

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36873

UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY
—CONTROL—

NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN
RAILWAY COMPANY

310637

**APPLICANTS' REPLY TO COMMENTS
ON COMPLETENESS OF APPLICATION**

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On December 19, 2025, Applicants¹ filed an approximately 6,700-page control Application, including verified statements from nineteen company witnesses and independent experts, along with more than 142 gigabytes of supporting workpapers. The Application demonstrates that the proposed transaction presents an unprecedented opportunity to drive growth, enhance competition, and create a more accessible, sustainable, and lower cost supply chain option that will benefit American businesses and consumers. The Application contains all the information required by the Board's merger rules, 49 C.F.R. part 1180, and presents a prima facie case that the proposed transaction is consistent with the public interest. The Board therefore should accept the Application. *See* 49 C.F.R. § 1180.4(c)(7).

The Board should reject the efforts of a few parties—primarily competitors of Applicants who will experience increased competition as a result of the merger—to

¹ “Applicants” are Union Pacific Corporation (“UPC”) and Union Pacific Railroad Company (“UP”) (collectively, “Union Pacific”) and Norfolk Southern Corporation (“NSC”) and Norfolk Southern Railway Company (“NS”) (collectively, “Norfolk Southern”).

delay and prolong this proceeding by claiming the Application is incomplete. The Board should also disregard the improper efforts of these same parties to litigate the merits of the Application at this time, directly contradicting the Board's explicit instructions to the contrary. *See* Decision No. 7 at 1 (“[C]omments should solely address whether the application is complete . . .”).

I. NGFA's Concerns Involve Merits Not Completeness.

Before addressing the arguments advanced by Applicants' four principal railroad competitors, Applicants respond to the concerns raised by the National Grain and Feed Association (“NGFA”). NGFA's concerns relate to the merits of the Application, not the completeness of the Application.

NGFA advances two principal claims. First, NGFA asserts that the Application is incomplete because the discussion of proposed competitive enhancements does not address all of the potential measures referenced as examples in the Board's 2001 decision promulgating the current rules for major rail consolidations,² including trackage rights, reciprocal switching, eliminating interchange commitments, and establishing shared or joint access areas.³ Second, NGFA contends that the Application's Service Assurance Plan is incomplete because it purportedly fails to comply with the merger rules' requirement for a process to compensate shippers for service failures and provides little information on back-up or contingency plans that would involve other rail carriers.⁴ Neither assertion is correct.

² *Major Rail Consolidation Procedures*, 5 S.T.B. 539 (2001).

³ *See* NGFA-3 at 4.

⁴ *See id.* at 5.

NGFA's critique of Applicants' proposed competitive enhancements rests on a misreading of the Board's 2001 decision and rules and, in any event, goes to the merits of Applicants' proposal rather than the completeness of the Application. In discussing various potential competitive enhancements, the Board was offering illustrative examples of what applicants might propose. The Board's decision and rules do not require applicants to posit and discard hypothetical access regimes across every potential geography merely to demonstrate that alternatives were considered. Rather, the Board's decision and rules contemplate that applicants retain discretion to propose a transaction-specific approach (including here the Committed Gateway Pricing program, together with the competitive benefits inherent in the transaction itself) to satisfy the Board's expectation of a special offering to enhance competition. NGFA may disagree with the sufficiency of Applicants' offering, but such disagreement concerns the merits of Applicants' proposals, not whether the Application contains the information required by 49 C.F.R. part 1180.

NGFA's objections to the Service Assurance Plan similarly reflect merits disagreements rather than an absence of required information. NGFA focuses on Applicants' proposed alternative dispute resolution ("ADR") framework for service-related claims and contends that it does not meet the standards NGFA believes should apply. The 2001 Rules, however, do not require applicants to include any arbitration mechanism. They instead encourage applicants to consider such approaches as one possible means of addressing service issues. Applicants followed that guidance and proposed an ADR framework fully described in their Application.

NGFA's disagreement with the contours of that proposal involves substantive questions that belong in the merits phase of this proceeding.

NGFA's complaints about the specificity of Applicants' plans for ensuring adequate service and providing for improved service are similarly issues for the merits stage. NGFA also erroneously blends two different rules: (i) the requirement that Applicants identify precisely how they will ensure adequate service, which Applicants meet through their detailed Operating Plan and Service Assurance Plan, and (ii) the requirement that Applicants commit to working with other railroads to overcome service disruptions, which Applicants meet by describing the cooperative processes they have used and will continue to use to address serious disruptions. NGFA's complaints do not demonstrate that the Application lacks the information required to be accepted as complete under the Board's rules.

Applicants appreciate NGFA's participation in this proceeding and its interest in the effects of the transaction on agricultural shippers and the broader economy. Applicants look forward to a constructive dialogue with NGFA and its members as this proceeding moves forward. However, none of the issues raised by NGFA bear on the completeness of the Application.

II. The Application Includes Full System Impact Analyses Required By The Board's Rules.

Applicants' four principal railroad competitors advance a number of baseless claims that the Application fails to provide the full system impact analyses required by 49 C.F.R. § 1180.7(b). Applicants fully complied with the Board's requirement that they submit full system impact analyses demonstrating the proposed transaction's

impacts on competition within regions of the United States and this nation as a whole. *See* 49 C.F.R. § 1180.7(b). Applicants devoted hundreds of pages of their Application and multiple verified statements, including verified statements from two expert economists, to addressing the proposed transaction’s competitive impacts.

