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Chairman Patrick J. Fuchs
Vice-Chair Michelle A. Schultz
Members Karen J. Hedlund and Richard J. Kloster

Surface Transportation Board
395 E. Street, S.W.
Washington, DC 20423

RE: **DOCKET FD 36873 Proposed merger between the Union Pacific (UP) and Norfolk Southern (NS) Railroads**

Dear Chairman Fuchs, Vice-Chair Schultz, and Members Hedlund and Kloster:

Highroad Consulting, Ltd. (Highroad) is a full-service transportation consulting firm that focuses on all modes of surface transportation; however, more than 90% of our work has addressed rail issues. Over the years since founding in 1996, we have enjoyed working with, and at times, representing a diverse base of clients, including numerous shippers; some Fortune 100 companies, Class I and short line railroads, regional economic development agencies, and other 3PL's and consulting companies who sub-contract rail projects to Highroad.

While our consultants also do project work, we are on retainer to manage rail transportation for three clients, so we work collaboratively with the railroads on a daily basis.

My name is Sandra Dearden; I am the founding President of Highroad, and I am highly qualified to present comments into this proceeding. I launched my railroad career at Illinois Central Railroad, as a secretary in Chairman William B. Johnson's office at Illinois Central Industries when the only jobs available to women in the railroad industry were administrative. I wanted something more challenging, so I networked my way into Sales as the Regional Service Manager for Illinois Central's Chicago Region. I was subsequently recruited into Marketing, serving six months in the Routing Department before being promoted to a Pricing Analyst position. During my tenure in the Routing Department, I served as a substitute for Illinois Central's representative at meetings of the Western Trunk Line Committee, where railroads met, to establish rates and routes prior to deregulation. Serving on that Committee raised my profile with other railroads, and I was recruited by Chicago & North Western Railroad (C&NW), where I had a progressive career from Assistant Rates Manager to General Manager – Marketing & Sales, leading a Strategic Business Unit. During my tenure, I served on Northwestern's merger and acquisitions team, and I testified as a marketing witness at the ICC hearing on the anti-trust portion of C&NW's application to acquire the Milwaukee Road. C&NW won the anti-trust portion of the case. I stayed on with UP through the end of the year, following UP's takeover of C&NW.

The scope of my first experience as a consultant was to perform the competitive impact analysis of the proposed UP/SP merger for Dr. Grimm's testimony, for Kansas City Southern's opposition to the merger. While the merger was approved, KCS received a favorable opinion from the Department of Justice, citing the competitive impact.

During my tenure at Highroad, I have presented comments and expert testimony before civil courts and in numerous STB proceedings. I led a five -member team of Highroad consultants who staffed a stand-alone railroad for Wisconsin Power & Light's rate case involving Union Pacific

Railroad rates on unit trains of coal from Wyoming to Sheboygan, WI. Wisconsin Power & Light received a favorable ruling, and reparations were ordered. UP appealed the decision, which was upheld by the court of appeals.

My objective when preparing this letter, is to represent the interests of numerous shippers I have listened to, who are understandably reluctant to openly participate in this proceeding due to threats of retaliation presented by Union Pacific Railroad (UP) personnel, and to underscore reasons why this proceeding should be dismissed.

I was personally in the audience when Mr. Vena addressed SWARS, but his veiled threat of retaliation came as no surprise to me, after hearing numerous reports from shippers who had received threats from other UP personnel. Considering the messages were always identical we assume the message was directed by senior management - *"we hope you will support our merger, but if you don't, we will remember you."*

I empathize with the Board members and the challenge they face when assessing the applicant's goals versus the public interest (current and long term) against anti-competitive effects, potential service disruptions, and other merger-related harms, with the ultimate goal to promote a competitive, efficient, and reliable national rail system. However, UP's conduct during this proceeding has raised serious concerns about the integrity of this proceeding. Rail customers, large and small, are among a group of industry stakeholders whose views should be heard, but blatant threats of retaliation by the applicants have contaminated this proceeding.

As you know, reports of the SWARS threat spread widely, including through Congress, but rather than apologizing, UP issued a flat denial, and Kenny Rocker, UP's EVP, Marketing & Sales, even publicly accused CPKC and BNSF of being retaliatory predators; allegations that were quickly rejected when the video of Mr. Vena's SWARS presentation was accessed and reviewed. We appreciate the Board's statement that it will not tolerate retaliation; however, many shippers have not embraced the opportunity to present their views, so the damage has already been done.

This is only one example of the arrogance and disrespect shown toward the Board, and toward shippers, as reflected by UP's conduct. If this proceeding moves forward, and if the merger is approved, there will be no assurance that UP will afford shippers the respect they deserve, nor will UP even care about their customers' concerns about markets, rates, and service requirements.

