**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36873

UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY

—CONTROL—

NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY

COMMENTS OF FORMER SENIOR ANTITRUST ENFORCERS

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INTERESTS OF THIRD PARTIES

This comment is submitted by former government officials with extensive experience enforcing federal antitrust laws on behalf of the United States Department of Justice ("DOJ") and/or the Federal Trade Commission ("FTC").[1] Collectively, we have served in leadership positions spanning multiple administrations and have been responsible for the investigation, evaluation, and litigation of mergers and acquisitions across a wide range of industries. We have testified before Congress; taught at leading universities; and published dozens of articles on various antitrust topics.

As former enforcement officials, antitrust practitioners, and academics, we have a strong interest in the consistent enforcement and predictable construction of antitrust laws and competition principles. We submit these comments in our individual capacities as former enforcement officials and as independent competition policy experts and not as counsel or consultants to any party.

We recognize that a full analysis of the proposed transaction and remedies remains subject to the Surface Transportation Board's ("STB" or "Board") review of the complete record, including competitors' submissions. Our comments are not intended to confirm or deny the merging parties' factual assertions and conclusions. Rather, we write to offer our views on two main points: *first*, the analytical framework that should apply to the competitors' public objections and the extent to which those complaints should be credited as evidence of competitive harm; and *second*, the importance of understanding modern economic learnings when analyzing mergers that involve the combination of complementary assets.

[1] Third-party signatories and their affiliations (for identification purposes) are listed in the addendum.

DISCUSSION

I. Competitor Complaints Should Be Evaluated with Care.

Competitors of the merging parties have submitted comments to the STB in opposition to the merger of Union Pacific ("UP") and Norfolk Southern ("NS"). These competitor complaints should be viewed with appropriate skepticism. As we have witnessed firsthand in our decades of experience, competitors have certain inherent incentives that must be taken into account when considering a rival's opposition to a merger.

The logic is straightforward: if a merger between competing firms is likely to have anticompetitive effects—for example, it results in higher prices, reduced output, or degradation of service—the competitors in a market would generally benefit from the resulting reduction in competition. In this scenario, rivals would not have a rational economic basis to complain about the transaction. Conversely, if a transaction makes the combined firm more efficient and more attractive to customers by lowering its costs and improving its ability to win business, rivals would be concerned.[2] Because competitors are threatened with loss of business precisely when a rival can compete more effectively and more vigorously, their efforts to prevent a merger that promises to make that happen may reflect an effort to hobble efficient practices rather than protect competition. *See, e.g.*, William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 247, 251–52 (1985). As two former DOJ Chief

[2] A transaction can make the combined firm more efficient and attractive to customers by, for example, allowing the combined company to spread fixed costs over a greater number of units, lowering the cost per unit. Or, in a merger of complements, by solving the double-markups problem (known as "elimination of double marginalization"). While competitor complaints of foreclosure in vertical mergers may be important, they, too, must be considered in light of the inherent self-interest to claim "foreclosure!" when the real fear is loss of business from a lower-cost, more efficient rival. As the Supreme Court has long explained, the proper goal of antitrust law is the protection of consumers and the competitive process, not rivals. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

Economists have explained, "when rival firms contest a proposed merger, arguing . . . that the proposed merger would reduce output and should be forbidden, [agencies] should perhaps infer that they believe the opposite, and that the merger would probably benefit consumers!" Joseph Farrell & Carl Shapiro, *Horizontal Mergers: An Equilibrium Analysis*, 80 Am. Econ. Rev. 107, 114 n.15 (1990). Ultimately, a competitor's opposition should serve as a signal to the Board not of harm, but of potential efficiency gains that will intensify market rivalry.

Competitors' inherent incentives have long been recognized by antitrust agencies and courts. For example, in *Alberta Gas Chemicals Ltd. v. E.I. Du Pont De Nemours & Co*., 826 F.2d 1235, 1239 (3d Cir. 1987), the Third Circuit explained that "[c]ourts have carefully scrutinized enforcement efforts by competitors because their interests are not necessarily congruent with the consumer's stake in competition. Mergers that promote efficiency and lower prices in the marketplace, for example, may cause economic loss to competitors." Indeed, "[c]ompetitors are threatened by legitimate competition," and "a rival has every incentive to challenge . . . pro-competitive mergers simply because they are pro-competitive." *Community Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146, 1166 (W.D. Ark. 1995), *aff'd sub nom. Community Publishers, Inc. v. DR Partners*, 139 F.3d 1180, 1183 (8th Cir. 1998). Similarly, in the vertical merger of AT&T-Time Warner, the court stated that:

> On the one hand, [competitor complaints] . . . can provide the Court with insight into the nature of the industry and a proposed transaction's potential effects on the market. [. . .] On the other hand—and particularly in the context of a vertical merger case where, as here, upstream customers are downstream competitors—there is a threat that such testimony reflects self-interest rather than genuine concerns about harm to competition. [. . .] Caution is therefore necessary in evaluating the probative value of the proffered third-party competitor testimony.

United States v. AT&T Inc., 310 F. Supp. 3d 161, 211-12 (D.D.C. 2018).