A. The Application appropriately addresses 3-to-2 and 2-to-1 points.

CN claims that Applicants’ impact analyses do not contain information about points where the merger would reduce the number of railroads from 3-to-2 or 2-to-1.⁵ The Board’s rules require Applicants to provide certain data regarding “each major point on the combined system” and state that Applicants “may define points as individual stations or as larger areas (such as Bureau of Economic Analysis statistical areas or U.S. Department of Agriculture Crop Reporting Districts) as relevant.” 49 C.F.R. § 1180.7(b)(2). The Verified Statement of Dr. Elizabeth M. Bailey, submitted in Volume 2 of the Application, provides the required information by using geographic points defined based on Bureau of Economic Analysis statistical areas (“BEAs”), one of the definitions contemplated by the rules. *See* Bailey VS, App. Vol. 2 at 12. Dr. Bailey’s statement explains her determination that BEAs are the appropriate level of geographic aggregation for the required analyses. *See id.* at 50–51. Dr. Bailey’s statement also explains how she identified “major points”—a term the Board’s rules do not define. *See id.* at 77.

⁵ *See* CN-6 at 10.

Contrary to CN's claim, Dr. Bailey's statement lists *all* 2-to-1 and 3-to-2 points in Exhibit 11. *See id.* at 56. Her statement also separately lists all *major* 2-to-1 and 3-to-2 points in Tables D1 and D2 to Appendix D, in compliance with § 1180.7(b)(2). Dr. Bailey identified no 2-to-1 points and one 3-to-2 point, and she explains why the merger is unlikely to cause competitive harm at that 3-to-2 point. *See Bailey VS*, App. Vol. 2 at 56–57.

CN claims the Application is incomplete because Applicants did not address 3-to-2 and 2-to-1 points at a more granular geographic level than BEAs.⁶ But § 1180.7(b)(2) explicitly allows points to be defined at this level. To the extent CN contends that Dr. Bailey's 3-to-2 and 2-to-1 analyses failed to identify competitive harms that would be apparent in a more granular analysis, those arguments go to the merits of the Application, not its completeness.⁷ Applicants fully complied with § 1180.7(b)(2) by providing 3-to-2 and 2-to-1 information for “each major point on the combined system.” The Board's rules do not require Applicants to conduct a station-level or facility-level analysis, though, as discussed below, Applicants did work to identify 2-to-1 shipper facilities and proactively negotiate arrangements to preserve existing competitive options.

⁶ *See* CN-6 at 13–14.

⁷ Applicants have committed to preserve pre-merger build-in/build-out options, which addresses potential concerns relating to shippers with existing facilities served exclusively by either NS or UP but located near a line of the other railroad. *See Joint Verified Statement of Kenny Rocker and Claude E. “Ed” Elkins*, App. Vol. 1 at 288.

B. The Application appropriately addresses 2-to-1 shippers.

Contrary to CN's claim,⁸ the Application appropriately addresses 2-to-1 shippers. The Verified Statement of Katherine Novak in Volume 1 of the Application explains that Applicants carefully reviewed their records to identify 2-to-1 shipper facilities and identified only three. *See* Novak VS, App. Vol. 1 at 333. Further, as discussed in the Verified Statement of Jim Vena and the Joint Verified Statement of Kenny Rocker and Claude E. "Ed" Elkins in Volume 1 of the Application, Applicants committed to ensuring that no 2-to-1 shipper facility loses access to two Class I railroads and that all 2-to-1 shippers facilities will be protected from such a loss of competition *even if* the affected shipper facilities were not identified in the Application. *See* Vena VS, App. Vol. 1 at 177; Rocker/Elkins VS, App. Vol. 1 at 287.

CN's claim that Applicants overlooked three 2-to-1 shippers is also incorrect. Contrary to CN's comments, CPKC has access to one of the facilities (Mighty River Recycling), and CSX and a short line have access to another (Milano Railcar Services). Applicants are revisiting their analysis of the third shipper facility identified by CN (Edmund Allen Lumber Company). In any event, questions regarding any loss of competition and remedies address the Application's merits not its completeness. To the extent CN asserts Applicants were required to do additional analysis to have a complete Application, CN's position finds no support in the Board's rules and is inconsistent with Board precedent. The Board has recognized that identification of 2-to-1 shipper facilities and development of plans for alternative rail service for those

⁸ *See* CN-6 at 15–16.

shippers can continue into the post-merger period. *See, e.g., Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp.*, 1 S.T.B. 233, 252-53 (1996) (discussing “omnibus” clause of applicants’ settlement agreement); *BNSF Ry.—Petition for Enforcement—Service to Granite Mountain Quarries*, FD 32760 (Sub-No. 48) (STB served June 30, 2025) (granting additional opportunity to try to demonstrate facility is a 2-to-1 shipper facility). In the same vein, CN’s suggestion that Applicants are required to specify their methodology for identifying 2-to-1 facilities finds no basis in the Board’s rules. The bottom line is that Applicants clearly committed in the Application that every 2-to-1 shipper will retain two-railroad access, and whether or not parties identify some additional 2-to-1 shippers over the course of the proceeding has no bearing on the completeness of the Application.

C. The Application appropriately addresses actual and projected market shares.

CN and BNSF both claim that Applicants’ market impact analyses do not contain required information regarding actual and projected market shares of revenues and traffic volume.⁹ The Board’s rules require Applicants to provide “[a]ctual and projected market shares of revenue and traffic volumes for major interregional or corridor flows by major commodity group.” 49 C.F.R. § 1180.7(b)(3). Dr. Bailey provided the required analysis in a manner consistent with standard practice in antitrust proceedings, analyzing pre-transaction shares of UP and NS separately, and comparing them with the post-transaction shares of a merged UP/NS.

⁹ *See* CN-6 at 17–19; BNSF-8 at 4.

See Bailey VS, App. Vol. 2 at 13; *see also id.*, App. E, Tables E2 and E4. BNSF and CN contend that Applicants should have interpreted the Board’s rules as requiring projected market shares to reflect the results of Applicants’ traffic diversion study.¹⁰ However, Dr. Bailey’s approach is not only consistent with standard antitrust analysis, it is also consistent with the Board’s requirement that Applicants identify a particular year for their impact analysis. *See* 49 C.F.R. § 1180.4(b)(1)(ii). CN’s and BNSF’s interpretation would result in collateral disputes over assumptions about traffic growth and market shifts, an issue that would be further complicated by the need to account for traffic changes in non-rail modes, because the Board’s rules require Applicants to provide the requested data “broken down by mode.” 49 C.F.R. § 1180.7(b)(3). Dr. Bailey’s approach incorporates the most reasonable interpretation of the Board’s requirements in § 1180.7(b)(3).