What has happened is most unfortunate – but it did happen, and it seems the situation is beyond repair. UP's deliberate efforts to intimidate shippers has undermined the integrity of this proceeding. The Board should send a loud and clear message to the applicants, and to all participants in future proceedings, that this type of conduct will not be tolerated, and I submit dismissal of this proceeding will carry that message.

So, what should we expect if this proceeding is not dismissed and the merger is approved? As so aptly stated by Messrs. Elkins and Rocker in their joint verified statement, "This merger isn't about the next two or three years, or the next decade, it's about the next century."[1] That is a very powerful statement! Yet the term of the Applicants' proposed commitment to Gateway Pricing only applies during oversight. This proposed transcontinental railroad will dominate the industry, but history has proved that bigger is not always better, so it is important when reviewing this merger application, to look beyond the present, and to consider what might be needed to protect the public interests from potential harm caused by a railroad holding too much market power.

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[1] App. VOL 1, Page 337

Market power is a crucial concept in the field of economics that plays a significant role in shaping market dynamics. It refers to the ability of a firm, or a group of firms, to influence or manipulate the market conditions to their advantage. Market power can arise due to various factors, such as technological superiority, exclusive access to customers and extreme market coverage, and strong brand recognition. One of the key indicators of market power is the ability of a firm to control prices independently. When a firm possesses significant market power, it can dictate pricing of products and services, often charging higher prices than what would prevail in a perfectly competitive market. This occurs when customers have limited alternatives and are forced to pay the premium for service offerings provided by the dominant firm. It has been our experience; when one railroad, i.e., UP, increases rates, other railroads will follow UP's lead by increasing rates. Truckers will see rail rates increasing, so truck rates will also increase. As a result, transportation costs in North America will increase, making it difficult for U.S. industries to compete in global markets.

It is important to note that market power can have both positive and negative effects on market dynamics. On one hand, market power can incentivize firms to invest in research and development, leading to technological advancements This can benefit consumers by providing them with improved products or services. On the other hand, and in the case of this proposed transcontinental railroad, excessive market power can lead to anti-competitive practices, such as predatory pricing, collusion, or barriers to entry, which can harm consumers and restrict competition.

One way to measure market power is by calculating ratios. These ratios indicate the market share of the largest firms in an industry. Higher concentration ratios suggest greater market power. For example, if the top four firms in an industry control 80% of a market, it indicates significant concentration and excessive market power. If this merger is approved, analysts predict UP alone will control 40% of national freight rail traffic, making it the dominant single Class I carrier in most commodity markets.[2]

The evils of extreme market power include:

A, Firms with extreme market power can lead to welfare loss by charging higher prices and reducing consumer choices.

B. The most extreme forms of market power are monopolies and oligopolies, where a single firm or small number of firms dominate a market. These structures can lead to a lack of competition, innovation, and higher prices.

C. Firms with market power can limit consumer access to products and services, making it difficult for consumers to access customers and to enter new markets.

If this merger is approved, the looming UP market power fits into each one of the above scenarios.

A, Welfare. The proposed transcontinental railroad will hold extreme market power based solely based on its geography, and the customers and the markets it will hold captive. The applicants are promoting this merger as a major growth initiative, which, of course, appeals to their shareholders. However, then what's next? There will only be two options available to UP to demonstrate future growth, i.e., contribution growth, and higher profits by increasing rates. Thus far, it appears 001 002there has been little focus on contribution growth in the railroad industry when communicating with Wall Street, so it seems logical to anticipate higher rates and increased revenues per ton-mile. If so, customers will be at

[2] Jason Miller, Eli Broad endowed professor of Supply Chain Management, Michigan State University, 10/28 webinar.

the railroad's mercy. While the option to file a rate case exists, few shippers have volumes concentrated on a single route, or the financial resources to justify assuming the risk and cost to litigate a rate case.

B. **Monopolies and Oligopolies.** The new railroad will certainly dominate the industry which will create a monopoly.

C. **Consumer Access.** Any railroad with too much market power can direct markets away from some customers to preferred customers that, for example, pay rates with higher margins. I have seen evidence of railroads directing markets several times during my career. The new transcontinental railroad will certainly be in a position to establish rates and provide equipment to targeted preferred customers and markets, thereby blocking other shippers from access to some markets.

There are many things wrong with the applicants' proposal, which I plan to enter into the record if this proceeding continues. In simple terms, it is just not a good idea for the American public. On the other hand, there are a number of reasons why the Board should dismiss this proceeding, including the applicants' failure to comply with the merger rules by showing enhanced competition, and the fact that the integrity of this proceeding has been destroyed by UP's conduct.

Sincerely,



Sandra J. Dearden
HIGHROAD CONSULTING, LTD.
9011 Indianapolis Blvd. Suite A
Highland, IN 46322
(219) 838-3800
sandra@takehighoad.com

CC: Parties of Record