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

# BNSF RAILWAY COMPANY'S MOTION TO SUMMARILY DENY AMENDED RAILROAD CONTROL APPLICATION FOR FAILURE TO PRESENT A *PRIMA FACIE* CASE


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## <u>INTRODUCTION</u>

The Board should deny the UP/NS control application because it fails to present a *prima facie* case that the merger is consistent with the public interest and, in fact, shows just the opposite. The record affirmatively demonstrates that the merger will ***harm*** the public interest. It is anti-competitive, unnecessary to secure any achievable benefits, and will hurt farmers, industrial shippers, rail workers, and consumers. It will increase rail transportation costs, inflate the prices of consumer goods across the economy, and hurt American manufacturers competing globally. The merger would weaken the supply chain that moves critical goods across the country, impair rail service and reliability, and decrease the investment incentives of other railroads.

In short, UP/NS offers a Wall-Street driven merger that would create a single transcontinental railroad with substantial market power—meaning fewer options for shippers. The merged entity would be an industry goliath, with a 50% market share of the domestic U.S. freight rail market and 53% of Class I Merchandise Gross Ton Miles—figures that far exceed levels associated with a structural presumption of competitive harm. *See* BNSF-24 at 2 (May 8, 2026). This is not a merger designed to benefit rail customers or competition. It is not even a merger to strengthen this industry by combining two financially struggling competitors: in 2025, UP made the most profits in the company's 160-year history. The only stakeholder that benefits from this scenario is the combined UP/NS, which will have every incentive and opportunity to apply UP's longstanding high-price strategies on a national scale.

If this merger review proceeds, BNSF will have more to say on the cascading harms the proposed merger will inflict on shippers, the freight railroad industry, and the American public. But the Board need not wait. The Board should deny the merger now because it fails to satisfy the 2001 Rules on its face.

In Decision No. 21, the Board held these proceedings in abeyance, explained that UP/NS's Revised Application was "unclear or underdeveloped" on critical issues, and required UP/NS to submit supplemental information on a range of topics, including enhanced competition, shipper access, public benefits, and downstream merger impacts. *See* Decision No. 21 at 17-33. The Board expressly reserved the right to evaluate, based on that supplemental record, whether UP/NS "have presented a *prima facie* case" that the proposed transaction is in the public interest. *Id.* at 19; *see* 49 C.F.R. § 1180.4(c)(8); *see also R.R. Consol. Procs. Expedited Processing*, 363 I.C.C. 767, 769 (1980). The Board should take up that question now.

This is the third time UP/NS have come before the Board claiming to have met their burden, and the third time the record shows otherwise. UP/NS's strategy has been consistent: deny the clearest harms, minimize the rest, inflate the benefits, offer as little as possible, and leave it to the Board and other participants to propose the fixes that responsible merger applicants should have brought to the table themselves. This pattern is fatal at the *prima facie* stage. UP/NS seeks a standard under which parties can skate past the application stage and eviscerate the 2001 Rules—the strictest merger-review rules ever adopted by the Board. If, as the Board has said, "[t]he current rules establish a 'heavier burden' for applicants, with new provisions concerning competitive enhancement," UP/NS's cynical approach to these proceedings cannot be right. *See* Decision No. 21 at 18.

UP/NS have not satisfied their burden to "present a *prima facie* case" that the proposed transaction "is consistent with the public interest." *See* 49 C.F.R. § 1180.4(c)(8)(i); 49 U.S.C. § 11324(c). Specifically, UP/NS's sole claimed competitive enhancement, Committed Gateway Pricing ("CGP"), does not enhance competition at all. It creates no new routing options and covers ***less than 1%*** of all traffic. Worse, CGP actually ***harms*** many shippers by hardwiring above-market rates into the regulatory structure and cloaking UP/NS in immunity from rate regulation and antitrust enforcement. In many ways, CGP is a Trojan horse—a program that promises to help shippers but will actually ratchet up their prices. UP/NS thus have "disclos[ed] facts that affirmatively demonstrate that the proposal is not in the public interest." *Id.* § 1180.4(c)(8)(ii).