BNSF also incorrectly claims Applicants have not provided the data that underlies Dr. Bailey’s market share calculations.¹¹ Dr. Bailey’s workpapers include all the underlying data and code required to replicate the calculations in her report. BNSF’s actual complaint is that Dr. Bailey’s workpapers do not include the voluminous intermediate datasets created in the process converting raw data into the evidence.¹² Applicants have agreed to provide the intermediate datasets to BNSF and any other requesting party (and can provide them to the Board), but their agreement

¹⁰ *See* CN-6 at 18–19; BNSF-8 at 4.

¹¹ *See* BNSF-8 at 5.

¹² *See* Exhibit A hereto (email correspondence between BNSF counsel and UP counsel).

to do so is an accommodation that goes beyond the requirements of the Board's instructions for submitting data in this proceeding, which allow parties to provide raw data and the code used to summarize, manipulate, or otherwise restructure those data for analysis, rather than all the intermediate data sets. *See* Decision No. 3, App. Item 16.

D. The Application appropriately addresses geographic competition.

CPKC makes the unsupported claim that Dr. Bailey's analysis of geographic competition is incomplete because Dr. Bailey flagged origins and destinations that raised potential concerns but did not conduct additional analyses to determine whether competitive concerns could be ruled out at some of the points.¹³ Dr. Bailey's approach was not incomplete. Rather, her approach was conservative in that she considered the potential for competitive harm at all the flagged points in arriving at her opinion that the substantial competitive benefits and greater economic efficiency expected to result from the transaction still outweigh the transaction's limited potential horizontal anticompetitive effects. *See* Bailey VS, App. Vol. 2 at 71–75. Dr. Bailey performed all the analyses necessary to reach her conclusion.

E. The Application appropriately addresses vertical competitive effects.

CPKC also claims Dr. Bailey's analysis is incomplete because it does not address competitive effects when UP and NS serve different legs of a movement.¹⁴

¹³ *See* CPKC-7 at 20.

¹⁴ *See id.*

However, CPKC is describing circumstances in which UP and NS provide different components of a route, not substitute components—that is, CPKC is describing situations involving potential vertical competitive effects, not horizontal effects. Dr. Bailey expressly does not address vertical effects in her verified statement; however, Dr. Mark A. Israel thoroughly addresses potential vertical effects in his Verified Statement in Volume 2 of the Application. Dr. Israel conclusively shows there is no realistic prospect of material harm to competition from vertical foreclosure resulting from the proposed transaction and significant demonstrable benefits that are expected to result from the merger. *See* Israel VS, App. Vol. 2 at 141–43, 144–73. Dr. Israel also observes that any potential lingering concerns are addressed by Applicants’ commitments to maintain open gateways on commercially reasonable terms, which mirror the commitments CPKC made in its own recent merger. *See id.* at 174.

Along similar lines, BNSF mistakenly claims that Applicants failed to address competitive risks posed by end-to-end mergers.¹⁵ As discussed above, Dr. Israel thoroughly analyzed that issue and found no realistic prospect of competitive harm.

BNSF also claims that Applicants made no attempt to show where freight flows would shift as a result of the transaction and “how the changes would affect various communities.”¹⁶ However, those issues are being addressed in the environmental review process, and as the Application explains, Applicants are engaged with the

¹⁵ *See* BNSF-8 at 3.

¹⁶ *Id.*

Board's Office of Environmental Analysis to fulfill the requirements of the environmental review process. *See App. Vol. 1 at 41–42.*¹⁷

III. The Application Appropriately Addresses Downstream Effects.

Applicants' railroad competitors also claim that the Application insufficiently discusses downstream effects from possible future mergers, but none of them explain what they believe would have been sufficient. CSX asserts that Applicants were required to submit "evidence" on downstream effects without specifying why the Application's evidence was insufficient or what additional evidence CSX thinks is required.¹⁸ BNSF says that the Application's discussion of downstream issues "cannot be what the Board had in mind," but fails to identify what exactly it believes is required.¹⁹ CPKC similarly does not explain what "real downstream analysis" it believes was needed.²⁰

These arguments are misguided. Applicants fully complied with the "downstream effects" provisions of the Board's rules, which simply ask applicants to "initiate a commentary" about the impact of likely future mergers on the structure of the industry. *Major Rail Consolidation Procedures*, 5 S.T.B. 539, 582 (2001). The Board's rules make clear that Applicants are not required to present "alternative merger benefit calculations based on specific alternative possible responses" or to

¹⁷ A party called Super Neighborhood 64 & 88 also filed comments on December 29, 2025, but the comments also involve environmental and other merits-related issues, not the completeness of the Application.

¹⁸ *See CSXT-4 at 11–12.*

¹⁹ BNSF-8 at 4.

²⁰ CPKC-7 at 17.

“forecast the precise actions of their competitors in response to a merger application.” *Id.* Instead, § 1180.6(b)(12) requires the Application to address two elements. First, Applicants must “anticipate whether future Class I mergers are likely to be proposed in response to their own proposal and explain how, taken together, those mergers, if approved, could affect the eventual structure of the industry and the public interest.” 49 C.F.R. § 1180.6(b)(12)(i). And second, Applicants must “discuss whether any conditions imposed on an approval of their proposed merger would have to be altered, or any new conditions imposed, if the Board should approve additional future rail mergers.” *Id.* § 1180.6(b)(12)(ii).

