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November 10, 2026

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Office of Chief Counsel
November 13, 2026
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Chairman Patrick Fuchs and Members of the Board
Surface Transportation Board
395 E Street SW
Washington, DC 20423

Re: Docket No. FD 36873, Union Pacific Corporation and Union Pacific Railroad Company—Control—Norfolk Southern Corporation and Norfolk Southern Railway Company; PBF Energy Comments in Opposition to the Proposed Merger

Dear Chairman Fuchs and Members of the Board:

PBF Energy Inc. ("PBF") submits these comments in opposition to the proposed merger of Union Pacific ("UP") and Norfolk Southern ("NS"). PBF respectfully asks the Surface Transportation Board ("STB") to reject the merger application. PBF is extremely concerned about the effects of the proposed merger and the lack of transparency with which UP and NS have approached the regulatory review process. PBF believes that combining UP and NS into a single railroad would irreparably and seriously harm competition, raise supply chain costs for PBF and our customers, and degrade service. Despite having announced this deal sixteen months ago and having filed thousands of pages of materials since, UP and NS have not proposed measures that we believe would adequately protect or enhance competition.

PBF is one of America's largest independent petroleum refiners and suppliers of unbranded transportation fuels, heating oil, petrochemical feedstocks, lubricants, renewable diesel, and other petroleum products. We operate refineries and terminals in both the eastern and western United States that depend upon competitive and reliable rail service. PBF ships and receives crude oil, liquefied petroleum gas, ethanol, and other commodities vital to the nation's energy infrastructure. The type, volume, and distance of our supply chain needs often makes rail the only practical transportation option for us.

Since the deregulation of the rail industry began in the 1970s, railroads have followed a predictable playbook of claiming they need to merge to grow. But instead of growth, consolidation has led to higher rates and declining rail volumes. A UP/NS merger would only continue this trend. Rather than paying billions of dollars to acquire NS, UP should spend that capital to invest in its own system and grow its business by meeting customers' needs and reducing its rates.

Two of our refineries, the Chalmette Refinery outside New Orleans and the Delaware City Refinery outside Wilmington are captive to NS and, accordingly, lack a practical alternative rail carrier. Competition between BNSF and UP at western origins gives PBF leverage to negotiate more reasonable rates and more favorable service terms than we would otherwise have for shipments to those facilities. Plus, we can access a competitive BNSF option for some outbound products from Chalmette via a transload from Braithwaite, Louisiana, an NS station which is open to BNSF, and other railroads. We believe the merger would effectively eliminate these competitive options. We have heard UP tout its single line service and its elimination of interchanges, but this is largely irrelevant to PBF, as much of our traffic interchanges seamlessly today. What PBF values are real, practically effective rail alternatives and the ability to deal with railroads who feel genuine competitive pressure to offer us reasonable pricing and reliable service.

We believe the merged entity will have every incentive to make sure that PBF uses UP in the west to maximize its length of haul, and UP could use its leverage at our captive NS destinations to make that happen. UP does not have to outright refuse to work with BNSF; but it can choose to work less efficiently with BNSF operationally or charge higher rates on the former NS leg of our shipments. The 3-decade-old UP/SP merger agreements still lack mutual coordination between the western railroads and, as a result, the shippers have suffered. Either of these strategies could effectively eliminate PBF's option to use BNSF to or from its refineries.

We understand that UP and NS have proposed to keep gateways "open" on "commercially reasonable terms," which is the same open-gateway commitment the STB imposed in the much smaller CP-KCS merger proceeding. In PBF's view, vague commitments to be "reasonable" are not meaningful and are not a workable basis for real-world supply chain strategies. Railroads favor their own traffic whenever possible, and the requirement to be "commercially reasonable" is a vague standard that makes it difficult for shippers to challenge the railroad. As the Joint Shipper Associations explained in one of their prior filings, these are the same commitments that *UP itself* called "illusory and unenforceable" in the CP-KCS merger proceeding.

Additionally, PBF believes UP and NS's Committed Gateway Pricing proposal has no meaningful effect and offers no actual benefit to us. To the extent PBF's shipments would even be eligible, they would be subject to new gateway rates set at the *70th percentile* of a group of supposedly comparable UP-direct rates that UP controls. While we do not know how those rates will compare to our current rates, we strongly suspect that they will be higher. UP has historically been associated with higher rail rates than its competitors and, accordingly, PBF believes that rates set to the top end of UP's rate scale will be unreasonably high. Plus, after PBF's gateway rates are reset at the higher level, UP would have the incentive and ability to raise them even higher every year the program remains in place.

