

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY  
– CONTROL –  
NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN  
RAILWAY COMPANY

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CSX TRANSPORTATION, INC.'S COMMENTS ON COMPLETENESS OF  
AMENDED APPLICATION

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CSX Transportation, Inc. (“CSXT”) respectfully submits these comments on the Amended Railroad Merger Application (“Amended Application” or “App.”) filed by Union Pacific (“UP”) and Norfolk Southern (“NS”). UP and NS propose the largest rail merger in history, which would, in their words, irreversibly “transform the U.S. supply chain.” App. Vol. 1 at 15. If and when the Board accepts their Application as complete, it will be responsible for overseeing the building of an evidentiary record on a tight statutory timeframe, and for determining—based on that record—whether the proposed transformation serves the public interest. UP/NS’ Amended Application, however, doubles-down on their minimalist approach to core requirements of the 2001 Major Merger Rules under which the Board will make that determination. *Major Rail Consolidation Procs.*, 5 S.T.B. 539 (2001) (“New Rules”). UP/NS’ chosen approach provides the Board with little information on which to make so momentous a decision.

For the reasons below, the Amended Application remains incomplete and should not be accepted. First, UP/NS improperly attempt to side-step filing a “significant” control application for the Terminal Railroad Association of St. Louis (“TRRA”), and with it an evaluation of the broader public interest issues at stake at this critical interchange. Second, UP/NS have not yet complied with the Board’s order to submit ordinary-course competition and efficiencies analyses of their proposed merger, which the Board directed them to submit before they re-filed their application.

These two deficiencies each render the Amended Application incomplete. More broadly, they illustrate the approach UP/NS have taken in their Amended Application, which systematically under-delivers on the information the New Rules recognized that the Board would need to evaluate whether any further consolidation among Class I railroads would be in the public interest. If the Board decides to accept the Amended Application, UP/NS must be held to their chosen, bare-bones affirmative case. *See R.R. Consolid. Procs. Expedited Processing*, 363 I.C.C. 767, 769 (1980) (“*Exp. Processing*”) (The Board’s consolidation procedures “require applicants to file with their application all the statements and other materials on which they intend to rely in proving the proposal consistent with the public interest.” (emphasis added)). UP/NS may hope to later supplement their Application with more meaningful evidence, after other participants have commented on merger-related harm and the failure of the merger to enhance competition. But that is not how the Board’s rules work. UP/NS cannot hang back and only try to make their case after

commenters have provided adverse evidence. That approach would leave commenters with no meaningful opportunity to then counter UP/NS' later-submitted evidence. The implications of a UP/NS combination are too important—and the schedule for assessing it is too short—to accommodate such gamesmanship. More than that, the Board's rules forbid it.

For the reasons laid out in Parts I and II, below, the Board should reject the Amended Application as incomplete. As explained in Parts III and IV, if the Board nonetheless decides to accept the Application, we respectfully ask the Board to make clear that UP/NS will be held to the case they make therein.

**I. UP/NS' Refusal To Submit a Significant Control Application for TRRA Makes Their Amended Application Incomplete.**

In its decision rejecting UP/NS' initial application, the Board recognized “the potential for manipulation of [TRRA] in the interests of [UP/NS]” risked harm to competition and the public interest. *Union Pac. Corp.—Control—Norfolk S. Corp.*, FD 36873, Decision No. 9 (Jan. 16, 2026), slip op. at 11 (*citing Union Pac. Corp., et al.—Control—Mo.-Kan.-Tex. R.R.*, 4 I.C.C.2d 409, 478 (1988)). To facilitate the Board's review of these potential anticompetitive effects, the Board contemplated that UP/NS would file a significant control application for TRRA with any revised filing. *See id.* n.12.