For § 1180.6(b)(12)(i), Applicants noted that BNSF’s public and repeated statements that it did not intend to pursue a merger meant that a BNSF-CSX merger was not likely to be proposed in response to the proposed transaction. *See* App Vol. 1 at 50. This plainly satisfies the rule’s requirement for Applicants to “anticipate whether future Class I mergers are likely to be proposed.” Applicants went on to discuss that—even were BNSF to change its mind—a second transcontinental merger would not diminish the public benefits of the UP/NS merger so long as that second merger was essentially end-to-end, included competition-protecting conditions, and was undertaken with careful integration planning. *See id.* at 50–51. Dr. Mark Israel supported this conclusion and opined that his extensive analysis of the vertical benefits of the merger would not be undermined by a subsequent one. *See* App. Vol. 2 at 194–95. As Dr. Israel observed:

From an economic perspective . . . the merger of UP and NS will generate significant vertical benefits for shippers. These vertical

benefits—including the expansion of single-line service, more efficient service and operations, and increased investment—are unlikely to be undermined by any subsequent mergers. Instead, a future U.S. transcontinental merger would also tend to be predominantly vertical with similar effects. To the extent such a merger generated efficiency improvements it would put more competitive pressure on UP/NS.²¹

Other interested parties are of course free to challenge these conclusions and make whatever arguments they wish on the merits. But Applicants have plainly provided the information required by § 1180.6(b)(12)(i) and initiated the commentary the Board required.

No commenter appears to challenge that Applicants provided the information required by § 1180.6(b)(12)(ii). Applicants plainly responded to § 1180.6(b)(12)(ii)'s requirement that they address whether conditions would need to be altered or new conditions imposed in the event of a second merger. Applicants believe that the answer is no, and they explained that the substantial public benefits of the proposed transaction would not be affected by a second merger, and thus that conditions would not need to be altered. *See* App. Vol. 1 at 51. If Applicants' competitors wish to take a different position on the merits, they are free to do so. But Applicants provided the information required by § 1180.6(b)(12)(ii). Here, too, this aspect of the Application is complete.

IV. Applicants Appropriately Enumerated And Quantified Public Benefits The Merger Would Generate.

Applicants enumerated and quantified the net public benefits that will be generated by the proposed transaction. They provided a Summary of Benefits Exhibit

²¹ App. Vol. 2 at 195.

as Exhibit B to Volume 1 of the Application, and the Verified Statement of Grant Janke describes and thoroughly documents the development of the Summary of Benefits Exhibit and also discusses the many unquantifiable public benefits the merger would generate. *See* Janke VS, App. Vol. 1 at 408–28. As Mr. Janke discusses, Applicants’ other witnesses exhaustively document the quantifiable and non-quantifiable public benefits of the transaction throughout the Application. *See id.* at 409–10.

CSX complains that Applicants did not identify “which of its claimed benefits are achievable through means ‘short of merger.’”²² However, the Board’s rules do not require Applicants to parse through the benefits calculations to determine whether some fraction of the benefits could be obtained without a merger. Applicants abundantly satisfied the Board’s requirement that they address whether the claimed benefits could be achieved short of a merger through the Verified Statement of Jim Vena, *see* Vena VS, App. Vol. 1 at 178; the Verified Statement of Mark George, *see* George VS, App. Vol. 1, at 190–91, 210–12; the Joint Verified Statement of Kenny Rocker and Claude E. “Ed” Elkins, *see* Rocker/Elkins VS, App. Vol. 1 at 280–82; the Verified Statement of Dr. Elizabeth M. Bailey, *see* Bailey VS, App. Vol. 2 at 38–40; the Verified Statement of Dr. Mark A. Israel, *see* Israel VS, App. Vol. 2 at 139–40, 143–44, 175–89; and the Joint Verified Statement of Eric Gehringer and John F. Orr, *see* Gehringer/Orr VS, App. Vol. 2 at 502–05. In short, Applicants thoroughly addressed the inability to achieve these public benefits without a merger.

²² *See* CSXT-4 at 13–15.

CSX also complains that Applicants did not identify “additional measures” the Board could take if claimed benefits do not materialize or address those measures in their Summary of Benefits Exhibit.²³ However, Katherine Novak explains in her Verified Statement that the Board could extend the duration of Applicants’ Committed Gateway Pricing program to address issues that require a remedy after the program’s scheduled expiration. *See* Novak VS, App. Vol. 1 at 330–32.²⁴ To be conservative, Applicants did not adjust their Summary of Benefits exhibit to account for Committed Gateway Pricing, particularly because BNSF, CSX, and shippers will ultimately determine whether to make use of the new program. Nonetheless, Dr. Israel estimated the potential savings related to Committed Gateway Pricing in his Verified Statement. *See* Israel VS, App. Vol. 2 at 208–15.

V. The Application Describes How The Merger Would Enhance Competition.

CSX also advances the claim that the Application is incomplete because it does not contain evidence showing how the proposed transaction would enhance competition.²⁵ CSX’s concerns plainly go to the Applicant’s merits, not its completeness. The Application contains abundant evidence that the merger will enhance intramodal and intermodal competition. *See, e.g.,* Rucker/Elkins VS, App. Vol. 1 at 285–87; Bailey VS, App. Vol. 2 at 29–42 (discussing the merger’s competitive

²³ *See* CSXT-4 at 12–13.

²⁴ While addressing such additional measures, Applicants do not agree that it would be rational for the Board to impose additional burdens on a transaction that was not generating anticipated benefits.

²⁵ *See* CSXT-4 at 14–17.

benefits); Israel VS, App. Vol. 2 at 179–94 (discussing how the merger will enhance competition); Hunt/Schabas VS, App. Vol. 2 at 314–84 (analyzing projected diversions of rail and truck traffic).

