BEFORE THE
SURFACE TRANSPORTATION BOARD

312871

ENTERED
Office of Chief Counsel
November 16, 2026
Part of
Public Record

DOCKET NO. FD 36873

UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY

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NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY

OPENING COMMENTS OF THE NORTH AMERICA FREIGHT CAR ASSOCIATION

The North America Freight Car Association ("NAFCA") hereby submits its Opening Comments in this proceeding on the Amended Railroad Control Application accepted for filing by the Board on May 28, 2026, as supplemented pursuant to Board directives (the "Revised Application"[1]). As discussed in more detail below, NAFCA maintains that if the Board is inclined to approve the merger between Union Pacific Railroad Company ("UP") and Norfolk Southern Railway Company ("NS") it must condition the approval on substantive conditions that (1) preserve existing rail-to-rail competition; (2) enhance rail-to-rail competition long-term; and (3) establishing meaningful, long-term incentives for the merged railroad to maintain, and ideally

[1] NAFCA is using the term "Revised Application" to be consistent with the term the Board has applied to the Revised Control Application in its decisions.

improve, service levels post-merger. All three of these factors are mandatory to facilitate the merging railroads and other Class I railroads' efficient use of the approximately 1.24 million privately owned railcars that make up 75% of the Nation's railcar fleet. Approving the merger without such conditions would not be consistent with the public interest.

I. Identity and Interest of NAFCA

NAFCA is a trade organization made up of private (non-railroad owned) railcar manufacturers, owner/lessors, owner/lessees, lessees, other rail shippers and entities that support the railcar industry. NAFCA's members include some of the industry's largest railcar manufacturers and lessors, as well as large rail shippers who collectively lease or own and maintain hundreds of thousands of railcars that are furnished to the Class I railroads in order to receive rail transportation service.[2] Combined, NAFCA's 39 members own or lease in excess of 759,000 railcars.

II. Opening Comments of NAFCA

A. General Background

NAFCA advocates on behalf of its members for policies and rules that incentivize the Class I railroads to use the Nation's private railcar fleet more efficiently through providing more regular service and engaging in reasonable car handling practices. The non-railroad entities who supply railcars to railroads have collectively invested tens of billions of dollars to acquire the railcars through lease or purchase and they incur additional significant ongoing costs to maintain them, in large part for their use by the Class I railroads to provide railroad freight service.

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[2] http://www.nafcahq.com/home. NAFCA's members are listed in Exhibit A to these Opening Comments.

While there are rules and policies in place by which suppliers of some private railcars receive compensation from railroads for their use of private railcars, current regulations and policies do not adequately protect this enormous investment by creating sufficient incentives for the Class I railroads to use private railcars efficiently. When private railcars in the possession of Class I railroads are handled inefficiently due to irregular service or other actions by a railroad that result in private railcars being held too long in the railroad's possession and control, the investment in those railcars is adversely affected and the business of the party supplying the railcars suffers.

There are at present no viable commercial mechanisms for the vast majority of rail shippers to negotiate incentives for a railroad to efficiently use the cars they are provided, such as rail contract service-standard provisions. In today's railroad industry that is controlled by a few Class I railroads, most shippers do not possess the commercial strength to condition their furnishing of private cars to a railroad on the railroad agreeing to pay monetary penalties if it holds onto the shipper's railcars for too long. As such, railroads presently have little or no commercial incentive (other than revenue generation) to efficiently use private railcars in their possession.

Moreover, private railcar movements under railroad common carrier terms and conditions are governed by the "common carrier obligation" to provide rail service upon reasonable request in 49 U.S.C. §11101(a). A railroad's failure to fulfill its common carrier obligation by holding onto private railcars too long, misplacing them, or other service failures is legally actionable under 49 U.S.C. §11704(b) and (c). However, the common carrier obligation, despite existing in transportation law for centuries, has never been clearly defined, either in agency decisions, court cases, or by the Board in a policy statement. This lack of clarity as to the definition of the common carrier obligation has posed a strong deterrent to many rail shippers to pursue formal adjudications in court or at the STB pursuant to Section 11704.