UP/NS declined to do so. Instead, they submitted an undefined “commitment” that deprives the Board and commentors of information necessary to assess the merger's effects with respect to TRRA, or even of the “commitment” they propose. They now assert that they need not file any application at all concerning TRRA

because the Board's decision left open the "alternative path" to completeness of divesting control. App. Vol. 1 at 79. UP/NS' chosen "path" is emblematic of their effort to systematically provide less information than a robust assessment of their proposed transaction's impacts calls for. More than that, this "path" seeks to preempt that assessment altogether for TRRA and the shippers that rely on TRRA, simply by promising to reach an undefined future agreement with non-parties to their transaction. The Board should not endorse such evasion.

UP/NS cannot unilaterally reform the board and governance rules of an entity they would, by definition, never control. Their "commitment" is therefore a promise to enter into a settlement agreement at some later time that will prevent them from controlling TRRA. Importantly, such settlements are ordinarily approved or denied as part of the merits of consolidation proceedings, based on a complete record. That was true in the only decision UP/NS rely on to support their approach. *See Ill. C. Gulf R.R. Co.—Acq.—Gulf, Mobile & Ohio R.R. Co.*, 338 I.C.C. 805, 869-70 (1971). And ordinarily, the Board does not approve a settlement without reviewing the settlement agreement in order to assess both its impacts and its effectiveness. UP/NS' approach would instead improperly shrink that assessment to a preliminary procedural question of completeness that the Board must decide before even opening merits proceedings.

With respect to the impacts of UP/NS' proposal, this effort to side-step the merits is particularly concerning because the potential anticompetitive impacts of the UP/NS transaction relating to TRRA go far beyond the question of formal

control. For example, UP/NS have not committed that UP will succeed to NS's substantial outstanding liabilities to TRRA. And as CSX previously noted, UP/NS also plan to divert significant traffic and revenue from TRRA (*see CSX Transp., Inc.'s Comments on Completeness of App. (CSXT-4), Union Pac. Corp.—Control—Norfolk S. Corp.*, FD 36873 (Dec. 29, 2025), at 8), but they do not address how this would affect TRRA's finances and operations. *See CSX Corp.—Control & Merger—Pan Am Sys., Inc.*, FD 36472, Decision No. 3 (May 26, 2021) (“*CSX/Pan Am Decision No. 3*”), slip op. at 11. And, most fundamentally, UP/NS' plans to rely far less on TRRA than their competitors will give a combined UP/NS the incentive to frustrate TRRA's operations in order to degrade those rivals' services, or to withhold or reduce the cooperation and mutual investment on which TRRA and its users depend. The Board's Rules focus its analysis on how a transaction or condition would affect the rail network as a whole, including Class III carriers like TRRA. *See* 49 C.F.R. § 1180.1(d)). The competitive impacts analysis that would come with a significant application would provide commenters and the Board the information they need to consider these effects. UP/NS' “alternative path,” in contrast, would deprive them of that information.

Moreover, even as a question of its mere effectiveness, UP/NS' “commitment” lacks sufficient definition for the Board to find that it would prevent UP control of TRRA. UP/NS limit their commitment to relinquishing “ownership and governance interests.” App. Vol. 1 at 401 (V.S. Novak ¶ 70). But control is a fact question that cannot be resolved through the “artificial tests” of minority share ownership and

director votes. *Alleghany Corp. v. Breswick & Co.*, 353 U.S. 151, 163-64 (1957).

UP/NS do not address whether they would retain the right to veto capital improvements and changes in TRRA's rates or fees, *see* CSXT-4, at 8 & n.5, precisely the kind of veto rights the Board has held prevent the evasion of control authority. *See Mich. C. Ry., LLC—Acq. & Op. Exemption—Lines of Norfolk S. Ry. Co.*, FD 35063 (Dec. 10, 2007), slip op. at 7-8.<sup>1</sup> Regardless, UP/NS' commitment may be illusory because reforming TRRA's Board (and governance documents) as it envisions, App. Vol. 1, pp. 402-03, would require non-applicants' agreement. Thus, the Board could not simply impose such changes as a condition. *See* 5 S.T.B. at 570 (imposing "conditions on carriers that are not applicants or controlled by applicants is not within our merger conditioning authority").

