

AMY KLOBUCHAR
MINNESOTA

COMMITTEES:
AGRICULTURE, NUTRITION,
AND FORESTRY
COMMERCE, SCIENCE,
AND TRANSPORTATION
JOINT ECONOMIC COMMITTEE
JUDICIARY
RULES AND ADMINISTRATION

United States Senate
WASHINGTON, DC 20510

December 07, 2015

The Honorable Loretta E. Lynch
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

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

Dear Attorney General Lynch and Chairman Elliott:

I am writing to express my concerns about concentration in the railroad industry following the recent proposal by Canadian Pacific Railway to merge with Norfolk Southern Railway. Despite Norfolk Southern's rejection of Canadian Pacific's offer, Canadian Pacific has reiterated its intent to acquire Norfolk Southern.

Significant consolidation has already occurred in the railroad industry. In 1980, there were approximately 26 major ("Class I") railroads in the United States. Today, however, there are only seven Class I railroads, four of which handle over 90 percent of United States rail freight. Increased prices and diminished service, such as delayed deliveries, has burdened the shipping industry, American producers, and those who rely on freight rail for distribution. These effects are costly to Minnesota, which ranks third in the country for agricultural exports (\$8 billion in 2013). I am also concerned that this proposed merger, if completed, would become the catalyst for a final round of railroad industry consolidation.

The railroad antitrust exemption makes further consolidation particularly dangerous. In other industries, that level of concentration would trigger substantial antitrust review by either the Department of Justice (DOJ) or the Federal Trade Commission to ensure any merger would not harm the nation's consumers in violation of Section 7 of the Clayton Act. Because of the exemption, the DOJ has only an advisory role in the process. The Surface Transportation Board (STB) has sole authority to approve Class I railroad mergers if it finds them to be "consistent with the public interest," 49 U.S.C. section 11324. I introduced the Railroad Antitrust Enforcement Act,

S. 1634, to repeal the outdated and anticompetitive antitrust exemption. Until Congress enacts that bill, the Surface Transportation Board's review must protect consumers.

I have specific concerns about this transaction. Combined, the two railroads would have approximately \$17 billion in annual revenue and would operate approximately 34,000 miles of track. The CEO of Canadian Pacific has proposed placing Norfolk Southern into a so-called "voting trust" under 49 C.F.R. section 1013 during the period of the Surface Transportation Board's review. As you are well aware, the voting trust is an instrument that ensures that a purchased railroad remains independent from the purchasing railroad until the Surface Transportation Board completes its review of the transaction. In 2001 the Surface Transportation Board added the following requirement for merger applicants contemplating the use of a voting trust:

[A]pplicants ... contemplating the use of a voting trust must explain how the trust would insulate them from an unlawful control violation and why their proposed use of the trust ... would be consistent with the public interest. 49 CFR section 1180.4(b)(4)(iv).

I believe that any proposal by Canadian Pacific to have current or former Canadian Pacific executives assume operational control of Norfolk Southern as Trustees of the potential voting trust would raise serious concerns about their true independence and essentially cede operational control before the Department of Justice has had an opportunity to provide its views and the Surface Transportation Board has reviewed whether the combination is in the public interest. To protect competition, review of the transaction must occur before any possible coordination between the two parties. I urge you to carefully scrutinize any such proposal and ensure that any voting trust structure is truly independent.

We can all agree that competition leads to low prices, high-quality service, and innovation, but I am concerned that further consolidation will complicate efforts to promote those goals. I look forward to working with you on these important issues.

Sincerely,



Amy Klobuchar
United States Senator