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November 18, 2026

BNSF-74

VIA E-FILING

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

Re: **STB Docket No. FD 36873, Union Pacific Corp., et al.—Control—Norfolk Southern Corp., et al.**

Dear Chief of Case Administration:

Enclosed for e-filing in the above-referenced proceeding is a public version of BNSF Railway Company's Opposition to the UP/NS Merger (BNSF-74) with appropriate redactions that the Board can place in its docket. We are concurrently filing a highly confidential version of the Comments to be filed under seal.

Respectfully submitted,

/s/ *Dan Donovan*

Daniel T. Donovan
Attorney for BNSF Railway Company

Enclosures

cc: All parties of record

BNSF-74

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36873

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

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4	October 22, 2026	Union Pacific Q3 2026 Earnings Call Transcript
5	November 2026	Rail Industry Overview, AAR
6	January 27, 2026	Union Pacific Reports Fourth Quarter and Full Year 2025 Results, Union Pacific
7	October 22, 2026	Union Pacific Reports Third Quarter 2026 Results, Union Pacific
8	October 22, 2026	Norfolk Southern Q3 2026 Earnings Call Transcript
9	October 1, 2022	BNSF to Build New Integrated Rail Complex in Barstow to Increase Supply Chain Efficiency Nationwide
10	June 2026	BNSF's Barstow International Gateway project in California approved by the City Council, BNSF Railway
11	August 7, 2025	New Truck Competitive Intermodal Service to Kansas City and Chicago, Union Pacific Announcement No. PR2025-61

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12	June 16, 2025	New Kansas City Terminal Begins Operations July 15, Union Pacific Announcement No. PR2025-44
13	August 1, 2024	Norfolk Southern to make strategic investments in Alabama, Norfolk Southern
14	October 19, 2026	BNSF and CSX team up for faster coast-to-coast domestic intermodal service, TrainsPro
15	July 22, 2026	Union Pacific and CN Announce Agreement to Improve North American Rail Connectivity, Union Pacific
16	July 23, 2026	CN and UP reach settlement on Norfolk Southern merger, FreightWaves
17	September 15, 2025	New Union Pacific and Norfolk Southern Intermodal Gateway Expands Market Access, Union Pacific Announcement No. PR2025-73
18	May 4, 2026	Amazon Launches Amazon Supply Chain Services, Opening Its Logistics Network to All Businesses, Amazon News
19	February 22, 2024	J.B. Hunt Signs Long-Term Intermodal Agreement With Walmart, J.B. Hunt
20	September 9, 2023	Norfolk Southern CEO apologizes before Senate for Ohio train derailment, PBS News
21	October 20, 2026	Excerpts from the Deposition of Vincenzo J. ("Jim") Vena
22	October 19, 2023	Union Pacific Q3 2023 Results
23	February 28, 2023	Union Pacific CEO to Step Down Amid Investor Pressure, Railfan & Railroad Magazine - Justin Franz
24	October 7, 2026	Excerpts from the Deposition of David Hunt
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26	July 26, 2025	Union Pacific and Norfolk Southern to Create America's First Transcontinental Railroad, Union Pacific
27	September 11, 2024	Norfolk Southern board of directors appoints Mark R. George President and Chief Executive Officer, Norfolk Southern
28	July 16, 1905	Norfolk Southern 2024 Annual Report
29	September 17, 2026	Excerpts from the Deposition of Mark George
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45	September 9, 2026	Excerpts from the Deposition of Todd Rynaski
46	November 2009	A Study of Competition in the U.S. Freight Railroad Industry – Laurits R. Christensen
47	September 9, 2026	Excerpts from the Deposition of Claude Elkins
48	January 2014	UP_1682678
49	January 23, 2023	NS_00793384
50		Rail Services, CN Website
51	June 29, 1905	A Primer on Foreclosure by Patrick Rey Jean Tirole
52	Winter 1995	Evaluating Vertical Mergers-A Post-Chicago Approach – Michael H. Riordan H. & Steven C. Salop
53	March 1990	Equilibrium Vertical Foreclosure, 80 Am. Econ. Assoc. Rev. 127 – Janusz Ordover, Garth Saloner, & Steven C. Salop
54	January 10, 2025	UP_2638273
55	December 3, 2021	UP_0877835
56	2023	GMXT, Información Financiera Trimestral (2T 2023)
57	August 6, 2026	U.S. Dep't of Labor, News Release No. 25-1009-DAL, US Department of Labor Orders Railroad Company to Reinstate Worker, Pay Over $300K in Back Wages, Damages, Attorney's Fees (Aug. 6, 2025)

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58	September 8, 2026	OSHA Blasts Union Pacific as 'Serial Violator' in Texas Whistleblower Case," Dallas Morning News (Sept. 8, 2025) - Amber Gaudet
59	October 13, 2026	Excerpts from the Deposition of Yannik Thomas
60	September 3, 2026	Excerpts from the Deposition of Brian Barr
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71	May 12, 2025	Deposition Exhibit 38
72	September 4, 2026	Spreadsheet HC-T2R Intermodal Segmentation Dataset vFinal.xlsx filed with Verified Statement of David Hunt
73	July 18, 1905	Norfolk Southern Q3 2026 Quarterly Financial Data
74	July 16, 1905	Union Pacific Corp. 2024 Form 10-K
75		Deposition Exhibit 350
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77	August 20, 2026	Excerpts from the Deposition of Aaron Pfeifer
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80	November 15, 2026	Union Pacific, Golden Spike and its Promontory Companions
81		BSNF, NS, NWSA Redesign Faster Service from PNW to Chicago and Beyond
82	May 9, 2006	UP, BNSF Announce Southern Powder River Basin Joint Line $100 Million Capacity Expansion Plan
83	December 29, 2020	America's Railroads Meet PTC Mandate, Look to the Future - Association of American Railroads
84	November 13, 2026	Federal Railroad Administration, US Department of Transportation, Positive Train Control (PTC) Overview
85	November 15, 2026	RailPulse Website: About

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86	June 7, 2022	Union Pacific Railroad Joins Forces with RailPulse Coalition to Digitally Transform North America's Freight Rail Industry
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88	November 11, 2026	Union Pacific X Post (@Union Pacific)
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90	October 29, 2026	Excerpts from the Deposition of Kenny Rocker
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93	August 29, 2025	Buffett to CNBC- We won't be acquiring CSX, or any other railroad, CNBC
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102	March 10, 2026	Rail merger critics should "quit looking backward," says Union Pacific CEO, FreightWaves – Stuart Chirls
103	December 17, 1965	Supplemental Agreement between Union Pacific & Missouri Pacific Railroad Company F-1775-0-5
104	December 16, 2009	Trackage Rights Agreement between BNSF Railway Co. & Union Pacific Railroad Company BF-57851-Main-0
105	January 5, 1966	Agreement between Union Railway Co. & Missouri Pacific Railroad Company Trackages Rights at Memphis, TN, 1966 TRA Decision
106	November 18, 2025	UP_0106714
107	September 27, 2021	NS_00300322
108	September 16, 2024	Deposition Exhibit 341
109	October 19, 2026	Huneke, William, *Remembering Hunter Harrison's Approach to Enhancing Competition*, Railway Age (Oct. 19, 2026)

INTRODUCTION AND SUMMARY OF ARGUMENT

Union Pacific and Norfolk Southern ("UP/NS") ask the Surface Transportation Board to approve the largest rail merger in American history. Their case rests on one premise: that the freight rail industry, as it exists today, is fractured and faltering. In UP/NS's telling, "rail continues to lose market share to trucking," and "only full integration can deliver the scale, coordination, and customer responsiveness necessary to compete with trucking and modern logistics providers." UP-80/NS-78, Supp. p. 117–19 (STB filed July 27, 2026); Sep. 4, 2026 Am. App., Vol. 1 p. 199, Verified Statement of Mark R. George ("George VS") ¶¶ 29, 170–74 ("The U.S. railroad industry has stalled," and "[s]omething has to change . . . ."). NS's CEO, Mark George, told investors the same thing the day the deal was announced: "We can only go so far independently . . . We've been losing share to truck, and this is one way to reverse that trend." Ex. 1, 2025 Q2 Norfolk Southern Corp. Earnings Call Tr. at 10 (July 29, 2025). UP's CEO, Jim Vena, warned that "[i]f the rail industry does not move forward, it will be left behind." Jim Vena, *Moving America Forward*, UNION PACIFIC (Oct. 22, 2026). UP/NS have made clear that intermodal growth—the conversion of long-haul truckloads to rail—is what drives the transaction. Sep. 4, 2026 Am. App., Vol. 1 p. 29.

That premise is fundamentally wrong. The rail industry is not stalled, and it is not broken. It is thriving. Intermodal, the segment that UP/NS say cannot grow without a merger, has just posted the three best months in its history. UP/NS concede, as they must, that intermodal is "already highly competitive." *See* UP-80/NS-78, Supp. p. 32–33. Carload traffic is growing across most commodity groups.

Railroads are investing billions of dollars in their networks and forming partnerships that win freight from trucks. UP and NS ***themselves*** are reporting record profits. All of this growth comes from the industry structure that exists today: independent railroads competing for freight, investing their own capital, and partnering with each other across the Mississippi River, east to west and west to east. ***None of it*** required a merger. ***All of it*** would be put at risk by one.

UP/NS try to avoid this reality by measuring the industry from the wrong starting point. They built their case on a 2023 base year, the low point of the post-COVID-19 freight recession. So, every analysis UP/NS submitted, and every benefit they promise, starts from that low point. Their unprecedented, made-for-show "lookalike" diversion model takes 2023 market shares, grafts them onto future lanes, and labels any change as a "merger benefit." That model has been revised, corrected, and recorrected ***again*** through more than six iterations of reports, supplements, and errata since filing. *See infra* Part III.A.2. Measured against the industry as it actually exists today, much of UP/NS's promised growth has already arrived, without a merger. The rest depends on fantastical diversion forecasts that eclipse those in the last major merger, in which even smaller forecasts went unmet. As the Board has explained, "prior major mergers . . . have fallen short of truck-to-rail conversion projections on past applicants' timelines[,]" including the recent CP/KCS merger where CP/KCS "forecast[ed] converting 64,000 trucks per year from highway to rail[,]" which "has not yet been realized." *See* Decision No. 21 at 25 n.29 (STB served May 28, 2026). Here, there is even more room to doubt UP/NS's claims because they

"project substantially more diversions" than CP/KCS, at almost 1.4 million truck-to-rail units. *See id.*

UP/NS's projections matter well beyond the numbers. Truck-to-rail diversions are the ***foundation*** of UP/NS's case—the basis for their claimed public benefits, their shipper savings, and their promise that the merger will grow rail rather than shrink competition. If UP/NS cannot be trusted on the cornerstone their entire case rests on, the Board should not trust their assurances on anything else. Not on rates, not on service, and not on the conditions they promise to honor. This is a merger in search of a problem, not a merger that solves one.

To be clear, BNSF is not afraid of competition: it competes every day with other Class I railroads and works hard to earn the trust and business of its customers. In fact, BNSF leads in the most competitive segment in rail—the intermodal business. All BNSF asks for is a fair fight, not one in which a single transcontinental railroad can abuse its position to steal traffic and squeeze shippers through anti-competitive means. Strip away UP/NS's rhetoric, and what remains is the real purpose of this transaction: acquiring market power. A combined UP/NS would control roughly ***50%*** of all Class I rail freight in the United States—far above the levels at which antitrust law presumes competitive harm. It would turn today's competitive, balanced industry into a world with one dominant transcontinental railroad and a handful of regional carriers competing on an uneven playing field. It would put that market power in the hands of a railroad that directly promises its investors: "We will maximi[z]e price." Ex. 2, Sep. 19, 2024 Tr. of UP Investor Day,

at 34. And it would put that market power in the hands of a railroad that threatened to "increase everybody's rates" that opposed the merger "by three or four extra percent to teach" shippers a lesson. Ex. 3, UP_3217794, at 51:50–53:00 ("SWARS Video"). UP's past is UP/NS's future: supercharge price and stock value, while decreasing volume.

The harm would come in several ways at once, totaling ***hundreds of millions to billions*** to industry stakeholders:

- ***Lost competition.*** The merger would eliminate a competing rail option at scores of stations and across hundreds of corridors—reducing optionality and independent routes for all customers.
- ***Foreclosure and bundling.*** The merger would give UP/NS the ability and incentive to exploit captive shippers and foreclose rival railroads at key gateways. For example, UP/NS's captivity over certain geographic areas will give them the ability to force bundling and impose higher rates on shippers. While UP/NS promise "open gateways" as a means to keep competition, that is the same commitment UP itself attacked as "worthless" in the CP/KCS proceeding and comes with the baggage of UP's checkered past of honoring conditions. UP Comments and Request for Conditions, *Canadian Pac. Ry.—Control & Merger—Kan. City S.*, FD 36500, at 69 (Feb. 28, 2022).
- ***Control of shared assets.*** The merger would hand UP/NS outsized influence over the jointly owned entities that the whole industry depends on, including TTX Company ("TTX").

The biggest losers would be shippers, especially captive shippers, and ultimately American consumers. Shippers would lose competitive options and see higher rates, and consumers would be left footing the bill by paying more for food, energy, and everyday goods. The American supply chain would bear the integration risk of the largest and most complex rail combination ever attempted. History shows that risk is not theoretical.

UP/NS have pursued this combination without regard for what the Board's rules require, flouting their responsibility to bring their best case. The Major Merger Rules impose a "heavier burden" on applicants and demand competition-***enhancing*** proposals. *Major Rail Consol. Procs.*, 5 S.T.B. 539, 545–46 (2001), *modified* (June 25, 2001); *see* Decision No. 21 at 18. UP/NS, though, offer just one supposed competitive enhancement that is nothing of the kind: a narrow Committed Gateway Pricing program that covers ***less than 1%*** of total U.S. units (and only about 5% of Class I interline units), expires with the oversight period, and will actually raise rates for many of the shippers it claims to help. *See id.* at 20–21; Decision No. 37 at 3 (STB served Sep. 18, 2026).

UP/NS's conduct in this proceeding previews how a merged UP/NS would behave, and it is not a pretty picture:

- ***A rejected first Application.*** The Board rejected UP/NS's first application as incomplete. Decision No. 9 at 1–2, 5–11 (STB served Jan. 16, 2026).
- ***A still-deficient Amended Application.*** The Board found UP/NS's second attempt "unclear or underdeveloped" on the questions that matter most and held the proceeding in abeyance pending supplementation. Decision No. 21 at 17–33.
- ***A benefits case that is a moving target.*** UP/NS have amended their filings, workpapers, and traffic projections again and again and again. *See infra* Part III.A.2; *see also* Decision No. 37 at 2–3 n.4. As one Board member aptly put it, this is "an apparent strategy of 'letting the line out slowly.'" Decision No. 37 at 5 (Kloster, Board Member, concurring).
- ***Approaching the process like a negotiation.*** UP and NS have treated this proceeding less as a public-interest review and more like a negotiation. UP's CEO has been open about their strategy: "[T]here's always deals to be made" and "[i]f you're playing poker, you don't put everything down before you see the last card"—meaning UP/NS are "waiting to see what [opponents] put in on November 18th" before they "re-examine." Ex. 4, UP 2026 Q3 Earnings Call Tr. at 28 (Oct. 22, 2026). Every move in this proceeding from UP/NS is a bargaining chip—not a good faith attempt to protect customers and consumers.

- ***Threats to shippers.*** On March 17, 2026, UP's CEO told a conference of over 900 industry stakeholders, including shippers, that he would raise rates on those who opposed the deal "to teach you a lesson." SWARS Video at 51:50–53:00; *see* Decision No. 45 at 3–4 (STB served Nov. 4, 2026). UP fought to keep the recording out of public view until the Board rejected its appeal as untimely and "wholly lack[ing] merit." Decision No. 45 at 4–5. UP is willing to threaten its customers now, while its transaction is pending and while the Board is watching. Shippers and the Board should expect worse once NS is no longer in the picture.

- ***Obstruction of the Board's process.*** UP/NS have shown a lack of transparency in everything they do—hiding behind confidentiality designations and seeking closed-door meetings, not once but twice. UP-4/NS-4 (STB filed Aug. 29, 2025) (first *ex parte* request); UP-114/NS-116 at 5 (STB filed Oct. 6, 2026) (second *ex parte* request). UP/NS have engaged in unprecedented clawbacks and statements disparaging Board members and the Board's process. At every step, UP/NS have put themselves and their interests first—not the public interest.

The question facing the Board is a straightforward one: does a transaction that reduces shippers' options, and inflicts massive harm, deliver "substantial and demonstrable public benefits . . . that cannot otherwise be achieved"? 49 C.F.R. § 1180.1(a). The evidence establishes that the answer is no.

The decision facing the Board is a serious one that is critically important to the future of American shippers, businesses, consumers, and the rail industry. Although the decision is serious, BNSF submits it is not difficult because the evidence all points in one direction. The evidence conclusively shows that the rail industry today is thriving and offering high-quality rail service to American businesses, which in turn leads to benefits for American consumers. The rail industry has grown materially since 2023, across almost all commodities, in both volumes and revenues. Record-breaking growth is happening every month, and even UP/NS expect it to continue for the foreseeable future. There is strong competition among the railroads, but there are strong incentives for cooperation too, so that rail carriers can provide innovative

customer solutions that already beat or rival UP/NS's claimed single-line benefits. The hard work done by the Board, railroads, and other industry stakeholders has created a healthy and balanced rail ecosystem that serves its customers well. The proposed merger threatens all of that, just so UP can increase its market power and ability to raise prices.

UP/NS offer no substantial, demonstrable public benefits flowing from the merger: intermodal rail growth and growth across freight sectors is happening ***now*** without a merger. UP's and NS's C-suites were forced to admit these facts under oath. For that reason, UP/NS have pivoted to claiming that operational benefits associated with fewer handoffs will help shippers in some unquantified way. But the rail industry has already solved that issue in the intermodal space, and efficiencies from collaboration among railroads are increasing. Other of UP/NS's claims are hypothetical and unsupported—*i.e.*, rail lines with low density suddenly becoming high-density, rail-centric lanes because of the merger. UP/NS also avoid the real harms a merger of this magnitude would create. They skate past concerns of shippers having less competitive options, being leveraged by a much larger railroad, and having to deal with the serious integration issues that have followed every major merger. UP/NS offer CGP, a rate option that offers prices at the 70th-percentile to some shippers and harms those shippers and others, even according to UP/NS's expert. UP/NS's other remedies would let the fox protect the henhouse, with UP/NS having their hands on the dial at gateways and determining what terms are "commercially reasonable." When all of the expensive PR slogans are put aside, what

UP/NS offer should concern everyone: UP/NS propose a post-merger world marked by fewer competitive options, higher prices for shippers and consumers, and imaginary benefits. That cannot be in the "public interest" of America—for its shippers, for its businesses, or for its consumers.

The stakes could not be higher. It is critically important that the Board get this decision right today, because it affects all the railroad industry's tomorrows. The Board should deny the application.

EXECUTIVE SUMMARY

The proposed merger will increase rates for shippers and costs for all Americans. A merged UP/NS ***will raise rates on shippers***. UP's strategy is to "maximize price." With greater market power—control of over 50% of American rail shipments—UP will only amplify that strategy. Despite rhetoric about efficiency and competition, this merger is about UP capitalizing on captive shippers, bundling, leveraging, and exporting its "maximize price" strategy to the NS network. The direct result would be higher rates for shippers that, in turn, would raise prices for American consumers.

The proposed merger will *not* provide demonstrable public benefits. The thesis of UP/NS's deal is that truck-to-rail growth will lead to shipper savings. That is false, and UP/NS's analysis is fatally flawed: it nonsensically shows truck diversions even when rail is more expensive than truck, uses a made-up methodology, and is based on an anomalous rail year (2023), without any reality adjustments. Further, UP/NS ignore that similar truck-to-rail promises in the CP/KCS merger never came to pass ***and*** that Class Is are converting freight from truck-to-rail now—without a merger—at record levels. UP/NS's suggested operational efficiencies are theoretical and have not been shown to flow as a benefit to shippers, rather than just to UP/NS's bottom line. There may be private benefits from the merger in profits for Wall Street and management stock options, but those are not public benefits.

The proposed merger will inflict real harms on shippers, the rail network, and consumers. There will be serious harms due to lost source and geographic competition, increased UP/NS leverage during bundled rate negotiations, and competitive foreclosure. There are also serious integration and network risks—like those seen in past mergers, including the most recent Class I merger—despite UP/NS's assurances otherwise.

UP/NS's proposed remedies are narrow and ineffective. UP/NS claim that there would be no harm from a merger and thus believe no remedies are needed. The supposed "concession" they offer—CGP—does not enhance competition: it is temporary, limited, and would instantly raise prices for most who are eligible to use it. Even UP/NS's expert had to admit CGP will harm certain shippers.

UP/NS approach this review process as a paper exercise and "poker game." The law requires UP/NS to meet a stringent review and demonstrate that the proposed merger is in the "public interest" and "enhances competition." UP/NS take a different approach, viewing it as an administrative paper exercise and leaving other parties and the Board to fill in the substance. UP/NS offered the bare minimum, believing it would position them to later negotiate the smallest package of concessions necessary—asking (again) to speak *ex parte* with the Board to fill in gaps. Their filings are replete with PR tag lines but lack substance and rigor, with many of their witnesses lacking an understanding of what they signed in their verified statements.

BACKGROUND

A. The Rail Industry Is Thriving, Not Declining.

UP/NS tell the Board that the rail industry is fractured and that only a transcontinental merger can put it back together. The evidentiary record shows the opposite. UP/NS's case is, at bottom, a truck-to-intermodal rail story. As the Board has recognized, UP/NS's public-interest analysis "relies principally on the proposed diversion of approximately 2.1 million truckloads of traffic from long-haul trucking to rail," which their expert claims will save shippers roughly $3.5 billion a year. Decision No. 21 at 24 (citing Apr. 30, 2026 Am. App., Vol. 1 p. 14). About 1.2 million of those diversions are long-haul intermodal conversions. Sep. 4, 2026 Am. App., Vol. 2 p. 450, Hunt VS at 63; *see* Decision No. 21 at 26 n.31. As one Board member has observed, the intermodal market segment, "by today's standards, is already competitive." Decision No. 37 at 5 (Kloster, Board Member, concurring). In many ways, UP/NS agree. They excluded intermodal from the only purportedly competition-enhancing condition proposed precisely because "intermodal traffic is already highly competitive." UP-80/NS-78, Supp. p. 32–33.

This concession exposes the flaw at the heart of the merger. The very growth UP/NS say requires a merger to unlock is the segment growing fastest without one. Nov. 18, 2026 Verified Statement of Katie Farmer ("Farmer VS") ¶ 12. In August 2026, U.S. railroads set a new monthly intermodal record, and the Association of American Railroads ("AAR") reported that August, September, and October 2026 were "the top three U.S. intermodal months ever, including a new all-time high in October," when railroads averaged more than 298,000 intermodal units per week. Ex.

5, AAR, *Rail Industry Overview* (Nov. 2026); Farmer VS ¶ 12. The growth is not limited to intermodal. "Year-to-date total carloads are the most since 2019." *Id.*; *see also* Farmer VS ¶¶ 12–13.

UP/NS have shared in the railroad industry's success. In 2025, UP reported a "record-breaking year." Ex. 6, Union Pacific, *Union Pacific Reports Fourth Quarter and Full Year 2025 Results* (Jan. 27, 2026); Farmer VS ¶ 15. This success has continued. In the third quarter of 2026, UP reported "record financial results," with net income of $2.1 billion and earnings per share up 15%. Ex. 4, Union Pacific Corp. Q3 2026 Earnings Call Tr. (Oct. 22, 2026); Ex. 7, Union Pacific, *Union Pacific Reports Third Quarter 2026 Results* (Oct. 22, 2026); Farmer VS ¶ 15. For the same quarter, NS reported "14% overall revenue growth" and "an all-time record for revenue less fuel." Ex. 8, Norfolk Southern Corp. Q3 2026 Earnings Call Tr. at 5 (Oct. 22, 2026); Farmer VS ¶ 15. These are not the results of a fractured industry in need of rescue.

This growth did not happen by chance. It is the product of the industry structure UP/NS are asking the Board to dismantle: sustained private investment and innovative service by independent railroads competing for traffic and investing to win it. Farmer VS § I.C; *see also id.* ¶ 15; Nov. 18, 2026 Verified Statement of Craig Morehouse ("Morehouse VS") §§ I–II. BNSF is investing more than $1.5 billion in the Barstow International Gateway ("BIG"), a first-of-its-kind inland port designed in part to strengthen interline moves with eastern partners, including NS and CSX. *See* Ex. 9, BNSF Railway, *BNSF to Build New Integrated Rail Complex in Barstow to Increase Supply Chain Efficiency Nationwide* (Oct. 1, 2022); Ex. 10, *Barstow*

International Gateway Project, BNSF (2026); Farmer VS ¶¶ 24–25; Morehouse VS § I. UP and NS are investing too. UP expanded its Inland Empire Intermodal Terminal and opened a new Kansas City terminal with 30% more lift capacity than the ramp it replaced. Ex. 11, Union Pacific, *New Truck Competitive Intermodal Service to Kansas City and Chicago*, Announcement No. PR2025-61 (Aug. 7, 2025); Ex. 12, Union Pacific, *New Kansas City Terminal Begins Operations July 15*, Announcement No. PR2025-44 (June 16, 2025); Morehouse VS § II. For its part, NS has invested more than $200 million in its Alabama corridor, with plans to nearly double capacity at its Livernois terminal in Detroit. Ex. 13, Norfolk Southern, *Norfolk Southern to Make Strategic Investments in Alabama* (Aug. 1, 2024); Sep. 4, 2026 Am. App., Vol. 2 pp. 921–22, Turner VS ¶ 103; Morehouse VS § II.

Railroads are doing what UP/NS say cannot be done: building seamless service through cooperation and innovation. Morehouse VS §§ I, III.B(ii). BNSF has partnered with both NS and CSX for almost a ***quarter of a century*** (since the early 2000s) to "achiev[e] service improvements, competitive gains, and seamless transcontinental service." Farmer VS ¶¶ 80–88. BNSF and CSX have built on those prior partnerships and now run a seven-day-a-week, 100-hour Los Angeles–South Kearny, New Jersey intermodal service. Ex. 14, Bill Stephens, *BNSF and CSX Team Up for Faster Coast-to-Coast Domestic Intermodal Service*, TrainsPro (Oct. 19, 2026); Farmer VS ¶ 85; Morehouse VS § I. And BNSF and NS run a Los Angeles–Croxton, New Jersey intermodal service that runs [redacted] hours ***faster*** than the 95-hour schedule UP/NS claim only a merger can deliver. Farmer VS ¶ 87; Sep. 4, 2026 Am. App., Vol.

2 p. 477, Hunt VS, Ex. 7-4; *see* Nov. 18, 2026 Verified Statement of Michael R. Baranowski and Nathaniel S. Zebrowski ("Baranowski/Zebrowski VS") § 10.1.

Quantum, BNSF's intermodal service developed with J.B. Hunt, further proves that partnership and innovation, not consolidation, expand the intermodal rail market. Quantum is a door-to-door intermodal product that pairs BNSF's rail network with J.B. Hunt's trucking expertise to serve time- and service-sensitive domestic shippers. Farmer VS ¶¶ 27–30; Nov. 18, 2026 Verified Statement of Thomas Williams ("Williams VS") ¶ 33. Quantum offers at least 95% on-time delivery; if the rail leg fails, J.B. Hunt trucks the load, and the customer still gets an on-time delivery. Farmer VS ¶ 28; Williams VS ¶ 34. This backstop is key: it allows BNSF to convert freight with a high cost of failure "that would otherwise never consider rail" because of reliability and consistency. Farmer VS ¶ 28; *see also* Williams VS ¶¶ 33, 37. Quantum has since expanded to Mexico (in partnership with FXE), and 2026 year-to-date volumes are nearly double 2025 volumes. Williams VS ¶ 35; *see also* Farmer VS ¶¶ 29–30.

But interline partnerships are not unique to BNSF; they reflect how the entire industry innovates to grow and meet customer demand. Falcon Premium (UP, CN, and GMXT) and the CSX–CPKC Southeast Mexico Express are all taking freight off highways today. Williams VS ¶ 37; Morehouse VS § III.B(ii). And in July 2026, UP reached an agreement with CN that cuts its Chicago transit time from roughly 35 hours to about 12. Ex. 15, Union Pacific, *Union Pacific and CN Announce Agreement to Improve North American Rail Connectivity* (July 22, 2026); Ex. 16, Trains, *CN and*

UP Reach Settlement on Norfolk Southern Merger (July 23, 2026). Most tellingly, UP and NS themselves launched a new Louisville-to-West Coast interline service, immediately ***after*** claiming that only a combination of their railroads could achieve such coordination. Ex. 17, Union Pacific, *New Union Pacific & Norfolk Southern Intermodal Gateway Expands Market Access*, Announcement No. PR2025-73 (Sep. 15, 2025); Williams VS ¶ 37; Morehouse VS §§ I, III.B(ii). UP/NS tell the Board that "railroads cannot contract their way to a seamless network through alliances and marketing agreements." UP-80/NS-78, Supp. p. 166. But their own conduct—and the decades of durable partnerships among Class I railroads—says otherwise.

These gains will last if the competitive dynamics that inspired them are protected. Railroads have added capacity that will not disappear, and large shippers are signing multi-year intermodal commitments for interline services. Ex. 18, Amazon News, *Amazon Launches Amazon Supply Chain Services, Opening Its Logistics Network to All Businesses* (May 4, 2026); Ex. 19, J.B. Hunt News Release, *J.B. Hunt signs new multi-year freight service agreement with Walmart, buys Walmart's intermodal assets* (Feb. 22, 2024); Farmer VS ¶ 14; Morehouse VS § II. In short, the industry UP/NS describe to the Board to justify their merger is not the industry operating today.

B. UP/NS Built Their Case on Railroads that No Longer Exist.

UP/NS describe a failing industry only because of a choice they made at the outset of this proceeding: they measured everything from the market low point of 2023. Their claimed $3.5 billion in shipper savings was "calculated using unadjusted 2023 truck and rail rates." UP-80/NS-78, Supp. p. 76–77.

That choice tilts the analysis from the start because UP/NS measured their merger from the bottom of the trough: by anchoring their projections to 2023, which was an unusually weak year for rail, they credit the merger with the very recovery the industry has already delivered on its own, without a merger. Morehouse VS §§ I–II. In 2023, the industry was still recovering from the pandemic, and NS was still dealing with the February 2023 East Palestine derailment and the leadership turnover that followed. Ex. 20, Josh Funk & Stephen Groves, *Norfolk Southern CEO Apologizes Before Senate for Ohio Train Derailment*, PBS (Mar. 9, 2023). UP was similarly dealing with network service issues, low market rates, and material management turnover in 2023. *See* Ex. 21, Oct. 20, 2026 Dep. of Jim Vena ("Vena Tr.") 15:8–12; Ex. 22, *Union Pacific Reports Third Quarter 2023 Results*, Union Pacific (Oct. 19, 2023) at 1; Ex. 23, Justin Franz, *Union Pacific CEO to Step Down Amid Investor Pressure*, Railfan & Railroad Magazine (Feb. 28, 2023). A model that starts at the bottom of a cycle creates an easy comparison that will mischaracterize the industry's recovery as something only a merger can deliver.

UP/NS's model does exactly that. It does not account for the growth railroads have added since 2023, even though UP/NS's own filing counts several UP and NS projects as pre-merger capacity that supports their growth plan. *E.g.*, Ex. 24, Oct. 7, 2026 Dep. of David Hunt ("Hunt Day 1 Tr.") at 21:7–21, 360:9–17; Ex. 25, Oct. 8, 2026 Dep. of David Hunt ("Hunt Day 2 Tr.") at 620:21–622:1, 693:16–694:6. Nor does it account for new services launched since then. UP/NS concede that their diversion work "does not attempt to forecast the impact of changes since 2023." UP-80/NS-78,

Supp. p. 140. The Board flagged the same gap and directed UP/NS to address how certain transactions—including CP/KCS, CSXT/Pan Am, and CN/Iowa Northern—would affect their projected diversions. Decision No. 21 at 30 (Request MS-2). UP/NS answered: "The premise of Request MS-2 is incorrect." UP-80/NS-78, Supp. p. 361–62. They defended relying on data "2 to 3 years old." *Id.* Older data may be helpful when a market has held steady. But in the years since 2023, the industry recovered from its low point, added capacity and new services, and absorbed major transactions that changed how traffic moves. *See* Morehouse VS § II. Relying on 2023 data here does more than introduce delay; it gives the merger credit for changes that have already happened.

The Board has seen this blind spot before. It rejected the original Application in part because UP/NS's market-share projections simply added together UP's and NS's 2023 shares, while the rest of the application promised that the merger would grow traffic by 15 to 26%. Decision No. 9 at 4–6. As the Board explained, those analyses did "not even attempt to project the market-share increases that [UP/NS] are plainly expecting[.]" *Id.* at 6. The same backward-looking approach infects the Amended Application. UP/NS's experts filtered out substantial portions of the underlying data, including at least 59% of intermodal locations in one set of diversion projections, and based their market-share analyses on roughly 80% of the traffic at issue. *See* Decision No. 30 at 4–5 (STB served Aug. 18, 2026). The Board found that what UP/NS had provided was "partial rather than exhaustive" and ordered them to refile their workpapers without filters. *Id.* at 5.