These are all reasons that UP/NS' undefined commitment to enter a future agreement with non-applicants as a means to avoid filing a TRRA control application violates the Board's rules. Those rules require that they submit a copy of "any contract or other written instrument entered into, or proposed to be entered into, pertaining to the proposed transaction." 1180.6(a)(7)(ii). This requirement is not a technicality; in the context of settlement agreements— especially one purporting to preempt competitive concerns in a transaction of unprecedented size and significance—it ensures the Board is able to evaluate whether the settlement's terms address the issues they purport to resolve. *See* Decision No. 9, slip op. at 8-9.<sup>2</sup>

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<sup>1</sup> By contrast, in the case Applicants rely on, the party in question divested 100% of its interests. *See Ill. C. Gulf*, 338 I.C.C. at 869-70.

<sup>2</sup> UP/NS similarly "commit" to reduce their ownership interests, "at such time as

For these reasons, UP/NS' undefined commitment not to control TRRA cannot justify their omission of the detailed information contemplated in Decision No. 9. The Amended Application should therefore be rejected as incomplete.

**II. The Board Should Not Accept the Amended Application Until UP/NS Comply with Decision No. 13.**

Applicants' incomplete response to the Board's order to submit ordinary course competition and efficiencies analyses further corroborates that UP/NS seek to avoid providing information the Board has ruled to be "critical" to its public interest assessment. *Union Pac. Corp.—Control—Norfolk S. Corp.*, FD 36873, Decision No. 13 (Mar. 18, 2026), slip op. at 6. As detailed in BNSF's Motion to Enforce Decision No. 13, it is not credible that in evaluating their \$85 billion "transformative" merger that UP and NS management engaged in only a few dozen communications and analyses and that many senior executives engaged in none. See BNSF Railway Company's Motion to Enforce Decision No. 13 (BNSF-22), *Union Pac. Corp.—Control—Norfolk S. Corp.*, FD 36873 (Apr. 27, 2026), at 5-12. More responsive documents clearly exist and will be produced once the issue is litigated and the Board's order is thus enforced.

The Board has held that, even where "Applicants are given leeway on the type of evidence to present in support of their Market Analysis," an application is

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they are able to do so on commercially reasonable terms," so as to purportedly resolve concerns about competitive impacts with respect to TTX (or in their words "to avoid" such "distraction"). App. Vol. 1 at 89. But they likewise fail to include even proposed agreements to accomplish this commitment as required by § 1180.6(a)(7)(ii).

incomplete where it “does not contain information sufficient for the Board to assess the impacts of the proposed transaction.” *CSX/Pan Am* Decision No. 3, slip op. at 7. The Board should apply that standard here. It has already explained in this proceeding that, where it orders Applicants to file documents in the “pre-application phase,” it has “decided this additional information [is] necessary to review the Application.” *Union Pac. Corp.—Control—Norfolk S. Corp.*, FD 36873, Decision No. 10 (Feb. 11, 2026), slip. op. at 3 (emphasis in original). In Decision No. 13, the Board likewise “exercise[d] this authority ... directing the submission of information during the pre-application phase” independent of any discovery request. Decision No. 13, slip op. at 5-6. It reasoned specifically that such documents would be “of ‘critical importance’” to the Board’s public interest assessment and potentially “more probative than” UP/NS’ representations in the Application itself. *Id.* And it deliberately ordered submission more than three weeks before the Application date UP/NS had noticed. *Id.* at 7.

The consequence of UP/NS’ noncompliance with Decision No. 13 is that the pre-application phase has not concluded. They will not have provided all information the Board has ruled “necessary to facilitate its review” until they comply in full. *Id.* at 5. The Board should not accept the Application as complete until they do.

