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

BNSF-24

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 amended UP and NS merger application contains the information required by the Board's rules. *See* Decision No. 17 (Apr. 30, 2026).

On January 16, 2026, the Board rejected the UP and NS merger application and identified specific deficiencies in the application. Since then, UP and NS have been forced to produce certain executive-level documents regarding the merger and competition issues, and their executives have been on speaking tours trying to sell the proposed merger. Against that background, *the amended merger application makes things worse, not better*. The amended application fails to address the issues the Board ordered to be addressed. And UP and NS continue to treat the application process like a flexible negotiation rather than a regulatory review governed by rules.

The failure by UP and NS to resolve open issues was a deliberate choice. They made a calculation. They understand that the proposed merger creates issues that they do not fully address, but their strategy is to deny even the clearest harms, leaving them to the Board and participants to identify and propose fixes. They are counting on what the Board implements as being less than what responsible merging parties would have to put forward to have a complete merger package for review. The Board and other stakeholders should not be left to solve the problems the proposed merger would cause. The proposed application cannot be approved on the merits (which we understand is an issue for a later time).

At this point, because there is still not a fully formed proposal for the Board's consideration—and because the application lacks other required information—the Board should find the amended application incomplete.

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Applicants' amended application largely repackages their first application. They offer cosmetic changes to gloss over the serious and fundamental competition, pricing, and service concerns that were previously raised. UP and NS offer no new conditions or commitments that would effectively preserve competition, enhance competition, or benefit shippers. They continue to shrug off downstream effects. Their calculations of the harms and benefits continue to shift. They rely on flawed and inflated truck-to-rail conversion projections to sell the deal. And they ignore the fundamental issues that would be created in an industry with one transcontinental goliath and a small number of regional railroads.

UP and NS also ignore a critical fact—the goliath position that the combined entity is projected to hold. Despite the Board's order requiring them to provide market share projections, the revised application contains no clear table or statement sharing their calculations. Lifting the lid, it is clear that this transaction would result in significant market control, a fact they try to obscure and avoid: ***the merged entity would have 50% market share of the domestic U.S. rail freight (loaded revenue units originated by Class I)s market and 53% of the Class I Merchandise Gross Ton Miles market.*** It makes sense that UP would want to avoid discussion of these market share figures, as they far exceed the levels associated with a structural presumption of competitive harm under the DOJ's guidelines, which are more permissive than the STB's rules for major transactions.

Two other aspects of these numbers are notable. *First*, UP continues to deny that there are any competitive harms that would result from the merger, despite very clear losses of direct and indirect competition. Their volume projections account only for the benefits they claim and ignore those harms. Their projections fail to account for the impacts—including increased volume capture—that would be a predictable outgrowth of the loss of competition. *Second*, UP's CEO has publicly said UP submitted “very conservative” growth projections and that they can overdeliver. Playing both sides, UP continues to lowball its projected market shares to the Board but signals to Wall Street—the engine behind this proposed merger—that the market shares and pricing power will be even higher. UP should not have two sets of books for its growth projections—one set for the regulator and one for Wall Street.

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. We will address those issues if this application ever reaches the merits phase. But at this procedural stage, UP and NS were obligated to make a complete and well-supported submission that demonstrates the merger is in the public interest. Instead, UP and NS made a strategic choice to output as little detail as possible and then plan to

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address identified holes during the review process. They employ the same approach with the amended application. That does not satisfy the Board's rules.

The amended application does not grapple with the competitive harms that the merger would create. UP and NS continue to argue that a transaction that would consolidate half of all American rail traffic 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, App. Vol. 1 at 221; Verified Statement of Mark R. George ¶ 63, App. Vol. 1 at 213. After dismissing that such harms even exist or that there is any obligation to address them, UP and NS continue to offer underdeveloped proposals that would not protect shippers, American consumers, or the U.S. economy.¹

By ignoring these issues, UP and NS are improperly shifting the burden to other parties and the Board to answer the tough questions that UP and NS will not. The Board should not be forced into a process to try to make the review 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 wherein Applicants make an opening, low-ball bid, and the Board and stakeholders must either counter or ask for more information. It is all due up front from the applicants. But here, Applicants made a deliberate choice not to provide this requisite information, leaving gaps and deficiencies that warrant rejection of the amended application.

