ppi radically pragmatic

1919 M St NW, Ste 300
Washington, DC 20036
Tel: 202-525-3926
Fax: 202-525-3941
info@ppionline.org

312980

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United States of America
Before the
Surface Transportation Board

Docket No. FD 36873
Union Pacific Corp., et al. – Control – Norfolk Southern Corp., et al.

Protest of the
Progressive Policy Institute
November 18, 2026

I. Introduction

The Progressive Policy Institute (PPI) respectfully submits this protest before the Surface Transportation Board ("Board") in regard to the revised merger application of Union Pacific Corp., et al. – Control – Norfolk Southern Corp., et al. ("UP-NS") in Docket No. FD 36873.[1] Under 49 C.F.R. § 1180.1, the Board must find that a railroad merger is in the public interest.[2] A public interest finding considers both the potential benefits and potential harms arising from the change in control. The harms from an anticompetitive railroad merger include a reduction of competition, loss of essential services, and transitional service problems.[3] The Board's framework also considers offsetting harms that would not otherwise be mitigated and how the transaction and proposed conditions would enhance competition.[4]

PPI's protest explains that the merger will significantly reduce competition in product and geographic markets for freight rail transportation involving origin-destination pairs and major commodity groups. The reduction, and even complete loss, of competition in these markets will eliminate important choice, drive up shippers' costs, degrade the quality and safety of service, and stifle innovation. These adverse effects would be passed on to American consumers for agricultural and food, chemicals, coal and crude oil, construction materials, pulp and paper, and grain commodities that are shipped by rail.

No remedy or "fix," particularly the weak behavioral commitments that UP-NS have grudgingly offered, could restore the competition lost by the merger, much less enhance it. Moreover, the anticompetitive impact of the merger sets an impossibly high bar for giving credence to any claimed "benefits" from the creation of a massive, monopoly transcontinental railroad. Perhaps most important, the UP-NS merger would exacerbate one of the worst cost-of-living crises in U.S. history. Rail is a critical part of the U.S. transportation infrastructure. In a country as large and geographically diverse as the U.S., more, not less, competition in freight rail is essential to the economic health and development of the country.[5] In simple terms, the merger is "too big to fix,"

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[1] Union Pacific Corp., Et Al. – Control – Norfolk Southern Corp., Et Al. ("Up-Ns"), Surface Trans. Board, Docket No. FD 36873; Railroad Control Application, Surface Trans. Board, Dec. 19, 2025, https://www.stb.gov/wp-content/uploads/UP-NS-Application-FD-36873.pdf.
[2] Frequently Asked Questions: Major Railroad Mergers, Surface Trans. Board, updated Feb. 27, 2026, https://www.stb.gov/wp-content/uploads/Major-Merger-Frequently-Asked-Questions.pdf
[3] *Id.*
[4] *Id.*
[5] *See, e.g.*, Diana L. Moss, The Affordability Crisis, Antitrust, and Consumer Anxiety, ProMarket.org, October 28, 2026,

and the application should be denied by the Board.

II. A Coast-to-Coast U.S. Rail Monopoly Is Bad for Competition, Consumers, and the Economy

The UP-NS merger combines one of two Class 1 railroads in the western U.S. (UP) with one of two Class 1 railroads in the eastern U.S. (NS). The $85 billion deal would create a massive, coast-to-coast U.S. railroad monopoly, following decades of consolidation that has reduced the number of Class I railroads from 63 in 1976 to only six in 2026.[6] UP-NS would control more than 50,000 network miles, or 36% of the 135,000-mile U.S. network.[7] This would make a merged UP-NS one-and-a-half to two-and-a-half times larger than the smaller Class 1 railroads operating in U.S. sub-regions. A merged UP-NS would also control about 44% of total freight shipped in the U.S., by revenue.[8] These market shares would, by any number of legal standards, make UP-NS a dominant railroad with the power to flex its market power to reduce competition and harm consumers.[9]

Federal approval of the UP-NS merger is bad public policy, with significant adverse effects on competition, consumers, and the U.S. economy. Since their initial filing in December 2025, Applicants have asserted their railroad merger will create new single-line routes and enhance competition from rail and trucking. They have overblown the alleged boost to competition in intermodal freight shipping. Indeed, sources estimate that rail and trucking compete head-to-head for less than 10% of total U.S. freight shipments.[10]

UP-NS have also downplayed concerns over how the creation of a monopoly "end-to-end" U.S. rail network will eliminate routes, reduce competition, and enhance the ability and incentive to disadvantage smaller, competing railroads, making them less competitive. Common-sense economics tells a simple story. Why would a larger, more powerful transcontinental UP-NS railroad want to hand off freight traffic to smaller competing railroads at interchange points and gateways when it controls coast-to-coast trackage and can move the freight itself? Moreover, why would UP-NS not ensure that rival railroads cannot compete effectively for shippers' business, so that UP-NS can solidify its transcontinental monopoly and ultimately raise shipping rates?