### **III. UP/NS Have Chosen To Provide Minimal Evidence To Make Their Case Under the Board’s New Rules.**

The Amended Application often reads as if the potential efficiencies of single-line service were unknown to the Board before UP/NS proposed their largely end-to-

end merger, and as though such efficiencies alone can meet their public interest burden. The STB, with input from over 100 stakeholders (including UP and NS), spent fifteen months developing its New Rules in 2000-2001. *See* 5 S.T.B. at 546. And these rules were specifically directed at the few possible end-to-end Class I mergers that remained, any one of which would inherently come with efficiencies of expanded single-line service. *See id.* at 554-559; *id.* at 545, 582, 590 (describing procedures as designed “for the large, transcontinental mergers that we may be asked to consider”). A UP/NS combination is one of those few specific permutations the Board had in mind.<sup>3</sup> Yet UP/NS’ Amended Application continues to pay no more than lip-service to the New Rules’ core requirements. For example:

- The New Rules acknowledge the inherent benefits of increased single-line service. 49 C.F.R. § 1180.1(c) (“Although further consolidation of the few remaining Class I carriers could result in efficiency gains and improved service ...”); *see also* App. Vol 1 at 19, 38-39 (acknowledging Board has “long recognized” benefits of single-line service, including decades of pre-2001 precedent). But those Rules nevertheless direct major merger applicants to propose measures that “enhance competition,” *id.* (“merger applications *should* include provisions for enhanced competition”) (emphasis added); *id.* § 1180.1(c)(iv); 5 S.T.B. at 551 (distinguishing enhanced efficiency, as from improved service or cost savings, from “enhanced competition”), with an emphasis on rail-to-rail competition. *See, e.g.*, 5 S.T.B. at 550, 554. Yet Applicants do not offer any proposal to enhance

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<sup>3</sup> The only remaining Class I combinations exempted from the New Rules were mergers with KCS, 49 C.F.R. § 1180.0(b), and suffice it to say, those Rules do not anticipate that further mergers of Western railroads or of Eastern railroads would be proposed as plausibly in the public interest. The New Rules’ new requirements are about end-to-end mergers.

rail-to-rail competition, claiming instead that the creation of a transcontinental railroad will “itself” enhance competition “on its own,” because the efficiencies of single-line service will make it more competitive against trucks. App. Vol. 1 at 13, 45, 100; *id.* 345, 347 (Rocker/Elkins VS). They dismiss the Board’s directive as merely a “policy statement” to “encourage” proposals to enhance competition. App. Vol. 1 at 53. And because their “voluntary” CGP program, *id.* at 74, excludes shippers who have direct rail-to-rail competition, Vol. 1 at 376-77 (Novak VS), it is clearly not a proposal to “enhance” such competition.

- The New Rules and Board precedent recognize end-to-end rail mergers can harm competition, including through vertical foreclosure. 49 C.F.R. § 1180.1(c) (“the Board believes additional consolidation in the industry is ... likely to result in a number of anticompetitive effects”).<sup>4</sup> Yet UP/NS’ Amended Application baldly claims that, because their proposed merger is end-to-end, it “does not risk harm” to competition, based on categorical assertions that vertical foreclosure theories “*do not apply*” in the rail industry. App. Vol 1 at 21-22, 52 (emphasis added). This is directly contrary not only to Board precedent, but UP’s and NS’s own very recent positions.<sup>5</sup>

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<sup>4</sup> *E.g.*, *Can. Pac. Ry. Ltd.—Control—Kan. City S.*, FD 36500, Decision No. 35 (Mar. 15, 2023), slip op. at 65-66 (recognizing a vertically-integrated railroad can worsen or eliminate shippers’ alternatives to its single-line service); *CSX Corp.—Control & Merger—Pan Am Sys., Inc.* FD 36472, Decision No. 9 (Apr. 14, 2022), slip op. at 16 (finding conditions are “vital” to ensure competitors against CSX’s single-line service could “continue offering competitive interline rates”).