COMPLETENESS ISSUES

The amended application is incomplete in at least five ways. The first three deficiencies bear on a critical aspect of the application and pertain to truck-to-rail conversion in the so-called Watershed Region. The Terminal Railroad Association of St. Louis ("TRRA"), TTX, and Kansas City Terminal Railway ("KCT") are central to evaluating the benefits and harms of the merger proposal. Rather than deal with each head-on, UP and NS kick the can for yet-to-be-identified processes, timelines, and transaction terms. The Board should not consider transactions that are based only on a party's "intent" before the terms and details have been negotiated.

First, the amended application fails to provide an actionable path forward and the necessary contracts for evaluation regarding the TRRA. The TRRA manages complex traffic and operational issues at a key gateway and is co-owned by five Class I railroads. UP holds 43% interest, and NS holds 14% interest. If the UP/NS deal is consummated, a combined UP/NS would own 57% of the entity and control four of the seven board seats. Applicants have stated that they do not want

¹ Applicants' view runs counter to the baseline regulatory view: "[T]he Board believes additional consolidation in the industry is also likely to result in a number of anticompetitive effects, such as loss of geographic competition, that are increasingly difficult to remedy directly or proportionately." 49 C.F.R. § 1180.1(c)).

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to control the TRRA post-merger and have indicated ongoing discussions with TRRA management about potential solutions, but they have not proffered any definitive proposal including to whom they would sell their shares, at what price, and on what terms. A statement of intent is not a complete proposal.

In the initial application, UP and NS filed a minor application to control the TRRA. But the Board determined the “proposed transaction should be classified as a ‘significant’ transaction.” *See* Decision No. 9, at 2. Rather than submitting a control application that included the elements required for a “significant” transaction as ordered, UP and NS take an alternative path. They *say* that if the Board authorizes the primary transaction, they will divest or otherwise relinquish control of sufficient ownership interests and governance rights in the TRRA, such that the combined UP/NS will not acquire control. This “promise” is problematic for several reasons. They have not identified a buyer, a price, or the deal terms for any such divestiture. Price matters always and even more so here because the to-be-sold shares could be burdened with capital obligations and other liabilities. There are real operational and financial issues lurking. UP and NS cannot use the merger to offload or foist potential costs and issues onto other parties. The TRRA is not a small, regional short line—it operates a core gateway that even UP acknowledged is key to the future national rail network. And remember, UP says the merger will materially increase rail traffic in the Watershed Region, *i.e.*, right where the TRRA sits.

Telling the Board and stakeholders that they will at *some* point in the future take *some* unspecified form of action is inconsistent with the Board’s process. Section 1180.6(a)(7)(ii) requires applicants to submit “a copy of any contract or other written instrument entered into, or proposed to be entered into, pertaining to the proposed transaction.” In Decision No. 9, the Board ordered that “[a]ny revised application in this matter must include complete copies of all contracts or other written instruments entered into, or proposed to be entered into, pertaining to the Transaction.” *See* Decision No. 9, slip op. at 9. The Board has already identified control of the TRRA as a significant issue relating to the proposed merger. If Applicants intend to take some action to avoid controlling an important entity impacted by the proposed transaction—and avoid filing the correct control application as ordered by the Board—they should have done so before refiling this application and as Section 1180.6(a)(7)(ii) requires. UP and NS should either wait to file their primary application until the TRRA negotiations are complete, or they should seek control authority of the TRRA by filing a significant related application—which they could withdraw if they reach an understanding that avoids control.

Second, a similar concern exists with respect to TTX. Applicants say they “intend” to address their control of TTX—and that they *will* refrain from controlling TTX—but they admit they have not yet determined *how*. *See* Verified Statement of Katherine N. Novak ¶¶ 74-75, App. Vol. 1 at 403-04 (“Applicants intend to reduce their ownership interest in TTX so it is not greater than 49 percent, at such time as they are able to do so on commercially reasonable terms.”). While acquiring control of TTX may not require Applicants to obtain a Board license, UP and NS’s

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intent-based approach leaves the application incomplete because it deprives the Board and other stakeholders of the information necessary to evaluate the competitive impacts of the transaction. UP and NS claim they will divert 1.58 million annual intermodal units to their combined railroad, a market segment where TTX owns over half of the underlying well cars—making the competitive impact of such changes critical for the Board to consider. Simply assuring the Board they “intend” to fix the problem is not enough, as an assurance does not provide the information that Section 1180.6(a)(7)(ii) requires for a complete proposal.

