LLP
1999 K Street, NW, Suite 600
Washington, DC 20036
(202) 336-8800
Jason.Tutrone@ThompsonHine.com
Karyn.Booth@ThompsonHine.com
Jeff.Moreno@ThompsonHine.com

*Counsel for Alliance for Chemical Distribution, American Chemistry Council, American Fuel & Petrochemical Manufacturers, The National Industrial Transportation League, and The Fertilizer Institute*

Dated: August 6, 2026

**CERTIFICATE OF SERVICE**

I hereby certify that on August 6, 2026, the foregoing document was served by first-class mail or email on all parties of record to this proceeding, the Secretary of Transportation, the Attorney General of the United States, and Administrative Law Judge Jenifer Soulikias.

/s/Jason D. Tutrone