The Board cannot ignore that a large coalition of railroads and shippers that transport agricultural and food, chemical, coal, construction/pulp and paper, crude oil, and grain commodities oppose the

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https://www.promarket.org/2026/10/28/the-affordability-crisis-antitrust-and-consumer-anxiety/.

[6] The Great Connection: Creating America's First Transcontinental Railroad, up-nstranscontinential.com, at p. 4, https://www.up-nstranscontinental.com/donotdelete/Great_Connection_Executive_Summary_v32.pdf, and https://en.wikipedia.org/wiki/Mergers_and_acquisitions_in_the_United_States_railroad_industry

[7] Mergers and acquisitions in the United States railroad industry, Wikipedia, https://en.wikipedia.org/wiki/Mergers_and_acquisitions_in_the_United_States_railroad_industry. See also, e.g., The Ultimate Guide to Railroad Classes: Defining Class I, Class II, and Class III Railroads, Rail State, Mar. 24, 2023, https://www.railstate.com/the-ultimate-guide-to-railroad-classes-defining-class-i-class-ii-and-class-iii-railroads/.

[8] Canadian Pacific Railway Limited; Canadian Pacific Railway Company; Soo Line Railroad Company; et al. —Control—Kansas City Southern; The Kansas City Southern Railway Company; et al., Surface Trans. Board, Decision No. 35, Mar. 15, 2023, https://Www.Stb.Gov/Wp-Content/Uploads/Fd-36500-Cp-Kc-March-15-2023-Decision.Pdf.

[9] *See, e.g.*, U.S. Dept. of Justice & Fed. Trade Comm'n, *Merger Guidelines*, 2023, § 2.1 at p. 6 ["2023 Merger Guidelines"].

[10] Rail Can't Replace Trucks, American Trucking Associations, Sep. 24, 2025, https://www.trucking.org/news-insights/rail-cant-replace-trucks.

merger.[11] When freight rates increase as a result of the transaction, millions of American consumers would also see higher prices for commodities transported by rail. Perhaps this explains why, in July 2026, Applicants finally offered remedies for the anticompetitive effects of the UP-NS merger.[12] The catch is that they are complex, cumbersome, and difficult-to-enforce fixes that will not restore the competition lost by the merger. For all of these reasons, the Board should just say "no" to the deal.

III. The UP-NS Merger Risks Reducing Competition and Harming Freight Rail Shippers and American Consumers

The UP-NS merger raises a major competitive problem by creating the ability and incentive for UP-NS to squeeze rival railroads in the east and west out of the market. An end-to-end railroad combination eliminates cooperation across a joint-line interchange and replaces it with operation of a single-line route, thus converting transfer points where UP or NS "interline," or hand off service to a carrier in the east or west, to single-network service. UP-NS would operate 10,000 single-line origin-destination lanes across the U.S.[13]

This seismic shift would be felt by shippers that rely on handoffs at major interchange points that had three independent rail carrier options before the merger. Post-merger, these shippers will have only two choices of independent carriers.[14] Shippers with only two options pre-merger will have no choice post-merger, effectively making them "captive" to a merged UP-NS.[15] As an end-to-end transcontinental monopoly, UP-NS would have strong incentives to frustrate rival railroads' ability to access these customers.

For example, UP-NS could manipulate access to gateways or interchange points where traffic is transferred to a competing railroad, degrade service quality for shippers that rely, in part, on a rival network, and work to raise fees. Disadvantaging competing railroads would raise their costs, making them less competitive. Although the ability to disadvantage rival railroads through control over infrastructure is critical, UP-NS must also have an *incentive* to foreclose competition. In other words, foreclosure must also be profitable.[16] UP-NS would have this incentive because any losses from not sharing traffic (i.e., interlining) with competing railroads would be more than made up for by higher shipping prices that result from squeezing them out of the market.

