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December 29, 2025

Chief of Case Administration
Office of Chief Counsel
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

BNSF-8

Re: *STB Docket No. FD 36873, Union Pacific Corporation, et al.—Control—Norfolk Southern Corporation, et al.*

Dear Chief of Case Administration:

BNSF Railway writes in response to the Board's request for comments on whether the UP/NS merger application (the "Application") contains the required procedural information. *See* Decision No. 7 (Dec. 19, 2025). Although BNSF believes the Application cannot be approved on the merits, BNSF defers to the Board's judgment on "whether the Application contains the information required in 49 C.F.R. part 1180"—with the understanding that the merits will be addressed by the parties and considered by the Board at a later time. *See id.* at 2. As submitted, the Application fails to establish that the proposed merger transaction meets the public interest standard on the merits and cannot be approved by the Board.

BNSF does, however, offer three overarching points in this submission for the Board's consideration of the Application at this stage and selection of an appropriate schedule for this proceeding. ***First,*** although BNSF takes no position on whether the Application provides the minimum procedural information in order to proceed, the Application was UP and NS's case-in-chief, yet it only superficially grapples with the serious issues the proposed merger creates for shippers, American businesses, the rail industry, and the American economy. BNSF identifies certain merits issues now because they impact the schedule and information exchange that is needed to address the Application. ***Second,*** based on the lack of meaningful detail in the Application, BNSF is concerned that UP and NS may attempt to supplement their submission to address the many deficiencies in it at a later date—without sufficient time for other parties to provide comments and for the Board to fully consider the supplements and comments thereto. Accordingly, BNSF reemphasizes that a longer schedule—consistent with the one sought by BNSF and others—is necessary to address the issues this Application raises. ***Third,*** UP and NS have failed to provide requested discovery and data necessary to fully consider and address the Application. The Board should require production in a timely manner.

THE APPLICANTS' BURDEN

The burden of proof in this proceeding belongs to and will always remain with UP and NS. Because "the Board does not favor consolidations that reduce the transportation alternatives available to shippers," UP and NS must show "substantial and demonstrable public benefits"—including enhanced competition—"that cannot otherwise be achieved." *See* 49 C.F.R. § 1180.1(a). UP and NS do not and cannot carry their burden based on the Application they submitted. UP and NS were obligated to submit a complete and well-supported record that demonstrates the merger is in the public interest. UP and NS made strategic choices regarding the scope, detail, and evidentiary support of their Application. The Application does not recognize the real competitive harms created by the proposed merger, instead arguing that a transaction that would consolidate nearly half of all rail traffic in the United States under UP's sole control is "unambiguously pro-competitive" and creates "no credible competitive harm." *See* Joint Verified Statement of Kenny Rocker and Claude E. Elkins ¶ 5, UP-NS Merger App. Vol. 1 at 221; Verified Statement of Mark R. George ¶ 63, UP-NS Merger App. Vol. 1 at 213. After dismissing that such harms even exist or that there is any legal obligation to address them, UP and NS offer underdeveloped proposals that will not protect rail shippers or American consumers.[1]

The conclusory nature of the Application, along with the billion-dollar change to UP and NS's claimed net revenue synergies, raises concerns that UP and NS are trying to improperly shift the burden to other parties and the Board to develop the factual record that UP and NS did not. The Board should not be forced into a process to try to make it work. Nor should the Board allow the limited, proposed conditions to function as an anchoring mechanism for what UP and NS may view as a floor for subsequent negotiation with shippers and competitors. A merger proceeding is not a bargaining process, and UP and NS may not rely on later-offered conditions or commitments to cure shortcomings in their case-in-chief.

PRELIMINARY IDENTIFICATION OF ISSUES THAT IMPACT THE SCHEDULE

BNSF identifies a non-exhaustive list of issues in the Application, which bear on the procedural schedule to be entered in this case. A longer procedural schedule will be necessary to (1) allow the Board and stakeholders to develop a complete evidentiary record and (2) guard against sandbagging in a process where UP and NS will likely try to remedially amend their merger package and expand their discussion of core issues.

[1] The Board is still dealing with serious issues from prior mergers. *See, e.g.*, *Canadian Pac. Ry. Co., et al.—Control—Kan. City S.*, FD 36500 (STB served Mar. 15, 2023); *Union Pac. Corp., et al.—Control and Merger—Southern Pac. Rail Corp., et al.*, FD 32760 (STB served Aug. 12, 1996).

Failure to Explain Product and Geographic Market Impacts and Competitive Harm.