Judged against today's industry instead of 2023's, the merger's benefits largely evaporate. Using UP's 2026 figures, roughly half or more of UP/NS's claimed benefits already exist without a merger. Approximately 64% of the $2.72 billion in claimed EBITDA and operating-cost benefits is already in the UP 2026 run rate; 72% of the claimed $4.03 billion in revenue growth has been achieved by UP; and approximately 40% of the claimed net traffic growth has already materialized by UP alone. Sep. 4, 2026 Am. App. Vol. 1 p. 516, Janke VS Table 4; Apr. 30, 2026 Am. App. Vol. 2, p. 405 Hunt VS Ex. 2–4; Am. App. Vol. 4, p. 195 (Ex. 6); Ex. 7, Union Pacific, *Union Pacific Reports Third Quarter 2026 Results* (Oct. 22, 2026). NS itself warned the Board a quarter-century ago that merger impact analyses are "predicated on traffic data for a prior, 'base' year[,]" while implementation occurs later, "when the volume, mix, and routing of freight traffic may be decidedly different." *Major Rail Consol. Procs.*, 5 S.T.B. at 654–85 (summarizing NS comments). That is precisely the problem here, and UP/NS seek to take advantage of it in order to overstate the actual effects of their transaction.

C. How the UP/NS Merger Came to Be.

UP/NS's "fractured industry" narrative did not exist before the proposed transaction. In September 2024, at the Board's hearing on growth in the freight rail industry, UP's Executive Vice President of Marketing and Sales told the Board: "[L]et me make it clear – Union Pacific has been growing." Kenny Rocker, Written Testimony of Union Pacific Railroad, EP 775, Doc. No. 308734 at 2 (STB filed Sep. 19, 2024). NS likewise reported that it "led the industry in volume growth in the second quarter of 2024," Alan Shaw, Written Testimony of Norfolk Southern Railway

Company, EP 775, Doc. No. 308606 at 20 (STB filed Aug. 16, 2024), and its Chief Commercial Officer testified that NS's network "is perfectly situated to accelerate growth," Transcript from Hearing on Growth in the Freight Rail Industry, EP 775, Doc. No. 308887 at 535:11–536:19 (STB filed Sep. 17, 2024). Neither carrier suggested that a merger was necessary to sustain that growth. Ten months later, on July 29, 2025, UP and NS announced their agreement, and the same industry was suddenly "fractured."

What changed was not the industry; it was the perceived opportunity. A merger of this magnitude would ordinarily be driven by customer demand, public policy, or financial distress. Farmer VS ¶ 35. None of those drivers are present here. Customers were not clamoring for this merger; railroads were already winning their freight through the interline partnerships described above. *Id.* ¶ 35; *see also id.* § II; Williams VS § II. No policymaker was pushing for further consolidation. Farmer VS ¶ 35. And neither UP nor NS is in financial peril; both have just reported record results. *See supra* Background § A; Farmer VS ¶¶ 35, 63.

With no problem to solve, what remains is the financial prize itself. The price for the merger confirms it. The transaction is valued at $85 billion, and UP agreed to pay a 25% premium—$320 per NS share, above the $174 to $300 range of Wall Street analysts' price targets at the time. *See* Ex. 26, Union Pacific, *Union Pacific and Norfolk Southern to Create America's First Transcontinental Railroad* (July 29, 2025); Farmer VS ¶¶ 35, 64. A buyer pays that kind of premium for the only thing that cooperation cannot deliver: the elimination of an independent competitor and

the pricing power that comes with it. *See* Farmer VS ¶¶ 35, 64. This is a Wall-Street-driven merger, plain and simple.

Upheaval at NS provided a ripe opportunity. In the years before the transaction, NS was dealing with network service issues, the East Palestine derailment, a proxy fight spurred by an activist investor's campaign to take over the board of directors, and repeated changes in leadership. The NS board fired CEO Alan Shaw after an internal investigation into an inappropriate workplace relationship and appointed Mark George in his place. NS also brought in a new CFO, COO, CHRO, CLO, and CIDO. *See* Ex. 27, Norfolk Southern, *Norfolk Southern board of directors appoints Mark R. George President and Chief Executive Officer through unanimous vote of independent directors* (Sep. 11, 2024); Ex. 28, Norfolk Southern 2024 Annual Report at 2; Ex. 29, Sep. 17, 2026 Dep. of Mark George ("George Tr.") 47:15–48:8. NS's board changed too; seven new directors joined in 2024. Ex. 29, George Tr. 50:3–6. This was nothing short of a transformative year for NS, which leadership ultimately leveraged into a buyout. *Id.* at 50:11–13.

Outside UP and NS's boardrooms, the merger faces strong opposition. *See* Farmer VS § II; Williams VS § II. Shipper associations that have opposed the merger or expressed concern represent nearly 60% of all rail cargo. Williams VS ¶ 27. Unions representing more than 70% of the combined railroad's unionized workforce oppose it. Farmer VS ¶ 40. Seven state attorneys general have warned that, rather than benefits, "rail mega-mergers deliver exactly the opposite to rural America: fewer routing options, higher captive freight costs, and catastrophic supply chain

disruptions." Letter AG A. Knudsen to Board (STB entered Aug. 11, 2026). One hundred and eighty-four members of Congress have issued statements of concern or opposition, compared to seven in support—five of them from UP's home state of Nebraska. By contrast, the shippers that signed UP/NS's more than 500 letters of support account for less than approximately 8% of U.S. freight tons. Baranowski/Zebrowski VS § 3.1. The opposition is also broader than the public record shows. At BNSF's 2025 Industrial Supply Chain Summit, {{ [redacted] }} of customers, shortlines, and transloaders said they were hesitant to voice opposition to the merger. Williams VS ¶ 25. UP's behavior toward merger skeptics explains why. UP's CEO told shippers he would raise their rates if they opposed the merger. SWARS Video at 52:23–52:41. His comments drew wide condemnation but had the desired effect: they have discouraged shippers from speaking up and participating in a process designed to gather and weigh public input. *See* Farmer VS ¶ 73; Williams VS ¶¶ 25–27.

D. What Has Happened Since UP/NS Decided to Merge.

UP/NS tell the Board they have presented a "seamless" case for a seamless railroad. The procedural history tells a different story. UP/NS have never presented a complete case, and the Board could deny the application on that basis alone. At each stage, UP/NS have failed to meet their filing obligations, including by filing insufficient materials, withholding critical information, and amending their filings only when the Board or other parties forced them to do so. As one Board member put it: "there has been a lack of transparency and depth in the application." Decision No. 37 at 5 (Kloster, Board Member, concurring). That conduct is relevant to more

than procedure. It previews how a merged UP/NS would treat its regulator, its rivals, and its customers.

UP/NS filed their original Application on December 19, 2025. UP-13/NS-11; *see also* Decision No. 14 at 1 (STB served Apr. 20, 2026). Less than a month later, the Board rejected that Application as incomplete. Decision No. 9 at 1–2. On April 30, 2026, UP/NS filed their Amended Application. The Board accepted it as complete, but only barely. It found that the Amended Application did "not contain the level of detail on certain issues that the Board would have preferred, particularly given the benefit of Board decisions and stakeholder comments after the original Application . . . ." Decision No. 21 at 12. It found the Amended Application "unclear or underdeveloped" in several respects and concluded that it "lacks clarity and detail and does not yet afford parties a meaningful opportunity to comment on the merits." *Id.* at 17–18. Accordingly, the Board did not set a procedural schedule.

Instead, the Board held the proceeding in abeyance and ordered UP/NS to supplement the record on: competitive enhancements; shipper access; public benefits; the service assurance plan; TRRA, KCT, and TTX; market-share projections; and downstream effects. *Id.* at 17–33. The Board explained that it "will not launch a procedural schedule that in effect places undue burden on the commenting parties to ascertain and evaluate important information about the [t]ransaction." *Id.* at 18. It also reminded UP/NS that this is the first merger reviewed under the Major Merger Rules. Those rules were "forged following real-world consequences" of past mergers,

and those consequences "cannot be ignored, assumed away, or overlooked based on vague intentions or promises." *Id.*

Yet even the supplements left fundamental questions open. After reviewing UP/NS's supplements, the Board let the case move forward, but only so the parties could keep building the record. It stressed that its decision "reflect[ed] no view on the merits . . . ." Decision No. 30 at 4. BNSF, CSXT, and a coalition of shipper associations then moved for summary denial. The Board allowed the case to proceed but emphasized that its decision was not "an endorsement of [UP/NS] arguments, analyses, or positions." Decision No. 37 at 4. One Board member wrote separately that the movants had "raised significant, compelling arguments" that UP/NS "will need to address in detail." *Id.* at 5 (Kloster, Board Member, concurring). He observed that although UP/NS "submitted thousands of pages of documents," they did "not offer a very robust plan for how they will address competitive concerns or mitigate potential harms." *Id.*

UP/NS's revisions have not stopped. Within three weeks of filing their Amended Application, UP/NS uploaded 169 new or replacement workpapers. Of those, 135 came ***after*** the deadline for completeness comments. BNSF-29 at 1 (STB filed May 20, 2026). The Board found the workpaper problems "concerning in their frequency and magnitude . . . ." Decision No. 21 at 12. It warned that the way UP/NS had handled the process "raised legitimate concerns that parties and the Board may not have a reliable and static set of workpapers to use in assessing and responding" to the proposed merger. *Id.* at 33. It then ordered a new, complete, certified set of

workpapers. *Id.* Yet three months later, the Board had to order UP/NS ***again*** to refile workpapers, this time because UP/NS had filtered them before filing. Decision No. 30 at 4–5. UP/NS also revised their traffic projections for the Board's environmental review in July 2026, then revised them ***again*** in September, forcing the Board and participants to switch to the newer set. Decision No. 37 at 2–3 n.4.

The revisions continued through discovery. Over Labor Day weekend, UP/NS filed 2,446 new or replacement files totaling 272 GB, and four of their witnesses changed their verified statements ***after*** being deposed. BNSF-54/CPKS-48/CSX-27 at 1 (STB entered Sep. 14, 2026). UP/NS's diversion expert testified in early October 2026 that he did not intend to submit additional errata. Weeks later, UP/NS submitted yet another set of changed workpapers. *See infra* Part III.A.2. In total, UP/NS have submitted a staggeringly large number of errata, corrections, updates, and amendments since the Board accepted the Amended Application.

This strategy is deliberate. Asked about conditions, UP's CEO compared this proceeding to a poker game: "If you're playing poker, you don't put everything down before you see the last card or the third card coming out." Ex. 4, UP 2026 Q3 Earnings Call Tr. at 28 (Oct. 22, 2026). He has also declared himself "99.999[%] sure that [the merger is] going to be approved." *Id.* at 13. UP/NS even asked the Board to authorize private, off-record communications with Board members about their case. UP-114/NS-116 (STB entered Oct. 6, 2026). The Board denied that request. Decision No. 45 at 1, 8; *see also* BNSF-64 at 3–4 (STB entered Oct. 13, 2026).

UP/NS "should [have] come with their best case in the application[,]" and "[t]he Board should not have to sift through vague language to try and figure out where any deficiencies may be . . . ." Decision No. 37 at 5 (Kloster, Board Member, concurring). Now, the Board finally has the opportunity to consider UP/NS's case on the merits, and as the record shows, it comes nowhere close to meeting the high bar imposed by the Board's Major Merger Rules.

LEGAL STANDARD

The Surface Transportation Board is vested with exclusive jurisdiction to "approve and authorize a transaction" involving the merger of Class I railroads "when it finds the transaction is consistent with the public interest." *See* 49 U.S.C. § 11324(c). 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*, 5 S.T.B. 539 (2001), *modified* (June 25, 2001). These regulations—commonly called the "Major Merger 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." *Id.* at 546 (emphasis added).

The Major Merger Rules recognize that application of the public-interest test must account for commercial realities in the railroad industry. *See* Decision No. 21 at 18 (explaining the rules were "forged following real-world consequences emanating from a 1990s wave of major mergers"). Historically, when "the industry was facing numerous bankruptcies by major carriers[,]" the pro-merger regulatory framework of the 1980s and 1990s for the statutory public-interest standard was fit to task. *Major*

Rail Consol. Procs., 5 S.T.B. at 548. This produced 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 549. By the time the Major Merger Rules were adopted in 2001, however, the environment had fundamentally changed: "the number of overall railroad companies ha[d] been reduced dramatically, and the size of the remaining carriers ha[d] increased correspondingly." *Id.*; *see also* Press Release, *Surface Transportation Board Issues Notice of Proposed Rulemaking on New Rules for Major Railroad Mergers*, at 1 (S.T.B. Oct. 3, 2000) (describing the rules as "a major shift in basis from the pro-merger approach" because "there is no longer pressing need that the Nation's largest railroads once had to consolidate their operations").

In this new competitive landscape, the Board's preexisting, presumptively pro-merger framework was "outdated and inadequate to address future major rail merger proposals, given the limited merger-related benefits still obtainable through the elimination of overcapacity in the industry, the significant service disruptions that had been associated with recent rail mergers[,] and the prospect that future major 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." *Major Rail Consol. Procs.*, 5 S.T.B. at 545; *accord* Decision No. 21 at 18.

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." *Major Rail Consol. Procs.*, 5 S.T.B. at 546; *accord* Decision No. 21 at 18 ("[T]he current rules establish a 'heavier burden' for applicants[.]"). Under the Major Merger Rules, the Board applies the statutory public-interest test to "not favor consolidations that reduce the transportation alternatives 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); *id.* § 1180.1(c) (a Class I merger "serve[s] the public interest only when substantial and demonstrable gains in important public benefits … outweigh any anticompetitive effects, potential service disruptions, or other merger-related harms"). Because the proposed merger undeniably reduces transportation options for shippers—and therefore is disfavored—UP/NS bear the heavy burden of proving substantial, demonstrable public benefits that can only be achieved through the merger.

This approach to major railroad combinations is consistent with—and higher than—the approach taken by antitrust regulators and federal courts to transactions in other industries. Like the regulatory framework here, the antitrust laws also feature a "rigorous" requirement that pro-competitive benefits of a merger 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 the traditional antitrust context, this

well-established standard has ***never*** been met for a presumptively anticompetitive merger. *See, e.g.*, *id.* at 349–50 (describing "the rigorous standard that applies to efficiencies, which must be merger specific, verifiable, and must not arise from any anticompetitive reduction in output or service" and noting "[t]his 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"); *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 790 (9th Cir. 2015) ("Courts recognizing the [efficiencies] defense have made clear that a Clayton Act defendant must 'clearly demonstrate' that 'the proposed merger enhances rather than hinders competition because of the increased efficiencies.'") (citation omitted); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 82 (D.D.C. 2015) ("The court is not aware of any case, and Defendants have cited none, where the merging parties have successfully rebutted the government's prima facie case on the strength of the efficiencies."). The Board has expressly recognized that antitrust principles inform its public-interest analysis. *See* Decision No. 9 at 6 n.6 (citing 49 C.F.R. § 1180.1(c)(2)); *see also* 49 C.F.R. § 1180.1(c)(2).

The Major Merger Rules expressly "disfavor[] mergers that reduce competitive 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.*, 5 S.T.B. at 549–50; *accord* Decision No. 21 at 18. The consequences of future consolidations "cannot be ignored, assumed away, or overlooked based on vague intentions or promises." *See* Decision No. 21 at 18. In

other words, the Board's task is not a paper-driven, check-the-box exercise; rather, it entails default skepticism and intense scrutiny of a proposed merger's benefits, and anticipates that further reductions in transportation options for shippers would destabilize the competitive ecosystem and harm shippers and the public more broadly. Given this baseline, the Major Merger Rules start from the premise that "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." *Major Rail Consol. Procs.*, 5 S.T.B. at 550. As the Department of Justice has recognized, this "heightened" standard imposes a stricter competition standard than that imposed by traditional antitrust law. *See* Dep't of Justice Letter to Board, Doc. No. 310931 at 3 n.6 (STB entered Mar. 3, 2026) (internal documents are "even more imperative" under the "heightened 'enhanced competition' standard" than the substantial lessening of competition standard).

At the end of the day, the Board's application of the statutory public-interest standard asks whether a proposed merger "would ultimately result in a rail industry structure that continues to provide at least the existing level of competitive options for shippers, and continues to make railroads pass on most of the beneficial results of their merger efficiencies to the shipping public." *Major Rail Consol. Procs.*, 5 S.T.B. at 549–50.

Merger Harms. A merger of multiple Class I railroads is not favored where it "reduce[s] the transportation alternatives available to shippers." *See* 49 C.F.R. § 1180.1(a). "Protection against a reduction in the number of railroads serving a

shipper facility is not new." *See* Decision No. 21 at 22. But the Major Merger Rules recognize that a merger of Class I railroads is likely to produce competitive and other harms by reducing transportation alternatives beyond the baseline reduction of railroads serving any particular facility. In the Board's considered judgment, "additional consolidation in the industry is . . . likely to result in a number of anticompetitive effects, such as loss of geographic competition, that are increasingly difficult to remedy directly or proportionately." 49 C.F.R. § 1180.1(c). "Consolidation can also threaten essential services and the reliability of the rail network"—a conclusion reinforced by real-world experience with prior mergers, including the "Mess in the West." *See id.* The Board must consider these and other merger-related harms in determining whether a proposed transaction furthers the public interest.

Competitive Harms. In evaluating harm to competition, the Board must consider "whether the proposed transaction would have an adverse effect on competition ***among rail carriers*** in the affected region or in the national rail system." *See* 49 U.S.C. § 11324(b)(5) (emphasis added). "Any railroad combination entails a risk that the merged carrier would acquire and exploit increased market power." 49 C.F.R. § 1180.1(c)(2)(i). Specifically, a Class I merger "can reduce competition both directly and indirectly in particular markets, including product markets and geographic markets." *Id.* § 1180.1(c)(2). Direct "[i]ntramodal competition can be reduced when two carriers serving the same origins or destinations merge[,]" thereby reducing competitive options for shippers. *See id.* § 1180.1(c)(2)(i). The Board must consider reductions to direct intramodal competition

in weighing the competitive harms from a proposed merger, including harms to 2-to-1 and 3-to-2 shippers. *See id.*; *see also* Decision No. 21 at 22–23.

The Board also must consider harms to "indirect competition" from mergers. Indirect competition also may be harmed by a merger, including a purported end-to-end merger. As an initial matter, the Board has expressed skepticism that any combinations of Class I railroads are truly end-to-end, noting, "[a] quick glance at a rail map confirms that the eastern and western railroads do not simply meet end-to-end at Chicago and the Mississippi River crossings; there is a fair degree of overlap." *See Major Rail Consol. Procs.*, 5 S.T.B. at 556.

But even "where carriers truly are 'end-to-end[]'" "significant losses in geographic competition could occur … because there are many commodities" "that have a limited number of sources." *Id.*; *see also* 49 C.F.R. § 1180.1(c)(2)(i) ("Competition in product and geographic markets can also be eliminated or reduced by mergers, including end-to-end mergers."). "[S]hippers who are served by a single rail carrier may benefit from having another carrier nearby." *Major Rail Consol. Procs.*, 5 S.T.B. at 554. For example, they may benefit "through the possibility of constructing (or proposing to construct) a connection to a second carrier, or by transloading freight by truck to a second rail carrier." *Id.* Shippers also "may benefit from the opportunity to negotiate a long-term contract before choosing to locate a new plant along either of two carriers' lines or to adjust production levels at plants already located along those lines." *Id.* at 556.

These competitive harms are "difficult to remedy" "directly and proportionately." *Id.* at 554; *see also* 49 C.F.R. § 1180.1(c) (same). As the Board has explained, although it has attempted to address such competitive concerns in the past, the "process would become increasingly difficult were the number of independent major railroads to decrease further in a final round of mergers, and were the nearest alternative rail option to be located farther away." *Major Rail Consol. Procs.*, 5 S.T.B. at 554. Specifically, the "traditional trackage rights remedy" for losses of competition faces serious obstacles: "unlike prior consolidations, shippers or product origination points losing two-railroad competition might not be easily reached and served by other carriers[,]" eliminating the availability of "an effective replacement service to shippers who would be harmed by a merger." *Id.* at 557. The fact that future mergers likely would produce difficult-to-remedy competitive harms for shippers necessarily frames the Board's evaluation of competition in the rail industry, influencing its evaluation of whether a proposed merger "enhances" competition, as discussed below.

Transitional Service Harms. The Board's application of the public-interest test also "carefully scrutinize[s]" "the likelihood of transitional service problems." 49 C.F.R. § 1180.1(c)(2)(iii); *Major Rail Consol. Procs.*, 5 S.T.B. at 561. "Experience shows that significant service problems can arise during the transitional period when merging firms integrate their operations, even after applicants take extraordinary steps to avoid those disruptions." 49 C.F.R. § 1180.1(c)(2)(iii); *see also Major Rail Consol. Procs.*, 5 S.T.B. at 558, 562 (explaining that prior transactions "resulted in

severe service problems that plagued applicants and their customers for a full year or more" "despite the railroads' very strong financial incentives to avoid post-merger service disruptions, despite substantial planning by applicants in conjunction with" the STB and FRA, "and despite carefully phased and delayed implementation").

The Board's default position thus "anticipate[s] that, because of their inherent complexity and scale, future mergers involving the remaining major carriers entail a risk of significant service disruptions that could be nationwide in scope and would not be easily addressed given that even fewer major carriers than today would be available to assist in resolving the disruptions." *Major Rail Consol. Procs.*, 5 S.T.B. at 558. This, too, influences the Board's evaluation of whether a proposed merger "enhance[s]" competition. *See id.* at 547.

Merger Benefits. The "efficiencies and service improvements likely to be realized from further downsizing of rail route systems are limited." *Id.* at 551. For this reason—and because of the anticipated competitive and service problems associated with a Class I merger—"[c]laims of improved carrier efficiency will be scrutinized carefully," *id.* at 552, with merging parties bearing the burden of showing "substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved[,]" *see* 49 C.F.R. § 1180.1(a). This is a significant burden that UP/NS must meet with actual proof, not just hollow promises.

Substantial: The proposed benefits of a transaction must be "substantial." 49 C.F.R. § 1180.1(a), (c). Given the current structure of the railroad industry and the Board's experience with prior mergers, the Board recognizes that "merger-related

benefits formerly obtainable through the elimination of overcapacity in the industry are unlikely to result from future mergers" and will at best be "limited." *Major Rail Consol. Procs.*, 5 S.T.B. at 555. Thus, to be "substantial," a proposed merger's benefits must be of a magnitude that clearly outweighs any merger-related harms—that is to say, extraordinary proof. *See, e.g.*, *St. Alphonsus*, 778 F.3d at 790 ("[P]roof of 'extraordinary efficiencies' is required to offset the anticompetitive concerns in highly concentrated markets.").

Demonstrable: In addition to being "substantial," the proposed benefits of a transaction must be "demonstrable." 49 C.F.R. § 1180.1(a), (c). This means that proposed benefits should "not be credited if they are vague, speculative, or otherwise cannot be verified by reasonable means"—a core tenet of traditional antitrust law. *United States v. Anthem*, 855 F.3d 345, 359 (D.C. Cir. 2017) (quoting Dep't of Just. & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (Aug. 19, 2010)). Merging parties must show that "it is possible to verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), [and] how each would enhance the merged firm's ability and incentive to compete." *See United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 89 (D.D.C. 2011) (quotations & citation omitted). Crucially, benefit claims must be evaluated "in light of [] historical acquisitions," meaning similar benefits promised but unachieved in other acquisitions weigh decidedly against the notion that a benefit is "demonstrable" or "verifiable." *See id.* at 91. In short, a merger will not be approved based on "vague intentions or promises, particularly given the possible implications

of subsequent mergers for the long-term future of the national rail network." *See* Decision No. 21 at 18.

Merger-Dependency. The "substantial" and "demonstrable" benefits of a transaction must also be "merger-dependent"—that is, something that could not be achieved without the proposed merger. 49 C.F.R. § 1180.1(c) ("[W]hen evaluating the public interest, the Board will consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation."); *see also Major Rail Consol. Procs.*, 5 S.T.B. at 609. This stringent requirement follows from the Board's view that "other private sector initiatives, such as joint marketing agreements and interline partnerships, can produce many of the efficiencies of a merger while risking less potential harm to the public." 49 C.F.R. § 1180.1(c). Even recognizing that mergers may produce some benefits, or result in "long-term investments that would not otherwise be made," that "does not mean that all of the claimed benefits require a merger for their accomplishment, nor does it address shipper concerns that a carrier might seek to gain enhanced market power through a merger, while claiming that this harm would be offset by efficiencies that could actually be achieved by means short of merger." *Major Rail Consol. Procs.*, 5 S.T.B. at 559.

The ultimate question is "whether the particular merger benefits upon which" the applicants "are relying could be achieved by means short of merger." *Id.* If they are, the benefit is not merger-specific and cannot factor into the Board's balancing of the public-interest factors. As with other elements of the Major Merger Rules,

merger-specificity is a key feature of analyzing benefits under a traditional antitrust rubric. *See, e.g.*, *id.*; *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 62 (D.D.C. 1998) ("In light of the anti-competitive concerns that mergers raise, efficiencies, no matter how great, should not be considered if they could also be accomplished without a merger."); *Penn State Hershey*, 838 F.3d at 351 ("[T]he District Court's finding that both Pinnacle and Hershey are capable of independently engaging in risk-based contracting contravenes its conclusion that this is a cognizable efficiency because the benefit is not merger specific."); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 722 (D.C. Cir. 2001) ("[N]either the district court nor the appellees addressed the question whether Heinz could obtain the benefit of better recipes by investing more money in product development and promotion—say, by an amount less than the amount Heinz would spend to acquire Beech-Nut.").

Enhanced Competition: Chief among the public benefits required by the Major Merger Rules is "enhanced competition." Because future transactions would involve "merger-related harms that cannot be directly or effectively mitigated[,]" merging parties ***must*** "present proposals that enhance, not merely preserve, competition, in order to secure [] approval." *Major Rail Consol. Procs.*, 5 S.T.B. at 547.

Although the Board did not prescribe "in advance" "exactly what type and what quantity of competitive enhancements would be appropriate," the Board's baseline requirement is that at least "***some*** new or enhanced ***rail-to-rail competition*** or other competitive benefits is likely to be necessary to resolve substantial difficulties so as to tip the balance in favor of the public interest." *Id.* at 550 (emphasis added);

see also The Surface Transportation Board's New Merger Rules Before the Subcomm. on Surface Transportation and Merchant Marine, S. Hrg. 107-1031, 21 (2001) (Hon. Linda Morgan) ("My view of these rules is that if anybody brings an application to us and they want it approved, they had better have some sort of enhanced intramodal competition. And that is a message that I think is very clear throughout the rules.").

"[P]rovisions for competitive enhancement will be given ***substantial*** weight as merger benefits and are likely to be extremely important to [the Board] in determining whether to approve a particular application." *Major Rail Consol. Procs.*, 5 S.T.B. at 554 (emphasis added); *see also* Decision No. 21 at 19 ("The Board's major merger rules reflect a policy shift that places greater emphasis in the public interest assessment on enhancing competition while ensuring a stable and balanced rail transportation system.") (quotations omitted); Press Release, *Surface Transportation Board Issues Notice of Proposed Rulemaking on New Rules for Major Railroad Mergers*, at 1 (S.T.B. Oct. 3, 2000) ("The Board would give substantial weight to this enhanced competition in making its public interest determination.").

Emphasizing enhancements in rail-to-rail competition makes sense: it comports with the statutory text focusing 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* 49 C.F.R. § 1180.1(a); and it recognizes 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.*, 5 S.T.B. at 552. In

fact, all of the Board's examples of "competitive enhancements"—joint access areas, reciprocal switching arrangements, trackage rights, and the elimination of paper and steel barriers on interchanges—presume some form of increased access to competition for rail shippers. *Id.* at 550, 557.

Public vs. Private Benefits: In analyzing the "substantial," "demonstrable," and "merger-specific" benefits of a transaction under the Major Merger Rules, it is critical to distinguish between truly public benefits and private benefits. UP, "like any merger suitor, has a legitimate interest in making a strong offer to [NS's] shareholders. But that 'interest' is for the private benefit of the suitor, and standing alone, carries no public benefit." *Union Pac. Corp.—Control & Merger—Canadian Nat'l Ry. Co. (Decision No. 5)*, FD 36514, slip op. at 22 (STB served Aug. 31, 2021). In this way, the public-interest test distinguishes between "a balance sheet of hoped-for private earnings," which "are not public benefits," and *bona fide* benefits that flow to the shipping public. *See Canadian Pac. Ry.—Control & Merger—Kan. City S. (Decision No. 35)*, FD 36500, slip op. at 24, 27 (STB served Mar. 15, 2023).

"[B]enefits to the combining carriers that are the result of increased market power, such as the ability to increase overall rates at the same or reduced service levels, are exclusively private benefits that detract from any public benefits associated with a control transaction." *See id.* at 19 (citing *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP-SP)*, 1 S.T.B. 233, 364 (1996)); *see also Union Pac. Corp.—Control & Merger—Canadian Nat'l Ry. Co. (Decision No. 37),* FD 33556, at 18 n.62 (STB served May 25, 1999) ("Applicants estimate that the $248.1 million in total

annual CN/IC gross revenues from traffic diversions will be offset by $157.8 million in total annual CN/IC incremental costs attributable to traffic diversions. Applicants concede that the difference (i.e., CN/IC's total annual net revenue gain of $90.3 million) must be viewed as a private benefit (not a public benefit) of the CN/IC control transaction.").

Downstream Effects. Finally, the Board's balancing of harms and potential benefits of a Class I merger incorporates potential downstream effects of the transaction. "Because there are so few remaining Class I carriers and the railroad industry constitutes a network of competing and complementary components," the Board "cannot evaluate the merits of a major transaction in isolation" and must assess "the cumulative impacts and crossover effects likely to occur as rival carriers react to the proposed combination." 49 C.F.R. § 1180.1(i); *Major Rail Consol. Procs.*, 5 S.T.B. at 581. Specifically, the analysis "look[s] down the road and determine[s] whether approving not just the immediate proposal … but others like it, would ultimately result in a rail industry structure that continues to provide at least the existing level of competitive options for shippers, and continues to make railroads pass on most of the beneficial results of their merger efficiencies to the shipping public." *Major Rail Consol. Procs.*, 5 S.T.B. at 549–50.

This downstream-effects analysis must be tailored to the specific merger under review. When the Major Merger Rules were adopted, the Board's principal concern was that further consolidation among Class I railroads would be "the first step in an end-game situation in which only two or three competing transcontinental carriers

would remain in North America." *Id.* at 582. But there is more than one path to a permanently degraded competitive environment. For this reason, the Board requires merging parties to "file their preliminary evidence about the evolving structure of the industry that would likely result from their proposal[,]" "address the merits of such a structure[,]" and "provide their views on how to deal with potential problems that structure could cause to service, efficiency, and competition[.]" *Id.* at *31.

* * *

The "significant change[s]" to the Board's framework did not create a regulatory glidepath for transactions that appeal to Wall Street. *See Major Rail Consol. Procs.*, 5 S.T.B. at 546. A Class I merger review is not an exercise in submitting a paper application and fielding questions from the Board and other interested stakeholders as they arise as part of some box-check exercise or even a give-and-take negotiation; rather, the Board's rules are a substantive application of the statutory public-interest test that merging parties must meet based on the application and evidence they submitted. A merger of Class I railroads is not available just for the asking, and the approval of such a merger is not a "99.999%" certainty, as UP's CEO seems to think. *See* Ex. 4, Union Pacific Q3 Earnings Call Tr. at 13 (Oct. 22, 2026) ("I'm 99.999[%] sure that it's going to be approved."). To the contrary, UP/NS's proposed merger will be scrutinized under the strictest merger approval rules ever adopted by the Board, all of which faithfully apply the statutory public-interest criteria.

In sum, UP/NS's merger application should be governed by the following set of overarching legal principles:

- The UP/NS merger is presumptively disfavored because it reduces transportation options for shippers, causing them competitive harm. *See* 49 C.F.R. § 1180.1(a).
- UP/NS bear the burden of proving substantial, demonstrable public benefits that can ***only*** be achieved through the proposed merger. *See id*.
- UP/NS's benefits claims—and promises of a smooth transition—are met with "a more skeptical, 'show me' attitude." *See* Decision No. 21 at 18.
- The UP/NS merger must benefit the public—private benefits, like balance sheet earnings, do not count. *See Decision No. 35*, FD 36500, slip op. at 19.
- UP/NS must enhance rail-to-rail competition as part of the merger by expanding shipper access. *See Major Rail Consol. Procs.*, 5 S.T.B. at 547, 550.
- The UP/NS merger must be evaluated in light of current competitive conditions—namely, the industry's balance and the combination of financially successful Class I competitors. *See* Decision No. 21 at 18.
- The UP/NS merger must not cause a downstream destabilization of the rail industry and competitive ecosystem. *See* 49 C.F.R. § 1180.1(i).
- The UP/NS merger "serve[s] the public interest only when substantial and demonstrable gains in important public benefits … outweigh any anticompetitive effects, potential service disruptions, or other merger-related harms." *See* 49 C.F.R. § 1180.1(c).