CSX specifically claims Applicants do not explain how single-line service enhances rail-to-rail competition, asserting that “greater economic efficiency and improved service” are different from “enhanced competition.”²⁶ However, Applicants’ evidence specifically shows that offering single-line service will attract traffic from their rail competitors, including CSX. *See* Hunt/Schabas VS, App. Vol. 2 at 357–74; *see also id.* at 314–15 & 322 (presenting evidence that shippers prefer single-line service to interline service by a wide margin). CSX, too, believes single-line service enhances rail-to-rail competition—at least when it is the railroad seeking to merge. *See CSX Corp, et al.—Control & Merger—Pan Am Systems, Inc., et al.*, FD 36472, Amended Application (CSXT/PAR-11) (filed July 1, 2021) at APP-285 (“Further, a rail merger that creates an improved – and thus more competitive – rail alternative can also put competitive pressure on competing rail carriers to improve performance and can strengthen rail as a competitor with other modes of transportation.”); *see id.* at App-340 (explaining that elimination of interchanges “will allow for faster, more competitive single-line service”). The Board has also recognized that greater economic efficiency and improved service from single-line service translate directly to enhanced competition. *See, e.g., Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500, slip op. at 23 (STB served Mar. 15) (“The Transaction will make possible improved single-line

²⁶ *See* CSXT-4 at 16.

service for many shippers and will result in merger synergies that are likely to allow CPKC to be a vigorous competitor to other Class Is by providing improved service at lower cost.”); *id.* at 21 (“CPKC’s new single-line service will provide new competition with single-line service already provided by those other carriers in various markets.”).

CSX also specifically claims the Application provides no evidence that Committed Gateway Pricing will enhance competition,²⁷ but that claim also simply ignores the evidence in the Application. *See* *Rocker/Elkins VS*, App. Vol. 1, at 292–295; *Novak VS*, App. Vol. 1 at 317–20; *Israel VS*, App. Vol. 2 at 196 (explaining that Committed Gateway Pricing extends the benefits of competition between UP/NS and CSX and BNSF to routes that are otherwise sole-served and do not benefit from such competition); *see id.* at 203 (explaining that Committed Gateway Pricing provides intensified source and geographic competition).

CN goes even further than CSX, asserting that Application is incomplete because Applicants failed to propose competition-enhancing conditions.²⁸ Like CSX’s claims, CN’s claims go to the Application’s merits, not the Application’s completeness. CN is incorrect in claiming the Board’s rules require applicants to propose conditions that enhance competition; rather, the Board’s rules encourage applicants to make such proposals to “improve the prospect that their proposal would be found to be in the public interest.” 49 C.F.R. § 1180.1(d). The Board’s rules recognize railroad mergers can enhance competition even when they do not include special competition-

²⁷ *See* CSXT-4 at 16–17.

²⁸ *See* CN-6 at 31–33.

enhancing conditions—as is the case with mergers outside the railroad industry. Applicants’ proposed transaction is such a transaction. *See* Bailey VS, App. Vol. 2 at 29–42 (discussing the merger’s competitive benefits); Israel VS, App. Vol. 2 at 179–94 (discussing how the merger will enhance competition); Hunt/Schabas VS, App. Vol. 2 at 314–84 (analyzing projected diversions of rail and truck traffic). However, the point is moot because Applicants proposed a special competition-enhancing condition, Committed Gateway Pricing, that is calibrated to address the concerns the Board identified when it adopted its current rules for major rail consolidations. *See* Novak VS, App. Vol. 1 at 330–32. And, as discussed above, Applicants’ evidence shows Committed Gateway Pricing will enhance competition. *See* Rocker/Elkins VS, App. Vol. 1, at 292–95; Novak VS, App. Vol. 1 at 317–20; Israel VS, App. Vol. 2 at 195–215.

VI. Applicants Appropriately Produced The Data Underlying Their Evidence.

Contrary to claims made by CPKC and BNSF,²⁹ Applicants’ workpapers include Transearch truck flow data underlying their truck-to-rail diversion evidence. Specifically, Applicants’ workpapers include all the truck movements identified for diversion at a county-to-county level of detail. Applicants’ experts divided diversions into two categories, truck-to-merchandise and truck-to-intermodal, based on whether diverted truck traffic would move by rail in carload or intermodal service. The Transearch data for truck-to-merchandise diversions are provided in Applicants’ Workpaper “t2merch_lookalike_market_share_vF.xlsx.” The Transearch data for

²⁹ *See* BNSF-8 at 5; CPKC-7 at 7–9.

truck-to-intermodal diversions are provided in Applicants' Workpapers "20251011_0752_truck_routes_full_curr.csv" and "20251020_1321_truck_routes_future.csv."

Applicants' workpapers also include all computer programs and instructions needed to process the raw data licensed from Transearch through a sequence of intermediate steps to obtain the data Applicants' witnesses ultimately used to develop the evidence presented to the Board, as well as the programs and instructions for using those data to create the evidence they presented. BNSF, CPKC, and the Board can thus examine and evaluate the steps Applicants' witnesses followed to identify diverted truck traffic and transform that traffic data into the evidence they submitted to the Board. *See* Decision No. 3 at 8 ("As a best practice, all empirical work should be submitted in enough detail so that Board staff can identify the methodology used to conduct the analysis and can review the results of the analysis.").

CPKC also complains that Applicants provided only a sample of truck pricing data obtained from DAT Freight & Analytics and used as part of the truck-to-rail diversion study.³⁰ However, Applicants' workpapers include the pricing data their witnesses actually used in the diversion study. The pricing data Applicants' witnesses used was derived by converting the DAT dry van spot and contract rate data for 2023, which was supplied on a DAT proprietary geographic basis, into an estimate for county-to-county lanes. The resulting pricing data are included in the two truck-to-intermodal diversion files identified above on a county-to-county basis.

³⁰ *See* CPKC-7 at 8–9.

Applicants’ workpapers also include a sample of DAT’s proprietary data and the instructions Applicants’ witnesses used to create county-level pricing. The instructions are provided as Workpaper “Truck_price_per_mile_calculation.ipynb.” CPKC and the Board can thus examine and evaluate the steps Applicants’ witnesses followed to transform DAT’s data into the data used as part of the diversion analysis. *See* Decision No. 3 at 8.

