ARU-4
BLET-3

BEFORE THE
UNITED STATES SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 36873

UNION PACIFIC CORPORATION AND
UNION PACIFIC RAILROAD COMPANY

—CONTROL—

NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY

COMMENTS OF THE
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION/IBT;
BROTHERHOOD OF RAILROAD SIGNALMEN; INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL AND TRANSPORTATION WORKERS-MECHANICAL DIVISION; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT #19,
TRANSPORTATION COMMUNICATIONS UNION/IAM; AND
THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN
IN RESPONSE TO MOTIONS FOR REJECTION OF THE REVISED APPLICATION

The unions participating in the above-captioned proceeding as the Allied Rail Unions (“ARU”) [Brotherhood of Maintenance of Way Employes Division/IBT; Brotherhood of Railroad Signalmen; International Association of Sheet Metal, Air, Rail and Transportation Workers Mechanical Division; International Association of Machinists and Aerospace Workers District #19, and Transportation Communications Union/IAM]; and the Brotherhood of Locomotive Engineers and Trainmen (referred to collectively herein as ARU/BLET) support the motions of various parties that have urged the Board to summarily deny or reject the Revised

Application submitted by Union Pacific Railroad Company and Norfolk Southern Railway Company and their corporate parents and affiliates (referred to herein as "Applicants" or "UP and NS"). Specifically, the ARU/BLET support the motions of the Joint Shippers Associations ("JSA"), NGFA, BNSF, CPKC, and CSXT (collectively referred to herein as "Movants") for denial or rejection of the Revised Application.

ARU/BLET will not belabor the record with duplication of citations, authorities and arguments set forth ably and in detail by the Movants. ARU/BLET support the motions and arguments of the Movants. ARU/BLET agree with the Movants that Applicants have failed to satisfy the requirement that they present a prima facie case that the proposed control and merger transaction may be permitted under the standards of 49 U.S.C. §11324, as required by the Board's regulations at 49 C.F.R. §1180.4(c)(8); and that Applicants have failed to comply with the new Class I combination standards promulgated by the Board in *Major Rail Consolidation Procedures,* 5 S.T.B. 539 (2001)(referred to herein as "new Class I Merger Rules"). In particular, ARU/BLET agree with the Movants that, under the new Class I Merger Rules, proponents of a new merger of Class I railroads must show more than previously required to demonstrate that a transaction is consistent with the public interest under Section 11324; and specifically that the proposed transaction will enhance intra-modal competition (that is competition among railroads, and not just inter-modal competition, *e.g.,* between railroads and trucking companies); that merger applicants must provide the Board with evidence and analysis sufficient for the Board to effectively evaluate the potential "downstream effects"/"end state of the industry" if the Board were to approve an application; and that a detailed and concrete Service Assurance Plan is required.

Here, the Revised Application completely fails to show any enhancement of intramodal competition (indeed Applicants assert that they need not make any such showing, restricting their evidence and arguments on enhancement of competition to intermodal competition, in contravention of the new Class I Merger Rules); the Applicants have essentially refused to provide, or claimed inability to provide, evidence and analysis of the potential downstream effects/end state of the industry if their Application were to be approved; and Applicants' Service Assurance Plan is little more than conclusory assertions of intent to provide adequate service.

In addition to being contrary to the plain terms of the new Class I Merger Rules, after three swings of the bat, the Applicants have completely ignored the context of the Board's issuance of the new Class I merger rules. ARU/BLET emphasize these shortcomings of the Application because Rail Labor lived through the adverse consequences of the merger and control transactions of the 1990s that were the reason for adoption of the new rules. Rail employment was reduced by nearly 20% in the several years between the Union Pacific-Chicago and North Western and Burlington Northern and Atchison Topeka and Santa Fe mergers and the CSX/NS- Conrail transaction. As each set of merger applicants leapfrogged the last merger, rail unions and others argued that the ICC and STB should consider the potential downstream effects of each transaction - that UP/CNW would beget BNSF, that would beget UP/SP that would beget the competition between CSX and NS that resulted in the division of Conrail between them. Each time the Commission or Board responded that it was only considering the transaction placed before it, and not potential future transactions. But the reality was that each approved transaction spurred a responsive transaction; and within about six years the industry was reduced to two carriers in the eastern and western halves of the Country; and shortly after that, to two carriers running north-south through the Midwest. Seemingly, without any real forethought or planning, freight rail transportation became dominated by duopolies. While the Staggers Act contemplated competition as a remedy for service issues, the ICC and STB had sleep-walked into a non-competitive environment that the agency lacked the statutory and regulatory tools to address.

The ultimate result of creation of the duopolies was reduced employment and reduced service (especially as finance interests moved to exploit the market dominance of the lightly regulated duopolies by compelling adoption of the ruthless cost-cutting business model branded as PSR). Rail workers experienced reductions in employment, and there was a concomitant deterioration of service that resulted from those reductions in employment and in competition as a consequence of the agency viewing each successive application in isolation. Rail workers also experienced the service meltdowns that followed the mergers. Rail unions warned of the likely problems as the mergers were implemented, as employment was reduced to help pay down debt, as collective bargaining agreements were overridden, and as the merged entities moved to quickly implement the mergers. Each time there were merger implementation problems as workforces were cut and employees pressed into new territories with insufficient training, support and co-worker backup. And after each transaction was implemented, the next applicants would tell the agency that they had learned from the lessons of the past merger and were prepared to implement their new merger without problems. But post-the UP/SP merger, UP lost track of rail cars on former SP lines, and cars took lengthy amounts of time to transit between Los Angeles and Houston. After the CSXT/NS-Conrail transaction, NS sent trains on former Conrail tracks that could not clear bridges and tunnels on the lines acquired by NS.