Danger to the rail industry and the U.S. economy tips the scales heavily against this merger. History is a teacher here: prior mergers have produced worse-than-predicted harms and less-than-estimated benefits, failing to achieve lofty promises made to the Board. *See* Decision No. 21 at 25 (noting CPKC's failure to achieve projected truck diversions). And the record robustly demonstrates that the UP/NS merger would not benefit competition. The merger would combine financially strong competitors, whose chief interest is returning value to shareholders, not customers. The merger would take UP's commercial model—keeping shippers

captive, maximizing price, and reducing service—and nationalize it across a coast-to-coast network. That is not in the public interest. Denial of the proposed transaction is both the best and lowest risk alternative. The status quo will preserve the competitive and balanced rail system that has well served the needs of railroads, shippers, and everyday Americans.

ARGUMENT

I. THE UP/NS MERGER WOULD IRREPARABLY HARM COMPETITION.

"Any railroad combination entails a risk that the merged carrier would acquire and exploit increased market power." 49 C.F.R. § 1180.1(c)(2)(i). For that reason, "the Board does not favor consolidations that reduce the transportation alternatives available to shippers." *Id.* § 1180.1(a). Contrary to UP/NS's suggestion, "[c]ompetition in product and geographic markets can also be eliminated or reduced by mergers, including end-to-end mergers." *Id.* § 1180.1(c)(2)(i). Although the "statutory public interest analysis is even broader than inquiries under the antitrust laws," the Board "***must*** consider the policies embodied in such laws when analyzing whether a merger has the potential to reduce competition either directly or indirectly." Decision No. 9 at 6 n.6 (STB served Jan. 16, 2026) (emphasis added); *see also, e.g.*, *Decision No. 35*, FD 36500, slip op. at 19 (applying antitrust principles in evaluating the competitive effects of a rail combination).

Applying basic principles of competition, the record is clear that the merger would irreparably harm competition in the railroad industry. If approved, the merger will create an industry behemoth that controls 50% of domestic rail units shipped by

Class I railroads. A combined UP/NS will export UP's well-documented "maximize price" model across the United States, raising rates by {{{ [redacted] }}} per year on legacy NS traffic. The consequences of reduced competition are equally dire: over 100 stations, accounting for {{ [redacted] }} in revenue would directly lose a rail option because of the merger, to say nothing of the independent route options shippers would lose, which are associated with {{{ [redacted] }}} in rail revenues. UP/NS also would have the incentive and ability to foreclose rivals like BNSF and CSX from more than {{{ [redacted] }}} of freight traffic, where UP/NS would otherwise consider cooperating today. All told, the UP/NS merger will inflict ***hundreds of millions to billions*** in harm on the freight economy ***annually*** for virtually no benefit. The merger is not in the public interest and must be rejected.

A. UP/NS Would Have a Dominant Share of U.S. Rail Freight.

A combined UP/NS would be an industry goliath, controlling roughly half of all U.S. Class I rail freight. Accounting for UP/NS's growth claims, leading competitive analysts estimate that 50% of domestic rail units shipped by Class Is would originate on UP/NS post-merger. Baranowski/Zebrowski VS § 9.

In response, UP/NS claim *pro forma* market shares—*i.e.*, shares that do not account for post-acquisition growth—should be the benchmark for assessing the competitive effects of the transaction because any increased traffic they would generate should be viewed as procompetitive. *See* Apr. 30, 2026 Am. App., Vol. 1 p. 55; Sep. 4, 2026 Am. App., Vol. 2 pp. 46–47, Bailey VS ¶¶ 78–82. But that ignores ***how*** UP/NS will purportedly achieve that growth—through unsubstantiated truck conversions and by trying to poach traffic from its competitors by destroying rail

competition. As explained below, UP/NS's growth estimates based on truck conversions are dramatically overstated, leaving conversion of rail traffic from other railroads as the only significant source of growth, including through vertical foreclosure and bundling, both clear competitive harms.

"Growth" estimates that are unsubstantiated or associated with competitive harm certainly do not reflect procompetitive deal benefits. In any event, whether UP/NS's shares are calculated using historical figures or forecasted growth, the result is the same: a combined UP/NS would control well over the 30% market share threshold that establishes a presumption of competitive harm. Indeed, even UP/NS's own, lower estimates place the combined share far above presumptively anticompetitive levels of market concentration. Based on pre-merger 2024 figures, UP/NS would account for 44% of carloads, 40% of tons, 44% of mileage operated, and 45% of gross freight revenue among Class I railroads. *See* Am. App., Vol. 2 Bailey VS, Ex. 3 at 18. UP itself admits that its combined share with NS would be "43% of U.S. carloadings" based on 2025 data. Ex. 30, @UnionPacific X (Sep. 28, 2026).

UP/NS's combined market share is presumptively anticompetitive under traditional antitrust principles. Under settled antitrust law, a merger that gives a combined firm 30% or more concentration in a market is presumptively unlawful. *See United States v. Phila. Nat'l Bank*, 374 U.S. 321, 364 (1963) ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat."); *see also* Ex. 31, U.S. Dep't of Justice & FTC, *The Use of Structural Presumptions in Antitrust – Note by the*

United States, OECD Doc. DAF/COMP/WP3/WD(2024) 14, ¶ 34 (2024) (describing the structural presumption as a sound and administrable method for identifying harmful mergers). That is because as concentration rises, remaining businesses face less competitive discipline and acquire greater ability and incentive to raise prices above competitive levels, reduce output, and allow service quality to deteriorate. *See Heinz*, 246 F.3d at 711, 715, 724–25.

Federal courts thus have held repeatedly that post-merger shares of 30% or more presumptively constitute undue market power, with the strength of the presumption increasing as the combined share climbs into the 40s and 50s. *See, e.g.*, *Heinz*, 246 F.3d at 711, 715–17 (32.8%); *Phila. Nat'l Bank*, 374 U.S. at 364 (36%); *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 568–70 (6th Cir. 2014) (acquirer with 46.8% pre-merger share); *United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1, 36–37 (D.D.C. 2022) (49%); *Sysco Corp.*, 113 F. Supp. 3d at 55–56 (combined share approaching 60%); *Penn State Hershey*, 838 F.3d at 346–47 (76%). Although the Board's statutory public-interest standard embraces a broader set of considerations, the Board still "must consider the policies embodied in" traditional antitrust law, including conceptions about market power and reduced competition. *See* Decision No. 9 at 6 n.6; *Decision No. 35*, FD 36500, slip op. at 19; *see also Union Pac. Corp.—Control—Missouri Pac. Corp.*, 366 I.C.C. 462, 1982 WL 190779, at *37 & n.39, *47–*48 & n.61 (Sep. 24, 1982) (citing *Philadelphia National Bank* for the proposition that "[m]ergers producing firms with a market share of 30 percent or less have been held to violate section 7").

It is no answer to say that the rail industry is already highly concentrated. "[I]f concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *Phila. Nat'l Bank*, 374 U.S. at 365 n.42. Federal courts apply the presumption of illegality in antitrust cases with equal—and often greater—force to mergers that further consolidate already-concentrated markets. *See, e.g.*, *Anthem*, 855 F.3d at 349–50, 363–65 ("Anthem failed to show the kind of 'extraordinary efficiencies' that would be needed to constrain likely price increases in this highly concentrated market, and to mitigate the threatened loss of innovation"); *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989) ("[A]n acquisition which reduces the number of significant sellers in a market already highly concentrated and prone to collusion by reason of its history and circumstances is unlawful in the absence of special circumstances."); *see also* Ex. 32, U.S. Dep't of Justice & FTC, Merger Guidelines § 2.1 (2023) ("Merger Guidelines") ("Guideline 1: Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market"). Courts have repeatedly enjoined mergers that would further concentrate already highly concentrated markets. *See, e.g.*, *ProMedica*, 749 F.3d at 568–71 (affirming injunction of merger that would "further concentrate markets that are already highly concentrated"); *Penn State Hershey*, 838 F.3d at 346–47 (affirming injunction of merger that increased well-established concentration score); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1081–82 (D.D.C. 1997) (enjoining merger of two of three office-superstore chains).

This antitrust precedent stems from sound economic principles that apply to the rail industry as well. In a market with only a handful of competitors, each remaining business is a larger source of competitive discipline on the others, so eliminating any one of them removes a proportionally greater constraint on price and service. *See, e.g.*, *In re Flat Glass Antitrust Litig. (MDL 1200)*, 385 F.3d 350, 359 (3d Cir. 2004) (in a "highly concentrated market," a single firm's "price and output decisions will have a noticeable impact on the market and on its rivals" (quoting Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1429, at 206 (2d ed. 2000)); *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp.*, 579 F.2d 20, 32 (3d Cir. 1978) (because "independent producers in an oligopolistic market serve[] to limit the market power of the dominant firms, the departure of an independent producer . . . adversely affects competition").

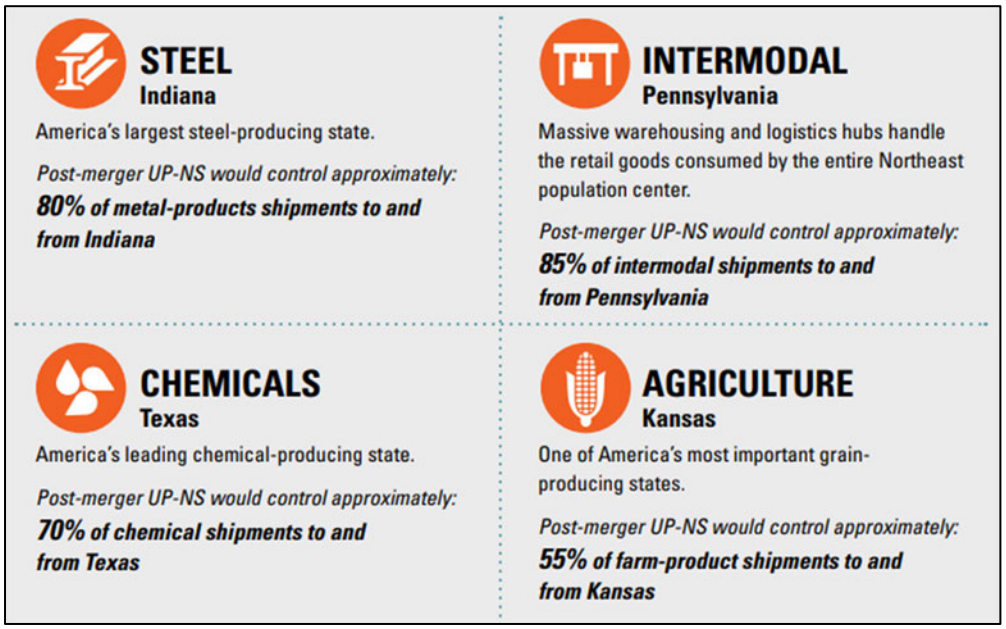
Concentrated markets also have less capacity to self-correct: where entry is costly and slow (as it is to build a rail network) there is no realistic prospect that new competitors will restore the competition a merger eliminates. These principles are reflected in the structural thresholds of the federal antitrust agencies, the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"), which treat a merger in a highly concentrated market (an HHI[1] above 1,800) as

[1] DOJ and the FTC "generally measure concentration levels using the Herfindahl-Hirschman Index ('HHI')." *See* Merger Guidelines § 2.1. HHI is calculated by adding the squares of the market shares of each firm competing in the relevant market. *Id.* For example, a market with four firms holding shares of 30%, 30%, 20%, and 20% has an HHI of 2,600 ($30^2 + 30^2 + 20^2 + 20^2$). *Id.* HHI ranges from near-zero in a market made up of many small firms "and grows larger as the market becomes more concentrated, reaching 10,000 in a market with a single firm." *Id.*

presumptively unlawful if it increases the HHI by more than 100 points—a far smaller change than would trigger concern in a less concentrated market. Merger Guidelines § 2.1; Nov. 18, 2026 Verified Statement of Dennis W. Carlton, Ph.D. ("Carlton VS") ¶ 36 & n.67.

The levels of concentration this merger would produce are unprecedented. A combination of UP/NS would reduce the number of Class I freight railroads from six to five and combine two of the four major U.S. freight carriers into a single network spanning the country. That exceeds antitrust thresholds for healthy competition many times over. If anything, then, pre-existing concentration does not lower the bar for merger approval—it raises it.

UP/NS's combined market power is even higher in certain commodities, corridors, and regions that affect the prices consumers pay for food, gas, and everyday products they use in their homes:



Baranowski/Zebrowski VS § 9. As a result, many shippers would face a combined UP/NS share of 85% for intermodal shipments to and from Pennsylvania, 80% of metal-products shipments to and from Indiana, 80% of automobile shipments to and from Missouri, 70% of chemicals shipments to and from Texas, and 55% of farm-product shipments to and from Kansas. *Id.*

UP/NS's dominance would be most acute at gateways where eastern and western railroads exchange traffic. Today, UP or NS already touch {{{ [redacted] }}} of carload interchange traffic and {{{ [redacted] }}} of intermodal interchange traffic across the major gateways, including {{{ [redacted] }}} of carload and {{{ [redacted] }}} of intermodal interchange traffic moving directly between UP and NS. Baranowski/Zebrowski VS § 11. By UP/NS's own projections, UP/NS would participate in {{{ [redacted] }}} of post-merger carload gateway crossings and {{{ [redacted] }}} of intermodal gateway crossings, and every remaining independent interchange with a neutral partner would disappear—and even those figures likely understate the concentration, because UP/NS's rail-to-rail diversion analysis understates the amount of rail traffic that will divert to UP/NS. *Id.* §§ 6.2–6.4, 11.

UP/NS's combined concentration levels would far exceed the thresholds federal courts treat as presumptively anticompetitive and would leave shippers at the mercy of a single dominant railroad. These bedrock antitrust principles—and the Board's rules applying the statutory public-interest test, *see* 49 C.F.R. § 1180.1(c)(2)(i)—all lead to the same place. The proposed merger is presumptively harmful and disfavored, and UP and NS bear the heavy burden of overcoming that presumption.

B. UP Will Maximize Price on Traffic Post-Merger.

UP's playbook has long been to "maximize price." Post-merger, UP will apply this strategy to shippers using NS's network, who currently enjoy prices that are more than {{{ [redacted] }}} lower than UP's pricing, after controlling for the other factors that impact price. *See* Ex. 33, Dep. Ex. 369 to 10/15/26 Dep. of M. Israel. It speaks loudly that UP/NS have not promised to maintain (let alone reduce) rates for NS customers, notwithstanding UP/NS's claims of substantial operating efficiencies.

First, the extent of UP's market power today—and the lengths to which it will go to apply that power—are showcased in threats from UP's CEO to retaliate against shippers opposing the merger. In March 2026, UP CEO Jim Vena addressed hundreds of shippers at the annual Southwest Association of Rail Shippers ("SWARS") conference. Mr. Vena told shippers to "come and see us, talk about what you need to move ahead with us and how we put this thing forward." SWARS Video at 51:50–53:00. UP's CEO was clear about the consequence for shippers who refuse to play ball: "If [you] don't do that, ***Union Pacific'll still be there. And if I stick around, which I probably will, 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.***" *Id.* (emphasis added). Not only do such threats deter participation in these proceedings by raising concerns "that [shippers'] commercial relationships—including, as applicable, rates and service—will be negatively affected," *see* Decision No. 28 at 4 (STB served July 22, 2026); Decision No. 45 at 3, they also are strong evidence regarding UP's current market power and its willingness to use that power to extract millions of dollars in supracompetitive prices

from shippers. *See* Farmer VS ¶¶ 73–74; *see* Decision No. 45 at 3 ("Evidence of actual or threatened retaliation could also be relevant to other aspects of the public interest assessment, including market power and abuse of market power.").

Threatening customers is unheard of in competitive markets because antagonized customers will simply switch to other options. But UP clearly knows that is impractical for many of the shippers it serves, a group that will only grow if UP succeeds in acquiring NS. Farmer VS ¶¶ 70–71; Williams VS ¶¶ 65–67. Put simply, if UP will threaten retaliatory rate hikes while its merger application is pending and scrutiny is highest, there is every reason to expect it to follow through once the merger removes NS as a competitive check and UP acquires even more market power. Farmer VS ¶ 73. "The Board [should] not tolerate retaliation." *See* Decision No. 28 at 4; *see also* Ex. 34, Sep. 30, 2026 Dep. of Dan McLaughlin ("McLaughlin Tr.") 223:10–13 ("Q. Can we agree that it would be inappropriate to raise prices on shippers because they opposed the merger? A. Yes.")[2]; Ex. 35, Oct. 15, 2026 Dep. of Mark Israel ("Israel Tr.") 69:15–70:19 (UP/NS's economist testifying that he was not aware of any acquirer in any merger proceeding threatening customers with higher prices for opposing a deal, and that such conduct "sounds troubling").[3]

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[2] All objections omitted from deposition quotes unless otherwise noted.

[3] UP has suggested that its CEO's comments were a "joke." The video speaks for itself, as the Board well knows. SWARS Video at 51:50–53:00. But nothing about the tone or delivery of Mr. Vena's price-hike threat reads as a joke, and there is nothing funny about raising prices on shippers in retaliation. Indeed, customers do not think Mr. Vena was joking. As the CEO of Spearpoint Logistics noted in his merger opposition comments: "I was in the room during his speech, and I can assure the Board that his comments were not interpreted by me or others in the room as a joke. They were heard as threats intended to keep people from publicly opposing the

Second, the record unequivocally establishes that UP's core business strategy is to raise prices. UP brags to investors that "***[w]e will maximi[z]e price***," UP already charges the highest rates of any Class I railroad, and as "***the last to lower, the first to increase***" rates, UP will continue to do so. *See* Ex. 2, Sep. 19, 2024 Tr. of UP Investor Day, at 29, 34 (emphasis added). In its own words, "strong core pricing gains [are] a result of [UP's] ***deliberate focus on maximizing price***." *See* Ex. 36, Union Pacific Q4 Earnings Call Tr. at 6 (Jan. 23, 2025) (emphasis added); *see also* Ex. 37, July 29, 2026 Dep. Tr. of David Welch ("Welch Tr.") 147:11–22 (UP's General Director of Corporate Strategy confirming that {{"[redacted]

UP's internal documents confirm that UP imposes price hikes above its competition where possible. UP is fully aware that {{"[redacted] Ex. 38, UP_2512665 (emphasis added). UP internally admits that {{"[redacted] Ex. 39, UP_2512667, at -668. Indeed, to hit growth targets in 2024, UP's Executive Vice President of Marketing and Sales {{[redacted]

merger[.]" *Spearpoint Logistics Opposition,* Doc. No. 312835 (STB filed Nov. 12, 2026). Further confirming that UP's CEO's statements were a credible threat of retaliation, UP's response was not to apologize, but to double down and attempt to keep Mr. Vena's statements hidden from the public view.

[redacted]}}." Ex. 40, Dep. Ex. 316 (UP_1118754) at -758; *see* also Ex. 34, McLaughlin Tr. 208:7–11 {{("[redacted]).}} In 2025, {{[redacted]

[redacted]

}}

Ex. 106, UP_0106714, at -734 (emphasis added).

UP's own executives acknowledge that rail competition constrains its pricing. UP's mission to {{"[redacted]"}} makes clear that, where competition is absent, UP raises rates—and that competition is the crucial check on UP's ability to raise rates even higher. *Id.*; *see also, e.g.*, Ex. 40, Dep. Ex. 316 (UP_1118754) at -756 {{[redacted]}};

Ex. 37, Welch Tr. 155:6–11 {{ [redacted] }}; Ex. 42, July 30, 2026 Dep. of Michael Houston ("Houston Tr.") 88:22–90:18 {{ [redacted] }}. In other words, where competition exists, UP prices up to the point competition allows and no further. By eliminating one of UP's competitors by absorbing it, the merger thus would eliminate a major competitive constraint on UP's pricing ability that keeps rates lower where UP and NS compete today.

Third, UP's own expert analysis confirms that UP charges more than competitors. UP's lead economic expert compared UP and NS pricing, controlling for "factors that affect pricing," including "local conditions at both the origin and destination of the move." *See* Sep. 4, 2026 Am. App., Vol. 2 pp. 233–34, Israel VS ¶ 112, Figure 10 & n.51. Unsurprisingly, that analysis confirmed that UP charges more: UP's lead economist conceded that his regression shows {{ [redacted] }}, and [redacted]. Ex. 35, Israel Tr. 34:17–38:5; Ex. 33, Dep. Ex. 369. Correcting for data errors in UP/NS's analysis, UP's rates remain {{{ [redacted] }}} higher than NS's, implying potential rate uplift of as much as {{{ [redacted] }}} per year on NS shipments. Carlton VS ¶¶ 170–71 & nn.268–70.

Industry-wide data on financial performance—how much a rail company earns from shippers relative to its costs—tell the same story. Between 2019 and 2023, UP

extracted by far the most revenue from shipments priced above 180% of variable cost. Baranowski/Zebrowski VS § 14. In the Gulf Coast, for example, UP's revenue-to-variable-cost ratios also [redacted] BNSF's in all nine originating and all twelve terminating commodity categories examined, meaning UP earns a [redacted] over its costs in every category studied. *Id.* § 15.2; *see also* Railroad Revenue Adequacy – 2025 Determination, STB Docket No. EP 552-30 (Oct. 7, 2026) (UP reporting ROI of 17.09%, while BNSF, CSX, and NS reported ROIs of 10.91%, 11.40%, & 10.29%, respectively). The cost to shippers of losing competition is measurable: in the Gulf Coast, UP captive shippers paid on average {{ [redacted] }} more per ton-mile for shipments between a UP captive Gulf Coast location and a competitive eastern location than traffic with access to competing carriers. Baranowski/Zebrowski VS § 15.2.

Because the merger eliminates NS as an independent pricing alternative where UP and NS compete, shippers would lose leverage to resist UP's price increases if the merger is approved.

Fourth, notwithstanding UP's threats, shippers understand that UP's "maximize price" strategy would send NS rates soaring after the merger, which in turn would cause shippers to pass on the burden to American consumers. UP and NS's internal documents show that shippers have told both railroads they oppose the merger for exactly this reason:

- {{ [redacted] }} (Ex. 43, NS_00095982 at P191);

- {{ [redacted] }} *Id.* at P137;
- {{ [redacted] }} Ex. 44, UP_0022580 at K18;
- {{ [redacted] }} *Id.* at K563;
- {{ [redacted] }} *Id.* at K2870; and
- {{ [redacted] }} *Id.* at K104; *see also* Ex. 43, NS_00095982 at P104 (same shipper raising same concerns to NS).

These fears are well-founded: UP's Senior Vice President of Strategy testified that UP's post-merger rate plan is [redacted] the same as its pre-merger plan. *See* Ex. 45, Sep. 9, 2026 Dep. Tr. of Todd Rynaski ("Rynaski Tr.") 192:13–17.

Extending UP's "price high" strategy to a larger network harms the public interest. The merger should not be approved simply because UP thinks it can squeeze more dollars out of shippers using NS's network. If UP/NS's projected synergies fall short, closing the gap through rates on shippers priced above 180% R/VC would require roughly {{ [redacted] }} in additional revenue—an average increase of perhaps {{ [redacted] }} in revenue per ton-mile for those shippers—driven solely by the transaction, not by any improvement in service. Baranowski/Zebrowski VS § 14. Much of this rate lift would be beyond the Board's reach. Because consolidating UP's and NS's regulatory costs would raise UP's variable costs, the share of UP carloads

priced above the 180% R/VC jurisdictional threshold would fall from {{{ [redacted] }}}, moving approximately {{{ [redacted] }}} in UP revenue below the threshold—meaning UP/NS could raise those rates up to the new 180% line without shippers having any recourse to the Board. *Id.* § 13. That loss of protection would fall hardest on shippers of bulk commodities like coal, which move largely in unit trains, have no practical trucking alternative, and so depend on rate reasonableness review as their principal check on rail pricing.

Rate lift due to change in ownership without any accompanying change in service quality is exactly the type of harm that the Board's rules warn against. *See* 49 C.F.R. § 1180.1(c)(2); *Decision No. 35*, FD 36500, slip op. at 19 ("[B]enefits to the combining carriers that are the result of increased market power, such as the ability to increase overall rates at the same or reduced service levels, are exclusively private benefits that detract from any public benefits associated with a control transaction.").

C. Lost Competition Will Harm Shippers and Consumers.

The proposed merger will eliminate direct rail competition at scores of stations, within corridors, and between corridors, harming shippers. For many shippers, UP and NS are two of five or fewer rail options at their origin or destination station. The merger would eliminate one of them, reducing the number of railroads directly competing for their traffic. In total, nearly {{ [redacted] }} of originating 2023 shipment revenue (or {{ [redacted] }} of terminating 2023 shipment revenue) would lose a rail option:

Table 1: Origins/Destinations With Fewer Than Five Rail Options Post-Merger

Reduction in Railroad at Origin or Destination	2023 Originating Revenue ($M)	2023 Terminating Revenue ($M)
2-to-1	{{ [redacted] }}	{{ [redacted] }}
3-to-2	{{ [redacted] }}	{{ [redacted] }}
4-to-3	{{ [redacted] }}	{{ [redacted] }}
5-to-4	{{ [redacted] }}	{{ [redacted] }}

Carlton VS, Appendix Figure 12. The merger would reduce competition between corridors and within them. These losses would directly translate into higher prices for shippers and, by extension, the American public.

1. The Proposed Merger Will Reduce Competition Between Corridors.

Geographic competition exists where railroads serving different routes compete for the same traffic because shippers can obtain service from competing origins or send it to competing destinations. The Board's rules expressly recognize that "[c]ompetition can be reduced when two carriers serving the same origins or destinations merge." 49 C.F.R. § 1180.1(c)(2)(i). That competitive harm is not confined to overlapping routes. "Horizontal effects occur where applicant carriers currently offer competing service within a defined market." *Decision No. 35*, FD 36500, slip op. at 19. Those effects "can range from loss of direct, head-to-head competition between two railroads serving the same origin/destination pair to loss of

geographic competition between railroads, as would occur if each of the merging parties exclusively serves a different competing port from the same origin." *Id.*

Geographic competition matters because it gives shippers leverage. A shipper facing higher rates or inferior service from one railroad can obtain the same product from a different source ("source competition") or ship the same product to a different customer ("destination competition"). *See* Ex. 46, Laurits R. Christensen Associates, Inc., A Study of Competition in the U.S. Freight Railroad Industry & Analysis of Proposals That Might Enhance Competition, Revised Final Report, Vol. 3, at 20–12 (Nov. 2009); Carlton VS ¶ 20; July 27, 2026 Am. App., Vol. 2 pp. 77–78, Bailey VS ¶ 158. For example, a chemical manufacturer in the middle of the country can buy its raw inputs either from West Coast suppliers that ship over UP or from East Coast suppliers that ship over NS. As a result, even where UP and NS do not serve the same route, each disciplines the other's rates and service.[4]

UP/NS documents and testimony confirm that source and destination competition are a real constraint on pricing. Today, where UP and NS serve competing origins or destinations, shippers can play one railroad against the other. As NS's Executive Vice President and Chief Commercial Officer explained: {{ [redacted] }}." *See, e.g.*, Ex.

[4] At a macro level, geographic competition is especially important for shippers of export commodities. Geographic competition between railroads offers exporters a better cost structure to sell to different markets, providing a tailwind to American export growth.

47, Sep. 9, 2026 Dep. Tr. of Claude Elkins ("Elkins Tr.") 204:22–205:8; *id.* at 191:16–192:3 ({{ }}). UP documents show the same. Ex. 48, UP_1682678 at -895 ({{ }}); Ex. 44, UP_0022580 at K783 ({{ }}). The merger would erase that constraint.

UP/NS's lead economist agrees. During deposition, he testified that a {{ }}" Ex. 35, Israel Tr. 284:23–285:16. Yet UP/NS's expert did not {{ }}. *Id.* at 285:18–21.

Lost geographic competition is particularly harmful to farmers and agricultural shippers, who depend on the ability to source from and sell to competing regions. For example, {{ }}—effectively considering source competition for each destination. Ex. 49, NS_00793474 at -475. {{ }}

[redacted] }} *Id.* Similarly, {{ [redacted] }} *Id.* at -474–75. As BNSF's agricultural economist explains, the grain marketing industry is fiercely competitive, so buyers continually seek the lowest-cost origin, carrier, and route—and relatively small changes in rail rates, service, or market access shift purchases from one origin or region to another. Nov. 18, 2026 Verified Statement of William Wilson ("Wilson VS") §§ 2.2–2.3.

This flexibility has substantial economic value, and the merger would erode it. *Id.* § 4. For example, the Bay State Milling flour mill in Clifton, New Jersey, served by NS, can currently buy hard red spring wheat from a BNSF-served origin in Argyle, Minnesota or a UP-served origin in Minneapolis, Minnesota, switching week to week to whichever origin is cheaper. If the BNSF option were foreclosed—or even discouraged through a high Rule 11 rate or degraded service—the mill's average delivered cost would rise by {{ [redacted] }} per car. *Id.* § 4.1. Likewise, Hershey's NS-served plant in Hershey, Pennsylvania sources beet sugar from the Red River Valley on BNSF and from Idaho on UP. Idaho sugar alone costs almost $3,000 more per car, so foreclosing the BNSF origin would raise Hershey's delivered cost by {{ [redacted] }} per car. *Id.* § 4.2. The risk is especially acute for wheat flour milling: a combined UP/NS would have the ability to foreclose or exercise leverage over [redacted] of U.S. wheat milling

capacity, and many NS-served mills depend on hard red spring and durum wheat that originates almost entirely on BNSF. *Id.* § 3.5. Those higher costs would flow through to bakers, pasta manufacturers, and consumers, and would deter future investment in agricultural processing at locations that lose origin options. *Id.* §§ 3.5–3.6.

UP/NS significantly understate the harm from reducing competition between corridors. Modifications to UP/NS's analysis identify {{{ }}} origin-commodity pairs and, separately, {{{ }}} destination-commodity pairs that would experience a reduction in competition between corridors. Carlton VS ¶¶ 19, 25, 34 & Figure 5. The structural presumption in the 2023 Merger Guidelines to flag origins and destinations for further analysis results in an even larger surface area of risk: {{{ }}} origin-commodity pairs and {{{ }}} destination-commodity pairs. *Id.* ¶¶ 19, 25, 40 & Figure 7. The upshot is "***horizontal concern on rail traffic over {{{ }}} at origin and {{{ }}} at destination***, in contrast to Dr. Bailey's conclusions of zero." *Id.* ¶¶ 19, 49 & Figure 10.

2. The Proposed Merger Will Reduce Competition Within Corridors.

The merger would also substantially lessen competition by reducing independent route options in key corridors. Like geographic competition, route competition gives shippers leverage. Where a shipper can move traffic between the same origin and destination over independent routes controlled by different railroads, each railroad must compete on rate and service to win that traffic, and a shipper dissatisfied with one carrier credibly threatens to shift its business to another.

The Board's rules recognize exactly this risk. *See* 49 C.F.R. § 1180.1(c)(2)(i). When a merger places previously independent routes under common control, that leverage is lost—entirely in a 2-to-1 corridor, and in 3-to-2 and 4-to-3 corridors by eliminating a rival whose presence disciplines the remaining carriers' rates and service. Carlton VS ¶ 74, n. 136; *see Santa Fe S. Pac. Corp.—Control—S. Pac. Transp. Co.*, 2 I.C.C.2d 709 (1986) (denying control of parallel systems that would eliminate competition between independent routes), *modified*, 3 I.C.C.2d 926 (1987); *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp.*, 1 S.T.B. 233 (1996) (imposing trackage-rights conditions to preserve an independent second carrier for 2-to-1 traffic); *see also Heinz*, 246 F.3d at 716–17 (3-to-2 merger presumptively anticompetitive); *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1387 (7th Cir. 1986) (reducing number of competitors facilitates coordination); Merger Guidelines §§ 2.1–2.3. Economic analysis shows that, if consummated, the proposed transaction would reduce the number of independent route options to at most 3 in {{{ [redacted] }}} corridors associated with more than {{{ [redacted] }}} in rail revenues. Carlton VS ¶ 76, n.139 & Appendix Figure 9. UP/NS make no meaningful effort to analyze the harm to competition in these corridors.

The harm is starkest for east-west traffic. Today, four transcontinental route options—BNSF-NS, UP-NS, BNSF-CSX, and UP-CSX—each carry a similar share of east-west interline traffic, allowing shippers on one side of the Mississippi River to choose among carriers on the other. Baranowski/Zebrowski VS § 3. But large rail networks almost never interline with one another for freight moving within territory

they already serve, and interlining by combined carriers dropped sharply after both the CP/KCS merger and the 1990s mergers that created today's UP and BNSF. *Id.* § 6.1; *see also* Carlton VS ¶¶ 122–24 & Figures 18–19. UP/NS's own rail-to-rail diversion model shows that on typical lanes where a future UP/NS route would compete against a dependent interline route, UP/NS would win {{{ }}} of the traffic—effectively reducing four transcontinental routes to one dominant UP/NS route. Baranowski/Zebrowski VS §§ 6.3, 7.