UP/NS have proposed a massive merger offering no material commitments that would enhance competition, as required. That was UP/NS's choice. And there are consequences for giving short shrift to a cornerstone of the Board's 2001 regulatory changes. Under the law, and even viewing the facts in the light most favorable to UP/NS, the proposed merger does not satisfy the enhanced competition standard. To the contrary, the proposed merger would substantially harm competition. Accordingly, the Board should deny UP/NS's Revised Application for failure to state a *prima facie* case.

## LEGAL STANDARD

Under 49 U.S.C. § 11323, no control or consolidation transaction involving rail carriers may be carried out without the Board's "approval and authorization[.]" 49 U.S.C. § 11323(a); *see also id.* § 11324(a). The merging parties must file a "primary application" that is "complete"—that is, it must "contain[] all information for all applicant carriers required by [the Board's] procedures." *See* 49 C.F.R. § 1180.4(c)(7)(i), (f). If complete, the application also "***must*** present a *prima facie* case." *See id.* § 1180.4(c)(8) (emphasis added).

An application falls short of the *prima facie* burden of proof by "disclosing facts that, even if construed in their most favorable light, are insufficient to support a finding that the proposal is consistent with the public interest," or by "disclosing facts that affirmatively demonstrate that the proposal is not in the public interest." *Id.* § 1180.4(c)(8)(i)-(ii). This is an evidentiary burden, meaning it cannot be met by conclusory or unsupported claims, or by evidence or arguments that do not appear in the application. *See Rio Grande Indus.—Purchase—Soo Line R.R. Co.*, FD 31505, Decision No. 14, 1990 ICC LEXIS 98, at *7-10, n.10 (ICC served Mar. 30, 1990) ("[I]f the information contained in an application will support neither findings on each of the statutory elements . . . , nor a conclusion that the proposal is consistent with the public interest, then summary denial is an appropriate disposition of the proceeding.") (citing *Railroad Consolidation Procedures*, 363 I.C.C. 767, 769 (1980)); *see also Union Pac. Corp.—Control—Chi. & Nw. Holdings Corp.*, 9 I.C.C.2d 939, 950-51 n.15 (ICC served Sept. 17, 1993) (citing 49 C.F.R. § 1180.4(c)(8)).

Having now received three opportunities from the Board to meet their burden of proof, UP/NS must live or die based on the merger application they actually submitted. *See, e.g.*, 49 C.F.R. § 1180.4(c)(7)-(8); UP-31/NS-30 at 2 (describing "the Board's distinctive and deliberately application-centric merger review framework").

### A. The 2001 Rules Significantly Raise The Bar For Class I Merger Approvals In Light Of Market Realities.

The Board's analysis of the public interest for a proposed Class I merger is governed by statute, *see* 49 U.S.C. § 11324(b), as well as the implementing regulations adopted in the *Major Rail Consolidation Procedures*, 2001 WL 648944 (STB. served June 11, 2001). These regulations—commonly called the "2001 Rules"—"reflect a significant change in the way in which" the Board "appl[ies] the statutory public interest test to any major rail merger application." *See Major Rail Consol. Procs.*, 2001 WL 648944, at *3.