NAFCA fully supports the use of rail-to-rail competition and other market forces to incentivize the Class I carriers to utilize private railcars more efficiently and minimize the costs incurred by their customers who supply them, typically at no cost to the railroad. The further consolidation of the industry through the merger of UP and NS will reduce rail-to-rail competition even more and increase Class I railroad market power. The reduction of market-based incentives such as rail-to-rail competition led NAFCA to petition the Board in 2021 to adopt regulations that would establish monetary penalties using demurrage principles if a railroad held onto a private railcar beyond a reasonable period of time. EP 768, *Petition for Rulemaking* of NAFCA, the Chlorine Institute, and the National Grain and Feed Association, filed July 26, 2021. After opening a proceeding and assembling an administrative record of public comments, the Board announced it was unable to reach a majority of the four members on the Board at that time on a path to move forward. Docket No. EP 768, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads* (served June 26, 2025)("*EP 768 Decision*"). The docket remains open and NAFCA remains engaged with this issue as allowed under Board rules.

Subsequent to the *EP 768 Decision*, NAFCA has supported the Board's efforts to increase rail-to-rail competition that could lead to more efficient use of the Nation's railroad system and correspondingly the more efficient use of the private railcar fleet. *See*, Opening Comments of NAFCA in Docket No. EP 788, *Elimination Regulatory Barriers to Competition: Review of Part 1144* at 3 ("NAFCA agrees that repealing Part 1144 and the anticompetitive conduct requirement more generally will free the Board up to "develop more flexible standards for today's rail environment via case-by-case adjudication."). However, the Board has yet to finalize the proposed repeal of Part 1144, and it remains to be seen whether shippers and railroads will successfully pursue case-by-case adjudication at the Board to obtain reciprocal switching relief if the repeal

occurs. Similarly, NAFCA is encouraged by recent decisions from the Board granting terminal trackage rights in response to cases pursued under 49 U.S.C. §11102(a). *See, e.g,* Docket No. FD 36844, *Commuter Rail Division of the Regional Transportation Authority d/b/a Metra – Terminal Trackage Rights – Union Pacific Railroad Company* (served September 3, 2025), *aff'd Union Pacific Railroad Co. v. Surface Transportation Board*, Docket No. 25-2919 (8th Circuit August 31, 2026). However, the extent to which this precedent will be expanded, and whether any access that is obtained results in more efficient use of private railcars is also presently unknown.

The upshot is that for the indefinite future the *status quo* that existed in 2021 when NAFCA filed its Petition for Rulemaking remains in place regarding the Class I railroads' use of private railcars: insufficient incentives exist for them to use and manage the private railcars that providers collectively pay billions of dollars to acquire and maintain.

B. Any Approval of the Merger of UP and NS Must Ensure that Rail-to-Rail Competition is Preserved and Enhanced

The proposed merger of UP and NS would, simply by occurring, further reduce rail-to-rail competition in the United States. This reduction of rail-to-rail competition in and of itself will adversely affect private car suppliers by reducing the competitive market forces discussed above that can in some cases result in Class I railcars utilizing private cars more efficiently. The Revised Application relies almost entirely on the purported benefits of additional single line routings that the merger of UP's and NS's system will create, and NAFCA does not dispute that single line service can mean faster turnaround times for railroad and private railcars. However, NAFCA maintains that the benefits of single line service will be more than offset by the adverse effects of the further concentration of market power by the merged carrier and reduction in alternatives that might otherwise provide incentives for the merged railroad to use private cars efficiently and fairly allocate the costs of private cars between the railroad and the car provider.

