January 20, 2016

The Honorable Daniel R. Elliott III
Chairman
United States Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

The Honorable Ann D. Begeman
Vice Chairman
United States Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

The Honorable Debra Miller
United States Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Dear Chairman Elliott and Surface Transportation Board Members:

I write in regard to the attempts by Canadian Pacific Railway to acquire Norfolk Southern Corporation. If consummated, a merger between Canadian Pacific and Norfolk Southern would result in the reported control of 32,000 miles of track by a single entity, or roughly one-fifth of the United States rail system. As the Ranking Member of the Regulatory Reform, Commercial and Antitrust Law Subcommittee, which has oversight of our nation’s antitrust laws and competition issues generally, I have a strong interest in ensuring competition in the railway industry.

As you have noted, merger activity has substantially declined since the Board adopted its current merger rules in 2001. These rules were promulgated in response to an unprecedented

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3 Letter from Daniel R. Elliott III, Chairman, U.S. Surface Transportation Board, et al., to Rep. Bob Goodlatte (R-VA), Chairman, House Comm. on the Judiciary (Jan. 7, 2016) (“No major consolidation proposals have been submitted since the adoption of the Merger Rules.”).
wave of mergers and rampant consolidation in the rail industry. In short, the rules require large
merger applicants in the rail industry to overcome the Board’s presumption that mergers “serve
the public interest only when substantial and demonstrable gains in important public benefits—
such as improved service and safety, enhanced competition, and greater economic efficiency—
outweigh any anticompetitive effects, potential service disruptions, or other merger-related
harm.”6 Additionally, the Board must give weight to whether the benefits of a proposed
transaction are achievable by alternative means without consolidation.5

Congress has a strong interest in enabling the federal government to “halt mergers in their
incipiency that likely would result in high market concentrations.”6 While the Surface
Transportation Board has exclusive authority to approve railway mergers,7 the lodestone of
traditional merger analysis is whether a proposed transaction creates a reasonable likelihood of
substantially lessening competition or creating a monopoly in a relevant market.8 Mergers
between competitors in highly concentrated markets tend to have anticompetitive consequences,
which may include higher prices and fewer choices.9 Transactions that lead to undue
concentration in the markets of particular geographic areas are presumptively anticompetitive.10

Canadian Pacific’s repeated purchase offers for Norfolk Southern present the alarming
threat of returning to an age of rampant consolidation in the rail industry. There is scant
competition in the industry today. Over the past several decades, the number of Class 1 railroad
operators has shrunk from 56 to seven, and mergers in this industry have reportedly led to “lost
cargo, derailments, death and billions of dollars lost by businesses and taxpayers.”11 As a natural
monopoly, the railway industry often lacks adequate choices for transporting goods, which
results in higher prices to consumers and fewer market entrants.12 I am also concerned that a
cascade of further consolidation could potentially follow in the wake of any new mergers. For

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6Elliott et al., supra note 2.
10See United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 49 (D.D.C. 2011) (“Section 7 does not require proof
that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the
merger create an appreciable danger of such consequences in the future.”); United States v. Philadelphia Nat. Bank,
374 U.S. 321, 367 (1963) (“A fundamental purpose of amending [Section 7 of the Clayton Act] was to arrest the
trend toward concentration, the tendency to monopoly, before the consumer’s alternatives disappeared through
merger.”); US DOJ & FTC, Horizontal Merger Guidelines ¶ 4.1.1 (2010) (the hypothetical monopolist test is
satisfied where a firm is able to raise prices for at least one product in the market).
is legal for rail carriers controlling bottleneck situations to use their monopoly power in the segment they control to
extract the maximum profit possible from shippers . . . [which] generally translates into higher costs for consumers
for the goods being transported.”).
instance, two other Class I railroads have already indicated they plan to submit competing offers.13

In light of these concerns, I urge careful scrutiny of this transaction, should it be finalized, and look forward to continuing a dialogue on competition in the railway industry.

Sincerely,

Henry C. “Hank” Johnson, Jr.
Ranking Member, Subcommittee on Regulatory Reform,
Commercial and Antitrust Law
House Committee on the Judiciary