

**BEFORE THE SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

ENTERED
Office of Chief Counsel
August 28, 2026
Part of
Public Record

Docket No. FD 36873

**UNION PACIFIC CORPORATION—CONTROL—NORFOLK SOUTHERN
CORPORATION**

RESPONSIVE COMMENT OF PARTY OF RECORD, J. VANN CUNNINGHAM

Surface Transportation Board

395 E Street, S.W.

Washington, D.C. 20423-0001

Re: Docket No. FD 36873 — Responsive Comment

Opposing a Finding That Applicants Have Presented a Prima Facie Case

Union Pacific Corporation and Norfolk Southern Corporation — Control

Dear Members of the Board:

I respectfully submit this Responsive Comment Statement in Docket No. FD 36873 concerning the amended application filed April 30, 2026, by Union Pacific Corporation and Norfolk Southern Corporation. I write as a Party of Record and retired industry professional with more than 50 years of experience in economic development and corporate site selection, holding the IEDC Fellow designation, and as a former Assistant Vice President of Economic Development at BNSF Railway Company. The views expressed are my own.

Respectfully submitted,

/s/ J. Vann Cunningham

J. Vann Cunningham, IEDC Fellow

Party of Record

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Dated: August 28, 2026

cc: All parties of record

**RESPONSIVE COMMENT OF PARTY OF RECORD, J. VANN CUNNINGHAM
SURFACE TRANSPORTATION BOARD**

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CORPORATION**

**RESPONSIVE COMMENT OF PARTY OF RECORD, J. VANN CUNNINGHAM
OPPOSING A FINDING THAT APPLICANTS HAVE PRESENTED A PRIMA FACIE
CASE**

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INTRODUCTION

Decision No. 21 asked eight categories of specific questions because the record as filed did not support answering them. Applicants have now filed labeled responses to each of those categories, along with four new commitments and a formal request that the Board declares a prima facie case without further input from other parties. Judged purely on format, this is a complete filing.

Judged on substance, the response follows a familiar pattern: real, quantified movement on questions with easy answers, paired with a burden shift back onto shippers, regulators, and future proceedings on the questions that actually mattered. This structural evasion reflects a broader operational posture across the docket, in which Applicants consistently offer a range of loosely defined possibilities or procedural arguments in place of a defensible commitment, leaving stakeholders and the Board to carry the analytical labor. The one place Applicants volunteer a number they did not have to, the errata correction to the diversion model, ends up confirming the baseline fragility that existed before a single supplemental page was filed. Each of these patterns is addressed in turn below.

For the reasons set forth in this comment, the Board should decline to find that Applicants have presented a prima facie case on the current record. The Second Response does not close the evidentiary record Decision No. 21 opened. It leaves the empirical question at the heart of the enhanced competition analysis unanswered, defers the downstream merger question to a proceeding that does not yet exist, rests its market share conclusions on figures withheld from the public record, and is accompanied by a self-disclosed correction confirming that Applicants' own baseline data required revision after the fact. The Board should treat the merits comment period as the evidentiary phase Decision No. 21 contemplated, not as a formality, and should require

Applicants to supplement the record on each of the specific deficiencies identified below before any prima facie determination is made.

LEGAL STANDARD

Under the Board's regulations, a major rail merger application must present a prima facie case that the proposed transaction is consistent with the public interest. See 49 C.F.R. § 1180.4(c)(8). An application fails that standard if it discloses facts that, even construed in the light most favorable to the applicant, are insufficient to support a finding of consistency with the public interest, or if it discloses facts that affirmatively demonstrate the proposal is not in the public interest. The inquiry is evidentiary in nature: the question is whether the application and supplemental record contain enough specific, testable evidence to support the required findings, not whether Applicants have addressed, in general terms, the categories the Board has identified.

The Board's 2001 Major Rail Consolidation Procedures govern the substantive public interest analysis for Class I mergers and require that a proposed transaction do more than preserve existing competition. See 49 C.F.R. § 1180.1(a), (c). Public benefits sufficient to support approval must be substantial and demonstrable, and enhanced competition is identified in the Board's own rules as a benefit warranting substantial weight in that analysis. *Id.* § 1180.1(c)(1). A response that defers the specific, measurable showing the Board has requested, whether by shifting the evidentiary burden to a later proceeding, by withholding the underlying data necessary to test a stated conclusion, or by arguing that no specific showing is required at all, does not satisfy an evidentiary standard that depends on the sufficiency of what is actually in the record before the Board.