For the foregoing reasons, the Board must condition any approval of the merger on effective, long-term measures that preserve existing rail-to-rail competition, and that enhance rail-to-rail competition going forward, as called for by the regulations set forth at 49 C.F.R. Part 1180. Specifically, as to the latter, 49 C.F.R. §1180.1(c) states "to assure a balance in favor of the public interest, merger applications should include provisions for enhanced competition . . . ." It is also clear from the rules that the Board was primarily referring to enhancing *rail-to-rail* competition. For example, the Board advised that:

> [c]ompetition can be enhanced in many ways. The focus of such a plan could be placed on enhancing intramodal (rail-to-rail) competition, for example, by the granting of trackage rights, the establishment of shared or joint access areas, the removal of "paper" and "steel" barriers, and other techniques that would enhance railroad-to-railroad competition.

STB Ex Parte No. 582 (Sub. No 1) *Major Rail Consolidation Procedures,* 5 STB 539, 554 (2001)("*2001 Rules*"). The Board further advised that "competitive enhancements could include, but would not be limited to, reciprocal switching arrangements, trackage rights, or elimination of 'paper barriers' on interchange by shortline carriers." *Id.* Finally, the Board favored the fact that creating or enhancing rail-to-rail competition permitted competitive gains to "be realized immediately," and the Board assumed such benefits would include "passing on the beneficial results of their merger efficiencies to the shipping public." *Id*. at 549-550. Finally, the Board stated that "provisions for competitive enhancement will be given substantial weight as merger benefits and are likely to be extremely important to us in determining whether to approve a particular application." *Id*. at 554.

NAFCA's review of the Revised Application did not reveal any proposals to enhance rail-to-rail competition in any of the manners recommended by the Board, an observation also made by other parties. *See,e.g,* CSX Transportation Inc.'s Motion for Summary Denial, CSX-19, at 36

("Applicants say nothing about enhanced rail competition"). NAFCA submits that the Board cannot approve the merger of UP and NS without measures in place to enhance rail-to-rail competition to try to mitigate the reduction in rail-to-rail competition caused by the combination of UP and NS into one railroad.

C. The Service Assurance Plan Must Contain Sufficient Incentives for the Merged Railroad to Maintain Pre-Merger Service Levels and be Accountable for Service Failures That Will Increased Costs and Disruptions to Car Providers

The use of private railcars by railroads is most efficient when railroads provide regular service consistent with shipper business operations, contract commitments, and transportation expectations. Rail shippers have large financial incentives to invest in railcars and size their fleets carefully, taking into account such factors as plant production rates for inflow of raw materials, output of finished commodities or other production and most importantly, the estimated service schedules provided by the serving railroad and overall cycle times between origins and destinations. Shippers constantly strive to size their railcar fleets and operate and maintain them in a manner that minimizes the overall cost of owning or leasing the cars and enables a shipper to earn a reasonable return on its investment in its railcar fleet. If there are too many rail cars in a fleet for a shipper's production rates and transportation needs, they constitute expensive unused assets that incur costs not associated with any revenues. In the worst case, a lack of sufficient railcars in use caused by a railroad's failure to pick up or deliver railcars for an extended period of time (or if too few of the shipper's cars are available because they are too long in the possession and control of railroads) can result in plant shutdowns and employee layoffs. The present lack of sufficient incentives for railroads to efficiently utilize private railcars means that the costs from such outcomes being borne entirely by the shipper supplying the private railcars.

NAFCA is very concerned that the merger of UP and NS will worsen the current

imbalances in the rail industry regarding private car use. When passing the *2001 Rules* the Board was intent on preventing the "serious transitional service problems that have accompanied recent major rail consolidations." 5 S.T.B at 546. The Board rightfully assumed that "[t]ransitional service disruptions are likely," *Id*. at 557 and that "future mergers involving the remaining major carriers entail a risk of significant service disruptions that could be nationwide in scope . . . ." *Id*. at 558.