Historically, when "the industry was facing numerous bankruptcies by major carriers," the pro-merger regulatory framework of the 1980s and 1990s was fit to task, producing railroads that "continued to face effective competition" and that were "forced" "to pass on the preponderance of the significant efficiency gains they . . . achieved (through mergers and other means) to the shippers that they serve[d]." *Id.* at *4. But by the turn of the century, "the number of overall railroad companies ha[d] been reduced dramatically, and the size of the remaining carriers ha[d] increased correspondingly." *Id.* at *5. The Board's preexisting, presumptively pro-merger regulations "were outdated and inadequate . . . , given the limited merger-related benefits still obtainable. . . , the significant service disruptions that had been associated with recent rail mergers[,] and the prospect that future merger proposals would trigger other proposals that, if approved, could result in the consolidation of the Class I railroad industry into only two North American transcontinental railroads." *Id.* at *2; *see also* Press Release, *Surface Transportation Board Issues Notice of Proposed Rulemaking on New Rules for Major Railroad Mergers*, at 1 (STB served Oct. 3, 2000) (describing the rules as "a major shift in basis from the pro-merger approach" because "there is no longer the pressing need that the [n]ation's largest railroads once had to consolidate their operations").

It was against this backdrop that the Board concluded "future merger applicants should bear a heavier burden to show that a major rail combination is consistent with the public interest." *See Major Rail Consol. Procs.*, 2001 WL 648944, at *3; *accord* Decision No. 21 at 18. Under the 2001 Rules, the Board "does not favor consolidations that reduce transportation alternatives available to shippers unless there are ***substantial*** and ***demonstrable*** public benefits to the transaction that cannot otherwise be achieved." 49 C.F.R. § 1180.1(a) (emphasis added). This standard mirrors the "rigorous" antitrust requirement that pro-competitive benefits be significant, verifiable, and merger-specific, and that they outweigh any presumed or actual harm to competition resulting from a merger. *See FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 349 (3d Cir. 2016). In antitrust law, that standard has ***never*** been met for a disfavored merger. *See, e.g.*, *id.* at 350 ("This high standard is not met here—nor, we note, has this high standard been met by any proposed efficiencies considered by a court of appeals."); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 82 (D.D.C. 2015) ("The court is not aware of any case . . . , where the merging parties have successfully rebutted the government's *prima facie* case on the strength of the efficiencies.").

Although the 2001 Rules do not "prejudge the merits of any" merger proposal, they do "disfavor[] mergers that reduce competition options for shippers" and "take a more skeptical, 'show me' attitude toward claims of merger benefits and towards claims that no transitional service problems would occur." *See Major Rail Consol. Procs.*, 2001 WL 648944, at *5. This "heightened" standard imposes a stricter competition standard than traditional antitrust law. *See* Dep't of Justice Letter at 3 n.6 (Mar. 3, 2026) (Record No. 310931) (explaining that ordinary-course documents are "even more imperative" under the "heightened 'enhanced competition' standard" than the substantial lessening of competition standard).

### B. The 2001 Rules Require Enhanced Rail-to-Rail Competition.

A Class I merger proposal must not only preserve competition—it must enhance it. As the Board recognized in 2001, any merger of Class I railroads likely will involve "merger-related harms that cannot be directly or effectively mitigated," so merging parties must "present proposals that enhance, not merely preserve, competition in order to secure [] approval." *Major Rail Consol. Procs.*, 2001 WL 648944, at *3. The Board was clear: "some new or enhanced rail-to-rail competition or other competitive benefits [are] likely to be necessary to resolve substantial difficulties so as to tip the balance in favor of the public interest." *Id.* at *5. "[P]rovisions for enhanced competition[,]will be given ***substantial*** weight" in the

Board's public interest "analysis[,]" 49 C.F.R. § 1180.1(c)(1) (emphasis added), and "are likely to be ***extremely*** important to [the Board] in determining whether to approve a particular application[,]" *Major Rail Consol. Procs.*, 2001 WL 648944, at *9 (emphasis added).