These "vertical foreclosure" concerns are well-known in rail markets. The Board has repeatedly held in past mergers that they are valid arguments and should be investigated. In response to questions and pushback from the Board, rival railroads, and shippers, UP and NS were forced to abandon their initial "nothing to see here" approach and acknowledge stakeholders' competitive concerns. As UP-

[11] The UP–NS Merger is a Bad Deal for America, Stop the Rail Merger Coalition, https://stoptherailmerger.com/; and Joint Shipper Associations' Motion For Summary Denial in Union Pacific Corp., Et Al. – Control – Norfolk Southern Corp., Et Al. ("Up-Ns"), Surface Trans. Board, Docket No. FD 36873, August 6, 2026, at p. 21.
[12] Union Pacific Corp., Et Al. – Control – Norfolk Southern Corp., Et Al. ("Up-Ns"), Surface Trans. Board, Docket No. FD 36873, Applicants' Second Response to Decision No. 21, Surface Trans. Board, Jul. 27, 2026, https://dcms-external.s3.amazonaws.com/DCMS_External_PROD/1785186491665/311848.pdf.
[13] The Great Connection: Creating America's First Transcontinental Railroad.
[14] Union Pacific and Norfolk Southern Affirm Strength of Merger Application and Offer Unprecedented New Customer Assurances, Investor.unionpacific.com, Jul. 27, 2026, https://investor.unionpacific.com/news-releases/news-release-details/union-pacific-and-norfolk-southern-affirm-strength-merger.
[15] *Id.*
[16] *See, e.g.,* Michael H. Riordan and Steven C. Salop, *"Evaluating Vertical Mergers: A Post-Chicago Approach,"* 63 Antitrust L.J. 513 (1995).

NS persists in denying that their transaction will enhance their market power, however, their public statements indicate otherwise. In March 2026, UP's CEO warned that "I'll probably increase everybody's rates that said they didn't want a seamless railroad by three or four extra percent to teach you a lesson."[17] This threat reveals that even alone, UP has the power to raise rates. Merging UP with NS would only increase this market power.

IV. The Board Should Give No Weight to UP-NS's Arguments Dismissing Concerns Over Vertical Foreclosure

Despite concerns raised by the Board, competing railroads, and shippers, UP-NS deny that the merger increases the risk of vertical foreclosure.[18] For example, UP-NS's economic expert asserts that "…economic theories of anti-competitive foreclosure that make up the bulk of the economic literature do not apply to the railroad industry."[19] This argument suffers from a number of fatal flaws.

A. Arguments Against Vertical Foreclosure Do Not Translate to the Absence of Competitive Harm

Applicants' defenses to vertical foreclosure include, but are not limited to, the availability of contractually negotiated prices and the elimination of double marginalization. To be sure, contractually negotiated (versus uniform) pricing may enhance allocative efficiency. But more "efficient contracting" does not mean that a merger will not have anticompetitive effects.[20] Likewise, the elimination of double marginalization (EDM), or UP-NS's internalization of the markup on interlining fees that they would otherwise pay as standalone railroads, can be a cost saving attributable to an end-to-end railroad merger. But it does not eliminate incentives to foreclose competitors.[21] Moreover, despite the heavy emphasis on EDM, Applicants provide any clear estimate of EDM-specific savings from the UP-NS merger.

B. Arguments Against Vertical Foreclosure Are Unrelated to the Facts of the UP-NS Merger

Applicants' rebuttal of vertical foreclosure is developed entirely outside the empirical context of the UP-NS merger. It is based on general, theoretical arguments that focus primarily on pricing dynamics. UP-NS avoid explaining how an end-to-end railroad merger can create the ability and incentive to discriminate against rivals. For example, little attention is paid to the potential for UP-NS to block access to essential or strategically important facilities and to degrade the quality and timeliness of connecting service, availability of alternative routing options, allocation of capacity, and interconnection terms. These methods for foreclosing competition are particularly important because railroads operate interconnected networks and access to another carrier's facilities is essential for competition.