The Board announced that "[w]e do plan to take a more skeptical, 'show me' attitude toward claims of merger benefits and toward claims that no transitional service problems would occur." *Id.* at 549. Importantly, the Board adopted the requirement that merger applicants provide a Service Assurance Plan with specific, measurable benchmarks of planned post-merger service accompanied by specific measures that would be taken to hold applicants accountable if the promised service levels failed to materialize. Applicants must submit a detailed Service Assurance Plan that identifies "precise steps [applicants] would take to ensure adequate service, and to provide for improved service." 49 C.F.R. §1180.1(h)(1). The *2001 Rules* also require the Applicants to provide a detailed description of where the potential service disruptions might occur should their merger be approved. *Id.* at 1180.1(c)(2).

In order to establish a baseline to which post-merger service can be compared "applicants will be required to provide service benchmarks, describe the extent to which they have entered into any arrangements with shippers and shipper groups to compensate for service failures, and establish contingency plans that would be able to mitigate any unanticipated service disruptions." *Id.* Under 49 C.F.R. §1180.10 (k), "Benchmarking is intended to provide an historic monthly baseline against which actual post-transaction levels of performance can be measured."

The intent and policy purpose of the Service Assurance Plan provisions of the *2001 Rules* is therefore clear: the Board in 2000-2001 expected service disruptions would occur with the next major Class I railroad merger and the *2001 Rules* require pre-merger service benchmarks from which to objectively measure and deal with service deterioration post-merger in an objectively determined manner.

While the Revised Application does contain benchmark data, the Service Assurance Plan does not propose meaningful, objective ways for the merged UP-NS to be held accountable for service reductions and disruptions should the merger be approved. In fact, the Service Assurance Plan proposed by the Applicants would permit rail service by the merged carrier to deteriorate to a certain level post-merger with no repercussions. NAFCA submits that if the merger is approved without changes to the Service Assurance Plan to provide real incentives to the merged carriers to maintain pre-merger service levels the current systemic imbalance with private railcar use by the Class I railroads will become more acute.

There are several aspects of the alleged accountability components of the Service Assurance Plan that violate the 2001 Rules. First, the plan would apply to only a fraction of the shipper traffic that will be affected by the merger by expressly limiting its features to non-exempt traffic transported via common carrier tariffs. There are no provisions that would hold the merged carrier accountable for service disruptions experienced by exempt commodities, intermodal traffic, and traffic that moves by contract.

Second, the Service Assurance Plan's terms provide no meaningful incentives for the Applicants to maintain their pre-merger service benchmarks post-merger. Most significantly, the Revised Application does not contain the incentive of procedures that would enable rail shippers to quickly and efficiently present, resolve, and be compensated for service-related

claims. In the *2001 Rules* decision the Board envisioned merger applicants would propose an arbitration that "identif[ied] in advance levels of service failure that would be construed as a failure to provide common carrier service and … stipulate a system for compensating shippers that are harmed by such failures." 5 S.T.B at 580. Moreover, "[w]ith those service levels in place, these disputes could be readily handled by an arbitrator if an affected shipper wishes to utilize such arbitration procedures." *Id.*

Applicants' "Damages ADR Program" differs sharply from the Board's intent. It first proposes to limit arbitration to questions of "whether the Carrier failed to provide reasonable service due to merger implementation problems during the statute of limitations period." Revised Application, Vol. 2, page 1141.[3] Other restrictions on the scope of the Damages ADR Program (in addition to it applying only to common carrier tariff traffic) are as follows:

1. The program would only be available for three years after the merger was approved.
2. Shippers would have a limited right to appeal.
3. Relief would be capped at $2,000,000 and restricted to direct damages only; no right to lost profits.
4. The terms would be subject to any limits in UP and NS tariffs
5. No injunctive or equitable relief

Post-merger rail service to a customer would be considered "reasonable" under the Plan until it reached the level of "substantial deterioration," which the customer would then bear the heavy evidentiary burden to demonstrate in an arbitration before obtaining any relief.[4] *Id.*

[3] NAFCA presumes Applicants are referring to the 2-year limit under 49 U.S.C. §11705(c), which is nowhere mentioned in the *2001 Rules* as a limitation on claims under a Service Assurance Plan.