It was in the aftermath of the control and merger transactions of the mid-1990s to early 2000s and the service problems following consummation of those transactions, and with knowledge that future Class I mergers would result in not merely regional duopolies but national duopolies, that the Board adopted the new Class I Merger Rules - insisting on affirmative showings of enhanced rail-to-rail competition, analysis of downstream/end state effects and real Service Assurance plans (not repeats of the conclusory statements and blithe assertions of lessons learned that characterized the transactions of the 1990s, that Applicants unfortunately echo in their current Revised Application)[1]. ARU/BLET submit that the shortcomings of the Applicants' Amended Application must be measured not only against the express requirements of the new Class I Merger Rules, but with due regard for the circumstances that caused the Board to issue the new rules, and context in which the specific new requirements were adopted.

ARU/BLET also note that events in the 2020s have demonstrated that the 2001 Board understated the degree of harm to the public interest and industry stakeholders as a result of consolidation of the industry and market dominance of the duopolies. In the wake of the PSR driven mindless focus on reductions in operating ratios (in order to support stock buybacks) there were continuing cuts in employment and disregard for the service provided to shippers. At the

[1] With respect to the Service Assurance Plan, ARU/BLET note that Applicants represent that they anticipate a net increase in craft employees of 901 positions by year 3. But Applicants elsewhere state that their combined pre-application craft employment was 63,755 employees and that they assume 8% per year attrition (or 16% over the two years required from date of announcement of the proposed merger to completion of Board review). It is unclear whether the expected net increase in employment is relative to pre-application staffing, or post -approval (post-attrition) staffing. In the first scenario, 901 positions would represent just over a 1% increase, in the second scenario it would be just under a 2% increase. Applicants have not explained which scenario they assume. And they certainly have not explained how they will handle the projected dramatic increases in traffic assumed in the Revised Application, as well as the additional and maintenance and repair work required as a result of greater use of the infrastructure from the planned growth in carloads, and from the overall increased infrastructure with just a 1% or 2% increase in staffing.

start of the pandemic, the Class I's engaged in heavy furloughs only to find that fed up employees were not interested in returning to work as demand for rail service increased. The Class I's could get away with prioritizing job cuts over preparedness for a return of demand because their customers had nowhere else to go, and the Board was hard pressed to utilize the statutory tools it had to compel better service. The result was the service meltdowns that led to the Board's Urgent Issues In Freight Rail Service proceedings, (Ex Parte No. 770) which revealed that the Class I's had reduced staffing well below what was needed to respond to a bounceback in demand for service; the remarkable Oversight Hearings Pertaining To Union Pacific Railroad Company Embargoes (Ex Parte No. 772) regarding an unprecedented number UP embargoes, exponentially greater than ever before, which were also attributed in part to UP staffing problems; Foster Farms' repeated requests for emergency service orders to UP (F.D. 36609) because insufficient service threatened a need to euthanize millions of chickens (in which BRS demonstrated that UP had dramatically reduced its Signalmen workforce and allowed the line used to service Foster Farms to deteriorate to well below adequate levels); and the Sanimax proceeding (NOR 4271) where UP dictated levels of service inimical to Sanimax's business model. All of those problems flowed from the impunity achieved by the Class I's as duopolies with their relative immunity to customer complaints, and this was especially so for UP.

The impunity that comes from such market dominance was graphically illustrated by Union Pacific's January 25, 2024, earnings call with industry financial analysts in which CEO Vena, CFO Jennifer Hamann, EVP Marketing and Sales Kenny Rocker, and EVP Operations Eric Gehringer were asked about increasing profits by increasing traffic by reducing prices and they responded that they would gain profitability by "efficiencies" including further reductions in headcounts, that Union Pacific was maintaining "price discipline' and would not lower prices to increase volumes, and that a shipper would have to meet Union Pacific's [profit] margin to be on the system - an approach plainly at odds with the common carrier obligation.[2] Such impunity would only be enhanced if there were national duopolies resulting from a UP/NS merger followed by another merger of Class I railroads.

Viewed in this larger context, the inadequacies of the Revised Application with respect to enhancement of rail competition, evidence and analysis of downstream/end state of the industry if the merger is approved, and the Service Assurance Plans are readily apparent. The Board should therefore hold that Applicants have failed to make a prima facie case in support of the proposed transaction, and the Revised Application should therefore be summarily denied or rejected.

CONCLUSION

For the reasons set forth herein, ARU/BLET respectfully submit that the Movants' motions for summary denial or rejection of the Revised Application be granted.

Respectfully submitted,

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[2] The link to a recording of that conversation is https://www.up.com/cs/groups/public/@uprr/@investor/documents/investordocuments/mp3_unp_4q23_er_replay.mp3. This conversation was discussed in more detail in the Unions' Third Supplemental Filing in E.P. 770-Sub No.1

CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the foregoing Comments Of the ARU and BLET to be served to representatives of all Parties of Record as of the date of this filing, and to Administrative Law Judge Jenifer Soulikias by email using the addresses on the service list for this proceeding.

Date: August 19, 2026

/s/Richard S. Edelman
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