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[17] Exclusive: 'Humor is good,' Union Pacific CEO says of video rate threat, Freight Waves, Nov. 5, 2026, https://www.freightwaves.com/news/exclusive-humor-is-good-union-pacific-ceo-says-of-video-rate-threat.
[18] Joint Shipper Associations' Motion For Summary Denial, at p. 21.
[19] Railroad Control Application, V. 2 at p. 158.
[20] *See, e.g.*, David J. Balan and Jeremy A. Sandford, Mergers when price and quality are set by bargaining, Mar. 15, 2026, https://www.jasandford.com/bargaining.pdf.
[21] See, e.g., 2023 Merger Guidelines, at p. 16, footnote 31.

C. The Board Has Long Recognized the Risk of Vertical Foreclosure in End-to-End Railroad Mergers

The Board's decision in the 2023 merger of Canadian Pacific and Kansas City (CPKC) recognized vertical foreclosure as a valid competitive concern. The Board found that "[e]ven in mergers . . . without horizontal network overlap…potential adverse vertical competitive impacts can include diminished service and/or increased prices on interline movements that have the effect of foreclosing efficient competitive options."[22] Indeed, the Board "expressly rejected the presumption . . . that a vertical combination will not result in competitive harm."[23] The Board cannot reverse course and accept UP-NS's arguments that vertical foreclosure is highly unlikely when they the railroads proposing to merge.

D. Union Pacific Has Changed Its Stance on Vertical Foreclosure Now That It Is Proposing to Merge with Norfolk Southern

UP *itself* advocated in the CPKC case for the Board to consider vertical foreclosure. For example, UP's economics witness noted, "…if CPKC will be able to divert traffic by reducing its own costs…it could also divert traffic by increasing its rivals' costs through a foreclosure strategy. And in fact, CPKC will have much stronger incentive and ability to raise KCSM interline rates, compared to the situation pre-merger (where such incentives already exist), because shipments diverted from competitors like UP will enable CPKC to capture the revenue and profits associated with the KCS segments as well as the CP segments."[24] When the "shoe is on the other foot" — that is, when its own deal raises vertical foreclosure concerns — UP now denies that it is an issue.

V. Complex Behavioral Remedies Are Unlikely to Restore Competition

A. Behavioral Remedies Suffer From Well-Known, Proven Flaws

Applicants have offered a set of conditions that they assert would preserve competition, including, but not limited to, relinquishing operational control of switching hubs or terminals where rival railroads interoperate, Committed Gateway Pricing (CGP) and the Targeted Access Program (TAP). Aside from the divestiture of UP-NS interests in terminals, both the CGP and TAP remedies are "behavioral," or "conduct" fixes. These fall into the same category as pricing, rate, or tariff, nondiscriminatory access, mandatory licensing, and anti-retaliation commitments or requirements. These remedies have a long and troubled history in antitrust enforcement and sector regulation.[25]

Behavioral remedies are "regulatory" because they prescribe and proscribe how a merged firm may operate for a period of time after the transaction is consummated. They suffer from major flaws that make them ineffective for fully restoring competition lost by a merger. First, conduct fixes do nothing to reduce the merged company's ability or incentive to exercise market power. Instead, they

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[22] Can. Pac. Ry. Ltd. – Control – Kans. City. S., Decision No. 35, FD 36500, slip op. at 21 (served Mar. 15, 2023) ("CPKC Decision"), https://www.stb.gov/wp-content/uploads/FD-36500-CP-KC-March-15-2023-Decision.pdf.
[23] *Id.*, at 66.
[24] Can. Pac. Ry. Ltd. – Control – Kans. City. S., Union Pacific Railroad Company's Comments And Request For Conditions, FD 36500, at 39 (Feb. 28, 2022), https://dcms-external.s3.amazonaws.com/DCMS_External_PROD/1646158210279/304028.pdf?
[25] John E. Kwoka and Diana L. Moss, Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement, 57 Antitrust Bulletin (No. 4, 2012).

are designed simply to contain or restrain strong anticompetitive incentives. As a result, merged firms often find workarounds to required behavioral remedies so that they can act on economic incentives to maximize monopoly profits. Overseeing behavioral remedies is, therefore, something akin to a "full employment act" for a sector regulator.

Second, behavioral remedies require market participants like smaller competitors, customers, and input suppliers to come forward to report violations. Not surprisingly, these stakeholders are less inclined to report if they fear retaliation from the larger, merged company. Without information from stakeholders reporting potential violations, internal company monitors, regulators, and courts have virtually no way to ensure that the merged company is complying with the new regulatory requirements.