Shippers in these corridors will lose competitive options, and UP/NS try to obscure just how many. ***First***, UP/NS's economic experts exclude relevant corridors from their analysis. As a result, UP/NS identify only 30% of the {{{ }}} corridors (with at least one carload per day from 2019 - 2024) that will suffer a reduction in independent route options to at most 2—corridors associated with over {{{ }}} in rail traffic. Carlton VS ¶ 53. In particular:

- UP/NS's experts disregard any corridor that averaged fewer than one carload per day from 2019 to 2024, even though shippers regularly use and rely on many of those corridors. That cutoff excludes, for example, corridors used every other day or once a week on average, as well as corridors used daily today that carried little or no traffic in 2019-2020. This restriction alone removes from UP/NS's analysis {{{ }}} 2-to-1 and 3-to-2 corridors associated with more than {{{ }}} in revenue. Carlton VS n. 117, 123, Appendix Figure 7, and Appendix Figure 8. {{{ }}} Carlton VS n. 117, 123.

- UP/NS use a similar cutoff for non-intermodal, non-automobile traffic. If a corridor carried fewer than 365 of those carloads in 2023, UP/NS drop it—even if

shippers regularly use it for that traffic. Relaxing that restriction identifies {{{ [redacted] }}} corridors with more than one unit per day from 2019 - 2024, accounting for more than {{{ [redacted] }}} in non-intermodal, non-automobile revenue, that lose a railroad at the same end of the corridor. For example, in 2023, about {{{ [redacted] }}} of the revenue on the Chicago to Las Vegas corridor came from non-intermodal, non-automobile traffic. Carlton VS ¶ 61 & n. 113, 115.

- UP/NS's method for identifying corridors that lose an independent route is biased toward finding no reduction in competition. UP/NS count two routes as "independent" within a corridor only if they share no carriers in common. For example, if a corridor could be served by (1) UP-NS, (2) UP-CSXT, (3) BNSF-NS, or (4) BNSF-CSXT pre-merger, UP/NS would count only two independent routes: UP-NS and BNSF-CSXT. Because both of these routes remain available post-merger, UP/NS consider this corridor a "2-to-2," and do not recognize any reduction in competition. But pre-merger, shippers can leverage ***each*** of these four routes in negotiations with railroads, and ***each*** therefore represents an independent option for at least some shippers. In particular, a shipper can leverage: the UP-NS option in negotiations with BNSF and CSXT; the UP-CSXT option in negotiations with BNSF and NS; the BNSF-NS option in negotiations with UP and CSXT; and the BNSF-CSXT option in negotiations with UP and NS. UP/NS ignore this competition. Carlton VS ¶¶ 69–72 & n.135.

Second, UP/NS ignore 4-to-3 corridors entirely. The merger would reduce independent routes from four to three in an additional {{{ [redacted] }}} corridors associated with more than {{{ [redacted] }}} in rail traffic. Carlton VS, Appendix Figure 9. UP/NS's failure to investigate or address these corridors has no basis in legal precedent. Carlton VS n.117 (CPKC expert reporting 4-to-3 and 5-to-4 overlaps in CP/KCS proceeding). In fact, courts applying antitrust laws routinely enjoin mergers that reduce the number of competitors from four to three. *See, e.g.*, *ProMedica*, 749 F.3d at 562, 568–72 (affirming order unwinding hospital merger that reduced competitors from four to three); *In re ProMedica Health Sys., Inc.*, FTC Docket No. 9346 (Mar. 28, 2012) (Comm'n Op.) (four-to-three hospital merger exceeded

thresholds for presumptive illegality); *Anthem*, 855 F.3d at 349–50 (affirming injunction of merger that would reduce national carriers from four to three); *see also* Merger Guidelines § 2.1 ("Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market").

Finally, for the small fraction of affected corridors that UP/NS's experts do acknowledge, UP/NS summarily conclude that competition will not be harmed by pointing to theoretical "independent routes"—without any analysis showing that those routes would be practically available or competitively viable post-merger. Many of these hypothetical routes carried no traffic at all across six years of comprehensive waybill data. Carlton VS ¶¶ 64, 75. For example, UP/NS assume that {{{ [redacted] }}}, Israel April VS Table D-3, p. D-19; that CN will enter the Springfield–Indianapolis corridor by linking with three short-line railroads even though CN provides no movements in that corridor today; and that CPKC, BNSF, and CSXT could stitch together a new Philadelphia–San Antonio route through Robstown and Chicago, Carlton VS ¶ 67 n.124. While railroads can and do interline to provide successful, market-responsive products today, the combinations cited by UP/NS are far from practical.

3. Reduced Competition Between and Within Corridors Will Result in Higher Prices for Shippers.

The reduction in competition between and within corridors will translate directly into higher prices. UP/NS's own analysis shows that the loss of a competing

railroad would result in an {{ }} price increase at origin and {{ }} at destination. Ex. 35, Israel Tr. 33:13–34:17; Ex. 33, Dep. Ex. 369; *see also* Ex. 35, Israel Tr. 38:8–17 ({{ }}). Applied to the roughly {{{ }}} and {{{ }}} shippers spent on UP/NS service in 2023 at origins and destinations both railroads serve, UP/NS's own estimates imply {{{ }}} per year in rate hikes imposed on shippers that will ultimately be passed through to American consumers. Carlton VS ¶¶ 84–85. Refining UP/NS's model to account for lost competition within corridors raises that estimate to over {{{ }}} per year. *Id.* ¶ 86 & Figure 13.

For example, shippers using BNSF-NS today between Los Angeles and New York would lose their independent UP-CSXT option, leading to rail rates {{{ }}} higher. *Id.* ¶ 86; *see also* Farmer VS ¶ 43; Williams VS ¶ 63. The harm also reaches the grocery aisle: UP/NS's own screens flag corridors for flour and grain mill products out of and into and , and canned and preserved food out of the , which UP/NS's experts dismiss only by assuming receivers could turn to the entire national market. Carlton VS ¶¶ 48 & n.85, Figures 8–9. Given UP's strategy of maximizing price at every turn, UP will exploit ***any*** reduction in competition to raise rates.

Evidence of "supracompetitive prices"—prices that could not be charged in a more competitive market—is "powerful evidence of anticompetitive harm." *Chase Mfg., Inc. v. Johns Manville Corp.*, 84 F.4th 1157, 1177 (10th Cir. 2023) (quoting

McWane, Inc. v. FTC, 783 F.3d 814, 838 (11th Cir. 2015)); *see also, e.g.*, *Staples, Inc.*, 970 F. Supp. at 1082 (enjoining merger where "direct evidence show[ed] that by eliminating Staples' most significant, and in many markets only, rival, this merger would allow Staples to increase prices or otherwise maintain prices at an anti-competitive level."). The Board has likewise denied approval of a motor carrier consolidation where "the elimination of a close competitor appears to have ended the market constraints that prevented [a company] from raising its prices without fear of a market response," which is a "hallmark of unrestrained market power." *See Stagecoach Grp. Plc & Coach USA, Inc.—Acquisition of Control—Twin Am., LLC*, MC-F-21035, 2011 WL 401047, at *7 (STB served Feb. 8, 2011).

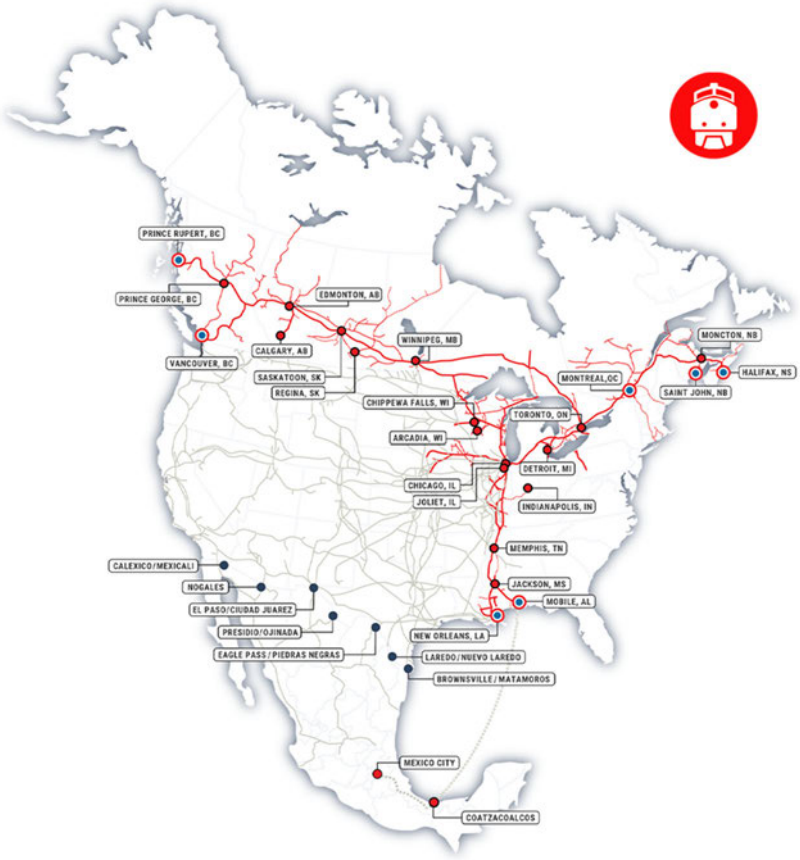
The record leaves no doubt about the competitive consequences of this transaction. By eliminating competition between corridors and independent route options within them, the merger would remove the constraints that discipline UP's and NS's rates and service today. UP/NS's own econometric analysis and documented pricing strategy confirm that the combined carrier will seize that opportunity. Those supracompetitive rates are precisely the "hallmark of unrestrained market power" that warrants denial of the application. *Id.* at *7.

4. UP/NS's Proposed CN Arrangement Cannot Replace the Competition the Merger Eliminates.

[redacted] that would lose a rail option, *see* Table 1, UP/NS propose a remedy for only the [redacted] at 2-to-1 and 3-to-2 locations, where they claim CN can fill the competitive gap. *See* UP-80/NS-78, Supp. p. 5–6. That claim does not withstand scrutiny. CN cannot replace the competition the merger eliminates, and

UP/NS have not shown otherwise, which is to say nothing of the other [redacted] that would see rail options drop for which UP/NS offer no solution at all.

First, CN's footprint does not reach the markets shippers need. CN is a Canadian railroad whose U.S. network runs principally north to south; it does not serve major origins and destinations such as Los Angeles, the San Francisco Bay Area, Florida, the New York metropolitan area, or southeastern Pennsylvania. Baranowski/Zebrowski VS § 16. CN's network map illustrates the point:



See Ex. 50, CN, Rail Services. In 2024, CN served only two of the eight 2-to-1 stations as an origin, and only one of the eight as a destination. CN served ***none*** of the 3-to-2 locations. To reach these customers at all, CN would remain dependent on interlining with the very carriers it is supposed to discipline.

A customer-by-customer review of the 2-to-1 and 3-to-2 facilities UP/NS identify confirms the point. For ***all but two*** of the facilities with meaningful recent rail volumes, CN fails to offer access to origin sources or destination markets comparable to those available on UP or NS for the facility's primary commodity. For ***every*** facility, CN does not reach a majority of the locations the facility currently ships to or from on UP or NS. And for most, there is no reasonable, non-circuitous connection between CN and the UP or NS route needed to serve the customer. Baranowski/Zebrowski VS § 16. Worse still, for ten of the facilities—one 2-to-1 facility and nine 3-to-2 facilities—UP/NS propose no remedy at all, asserting either that they lack authority to provide one or that a remedy is "not necessary or appropriate." *See* UP-80/NS-78, Supp. pp. 54–55, 58–63; *id.*, Supp. pp. 223–27 (Bailey Supp. VS ¶¶ 7–12).

Second, there is no evidence that CN can compete on cost or service. UP/NS offer nothing to show that CN's cost structure would allow it to move shippers' goods to where they need to go at competitive rates, or that CN could operate as efficiently as the independent UP or NS service the merger eliminates. CN would have to commit significant capital to build out its network to be a viable competitor at these locations. *See* Baranowski/Zebrowski VS § 16. Even UP/NS's own experts and executives do not claim otherwise. *See* Ex. 35, Israel Tr. 71:4–72:15 (admitting CN's network is "smaller" and "doesn't cover the same geography" as UP or NS, that he is not aware of any shipper viewing CN access as equivalent to UP or NS access, and that he has done no analysis of the 2-to-1 and 3-to-2 shippers that would receive CN

access under the UP-CN MOU); Ex. 34, McLaughlin Tr. 191:14–18 ("Q. UP reaches origins and destinations that CN does not, correct? [A].: That's correct.").

Third, UP/NS's arrangement with CN is incomplete and undetermined. It is, at most, an agreement to agree—not a binding commitment, and certainly not a divestiture-type fix of the kind that could restore lost competition. *See* Settlement Mem. of Understanding, UP-80/NS-78, Supp. pp. 202–10 (calling itself "only an overview of principal and legal terms," with the parties expecting to "negotiate in good faith to finalize a definitive written agreement" as CN's and UP's "interests diverge" in some respects). CN has acknowledged that it and UP still must "finalize the numerous, complex definitive agreements required to give effect to the CN MOU[,]" *see* CN-30 at 1 n.4 (STB entered Sep. 9, 2026), and says that "the precise form of such access is ultimately a decision for the Board." CN-33 at 4 (STB entered Oct. 14, 2026). But most startling, "CN and UP may not agree on the precise form such remedies should take." *Id.* Hopes and wishes are no substitute for enforceable relief. *See United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 60 (D.D.C. 2017) ("Obviously, defendants cannot produce evidence showing that the divestiture would create an effective competitor unless they first produce evidence that the divestiture is likely to occur."); *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 304 (D.D.C. 2020) ("Defendants have the burden to show that a proposed divestiture will replace the merging firm's competitive intensity," with "courts consider[ing] the likelihood of the divestiture; the experience of the divestiture buyer; the scope of the divestiture, the

independence of the divestiture buyer from the merging seller, and the purchase price." (internal citations omitted)).

Fourth, UP/NS's ADR program is illusory and does not remotely protect against future price gouging. *See* UP-80/NS-78, Supp. p. 196 (STB filed July 27, 2026). UP/NS reserve the right to mothball the program by opting into the Board's Small Rate Case Arbitration Program. *Id.* at Supp. p. 201 § 12.2. The program imposes a threshold springing condition—that merger benefits have not materialized in a timely manner, *id.* at Supp. pp. 9–10—that will be difficult-to-impossible for a lone shipper to prove, on top of market dominance and unreasonableness requirements. *Id.* at Supp. p. 198 § 6.2. UP/NS also put a thumb on the scale by imposing a self-serving requirement that due consideration be given to the need for price differentials and no consideration be given to revenue adequacy. *Id.* at Supp. pp. 198–99 § 6.4. The ADR program suffers from limited eligibility, covering regulated traffic (not contracted traffic or exempt commodities) and relief cannot be given below a 180% revenue-to-variable cost ratio. *Id.* at Supp. pp. 10, 199 §§ 8.1, 8.3. A $4 million monetary cap over two years also applies across all shipper lanes—a ceiling so low that UP/NS could easily conclude efficient breaches are in their interest. *Id.* at Supp. p. 199 § 8.4.

In short, the merger would eliminate geographic and route competition at [redacted] and across hundreds of corridors, raise rates for the shippers who depend on that competition, and leave nearly all that harm unremedied.

D. Vertical Foreclosure on a Massive Scale Will Harm Competition.

The Board has squarely rejected the presumption that end-to-end mergers cannot harm competition. In *Canadian Pacific Railway—Control & Merger—Kansas City Southern (Decision No. 35)*, the Board held that "end-to-end mergers . . . can pose competitive risks," and "overturn[ed] prior agency precedent that did not sufficiently recognize such concerns." *Decision No. 35*, FD 36500, slip op. at 4. The Board cited "recent economic analysis suggesting that in the absence of perfect information . . . vertical mergers can result in anti-competitive effects" and explained that it is "unlikely that [the applicants] (or any rail carriers in comparable situations)" have "complete information regarding the costs and prices charged on moves involving interline bottleneck segments." *Id.* at 46. The Board also credited "some recent empirical economic studies [that] have found evidence suggesting competitive harm from vertical mergers." *Id.*

UP itself advocated for these changes and presented economic analyses supporting the now-accepted view that end-to-end mergers can result in vertical foreclosure. *See* UP Comments and Request for Conditions, *Canadian Pac. Ry.—Control & Merger—Kan. City S.*, FD 36500, at 20–21 (STB served Feb. 28, 2022) (shippers benefit from competition on "rates" and "non-price dimensions," including "transit time, equipment supply, reliability"); *id.*, Verified Statement of Steven Salop ("Salop VS") ¶ 40 (rail transport services "are generally differentiated, not homogenous," and "can differ with respect to distance from a shipper's business to the origin and destination stations"); *id.*, Salop VS ¶ 70 ("economic analysis does not

support a general proposition that an alternative upstream carrier eliminates the risk and potential shipper harms from pricing foreclosure").

Recognizing potential competitive harms from so-called end-to-end mergers is consistent with well-established economic literature recognizing that vertical integration can give a merged firm both the ability and incentive to raise rivals' costs or foreclose rivals' access to inputs or connecting services. *See, e.g.*, Ex. 51, Patrick Rey & Jean Tirole, *A Primer on Foreclosure*, in 3 Handbook of Industrial Organization 2145, 2149 (Mark Armstrong & Robert Porter eds., 2007); Ex. 52, Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 Antitrust L.J. 513, 519–20 (1995); Ex. 53, Janusz A. Ordover, Garth Saloner & Steven C. Salop, *Equilibrium Vertical Foreclosure*, 80 Am. Econ. Rev. 127, 140 (1990). Federal antitrust agencies likewise recognize that a merger can substantially lessen competition by "creat[ing] a firm that may limit access to products or services that its rivals use to compete." Merger Guidelines § 2.5 (capitalization altered).

1. The Merger Will Result in Anticompetitive Vertical Foreclosure.

In this transaction, vertical foreclosure is not a theoretical possibility—it is the predictable result. Economic analysis confirms anticompetitive foreclosure is likely as the merger satisfies all of the risk factors related to foreclosure under the 2023 Merger Guidelines. Nov. 18, 2026 Verified Statement of Nicholas Hill, Ph.D. ("Hill VS") § 7 (citing Merger Guidelines at 14). In particular:

> (i) BNSF and CSXT have "few viable substitutes for NS and UP on a significant volume" of their traffic;
>
> (ii) "NS and UP are of {{{ }}} competitive significance to BNSF [and CSXT] on a {{{ }}} volume of traffic";

(iii) BNSF and CSXT are of "{{{ [redacted] }}} competitive significance" and therefore the potential "effect on competition if BNSF or CSXT were to be partially or fully foreclosed" is significant; and

(iv) "BNSF and CSXT compete {{{ [redacted] }}} with NS and UP."

Hill VS § 7.1; *see also* Williams VS ¶¶ 81–84.

A combined UP/NS would "have a variety of ways to foreclose rivals . . . including eliminating competitors' access to the merged firm's segments, increasing competitors' interline rates, and increasing the division paid by competitors." Hill VS § 7; *see also* Williams VS ¶¶ 63–64, 81–84; *cf.* Farmer VS ¶¶ 51–53. "The merged firm can also engage in non-price foreclosure measures, such as imposing delays for competitors." Hill VS § 7; *see also* Williams VS ¶¶ 63–64; *cf.* Farmer VS ¶¶ 51–53. A substantial volume of commerce is at risk of harm: {{{ [redacted] }}} of traffic travels on interline corridors that are jointly served by UP and NS and at least one other carrier. Hill VS § 6. Non-integrated rivals (such as BNSF and CSX) compete for more than {{{ [redacted] }}} of traffic that could be at risk of potential foreclosure. Carlton VS ¶ 105, Figure 16.

Moreover, as one of BNSF's leading antitrust economists explains, the railroad industry is a network and, as such, changes in volumes in one part of the network can impact other parts of the network. *Id.* ¶¶ 107–11, 114–16; *see also* Williams VS ¶¶ 19–20, 47; Farmer VS ¶¶ 18, 67–68. If UP/NS limit BNSF and CSX's ability to interline with NS post-transaction, BNSF would lose more than the diverted traffic. Lower volumes would reduce BNSF and CSX's network density, constraining their ability to invest in capacity and run trains as frequently, and making BNSF and CSX less efficient competitors across all routes connected to the affected traffic. Williams

VS ¶¶ 19–20, 47; *see also* Farmer VS ¶¶ 18, 67–68. In other words, UP/NS would ***gain more*** than the diverted traffic—they would weaken their primary competitors on a significantly broader set of traffic. UP internal documents confirm that end-to-end mergers can reduce competitors' efficiency. {{[redacted]}} Ex. 48, UP_1682678 at -712.

Post-merger, a combined UP/NS would have the enhanced incentive to raise rivals' costs for interlining with either UP or NS, diverting traffic to their own network. Farmer VS ¶ 88; Williams VS ¶¶ 16, 40, 71, 85; *see also infra* § VI. Rivals like BNSF and CSX would lose network density, diminishing their competitiveness more broadly. *See infra* § VI; Williams VS ¶¶ 19–20, 47; *see also* Farmer VS ¶¶ 18, 67–68. When faced with competitors that are less efficient than they are today, UP/NS would be poised to raise prices, capitalizing on UP's strategy of {{"[redacted]}} Ex. 38, UP_2512665 at -665.

2. <u>The Transaction Will Increase Leverage Over Customers Contracting on a "Bundled" Basis, Harming Competition.</u>

When UP and NS contract with shippers on a "bundled" basis, the combined railroad's expanded footprint translates directly into increased leverage over those shippers and a corresponding ability to divert traffic from competitors. Bundling refers to the common practice of negotiating a single contract covering many of a shipper's lanes together rather than pricing each route on its own. In that setting, a

carrier that already controls a shipper's "closed" lanes—origins or destinations where it is the only practical option—can use that incumbency as leverage to win the shipper's "open," competitively served lanes as well, by conditioning favorable overall terms on the shipper awarding it the entire package. For example, a shipper with several plants served exclusively by UP and others served competitively by both UP and NS may find that it cannot obtain competitive pricing on the contested lanes without giving UP the whole bundle. The larger the merged carrier's network, the more lanes it can pull into such bundles, and the harder it becomes for a rival like BNSF to compete for any single piece of the shipper's business.

UP/NS frequently contract with shippers on a bundled basis, with contracts covering multiple routes. UP/NS's business documents consistently recognize that railroad carriers have greater leverage over shippers if the carrier has a larger footprint and/or serves a greater portion of the shipper's closed locations. {{ }} Ex. 49, NS_00793384 at -384. UP and NS business documents also recognize {{ }} Ex. 48, UP_1682678 at -800.

Shippers have expressed similar concerns regarding the proposed merger. {{

[redacted] Ex. 44, UP_0022580 at K783.

Post-merger, a combined UP/NS would have greater leverage over shippers. By combining UP's and NS's "closed" locations in a single network, the merged carrier could condition its pricing on those captive lanes to pull shippers' "open" lanes into the bundle, reducing shipper choice. Williams VS ¶¶ 65–67, 96–101; Farmer VS ¶¶ 70–72. This would allow UP/NS to raise prices for shippers when a shipper contracts multi-route rates with UP/NS before demand for the relevant commodity is known with certainty or when shipments are subject to rate regulation. *See* Carlton VS ¶¶ 158–69. UP/NS's economist has not grappled with this harm. UP/NS's lead economist acknowledged that {[redacted]}. Ex. 35, Israel Tr. 64:3–66:1, 281:13–17, 297:17–298:9. He likewise conceded {[redacted]}. *Id.* at 222:14–223:24.

Bundling also harms competing railroads. Every open lane that UP/NS pulls into a bundle is traffic that BNSF and other rivals lose, and with it the network density that keeps their costs low and their service competitive across their systems

more broadly. Carlton VS ¶ 159; Farmer VS ¶¶ 70–72; Williams VS ¶¶ 65–68, 96–101. As those rivals weaken, they impose less discipline on UP/NS, freeing the merged carrier to raise prices or degrade service even on traffic that is not part of any bundle.

3. The Results of Past "End-to-End" Mergers Confirm that Competition Will Be Harmed.

Recent experience confirms that end-to-end mergers can harm competition. Under UP/NS's theory in this proceeding, the end-to-end CP/KCS merger should have improved service or reduced prices. The opposite happened. In January 2025, approximately 21 months after CP acquired KCS, {{ }} Ex. 54, UP_2638273 at -274. Similarly, a {{ }} Ex. 39, UP_2512667 at -668 {{ }} *Id.*

Customers similarly have reported that CPKC's service declined even as its rates rose. One customer informed UP that {{ }} Ex. 44, UP_0022580 at K2486. Another customer indicated that {{ }}

[redacted] }} *Id.* at K2474.

Traffic data confirm the pattern. Following the CP/KCS merger, interlining dropped sharply—particularly for traffic moving within territories CPKC can serve itself, and even more steeply in corridors where only CPKC serves one end. Baranowski/Zebrowski VS § 6.1. Likewise, from 2022 to 2024, CPKC interline carloads with other Class I railroads fell by {{{ [redacted] }}} while interlining among the other Class Is rose by {{{ [redacted] }}}; CPKC intermodal interline volumes plummeted by {{{ [redacted] }}}; and the ripple effects through the Laredo gateway were nearly twice the direct loss in carloads interchanged there. Carlton VS ¶¶ 123–26 & Figures 18–20; *see also* Williams VS ¶ 58 (CPKC's intermodal volume only grew by 2% between 2023 and 2024, while UP and NS's grew by 11% and 7%, respectively); *id.* ¶ 60. Meanwhile, the promised growth never materialized: CPKC's actual truck diversions fell dramatically short of even its own predictions, achieving only 23,000 annual truck diversions in its best year, more than three years after consummation. Baranowski/Zebrowski VS § 4.4.2; *see also* Williams VS ¶ 57; Farmer VS ¶ 69.

A retrospective economic analysis of the merger's effects on corridors between Mexico and Chicago likewise shows that the CP/KCS merger resulted in foreclosure. Hill VS § 5. Despite CPKC's open gateway commitments, CPKC traffic between Mexico and Chicago increased materially at the expense of previously preferred

interline routes, partially foreclosing BNSF and UP. *See* Hill VS § 5; Williams VS ¶¶ 59–62; Farmer VS ¶ 46.

4. UP/NS Fail to Show Vertical Harm is Unlikely.

Because end-to-end mergers can harm competition, UP/NS bear the burden of proving that "the facts in an individual proceeding warrant application of the one-lump theory[.]" *Decision No. 35*, FD 36500, slip op. at 47. The one-lump theory holds that a carrier sole-serving one segment of a route already captures the full monopoly profit, so acquiring the other segment's carrier creates no added foreclosure incentive. *See* Sep. 4, 2026 Am. App., Vol. 2 p. 202, Israel VS ¶ 41. UP/NS cannot carry their burden of showing the one-lump theory applies here. UP/NS's own economist conceded that {{ }}. *See* Ex. 35, Israel Tr. 188:23–189:21, 205:19–206:16.

The one-lump theory is also premised on assumptions that are not present here. For the one-lump theory to apply, parties must "have perfect information about each other's prices and costs," and competitors must "offer homogeneous (i.e., identical) products." *See* UP Comments and Request for Conditions, *Canadian Pac. Ry.—Control & Merger—Kan. City S.*, FD 36500, at 35–36 (STB entered Feb. 28, 2022) (citing Salop VS ¶¶ 21–23). UP has previously ***admitted that neither of these assumptions applies to the rail industry***, telling the Board that rail carriers sell "differentiated products" and operate "with imperfect information regarding each other's prices and costs, as is the case in the rail markets likely to be affected by the

proposed transaction," and that "[i]n those circumstances . . . the merged carrier *does* have an incentive to engage in anticompetitive conduct." *Id.* at 5, 35–36.

The record confirms that that is equally true in this transaction. *See, e.g.*, Ex. 47, Elkins Tr. at 210:7–211:8 (confirming that {{ }}); Ex. 35, Israel Tr. 129:6–19 (conceding it is "not my opinion" that railroads have complete information about each other's costs, rate offers, and shippers' willingness to pay); *id.* at 131:18–132:17 (agreeing that rail contracts are privately negotiated and confidential); *id.* at 133:24–135:3 (agreeing that an upstream railroad may have incomplete information about downstream railroads' costs); *see also* Carlton VS ¶¶ 97–102; Wilson VS § 3.2 (post-merger, UP/NS would know the rate it charges BNSF on the NS leg, but BNSF would not know the rate UP/NS assesses on its own movement). There is no plausible argument that the one-lump theory inoculates the proposed merger from competitive harm.

UP/NS's economic expert tries to demonstrate that vertical harm is implausible, even when the merger parties do not have perfect information regarding each other's prices and costs. But that analysis is based on simplified assumptions that do not apply in the real world. In particular:

- Contrary to UP's comments in the CP/KCS merger, UP/NS's expert here assumes that competing railroads provide undifferentiated products. *See* UP-80/NS-78, Supp. p. 277, Suppl. Verified Statement of Mark A. Israel ("Israel Supp. VS") ¶ 48 ({{ }}); Ex. 35, Israel Tr. 172:18–21 (same); *id.* at 301:10–302:22 (describing competition between two railroads as "relatively undifferentiated Bertrand competition"). This assumption is unsupported by the record. *Id.* at 174:13–175:12, 177:8–22 (conceding that rail

contracts "are not homogenous," and that they differ in volume commitments, route combinations, duration, and service guarantees); Carlton VS ¶ 70 (interchange access, rail-site locations, commodity preferences, and service quality mean competing carriers are not equally good options for every shipper).

- UP/NS's analysis improperly assumes contracts for each route are independent, when in reality shippers commonly negotiate agreements with carriers that cover several routes. *See* Sep. 4, 2026 Am. App., Vol. 2 p. 317, Israel VS App'x ¶ 10; Ex. 35, Israel Tr. 136:22–137:16 (conceding that his CGP simulation models shippers paying a linear rate per car-mile on each route); *id.* at 193:3–8 ({ }). But Dr. Israel admitted that it is common practice in the rail industry for shippers to bundle negotiations over multiple routes. *Id.* at 281:13–17; *id.* at 177:8–22 (contracts "can combine different routes."). As one of BNSF's economists explains, the concept of "bundling is relevant to the Proposed Transaction given that both UP and NS discuss bundling practices in their internal documents." Carlton VS ¶ 142 & n.238; *see, e.g.*, {{ }}; *see also* Williams VS ¶¶ 65–67, 96–101.

- UP/NS's analysis does not account for the backdrop of rate regulation, which limits a monopolist's ability to extract the full monopoly rent. Carlton VS ¶¶ 166–69. That omission matters. Because the Board can review the reasonableness of rates, railroads may not be able to simply raise those rates to the maximum monopoly level. A merged UP/NS would thus have both the incentive and the ability to capture those rents indirectly through anticompetitive vertical conduct—for example, by raising the cost of, or degrading, rival interline routes on the competitive segment to steer traffic onto its own single-line service, conduct that rate review does not reach. Far from eliminating foreclosure concerns, rate regulation makes vertical foreclosure the merged carrier's most effective way to extract the rents regulation denies it. UP/NS's economist conceded that he did not empirically study whether concern about triggering a rate challenge currently constrains UP's pricing at sole-served locations, nor the extent to which indirect

competition from other railroads constrains those prices. Ex. 35, Israel Tr. 215:19–216:21.

UP/NS also ignore the negative impact of the transaction on competing carriers' networks. Foreclosure can harm a rival's network and, in turn, adversely affect competition and result in harm to shippers. Carlton VS ¶ 108. As explained above, a railroad's value to shippers depends on investment in capacity across its network: more volume supports more frequent trains, better asset utilization, and greater investment in capacity. That means foreclosure pays off twice. Every carload UP/NS diverts from a BNSF or CSX interline route is density the merged carrier takes from BNSF and CSX and adds to its own single-line network. As that traffic leaves the interline routes, the gateways and connections that BNSF and CSX depend on become less viable, degrading BNSF and CSX's service, raising their costs not only on the foreclosed lane but across their entire systems, and shrinking routing flexibility that the entire industry relies on to absorb disruptions. *See* Morehouse VS §§ IV.C, V.A; Williams VS ¶¶ 19–20; *see also id.* ¶¶ 47–48, 55. A weaker BNSF and CSX, in turn, exert less competitive pressure on UP/NS everywhere the two compete, freeing UP/NS to raise prices or let service slip. And the larger the merged network, the greater the volume UP/NS can pull away from rivals and the greater the payoff from doing so. UP/NS's own economist agreed that "economies of scale and density are features of the rail industry" and that "improved operations along one corridor may improve the efficiency among other corridors"—the same dynamic, in reverse, that makes foreclosure on one corridor harmful to rivals on others. Ex. 35, Israel Tr.

229:21–230:9. Yet UP/NS's analysis treats each interline movement in isolation and does not account for these network-wide effects.

5. UP/NS's "Open Gateways" Proposal is Insufficient to Remedy Vertical Harm to Competition, and UP's Track Record Shows No Conditions Would Be.

UP/NS's vague open gateway commitments would not preserve the competition the merger eliminates. UP/NS offer only a vague commitment to maintain open gateways on "commercially reasonable terms"—that is it. *See* Apr. 30, 2026 Am. App., Vol. 1 p. 90; *id.* at pp. 348–49, Rocker & Elkins VS ¶¶ 164–65 ("We commit to keep open on commercially reasonable terms all existing gateways for eligible traffic[.]"). That language is ***identical*** to the commitment proposed in CP/KCS and offers no concrete pricing standard for what constitutes "commercially reasonable terms." Baranowski/Zebrowski VS § 8. UP/NS's own economist could not say what the phrase means; could not identify what price increase above inflation would be commercially unreasonable; agreed the commitments themselves specify no remedy if a shipper is dissatisfied with UP's justification for a rate increase; and conceded he had not analyzed whether anyone has used the open gateway conditions imposed in CP/KCS. Ex. 35, Israel Tr. 77:10–80:5, 82:12–83:4, 297:23–299:4.

