

BEFORE THE SURFACE TRANSPORTATION BOARD

312148

WASHINGTON, D.C.

ENTERED
Office of Chief Counsel
August 31, 2026
Part of
Public Record

Docket No. FD 36873

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

**RESPONSIVE COMMENT OF J. VANN CUNNINGHAM, PARTY OF RECORD,
OPPOSING APPLICANTS' CLAIM THAT THE BOARD CANNOT REQUIRE
ENHANCED COMPETITION**

Surface Transportation Board

395 E Street, S.W.

Washington, D.C. 20423-0001

Re: Docket No. FD 36873 — Responsive Comment

Union Pacific Corporation and Norfolk Southern Corporation — Control

Dear Members of the Board:

I respectfully submit this Responsive Comment 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

Arlington, Texas

B155549@gmail.com

Dated: August 31, 2026

cc: All parties of record

**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**

**RESPONSIVE COMMENT OF J. VANN CUNNINGHAM, PARTY OF RECORD,
OPPOSING APPLICANTS' CLAIM THAT THE BOARD CANNOT REQUIRE
ENHANCED COMPETITION**

I. COMMENT INTRODUCTION

I am a Party of Record in this proceeding, and I am writing about one specific argument in *Applicants' Response Regarding Their Prima Facie Case*, filed August 26, 2026 (the “Response”). Most of the Response repeats arguments Applicants have already made. One part does not. In a footnote, Applicants suggest that the Board lacks the legal authority to ever require a merger applicant to enhance competition as a condition of approval. Response at 22 & n.20 (referring to 49 U.S.C. § 11324(b)(5); *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 302 (2017)).

That is a much bigger claim than it might appear when tucked into a footnote, and it deserves a direct answer now. If Applicants plan to make this argument again later in this case or on appeal, the Board and the other parties should know that today, while the time to gather evidence on it is still available. Waiting until later would mean deciding a question about the Board's own power under time pressure, after all the evidence has already been submitted.

**II. THIS QUESTION DIFFERS FROM WHETHER APPLICANTS' FILING WAS
ENOUGH TO MOVE THIS CASE FORWARD**

At this early stage of the case, the Board is only asking whether Applicants' filing gives the Board enough to work with, taking the evidence in the best possible light for Applicants. Response at 1 (referring to 49 C.F.R. § 1180.4(c)(8)). Under that standard, Applicants did not need to propose a competition-enhancing condition to clear this first hurdle. The Board decided that question years ago when it wrote the current merger rules, and I am not asking the Board to revisit it here.

The footnote raises a different question. It asks whether the Board has the power, at any point in this case or in any future rail merger case, to require enhanced competition as a condition of approval at all. That is not a question about what Applicants had to file to get past the starting line. It is a question about the Board's authority under 49 U.S.C. § 11324 and about whether the Board's own rule on this subject, 49 C.F.R. § 1180.1(c)(2)(iv), is even valid. Applicants raise that question in a single footnote and seem to expect it to go unanswered.

III. APPLICANTS' READING OF THE STATUTE FAILS TO HOLD UP

A. The statute lists factors for the Board to weigh. It does not say those are the only things the Board can consider.

The law directs the Board to weigh several specific factors when it reviews a rail merger, including, under 49 U.S.C. § 11324(b)(5), whether the merger would harm competition among railroads. Applicants read the word “adverse” in that part of the law to mean that Congress meant to stop the Board from ever crediting the opposite effect, a merger that improves competition, when deciding whether the merger serves the public interest. Response at 22 n.20.

That reads too much into one word. Section 11324(b) provides the Board with a list of factors it must consider. Nothing in the text says the list is the only thing the Board may consider. Applicants point to *NLRB v. SW General, Inc.* for the opposite reading, but that case applied a rule of interpretation that only makes sense when a law is written to cover its subject completely, leaving nothing out. 580 U.S. at 302. Section 11324 is not written that way. It tells the Board to decide whether a merger is “consistent with the public interest,” a broad standard that Congress left for the Board to work out, first through case-by-case decisions and, since 2001, through a public rule-writing process. The factors listed in subsection (b) guide that decision. Nothing in the law or its history limits the Board to those factors alone.

B. The Board adopted its enhanced-competition rule the right way, and Applicants rely on that same rule elsewhere in this filing.