The Board's principal focus of the 2001 Rules was enhancing intramodal competition. As the Board explained in promulgating the 2001 Rules, the "heavier burden" by the Board will require "some new or enhanced ***rail-to-rail*** competition or other competitive benefits." *See Major Rail Consol. Procs.*, 2001 WL 648944, at *5 (emphasis added). The Board's own examples of qualifying "competitive enhancements"—joint access areas, reciprocal switching arrangements, trackage rights, and the elimination of paper and steel barriers on interchanges—presume increased access to rail competition for shippers. *See id.* at *3, *9. The 2001 Rules thus require that a merger provide for enhanced intramodal—that is, rail-to-rail—competition. *See id.* at *9; *see also* 49 C.F.R. § 1180.1(d). UP/NS's attempted justification of a reduction in rail-to-rail competition by pointing to purported benefits in the trucking market is antithetical to these principles.

The Board's focus on rail-to-rail competition makes sense. It comports with the statutory text's focus on competition "among rail carriers," *see* 49 U.S.C. § 11324(b)(5); it addresses the Board's concern for transactions that eliminate rail options for shippers, *see id.* § 1180.1(a); and it reflects the Board's decision to "upgrad[e] the importance of competition" in the public benefits analysis, given that financial distress and "redundant capacity" are "no longer [] central issue[s]" facing the railroad industry, *Major Rail Consol. Procs.*, 2001 WL 648944, at *7.

Bedrock principles of antitrust law reinforce the focus on enhancing rail-to-rail competition. For a merger's pro-competitive benefits to outweigh its harms, there must be symmetry in the markets where the benefits and harms arise. "If anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could . . . , embark on a series of mergers that would make it in the end as large as the industry leader." *United States v. Phila. Nat. Bank*, 374 U.S. 321, 370 (1963); *see also RSR Corp. v. FTC*, 602 F.2d 1317 (9th Cir. 1979) (rejecting procompetitive benefits in a secondary market); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1 (D.D.C. 2017) (citing *Philadelphia National Bank* and Merger Guidelines to reject proposed efficiencies outside challenged market). Were it otherwise, cross-market balancing would destroy the constraints that prevent unchecked consolidation, contrary to sound economic principles about what makes a competitive market structure. *See Phila. Nat. Bank*, 374 U.S. at 371 ("We are clear, however, that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial.").

## ARGUMENT

### A. CGP—UP/NS's Sole Competitive Enhancement—Would Not "Enhance" Rail-to-Rail Competition.

Despite three chances, UP/NS continue to treat the enhanced-competition requirement as an afterthought. CGP is the "***sole*** competitive enhancement Applicants propose." *See* Decision No. 21 at 21 (emphasis added). But CGP does not offer any post-merger combinations to shippers that do not already exist today. It is a convoluted—and pro-UP/NS—mechanism to halfheartedly address preservation of current competition at select gateways. That is not enhanced competition.

#### 1. How CGP Works in Practice.

CGP is UP/NS's proposed pricing mechanism that creates new rates UP/NS will receive for the legacy-UP or legacy-NS leg of an extremely small number of preexisting interline movements. UP/NS identify their own rates for shipments within specific commodity and distance groupings, then set the "CGP rate" for each grouping at the weighted average 70th percentile of those UP/NS rates. UP-80/NS-78 at 14-15, 41-42. To preserve preexisting interline options, BNSF or CSX must then use that new CGP rate as the UP/NS revenue requirement when quoting a through rate to a customer at a UP/NS sole-served facility. In other words, rather than giving BNSF- or CSX-served shippers a genuine, new competitive option, CGP would maintain access to an existing route at a new (most likely higher) rate that ***UP/NS*** calculate, from ***UP/NS's*** data, using an arbitrary (high) percentile selected by ***UP/NS***, for a bottleneck segment that ***UP/NS*** control. A remedy that UP/NS unilaterally design, calibrate, and price—and that raises rates for many shippers for existing routes—is not a competitive enhancement.[1]