This commitment does not meet even UP's standard. In prior proceedings, UP told the Board that such commitments are not sufficiently "concrete" and "enforceable." *See* UP Comments and Request for Conditions, *Canadian Pac. Ry.—Control & Merger—Kan. City S.*, FD 36500, at 68 (Feb. 28, 2022) ("Applicants also recognize their commitments are not sufficiently 'concrete' and 'enforceable.' UP's proposed conditions are designed to convert Applicants' vague assurances into

effective, concrete, enforceable remedial measures." (footnote omitted)). UP argued that "without some established method of evaluating whether the gateway rate provided is 'commercially reasonable,' the promise to provide a rate is worthless." *Id.* at 69. UP therefore requested specific rate, operational, and investment commitments to preserve effective competition. *See id.* at 66–77. UP now offers none of those protections—only the same "commercially reasonable" promise it previously deemed "worthless."

The inconsistency is not merely institutional; UP's executives have also changed their tune across proceedings. The very UP executive sponsoring UP's "open gateways" commitments here (Mr. Rocker) told the Board the opposite in CP/KCS. Addressing the same "commercially reasonable terms" formulation that UP/NS propose here, he testified that "key elements of those commitments are vague, ephemeral, and essentially unenforceable." Verified Statement of Kenny Rocker and John Turner, *Canadian Pac. Ry.—Control & Merger—Kan. City S.*, FD 36500, at 17–18 (Feb. 27, 2022) ("Rocker CPKC VS"). The defect UP identified is the very one UP/NS replicate here: no pricing standard. UP/NS "never define what it means for rates to be 'commercially reasonable'"; there is no "mechanical definition" of that term; and "[n]one of UP's contracts call[ed] simply for rates that are 'commercially reasonable.'" Rocker CPKC VS at 19. The promise was thus "illusory and unenforceable." *Id.* If UP could not judge compliance even "with full hindsight," UP's executive asked, "how is a customer, or an arbitrator, or the Board expected to be able to enforce the commitment[?]" *Id.* at 20. His prescription was a "concrete, enforceable

pricing methodology"—a mileage-based prorate of the merged carrier's single-line rate. *Id.* at 18, 21. UP/NS now ask the Board to accept what they have condemned.

UP's about-face in this proceeding also cannot be squared with the real-world consequences of the CP/KCS merger. Specifically, post-merger experience at the Laredo gateway shows that open gateway promises are practically worthless once a carrier controls both sides of a gateway. Williams VS ¶¶ 59–62; Farmer VS ¶ 46. When CP sought to acquire KCS, BNSF, ***and UP*** warned that the merged carrier would have the ability and the incentive to abandon KCS's interline partnerships over Laredo in favor of its own new single-line route into Mexico. Williams VS ¶ 59. As UP put it: CP/KCS "would face enormous post-merger pressure to divert traffic from existing KCSM interline service to CPKC single-line service using strategies that reduce shippers' existing competitive options." UP Comments and Request for Conditions, *Canadian Pac. Ry.—Control & Merger—Kan. City S.*, FD 36500 at 26 (Feb. 28, 2022). BNSF and UP asked for concrete interline rate-setting conditions that would maintain competition over the Laredo gateway, but the Board instead imposed "open gateway" commitments. Williams VS ¶ 62.

Those fears came true almost immediately. Within a year after the CP/KCS merger closed, BNSF's intermodal traffic over Laredo "fell to practically zero." *See id.* ¶ 60. While the merger was pending, KCS would agree only to a {{ [redacted] }} extension of its interline agreement with BNSF and {{ [redacted] }}. *See id.* Once the merger was approved, CPKC refused to extend the arrangement at all. *See id.* "Open gateway" conditions did nothing to stop the

subsequent loss of competition. Shippers lost a competitive option, and BNSF was forced to move its Mexico traffic to Eagle Pass, a longer and more constrained route that depends on UP trackage rights. *See* Morehouse VS § IV.C; Williams VS ¶¶ 61, 83; Farmer VS ¶ 46. Since the merger, Laredo rail volume has declined roughly 6% a year, and the trains lost at Laredo reappeared at Eagle Pass. *See* Morehouse VS § IV.C. Demand did not fall: border rail volume overall is near its 2019 level and Laredo truck crossings have grown sharply, yet Laredo rail traffic is down nearly 16%. *See id.* While the Laredo gateway remains open on paper, in practice, open gateway conditions could not keep the Laredo gateway competitive in CP/KCS. UP/NS now offer the Board the same empty open-gateway promises, but on a larger scale, implicating Chicago, New Orleans, Kansas City, Memphis, and St. Louis. *Id.* §§ IV.B–C.

Nor was Laredo an isolated failure. Across CPKC's network, the same open gateway commitments UP/NS now propose did not preserve competition. CPKC interline carloads fell {{{ [redacted] }}} from 2022 to 2024 while other Class I interlining rose. *See* Carlton VS ¶¶ 123–27, Figure 18. Even though the Board conditioned the CP/KCS merger on keeping gateways open at commercially reasonable rates—strengthened by a requirement to justify gateway rate increases above inflation—interline traffic in CPKC territory has already fallen steeply. Baranowski/Zebrowski VS § 8. Similar conditions have failed even when targeted narrowly. For example, after the Board required CN to keep its Chicago interchange with CP "open and competitive" for North Dakota grain moving to the Gulf Coast in

CN/IC, CP-CN grain traffic in that corridor dropped {{{ [redacted] }}} immediately and {{{ [redacted] }}} within ten years. Baranowski/Zebrowski VS § 8. And even assuming conditions were totally effective at keeping gateways open, UP/NS's own diversion model shows the realignment of east-west traffic would be only slightly reduced. *Id.* UP/NS's theoretical work thus would effectively dismiss the potential for anticompetitive foreclosure concerns in relation to ***any*** vertical merger in the rail industry. That position is inconsistent with the business reality—consistently recognized in the Board's decisions and UP's own statements and internal documents—that an "end-to-end" merger risks anticompetitive foreclosure.

E. UP/NS Would Leverage TTX's Railcar Fleet to the Detriment of Competitors, Further Harming Competition.

A combined UP/NS would exercise effective control over railcar pooling company TTX to the detriment of competition. TTX supplies intermodal and other equipment across the entire rail industry and is jointly owned by seven railroads: BNSF (17.4%), UP (37%), CSX (19.8%), NS (19.8%), CN (3.2%), CPKC (2.2%), and FXE (0.6%), in which UP holds a 26% minority stake. Carlton VS ¶ 202; Williams VS ¶ 90. Recognizing that a combined share above 50% would harm competition, UP/NS have committed to reduce their combined stake to 49%. Apr. 30, 2026 Am. App., Vol. 1 p. 403–04, Novak VS ¶ 75; *see also* Williams VS ¶¶ 88–89.

UP/NS's *de facto* control at 49% still threatens competitors' access to TTX's pooling resources. Williams VS ¶¶ 88–89, 91–93. Control does not require a majority stake. The Interstate Commerce Act defines "control" to include not only legal control but also "actual control" and "the power to exercise control," whether through

"stockholders, a voting trust, or a holding or investment company," or "any other means." 49 U.S.C. § 10102(3). In construing materially identical language, the Supreme Court explained that Congress "did not imply artificial tests of control"; whether one company controls another "is an issue of fact to be determined by the special circumstances of each case." *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 145 (1939). The antitrust laws likewise recognize that a minority interest can confer working control. In *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957), the Supreme Court held that du Pont's acquisition of a 23% stock interest in General Motors violated Section 7 of the Clayton Act because it gave du Pont the ability to secure preferential treatment from General Motors. *Id.* at 588, 607; *see also United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 331–34 (1961) (ordering complete divestiture).[5] A 49% interest—more than twice the stake of any other TTX owner—confers at least that degree of influence. To block a UP/NS proposal or approve one of their own, ***every single other railroad*** would have to vote together. Carlton VS ¶ 209; Williams VS ¶ 91. By contrast, UP/NS would need only one other owner to command a majority. *Id.*

[5] UP knows this: its 26% stake in Ferromex entitles it to appoint three of Ferromex's eleven directors, and, according to Grupo México's own disclosures, important Ferromex decisions generally must be made by agreement between Grupo México and UP. Ex. 56, GMXT, Información Financiera Trimestral (2T 2023), at 11, https://gmxt.mx/wp-content/uploads/2023/07/2TRIM-23-GMXT-ESP.pdf. UP has likewise acknowledged that its FXE stake gives it "an added incentive to encourage movements over FXE." *Canadian Pac. Ry.—Control & Merger—Kan. City S.*, Verified Statement of Kenny Rocker and John Turner, FD 36500, at 5 (Deposition Ex. 107) (STB filed Feb. 27, 2022).

UP/NS have been clear that intermodal growth is the essential driving force of the proposed merger, *see* Apr. 30, 2026 Am. App., Vol. 1 p. 29, and that growth, if achievable, depends in significant part on access to TTX's railcar fleet. A combined UP/NS would have every incentive to change TTX operations to favor itself at the expense of its competitors—for example, by steering fleet investment toward the equipment types and lanes that serve UP/NS's network, influencing how scarce railcars are allocated and repositioned during periods of peak demand, shaping car-hire and pool pricing terms to the disadvantage of competing railroads, or slowing the replacement and expansion of equipment on which rivals depend. *See* Williams VS ¶¶ 88, 91–95.

II. THE UP/NS MERGER WOULD CAUSE SERIOUS INTEGRATION PROBLEMS.

History shows that a merger this large is almost certain to cause integration problems. Morehouse VS § IV.A. UP's own record is the starkest example. The UP/SP integration gridlocked the western network. Farmer VS ¶¶ 57–58. Trains backed up for miles, and shipments were delayed for weeks. *Id.* ¶ 57. The meltdown, centered on Houston, stranded over 10,000 cars per day and forced the Board to declare an emergency and issue emergency service orders. *Id.* ¶ 57; *see* Morehouse VS § IV.A. It ultimately cost shippers an estimated $100 million per month. Farmer VS ¶ 58; Williams VS ¶ 48.

The Board has recognized that prior transactions "resulted in severe service problems that plagued applicants and their customers for a full year or more," "despite carefully phased and delayed implementation." *Major Rail Consol. Procs.*, 5

S.T.B. at 558. Most recently, the far smaller CP/KCS combination suffered a failed IT cutover that took about seven months to recover from. Morehouse VS § IV.A; Farmer VS ¶ 60; Williams VS ¶ 79. The disruption was serious enough that the Chairman of the Board wrote to CPKC citing "higher terminal dwell at key yards, slower average velocity, and decreased on-time performance" and directed CPKC to submit a Service Action Plan. Letter from Patrick J. Fuchs, Chairman, STB, to Keith Creel, President & CEO, CPKC, FD 36500 (Sub-No. 6), at 1 (June 17, 2025). But the UP/NS transaction dwarfs both UP/SP and CP/KCS; no railroad has ever attempted an integration this large. Morehouse VS §§ I, IV.A; Farmer VS ¶¶ 60–61; Williams VS ¶¶ 57, 78, 80. It would add volume to five gateways that are already constrained—Chicago, New Orleans, Kansas City, Memphis, and St. Louis—while the network runs near capacity and demand is rising. Morehouse VS §§ I, IV.B; *see also* Farmer VS ¶ 60. UP/NS's own plans would push Chicago's Global 2 and 47th Street terminals to 89% and 86% utilization. Morehouse VS §§ IV.B, IV.C.

When integration problems come, help will not be on the way. UP/NS's Service Assurance Plan would accept on-time origination as low as 25% at some yards, Morehouse VS § I, and it (i) would not activate contingency plans for principal classification yards unless dwell times rise above 29 hours at legacy UP yards or 36 hours at legacy NS yards—and (ii) would not even activate its special problem resolution team until a yard's dwell for the previous month exceeds those thresholds. *See* Verified Statement of John W. Turner ¶¶ 76, 418. In other words, UP/NS plan to run key Chicago terminals with almost no room to absorb a disruption, and they are

prepared to accept that. When terminals that full fall behind, delays do not stay local—they back up into the connecting yards, gateways, and other rail networks that carry shippers' freight nationwide. Morehouse VS § IV.B. And because a merged UP/NS would eliminate an independent partner for rerouting, the network would lose the options that have helped it recover from past disruptions. Morehouse VS § IV.C; Farmer VS ¶¶ 48, 61; Williams VS ¶¶ 76, 78. If integration fails, it will ripple across the national network. A failure at the scale of a UP/NS integration would spread far beyond the Class I railroads to "the shortlines; the ports; the farmers, manufacturers, chemical producers and retailers who need their goods delivered; and American consumers." Farmer VS ¶ 56.

UP/NS's answer to this history is a surface-level Operating Plan and Service Assurance Plan that are not made for the real world. UP/NS's foundational plans model an "average" railroad operating day that never really occurs; route only about half of existing carload traffic; ignore first- and last-mile work; and assume away the growth traffic and customer behavior that UP/NS say justify the deal. Baranowski/Zebrowski VS § 12. This does not meet the Board's "show me" standard for judging "claims that no transitional service problems would occur." *Major Rail Consol. Procs.*, 5 S.T.B. at 549–50.

UP/NS Plan for an Average Day That Never Happens. Railroads do not operate on "average" days, and service breakdowns happen on the busiest ones. Yet the traffic records in UP/NS's model represent an average daily volume, with UP/NS's plans resting on the premise that "most of [their] main lines, yards, and terminals

will not experience any significant merger-related increase in activity levels." Baranowski/Zebrowski VS § 12.1 (quoting Turner VS at 6). It is difficult to square that admission with UP/NS's claims of step-change traffic growth. But even so, averages hide exactly the peaks that cause cars to pile up, dwell to climb, and connections to be missed. *Id.*; *see also* Morehouse VS § IV.B. Consider UP's North Little Rock yard. UP/NS's base plan assumes it will process {{{ [redacted] }}} cars per day, comfortably below UP/NS's stated post-transaction capacity of {{{ [redacted] }}}. Baranowski/Zebrowski VS § 12.1. But in 2023, the yard processed as many as {{{ [redacted] }}} cars in a day, exceeded the base plan figure on {{{ [redacted] }}} days, and exceeded its post-transaction capacity on {{{ [redacted] }}} days. *Id.* Nor do UP/NS ever quantify how many cars their yards can practically hold—even though, at each of the five highest-volume yards on both UP and NS, dwell rose as car inventories approached capacity. *Id.* Congested yards like these are where integrations unravel.

UP/NS's Plan Leaves Traffic Behind. An operating plan is supposed to move every car from where it starts to where it is going. UP/NS's does not. After accounting for stranded blocks, incomplete block sequences, deleted traffic, and location remaps, only {{{ [redacted] }}} of Base Plan carload traffic and {{{ [redacted] }}} of Optimized Plan traffic is successfully routed between its true origin and destination. Baranowski/Zebrowski VS § 12 & Table 33. In the Optimized Plan alone, over {{{ [redacted] }}} cars are assigned to blocks no train picks up, {{{ [redacted] }}} carloads have incomplete block sequences, and another {{{ [redacted] }}} carloads are simply marked "deleted" and never assigned to any train or block. *Id.* § 12.3. And UP/NS

cannot tell the Board or shippers how long any of it will take: the train-level arrival, departure, and dwell times in their model are only placeholder values. *Id.* § 12.2. The transit times central to UP/NS's claimed service benefits thus cannot be tested against anything in the record. *Id.* A model that leaves half the traffic unaccounted for cannot show that the combined railroad will move it.

The plan also skips the first and last mile. Rather than picking up and delivering traffic at the locations on the waybill, UP/NS's model remaps it to locations convenient for blocking—so the modeled routings of over {{{ [redacted] }}} unique cars begin beyond the shipment's origin or end before its destination over {{{ [redacted] }}} times. Baranowski/Zebrowski VS § 12.4. The problem is worst at the gateways where integration risk is already concentrated: in the Chicago area alone, the equivalent of nearly {{{ [redacted] }}} cars per day are remapped to the wrong originating or terminating location. *Id.* Some remaps are not even close; one Optimized Plan record originating in Enola, Pennsylvania enters the modeled network in New Orleans, more than 1,200 miles away, with no connecting movement to explain how it gets there. *Id.* All told, UP/NS leave over {{{ [redacted] }}} car-miles of first- and last-mile work unmodeled—more than {{{ [redacted] }}} the car-miles UP/NS claim they will save under the optimized plan. *Id.*

UP/NS Assume Away the Growth Traffic That Supposedly Justifies the Merger. UP/NS insist this merger is about growth, but their plan does not show how the combined railroad would serve it. For truck-to-merchandise diversions, UP/NS model only roughly the [redacted] highest-volume lanes of more than [redacted] predicted,

and "gross up" those lanes to stand in for everything else—placing traffic density where it will not exist. Baranowski/Zebrowski VS § 12.5. Existing intermodal customers fare no better. To free up terminal capacity for projected growth, the Growth Plan reassigns {{{ [redacted] }}} Southern California intermodal units—{{{ [redacted] }}} of the region's total—to different terminals, requiring as many as {{{ [redacted] }}} additional dray-miles on congested local roads. *Id.* § 12.6. Those customers have not agreed to any of this, and for many, a longer dray could erase intermodal's cost advantage and push traffic back onto trucks. *Id.*; *see also* Williams VS ¶¶ 54, 82.

The Integration Would Put Safety at Risk. The Board "consider[s] safety in its merger decisions," and in CP/KCS it found no meaningful increase in safety risk in part because CP had the best Class I safety record. *Canadian Pac. Ry. Ltd.; Kansas City S. Ry. Co.*, 2023 WL 2531588, at *3 (S.T.B. Mar. 14, 2023). Here, the opposite is true. Over the past ten years, UP has received over 13,500 civil penalties for violations of the railroad safety laws, 67% more than any other railroad, and has paid over $37 million in civil penalties, 69% more than any other railroad. *See* FRA Annual Enforcement Reports, Fiscal Years 2016–25, available at https://bit.ly/4zrRs8G. In 2025, OSHA found that UP violated the Federal Railroad Safety Act by firing an engineer who reported a work-related injury, and called UP a "serial violator" of the statute. *See* Ex. 57, U.S. Dep't of Labor, News Release No. 25-1009-DAL, *US Department of Labor Orders Railroad Company to Reinstate Worker, Pay Over $300K in Back Wages, Damages, Attorney's Fees* (Aug. 6, 2025); Ex. 58, Amber Gaudet, "OSHA Blasts Union Pacific as 'Serial Violator' in Texas

Whistleblower Case," Dallas Morning News (Sep. 8, 2025). NS fares little better; over the past ten years, it has had, on average, the worst employee injury frequency ratio in the industry and the second worst ratio of train accidents per one million train miles (behind only UP). FRA Rail Safety Overview Report (1.12), *available at* https://data.transportation.gov/stories/s/Rail-Safety-Overview-Report-1-12-/dsuf-xcni/. Communities should not bear the risk while UP/NS learn whether their integration plan works.

The Service Assurance Plan Assures Little. UP/NS's Service Assurance Plan is supposed to explain what UP/NS will do when integration goes wrong. But it is built on the Optimized and Growth Plans, so every deficiency in those plans flows directly into it. Baranowski/Zebrowski VS §§ 12, 12.7. A plan that assumes an average day, does not route half the traffic, skips the first and last mile, and places growth traffic where it will not exist cannot tell the Board how UP/NS will absorb peaks or recover from disruptions. *Id.* §§ 12.1, 12.3–12.7; *see also* NGFA-3 at 5–8 (STB filed Dec. 29, 2025) (Service Assurance Plan lacks a compliant compensation process for service failures and provides little information on contingency plans involving other carriers); NGFA-4 at 5–8 (STB filed May 8, 2026) (same, as to Amended Application); NGFA-5 at 4–7 (STB filed Aug. 13, 2026) (Second Response "Affirms that the Service Assurance Plan is Facially Deficient"). Nor is it clear who would be left to execute it. UP/NS's own filings project 1,138 workforce reductions and 546 transfers. Perkes VS ¶ 10. Key NS employees—including the designer of NS's Operating Plan—[redacted]

[redacted] Ex. 59, Oct. 13, 2026 Dep. of Yannik Thomas 128:22–129:2. And although NS's replacement COO claimed that he had "carefully reviewed the Operating Plan in its entirety," he admitted that he [redacted]. *Compare* UP-84/NS-82 ¶ 4 & Barr VS ¶ 4, *with* Ex. 60, Sep. 3, 2026 Dep. of Brian Barr at 108:21–24, 112:3–5, 125:11–14. UP, meanwhile, is starting from a weak position: {{[redacted]}} *See* Ex. 61, UP_1610174 at -197; Ex. 62, UP_1610209 at -244; Ex. 63, UP_1610260 at -290. A railroad that struggles to deliver on its promises today should not be trusted to execute the largest integration in rail history on the strength of a plan that, by its own terms, leaves so much of the work undone.

TAP Does Not Resolve Integration Harms. UP/NS's Targeted Access Program ("TAP") does not mitigate the harms caused by the merger. *See* UP-80/NS-78, Supp. pp. 9, 122–28; *id.* App. A §§ 2.2–2.3, 3.1. Even if switching is ultimately ordered, it applies to sole-served customers, only lasts six months, and automatically terminates. *Id.* App. A § 9.1. TAP excludes intermodal, unit train, and contract traffic; does not award monetary relief; applies only in terminal areas; 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. TAP also stacks the deck against shippers—the only stakeholders with standing to bring a challenge in the event of a UP/NS service failure: shippers have

to show 12 weeks of service failure, which UP/NS can moot with 4 weeks' worth of improvement. Even then, shippers are forced into a multi-step pre-arbitration process, followed by arbitration where UP/NS's defenses (*e.g.*, extraordinary circumstances, volume surges, third-party dispatching choices, customer inaction, and unusual traffic patterns) leave most claims dead on arrival.

III. THE UP/NS MERGER WILL NOT DELIVER ITS PROMISED BENEFITS.

UP/NS's public-benefits case depends on the diversion of 2.1 million truckloads from long-haul trucking to rail that will not occur in the real world. *See* Decision No. 21 at 24. UP/NS use a made-up methodology plagued by a never-ending carousel of errors, irrationally project millions of truck diversions even when truck prices are steeply discounted and rail is more expensive than truck, and rely on an unrepresentative base year (2023) without netting out record-level truck-to-rail diversions that already are happening today. This hardly reflects the care the Board expects in "the[] presentation of public benefits," nor does it heed the Board's "strong[] caution[]" to merging parties "not to exaggerate their benefit projections." *See Major Rail Consol. Procs.*, 5 S.T.B. at 560.

For all their talk about shipper benefits, UP/NS did not even bother to calculate shipper savings from truck-to-rail diversions in the original Application. *See* Dec. 19, 2025 App., Vol. 1, p. 73; Ex. 25, Hunt Day 2 Tr. at 701:20–704:20. In any event, UP/NS's newfound $3.5 billion estimate is pure fiction: shippers cannot benefit from diversions that do not happen. The weaknesses and fundamental unreliability of UP/NS's truck diversion analysis come as no surprise: just weeks before the merger

was announced, one UP executive admitted behind closed doors that his {{ [redacted] }}; another acknowledged that Oliver Wyman's pre-application synergy analysis {{ [redacted] }} *See* Ex. 64, Dep. Ex. 342, UP_1151749; Ex. 24, Hunt Day 1 Tr. 155:11–164:23. If UP does not trust its own expert firm's ability and judgment, why should the Board? *See* Ex. 64, Dep. Ex. 342; Ex. 108, Dep. Ex. 341, UP_2157328 at -7328 (UP executives stating {{ [redacted] }}); Ex. 24, Hunt Day 1 Tr. 151:8–154:16, 155:11–164:23. Diversions on paper are not diversions in practice, and nothing about UP/NS's deeply flawed analysis offers a foundation to approve the largest railroad merger in American history.

A. UP/NS's Projected Truck Diversions Are Fundamentally Unreliable.

1. UP/NS Use an Unprecedented, Unsound "Lookalike" Methodology to Predict Diversions.

To estimate truck diversions that are the centerpiece of their claimed merger benefits, UP/NS utilize a made-for-show "lookalike" methodology that lacks any grounding in prior administrative or federal proceedings.

UP/NS start by calculating the "average" market shares for single-line lanes that share certain characteristics today.[6] *See* Sep. 4, 2026 Am. App., Vol. 2 pp. 445,

[6] UP/NS calculate a weighted average market share for each "lookalike." For instance, the "lookalike" shares for truck-to-intermodal rail were calculated based on the total intermodal rail units divided by the total truck and rail intermodal units. Sep. 4, 2026 Am. App., Vol. 2 p. 528, Hunt VS; *see also id.* at p. 542.

525–28, 540–41, Hunt VS. The characteristics used to build UP/NS's "lookalike" lanes include price, transit time, length of haul, and junction (*i.e.*, interchange) frequency. *See id.*[7] UP/NS sort lanes based on the following buckets:

Price	Transit Time	Length of Haul	Junction Frequency
10% cheaper than truck	Within 24 hours of truck	0–500 miles	0 interchanges
10% more expensive than truck	Within 72 hours of truck	500–1,000 miles	1+ interchanges
Within 10% of truck	More than 72 hours longer than truck	1,000–1,500 miles	
		1,500–2,000 miles	
		2,000+ miles	

Id. at 526–28, 540–41. So long as there is a minimum of three lanes in a lookalike, UP/NS calculate a weighted average share of rail traffic using 2023 traffic data. *Id.*

To calculate diversions, UP/NS match future lanes that purportedly would experience an "improvement" as a result of the merger—*i.e.*, a 50-mile distance or interchange improvement—to 2023 "lookalikes" using the same characteristics. *See* Sep. 4, 2026 Am. App., Vol. 2 pp. 446, 458, 485, 495–96, 528, Hunt VS; Ex. 24, Hunt Day 1 Tr. 233:4–11, 234:9–235:6, 309:9–310:11. If a future lane matches a lookalike, UP/NS ***assume*** the new lanes would achieve an ***identical*** market share to established, pre-merger lanes, and automatically graft 2023 rail market shares onto

[7] UP/NS's truck-to-merchandise/bulk rail diversion model uses a similar construction, but groups lanes based on interline/single-line service potential, rail mileage, rail transit hours, and rail price. *See* Sep. 4, 2026 Am. App., Vol. 2 p. 541, Hunt VS.

future lanes in order to estimate diversions from truck. *See* Sep. 4, 2026 Am. App., Vol. 2 pp. 418, 530, Hunt VS; Ex. 24, Hunt Day 1 Tr. 234:22–235:6. As UP/NS's expert agreed, their methodology boils down to "if a lane looks like a duck and quacks like a duck, it's going to act like a duck[.]" Ex. 24, Hunt Day 1 Tr. 235:7–13.

The "duck" method should not be the basis for approving the largest rail merger in U.S. history.[8] UP/NS's expert admits that a lookalike method has never before been used to estimate truck diversions in a Board proceeding, nor is he aware of any federal court or agency using or accepting such a method. *See id.* at 238:14–19, 240:4–241:7, 242:3–10. UP/NS's expert cites no publications or scholarship supporting the use of "lookalike" methods to estimate traffic diversions. *See id.* at 242:12–21 ("Q. In your verified statements, do you cite a single publication in which a lookalike methodology is used to estimate traffic diversions? A. I don't believe I do. Q. Okay. Do you cite any scholarly papers on lookalike methodologies for estimating diversions? A. I do not."). UP/NS also identify no margin of error or confidence intervals. Ex. 25, Hunt Day 2 Tr. at 608:13–21. Indeed, directly contrary to the

[8] UP/NS's expert claims that CPKC utilized a "form of a lookalike model" for its rail-to-rail diversion model during the CP/KCS merger proceedings because CPKC predicted, "based on the characteristics of the lanes, that they would divert 25 percent, 50 percent, or 75 percent" of traffic. Ex. 24, Hunt Day 1 Tr. at 237:8–21. CPKC's rail-to-rail diversion model does not resemble UP/NS's lookalike model: it did not segment lookalike or addressable lanes; it did not develop comparative single-line and interline shares; and it did not segment markets based on relative truck vs. rail transit times and prices. Instead, CPKC's rail-to-rail model reviewed a limited set of lanes where either dependent or independent interline routes retained some traffic share competing against single line routes, and the average overall share of traffic on single line routes in these lanes informed the judgment-based diversion percentages applied to volumes on lanes where currently inactive CP/KCS routes would become active single line CPKC routes.

approach UP/NS take here, their expert previously ***criticized*** diversion models in a prior proceeding for "mechanically attribut[ing] the same diversion percentage to [] vastly different scenarios[.]" *See* Verified Statement of David T. Hunt, *Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500, Doc. No. 304039 at 10 (STB entered Feb. 28, 2022). Such an approach "applies simplistic rules that are not supported by data or other credible evidence," which "highlights the degree to which th[at] approach is flawed." *See id.* at 7, 10.

Tellingly, UP/NS's "lookalike" model deviates from the regression-based tools their expert previously used to estimate diversions. UP/NS's expert has ***repeatedly*** used regression-based models in Board proceedings to estimate truck diversions for prior mergers. *See* Ex. 24, Hunt Day 1 Tr. at 245:24–247:2, 279:2–8; Jan. 30, 2024 Verified Statement of David T. Hunt, *Canadian Nat'l Ry. Co. & Grand Trunk Corp.—Control—Iowa N. Ry. Co.*, FD 36744, Doc. No. 307861 at App'x B (STB entered Jan. 30, 2024); Verified Statement of David T. Hunt in Support of Springfield Line Divestiture to CN, *Canadian Nat'l Ry. Co. & Ill. Cent. Ry. Co.—Control—Gateway E. Ry. Co.*, FD 36500 (Sub-No. 3), Doc. No. 304041 at Ex. 12A (STB entered Feb. 28, 2022) at 4. UP/NS's expert has ***never*** used a lookalike model to estimate traffic diversions before this merger, and the first formal audience to whom he will present a "lookalike" model is the Board in this case. *See* Ex. 24, Hunt Day 1 Tr. at 243:20–244:8, *id.* at 245:17–23.

This is "well outside of the mainstream" of traffic diversion methodologies used in Board proceedings, rendering UP/NS's methodology fundamentally unreliable. *See*

Rothe Dev., Inc. v. Dep't of Def., 107 F. Supp. 3d 183, 204 (D.D.C. 2015), *aff'd on other grounds*, 836 F.3d 57 (D.C. Cir. 2016); *see also Burton v. E.I. du Pont de Nemours & Co., Inc.*, 994 F.3d 791, 827 (7th Cir. 2021) (district court abused discretion in admitting expert testimony based on "unprecedented" methodology and the court did not otherwise confirm testimony "rested on a reliable methodology"); *In re Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.*, 26 F. Supp. 3d 449, 456, 465 (E.D. Pa. 2014) (rejecting expert who used a "novel technique" when "[t]here exists a well-established methodology used by scientists in her field . . . , and [the expert] herself has utilized it in her published, peer-reviewed work"); *Valador, Inc. v. HTC Corp.*, 242 F. Supp. 3d 448, 464–65 (E.D. Va. 2017) (rejecting expert as unreliable who did not employ either of "two common methods" in field and instead "created his methodology specifically for this litigation," which was "novel" and "has never enjoyed general acceptance, been tested, or faced peer review"), *aff'd*, 707 F. App'x 138 (4th Cir. 2017).

Even worse, UP/NS's expert ***did*** conduct a regression-based model for this case, but discarded it and did not disclose its existence until his deposition. Ex. 24, Hunt Day 1 Tr. at 249:19–250:10, 251:24–252:4, 263:12–21, 267:7–22. UP/NS's expert could not recall the specific results produced by this alternative methodology ("some were lower, some were higher"); they were never produced or disclosed; and they were not "referenced or used" in any iteration of his verified statements. *See id.* at 250:7–10, 257:9–258:1, 259:13–260:4, 261:9–263:8, 265:15–267:14, 272:12–273:6. Relying on a "lookalike model," which UP/NS believe "support[s] [their] argument,"

while "exclud[ing] the results of" accepted regression models "lack[s] the hallmark of science properly performed" and is a reason to reject UP/NS's model out of the gate. *See In re Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prods. Liab. Litig.*, 892 F.3d 624, 634–35 (4th Cir. 2018) (affirming exclusion of expert who omitted results from "well-known small-sample technique" that did not favor party and reporting results of different test that favored party); *In re TMI Litig.*, 193 F.3d 613, 668–69 (3d Cir. 1999), *amended*, 199 F.3d 158 (3d Cir. 2000) (affirming exclusion of expert who "discarded standard and generally accepted computer models" and "never provided any testimony, documentation or any other evidence that the numerical models he did use are generally accepted within the meteorological or the broader scientific community").