More generally, the Board should reject BNSF’s and CPKC’s claims that its merger rules require applicants to provide all data related to their evidentiary submissions at the most disaggregated level possible. The Board’s rules require applicants to provide the data that they used to produce the evidence they submitted—which in this case is the subset of Transearch data and the modified DAT data provided in Applicants’ workpapers. Notably, CPKC did not assert that its workpapers included the Transearch database that it used to develop truck to rail diversions in its own recent merger application.³¹ Further, BNSF’s and CPKC’s implicit claim that the Board’s rules require Applicants to underwrite the cost of their voluntary participation in this proceeding by purchasing Transearch or other data licenses for them is inconsistent with black letter legal rules requiring parties to pay their own litigation costs. *Cf. E.I. DuPont De Nemours & Co. v. Norfolk S. Ry.*, NOR 42125, slip op. at 2 (March 27, 2013) (discussing decision to decline Norfolk

³¹ *See Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500, App. Vol. 2 (CP-26/KCS-14), Verified Statement of Bengt Muten at App. Vol. 2, Page 206 (filed Oct. 29, 2021) (“In my analysis, I relied upon the truck flows that are reflected in the HIS Markit Transearch database for 2019 . . .”).

Southern's offer to provide MultiRail loaded on a laptop computer at no cost to the Board). These rules are particularly important when the best available evidence is derived from data that can be obtained only by paying a licensing fee. If applicants could not use such evidence without purchasing licenses to the underlying data for all voluntary participants, then applicants would not be able to use the best available evidence to prepare and present their applications, and the Board could not make the important policy decisions required when it evaluates such applications using the best available evidence.

VII. Applicants Provided A Complete Impact Analysis And Operating Plan.

CN makes the baseless claim that the Application is incomplete because Applicants did not use 100% traffic tapes from other Class I railroads and instead used traffic data from the Board's Carload Waybill Sample in portions of their impact analyses and operating plans.³² CN suggests Applicants should have delayed their preparation of the Application until they obtained 100% traffic tapes from all other Class I railroads.³³ The Board's rules do not require applicants to use other Class I railroads' traffic tapes to provide a complete application. To the contrary, the Board's rules provide that applicants can obtain those traffic tapes only if other Class I railroads first request applicants' traffic tapes. *See* 49 C.F.R. § 1180.4(b)(4)(iii). Even

³² *See* CN-8 at 19–22. To be clear, Applicants did not directly use traffic data from other railroads in developing their Operating Plan, but the Operating Plan does address traffic diverted from other railroads, and Applicants' traffic diversion analysis used information about traffic moving on other railroads.

³³ *See id.* at 19.

then, applicants are not required to obtain or use those other Class I railroads' traffic tapes: the Board's rules state that "applicants *may* require" railroads to produce their own traffic tapes in exchange for receiving applicants' tapes." *Id.* Here, Applicants used traffic tapes from other Class I railroads that provided them on a timely basis, but they had no obligation to delay the preparation of the Application because other railroads did not promptly produce traffic tapes. Applicants' use of the Board's Carload Waybill Sample data for their impact and traffic diversion analyses is fully consistent with past practice in merger proceedings.³⁴

VIII. The Application Provides The Merger Agreement.

Consistent with common practice before the Board, Applicants provided the body of their merger agreement as Exhibit 2 to Volume 4 of the Application.³⁵ The Exhibit contains the substance of Applicants' agreement, including all terms relevant to the Board's public interest analysis under 49 U.S.C. § 11324. Indeed, Exhibit 2 is

³⁴ For example, in the recent CP-KCS merger proceeding, applicants' economic expert conducted his analyses using data from the Board's Carload Waybill Sample. *See Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500, App. Vol. 2 (CP-26/KCS-14), Verified Statement of W. Robert Majure (filed Oct. 29, 2021). Similarly, applicants' diversion analysis used Carload Waybill Sample data when not addressing movements handled by one of the applicant carriers. *See Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500, App. Vol. 2 (CP-26/KCS-14), Verified Statement of Richard W. Brown and Nathaniel S. Zebrowski, at App. Vol. 2, Page 123 (filed Oct. 29, 2021) ("[W]e relied on . . . the Board's 2019 Confidential Carload Waybill Sample ('CWS') data to identify all other loaded revenue traffic movements handled by other carriers.").

³⁵ *See, e.g., Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500, App. Vol. 4 (CP-28/KCS-16) (filed Oct. 29, 2021), Ex. 2 (Agreement and Plan of Merger) (providing merger agreement but not referenced disclosure schedules); *CSX Corp.—Control & Merger—Pan Am Systems, Inc.*, FD 36472, Amended Application (CSXT/PAR-11) (filed July 1, 2021), Ex. 2 (Agreement and Plan of Merger) (same); *Canadian Nat'l Ry.—Control—Iowa Northern Ry.*, FD 36744 (CN/IANR-1) (filed Jan. 30, 2024), Ex. 2 (Unit Purchase Agreement) (same).

the document UPC submitted to the Securities and Exchange Commission in SEC Form S-4 (attached to the Application as Exhibits 7.1 and 7.2 to Volume 4) as part of satisfying its legal obligation under the securities laws to produce all material information regarding the proposed transaction.

Applicants' competitors are unhappy because, in responding to discovery requests seeking the disclosure schedules accompanying the merger agreement, Applicants produced the voluminous schedules but redacted one of the schedules to protect privileged material.³⁶ The schedule at issue addresses the allocation of regulatory risk between UPC and NSC, and the redacted material does not alter the terms of the underlying transaction. More specifically, the schedule identifies the outer limits of conditions to the merger that UPC is obligated to NSC to accept. Commenting parties' interest in information is obvious: they would have a tremendous benefit in bargaining for concessions if they knew UPC's bottom line. However, UPC's bottom line should have no bearing on either the conditions parties request or those the Board determines are appropriate to impose. The schedule at issue is shielded from discovery by recognized privileges. Commenting parties may disagree with Applicants' privilege assertions, but such issues can and should be adjudicated through the discovery process. A discovery dispute regarding Applicants' assertion of privilege is not a basis for rejecting the Application as incomplete.