CGP's eligibility rules confirm how narrow the program really is. To qualify, a movement must involve a UP/NS sole-served facility connecting through one of only four gateways—Chicago, St. Louis, Memphis, or New Orleans—to a facility served by BNSF or CSX—excluding CN, CPKC, and any Class II or III railroad that would connect to a different Class I carrier. *Id.* at 31-33. That narrow universe narrows further. Although UP/NS "expands" CGP to include bulk unit trains, CGP ***still*** would not apply to intermodal shipments; shipments of finished vehicles; shipments to and from storage-in-transit facilities or facilities owned by rail carriers or their affiliates; or certain specialized shipment types that present heightened operational capacity and risk concerns. *Id.* at 14, 32-36. Even for traffic that clears these hurdles, CGP would not be a permanent feature of the post-merger landscape because it expires at the end of the Board's oversight period. *Id.* at 37. The result is a program that reaches a sliver of UP/NS's traffic, for a limited window of time, at a rate UP/NS control—which is why even UP/NS's (newfound) supporters have called it a

[1] UP/NS's discussion of CGP is scattered over multiple filings and multiple verified statements from multiple witness and is notably opaque as to its regulatory implications. Nonetheless, it appears that UP/NS are reserving the right to argue later that, among other things, CGP will immunize UP/NS from rate reasonableness challenges in the future—either because they have established "effective competition" and therefore market dominance cannot be shown and/or because the through rate will be charged by BNSF or CSX and therefore the regulatory risk is shifted to other railroads away from UP/NS. Forcing shippers to waive their right to pursue statutory protections as the price for merely preserving existing competitive options (which CGP does not even do) only benefits UP/NS, not shippers.

mechanism that covers "negligible traffic" or "less than 1% of all rail traffic." *See* CN-15 at 25-26, 30 (citation modified).

A condition so narrow, so manipulable, and so transparently calculated to raise rates on most eligible shippers cannot be the "substantial and demonstrable" competitive enhancement the 2001 Rules demand for a merger that eliminates rail-to-rail options for shippers. *See* 49 C.F.R. § 1180.1(a). In Decision No. 21, the Board correctly recognized that version 1.0 of CGP "appears to exclude a significant amount of traffic hauled or proposed to be hauled by Applicants, terminates with the conclusion of the Board's oversight period, and may harm some shippers by incentivizing UP/NS to compete less aggressively for some traffic." *See* Decision No. 21 at 21. Despite the Board's invitation to UP/NS to improve CGP, version 2.0 suffers from the very same fundamental defects. *See id.* ("Applicants' policy choices underlying CGP and Applicants' own claims as to its effects raise substantial questions that must be addressed early in this proceeding.").

#### 2. CGP Definitionally Does Not Enhance Competition.

As a threshold matter—and fatally for UP/NS's merger bid—CGP does not enhance competition because it does not create a single new routing option or give any shipper access to a railroad that it could not already reach. Instead, as explained above, CGP is a rate-setting formula for interline movements with BNSF and CSX that already exist today. This structural shortcoming is dispositive: because CGP does not facilitate increased access to rail competition for shippers, it categorically does not qualify as a competitive enhancement. *See Major Rail Consol. Procs.*, 2001

WL 648944, at *3, *9 (identifying access-enhancing conditions including joint access areas and switching arrangements). At best, CGP is an effort to partially ***preserve*** competition—something that it attempts in a convoluted, *de minimis*, and ultimately harmful manner.