These fundamental principles apply here. Railroad competitors are not disinterested observers of this transaction; they are commercial rivals that presumably stand to lose traffic if the merged UP–NS offers a superior service product. Their opposition should be understood as advocacy by market participants to protect their bottom line—not as objective evidence of likely harm to shippers or the competitive process. No matter how much data a competitor stacks up, data showing that a rival expects to lose traffic to a newly integrated single-line network merely quantifies competitor harm (loss of revenue/market share), not harm to competition or shippers. In mergers of complements, single-line integration inherently redirects traffic away from legacy interline handoffs. Competitors may attempt to label this network redirection as "shipper foreclosure" because it threatens their participation in lucrative long hauls. But when single-line integration eliminates interline handoffs, it can also eliminate double markups (or double-marginalization) or otherwise reduce costs and improve efficiency. Rivals who used to share in those joint-line rates naturally attack the new single-line option as "foreclosure" but economically, single-line integration can create a lower-cost, more efficient service that intensifies overall modal rivalry.

Of course, we recognize that input from industry participants can provide important factual context in merger reviews. For instance, market participants may help agencies understand how products and services are bought and sold, how customers make substitution decisions, how contracting and routing practices work, and when capacity constraints or bottlenecks exist. During our government service, we routinely sought such industry input when evaluating mergers, and we recognize its value. We also recognized that the probative value of industry input depends on the nature of the information provided. Competitor and other industry input is most reliable when grounded in concrete, verifiable facts rather than in generalized assertions about market concentration or speculative claims about future harm.

Here, the competitor complaints suggest that their real concern may be having to compete with a more efficient merged entity. For example, the complaints raise concerns of increased concentration and higher prices, both of which would seem to benefit competitors and therefore raise questions about the pretextual nature of their complaints.

II. Proper Context for Evaluating Mergers of Complements.

We understand that the UP-NS merger is primarily a merger of complements. As the DOJ and FTC explained during the first Trump Administration:

> While horizontal mergers necessarily eliminate competition between the merging firms, vertical mergers involve firms that do not compete, and thus often have no anticompetitive tendency. Rather, they may promote efficient and effective coordination, thereby reducing or eliminating transaction costs and allowing for profit maximization over a larger set of complementary products.[3]

This is not to say that vertical mergers can never have anticompetitive effects, but rather to recognize the body of evidence indicating that vertical mergers are frequently procompetitive or benign.[4]

As the DOJ and FTC have long recognized, vertical mergers can solve the types of problems presented by vertical dealing through contracting, which presents challenges given the

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[3] *Vertical Mergers in the Technology, Media and Telecom Sector – Note by the United States*, ORG. FOR ECON. COOP. AND DEV, at 2 (June 4, 2019), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/vertical_mergers_us-oecd.pdf.

[4] *See, e.g.*, Abbott ("Tad") Lipsky et al., *DOJ/FTC Draft 2020 Vertical Merger Guidelines Comment of the Global Antitrust Institute, Antonin Scalia Law School George Mason University*, GEO. MASON L. & ECON. RESEARCH PAPER SERIES No. 20-03, at 10–14 (Feb. 7, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3534352.

costly process of forming, administering, and enforcing contracts with independent suppliers.[5] "By improving coordination between the merging parties and thereby mitigating problems such as double markup and moral hazard [e.g., holdup or free riding], the overwhelming majority of vertical mergers increase efficiency."[6] These economic and enforcement learnings should be taken into account as important context when analyzing the complementary nature of the UP-NS merger.

Respectfully submitted,

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[5] *Roundtable on Vertical Mergers – Note by the United States*, ORG. FOR ECON. COOP. AND DEV., at 2 (Feb. 15, 2007), https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/07RoundtableonVerticalMergers.pdf.

[6] *Id.* at 7; s*ee also e.g.,* Christine S. Wilson, *Reflections on the 2020 Draft Vertical Merger Guidelines and Comments from Stakeholders*, Remarks at the DOJ Workshop on Draft Vertical Merger Guidelines (Mar. 2020), https://www.ftc.gov/system/files/documents/public_statements/1568909/wilson_-_vertical_merger_workshop_speech_3-11-20.pdf.

ADDENDUM

List of Third Parties

1. Alden F. Abbott is a Senior Research Fellow at the Mercatus Center at George Mason University. He served at the Federal Trade Commission as General Counsel from 2018 to 2021 and in various other senior positions from 2001 to 2012. He also served at the U.S. Department of Commerce in various positions, including Acting General Counsel, from 1989 to 2001. Prior to that, he served at the U.S. Department of Justice as Special Counsel and Special Assistant to the Assistant Attorney General from 1981 to 1989.

2. Abbott (Tad) B. Lipsky, Jr. is an Adjunct Professor of Law at the George Mason University Antonin Scalia School of Law. He served as Deputy Assistant Attorney General in the Antitrust Division of the U.S. Department of Justice from 1981 to 1983. He more recently served as co-chair of the Transition Team for the Federal Trade Commission following the election of President Donald Trump in 2016 and as Acting Director of the Federal Trade Commission Bureau of Competition in 2017.

3. Gregory J. Werden served in the Antitrust Division of the U.S. Department of Justice for more than forty years. His antitrust scholarship has been cited by more than 1000 law review articles and more than 20 decisions by federal courts.

4. Mark Whitener is an Adjunct Professor at Georgetown University and a Senior Fellow at the Georgetown Center for Business & Public Policy. He served as Deputy Director of the Bureau of Competition at the Federal Trade Commission from 1993 to 1997.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2026, the foregoing document was served by first-class mail or email on all parties of record in this proceeding, the Secretary of Transportation, the Attorney General of the United States, and Administrative Law Judge Jenifer Soulikias.

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