³⁶ See CN at 25–31; CPKC-7 at 10–11; CSXT-4 at 9–10. Applicants would have no objection to providing the Board with the disclosure schedules they produced in discovery, with appropriate redactions.

IX. The Application Appropriately Addresses Issues Regarding Applicants' Control Of Other Rail Carrier Entities.

Applicants' railroad competitors also advance a number of claims regarding rail carrier entities which Applicants either control or hold interests in. These claims are baseless.

A. NPBL

CSX contends that the Application is incomplete because it implicitly seeks control of the Norfolk and Portsmouth Belt Line Railroad ("NPBL") without filing a separate related control application.³⁷ As explained more thoroughly in a separate submission on this issue by Norfolk Southern, CSX is wrong. The Application is forward-looking, seeking authority for Union Pacific to acquire whatever interests Norfolk Southern is legally authorized to hold. The Board has stated that it will issue a decision in Docket No. FD 36836 regarding Norfolk Southern's application to control NPBL by April 2026. If the Board grants that application, then Norfolk Southern's control of NPBL will be treated the same as Norfolk Southern's control of any other carrier subsidiary. If the Board denies the request, then Norfolk Southern will be required to divest sufficient shares so that it does not control NPBL. Either way, no separate related application was required. The two proceedings are unrelated and should proceed separately.

B. TRRA

CSX also takes issue with Applicants' related application for control of the Terminal Railroad Association of St. Louis ("TRRA"). Contrary to CSX's claim,

³⁷ See CSXT-4 at 3.

Applicants were not required to treat their application for control of the Terminal Railroad Association of St. Louis (“TRRA”) as a significant transaction under the Board’s rules.³⁸ Applicants have no interest in controlling TRRA. As discussed in the primary Application, they have committed to divesting NS’s ownership interest in TRRA and redistributing NS’s shares equally to TRRA’s other current owners—BNSF, CN, and CSX—which would reduce UP’s post-merger ownership interest in TRRA below 50 percent. *See* Novak VS, App. Vol. 1 at 334–36. Applicants applied for control authority solely because such authority would become necessary in the event they are unable to complete the planned divestiture before they are allowed to consummate their transaction. *See* App. Vol. 1 at 18–19.

Even during the brief period in which they may control TRRA, Applicants’ acquisition of control will not have any anticompetitive effects because Applicants are not planning any changes to TRRA. *See* TRRA Control Application, App. Vol. 2 at 1049. Further, TRRA’s operating agreement specifically and unequivocally prohibits TRRA from discriminating in favor of any company with respect to use of its terminal system and from discriminating with respect to the transfer or handling of cars. *See id.* at 1049–50. TRRA’s bylaws further protect minority owners by imposing supermajority requirements on matters including fees and capital contributions that Applicants could not overcome, even with a combined 57.13% interest. *See id.* at 1050. CSX asserts that the Board cannot rely on such provisions, calling them “illusory,”³⁹

³⁸ *See* CSXT-4 at 6.

³⁹ *Id.* at 7.

but the Board's predecessor has relied on non-discrimination provisions in approving transactions in similar contexts, and CSX does not identify any circumstances in which those provisions have been violated. Further, Applicants have already agreed to divest shares to reduce UP's post-merger ownership interest in TRRA below 50 percent, which is the most that would be required under Board precedent.⁴⁰ CSX's concerns about Applicants' application to control TRRA have no merit and have no bearing on the Application's completeness.

C. Other Controlled and To-Be-Controlled Entities

BNSF vaguely alleges that the Application is deficient in some way because it fails to specify the entities that UP seeks to control.⁴¹ That is incorrect. Exhibits 8 and 10 to the Application provide extensive information, required by the regulations, regarding Applicants' organizational structures, which subsidiaries are rail carriers, the extent of control of each carrier, and change in control information. Where neither UP nor NS previously controlled an entity but where the combined entity would control that entity, Applicants submitted related control applications (despite plans for divestiture).

⁴⁰ In the UP-MKT transaction, the Interstate Commerce Commission originally imposed a stock-sale condition on UP's acquisition of control of a similar terminal railroad, Texas City Terminals, because the Commission was unable to find "specific, unequivocal language . . . guaranteeing equal access to all participating railroads." *Union Pac. Corp., et al.—Control—Missouri-Kansas-Texas R.R.*, 4 I.C.C.2d 409, 478 (1988). However, the Commission later approved a negotiated non-discrimination condition in lieu of the stock purchase condition. *See Union Pac. Corp., et al.—Control—Missouri-Kansas-Texas R.R.*, FD 30800 (ICC served Oct. 21, 1988). Here, TRRA's operating agreement unequivocally prohibits discrimination, and Applicants have committed to divesting sufficient shares to preclude majority ownership of TRRA.

⁴¹ *See* BNSF-8 at 4–5.

BNSF takes issue with the Application’s statement that Applicants’ collective ownership of 50 percent of Kansas City Terminal Railway (“KCT”) will not give Applicants control of KCT and thus does not require authorization—a proposition that is supported by ample Board precedent. *See* Appl. Vol. 1 at 19 n.3. And while Board precedent recognizes that other factors could nonetheless be relevant to the question of control despite a 50 percent ownership stake, BNSF has not alleged that any such factors exist—and none do.

X. Minor Map Issues Do Not Make The Application Incomplete.

CN notes that Applicants’ non-GIS map submitted as Exhibit 1 does not show UP’s overhead trackage rights on NS between Kansas City, Missouri, and Springfield, Illinois, or NS’s haulage rights on UP between Salem, Illinois, and Sidney, Illinois. Applicants regret the omissions and will be filing a corrected Exhibit 1, but the issue does not render the Application incomplete.⁴²

The mapping issue has no impact on the substance of the Application or any of the analysis in it. UP has never used the Kansas City-Springfield rights, but if UP had used them, Applicants’ witnesses would have included any traffic moving over the rights in their analyses. Similarly, NS no longer uses its Salem-Sidney rights (which actually consist of haulage rights between Salem and Villa Grove, Illinois, and trackage rights between Villa Grove and Sidney), but if NS had been using those

⁴² The GIS Maps that Applicants submitted with the Application show NS’s Salem-Sidney rights, but not UP’s Kansas City-Springfield rights.

rights, Applicants' witnesses would have included any traffic moving over the rights in their analyses.