Any serious discussion of a proposed Class I merger—as a matter of law and common sense—must include a rigorous analysis of its impacts on competition, including product and geographic competition. *See* 49 C.F.R. § 1180.7(b) (requiring "'full system' impact analyses" on competitive issues). Understanding geographic and product markets is essential to understanding whether a merger will cut off shippers' access to other railroads, give the merged company more price leverage through greater control over certain industries, and/or affect long-term investment decisions that matter to local communities.

But here, UP and NS all but ignore the merger's effects on geographic and product competition, instead repeating that this is an "end-to-end" merger. For example, the Application does not try to model or measure any shifts of traffic flows, even though the new rules require "an analysis of traffic flows indicating patterns of geographic competition or product competition." *See id.* § 1180.7(b)(4). UP and NS made no attempt to show where freight flows would shift from current origin-destination routes as a result of the transaction, where those shifts would occur, and how those changes would affect various communities.

The Application's lack of detail will hinder the Board in evaluating the competitive conditions arising from the merger and whether the merger serves the public interest. It gives short shrift to the Board's rules and the policy judgments underlying them, which expressly warn that "[c]ompetition in product and geographic markets can also be eliminated or reduced by mergers, ***including end-to-end mergers***." *See id.* § 1180.1(2)(i) (emphasis added). UP and NS's silence on key aspects of product and geographic competition is a tacit admission that this merger can (and here, does) significantly harm competition. Indeed, UP recognized the clear competitive risks posed by end-to-end mergers in the CP-KCS proceedings, where UP told the Board that "an end-to-end merger can lead to foreclosure and reduce competition," and that there should not be any presumption that vertical mergers are inherently procompetitive. *See* Verified Statement of Steven C. Salop, *Canadian Pac. Ry. Co., et al.—Control—Kan. City S.*, FD 36500, at ¶ 33 (STB served Feb. 28, 2022). That is not just economic theory, it is a commercial fact. A combined UP and NS would control nearly ***half*** of U.S. rail freight. The Application's discussion of harm to shippers is inadequate and does not offer the Board a clear picture of post-merger competitive dynamics.[2]

[2] The proposed Committed Gateway Pricing ("CGP") is no remedy for vertical foreclosure, nor does it enhance competition. The merger threatens foreclosure on thousands of routes; CGP would only apply to a small subset of them. *See* UP-NS Merger App. Vol. 1 at 322. CGP is also shot through with caveats and limitations, which appear to exclude most traffic currently interchanged with UP and NS. And CGP would be temporary and expire after a Board oversight period (within a few years of UP and NS completing their proposed three-year integration).

Failure to Address the "End-Game" of Rail Consolidation or Downstream Effects.

The Application barely acknowledges the potential downstream effects of this merger—a centerpiece of the 2001 rules. *See* 49 C.F.R. §§ 1180.1(i), 1180.6(b)(12). As the Board recognized, "[b]ecause there are so few remaining Class I carriers," and because of the interconnected nature of the rail industry, "the Board cannot evaluate the merits of a major transaction in isolation." *Id.* § 1180.1(i).

UP and NS's discussion of downstream industry structure amounts to little more than a shrug and suggestion to ask BNSF and CSX. That cannot be what the Board had in mind when it said it "***expects*** applicants to explain how additional Class I mergers would affect the eventual structure of the industry and the public interest," including by discussing "the likely impact of such future mergers on the anticipated public benefits of their own merger proposal" and "whether and how the type or extent of any conditions imposed on their proposed merger would have to be altered, or any new conditions imposed, should [the Board] approve any future consolidation(s)." *See id.* UP and NS's unwillingness to confront these issues head-on means the Application, as filed, cannot be approved by the Board on the merits.

Missing Projected Market Shares.

UP and NS do not provide "projected market shares" as required by the 2001 rules. *See* § 1180.7(b)(2)–(3). The Board's rules explicitly call for projected shares because that information is relevant for determining the state of future competition and the impact of the merger on the network and operations. UP and NS's economist, Elizabeth Bailey, defines "projected market shares" as the sum of NS and UP's 2023 actual market shares, which does <u>not</u> incorporate the over 2 million new units that UP and NS project they will attract elsewhere. *See* UP-NS Merger App. Vol. 2 at 12–13. These figures are thus not "projected market shares"; they do not "reflect the consolidated company's marketing plan"; and they do not "demonstrate the impacts of the transaction . . . on competition within regions of the United States." *Cf.* § 1180.7(a)–(b). In short, UP and NS once again have failed to provide the Board and stakeholders with the data needed to make an informed evaluation of post-merger competition, without which the merger cannot be approved on the merits.