### 3. CGP Affirmatively Harms Competition by Raising Rates.

In reality, CGP does not even preserve competition—it affirmatively harms it by hardwiring price increases into the regulatory system. For CGP-eligible shippers, CGP locks in an above-market 70th-percentile rate structure, with the logical result that prices for ***any*** shipper that currently pays below-70th percentile rates will immediately bump-up to the CGP rate. According to UP/NS, this "70th-percentile rate cap" protects shippers, "appropriately balanc[ing] competitive enhancement with differential pricing." *See* UP-80/NS-78 at 10. CGP does nothing of the sort. CGP imposes a ***floating*** 70th-percentile rate structure that gives UP/NS the incentive and ability to ratchet up prices on CGP-eligible and non-CGP-eligible shippers alike: by raising rates on non-CGP-eligible shippers, UP/NS can push the benchmark for CGP pricing even higher. That is because the 70th-percentile CGP rate is a function of ***all*** of UP/NS's rates for shipments within specific commodity and distance groups. *See* CN-15 at 26 ("Indeed, approximately 46% of shippers studied by Dr. Israel (which includes both CGP[-]eligible shippers, and other shipments used for generating CGP prices) would experience increased rail shipping costs from the CGP program."). Contrary to UP/NS's suggestion, CGP-style ratchet pricing is not a shipper-protective rate cap. In fact, UP/NS's own expert acknowledges the "compounding effects" of this structure that "would lead to harms" if a similar structure is adopted in any future consolidation. *See* UP-80/NS-78 at Suppl. Verified Statement of Dr. Mark A. Israel ("Israel Supp. VS") ¶ 39 (July 17, 2026). UP/NS concede that this pricing structure was not designed to maximize benefits for CGP-eligible traffic in the first place. *See* UP-80/NS-78 at 41-42.

#### 4. CGP Covers a *De Minimis* Amount of Traffic and Will Not Be Competitive in the Post-Merger World.

Finally, CGP is shot through with limitations on traffic coverage, gateway coverage, and duration that fatally compromise its ability to pass on any meaningful benefits from the proposed merger to shippers—and critically, CGP would not create a single new routing option or give any shipper access to a railroad that it could not already reach. That proposal—which UP/NS asked the Board and stakeholders to believe would enhance competition—applied to "less than 1% of all rail traffic." *See* CN-15 at 25-26; Decision No. 21 at 20 (citing CN-15 at 25-26).

UP and NS's expansion of CGP does nothing to address the massive, anticompetitive impact of creating a 50+% market share behemoth. UP/NS say that the proposed expansion of CGP "double[s] the number of carloads of traffic eligible for CGP, from 133,890 to 257,971 carloads"—a "meaningful[] increase," in UP/NS's view, of "the amount of traffic eligible for and benefitted by CGP." *See* UP-80/NS-78 at 20 (citing Israel Supp. VS ¶ 29, Fig. 6; *id.* ¶ 34, Fig. 8), 29. But what UP/NS downplay is that the proposed expansion increases the amount of covered traffic by a mere 0.6%. Worse still, even for the ***less than 1%*** of traffic that qualifies, UP/NS's own expert shows that roughly 60% of eligible carloads would see no rate benefit whatsoever. *See* Israel Supp. VS ¶ 34, Fig. 8. Nor is the program permanent: CGP expires at the end of the Board's oversight period, then evaporates into the ether. *See* UP-80/NS-78 at 39-40; Israel Supp. VS ¶ 53.

This cannot possibly be what the Board had in mind when it told industry stakeholders that enhanced competition would carry "substantial weight" and be "extremely important" in any future merger analysis, offering big ideas—joint access areas and reciprocal switching arrangements—as examples. *See Major Rail Consol. Procs.*, 2001 WL 648944, at *3, *9; 49 C.F.R. § 1180.1(c)(1). Doubling eligibility for a program that covers only a sliver of U.S. rail traffic does not transform CGP into the kind of "substantial and demonstrable" competitive benefit that would support approval of this fundamentally anticompetitive merger. *See* 49 C.F.R. § 1180.1(a).[2] Tellingly, UP/NS admit that CGP does not even enhance the competition that they think matters in the post-merger world: CGP "was not intended to create competition with post-merger single-line traffic," nor would CGP "be as fast or reliable as single-