The rule Applicants now question is 49 C.F.R. § 1180.1(c)(2)(iv). The Board adopted it the same way it adopts all of its rules: it published the proposed rule, took public comments, and then issued a final version. That rule has applied to every major rail merger since 2001, and no court or agency has ever found it invalid. It comes from *Major Rail Consol. Procs.*, EP 582 (Sub-No. 1) (STB served Oct. 3, 2000); 5 S.T.B. 539 (final rule). In fact, on the page just before their footnote, Applicants quote from the same rule-writing record to make a different point: namely, that enhanced competition is “an encouraged goal rather than a mandated standard.” Response at 23 (quoted from *Major Rail Consol. Procs.*, 5 S.T.B. at 607).

Those two arguments cannot both be right. Saying that enhanced competition is an “encouraged goal” rather than a strict requirement assumes the Board had the authority to write that rule in the first place and simply chose to apply it flexibly. Saying the Board may lack authority to require enhanced competition at all is a claim that the rule should never have existed. Applicants cannot rely on the rule's flexible design one page and question its legal foundation the next. The Board should treat this as settled in favor of the reading Applicants themselves use elsewhere in their own filing.

C. A few pages later, Applicants' own argument depends on the very authority their footnote questions.

The clearest response to the footnote appears in Applicants' own filing. Just a few pages after suggesting the Board may lack authority to require enhanced competition, Applicants defend their voluntary Committed Gateway Pricing proposal by pointing to the Board's duty under national rail policy “to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes” and “to ensure effective competition...between rail carriers and other modes.” Response at 25 (quoted from 49 U.S.C. §§ 10101(4), (5)). On the same page, Applicants use those same parts of the law to argue that the Board should give substantial weight to how the merger will affect competition between railroads and trucking.

Sections 10101(4) and (5) come from the same body of law as Section 11324(b)(5). Applicants cannot have it both ways. They cannot ask the Board to use the rail policy's pro-

competition language to give them credit for the merger's benefits, while elsewhere suggesting that the same body of law prevents the Board from ever requiring that those benefits actually materialize. The Board should note the contradiction and reject the narrow reading that Applicants offer only in a footnote.

IV. THE BOARD SHOULD ADDRESS THIS ISSUE NOW, NOT LATER

The Board's rules encourage applicants to propose conditions that enhance competition but do not require them. 49 C.F.R. § 1180.1(c)(2)(iv). That flexibility allows applicants to make their public-interest case in different ways. It was never intended to open the door to a separate argument, raised for the first time at this early stage, that the Board lacks the underlying authority to require such conditions.

I am not aware of Union Pacific ever raising this authority argument before, either in this case or in *Canadian Pacific Railway Limited—Control—Kansas City Southern*, FD 36500. In fact, Applicants quote their own witness, Kenny Rocker, who criticized a competing applicant's open gateway commitment in that case as “illusory and unenforceable.” Response at 21 & n.16. That criticism only makes sense if the Board has the power to require a real, enforceable condition when the facts call for one. Applicants do not explain how that earlier position aligns with the argument they raise now.

Raising this argument for the first time in a footnote, this early in the case, leaves everyone guessing how far Applicants intend to take it. If Applicants plan to argue later in this case, or on appeal, that the Board cannot require any condition beyond what Applicants themselves chose to offer, the Board and the other parties deserve to know that now. That gives everyone a chance to gather the evidence this question requires and gives the Board a chance to settle it by order rather than by surprise.

V. REQUEST FOR BOARD ACTION

I respectfully ask the Board, when deciding whether Applicants' filing was sufficient to allow this case to proceed, to state clearly that 49 C.F.R. § 1180.1(c)(2)(iv) is a valid rule, properly within the Board's authority under 49 U.S.C. § 11324, and that the Board's ability to weigh

enhanced competition, including competition between railroads and trucking, is not limited by the word “adverse” in Section 11324(b)(5).

I am not asking the Board to decide at this stage whether any specific condition should be required in this case. That question belongs later, once all the evidence is in. I am only asking the Board to close the door Applicants opened in a footnote, so that a question about the Board's own power is not left open until after all the evidence is in.

Respectfully submitted,

/s/ J. Vann Cunningham

J. Vann Cunningham

Party of Record

Fort Worth, Texas

Dated: August 31, 2026

CERTIFICATE OF SERVICE

I certify that on August 31, 2026, I sent this Responsive Comment by email or first-class mail to everyone formally involved in this case, as required in Finance Docket No. 36873.

/s/ J. Vann Cunningham