

HENRY C. "HANK" JOHNSON, JR.  
4TH DISTRICT, GEORGIA

COMMITTEES:

JUDICIARY

ARMED SERVICES

**Congress of the United States**  
**House of Representatives**  
**Washington, DC 20515-1004**

SUBCOMMITTEES:  
RANKING MEMBER,  
REGULATORY REFORM, COMMERCIAL,  
AND ANTITRUST LAW  
CONSTITUTION AND CIVIL JUSTICE  
SEAPOWER AND PROJECTION FORCES  
INTELLIGENCE, EMERGING THREATS  
AND CAPABILITIES  
STRATEGIC FORCES

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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> These rules were promulgated in response to an unprecedented

<sup>1</sup> Leslie Picker, *Norfolk Southern Rejects Canadian Pacific's Third Offer*, N.Y. TIMES (Dec. 23, 2015), <http://www.nytimes.com/2015/12/24/business/dealbook/norfolk-southern-rejects-canadian-pacifics-third-offer.html>.

<sup>2</sup> David Z. Morris, *Huge Hurdles, Upside in Proposed Rail Megamerger*, FORTUNE (Nov. 25, 2015), <http://fortune.com/2015/11/25/canadian-pacific-norfolk-southern-merger/>.

<sup>3</sup> 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 harms."<sup>4</sup> Additionally, the Board must give weight to whether the benefits of a proposed transaction are achievable by alternative means without consolidation.<sup>5</sup>

Congress has a strong interest in enabling the federal government to "halt mergers in their incipiency that likely would result in high market concentrations."<sup>6</sup> While the Surface Transportation Board has exclusive authority to approve railway mergers,<sup>7</sup> 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.<sup>8</sup> Mergers between competitors in highly concentrated markets tend to have anticompetitive consequences, which may include higher prices and fewer choices.<sup>9</sup> Transactions that lead to undue concentration in the markets of particular geographic areas are presumptively anticompetitive.<sup>10</sup>

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 I 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."<sup>11</sup> 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.<sup>12</sup> 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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<sup>4</sup>Major Rail Consolidation Procedures, Fed. Reg. 32582 (adopted June 15, 2001) (to be codified at 49 C.F.R. 1180), <https://www.gpo.gov/fdsys/pkg/FR-2001-06-15/pdf/01-14984.pdf>.

<sup>5</sup> Elliott et al., *supra* note 2.

<sup>6</sup> Fed. Trade Comm'n v. Sysco Corp., No. 1:15-CV-00256 (APM), 2015 WL 3958568, at \*2 (D.D.C. June 23, 2015).

<sup>7</sup> 49 U.S.C. § 11321–11328 (2016) (listing STB-approved transactions).

<sup>8</sup> 15 U.S.C. § 18 (2016); *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 171 (1964); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 49 (D.D.C. 2011).

<sup>9</sup> *See 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).

<sup>10</sup> *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 49 (D.D.C. 2011).

<sup>11</sup> Leslie Picker, *Regulations May Thwart Acquisitions in Railroads*, N.Y. TIMES (Dec. 20, 2015),

<http://www.nytimes.com/2015/12/21/business/dealbook/regulations-doubts-and-concerns-may-thwart-railway-mergers.html?ref=dealbook>.

<sup>12</sup> *See* H. REP. NO. 111-669 at 7 (2010), <https://www.congress.gov/111/crpt/hrpt669/CRPT-111hrpt669-pt1.pdf> ("[I]t 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.").

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instance, two other Class I railroads have already indicated they plan to submit competing offers.<sup>13</sup>

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,

A handwritten signature in blue ink, appearing to read "Hank Johnson".

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

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<sup>13</sup> Thomas Black, *BNSF Could Join Bidding If Railroad Mergers Start, Top Exec Says*, STAR-TELEGRAM (Dec. 11, 2015), <http://www.star-telegram.com/news/business/article49332870.html> ("The head of Fort Worth-based BNSF Railway is vowing to join any consolidation in the North American industry, saying that Canadian Pacific Railway's \$27 billion bid for a U.S. rival inevitably would trigger more deals.").