[2] UP/NS have not claimed their newly proposed Targeted Access Program ("TAP") proposal for temporary reciprocal switching for serious service problems is intended to satisfy the enhanced competition standard. To the extent UP/NS intend to make such an argument, it lacks any merit and does not meet the requirement for enhanced competition. *See* UP-80/NS-78 at 9, 122-28; *id.* App. A §§ 2.2-2.3, 3.1. Even if switching is ultimately ordered, it lasts only six months and automatically terminates. *Id.* App. A § 9.1. TAP excludes intermodal, unit train, and contract traffic; does not award monetary relief; and does not allow shippers to avoid UP/NS altogether, since UP/NS would still provide first-mile or last-mile service to shipper facilities. *Id.* at 126-28 & nn. 236-37; *id.* App. A § 9.2-9.3. At best, TAP is a narrow and delayed backstop against service disruptions during integration, not a competitive enhancement addressing the loss of rail-to-rail competition that the merger itself will cause.

line service." *See* UP-80/NS-78 at 43. Giving UP/NS the benefit of every doubt, CGP does not enhance rail-to-rail competition.

### B. UP/NS Do Not Believe *Any* Competition-Enhancing Conditions Are Necessary.

UP/NS's reason for putting forward such a weak proposal for enhanced competition is simple: UP/NS do not believe ***any*** competition-enhancing conditions are necessary because the "merger itself will substantially enhance competition." *See* UP-80/NS-78 at 14. On this view, CGP and any other commitments are optional extras that "do not define the merger" and "merely reinforce" a showing the merger has already made on its own. *See id.* at 27. In fact, UP/NS go so far as to say that scrutinizing its commitments in "[m]easuring the merger's public interest benefits … mistakes the tail for the dog." *See id.*

This view—that UP and NS do not have to propose anything other than the merger itself to enhance competition—is a direct attack on the 2001 Rules. Contrary to UP/NS's position, the Board's expectation under the current merger-review framework is that "efficiencies and service improvements likely to be realized from further downsizing of rail route systems are limited." *See Major Rail Consol. Procs.*, 2001 WL 648944, at *6. On the other hand, the Board recognized that "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 proportionally." *See* 49 C.F.R. § 1180.1(c).

This concern extended to end-to-end mergers. "[S]ignificant losses in geographic competition" can occur "even where carriers truly are 'end-to-end.'"

*See Major Rail Consol. Procs.*, 2001 WL 648944, at *11; *Canadian Pac. Ry. — Control—Kan. City S.*, FD 36500 et al., slip op. at 4, 27 (STB served Mar. 15, 2023) ("Even end-to-end mergers . . . can pose competitive risks, and indeed this decision overturns prior agency precedent that did not sufficiently recognize such concerns."). At least UP used to recognize as much. *See* Union Pac. R.R. Co.'s Comments and Req. for Conditions, *Canadian Nat'l Ry.—Control—Iowa N. Ry.*, FD 36744 et al., slip op. at 4 n.8 (STB served Apr. 29, 2024) ("Professor Salop also shows that end-to-end transactions can produce anticompetitive effects for shippers . . . .").

It was for these reasons that the Board anticipated "competitive enhancements" "likely would be necessary . . . to offset a difficult-to-remedy loss of competition." *See id.* UP/NS's claim that "applicants can demonstrate that their transaction enhances competition even without special competition-enhancing conditions" is thus not just wrong, it is backwards. *See* UP-80/NS-78 at 26.

## CONCLUSION

The Board retains ultimate discretion in deciding whether UP/NS's submissions establish a *prima facie* case that the merger is in the public interest. For the foregoing reasons, and those identified by other stakeholders, the answer is no, and summary disposition of the application is appropriate. *See R.R. Consol. Procs. Expedited Processing*, 363 I.C.C. 767, at *769-70 (1980). Denying the Revised Application at this stage will avoid unnecessary, wasteful hearings and spare the Board and the industry the time, expense, and uncertainty of a protracted review of a transaction that cannot be approved on this record. It would also send the important message to future merger applicants that taking an "as little as possible" approach to the Board's enhanced-competition requirement does not entitle them to a full merits review.

*[Signature page follows.]*

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Dated: August 6, 2026

## **CERTIFICATE OF SERVICE**

I hereby certify that I have caused the foregoing submission 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.

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