Third, Applicants failed to seek Board authority to control KCT, despite the indication that the proposed transaction will result in Applicants’ control of KCT. KCT is owned by BNSF, CPKC, NS, and UP. All four owners use KCT to interchange traffic with each other at a key gateway in the Watershed Region. Applicants *say* they “have no intent” to exercise control over KCT and that their “ownership of 50% of KCT’s shares would not give them the ability to control KCT.” App. Vol. 1 at 82. Applicants’ statement of intent should have no weight here. Contrary to the bright-line assertion that “50% does not equal control,” the Board has been clear that control is actually a fact-based inquiry,² and even NS has recognized in past transactions that a 50% interest in a carrier would give rise to control.³ Applicants argue that KCT’s governing documents ensure that KCT will remain a cooperative venture structured to operate on a non-discriminatory basis and to prevent control by any single owner. But as a 50% owner of KCT, with two remaining 25% minority owners, UP/NS would dominate the KCT governance structure and control KCT’s decision-making. Notwithstanding any protections built into the KCT governance documents, UP/NS’s 50% ownership and control of six of the 12 directors on the KCT board would enable UP/NS to effectively block any proposal made by BNSF and CPKC that requires majority support. If the Board concludes that UP/NS would control KCT, the primary control application is incomplete. Regardless of the outcome of this control question, BNSF intends to address the competitive implications of UP/NS’s accumulation of KCT shares and influence should the Board decide to consider the merits of the primary transaction.

² “Control is the power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee.” *Declaratory Order—Control—Rio Grande Indus., Inc.*, FD 31243, 1988 WL 224606, at *2 (ICC served Aug. 11, 1988) (“The kind of control contemplated by the statute is the power to manage the day-to-day affairs of the entity assertedly controlled.”). “Instead of an arbitrary formula based upon the percentage of stock ownership, [the Board] looks 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.” *Paducah & Louisville Ry., Inc.—Control Exemption—Paducah & Ill. R.R. Co.*, FD 33362 (STB served Aug. 25, 1997).

³ NS has previously sought “joint control” authority when it obtained a 50% interest in one of its subsidiary rail carriers, Pan Am Southern LLC. *Norfolk S. Ry. Co.—Joint Control & Operation/Pooling Agreement—Pan Am S. LLC*, FD 35147 (STB served Mar. 10, 2009).

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Fourth, UP and NS fail to identify fully developed solutions for 2-to-1 shippers—also running afoul of Section 1180.6(a)(7)(ii). Preservation of intramodal competition has been a requirement for merger applications at the Board for decades. The Board has “consistently sought to assure that agency-approved transactions would not result in the creation of ‘2-to-1’ points where shippers lose existing intramodal rail competition.” *See, e.g., Canadian Nat’l Ry.—Adverse Discontinuance—Lines of Bangor & Aroostook R.R. Co. & Van Buren Bridge Co. in Aroostook Cnty., Me.*, AB 279 (Sub-No. 3) et al., slip op. at 5 (STB served May 3, 2004). UP and NS acknowledge that certain shippers will lose a competitive option as a result of the proposed merger, but they do not offer fully formed solutions. A good example is Foresight Energy, which has 2-to-1 locations in Illinois. UP says that Foresight has asked UP to give BNSF access via trackage rights. App. Vol. I at 395. UP says it “commit[s] to try to negotiate a trackage rights agreement with BNSF, contingent on consummation of their merger.” *Id.* While UP has had at least five months to do so, UP has done nothing to advance any such discussion with BNSF. UP has not made a specific proposal, shared a draft trackage rights agreement, or discussed potential pricing for the same. Section 1180.6(a)(7)(ii) requires applicants to provide signed or proposed draft agreements to address such issues. The Board should not allow UP and NS to “punt” on such a crucial competitive issue.⁴

Fifth, UP and NS fail to address the “end-game” of rail consolidation or downstream effects, even though it is 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). The Board “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.” *See id.*