<sup>5</sup> *E.g.*, UP’s Comments & Request for Conditions, *Can. Pac. Ry. Ltd.—Control—Kan. City S.*, FD 36500 (Feb. 28, 2022), at 2-10, 19-46, 34 (“Applicants would thus have the Board rely on a flawed and unsupported presumption that their vertical merger cannot harm competition[.]”); NS’ Comments & Request for Conditions, *Can. Pac. Ry. Ltd.—Control—Kan. City S.*, FD 36500 (Feb. 28, 2022), at 28-32 (“[E]ven efficiency-enhancing vertical mergers can cause discrete harm, both to competition and the public interest.”).

- The New Rules require applicants to suggest additional measures the Board might take if their anticipated public benefits fail to timely materialize. 49 C.F.R. § 1180.6(b)(11). Yet the only measure UP/NS identify is that the Board may lengthen their CGP program’s duration. App. Vol. 1 at 94. That program is only offered for a limited set of shippers, who UP/NS acknowledge would not otherwise benefit from their merger—as a means of “sharing” the merger’s supposed benefits with them. *Id.* at 53. But sharing benefits that haven’t materialized with additional shippers is no measure at all.

- The New Rules require applicants to address—in their calculation of net public benefits—whether particular benefits they claim could be achieved short of merger. 49 C.F.R. § 1180.6(b)(11). This is because the Board “need[s] to have full awareness of **which** of the claimed benefits are only obtainable through a merger so that [it] can fairly weigh them against potential harms.” 5 S.T.B. at 559 (emphasis added). Yet the Application does not net out which of the claimed benefits could be achieved by greater efforts at closer collaboration, as the Board explained it needed to fairly weigh the public interest impact.

- Finally, the New Rules require that Applicants submit “evidence” on the potential downstream effects of their merger—including on the public interest “merits” of the “evolving structure of the industry that would likely result from their proposal and others like it.” 49 C.F.R. §§ 1180.1(i) & 1180.6(b)(12); 5 S.T.B. at 582. And they recognize that the Board can “meet [its] responsibility only if” applicants file that evidence in their Application, so that other parties may respond. 5 S.T.B. at 582. Yet UP/NS give only lip-service to this requirement, on the ground they cannot predict what other railroads might do. App. Vol 1 at 95. This re-raises objections the Board rejected in adopting this

requirement, 5 S.T.B. at 582, leaving the Board without meaningful evidence from UP/NS to meet its responsibility.<sup>6</sup>

**IV. If the Board Accepts the Amended Application, Applicants Must Be Held to the Affirmative Case They Make Therein.**

CSX understands the Board may consider issues of whether the Application fulfills the New Rules' requirements to be merits issues. Decision No. 9, slip op. at 11-12. CSX intends to address them in full in its comments on UP/NS' Application, if accepted. And it anticipates that UP/NS will disagree and will defend their approach in rebuttal—relying on the evidence they have submitted in their Application. But this focused rebuttal is all UP/NS may do. Once their Application is accepted, they may no longer submit supplemental evidence that they could and should have submitted as part of their case-in-chief.

The Board's rules "require applicants to file with their application all the statements and other materials on which they intend to rely in proving the proposal consistent with the public interest." *Exp. Processing*, 363 I.C.C. at 769 (citing previous version of 49 C.F.R. § 1180.4(c)(3)). *See also id.* at 769 ("[A]pplicants will have submitted ... applicants' entire direct case at the time the application is filed.") & 770 (the Board should "ha[ve], upon the filing of an application, all of the applicants' supporting evidence"); 49 C.F.R. § 1180.4(c)(3), (4), & (8).

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<sup>6</sup> CSXT anticipates that discovery will reveal that UP/NS would have extensively analyzed, in evaluating whether to pursue their transaction, how they expected other railroads to respond if their merger were consummated. To the extent they have performed such analysis internally but withheld it from their Application, that Application cannot be considered complete.

This requirement is critical both to the participation of the public and other stakeholders, who must be afforded a full and fair opportunity to respond to Applicants' case with their own evidence, and to the Board's decision-making. *See Pet. of Fieldston Co. to Establish Procs. Regarding Ex Part Commc'ns*, 1 S.T.B. 1083, 1085 (1996) (the Board must adjudicate conflicting claims by competing parties, based on the record before it, consistent with due process). This requirement is also essential given the short statutory period permitted for the evidentiary record-building once an application is accepted. *See* 49 U.S.C. § 11325(b).