ARGUMENT

A. The Enhanced Competition Answers Defer the Empirical Question the Board Actually Asked

Decision No. 21 asked three specific questions concerning the Committed Gateway Pricing (“CGP”) time limitation, identified in the record as EC-2: whether the harms CGP addresses are permanent, why the specific termination date was chosen and not another, and whether the time limit reduces the net benefit of the proposed transaction. Applicants address all three questions in form. The substance of the answer is that any harm from lost geographic competition should be treated as transitory absent evidence to the contrary, and that shippers who believe otherwise can bring forward actual evidence during the oversight period.

The analytical apparatus in the filing, built on a price-distortion theory of rate caps, supports, in principle, keeping CGP temporary. It does not provide an empirical response to EC-2(a), which the Board actually mandated: how much of the harm CGP offsets is permanent. Applicants assign that question to the shippers, later, one at a time, during an oversight period governed by a calendar Applicants themselves control.

The same pattern appears in Applicants' treatment of the CGP exclusions tied to captive shipper rate disparity. The filing defends the exclusion list on operational and pricing-comparability grounds, including that intermodal and automotive traffic are already competitive, that hazardous materials raise subsidization concerns, and that dimensional loads are not reducible to a per-mile rate. Those arguments, whatever their coherence on their own terms, address a different question than the one that prompted the Board's interest in CGP's scope in the first place: the differential rate exposure between captive and competitively served shippers. In each instance,

a defensible-sounding principle is substituted for the specific, falsifiable answer the question called for, and the burden of proving otherwise is reassigned to the shippers least equipped to carry it.

B. The Downstream Merger Analysis Asks the Board to Pre-Clear Future Transactions on an Incomplete Record

Applicants' treatment of downstream mergers, addressed as DS-1 through DS-3, illustrates the same pattern of deferral in its most developed form. Applicants offer a multi-part argument for why the Board's conditioning authority cannot reach hypothetical future mergers: that the governing statute authorizes conditions only on the transaction before the Board, that retroactive conditions raise due process concerns, that administrative finality counsels against reopening approved transactions, and that any conditioning must rest on substantial evidence developed in this proceeding.

Each proposition is defensible in isolation. Together, they produce a specific outcome in which every question about what happens if competing carriers later combine, including a scenario Applicants themselves acknowledge, that a reciprocal CGP obligation on a merged competitor could have an outsized effect on rail-to-rail competition, is deferred to a proceeding that does not yet exist, before a Board that may look different, on a record that has not been built. The Board is asked to accept, on the current record, that any future end-to-end merger will enhance rather than reduce geographic competition, a conclusion offered without the kind of route-level evidence Applicants supplied for their own transaction.

Table DS-1 illustrates the same pattern in miniature. It quantifies customer facility overlap for five potential future combinations among other carriers without running the same exercise for the UP-CN or UP-CPKC combinations involving the Applicant whose network geometry is most

directly at issue. That is a gap in the empirical record Applicants control, not an oversight in the Board's request, and it should not be read in Applicants' favor at the prima facie stage.

C. The Market Share Projections Rest on Figures Withheld from the Public Record

Applicants' market share projections, addressed as MS-1 and MS-2, present a problem with redacted figures. The MS-1 response addresses competing route viability with a genuinely useful reframing, testing viability by whether volumes at specific Business Economic Area rail locations remain sufficient, apart from route-by-route flows. Although the methodology is described in detail, the specific figures that would let an outside party test the conclusion, namely the projected daily change in UP-NS railcars moving through the Belt Railway of Chicago and the Indiana Harbor Belt, are redacted in the public version and shown only as placeholders. The conclusion that these switching carriers will retain sufficient volume rests on numbers the public record does not contain. That is a completeness problem independent of whether the underlying conclusion is ultimately correct.

This commenter has not executed the protective order undertaking required to access material designated Highly Confidential in this proceeding and does not seek, and cannot supply, the redacted BRC and IHB figures underlying the MS-1 conclusion. That is the point, not a limitation on it. The protective order structure requires any party seeking to test Applicants' redacted figures to accept terms that most individual and public-interest commenters, including this one, are not in a position to meet. A market share conclusion that can be tested only by parties with the resources to execute a Highly Confidential undertaking is not a conclusion the public record supports for purposes of a prima facie finding. Applicants' choice to redact this data, rather than support the MS-1 conclusion with figures available to every party of record, is itself part of the pattern of limited disclosure addressed throughout this comment.

Market share growth questions in MS-2 are engaged more substantively, with Applicants arguing that certain alternative routes were already modeled as existing single-line competitive alternatives against diversions rather than omitted from the baseline. That narrows one credibility gap. It does not touch the multi-year, systemwide decline in carload volume against which Applicants' own growth projection was measured, and nothing in the MS-2 response reconciles the projected growth figure with that trend.