Finally, the monitoring, enforcement, and compliance associated with behavioral conditions consume enormous agency resources. Those resources could be put to better use promoting competition and protecting consumers in other regulatory matters in budget-constrained regulatory agencies. Moreover, any compliance issues are sure to be contested by the merged company that — as a much larger entity — has deeper pockets to fund litigation inside the Board, or outside the agency in the federal appellate courts.

Antitrust history is riddled with evidence that behavioral or conduct remedies are ineffective at restoring competition lost by a merger. Indeed, in the vertical merger of Live Nation and Ticketmaster, the DOJ used behavioral antidiscrimination and anti-retaliation remedies that were routinely violated by the merged company.[26] After modifying the consent decree a decade later, followed by more violations, the DOJ finally brought a monopolization case seeking to break up the company. U.S. consumers do not need another "Live Nation-Ticketmaster" debacle in an important sector like rail transportation.

B. UP-NS's Proposed Remedies Will Not Restore Competition Lost by the Merger

The remedies proposed by UP-NS fall short, for a variety of reasons. For example, divestment of ownership stakes in shared terminal facilities near major gateways has little impact on UP-NS's broader control over "captive traffic" lanes. Relinquishing control of terminals does not eliminate all the ways that UP-NS could discriminate against rivals, including rate increases and service downgrades, regardless of who operates the terminal switches.

Applicants explain that "CGP is best understood as a market-rate haulage program that extends the commercial reach of one carrier into a customer facility that is physically served only by the legacy UP or legacy NS."[27] CGP pricing would allow a competing railroad, such as CSX, to offer a single through-rate from origin to destination on the combined UP-NS network. The TAP remedy addresses a different problem, namely, the risk of operational service failures. It would allow customers experiencing service issues during the integration to request access to another Class I railroad through reciprocal switching.[28] It applies to sole-served customers in terminal areas after

[26] Tunney Act Comments in U.S., et al. v. Live Nation Entertainment, Inc. and Ticketmaster, L.L.C., Progressive Policy Institute, Sep. 3, 2026, https://www.progressivepolicy.org/wp-content/uploads/2026/09/PPI-Tunney-comments_LNTM_9.3.26.pdf.
[27] Applicants' Second Response to Decision No. 21, at p. 157.
[28] *Id.*, at p. 189.

their service performance deteriorates from pre-merger levels and falls below specified performance thresholds.

Applicants' proposed CGP and TAP protections are unlikely to fully restore competition lost by the UP-NS merger. First, they are temporary. When they end, UP-NS can raise rates or degrade interline handoffs. CGP is narrow in scope and applies to a small fraction of total affected movements. Burlington Northern-Santa Fe, for example, estimates that CGP would apply to a tiny percentage of rail shipments potentially affected by the merger.[29] Such a remedy would have minimal, if any, effect in restoring competition lost by a hugely anticompetitive end-to-end railroad.

Moreover, as with most behavioral access and pricing remedies, the benchmarks and standards are controlled by UP-NS. Manipulation of costs or service would be exceptionally hard for the Board to detect. Deviations from, and violations of, the remedies are unlikely to be reported by smaller market participants because they fear retaliation — another common problem with behavioral remedies. Finally, if competing railroads like BNSF and CSX are granted trackage rights to ensure competitive access, UP-NS would very likely still control dispatch and operation. This means that the merged railroad could "self-preference" by giving its own movements priority.

VI. The Union Pacific-Norfolk Southern Merger Is "Too Big to Fix" and the Board Should Find That It Is Not in the Public Interest

In sum, a robust body of empirical economic evidence demonstrates that the larger and potentially more anticompetitive a merger is, the harder it is to justify any claimed benefits and to fashion a "fix." The failure of government-imposed conditions to restore competition would ultimately burden consumers with less choice, higher freight transportation costs, and higher prices for commodities that are essential for American consumers. PPI urges the Board to find that the UP-NS merger is not in the public interest and the most effective remedy for preserving competition and protecting consumers is to deny the application.

Respectfully submitted,



Diana L. Moss
Vice President and Director of Competition Policy
Progressive Policy Institute
1919 M St. NW
Suite 300
Washington, DC 20036

cc: All parties of record

[29] UP and NS Complete Fourth Merger Filing - Make Sure Your Voice is Heard, Burlington Northern-Santa Fe Railroad, Jul. 28, 2026, https://bnsf.com/customer-notifications/up-and-ns-complete-fourth-merger-filing-make-sure-your-voice-is-heard.