If the Board accepts the Amended Application as complete, UP/NS must therefore be held to the evidence offered in it. There is no doubt UP/NS have made a considered choice about how to approach their Application and supporting evidence, their burden, and the development of the record on which their proposal will be assessed. They now already have had a second chance to prepare—and supplement—their Application. In rejecting their original application, the Board specifically suggested UP/NS take that opportunity to “mak[e] additional changes to improve their Application now that they have received comments from other stakeholders.” Decision No. 9, slip op. at 11-12.<sup>7</sup> Applicants even claim that their

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<sup>7</sup> Applicants have chosen to offer certain supplementation to their original application, but this is limited to one new analysis by Dr. Israel and one by Dr. Bailey. Cover Ltr. of M. Rosenthal to Amended Application (Apr. 30, 2026), at 2. They also add a newly invented category of claimed benefits, more than doubling the benefits they claim for their merger. *Id.* But consistent with UP/NS' overall approach, they are light on detail how these purported benefits, which are based on roughly the same volume of truck diversions projected in their initial application, suddenly materialized. Finally, UP/NS bury their response to the Board's order to provide market share projections layers deep in appendices. Peeling those layers reveals that they project shares of rail freight in excess of

Amended Application is “unique in its robustness and precision” because, “[f]or the first time in any merger application,” UP/NS rely on “full traffic files from all Class I carriers.” Cover Ltr. of M. Rosenthal to Amended Application (Apr. 30, 2026), at 2. (Notably, this is because of information provided by other carriers.) So Applicants have no cause to point elsewhere for reasons to submit so little. It was their choice.

Despite their claims of “robustness,” UP/NS offer very little evidentiary support from ordinary course materials or empirical analyses about their combination. And despite claiming to have begun responding to discovery requests last fall, *see* UP/NS Comments on Proposed Proc. Sched. (UP-7/NS-7), *Union Pac. Corp.—Control—Norfolk S. Corp.*, FD 36873 (Nov. 13, 2025), at 3, they have produced almost no ordinary course discovery to date, and even then only in response to the Board’s order. *See* BNSF-22. CSXT anticipates that discovery will reveal that UP/NS are sitting on substantial, ordinary-course materials highly relevant to their proposed merger, including about its anticipated competitive effects and other core aspects of the Board’s New Rules. If so, CSXT urges the Board to bar UP/NS themselves from relying on such evidence to supplement their case.

The paucity of information UP/NS have provided on issues so fundamental to the Board’s public interest determination suggests they may intend to sand-bag other participants by offering new analyses or evidence they have held in reserve as

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50% nationally, and greater than 80% for many corridors and commodities, suggesting real potential for anticompetitive harm, contrary to UP/NS’ claims. Yet here again the Application offers no analysis of such potential for competitive harm, even though that is a core part of the Board’s standards for assessing public interest impact.

part of their reply. CSXT raised this concern in its original completeness comments. *See* CSXT-4 at 19-20. If the Board has any doubt that the Amended Application is complete, the Board should decline to accept it. And if UP/NS do not want to be held to the affirmative case made therein, they should withdraw it and file again with evidence and analysis that meaningfully addresses the Board's requirements. Otherwise, they must be prepared to stand or fall on the Application, and its body of analysis and evidence, as they chose to file it.

Respectfully submitted,

  

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Dated: May 8, 2026

**CERTIFICATE OF SERVICE**

I hereby certify that, on this 8th day of May, 2026, I caused a true and correct copy of the foregoing CSX Transportation, Inc.'s Comments on Completeness of Amended Application to be served by first-class mail or email on all parties of record in this proceeding, the Secretary of Transportation, the Attorney General of the United States, and Administrative Law Judge Jenifer Soulikias.

*/s/ Kent A. Gardiner*

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Attorney for CSX Transportation, Inc.