In public, UP and NS shrug off their obligation to address the downstream effects of the merger, dismissing the analysis as impossible and redefining the Board’s requirements to suit their narrative. The documents UP and NS produced recently, pursuant to the Board’s Decision No. 13, tell quite a different story. Applicants simply do not want to share it. Applicants need to confront the market imbalances this merger will create, and their downstream consequences. The Board *would* have to grapple with that imbalance for decades. By shielding their “end game”

⁴ Historically, other major merger applicants—including UP in its past mergers—complied with Section 1180.6(a)(7)(ii) by including real, concrete resolutions to 2-to-1 loss of competition. *See, e.g., Union Pacific Corp., et al.—Control and Merger—Southern Pacific Rail Corp., et al.*, FD 32760 (STB served Aug. 6, 1996). Then, the Board and other parties were able to assess the proffered solutions—including the price of access intended to replace competition—to determine whether they were sufficient to ameliorate the loss of competition.

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assessments, UP and NS fail to give the Board even the most basic tools to wrestle with those industry-shaping issues.

IF THE APPLICATION PROCEEDS, A LONGER SCHEDULE IS NECESSARY

To the extent the Board concludes the amended application is complete, the procedural schedule will need to be adjusted to account for (i) the underdeveloped record on core merits issues and (ii) the choices that UP and NS made to not meaningfully advance discovery. A longer procedural schedule—like the one BNSF proposed at BNSF-4 (Nov. 13, 2025)—will be necessary to allow the Board and stakeholders the necessary time to develop a complete evidentiary record and guard against sandbagging.

Failure to Enhance Rail-to-Rail Competition and Address Competitive Harm. Any discussion of a proposed Class I merger 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 impacts). Understanding geographic and product markets is essential to understanding whether a merger will (i) cut off shippers’ access to other railroads, (ii) give the merged company more pricing leverage through greater control over certain industries, and/or (iii) affect long-term investment decisions that matter to local communities. 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, UP and NS make no attempt to show where freight flows would shift from current origin-destination routes as a result of the transaction or how those changes would affect various communities. Their discussion of harm to shippers is inadequate and does not offer the Board a clear picture of post-merger competitive dynamics. Time will be needed to develop the full record of harms for the Board’s evaluation.⁵

Exaggerated Truck-to-Rail Diversion Estimates. Nearly all of the public benefits alleged by UP and NS depend on truck-to-rail diversions. These estimates are exaggerated and rely on a fundamentally flawed model. The diversion claims are inconsistent with not only UP’s history of shrinking margin and raising rates on shippers but also the promised conversions that have not materialized as a result of the CP-KCS merger just years ago.

No Promises for Meaningful Public Benefits to Shippers. Other than supposedly taking trucks off the highway, the amended application offers little in terms of public benefits. UP and NS are careful not to promise to pass to customers any efficiency gains or cost reductions in the form of lower rates from UP. The deal may be good for UP’s Wall Street investors, but it will lead

⁵ The proposed Committed Gateway Pricing (“CGP”) does not purport to remedy vertical foreclosure, and it does not enhance competition. CGP would only apply to a small subset of traffic and is shot through with caveats and limitations. It covers less than 1% of traffic, is limited to four gateways, and excludes intermodal, autos, unit trains, TIH/PIH, dimensional shippers, and Canadian carriers. It is also temporary.

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to higher shipper prices, less competition, and service issues that the Board and stakeholders will need time to fully understand and explore.

Applicants' Failure to Advance Discovery and Submission of Incomplete Work Papers.

UP and NS have now had nine months to get ahead of their discovery obligations. They have failed to do so—in obstructive and stubborn ways. The Class I railroads have more than 100 outstanding discovery requests to UP and NS that still need to be addressed. UP has produced only 1,932 documents and just 5 emails; NS has produced only 1,068 documents and just 11 emails. Despite months of asking, UP only made an *opening* bid on email searches last night. And in a replay of Applicants' spotty effort last December to timely and fully upload their work papers, BNSF has thus far identified more than 100 work papers, intermediate datasets, and supporting files that are missing. Applicants' failure to fully share their work prevents parties from addressing the application's inconsistencies. BNSF will present the discovery issues to the ALJ, but these data and discovery deficiencies are further evidence that a longer discovery schedule is necessary to develop a record that will allow the Board to make a full evaluation of the biggest proceeding in its history. The Board, its staff, and other stakeholders should not bear the consequences of a contracted schedule and a rush to develop the record.

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

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

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