PBF's substantial experience with the STB's processes also tells us that the Targeted Access Program ("TAP") and Rate ADR Program proposals would not

adequately protect shippers. TAP and Rate ADR only become options if problems caused by the merger are already harming shippers in the form of declining service or increasing rates. And in the case of Rate ADR, STB first has to hold a proceeding and find that the benefits of the merger have not been achieved, which is a very vague standard.

Given the well-known history of service problems and unfulfilled competitive promises from prior rail mergers, UP and NS should be required to *prevent* such harms from happening in the first place, not just tell shippers they can complain or file a lawsuit after problems have occurred. Both programs are also subject to many exclusions and limitations, including that all of PBF's traffic moving under committed contracts with NS would be ineligible, and they would sunset in just a few years. Ultimately, we believe, both programs will require PBF and other shippers who have already been harmed by the merger to spend money on lawyers and consultants to pursue lengthy and expensive legal remedies that could continue for long periods of time.

PBF also finds UP and NS's assurances about service unconvincing. The long history of Class I mergers shows that they consistently result in service problems, and that those service problems disproportionately impact carload shippers like PBF. The prior UP-SP merger caused a well-known rail service meltdown in the Gulf Coast. Additionally, the CP-KCS service integration problems last year adversely impacted shippers in the Gulf Coast, including PBF, as several of our chemical customers had to adjust their operations due to the lack of products they could reliably receive. Both of those network integrations were significantly smaller and less complex than the UP-NS integration would be. PBF and others who rely on the rail network have spent the past several years rebuilding our supply chains following another rail service meltdown in 2022, which taught us that service problems on one Class I quickly spread across the entire rail network. PBF cannot afford to take the risk that UP and NS will not experience the same problems that everyone before them has.

The risk of significant service disruptions is especially concerning considering how few, if any, of the theoretical merger benefits would go to carload shippers. UP and NS have almost exclusively pitched the value of this merger as creating over-the-road conversion growth for intermodal shippers, which appears to make up more than 75% of all their growth projections. They claim that carload shippers will get the benefits of single-line service to so-called watershed areas around the Mississippi River, but, in PBF's view, those potential market opportunities are very narrow and *significantly* overstated. Simply put, these do not represent real market opportunities for PBF. Importantly, intermodal shippers considering shifting loads from truck to rail post-merger can easily and immediately revert to truck if they are not satisfied with their experience. Shippers who ship industrial commodities generally do not have the same degree of optionality. As a result, PBF, and others like us, would be burdened with all the service, competition and rate risks of this merger while any potential upside will go to UP/NS's intermodal network.

It appears that the consensus among stakeholders with intermodal expertise is that UP and NS's intermodal growth projections are exaggerated. When that intermodal growth does not happen, PBF believes that carload shippers like us will end up footing

the bill for the merger. UP and NS will follow the same playbook that we have seen for the last decade. They will cut service, reduce costs, and raise rates, but this time it will be done on a much larger scale. The American industrial economy is already facing significant inflationary challenges; we cannot afford to institutionalize the merged entity's pricing practices at the heart of our supply chain.

For more than a year, UP and NS have followed a deliberate strategy of offering small amounts of information and hollow concessions only when they feel forced to do so. In fact, STB Member Richard Kloster recently noted in a motion ruling that he believes UP and NS have "approached this proceeding with an apparent strategy of "letting the line out slowly." UP and NS even fought against making the full *merger agreement* public. Until UP and NS demonstrate complete transparency, it is difficult for shippers to trust their claims about the merger's benefits.

Finally, we note how challenging it has been to meaningfully evaluate and provide comments on the merger application given the many amendments, corrections, and clarifications that UP and NS have submitted. PBF and other shippers have limited time and resources and are the ones who suffer from what we believe is UP and NS's strategy to try to limit participation from individual stakeholders. This makes comments from trade associations representing hundreds or thousands of members even more important for the STB to consider, and an overwhelming list of those associations strongly opposes this merger, like PBF.

For the reasons stated above, PBF respectfully urges the STB to reject the merger application. PBF believes the merger will reduce, not preserve or enhance, our competitive options. PBF has observed over the years that even STB processes designed with the best intentions often struggle to provide meaningful remedies to shippers. PBF believes that, given the scale of the combined system and its market power post-merger, which will allow it to move roughly half of all rail freight, control terminal railroads at key gateways, and gain enormous leverage over locomotive and railcar suppliers, it will be very unlikely that any STB-imposed conditions, including those that UP and NS have proposed, will be able to fully protect shippers from rate hikes and service cuts post-merger and replicate the competition that would be lost through the merger.

PBF appreciates STB's consideration of these comments.

Respectfully submitted,

Kent Avery
Vice President, Rail

cc: All Parties of Record



CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing *Statement in Opposition of the Proposed Union Pacific and Norfolk Southern Merger* to be served electronically to all Parties of Record in this proceeding.

/s/ Andrew Bernstein
Andrew Bernstein
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