D. The Errata Confirms the Baseline Fragility the Board Was Asked to Examine

Filed alongside the Second Response, separate from the substantive filing itself, is a corrected errata table disclosing a spreadsheet error in the truck-to-rail diversion model. The magnitude of the individual corrections is modest: diverted intermodal units fall from 1.58 million to 1.55 million, total annual public benefits shift from \$6.385 billion to \$6.361 billion, net revenues move from \$1.784 billion to \$1.758 billion, and net craft jobs created shift from 1,230 to 1,173. The size of the correction is not the point.

The point is that Applicants' own modeling, built on the same base-year data previously questioned as a baseline for Applicants' growth projections, contained an error large enough to shift the jobs figure by fifty-seven positions and the benefits figure by twenty-four million dollars. That error was not caught until the supplemental filing deadline forced a fresh look at the underlying workpapers. This is a self-disclosed instance of the baseline fragility built into the original application, surfacing only because the Board's directive forced re-examination, and it confirms that the growth-projection concerns raised in this commenter's prior filings were never an isolated discrepancy. It is the first piece of Applicant-supplied evidence that the underlying data could not fully support the headline figures built upon it.

One detail is worth noting for the record. The \$3.5 billion annual shipper truck-to-rail savings figure that accompanies Applicants' public messaging around this filing is, under the errata, essentially unchanged. The public benefits total that fell, and the jobs figure that fell, do not appear alongside it.

E. The Prima Facie Request Does Not Answer Any Decision No. 21 Directive and Should Be Denied

The Prima Facie Case argument in Applicants' filing is not a response to any specific Decision No. 21 directive. It is a request that the Board, on the current record construed in the light most favorable to Applicants, find that Applicants have already made their case, and a statement that the Board needs no further input from other parties to reach that conclusion. Whatever the merits of the individual supplemental answers addressed above, this request asks the Board to treat the merits comment period, the phase in which evidence from parties of record is tested against Applicants' own, as a formality with no evidentiary work left to do.

The Board should deny that request. A request for a prima facie finding that is not tethered to any of the eight categories the Board itself identified as requiring supplemental information does not advance the inquiry Decision No. 21 opened. It asks the Board to treat the categories as closed based on the same record whose deficiencies are addressed in Parts A through D above. The Board should decline to find that Applicants have presented a prima facie case, and should preserve the merits comment period so that the specific deficiencies identified in this comment can be tested rather than assumed away.

CONCLUSION

On the narrow question of whether Applicants addressed the required categories of information, the answer is mostly yes. Every enumerated topic received a labeled, evidence-supported response, and two of the four new commitments, expanded CGP eligibility and the Targeted Access Program, offer real and testable metrics that can be checked against future data.

On the broader question of whether the underlying analytical concerns identified in Decision No. 21 are resolved, rather than merely relabeled, the record supports only one conclusion. Applicants' pattern of limited disclosure, general lack of transparency, and shifting responsibility onto shippers, regulators, and future proceedings persists, with exceptions occurring only under sustained pressure rather than through voluntary disclosure. The CGP pricing exclusions and time limits are defended with theory while the empirical answer the Board mandated remains absent. The downstream merger questions are answered by arguments against regulatory reach rather than by the route-level evidence that Applicants supplied for their own transaction. The market share conclusions rest in part on figures withheld from the public record. And the one piece of evidence Applicants volunteered without being asked, the errata correction, confirms rather than resolves the baseline fragility this commenter identified before the Board's supplemental-information mandate was even issued.

Allowing this filing to close the evidentiary door would treat a self-corrected spreadsheet error and a deferred empirical burden as a sufficient foundation for a major structural consolidation. The Board's own rules require substantial evidence supporting findings of enhanced public interest benefit and the preservation of competition. The current record does not meet that standard. The Board should decline to find that a *prima facie* case has been made, and should require Applicants to supplement the record on the specific gaps identified in Parts A through D

above, the empirical basis for the CGP time limitation, the UP-CN and UP-CPKC downstream analysis, the redacted BRC and IHB figures underlying the market share conclusions, and the baseline data confirmed fragile by Applicants' own errata, before any prima facie determination is made.

Respectfully submitted,

/s/ J. Vann Cunningham
J. Vann Cunningham, IEDC Fellow
Party of Record
Arlington, Texas
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Dated: August 28, 2026

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing submission to be served electronically or by first-class mail, postage prepaid, on the Secretary of the Surface Transportation Board, Applicants' representatives, and all parties of record in this proceeding.

/s/ J. Vann Cunningham
J. Vann Cunningham
August 28, 2026