As CN observes, the existence of the trackage and haulage rights is publicly known. UP and NS also identified the rights in response to the Board's Decision No. 3, which required Applicants to provide a list of joint facilities and joint use agreements on the entire UP system and the entire NS system.⁴³ The joint facilities were also included on UP's Geospatial Information System ("GIS") Maps produced in response to Decision No. 3, and the Kansas City-Springfield rights were included on NS's GIS Maps. Applicants will be filing a corrected Exhibit 1, but the issue is not a reason to reject the Application as incomplete.

XI. Workpaper Complaints Do Not Make The Application Incomplete.

Finally, BNSF vaguely asserts there have been "issues receiving and accessing Applicants' work papers."⁴⁴ Applicants recognize some—but not all—parties have had difficulties addressing the workpapers because of the size of the files. Applicants also recognize that there might be questions about certain workpapers. This is bound to be the case in a filing the size of the Application. Applicants have been working diligently to answer the questions they have received, and they are committed to promptly addressing and resolving any issues related to workpaper access. Applicants have provided more than 142 gigabytes of supporting workpapers. The

⁴³ See UP-6, attachment "UP joint facilities.xlsx"; NS-6 "NS – Joint Facilities List.xlsx."

⁴⁴ See BNSF-8 at 5.

existence of a few issues with such a massive production is not a reason to reject the Application as incomplete.

Respectfully submitted,

/s/ Raymond A. Atkins

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January 2, 2026

/s/ Michael L. Rosenthal

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CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of January, 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.

/s/ Michael L. Rosenthal

From: [Williams, Onika](#)
To: [Harrison, Caroline](#)
Cc: [Rosenthal, Michael](#); [Kelly, Kevin](#); [Denton, Peter](#); [Thompson, McClain](#); [Strafford, Tim](#)
Subject: RE: FD 36873 – Replacement workpaper files
Date: Saturday, December 27, 2025 9:01:20 AM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)

[EXTERNAL]

Caroline,

Thank you for the response, but we may not be on the same page. We are not requesting raw data files shared by the STB or the railroads. What we need – and are requesting – are intermediate datasets that result from Dr. Bailey's processing of the raw data, a processing that often involve combining multiple sources of raw data.

Dr. Bailey did provide a set of final datasets that her programs output for use in the Hunt-Schabas report. However, Dr. Bailey did not provide the nine datasets that we request below and that she uses in her own report. (For reference, Dr. Israel provided a packet of final datasets that reflected the output from his programs; that is analogous to what we are requesting from Dr. Bailey.)

Please let us know whether UP will provide the nine requested datasets or not.

Thanks,

Onika

From: Harrison, Caroline <CHarrison@cov.com>
Sent: Friday, December 26, 2025 4:32 PM
To: Williams, Onika <owilliams@steptoe.com>
Cc: Rosenthal, Michael <mrosenthal@cov.com>; Kelly, Kevin <Kkelly@cov.com>; Denton, Peter <pdenton@steptoe.com>; Thompson, McClain <mcclain.thompson@kirkland.com>; Strafford, Tim <tstrafford@steptoe.com>
Subject: [EXTERNAL] RE: FD 36873 – Replacement workpaper files

Onika,

All of the datasets referenced below are included in the Bailey workpaper collection with the exception of the confidential waybill sample data, which was obtained directly from the STB. We assumed you had separately obtained access to the confidential waybill sample, but we can provide you with a copy of it if you provide us with a copy of an STB letter authorizing your access.

Best,
Caroline

Caroline Harrison

Covington & Burling LLP
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Washington, DC 20001-4956

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From: Williams, Onika <owilliams@steptoe.com>
Sent: Friday, December 26, 2025 3:44 PM
To: Harrison, Caroline <CHarrison@cov.com>
Cc: Rosenthal, Michael <mrosenthal@cov.com>; Kelly, Kevin <Kkelly@cov.com>; Denton, Peter <pdenton@steptoe.com>; Thompson, McClain <mcclain.thompson@kirkland.com>; Strafford, Tim <tstrafford@steptoe.com>
Subject: RE: FD 36873 – Replacement workpaper files

[EXTERNAL]
Caroline,

May we have access to the following datasets referenced in Dr. Bailey's workpapers?

	Requested dataset name
1	bnsf_2019_2024
2	stb_cws_data_2019_2023
3	cn_2023
4	waybill_wide_stack_all_years
5	waybill_wide_stack_all_years_revenue_flag
6	non_relevant_stcc_codes
7	non_rail_tonnage_and_revenue
8	ns_2019_2024_step2
9	UP_NS_Merged_Data_19_24

Thank you,

Onika
Onika K. Williams
Of Counsel
Steptoe

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From: Harrison, Caroline <CHarrison@cov.com>
Sent: Tuesday, December 23, 2025 9:02 PM
To: Harrison, Caroline <CHarrison@cov.com>
Cc: Rosenthal, Michael <mrosenthal@cov.com>; Kelly, Kevin <Kkelly@cov.com>
Subject: [EXTERNAL] FD 36873 – Replacement workpaper files

All,

We have received reports that some parties have had issues accessing certain workpaper files. In response to these requests, we have uploaded a number of replacement files for workpapers in the Bailey and Hunt-Schabas workpaper collections. These replacement files can be accessed here: <https://covington.kiteworks.com/w/f-47525614-d86f-4f6b-94fo-37f48e75206f>

Our efforts to investigate access issues and upload replacement workpapers remain ongoing, and we will notify you in the event that additional replacement files are uploaded.

Best,
Caroline

Caroline Harrison

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