[4] The complete standard would require a shipper to demonstrate via litigation that (a) it suffered a substantial deterioration in service that was not cured by the railroad prior to the commencement of arbitration, (b) that merger implementation was the proximate cause of that

Moreover, Applicants' proposal would eliminate any compensation to a shipper for damages it incurs from "substantially deteriorated" rail service if the merged railroad "cures" the service issue within the 30-day period after notice of arbitration is provided.

In the Second Supplement, the Applicants responded to the Board's requests to clarify the Damages ADR Proposal by confirming that "substantial deterioration in service" was not to be measured using pre-merger service benchmarks, but rather on the narrow standard for emergency service in 49 C.F.R. § 1147.1(a); *id. at* § 1146.1(a), which would require a finding of "serious, localized railroad service problems," not "minor service disruptions." Second Supplement at 121-122. Thus, the Revised Application would allow pre-merger service levels to deteriorate without penalty to the merged railroad until the deterioration reached "substantial." Moreover, disputes over "substantial deterioration" would be resolved in an evidentiary adjudication before an arbitrator applying STB rules and precedent. This proposal is not the "stipulated system for compensating shippers" for performance benchmarks is directly contrary to the letter and spirit of the *2001 Rules.*

In summary, the Applicants' Damages ADR Program proposal would not provide the Applicants' with any incentives to utilize private railcars efficiently, and indeed would permit the merged carrier to utilize them inefficiently without penalty unless and until the car provider could obtain a ruling from an arbitrator that the inefficient use of the private railcar sunk to the level of "serious, localized railroad service problems." This is contrary to the letter and spirit of the *2001 Rules*, and is not consistent with the public interest. 49 U.S.C. §11324(c).

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substantial deterioration in service, and (c) that the substantial deterioration in service caused direct damages to the customer." Second Supplement at 121.

NAFCA also submits that the Applicants' proposed "Targeted Access Program"[5] falls short of providing sufficient incentives for the merged railroad to utilize private railcars efficiently and provide regular service. Under that proposal, a customer captive to the merged railroad located in a "terminal area" could become potentially eligible for "expedited" reciprocal switching if, during the "three-year merger implementation period" after merger approval: (1) its Original ETA or Industry Spot & Pull performance as reported to the Board in *Updating Class I Rail Carrier Reporting Requirements*, Ex Parte 787 (served May 8, 2026) and codified at 49 C.F.R. § 1251.2, has deteriorated from pre-merger levels, and (2) that performance falls below 70% for Original ETA or 85% for Industry Spot & Pull. Service falling below these thresholds would create a rebuttable presumption of eligibility for reciprocal switching that the merged railroad could contest with certain "affirmative defenses" in litigation before an arbitrator. Moreover, any switching ordered through expedited arbitration would be limited to six months and only available during the merger integration period. Disputes over compensation to the merged railroad would be determined through litigation at the STB.

NAFCA believes the Targeted Access Program would have little or no effect on the present industry imbalances surrounding the railroads' use of private railcars. First, the proposal would only apply to reductions or deterioration of service after the merger is approved and for only a three-year period. Second, like the Damages ADR Program. the Targeted Access Program would erect litigation barriers to obtaining reciprocal switching relief in the form of the carrier's right to "cure" and multiple affirmative defenses, which include such subjective standards as "materially degrade system Fluidity," "customer's failure to increase its operations to help address surges in

[5] The Targeted Access Program is summarized in Appendix A to Applicants' Second Response to Decision No. 21. UP-80, NS-78, filed July 27, 2026.

volume", and "otherwise unduly impair Carrier's ability to serve existing customers"[6] Finally, the Targeted Access Program is silent as to the terms governing the participation of the alternative carrier for whom the merged UP/NS would provide the reciprocal switching.