UP/NS's excuse does not withstand scrutiny. UP/NS's expert claims the results were discarded because they produced "very similar diversion results for the entire country," regardless "of the characteristics" of "that individual market"—in other words, a one-size-fits-all diversion rate. *See* Ex. 24, Hunt Day 1 Tr. 249:19–250:10, 251:24–252:4, 253:5–18, 261:9–263:8. But that criticism applies equally to UP/NS's "lookalike" approach, which gives about the same market share to routes from {{ [redacted] }} as it does to routes from {{ [redacted] }} and {{ [redacted] }}. Ex. 67, Hunt Dep. Ex. 347 at TerminalTerminal2 Mod. Tab, Cells DF-, DL-4387, 1554, 1508, 3262. The fundamental problem is that the Board cannot evaluate the merits of UP/NS's explanation—or their regression model

at all—because UP/NS's alternative results were "discarded." *See* Ex. 24, Hunt Day 1 Tr. 261:13–263:21; *see also id.* at 265:7–10 (conceding he did not try to refine the regression model to account for lane-specific characteristics). This is a strong basis to reject UP/NS's cherry-picked methodology, particularly because the failure to produce the results of its alternative methodology cannot be squared with Decision No. 13. *See* Decision No. 13 at 6–7 (STB served Mar. 18, 2026) (compelling production of "all studies, surveys, analyses, and reports prepared by . . . third-party advisors" for UP/NS "for the purpose of evaluating or analyzing market shares" and "potential for sales growth or expansion into product or geographic markets").

UP/NS cannot secure approval of the merger on the back of a novel "lookalike" model that copies and pastes existing market shares onto future lanes, without any basis in real-world shipper switching behavior.

2. UP/NS's Truck Diversion Analysis Is Fatally Undermined by the Volume and Nature of UP/NS's Errors.

UP/NS's seriatim error correction of their diversion analysis also undermines its reliability. Earlier in these proceedings, the Board expressed concern about the "frequency and magnitude" of issues with UP/NS's expert workpapers, noting that UP/NS's management of "the workpaper submission process [ ] raised legitimate concerns that the parties and the Board may not have a reliable and static set of workpapers to use in assessing and responding" to UP/NS's application. *See* Decision No. 21 at 12, 33. The Board's concerns were justified then—and the problem has only worsened. Over the course of these proceedings, UP/NS's traffic diversion analysis

has been riddled with errors, which cascaded across UP/NS's filings and workpaper submissions:

- UP/NS submitted six iterations of reports and supplements about their diversion analysis between December 2025 and today.
- UP/NS listed more than 230 rows' worth of errata for their traffic diversion expert at Oliver Wyman.
- UP/NS were forced to correct over 310 errors throughout their traffic diversion analysis.
- UP/NS submitted at least 214 new and replacement workpapers for their traffic diversion analysis, with errors infecting almost every aspect of the workpapers.

See Dec. 19, 2025 App., Vol. 2 p. 309, Hunt VS; Apr. 30, 2026 Am. App., Vol. 2 p. 388, Hunt VS; July 27, 2026 Supp. p. 323, Hunt Supp. VS; July 27, 2026 Am. App., Vol. 2 p. 388, Hunt VS; Sep. 4, 2026 Am. App., Vol. 2 p. 388, Hunt VS; Sep. 11, 2026 Supp. p. 323, Hunt Supp. VS; UP-82/NS-80 (STB entered July 27, 2026) (Errata to Am. App.); UP-100/NS-99 (STB entered Sep. 4, 2026) (Errata to Am. App.); UP-103/NS-102 (STB entered Sep. 11, 2026) (Errata to Hunt Supp. VS); UP-121/NS-120 (STB entered Oct. 22, 2026) (Errata to Hunt VS); *e.g.*, Ex. 24, Hunt Day 1 Tr. 76:10–18, 100:23–101:3, 109:23–110:14, 112:18–113:9, 117:6–118:2.

Contrary to UP/NS's suggestion, the errors in their truck diversion analysis were not minor. For example:

- ***Transit Time Error.*** UP/NS estimate diversions by matching future, post-merger lanes to 2023 "lookalikes" based on a set of characteristics, including transit time. But for at least 7 months in these proceedings, UP/NS calculated transit time between truck and rail by using a formula that subtracted ***miles*** (a unit of distance) from ***hours*** (a unit of time). *See* Ex. 65, Dep. Ex. 333 at Future Tab, Column BZ; Ex. 24, Hunt Day 1 Tr. 58:20–59:3, 60:10–20, 65:20–66:4. That is not mathematically possible. *See* Ex. 24, Hunt Day 1 Tr. 60:10–14 ("Q. As a mathematical matter, are you aware of any way in which you can subtract distance from time without a conversion? A. No.").

- ***Price Error.*** UP/NS also incorrectly calculated the price difference between truck and rail in their initial submission. Instead of comparing the difference between truck prices and total average rail prices, UP/NS compared truck prices to intermodal drayage cost—which is just one component of intermodal rail cost. Ex. 65, Hunt Dep. Ex. 333 at Future Tab, Column CF; Ex. 24, Hunt Day 1 Tr. at 43:18–23; *see also id.* at 42:23–43:12, 46:10–24, 47:8–21. This resulted in ***every single post-merger lane*** being at least 10% cheaper than truck—a result even UP/NS's expert agreed was unrealistic. Ex. 24, Hunt Day 1 Tr. 49:18–51:15, 52:1–5; *see also id.* at 55:8–11; Ex. 65, Hunt Dep. Ex. 333 at Future Tab, Column BR.

It is no answer to say that correcting these errors did not materially change the results of UP/NS's diversion analysis. If anything, that raises more questions than it answers: an analysis that predicts the same number of diversions with—and without—fundamental errors cannot be trusted. A reliable methodology should not yield virtually the same amount of truck conversions in a post-merger world where ***all*** lanes are 10% cheaper than truck and a post-merger world where virtually ***no*** lanes are 10% cheaper than truck. Ex. 24, Hunt Day 1 Tr. at 51:3–52:5, 64:16–66:4, 67:14–18. Nor should a reliable methodology predict the same results using—and not using—a formula to calculate transit time that is mathematically impossible. *See id.* at 64:16–66:4 ("Q. Right. So using the impossible formula, you're getting approximately 1.5 million of truck-to-rail intermodal diversions, correct? THE WITNESS: Yes. The number is there.").

UP/NS's repeated inability to submit an accurate diversion analysis wholly undermines the reliability and results of UP/NS's projections. *See Castellow v. Chevron USA*, 97 F. Supp. 2d 780, 793 (S.D. Tex. 2000) (rejecting expert report because "the mathematical errors which required multiple amendments to his reports call into question the validity of his opinions and undermine the value of those calculations to a factfinder"); *see also EEOC v. Freeman*, 778 F.3d 463, 466 (4th Cir.

2015) (affirming exclusion of expert whose reports contained "an alarming number of errors and analytical fallacies … making it impossible to rely on any of his conclusions"); *cf. In re Pied Piper Casuals, Inc.*, 40 B.R. 723, 725 (Bankr. S.D.N.Y. 1984) (holding that a bankruptcy examiner's "repeated amending of his report belie[s] reliance on the conclusion set forth in his report."). Indeed, after UP/NS's expert testified that he did not intend to submit additional errata, UP/NS submitted yet another set of changed workpapers just a few weeks later. *Compare* Ex. 24, Hunt Day 1 Tr. 92:5–8, *with* Letter from UP to STB re Hunt replacement workpapers (STB entered Oct. 22, 2026).

3. UP/NS's Truck Diversion Analysis Is Not Price Sensitive and Does Not Reliably Predict Future Switching to Rail.

UP/NS's truck diversion analysis should be rejected across the board because it is not sensitive to what matters most to shippers—price. This leads to the absurd result that UP/NS would convert substantial traffic in lanes where it is ***cheaper*** to ship over the road than it is to ship on rail. Industry analysis from UP/NS's expert firm—Oliver Wyman—identifies price as the top factor influencing transportation mode by nearly 50% of shippers. *See* Ex. 66, Hunt Dep. Ex. 345 at Exs. 6–7; Ex. 24, Hunt Day 1 Tr. 212:5–15. That figure expands to 85% of shippers switching between rail and truck if price is a top three factor, including 40% of carload shippers and 50% of intermodal shippers. *See* Ex. 66, Hunt Dep. Ex. 345 at Ex. 7; Ex. 24, Hunt Day 1 Tr. at 212:16–19, 220:9–18. As UP/NS's expert acknowledged, price is a "very important consideration[]", *see* Ex. 24, Hunt Day 1 Tr. 39:4–11, and one of the "core

factors" that "shippers value most" in choosing between modes of transportation, Sep. 4, 2026 Am. App., Vol. 2 pp. 410, 417, Hunt VS.

UP/NS's model, however, is not sensitive to price in any meaningful way:

- ***UP/NS Predict 94% of Projected Intermodal Diversions Still Occur Even If Truck Price is Discounted by 99%.*** Incredibly, UP/NS's analysis barely reduces truck diversions even when truck prices in future lanes are discounted by 99%. Specifically, UP/NS's truck-to-intermodal model still predicts ***1,129,413*** diversions to intermodal rail when truck prices are discounted by 99%. *See* Ex. 24, Hunt Day 1 Tr. 340:24–341:5 ("Q. With truck discounted by 99 percent in all future lanes, your model still predicts the merger will divert 1.13 million intermodal units from truck to rail, correct? A. Correct."); *see also id.* at 334:13–340:9; *see generally* Ex. 67, Hunt Dep. Ex. 347. In other words, according to UP/NS's analysis, a stunning 94% of UP/NS's total truck-to-intermodal diversions—and over 80% of ***all*** truck diversions—would still occur in a post-merger world with bargain-bin truck prices. Even UP/NS's expert agrees that is not a rational projection. *See* Ex. 24, Hunt Day 1 Tr. 188:8–18.

- ***Nearly {{ }} of UP/NS's Intermodal Diversions Occur in Lanes Where Rail is More Expensive than Truck.*** Consistent with the above, the actual results of UP/NS's diversion analysis confirm that it fails to meaningfully incorporate shipper responses to price changes. Specifically, {{ }} of UP/NS's intermodal truck diversions occur in lanes where shipping using rail is more expensive than truck. *See* Baranowski/Zebrowski VS § 4.4.1; *see also* Ex. 67, Hunt Dep. Ex. 347 at TerminalTerminal2 Mod. Tab at Column DK, Cell AD-5359. Given that rail is typically less convenient and generally slower than truck, there is no rational reason nearly {{ }} of the projected intermodal diversions would occur in lanes where rail does not offer a price advantage. *See* Baranowski/Zebrowski VS § 4.4.1; Williams VS ¶ 54.

- ***1 out of 4 of UP/NS's Intermodal Diversions Occur in Lanes Where Rail is Meaningfully More Expensive than Truck.*** UP/NS's failure to account for price becomes even clearer by focusing on lanes where rail prices are over 10% more expensive than truck. Nearly 25%—or 1 out of every 4—of UP/NS's predicted intermodal truck diversions come from such lanes. *See* Ex. 24, Hunt Day 1 Tr. 372:9–13 ("Q. Lanes where rail is over 10 percent more expensive than truck account for 24.78 percent of your total intermodal diversions, correct? A. Yes."); *id.* at 374:18–23 ("Q. One out of every four of your diversions involve scenarios where, among other things, rail is over 10 percent more expensive than truck, correct? A. Yes."); *see also* Ex. 67, Hunt Dep. Ex. 347 at TerminalTerminal2 Mod. Tab at Column DK, Cell AD-5359.

- ***Only {{ }} of UP/NS's Intermodal Diversions Occur in Lanes Where Oliver Wyman Considers Rail to be Competitive.*** UP/NS's diversion analysis does not actually produce results that align with the price thresholds that UP/NS believe prompt shipper switching. UP/NS's expert claims that "when intermodal can offer transit times of truck plus one day and offer a 10% lower price than truck, a shipper is likely to consider intermodal as a competitive substitute for truck." Sep. 4, 2026 Am. App., Vol. 2 p. 445, Hunt VS. Setting aside that this threshold is not based on any empirical evidence, only {{ }} out of the 1.2 million estimated intermodal diversions {{ }} fall within those competitive thresholds. Ex. 67, Hunt Dep. Ex. 347 at TerminalTerminal2 Mod. Tab at Columns DI, DJ, Cell AD-5359.

A traffic diversion analysis that does not respond to price changes cannot be reliable. As UP/NS's expert admitted, "[i]f truck was 99 percent cheaper than rail, I would expect that most shippers would select truck." Ex. 24, Hunt Day 1 Tr. 188:8–18; *see also id.* at 187:3–8. The architect of the merger from the NS side—NS's Senior Vice President and Chief Strategy Officer—likewise testified that he {{ }} *See* Ex. 68, Oct. 9, 2026 Dep. of Michael McClellan ("McClellan Tr.") 263:23–264:17 (emphasis added). As he put it, {{ }} *See id.* at 264:18–265:3.

To the extent UP/NS argue these results reflect shippers' preference for other factors, such as transit time, no real-world data support that view. *See* Ex. 24, Hunt Day 1 Tr. 349:23–350:10, 350:17–351:2. Industry analysis by UP/NS's expert firm shows that shippers identify price as the top factor influencing their choice of a mode of transportation seven times more than transit time and as a top-three influencer over twice as much as transit time. *See* Ex. 66, Hunt Dep. Ex. 345 at Ex. 6; Ex. 24,

Hunt Day 1 Tr. 215:18–216:9. Nor is there any support for UP/NS's assumption that shippers consider switching from truck to rail based on a 50-mile impedance improvement—UP/NS's standard for diversions in the post-merger world. UP/NS's expert "d[id not] recall how we came up with that" figure, did not cite anything to support the assumption, and was unaware of "any empirical research about the 50-mile impedance difference being a differentiating factor for shippers." *See* Ex. 24, Hunt Day 1 Tr. 309:17–311:2.

Because UP/NS chose ***not*** to conduct a shipper survey to back up their theories about switching behavior, there is no "real world data to support [UP/NS's] price sensitivity conclusion" in their model or in the record. *See Laumann v. Nat'l Hockey League*, 117 F. Supp. 3d 299, 318 (S.D.N.Y. 2015). UP/NS's truck diversion analysis "is so far removed from actual [shipper] preferences and tastes that" the Board is left to "speculate as to the reasons for the model's seemingly nonsensical results." *See id.*

Equally meritless is the notion that reducing truck prices by 99% "redefine[s]" their lookalike "buckets," thus changing their diversion model. *See* Ex. 24, Hunt Day 1 Tr. 342:19–344:9; *see also id.* at 340:24–341:19, 341:22–342:15. UP/NS's "lookalikes" and present-day market shares are built on ***historical*** 2023 data. *See id.* at 347:3–10. UP/NS then match future lanes to existing lookalikes based on post-merger characteristics, including price. *See id.* at 347:11–16. Thus, when truck prices in ***future*** lanes are discounted by 99%, "[i]t's not redefining the buckets" from 2023, "[i]t's reassigning lanes to different buckets" in the post-merger world. *See id.*

at 344:13–19. Contrary to UP/NS's argument, the only change is to the "future world," underscoring the total lack of predictive power in their model.

The core problem, which UP/NS cannot escape, is that they built a diversion analysis that is structurally insulated from price changes. UP/NS sort lanes into only three price bands—where rail is 10% cheaper than truck, where rail is 10% more expensive than truck, and where rail is within 10% of truck prices. *See* Sep. 4, 2026 Am. App., Vol. 2 p. 528, Hunt VS. UP/NS thus have no way to meaningfully distinguish between lanes where rail is 11% more expensive than truck or 99% more expensive than truck. Both land in the same "bucket" and automatically receive the same market share, all else being equal.

This was a deliberate choice to ignore basic laws of supply and demand: UP/NS manipulated the market shares of pre-merger "lookalikes" for certain lanes. Although UP/NS claim that they calculate market shares for present day "lookalike" lanes, in reality, UP/NS artificially inflate the market share of certain lanes. For example, the original rail market share for lanes with zero interchanges, lengths of haul over 2,000 miles, transit times within 24 hours of truck, and where rail was over 10% cheaper than truck was {{ [redacted] }}. *See* Ex. 67, Hunt Dep. Ex. 347 at Segmentation Tab, Cell L46. But UP/NS assign such lanes a {{ [redacted] }} market share of a lookalike with a ***higher*** price component where all other characteristics (length-of-haul, transit time, and number of interchanges) are the same. *See id.* at Segmentation Tab, Cells L45, N46. This improperly inflates market shares for these lanes and others. *See id.* at Segmentation Tab, Cells L35-37, N36-37 (forcing certain

lanes with zero interchanges; lengths of haul between 1,500-2,000 miles; and transit time within 24 hours of truck to increase from an original share of {{ [redacted] }} to the {{ [redacted] }} share of a higher price bucket). This was not expressly disclosed in any iteration of UP/NS's public filings.

The consequences of UP/NS's manipulation are far reaching. {{ [redacted] }} of UP/NS's intermodal truck diversions occur where lanes {{ [redacted] }}. *Id.* at TerminalTerminal2 Mod. Tab at Columns DG-DI, Cell AD-5359. That means any price changes within {{ [redacted] }} of UP/NS's post-merger lanes will have minimal to no effect on rail market shares. *See id.* No surprise, then, that UP/NS's model predicts over 1 million truck diversions, no matter the errors and no matter the price point for truck. UP/NS's model is fatally unreliable and cannot be the backbone of any estimation of alleged public benefits stemming from the merger.

4. UP/NS's Truck-to-Rail Analysis Ignores Key Variables Affecting the Likelihood of Diversion.

UP/NS also ignore other key variables that affect diversion decisions, further undermining the reliability of their analysis.

Commodity Type / Pre-Merger Market Shares. UP/NS dramatically overstate truck-to-carload diversions because they ignore the effect of commodity type and preexisting market shares on diversions. UP/NS's truck-to-carload analysis largely treats all commodities the same for lookalike purposes, {{ [redacted] }} *See* Ex. 25, Hunt Day 2 Tr. 651:8–16,

663:14–22.[9] In other words, if commodities were {{ }}—regardless of commodity type or pre-merger rail share. *Id.* at 641:3–18; *see also id.* at 639:15–641:1. That causes UP/NS to project over {{ }} growth in markets where current rail shares are lower than {{ }}. *See id.* at 664:21–665:2.

This conflicts with market realities. UP/NS's own expert firm has published market analysis outside these proceedings that confirms different commodity segments have "different growth and rail market share patterns over the past decade," with each having "a different trajectory for future growth." *See* Ex. 66, Hunt Dep. Ex. 345 at 4–5; *see also* Ex. 24, Hunt Day 1 Tr. 198:22–199:7 ("There are more truck-centric commodities and more rail-centric commodities, yes."); *see also id.* at 199:20–24. UP executives also acknowledge that {{ }} *See* Ex. 69, Sep. 9, 2026 Dep. of David Lehlbach ("Lehlbach Tr.") 113:4–24, 114:6–14; *see also* Ex. 34, McLaughlin Tr. 267:17–268:4 ({{ }}); *id.* at 270:12–19. Because different commodities have different profitability and operational profiles, {{ }} *See* Ex. 70, Oct. 20, 2026 Dep. of Shawn Tureman ("Tureman Tr.") 355:23–356:3.

[9] There were a few carveouts. For instance, UP/NS analyzed automotive diversions separately. Sep. 4, 2026 Am. App., Vol. 2 pp. 437–40, Hunt VS § 4.3.

Real-world evidence also shows it is unrealistic to believe that lanes with {{ }} rail market share today will automatically jump to significantly higher shares. UP executives were clear: {{ }} Ex. 34, McLaughlin Tr. 67:19–23. It is {{ }} *Id.* at 67:24–68:4. UP/NS's internal analysis also recognizes it {{ }} *See* Ex. 71, Dep. Ex. 38 at -357. UP/NS offer no explanation for ignoring these market realities, and their projections thus should be rejected.

Prior Merger Experience. UP/NS also fail to learn from—or account for—lower-than-expected truck diversions from prior mergers. "Particular scrutiny" and independent verification of merger benefits claims are warranted because "historical acquisitions" of a "much smaller [ ] scale" have failed to achieve anything close to UP/NS's projected diversions. *See H&R Block, Inc.*, 833 F. Supp. 2d at 91.

As the Board has explained, "there is history of prior mergers that have fallen short of truck-to-rail conversion projections on past applicants' timelines." *See* Decision No. 21 at 25 n.29. Specifically, despite projecting 64,018 annual intermodal truck diversions—magnitudes lower than what UP/NS project here—CPKC has yet to reach its target. *See id.*; Verified Statement of Bengt Mutén ("Muten VS"), *Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500, App. Vol. 2 p. 223 (STB entered Oct. 29, 2021); *see also* Ex. 25, Hunt Day 2 Tr. 572:18–573:1 (CPKC's truck-

to-rail diversions were "far lower" than projected); Williams VS ¶ 57. By early 2026, when CPKC expected all diversions would be achieved, CPKC reached only 36.5% of its projection. *See* CPKC-55, FD 36500-6 (STB entered Jan. 15, 2026); CPKC-63, FD 36500-6 (STB entered July 15, 2026); Williams VS ¶ 57. The years immediately after the CP/KCS merger were even worse: in the first and second years post-merger, CPKC only diverted approximately 10% and 15%, respectively, of the truck traffic it had projected. *See* CPKC-8, FD 36500 (STB filed Jan. 16, 2024) (Traffic Diversion Submissions) (later amended by CPKC-15, FD 36500, App. A); CPKC-15, FD 36500 (STB filed July 15, 2024); CPKC-27, FD 36500 (STB filed Jan. 15, 2025); CPKC-40 (STB filed July 15, 2025); Williams VS ¶ 57. This experience, which NS's Senior Vice President and Chief Strategy Officer concedes is {{"[redacted]}}, *see* Ex. 68, McClellan Tr. at 268:22–269:19, "only underscores the need for any claimed efficiencies to be independently verifiable in order to constitute evidence that can rebut the [] presumption of anticompetitive effects," *see H&R Block*, 833 F. Supp. 2d at 91–92.

UP/NS claim that they do consider the impact of the CP/KCS merger because they allow diversions only where a "merged UP-NS route offers improved service" over existing offerings. *See* Sep. 11, 2026 Suppl. Verified Statement of David T. Hunt, Supp. p. 362. But that misses the point: UP/NS's definition of "improved service" does not answer the Board's questions about the lessons of CP/KCS on UP/NS's "ability to achieve the truck-to-rail and rail-to-rail diversions modeled." *See* Decision

No. 21 at 30. Past is prologue, and there is no reason to believe UP/NS will succeed where CPKC has failed.

5. Correcting Basic Errors in UP/NS's Models Eliminates 89% of Claimed Diversions.

The Board should reject UP/NS's truck diversion analysis for the reasons above. But even working within UP/NS's model, it collapses once basic errors are fixed. Among other errors, UP/NS manufacture a gap in market shares between interline and single-line service that does not exist; inflate diversions by discarding low-performing single-line lanes to calculate target market shares, while ensuring low-performing interline lanes remain eligible for diversions; and ignore lane density in grafting market shares from high-volume lanes onto low-volume lanes. Correcting these errors, and others, cuts UP/NS's projected truck-to-carload diversions to ***zero*** and truck-to-intermodal diversions by 89%, to 229,330. Baranowski/Zebrowski VS § 4.3.2 & Table 13.

UP/NS Invent a Single-Line Advantage That Does Not Exist. UP/NS's diversion analysis rests on the premise that single-line service commands a greater market share than interline service where truck and rail compete. *See* Sep. 4, 2026 Am. App., Vol. 2 pp. 411–12, Exs. 3-1, 3-2, Hunt VS. UP/NS claim that single-line service wins 15-26% more share in merchandise and bulk markets, and 15-22% more in intermodal markets. *Id.* Those gaps are not real. They are artifacts of comparing dissimilar traffic, and once corrected, the gaps largely vanish—and with them the basis for UP/NS's diversions. Baranowski/Zebrowski VS § 4.2.1.

Carload. UP/NS's carload analysis is distorted in two ways. To start, it inflates single-line rail share by including rail-dependent grain that moves almost entirely within single-line territory and concentrated in the West. *See* Baranowski/Zebrowski VS § 4.2.1. On lanes over 500 miles, {{ [redacted] }} of grain tons stay within single-line territory, with rail carrying {{ [redacted] }} of them. *Id.* at Table 4 ({{ [redacted] }} freight tons of grain traveling by rail, {{ [redacted] }} tons traveling by truck). That traffic is not a candidate for truck diversions at all—in fact, UP/NS predict almost no grain diverting from truck. Baranowski/Zebrowski VS § 4.2.1. Including grain thus artificially inflates single-line shares and makes it look more advantageous than it actually is. *Id.* At the same time, UP/NS depress interline rail share by including truck-dependent, low-volume freight flows from counties that ship too little to support rail service by UP/NS's own criteria. Baranowski/Zebrowski VS § 4.2.1, Table 4 ({{ [redacted] }} truck tons of low-volume flows that skew interline shares down). Those low-volume flows are disproportionately in interline territory, so their inclusion makes interline service look worse based on interline service alone—rather than the low-density issue that is driving interline shares down. *Id.*

Correcting these errors cuts the claimed single-line advantage in merchandise markets in half, to {{ [redacted] }}, compared to UP/NS's 15–26%: {{



}} *See id.* (Figure 10). This has a substantial effect. For example, for moves of 1,500 to 1,999 miles, UP/NS claim single-line service outperforms interline service by 20%, but in reality, the difference is just {{ }}. *See id.*; Sep. 4, 2026 Am. App., Vol. 2 pp. 411–12, Ex. 3-1, Hunt VS. Because UP/NS generate diversions by closing the purported market share gap between interline and single-line service, the fact the claimed gap barely exists leaves little for UP/NS to actually divert. Baranowski/Zebrowski VS § 4.2.1.

Intermodal. UP/NS do not control for density and thus mistakenly attribute higher market shares in high-volume lanes to single-line service. *See id.* § 4.2.1. This creates the appearance of a market share advantage for single-line service that actually reflects lane density. *See id.* In reality, the difference reflects corridor size, not service: busier corridors support more trains and better service, so they win more freight, regardless of whether there is single-line or interline service. *See id.* Compared to high-volume corridors, average rail share in low-volume corridors is {{

[redacted] }} lower at 500-999 miles; {{ [redacted] }} lower at 1,000-1,499 miles; {{ [redacted] }} lower at 1,500-1,999 miles; and {{ [redacted] }} lower at 2,000-plus miles. *See id.* {{



}} *Id.* (Figure 11). Controlling for lane density, interline lanes achieve comparable shares: {{



}} *Id.* (Figure 12). UP/NS could have controlled for lane density (like CP/KCS did in their proceeding, *id.* § 4.2.1)—but UP/NS did not. By failing to do so, UP/NS inflated the gap between single-line and interline rail share and their projected intermodal diversions.

UP/NS's share estimates confirm that their method is fatally flawed. If UP/NS's results were realized, post-merger UP-NS diversion lanes would achieve {{{ [redacted] }}} more market share than all single-line lanes across all lengths of haul—well above the average rail share of existing single-line intermodal lanes today in UP/NS's analysis. Baranowski/Zebrowski VS § 4.4.1. For instance, the post-merger Huntsville to Los Angeles and Detroit/Toledo to Los Angeles intermodal lanes are predicted to have rail shares of {{ [redacted] }}. Ex. 67, Hunt Dep. Ex. 347 at TerminalTerminal2 Mod. Sort Tab, Cells DF-, DL-4567, 4813; *infra* pp. 124–25. UP/NS thus push post-merger lanes past the very benchmark the model claims to match. Baranowski/Zebrowski VS § 4.4.1. That is irrational for a model that purports to bring the benefits of single-line service only to interline lanes.

UP/NS Discard Low-Performing Single-Line Lanes But Keep Low-Performing Interline Lanes When Predicting Diversions. To calculate target market shares for post-merger lanes, UP/NS exclude low-performing single-line lanes that do not generate a certain volume of freight. *See* Baranowski/Zebrowski VS § 4.3.1.1. For instance, the intermodal lane from {{ [redacted] }} is excluded from the lookalike process because it has less than 4,380 annual units. *Id.* That filter

increases target rail shares on average from {{ [redacted] }} for carload and {{ [redacted] }} for intermodal. Baranowski/Zebrowski VS § 4.3.1.1.

But even though low-volume, single-line lanes are excluded from the lookalike process, low-volume interline lanes are eligible for diversions, with the inflated target shares being applied to those lanes to generate diversions. Baranowski/Zebrowski VS § 4.3.1.1. For instance, the Louisville to San Francisco intermodal lane has {{ [redacted] }} pre-merger rail share, but it is projected to divert over {{ [redacted] }} intermodal units. Ex. 67, Hunt Dep. Ex. 347 at TerminalTerminal2 Mod. Sort Tab, Cells AD-, DF-, DL-, DO-4568; *see also* Baranowski/Zebrowski VS § 4.3.1.1. In fact, {{ [redacted] }} of UP/NS's projected truck-to-intermodal rail diversions occur in lanes with {{ [redacted] }} pre-merger rail share. *Id*. at TerminalTerminal2 Mod. Tab, Cells AD-5359-60; AD-, DO-4564, 4566-4570, 4574-4576, 4606-4609, 4611-12, 4649-4652, 4654, 4656, 4662, 4664-4665, 4668, 4723-4727, 4733, 4735, 4737, 4771-4772, 4788-4793, 4795-4798, 4800, 4803, 4805, 4827. If low-volume, single-line lanes are included in determining pre-merger market shares for UP/NS's "lookalike" lanes, truck-to-carload diversions decrease by more than 30%, to 583,331 diversions, and truck-to-intermodal diversions decrease by more than 25%, to 881,374 diversions. Baranowski/Zebrowski VS § 4.3.2.

UP/NS Ignore Density & Apply High-Volume Lane Shares to Low-Volume Lanes. UP/NS improperly inflate diversions by ignoring lane density and applying market shares from high-volume lanes to low-volume lanes. In UP/NS's carload analysis, very low-volume lanes have a {{ [redacted] }} rail share on single-line lanes and a similarly low {{ [redacted] }} share on interline lanes. *See*

Baranowski/Zebrowski VS § 4.3.1.2 (Table 8). Because UP/NS set target shares using a weighted average that gives very low-volume lanes practically zero weight, the model assigns these low-volume lanes a post-merger target share of {{ }} that is typical of much busier lanes. *See id.* For instance, post-merger bulk carload lanes that matched one of UP/NS's lookalikes achieved a {{ }} target share, even though over {{ }} of the composite post-merger lanes had {{ }} pre-merger rail share. Ex. 25, Hunt Day 2 Tr. at 647:12–648:21, 650:5–651:6; Ex. 75, Dep. Ex. 350 at Bulk_Post Tab, Columns H, J&K. As shown below, ***over*** {{ }} of UP/NS's projected truck-to-merchandise diversions (~{{ }} carloads) are created on low-volume lanes where there is little gap to close between single-line and interline shares: {{



}} Baranowski/Zebrowski VS §§ 4.3.1.2–4.3.1.3; *id.* at Table 8.

Similar problems undermine UP/NS's intermodal analysis. UP/NS assume that small-market, post-merger UP/NS intermodal lanes will perform just like the largest and most successful pre-merger intermodal corridors in the country, rather than like other small single-line lanes that have similar rail shares. *See* Baranowski/Zebrowski VS § 4.3.1.2; *see also id.* at Figure 15. The target shares for dozens of smaller UP/NS interline lanes (*e.g.*, San Francisco to Columbus) are based

almost entirely on a few major intermodal corridors (*e.g.*, Los Angeles to Chicago), rather than on comparable smaller single-line lanes (*e.g.*, San Francisco to St. Paul). *Id.* For instance, {{ [redacted] }} of UP/NS's claimed diversions come from post-merger lanes that match a single "lookalike" largely driven by mature lanes that either originate or terminate in {{{ [redacted] }}}. Ex. 67, Hunt Dep. Ex. 347 at Diversions Pivot Table Tab, Cell C37; Ex. 72, Hunt T2R Intermodal Segmentation vFinal at Data Outputs tab, Cells H116, I115, J116-127. In fact, {{ [redacted] }} of UP/NS's weighted-average rail shares in its largest post-merger market segment are based on large corridors between Los Angeles, San Francisco, Portland, and Seattle with Chicago. *See* Baranowski/Zebrowski VS § 4.3.1.2. UP/NS compounded this flaw by using weighted averages to set target shares, which gives the largest lanes even more sway. Baranowski/Zebrowski VS § 4.3.1.2; Sep. 4, 2026 Am. App., Vol. 2 p. 528, Hunt VS.

UP/NS's truck-to-intermodal rail model ultimately results in {{ [redacted] }} of target single-line shares being based on lanes with over 50,000 annual units, even though only {{ [redacted] }} of diversions occur on such lanes in the post-merger world. Baranowski/Zebrowski VS § 4.3.1.2. UP/NS thus graft market shares from unrepresentative, high-volume lanes to project unattainable diversions from low volume lanes:

Route	Projected Diversions	Pre-Merger Share	Post-Merger Share	Merger Share Difference
Huntsville to Los Angeles	{{ [redacted] }}	{{ [redacted] }}	{{ [redacted] }}	{{ [redacted] }}
Louisville to San Francisco	{{ [redacted] }}	{{ [redacted] }}	{{ [redacted] }}	{{ [redacted] }}

Route	Projected Diversions	Pre-Merger Share	Post-Merger Share	Merger Share Difference
Detroit to San Francisco	{{ [redacted] }}	{{ [redacted] }}	{{ [redacted] }}	{{ [redacted] }}
Cincinnati to Los Angeles	{{ [redacted] }}	{{ [redacted] }}	{{ [redacted] }}	{{ [redacted] }}
San Francisco to New Jersey	{{ [redacted] }}	{{ [redacted] }}	{{ [redacted] }}	{{ [redacted] }}
Atlanta to San Francisco	{{ [redacted] }}	{{ [redacted] }}	{{ [redacted] }}	{{ [redacted] }}
Charlotte to Los Angeles	{{ [redacted] }}	{{ [redacted] }}	{{ [redacted] }}	{{ [redacted] }}
Los Angeles to New Jersey	{{ [redacted] }}	{{ [redacted] }}	{{ [redacted] }}	{{ [redacted] }}

Ex. 67, Hunt Dep. Ex. 347 at TerminalTerminal2 Mod. Sort Tab, Cells AD-, DF-, DL-, DO-, DP-4567-4568, 4586, 4624, 4659, 4698, 4711, 4801.