Failure to Identify Information About Controlled—and To-Be-Controlled—Entities.

UP and NS were required to specify the proposed control structure for each of their subsidiary rail carriers and to identify all the "applicant carriers" in each system. This is not simply an academic exercise—it has real-world consequences. Short line railroads jointly-owned by Class I railroads often manage access to critical gateways and terminal facilities. If a Class I railroad obtains control over those smaller carriers, the larger railroad could manipulate the smaller railroads to artificially obtain and exercise market power over those facilities without recourse from antitrust scrutiny or other laws. As the Board recently explained when it determined that NS previously failed to seek and obtain control authority over one of its subsidiary carriers: "Given the significance of the antitrust immunity and other immunity that comes with control authority, the Board and the public must be able to have a clear understanding of the scope of the authority being sought." *See Norfolk S. Ry. Co.—Petition for Dec. Order*—FD 36522, slip op. at 13–14 (STB served June 17, 2022). The UP-NS Application frustrates that objective because it fails to specify the entities UP seeks control. It does not, for example, identify which NS rail carrier subsidiaries are subject to this control request or which are "applicant carriers" under the Board's rules.

The Application also assumes that obtaining 50% ownership of any rail carrier "will not give Applicants control of any rail carrier and thus does not require Board authorization." UP-NS Merger App. Vol. 1 at 19. The Board has been clear, however, that the amount of ownership interest in another carrier is not, on its own, dispositive on the question of control.[3] And NS previously sought "joint control" authority when it obtained a 50% interest in one of its subsidiary rail carriers, Pan Am Southern LLC ("PAS"). *Norfolk S. Ry. Co.—Joint Control & Operation/Pooling Agreement—Pan Am S. LLC*, FD 35147 (STB served Mar. 10, 2009). It seems from the Application's flawed "one-half ownership means no control" approach that PAS would be excluded from the ultimate control request here, notwithstanding its different treatment by NS in the past.

<u>MISSING DISCOVERY AND DATA NEEDED TO FULLY ASSESS APPLICATION</u>

UP and NS's surface-level presentation of their case-in-chief is exacerbated by their approach to data-sharing and discovery. UP and NS have not provided the source data that underlies their modal share and truck diversion analysis—the core of their purported benefits analysis. Nor have UP and NS provided the data that underlies their market share calculations in the report of their economist, Dr. Bailey. The failure to provide this data impairs other stakeholders from beginning their assessments and rebuttals. There have also been issues receiving and accessing Applicants' work papers.

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[3] *See, e.g.*, *Paducah & Louisville Ry., Inc.—Control Exemption—Paducah & Ill. R.R. Co.*, FD 33362, slip op. at 2 (STB served Aug. 25, 1997) ("Instead of an arbitrary formula based upon the percentage of stock ownership, [the Board] look[s] at a number of additional factors, including distribution of the remaining stock, the ability to elect directors and otherwise control or influence decision-making machinery, and the existence of management, marketing, operating and financial ties."). Applicants in STB proceedings have obtained authority to control carriers where the Applicants hold less than a 50% equity interest in the carrier—sometimes much less. *See, e.g.*, *RFM HoldCo LLC—Control Exemption—Pioneer Railcorp, et al.*, FD 36306 (Sub-No. 1), Verified Notice of Exemption at Ex. 1 (filed Dec. 2, 2020) (one of the entities obtaining control authority had a 0.55% equity interest in the railroads at issue).

In addition, UP and NS failed to use the five-month pre-Application period to address their discovery obligations. Substantial discovery remains outstanding and will now need to be expedited before depositions can begin. Among other issues, UP and NS have yet to produce a single email, and they have so far declined to identify the custodians they are using to search for case-relevant information. They have not even provided a full and complete copy of the merger agreement. Nor have they produced board materials or other internal assessments from their investment bankers and financial advisors. These data and discovery deficiencies are further evidence that a longer schedule will be required.

Sincerely,

/s/ Daniel T. Donovan
Daniel T. Donovan, P.C.

cc: Counsel of Record

CERTIFICATE OF SERVICE

I certify that I caused the foregoing to be served electronically or by first-class mail, postage pre-paid, on the Secretary of Transportation, the Attorney General of the United States, Applicants' representatives, Administrative Law Judge Jenifer Soulikias, and all parties of record in this proceeding.

/s/ Onika K. Williams
Attorney for BNSF Railway Company
December 29, 2025