In summary, the Targeted Access Plan would not provide service assurance as envisioned by the Board in the *2001 Rules* and therefore would not sufficiently incentivize the merged carrier to utilize the private railcars it has been provided more efficiently.

D. Retaliation Issues

Finally, on November 4, 2026 the Board issued Decision No. 45 in this proceeding. In part, that Decision addressed the overarching issue of retaliation, either real or implied, directed to rail shippers for appearing before this Board and expressing objections to the proposed merger. The Board stated "[s]takeholders, including trade associations, are invited to share with the Board any alleged instances of perceived, threatened, or actual retaliation relevant to these proceedings." Decision at 4. In response to this invitation, NAFCA responds on behalf of its members that the fear of retaliation for opposing the merger is real. In fact, UP's own CEO Jim Vena is on record and on video threatening increased rates for customers that do not support the merger in order to "teach them a lesson." The fear of retaliation from Class I railroads has stopped some NAFCA members from participating in their own name in this and prior Board proceedings. In its Comments in EP 768, *Petition for Rulemaking,* filed June 30, 2022, NAFCA reluctantly informed the Board, in response to its request for specific, concrete examples of railroads inefficiently using private cars that:

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[6] The program also would also exclude reciprocal switching relief if "The Carrier's failure to meet the performance standard was due to extraordinary circumstances beyond the carrier's control, including but not limited to . . . ., accidents, derailments, . . . and extraordinary surges in volume." These factors would create additional issues to litigate prior to obtaining relief since these occurrences are not necessarily out of a railroad's control.

> Unfortunately, as the Board will no doubt understand, many rail shippers are extremely reluctant to publicly complain about their service and provide 'specific concrete examples' of inefficient use of their Private Railcars that identify a specific Class I railroad. This reluctance was not assuaged by the existence of the Protective Order in this proceeding, and, to some extent, it has prevented Petitioners from providing the more detailed examples the Board sought in the *April 1 Decision*.

Comments at 9-10. This statement prompted a response from Board Member Robert Primus in his separate statement in the *EP 768 Decision*, who stated "[t]he implication is that petitioners feared retaliation from the railroads. Retaliation is of great concern to me and, and [sic] I continue to believe that the Board must more forcefully address retaliation. For purposes of this case, fears of railroad retaliation, if true, could further indicate the railroads' considerable market power." *EP 768 Decision* at 6, note 1.

III. Conclusion

In conclusion, NAFCA reiterates that the current rules and policies governing the Class I railroads use of private cars do not provide any meaningful incentives for them to provide regular service and efficient use of private railcars in their possession, which imposes huge costs and logistical burdens on their customer who supply the railcars. Parties who have collectively spent billions of dollars to acquire, maintain, and manage private railcar fleets bear 100% of the attributable costs. The Revised Application would do nothing to address or to improve this status quo, and reducing the number of Class I railroads from six to five would by definition adversely affect the status quo by further reducing rail-to-rail competition.

Accordingly, NAFCA maintains that if the Board is inclined to approve the merger, it can only do so with detailed and substantive conditions that preserve and enhance rail-to-rail competition, and that meaningfully incentivize the merged railroad to assure pre-merger service levels are maintained, not just during the implementation period, but long term.

Respectfully submitted,

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November 16, 2026

Exhibit A

North America Freight Car Association Members – 2026

Formosa Plastics, Inc.

Freightcar America

GLNX Corporation

The Greenbrier Companies

Iron Oak Energy Solutions

Louis Dreyfus Company

LSB Industries

Macrosource

Marathon Petroleum

Midwest Railcar

MRC

Mosaic

Murex Ltd.

Nova Chemicals

Omya

PBF Energy

Perdue Agribusiness

PNW Railcars

POET Ethanol Products

Primient

Residco

Smart Sand

Trinity Rail

Union Tank

US-Venture LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November 2026, a copy of the foregoing Opening Comments was served on all parties of record on the official service list for Docket No. 36873, and Administrative Law Judge Soulikias.

/ss/ Thomas W. Wilcox
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