UP/NS's analysis rests on apples-to-oranges comparisons. Los Angeles shippers bound for Chicago can choose from at least 16 daily intermodal trains departing from 5 terminals, reaching 17 different intermodal terminals in Chicago, at a range of price and service levels. *See* Baranowski/Zebrowski VS § 4.3.1.2. For San Francisco to Columbus—a lane UP/NS claim will "look like" Los Angeles to Chicago—UP/NS propose a single daily train from a single terminal making {{ [redacted] }} stops en route. *Id.* No shipper would mistake a Los Angeles to Chicago route with a San Francisco to Columbus route, and no reasonable analysis would assume they would win the same share.

UP/NS's failure to control for density is fatal to the integrity of their model. Accounting for density when projecting diversions eliminates over 532,000 truck-to-carload and intermodal rail diversions. Baranowski/Zebrowski VS § 4.3.2 (Table 13).

* * *

Thus, even working within UP/NS's flawed model, correcting the above basic errors (and others) reduces UP/NS's intermodal truck-to-rail diversions ***by 89%*** to 229,330 and carload diversions to ***zero***. *See* Baranowski/Zebrowski VS §§ 4.3.1.1–4.3.1.4, 4.3.2. This is a far cry from the millions of diversions that UP/NS estimate, wholly undermining any claim that truck-to-rail diversions produce real benefits from the merger that will flow to the shipping public.

IV. THE CLAIMED BENEFITS OF THE UP/NS MERGER CAN BE ACHIEVED—AND ARE BEING ACHIEVED—WITHOUT A MERGER.

A. UP/NS's Projected Diversions Are Not Merger Dependent Because They Are Already Occurring Today.

UP/NS's projected diversions are not merger dependent because the truck conversions that UP/NS attribute to the merger are already happening today—without a merger. UP/NS built their truck diversion models on 2023 data, making no adjustment for the rail growth that has occurred since 2023.

The ultimate question is "whether the particular merger benefits upon which" the merging parties "are relying could be achieved by means short of merger." *See Major Rail Consol. Procs.*, 5 S.T.B. at 559. If they are, the benefit is not merger-specific and cannot factor into the Board's balancing of the public-interest factors. *See, e.g.*, *id.*; *Cardinal Health*, 12 F. Supp. 2d at 62 ("In light of the anti-competitive concerns that mergers raise, efficiencies, no matter how great, should not be considered if they could also be accomplished without a merger."); *Penn State Hershey,* 838 F.3d at 351 ("[T]he District Court's finding that both Pinnacle and Hershey are capable of independently engaging in risk-based contracting contravenes its conclusion that this is a cognizable efficiency because the benefit is not merger

specific."); *Heinz,* 246 F.3d at 722 ("[N]either the district court nor the appellees addressed the question whether Heinz could obtain the benefit of better recipes by investing more money in product development and promotion—say, by an amount less than the amount Heinz would spend to acquire Beech–Nut."). This merger-dependency requirement reflects the Board's recognition that "other private sector initiatives," including "interline partnerships, can produce many of the efficiencies of a merger while risking less potential harm to the public" from future mergers that can achieve fewer and fewer benefits. *See* 49 C.F.R. § 1180.1(c). A benefit that is being achieved today, without the transaction, is a clear case of a benefit that can be achieved by means short of a merger.

UP/NS's thesis is that the merger would fix "a fractured rail industry [that] cannot compete effectively against the trucking industry." *See* Sep. 4, 2026 Am. App., Vol. 1 p. 278, Rocker & Elkins VS ¶ 9. To support that thesis, UP/NS root their model in 2023 data, with no forward-looking analysis or evidence that 2023 is representative of current growth in the rail industry and market conditions. At best, UP/NS's models provide their "best estimate what [] if Union Pacific and Norfolk Southern had been merged in 2023 . . . what the world would have looked like had they been merged in that year"—not 2027. Ex. 24, Hunt Day 1 Tr. at 21:7–21.

What may have been true in 2023 is not true today: record-breaking intermodal growth is happening now—without a merger. The rail industry has grown substantially since UP/NS's 2023 baseline, and the growth is concentrated in the very intermodal segment that accounts for most of UP/NS's projected diversions. *See*

Farmer VS ¶¶ 11–15. AAR reports that August, September, and October 2026 were "the top three U.S. intermodal months ever, including a new all-time high in October." Ex. 5, AAR, *Rail Industry Overview* (Nov. 2026). In October 2026, U.S. railroads averaged more than 298,000 intermodal units per week, "the highest weekly average ever for a month," and October included "the first, third, and fifth-best intermodal weeks ever." *Id.* Year-to-date intermodal volume was up 4.7% through October, and AAR expects that "this year will set a new annual record." *Id.*

BNSF's results confirm the recent rail growth. BNSF's consumer products volumes (which include intermodal) were up about 5.6% in Q3 2026 and 5.4% through the first nine months of 2026 compared to 2025. Farmer VS ¶ 12. BNSF's Quantum intermodal service with J.B. Hunt—which "attract[s] the most service-sensitive highway freight to rail"—has nearly doubled its year-to-date volumes compared to 2025. Williams VS ¶¶ 33–36. That is truck-to-rail conversion occurring today, through partnership, not consolidation.

UP/NS's own statistics tell a similar story of record-setting growth. UP's intermodal carloads were up 11% and NS's intermodal units up 3% between Q3 2025 and 2026 (UP and NS's intermodal revenues were up 27% and 21% over the same period). Ex. 7, Union Pacific Q3 2026 Results at 2 (Oct. 22, 2026); Ex. 73, Norfolk Southern Q3 2026 Quarterly Financial Data at 4 (Oct. 22, 2026). This intermodal growth is not new to 2026: between 2023 and 2024 (the year immediately after UP/NS's base year), UP and NS grew intermodal about 11% and 7% respectively—all

without a merger. Ex. 74, 2024 Union Pacific Corp. Form 10-K; Ex. 28, Norfolk Southern Corp. 2024 Annual Report at K28.

UP reported "record financial results" in Q3 2026 "as net income totaled $2.1 billion" and earnings per share increased 15%. Ex. 4, Union Pacific Q3 2026 Earnings Call Tr. (Oct. 22, 2026); Farmer VS ¶ 15. NS similarly reported "14% overall revenue growth" and "an all-time record for revenue less fuel" in Q3 2026. Ex. 8, Norfolk Southern 2026 Q3 Earnings Call Tr. (Oct. 22, 2026); Farmer VS ¶ 15.

The growth that the industry is currently achieving indicates it "is growing organically." Farmer VS ¶ 14. UP/NS witnesses admit that their 2026 growth is {{ [redacted] }} *E.g.*, Ex. 76, Oct. 15, 2026 Dep. of Jennifer Hamann 69:4–20, 111:11–112:8, 113:2–15, 121:10–17; Ex. 68, McClellan Tr. at 213:24–215:8, 223:20–224:7; Ex. 47, Elkins Tr. at 97:1–7, 98:15–100:2, 100:10–16, 107:17–20; Ex. 70, Tureman Tr. at 217:9–17, 344:18–22; Ex. 29, George Tr. at 30:3–7, 82:22–83:9; Ex. 69, Lehlbach Tr. at 101:8–13; Ex. 77, Aug. 20, 2026 Dep. of Aaron Pfeifer 170:8–13, 171:9–16, 279:10–13; Ex. 78, NS_00119427 at -435; Ex. 79, NS_00672649 at -654, -661.

Yet UP/NS's diversion estimates do not account for this rail growth—nor any macroeconomic factors that could affect the relationship between truck and rail share, including future fuel cost. Ex. 25, Hunt Day 2 Tr. at 693:16–694:6. UP/NS neither incorporated nor forecasted base traffic in any year other than 2023. *See, e.g.*, *id.* at 620:21–622:1; *see also* Ex. 24, Hunt Day 1 Tr. 360:9–17. They conducted no

analysis on how the price of truck impacts the demand of rail, and vice versa. Ex. 25, Hunt Day 2 Tr. 695:17–696:9. UP/NS's diversion analysis does not (and cannot) account for the growth of railroads in 2026 (or 2024-2025) because their model is only a "snapshot in time," so "if you did a different snapshot, it would change." Ex. 24, Hunt Day 1 Tr. 359:1–23. UP/NS's expert agrees that for his model to have "predictive power for what the post-merger world is actually going to look like, that snapshot needs to be representative of market conditions." *Id*. at 362:11–16.

By UP/NS's own standard, then, their models lack predictive power, and their 2023 snapshot is not representative of today's market. Using UP's 2026 financial figures, roughly half or more of UP/NS's claimed benefits already exist without a merger. Approximately 64% of the $2.72 billion in claimed EBITDA and operating-cost benefits is already in the UP 2026 run rate; 72% of the claimed $4.03 billion in revenue growth has been achieved by UP; and approximately 40% of the claimed net traffic growth has already materialized by UP alone. Sep. 4, 2026 Am. App. Vol. 1 p. 516, Janke VS; Am. App. Vol. 2, p. 405 (Ex. 2-4); Am. App. Vol. 4, p. 195 (Ex. 6); Ex. 7, Union Pacific, *Union Pacific Reports Third Quarter 2026 Results* (Oct. 22, 2026). Because UP/NS have not, and cannot, parse out which of their projected diversions have already converted to rail, their models are incapable of providing the merger-specific, verifiable projections that the Board requires.

B. UP/NS's Claimed Transcontinental Service Benefits Are Not Merger-Specific Because Independent Railroads Already Deliver Them Through Interline Partnerships.

After their truck-to-rail diversion analysis was exposed during discovery, UP/NS have since pivoted to publicly selling the purported operational benefits of

single-line transcontinental service, including fewer "hand offs" and quicker interchange times. But transcontinental service exists today—what UP/NS are really selling is transcontinental service controlled by a single corporation. This is marketing spin: UP/NS do not promise to run new tracks to new locations, and origins and destinations will be the same after the merger as they are today. Nor will UP/NS achieve step-change operational efficiencies. There are no "hand offs" for transcontinental moves for intermodal traffic in lanes with sufficient density. UP/NS's growth, by contrast, comes in lanes with low density, meaning traffic will still be handed off at gateways or other interchange points. The only difference is that those handoffs will be between railroaders wearing UP hats, rather than hats of different railroads. UP/NS's transcontinental service will still require federally mandated brake inspections, crew changes, and stops to build density. Morehouse VS §§ I, III.B(i).

In the end, the merger does not offer any real operational savings. The opposite is true: post-merger, UP/NS will degrade the coast-to-coast collaboration that makes transcontinental service a reliable, cost-effective option for shippers today. *See* Morehouse VS §§ I, IV.C, V.A.

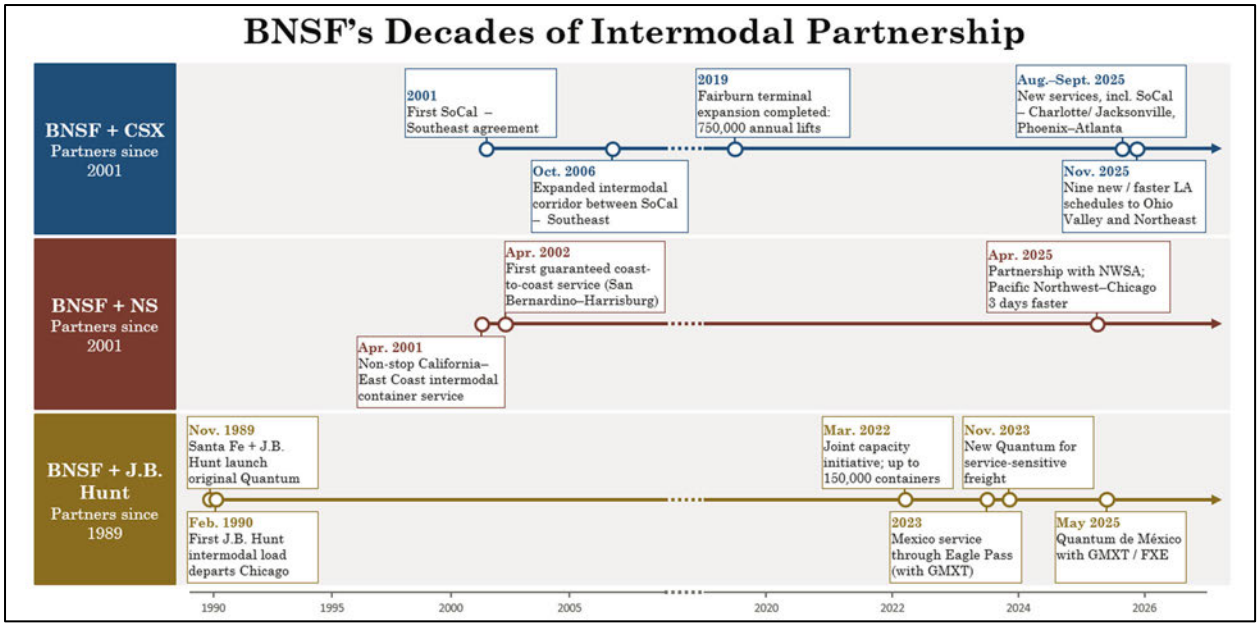
1. Transcontinental Service is Available Today Via Interline Partnerships.

UP/NS's central service claim is that the merger will create "America's first transcontinental railroad." Ex. 26, Union Pacific, *Union Pacific and Norfolk Southern to Create America's First Transcontinental Railroad* (July 29, 2025). But transcontinental service exists ***today***, and shippers can choose among four

competitive transcontinental pairings: BNSF-NS, BNSF-CSX, UP-NS, and UP-CSX. Farmer VS ¶¶ 11, 80–88; Williams VS ¶¶ 14–16, 41–44.[10] BNSF's interline partnerships with eastern carriers already rival or beat the transit times UP and NS project for their combined system. Farmer VS ¶¶ 85, 87; Williams VS ¶ 42; Morehouse VS §§ I, III.B(ii). The Board only credits public benefits that can be achieved without the transaction. *See* 49 C.F.R. § 1180.1(c). A benefit that independent railroads already deliver through voluntary coordination is, by definition, not a benefit of the merger, and it should receive no weight in the public-interest analysis.

BNSF, CSX, UP, and NS already provide the transcontinental intermodal service that UP/NS tout as a benefit of the merger. BNSF has partnered with CSX and NS since the early 2000s to offer service from Southern California to the Southeast. Farmer VS ¶¶ 81–87; Williams VS ¶¶ 39–42; Morehouse VS §§ I, III.B(ii). BNSF's partnerships with NS and CSX have lasted for decades, through multiple management changes, and they have steadily grown, added new routes, cut transit times, and improved reliability:

[10] UP proclaims that it created "the world's first transcontinental railroad" more than 150 years ago when the famous Golden Spike was driven home in Promontory Point, Utah. *See* Ex. 80, Union Pacific, *The Original Golden Spike and its Promontory Summit Companions*, https://www.up.com/aboutup/community/great-race/golden-spike/.



Farmer VS ¶¶ 80–88; Williams VS ¶¶ 38–44.

For instance, BNSF's intermodal partnership with CSX launched in 2001 with a premium service between Los Angeles and San Bernardino and Atlanta that cut 12 hours off the then-existing transit time. Farmer VS ¶¶ 81, 83; Williams VS ¶ 41. That partnership ultimately expanded to include routes from Los Angeles to the rest of the Southeast and Northwest Ohio (among other destinations). Farmer VS ¶¶ 81, 83-86; Williams VS ¶¶ 41–42, 44. Similarly, BNSF's intermodal partnership with NS, which dates to 2000, has expanded well beyond its original non-stop Southern California to Southeast transcontinental container service. Farmer VS ¶¶ 81, 87–88; Williams VS ¶¶ 39–40, 44. In 2025, BNSF and NS partnered with the Northwest Seaport Alliance to redesign service for intermodal traffic from the Pacific Northwest to and through Chicago that "was designed to cut up to ***three days*** off prior routes." Farmer VS ¶ 88; Williams VS ¶ 39. NS's Vice-President of Intermodal called it "a faster, more reliable rail option that helps shippers reduce transit time, cut costs, and

streamline supply chains." Ex. 81, *BNSF, NS, NWSA Redesign Faster Service from PNW to Chicago and Beyond*, BNSF Railway (Apr. 2, 2025). NS's CEO further acknowledges that partnerships "have been used for decades" and "have served—and continue to serve—as a vital option." Sep. 4, 2026 Am. App., Vol. 1 p. 265, George VS ¶ 57.

While most customers value reliability and price over speed, BNSF (and the other Class Is) offer expedited transcontinental services for customers that want them. Farmer VS ¶¶ 28–30, 80–88; Williams VS ¶¶ 29, 32–36, 41–42. Partnerships work, and they have allowed BNSF to operate "the industry's fastest transcontinental direct trains between Southern California and New York." Williams VS ¶ 44; Farmer VS ¶¶ 85, 87. UP and NS's own partnership is a case in point. After signing the merger agreement, UP and NS partnered to offer new interline lanes from Louisville through Kansas City to Los Angeles, Portland, Salt Lake City, and Houston that offered "truck-competitive transit times." Williams VS ¶ 37; Ex. 17, Union Pacific, *New Union Pacific and Norfolk Southern Intermodal Gateway Expands Market Access* (Sep. 15, 2025).

Other examples of non-intermodal interline partnerships confirm that a merger is not required to deliver fast, reliable service. The Powder River Basin Joint Line (the "Joint Line") was created after BNSF and UP's predecessor proposed competing routes to serve developing coal mines in Wyoming and the ICC encouraged the carriers to develop a single shared corridor. *See Burlington Northern, Inc., and Chicago and North Western Transportation Company—Construction and*

Operation—Between Gillette and Douglas, in Campbell and Converse Counties, Wyoming, FD No. 27579, 348 I.C.C. 388 (1976); *Mobil Oil Corp. v. ICC*, 685 F.2d 624, 626–30 (D.C. Cir. 1982). The Joint Line, completed in 1979, is maintained and dispatched by BNSF, while each railroad operates its own trains over the line and jointly funds capital improvements. In 2006 alone, BNSF and UP announced a nearly 75-mile, $200 million expansion, jointly funded by the two railroads, that included new triple- and quadruple-track capacity. Ex. 82, *UP, BNSF Press Release Announcing Southern Powder River Basin Joint Line $100 Million Capacity Expansion Plan* (May 8, 2006), reprinted by Brotherhood of Locomotive Engineers and Trainmen. Today, BNSF and UP continue to jointly use the approximately 103-mile corridor while remaining independent competitors for the traffic moving over it. The Joint Line supports substantial operations by both railroads, averaging approximately 23 BNSF trains and 12 UP coal trains per day. For decades, the Joint Line has allowed two competing railroads to jointly invest in and coordinate the use of critical infrastructure, including dispatching, maintenance, and daily train operations, without common ownership or a merger.

Positive Train Control (PTC) provides another example of railroads working together. In 2008, Congress enacted the Rail Safety Improvement Act, mandating PTC and requiring interoperability, meaning that locomotives of one railroad operating over another railroad's tracks had to communicate seamlessly with the host railroad's PTC system. Meeting that mandate required extensive coordination among otherwise competing railroads because their operations routinely cross railroad

property boundaries. The Class I railroads alone invested nearly $11.5 billion implementing interoperable PTC systems. Ex. 83, Association of American Railroads, *America's Railroads Meet PTC Mandate, Look To The Future* (Dec. 29, 2020). By December 2020, PTC was operating on all 57,536 federally required route miles, and interoperability had been achieved between every applicable host and tenant railroad. The FRA described that accomplishment as the product of "over a decade of sustained and direct engagement and collaboration" among 41 railroads, the agency, industry associations, suppliers, and service providers. Ex. 84, U.S. Dep't of Transp., Fed. R.R. Admin., *Positive Train Control (PTC) Overview*. The experience demonstrates that even complex, network-wide operational challenges can be solved through coordination and interoperability among independent railroads, without common ownership or a merger.

UP and NS themselves have publicly praised other types of partnerships that purportedly offer benefits. For example, UP and NS participate in the RailPulse coalition, an initiative that claims to equip cars with cellular-based telematics to gain real time unit-level visibility into movements across North America. Ex. 85, *A Technology Coalition to Transform the Rail Industry* (https://railpulse.com/aboutrailpulse/). Executives at UP and NS have championed RailPulse and similar initiatives as a means of achieving the growth UP/NS now say can come only through a merger. Ex. 86, Press Release, *Union Pacific Railroad Joins Forces with RailPulse Coalition to Digitally Transform North America's Freight Rail Industry* at 1 (June 7, 2022) ("RailPulse's mission to establish new standards and

support GPS and telematics use enhances customer experiences. Ultimately, an improved shipper experience can attract more shipments to the North American rail network."); Ex. 87, Norfolk Southern, *Norfolk Southern CMO Ed Elkins testifies on growth in freight rail* (Sept. 18, 2024) ("Elkins underscored the importance of leveraging new technologies to enhance service and customer experience. Notable initiatives include investments in digital train inspections, autonomous track inspection, and RailPulse, a GPS and telematics platform that gives customers greater shipment visibility.").

Investment, partnerships, and customer-driven service drive growth in the industry and demonstrate that the improvements UP/NS point to are available today. Farmer VS §§ I.C, III.A; Williams VS § III.A.

2. UP/NS's Proposed Operational Efficiencies are Already Occurring Today Through Interline Partnerships.

The interline transcontinental services that are available today already rival or beat UP/NS's projected post-merger transit times. For instance, BNSF and NS already run interline intermodal service from Los Angeles to Croxton, New Jersey that averages about [redacted] hours faster than the 95 hours UP/NS project for their post-merger single-line service, even with an interchange. Farmer VS ¶ 87; Sep. 4, 2026 Am. App., Vol. 2 pp. 828, 836, Gehringer & Orr VS; Baranowski/Zebrowski VS § 10.1. BNSF and CSX likewise offer a seven-day-a-week, 100-hour intermodal route from Los Angeles to South Kearny, New Jersey that rivals UP/NS's same 95-hour projection. Farmer VS ¶ 85; Williams VS ¶ 42; Sep. 4, 2026 Am. App., Vol. 2 pp. 828, 836, Gehringer & Orr VS.

UP and NS themselves already offer interline services that beat their own single-line projections: while UP/NS claim that they will introduce trains between Southern California and the Southeast that will save about 70 hours, UP/NS already offer interline trains to the same destinations that either rival or perform better than the proposed single-line service. Baranowski/Zebrowski VS § 10.1. For instance, UP/NS project a single-line service between Inland Empire and Atlanta that will take [redacted] hours, but their existing interline service already performs better, with a median transit time of [redacted] hours. *Id.* UP/NS cannot claim credit for transit times that interline partners already deliver. A single railroad leviathan is not needed to unlock transcontinental services.

UP/NS make single-line service look more attractive by inflating the time lost at interchanges. When the merger was announced, UP's CEO claimed every interchange "touchpoint" adds "24 to 36 hours, even at the best," and that the merger would "cut a day or two off of every transit time." Ex. 1, Norfolk Southern 2025 Q2 Earnings Call Tr. at 12 (July 29, 2025). UP recently repeated that claim, claiming that combining UP and NS "will eliminate time-consuming interchanges and cut 24 to 48 hours from transit times." *See* Ex. 88, Union Pacific X Post (Nov. 11, 2026); *see also* Sep. 4, 2026 Am. App., Vol. 1 p. 294, Rocker & Elkins VS ¶ 50 (stating that interchanges add 24 to 48 hours of dwell). UP/NS's traffic diversion expert assumes a railcar spends 22 hours at each interchange in his truck-to-rail models and approximately 15-29 hours in his rail-to-rail model. Sep. 4, 2026 Am. App., Vol. 2 pp. 416, 527; Baranowski/Zebrowski VS § 10.2.

UP's own data refutes these figures. UP/NS's median intermodal interchange time is [redacted] hours through major gateways for its 10 highest-volume intermodal shippers. Baranowski/Zebrowski VS §§ 4.2.2, 10.2. BNSF and NS do even better, with a median interchange time through major east-west gateways of [redacted] hours. *Id.* § 10.2. Many of these interchanges are performed in less than [redacted] hours. *Id.* §§ 4.2.2, 10.2.

BNSF's data also confirms that interchanges can be completed quickly, without a merger. BNSF's median interchange time for intermodal shipments is 2 hours, and the average is 9.5 hours. Morehouse VS § III.A(i); Farmer VS ¶ 91; *see also* Williams VS ¶ 31. About 90% of BNSF's loaded intermodal cars delivered to other Class I carriers have interchange times below about 23 hours. Morehouse VS § III.A(i). In fact, some interchanges happen in ***less than an hour***, as shown by the 36-minute interchange between BNSF and CSX on a route from Los Angeles to Ohio. *See* Ex. 89, BNSF Railway X Post (Nov. 12, 2026), https://x.com/BNSFRailway/status/2121002893637501007; *see also* Williams VS ¶ 31. UP/NS's 22-hour assumption thus reflects extended dwells that are not typical of usual operations. Morehouse VS § III.A(i). Instead, BNSF's median interchange time of 2 hours—achieved without a merger—is already on par with the claimed benefits of single-line service, given that single-line service still runs with some dwell related to humps, crew changes, intermediate safety inspections, classifications, and other work events. Farmer VS ¶ 91; Williams VS ¶ 31; Morehouse VS §§ I, III.B(i).

UP/NS plans confirm that single-line service will require some level of dwell time at gateways, which further minimizes the gap between what interline services currently offer and the claimed benefits of single-line service. Of the {{ }} new "gateway" trains in the Growth Plan, {{ }} still stop at a gateway, and more than of existing UP/NS interline traffic through gateways would post-merger move on trains with similar gateway operations as today. Baranowski/Zebrowski VS § 10.3. All the intermediate stops added to UP/NS's intermodal single-line lanes increase transit time and remove the efficiencies that UP/NS attribute to single-line service. Baranowski/Zebrowski VS § 10.6. Given that UP/NS interline trains run at a higher velocity (mph) than UP's single-line trains mph), interchange times do not hinder overall service. Baranowski/Zebrowski VS § 10.2.

Instead, as BNSF's 2-hour median intermodal interchange time illustrates, interchange performance depends on how an interchange is run—not who owns the railroad. Morehouse VS §§ III.A(i), III.B(i); Farmer VS ¶ 90. Data from BNSF's twelve high-volume interchange gateways in Q4 2025 show that gateways with fewer interchange cars do not necessarily have shorter dwell times. Farmer VS ¶¶ 90, 91. Instead, interchange performance turns on train frequency, terminal capacity, car volume, and operational coordination—all of which can be achieved and improved through investment and partnership. *Id.*; *see also* Williams VS ¶ 31; Morehouse VS § III.B.

UP/NS's claimed handling reductions fare no better. UP/NS claim that their merger will reduce the number of times a railcar is pulled off one train, sorted in a

yard, and then added to another train. Baranowski/Zebrowski VS § 10.5. But by UP/NS's count, that reduction only applies to about [redacted] of all daily handlings. *Id.* Most of that modest reduction is not merger-specific: roughly [redacted] occurs on local shipments that do not move between UP and NS today and are unaffected by the transaction. *Id.* Only about [redacted] daily handling reductions—roughly [redacted] of the total—are attributable to the merger at all. *Id.* Nor would those reductions reach many shippers. For intermodal traffic, nearly [redacted] of affected routes would see no or minimal change in handlings, and only [redacted] of routes, carrying just [redacted] of intermodal units, would lose more than one handling per trip. *Id.*

Because the transcontinental service benefits UP/NS identify can be, and already are being, achieved without a merger, they are not merger-specific and should be given no weight.[11]

V. THE UP/NS MERGER WOULD NOT ENHANCE COMPETITION.

The proposed merger does not come close to enhancing rail-to-rail competition. The sole purported "competitive enhancement" UP/NS offer is Committed Gateway Pricing ("CGP"). *See* Decision No. 21 at 21. But CGP does not create a single post-

[11] Lately, UP/NS's rationale *du jour* for the merger has been the advent of autonomous trucking and its potential implications for the rail industry. *See* Kenny Rocker, *Autonomous Trucking Is Here: Why Rail Cannot Be the Industry That Waited* (Oct. 27, 2026), https://www.up-nstranscontinental.com/letters/autonomous-trucking-is-here-why-rail-cannot-be-the-industry-that-waited/. That justification—which is all but absent from UP/NS's filings—does not justify the merger. Executives at UP acknowledged under oath that {{ [redacted] }} *See* Ex. 90, Oct. 29, 2026 Dep. of Kenny Rocker ("Rocker Tr.") 97:23-98:19. {{ [redacted] }} *See id.* 104:12-105:2.

merger option or combination for shippers that does not already exist today. Instead, CGP is a mechanism that will operate as a price floor that instantly increases shipper rates and that rises over time, taking tens of millions of dollars out of shippers' pockets even for the vanishingly small number of shippers whose traffic would be eligible for CGP. A remedy that UP/NS design, calibrate, and price unilaterally is not a competitive enhancement; it would be a regulatorily approved, self-administered, self-benefitting upward price ratchet.

Although UP/NS believe competition-enhancing conditions are a nice to have—not a need to have—for their merger application, *see* UP-94/NS-93 at 22 n.20, the Board's rules clearly embody a "shift in policy [that] places greater emphasis in the public interest assessment on enhancing competition." *See Major Rail Consol. Procs.*, 5 S.T.B. at 546; *accord* Decision No. 21 at 19. Competitive enhancements "are likely to be extremely important … in determining whether to approve a particular application." *Major Rail Consol. Procs.*, 5 S.T.B. at 554; *accord* Decision No. 21 at 19. On this score, UP/NS fall far short, and the merger should be rejected for its failure to make any meaningful attempt to meet the enhanced-competition requirement.

A. The Major Merger Rules Require Enhancement of 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 cause "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.*, 5 S.T.B. at

547. 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; *accord* Decision No. 21 at 19–20. "[P]rovisions for enhanced competition" thus "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.*, 5 S.T.B. at 554 (emphases added); *accord* Decision No. 21 at 20.

The Board's principal focus was enhancing intramodal competition. As the Board has explained, "the heavier burden" imposed by the Board will require "some new or enhanced ***rail-to-rail*** competition or other competitive benefits." *See Major Rail Consol. Procs.*, 5 S.T.B. at 550, 604 (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—all presume increased access to rail competition for shippers. *See id.* at 547–48. The Board's application of the statutory public-interest test thus requires that a merger provide for enhanced intramodal—that is, rail-to-rail—competition. *See id.*; *see also* 49 C.F.R. § 1180.1(d).

Focusing 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) (emphasis added); it addresses the Board's concern for transactions that eliminate rail options for shippers, *see* 49 C.F.R. § 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.*, 5 S.T.B. at 552.

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." *Phila. Nat'l Bank*, 374 U.S. at 370; *see also RSR Corp. v. FTC*, 602 F.2d 1317, 1325 (9th Cir. 1979) (rejecting procompetitive benefits in secondary market); *Aetna*, 240 F. Supp. 3d at 60 (rejecting proposed efficiencies outside challenged market). Were the law otherwise, cross-market balancing would destroy the constraints that are designed to prevent unchecked consolidation, contrary to sound economic principles about what makes a competitive market structure. *See Phila. Nat'l 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.").

UP/NS's attempted justification of harm to rail-to-rail competition by pointing to purported (but nonexistent) benefits in the trucking market is antithetical to these

principles and should be rejected. *See United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 252 (D.D.C. 2017) ("Nor may one justify the loss of competition in one market with an argument that it would countervail market power in another."), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017).

B. CGP—UP/NS's Sole Competitive Enhancement—Does Not "Enhance" Rail-to-Rail Competition.

Despite three chances, UP/NS continue to give lip service, but no real consideration, to the enhanced-competition requirement. As the Board has explained, CGP is the "***sole*** competitive enhancement [UP/NS] propose." 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 skewed—mechanism that does not enhance competition in any way. To the contrary, it harms competition, resulting in price hikes on shippers that participate in the program.

1. How CGP Works in Practice

CGP is UP/NS's proposed pricing mechanism that creates new rates that 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 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, Supp. p. 14–15, 41–42; Williams VS ¶¶ 70, 72. 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 maintains access to an existing route at a new (most likely higher) rate that ***UP/NS*** calculate, from ***UP/NS's*** data, using an arbitrarily high percentile selected by ***UP/NS***, for a bottleneck segment that ***UP/NS*** control. A remedy that UP/NS unilaterally design, calibrate, and price—that raises rates for many shippers on existing routes—is not a competitive enhancement.

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 Class III railroad that would connect to a different Class I carrier. UP-80/NS-78, Supp. p. 31–33; *see also* Williams VS ¶ 72. That small universe narrows even further. Although UP/NS "expanded" 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. UP-80/NS-78, Supp. p. 14, 32–36; Williams VS ¶ 72. 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. UP-80/NS-78, Supp. p. 37; Williams VS ¶ 72. 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 dictate—which is why even UP/NS's (newfound) supporters at CN have called it a mechanism that covers "negligible

traffic" and "less than 1% of U.S. rail traffic." *See* CN-15 at 25–26, 30 (STB entered May 8, 2026) (citation modified); Williams VS ¶¶ 70–72.

A condition so narrow, so manipulable, and so transparently calculated to raise rates on most eligible shippers cannot be the sort of competitive enhancement the Major Merger Rules demand for a merger that eliminates 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 [UP/NS], 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. Carlton VS ¶ 174. 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.*, 5 S.T.B. at 547, 554 (identifying access-enhancing conditions including joint

access areas and switching arrangements as examples of enhanced competition); *see also* Ex. 91, UP_1682669 at -672 ({{ [redacted] }}). At best, CGP is an effort to partially ***preserve*** competition—something that it attempts to do in a convoluted, *de minimis*, and ultimately harmful manner.

UP/NS's effort to analogize CGP to the BNSF-UP I-5 proportional rate agreement negotiated as part of the UP/SP merger only proves the point. UP/NS claim that they modeled CGP on the I-5 agreement, which was a "competitive enhancement" that "successfully increase[d] competition with BNSF for traffic moving on the I-5" corridor. *See* Apr. 30, 2026 Am. App., Vol. 1 p. 378, Novak VS ¶¶ 12–13. UP/NS's comparison of CGP to I-5 should receive ***zero*** weight in the Board's analysis.

Other than her awareness that I-5 exists today, UP/NS's business sponsor for CGP was unable to describe virtually any comparable features of the I-5 agreement: UP/NS's CGP sponsor is { [redacted] }. *See* Ex. 92, Sep. 24, 2026 Dep. of Katherine Novak ("Novak Tr.") 165:12–168:10, 169:20–23; *id.* at 168:2–5 ("Q. Okay. Do you have any day-to-day responsibility for anything to do with the I-5 agreement? A. No."). "[P]ersonal knowledge is the predicate of reliability." *Soutter v. Equifax Info. Servs. LLC*, 299

F.R.D. 126, 131–33 (E.D. Va. 2014); *Jud. Watch, Inc. v. U.S. Dep't of Com.*, 224 F.R.D. 261, 264–65 (D.D.C. 2004) (striking parts of declaration where affiant lacked "first-hand knowledge and personal experience necessary to render her competent to attest to any sets of facts underlying her statements"). Because UP/NS chose to put forward a business sponsor that has no material knowledge about the program to which she is comparing CGP, UP/NS cannot get credit for CGP as a competition-enhancing mechanism based on that comparison.

If anything, the record confirms that CGP and the I-5 program are not comparable. *See* Ex. 92, Novak Tr. 168:11–14 ("Q. Okay. Do you think that comparing I-5 and CGP is an apples-to-apples comparison? THE WITNESS: No."). Contrary to UP/NS's suggestion, the programs differ on almost every material element, including on the crucial issue of access to a different rail carrier:

Element	I-5	CGP
Duration	Permanent	Temporary (Sunsets Post-Oversight Period)
Pricing	Average Rates	70th Percentile Rate (Above Market)
Traffic Exclusions	None (All Commodities, All Car Types)	Intermodal, Storage Intra-transit, Toxic Inhalation Hazards/Poison Inhalation Hazard, Dimensional Loads
Route Exclusions	None (All Routes, Lanes, and Corridors)	Routes Not Touching Chicago, St. Louis, Memphis, or New Orleans
Fees	Included	Additional Fees Permitted (Fuel Surcharge / Assessorial Fees)
Access	Lane Divestment / Trackage Rights	None

See, e.g., Ex. 92, Novak Tr. 169:24–172:6, 185:7–190:4, 195:24–198:2; Williams VS ¶¶ 72–73.

Separate and apart from these facts, UP/NS are also legally wrong to suggest that the I-5 proportional rate mechanism, standing alone, "enhanced" competition. *See* Apr. 30, 2026 Am. App., Vol. 1 p. 378, Novak VS ¶ 12. It is true that the Board has previously described conditions offered in the UP/SP merger as "competitive enhancements." *See Major Rail Consol. Procs.*, 5 S.T.B. at 557, 569. But it was not the ***rate*** portions of those conditions that enhanced competition standing alone. Instead, the "condition requiring BNSF trackage rights remedied the competitive harm that would have arisen from the loss, through the merger, of a nearby carrier, ***because BNSF was permitted to serve new facilities***, as well as handle 'build-out' and 'transload' traffic." *See id.* at *10 (emphasis added); *see also* Ex. 92, Novak Tr. 168:23–170:12. Unlike I-5, which expanded access through line sales and trackage rights, CGP does not facilitate any new access, and UP/NS have not identified any instance in which additional rate optionality would functionally expand the number of carriers a shipper could use. *See* Ex. 92, Novak Tr. 200:9–12 ("Q. Have you done any analysis to see how many shippers would get increased access as a result of CGP? A. I have not done that analysis."); *id.* at 202:18–21 ("Q. Can you identify a single shipper that will have increased access as a result of CGP? [A.] No."); *see also* Williams VS ¶¶ 72–73.

3. <u>CGP Affirmatively Harms Competition by Raising Rates</u>

CGP affirmatively harms competition 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. *See* Williams VS ¶ 70. According to UP/NS, this "70th-percentile rate cap" protects shippers, "appropriately balanc[ing] competitive enhancement with differential pricing." UP-80/NS-78, Supp. p. 10.

CGP does nothing of the sort. CGP imposes a ***floating*** 70th-percentile rate 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-eligible CGP shippers, UP/NS can push the benchmark for CGP pricing even higher. *See* Ex. 92, Novak Tr. 211:15–24. That is because the CGP rate is a function of all UP/NS's rates for shipments within specific commodity and distance groups. *See id.* at 209:1–17; 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.").

CGP-style ratchet pricing is not a shipper-protective "rate cap." UP/NS's sponsor for CGP was unable to identify a single shipper that would receive better pricing, nor could she otherwise quantify benefits that shippers would enjoy as a result of CGP—in part because she has never tried to calculate a CGP rate. *See* Ex. 92, Novak Tr. 202:23–203:2 ("Q. Can you identify a single shipper that will have a better rate as a result of CGP? THE WITNESS: No."); *id.* at 209:20–210:1 ("Q. Have you ever tried to calculate CGP rate? A. No. Q. Have you ever asked anyone to calculate a CGP rate? A. No."); *id.* at 178:11–14 ("Q. Have you calculated the dollar

benefits that shippers will obtain for those who are eligible and who participate in the CGP program? A. No, I have not."). UP/NS's sponsor went so far as to testify that how much CGP could benefit shippers is not even information she would be interested in knowing. *See id.* at 182:6–11 ("Q. As the sponsor of CGP, would that be information that you would like to know; how much this would benefit or not benefit shippers? THE WITNESS: No.").[12]

Contrary to UP/NS's suggestion, their own expert acknowledges the "compounding effects" of CGP's structure, which "would lead to harms" if a similar structure is adopted in any future consolidation. *See* UP-80/NS-78, Supp. p. 274, Israel Supp. VS ¶ 39. Although UP/NS suggest the impact of this incentive on shippers is limited, the numbers tell a different story: nearly ***50%*** of shippers in UP/NS's CGP simulation "would experience an overall rate increase," resulting in welfare losses of at least $44 million. *See* Carlton VS ¶ 178 & n.289. In other words, "it is advantageous for UP/NS to set rates on routes in the input set to increase the CGP price in order to reduce the effect of [CGP's] cap," as UP/NS's expert concedes. UP-80/NS-78, Supp. p. 276–77, Israel Supp. VS ¶ 46. Far from enhancing

[12] UP/NS's suggestion that no one will be harmed because shippers "can continue to use traditional Rule 11, contract, and joint rate options" is wrong. *See* UP-94/NS-93 at 26. In the post-merger world, UP/NS will dictate the rate charged under Rule 11 or as part of any revenue requirement under a contract or interline partnership involving a UP/NS route. *See* Ex. 92, Novak Tr. 184:7–185:2. This means UP/NS will be able to impose its preferred price, whether through Rule 11, CGP, or other means. In the best-case scenario, then, the CGP rate will become a UP/NS-favorable price ***floo***r. Apr. 30, 2026 Am. App., Vol. 1 p. 389, Novak VS ¶¶ 39–40.

competition, CGP thus takes from some shippers and gives a windfall to others, all to the benefit of UP/NS.

Make no mistake: UP/NS do not care whether CGP will harm shippers. UP/NS's sponsor for CGP does not know whether any shippers will be harmed by CGP; has not made any effort to identify shippers that would be harmed; does not know the locations of any shippers that would be harmed; and refused to answer whether she would even be bothered if shippers were harmed by CGP. *See* Ex. 92, Novak Tr. 213:20–215:23.

But no one should be surprised—CGP was never designed to maximize benefits for eligible traffic in the first place. *See* UP-80/NS-78, Supp. p. 414–15, Novak VS at 41–42. Although UP/NS [redacted] *See* Ex. 92, Novak Tr. 175:1–6. Why was this rate selected? UP/NS's corporate sponsor for CGP was unable to say: asked why UP/NS selected the 70th percentile as a benchmark, she testified that she does not know, did not make the decision, and never asked why. *See id.* at 175:8–11, 176:5–15. Nor was UP/NS's sponsor aware of any internal economic modeling of the benefits CGP would deliver to shippers using different rates or by including additional categories of traffic as part of the program. *See id*. at 180:14–20, 191:3–192:22.

Despite the Board's observation that "policy choices underlying CGP and [UP/NS's] own claims as to its effects raise substantial questions[,]" *see* Decision No. 21 at 21, UP/NS's corporate sponsor for CGP could not answer basic questions about

the program's design and does not appear to have any ongoing involvement with CGP issues. *See* Ex. 92, Novak Tr. 87:5–12 ("Q. Were you involved in the decision to change the scope of the CGP program from the one that you had sponsored? A. No."); *id.* at 32:9–13 ("Q. Apart from the two verified statements that you submitted, do you have any role with respect to the CGP program today? THE WITNESS: I would say no."). Incredibly, UP's CEO admitted that UP/NS's sponsor was {{ [redacted] }}. *See* Ex. 21, Vena Tr. 181:2–10 ({{ [redacted] }}); *see also id.* at 181:12–186:11. That is enough to reject UP/NS's CGP submissions, *see Soutter*, 299 F.R.D. at 131–33; *Jud. Watch*, 224 F.R.D. at 264–65, but it also underscores UP/NS's approach to these proceedings: use paper submissions to make rosy benefits claims unsupported by any corporate sponsor with actual knowledge or foundation of relevant details.

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 compromise its ability to pass on any meaningful benefits from the proposed merger to shippers. UP/NS's original proposal—which they asked the Board and stakeholders to believe would enhance competition—applied to "less than 1% of U.S. rail traffic." *See* CN-15 at 25–26; *accord* Decision No. 21 at 20.

UP/NS's expansion of CGP does virtually nothing, much less anything to address the massive, anticompetitive impact of creating a 50% market share behemoth. UP/NS say that their expansion of CGP "double[s] the number of carloads of traffic eligible for CGP, from 133,890 to 257,971 carloads"—something they call a "meaningful[] increase of the amount of traffic eligible for and benefitted by CGP." *See* UP-80/NS-78, Supp. p. 20 (citing Israel Supp. VS ¶ 29, Figure 6; *id*. ¶ 34, Figure 8), 29. But what UP/NS downplay is that this "expansion" increases the amount of covered traffic by a mere 0.6%. Worse still, even for the ***less than 1%*** of total U.S. units and about 5% of Class I interline units that qualifies, UP/NS's own expert shows that roughly 60% of eligible carloads would see no rate benefit whatsoever. *See* UP-80/NS-78, Supp. p. 269–70, Israel Supp. VS ¶ 34, Figure 8; *see also* Williams VS ¶ 70. 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, Supp. p. 39–40; *id*. at p. 279, Israel Supp. VS ¶ 53; Williams VS ¶ 72.

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 and reciprocal switching—as examples. *See Major Rail Consol. Procs.*, 5 S.T.B. at 547–48, 554; 49 C.F.R. § 1180.1(c). Doubling eligibility for a program that covers only a sliver of U.S. traffic does not transform CGP into the kind of "substantial and demonstrable" benefit that would support approval of this fundamentally anticompetitive merger. *See* 49 C.F.R. § 1180.1(a). Tellingly, UP/NS admit that CGP

does not even enhance the competition that they think matters most 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-line service." *See* UP-80/NS-78, Supp. p. 43. Giving UP/NS the benefit of every doubt, CGP does not enhance rail-to-rail competition.

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

UP/NS's reason for putting forward such a feeble proposal for enhanced competition is simple: UP/NS do not believe ***any*** competition-enhancing conditions are necessary because "the UP/NS merger itself will substantially enhance competition[.]" *See id*. at 14. On this view, CGP and other commitments are optional extras that "do not define the merger," but "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 their commitments in "[m]easuring the merger's public interest benefits … mistakes the tail for the dog." *See id.*

That view—that UP/NS do not have to propose anything other than the merger itself to enhance competition—is a direct assault on the Major Merger 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.*, 5 S.T.B. at 551. On the other hand, the Board recognized that "additional consolidation in the industry is [ ] likely to result in a number of anticompetitive

effects, such as loss of geographic competition, that are increasingly difficult to remedy directly or proportionately." *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.*, 5 S.T.B. at 556; *Decision No. 35*, FD 36500, slip op. at 4, 27 ("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 Pac. Ry.—Control & Merger—Kan. City S.*, FD 36500, at 4 n.8 (Feb. 28, 2022) ("Professor Salop also shows that end-to-end transactions can produce anticompetitive effects for shippers.").

It was for these reasons that the Board anticipated that "competitive enhancements" "likely would be necessary . . . to offset a difficult-to-remedy loss of competition." *See Major Rail Consol. Procs.*, 5 S.T.B. at 556. In response, UP/NS suggest that the Board "rejected a requirement that merger proposals contain competition-enhancing conditions" in the Major Merger Rules. *See* UP-94/NS-93 at 22 (STB entered Aug. 26, 2026). But that badly misstates the regulatory record. When the Board stated it was not adopting a "presumption," it was referring to a presumption that "no future mergers would result in appreciable public benefits," "all future mergers would result in post-merger transitional service disruptions," and "all mergers would cause irremediable competitive harms." *Major Rail Consol. Procs.*, 5 S.T.B. at 550. At the same time, the Board was clear that "some new or enhanced

rail-to-rail competition" "is likely to be necessary to resolve substantial difficulties so as to tip the balance in favor of the public interest." *Id.* It was the "***amount*** of new or enhanced competition"—not the fact of such enhanced competition—that would depend on the specific merger under review. *See id.* (emphasis added).

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, Supp. p. 26. By UP/NS's logic, virtually ***every*** Class I merger would "enhance" competition because—by definition—it would increase integration or service in some vague sense. To be sure, those benefits can be weighed elsewhere in the Board's public-interest analysis, but they do not qualify as competitive enhancements within the meaning of the rules or analogous antitrust principles. *See* 49 C.F.R. § 1180.1(c); *Major Rail Consol. Procs.*, 5 S.T.B. at 547–48; *St. Alphonsus*, 778 F.3d at 791 ("It is not enough to show that the merger would allow St. Luke's to better serve patients. The Clayton Act focuses on competition, and the claimed efficiencies therefore must show that the prediction of anticompetitive effects from the prima facie case is inaccurate.").

UP/NS's position—that ***no*** competitive enhancements are needed apart from the merger itself—is a tacit admission that the merger does not enhance competition. Even so, it is unclear whether UP/NS's position is sincerely held or just a negotiating tactic. As UP's CEO has publicly stated in discussing competitive enhancements, "[if] you're playing poker, you don't put everything down before you see the last card or the third card coming out[,]" and "we'll reexamine" whether additional conditions or

enhancements are needed after the opposition and responsive application deadline pass. *See* Ex. 4, Union Pacific Corp. Q3 2026 Earnings Call Tr. at 28 (Oct. 22, 2026). UP/NS's strategy of tactical ambiguity and "letting the line out slowly" flagrantly misunderstands how the merger review process works. *See* Decision No. 37 at 5 (Kloster, Board Member, concurring). UP/NS "should come with their best case in the application filed to justify the merger . . . so that the Board can decide on its merits." *Id.* Neither the Board nor other stakeholders should "have to sift through vague language to try and figure out . . . what potential conditions could mitigate any harm." *Id.*

Yet even after receiving that feedback from one of the Board's members, UP's CEO was recalcitrant, telling investors he was "surprised at the comments that we got from one of the STB members," wondering aloud "if he used AI to summarize the 8,000 pages," and saying it is "up to [the Board] if they want to have" *ex parte* discussions to learn about the merger's purported benefits and other issues. *See* Ex. 4, Union Pacific Corp. Q3 2026 Earnings Call Tr. at 13, 28 (Oct. 22, 2026). That is wrong: it was up to UP/NS to prove the proposed merger furthers the public interest through its application, including by affirmatively proposing conditions to enhance competition—not by trying to negotiate deals or explain details on an *ex parte* basis out of public view. Because UP/NS failed to do so, the merger should be rejected.

D. The Enhanced-Competition Requirement Comports With the Statutory Public-Interest Criteria.

Perhaps recognizing that the merger does not enhance competition, UP/NS make a last-ditch argument that the Board lacks statutory authority to require Class

I railroads to enhance competition to satisfy the public-interest standard. *See* UP-94/NS-93 at 22 n.20. UP/NS claim that "Congress's specific instruction in 49 U.S.C. § 11324(b)(5) to focus on adverse competitive effects among rail carriers appears to preclude the Board from requiring applicants to enhance rail-to-rail competition to satisfy the public interest standard." *Id.* (emphasis omitted). That single-sentence footnote argument does not deserve serious consideration. It is true that 49 U.S.C. § 11324(b)(5) asks whether a proposed transaction "would have an adverse effect on competition among rail carriers." *See* 49 U.S.C. § 11324(b)(5). But that does not preclude a requirement of enhanced competition, either on its face or in its effect. The statutory public-interest criteria are non-exhaustive, meaning 49 U.S.C. § 11324 poses no textual bar to the Board's enhanced-competition requirement. *See id.* § 11324(b) ("[T]he Board shall consider ***at least*** . . . .") (emphasis added). But regardless, assessing whether a proposed merger enhances competition by expanding shipper access to other railroads fits comfortably with the statute's mandated consideration of "the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction." *See id.* § 11324(b)(2).

The enhanced-competition requirement also furthers the Board's consideration of "whether the proposed transaction would have an adverse effect on competition." *See id.* § 11324(b)(5). Because the Board's public-interest analysis starts from the premise that a merger eliminating shipper options is disfavored, *see* 49 C.F.R. § 1180.1(a), it makes sense to ask merging Class I railroads to propose some means

of expanding shipper access as part of their application. After all, to fully consider a transaction's competition effects, a decisionmaker must consider not just debits (*i.e.*, competition-harming elements of the transaction), but credits too (*i.e.*, competition-enhancing elements of the transaction).

This sort of balancing is a familiar feature of traditional antitrust law. For a presumptively disfavored transaction, merging parties must "demonstrate that efficiencies resulting from [a] merger would have a positive effect on competition." *See St. Alphonsus*, 778 F.3d at 792; *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1223 (11th Cir. 1991) ("[A] defendant who seeks to overcome a presumption that a proposed acquisition would substantially lessen competition must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers."); *Anthem*, 236 F. Supp. 3d at 252 ("There has been no showing made here that the claimed medical cost economies would enhance competition.").

UP/NS's refusal to include any meaningful proposal for fostering enhanced competition highlights why this merger should be rejected. Despite the clear importance the Major Merger Rules place on enhanced competition, UP/NS offered little, made cosmetic tweaks to the program in response to criticisms from the Board and stakeholders, and then ultimately insinuated that they should not even be required to enhance competition at all. This "Hail Mary" disregards the cornerstone of the Major Merger Rules, requires rejection of the proposed merger, and is emblematic of the way in which UP/NS treat statutory and regulatory requirements.

VI. THE PROPOSED MERGER WILL DEGRADE THE DOWNSTREAM COMPETITIVE ENVIRONMENT, FURTHER HARMING SHIPPERS.

Given the interlocking nature of the rail network, the Board "cannot evaluate the merits of a major transaction in isolation" and must assess "the cumulative impacts and crossover effects likely to occur as rival carriers react to the proposed combination." *See* 49 C.F.R. § 1180.1(i); *Major Rail Consol. Procs.*, 5 S.T.B. at 581. This entails an assessment of "the evolving structure of the industry that would likely result from" the merger, "the merits of such a structure[,]" and "how to deal with potential problems that structure could cause to service, efficiency, and competition." *See Major Rail Consol. Procs.*, 5 S.T.B. at 582.

In 2001, when the Board's rules were adopted, the Board's primary concern was that additional consolidation among Class I railroads would be "the first step in an end-game situation[,]" ultimately producing "two or three competing transcontinental carriers" in North America. *See id.* The record confirms that will not be the likely downstream result of this merger: as UP's CEO has acknowledged, {{ [redacted] }}" *See* Ex. 21, Vena Tr. 311:10–14; *see also* Ex. 93, CNBC, "*Buffett to CNBC: We won't be acquiring CSX, or any other railroad*," (Aug. 29, 2026) ("Buffett and Abel made clear at that point that they were not going to be making a bid for CSX, but they really thought there was a lot they could do to cooperate and work together, and come up with those same synergies that there would be even if the two companies were combined.").

The future competitive environment will, however, be permanently degraded in other ways. Today, UP and NS are incentivized to work with all available interline partners across all efficient gateways. But after the merger, they will have every financial incentive not to partner with BNSF and CSX to move traffic. Farmer VS ¶¶ 43–44, 88; Williams VS ¶¶ 14–23, 40, 71, 85; *id.* § VI.B; Morehouse VS § I. This will have significant consequences, especially for CSX. By foreclosing interline partnerships with CSX, UP/NS not only will rob CSX of additional traffic; they would shorten CSX's length of haul and reduce volumes that support CSX's network density, diminishing CSX's ability to invest in capacity and run trains as frequently. *See, e.g.*, Ex. 94, Dep. Ex. 534 at -313844 ({{ }}); *see also* Ex. 95, Dep. Ex. 128, Slide 11 ({{ }}); Ex. 96, Dep. Ex. 576 at -3353006 (UP discussing NS's desire to {{ }}); Ex. 97, Dep. Ex. 48 at Cells T179, T182 (discussing using {{ }}). This would permanently compromise one of UP/NS's competitors, creating permanent imbalance and misalignment in the freight rail industry. The merger will add a single dominant carrier on top of an already-concentrated structure, with other Class I carriers and shippers squeezed on all sides by the combined UP/NS. Farmer VS ¶¶ 43–44, 88; Williams VS ¶¶ 14–23, 40, 71, 95; *id.* § VI.B; *see also* Morehouse VS §§ IV.C, IV.D.

The distortive effects of the merger will be reinforced by UP/NS's failure to achieve rail-to-rail and truck-to-rail diversions. Although UP/NS's diversion synergies are pure fantasy, UP/NS's ability to exert leverage to achieve revenue targets is not. Internal UP documents confirm if UP/NS {{ [redacted] }}. *See* Ex. 98, Dep. Ex. 317. But crucially, {{ [redacted] }}," underscoring that every "miss" in volume growth will be made up in other ways—most likely, price. *See id.*; Ex. 34, McLaughlin Tr. 218:11–16.

This is exactly the opposite of what the Board's rules encourage: "[t]he Board's regulations aim to ensure applicants have no incentive to exaggerate their calculations of a merger's net public benefits." *See* Apr. 30, 2026 Am. App., Vol. 1 p. 391–92, Novak VS ¶ 48 (citing 49 C.F.R. § 1180.1(c)(1)). Based on experience with past mergers, the Board has recognized that "many of the benefits claimed by applicants … have been delayed[,]" and "the potential efficiency benefits of future large rail mergers may be more limited than in the past." *See Major Rail Consol. Procs.*, 5 S.T.B. at 560; *see also* 49 C.F.R. § 1180.1(c)(1) ("[T]he Board expects applicants to propose additional measures that the Board might take if the anticipated public benefits fail to materialize in a timely manner."). But UP/NS have made ***zero*** enforceable commitments to shippers or the Board about the level of benefits that shippers will enjoy, and their fail-safe for achieving revenue synergies—

extracting value by means other than transcontinental volume—will create a vicious cycle where only UP/NS financially benefit from the proposed merger.

VII. CONDITIONS CANNOT REMEDY THE HARMS FROM THE UP/NS MERGER, BUT ARE NEEDED IF THE MERGER IS APPROVED.

A. Conditions Cannot Address the Significant Harms Created by the UP/NS Merger, Particularly Given UP's Past Conduct.

No conditions could remedy the competitive and integration harms of the UP/NS merger. The Board has used conditions to address "the loss of [] competitive constraints in prior mergers," but it has also recognized that crafting appropriate conditions for future Class I mergers "would become increasingly difficult." *See Major Rail Consol. Procs.*, 5 S.T.B. at 554. This has serious consequences for any merger review: the purpose of a merger condition is to identify "which equitable remed[ies] would best promote competition"—that is, the remedies that would put a "structure in place to foster competition." *See Steves and Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 720–21 (4th Cir. 2021). By contrast, if decisionmakers "were required to choose the remedy least burdensome to the" merging parties, then "conduct remedies would be the norm because they generally burden" merging parties "less." *Id.*; *see also du Pont*, 366 U.S. at 327 ("If the remedy chosen is not effective, it will not be saved because an effective remedy would entail harsh consequences."); *ProMedica*, 749 F.3d at 573 (explaining that conduct remedies carry "usually greater long term costs" than "a structural solution"). The conduct-based commitments UP/NS have offered are exactly the kind of remedy these authorities caution against, and they cannot restore the competition this merger would eliminate.

It makes little sense to put conduct-governing conditions in the hands of UP/NS, the very entity with structural incentives to engage in anticompetitive conduct. Asking UP/NS to police their own conduct is like asking the fox to guard the henhouse. UP's track record underscores that conditions—even ones far more robust than the commitments they have offered here—would not constrain UP/NS in the post-merger world. The UP/SP merger is Exhibit A. That merger eliminated competition between two of the West's three largest railroads and was, at the time, "unprecedented in scope." *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp.* (Oversight Decision No. 10), 2 S.T.B. 703, 705 (1997). The Board approved it on conditions requiring UP to give BNSF access to 2-to-1 shippers over 4,000 miles of trackage rights, letting shippers elect BNSF service at new facilities, opening jointly funded infrastructure to BNSF, and dispatching BNSF trains on equal terms. *See* Farmer VS ¶ 52. For thirty years, UP has treated those conditions as obstacles to be circumvented, not commitments to be honored. *Id.* ¶¶ 51–54.

Through manipulation of the election process, delay-and-deny tactics, misuse of jointly funded infrastructure, and unequal dispatching, UP has degraded the very competition the conditions were meant to preserve. *Id.* ¶¶ 52–53. The Board has had to resolve more than a dozen disputes and has noted the recent uptick in enforcement requests. *BNSF Ry. Co.—Pet. for Rev.—UP/SP Merger Conditions*, FD 32760 (Sub-No. 52), slip op. at 4 (STB served May 26, 2026); *see also* Farmer VS ¶ 53. Many more never reach the Board, because customers abandon competitive BNSF service before relief arrives. Farmer VS ¶ 53. UP's internal documents confirm that its employees

are rewarded for keeping customers from BNSF. UP's own trackage rights strategy calls for {{ [redacted] }} as UP's Senior Vice President for Administration confirmed. Ex. 99, Dep. Ex. 443, UP_1544866 at -867; Ex. 100, Oct. 14, 2026 Dep. of Rebecca Gregory ("Gregory Tr.") 172:12–175:19.

The examples are concrete. UP promised Lake Charles customers BNSF access in 1996 without ever seeking consent from its Rosebluff Lead co-owner, KCS, forcing BNSF into a thirteen-year terminal trackage rights fight that is now on appeal; as the Board found, "UP is most responsible for creating the unique controversy." *BNSF Ry.—Terminal Trackage Rts.—Kan. City S. Ry. & Union Pac. R.R.* (Decision No. 16), FD 32760 (Sub-No. 46), slip op. at 56 (STB served July 21, 2026); *see also id.* at 59; *BNSF Ry.—Terminal Trackage Rts.—Kan. City S. Ry. & Union Pac. R.R.* (Decision No. 3), FD 32760 (Sub-No. 46), slip op. at 3, 11–13 (STB served July 5, 2016). At Elmendorf, Texas, UP tried to reclassify track to wall off a new industrial park from BNSF, and the Board rejected changes "wholly within UP's control." *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp.* (Decision No. 109), FD 32760, slip op. at 11 (STB served Jan. 31, 2018). In Tooele, Utah, UP kept one mile of track to block BNSF and celebrated internally. *See* BNSF Rebuttal, *BNSF Ry. Co.—Pet. for Enforcement—Interchange with Savage Tooele R.R. Co.*, FD 32760 (Sub-No. 50), at 14 (filed June 11, 2026). And in Salt Lake City, UP claimed days before BNSF's new intermodal service launched that it could not crew a single train—

until BNSF sought emergency relief. *BNSF Ry. Co.—Emergency Pet. for Enforcement—Interchange With Salt Lake Garfield & W. Ry.*, FD 32760 (Sub-No. 51) (filed July 7, 2025).

Where UP cannot block access, it prices rivals out. *See* Farmer VS ¶ 52. {{ [redacted] "}} Ex. 99, Dep. Ex. 443, UP_1544866 at -867; *see also* Ex. 100, Gregory Tr. at 173:24–174:19 ({{ [redacted] }}). On the Kern-Mojave Line, UP asked the Board to raise BNSF's annual rent from roughly {{ [redacted] }} to {{ [redacted] }}—{{ [redacted] }} market-based rates. *See* Petition to Reopen, *Atchison, Topeka & Santa Fe Ry.—Operating Rights—S. Pac. Transp. Co.*, FD 22218 (filed Jan. 6, 2023); BNSF Final Br. at 2, FD 22218 (filed Apr. 15, 2025) (Filing ID 309468) (UP's proposal is 36 times the current rental and 22 times BNSF's proposal). UP's CEO has told investors that if competitors receive trackage rights in this merger, he would simply raise the rates. Ex. 101, Union Pacific, Morgan Stanley Conference Presentation, at 11, 25 (Sept. 16, 2026) (remarks of Mr. Vena), *reproduced in* CPKC-64 at 4–5 n.13 & Ex. U (STB entered Oct. 30, 2026) ("The idea to give up tracks of your railroad for no reason at all just goes against the fundamental principle of how business should work . . . . If we allowed X railroad to run on our railroad for 800 mi, we would charge them a per car mile charge that actually would make it more expensive for them to get to that destination. I have thought about just about agreeing. Because guess what? We would just reset the

price higher for us."). Yet UP refuses to pay BNSF the same $100-per-train-mile detour rate UP charges BNSF. BNSF Pet. for Damages ¶¶ 4–7, *BNSF Ry. Co. v. Union Pac. R.R. Co.*, No. 2616-CV03364 (Cir. Ct. Jackson Cnty., Mo. filed Jan. 30, 2026). A railroad that treats its existing commitments this way will treat a vague promise of "commercially reasonable" gateway rates no differently. *See* Farmer VS ¶¶ 45, 54.

B. If the UP/NS Merger Is Approved, the Board Should Attempt to Mitigate Anticompetitive Effects as Much as Possible.

BNSF's position is straightforward: the Board should reject the proposed merger. As set out above, UP/NS's application is not in the public interest. The transaction would leave a monopoly-concentrated rail industry, with the combined carrier holding roughly half of all Class I shipments originating in the United States and an even larger share in particular commodity markets. It would raise prices on shippers for several independent reasons. It would shift traffic in ways that harm shippers and competition, and it would leave the national network less resilient and prone to cascading operational failures.

Against those harms, UP/NS offer overstated benefits that mostly will not manifest. Most of the benefits could be achieved without a merger. And the transaction does not meet the Board's requirement that a Class I merger ***enhance*** competition. Instead, it would destroy competition, increase the number of captive shippers, raise rates, and degrade interline service across the country. These deficiencies go to the heart of the transaction, and no set of conditions can fully cure them.

The conditions discussed below therefore do not reflect any view that the merger can be approved if properly conditioned. Indeed, they show the opposite. The scale and breadth of the merger harms determine the scale and breadth of the conditions any approval would require. Therefore, any remedy package proposed by UP/NS or other parties must (i) permanently eliminate or offset the competitive harm the transaction creates and (ii) enhance competition. The harms this transaction would cause reach every corner of the combined network: transcontinental gateways, intermodal corridors, captive shipper regions, shared terminal infrastructure, and industry-wide joint ventures. So, the remedies must reach just as far.

UP/NS fail to recognize the harms identified by BNSF and other parties, and UP/NS's proposed conditions do very little to address those harms and nothing to enhance competition. Their CGP mechanism is *de minimis* in scope and structured to ensure that increased pricing prevails on both the traffic it applies to and the traffic from which CGP rates are calculated. The Open Gateway Commitment UP/NS propose is the very same proposal UP itself harangued in the CP/KCS merger as being "illusory" and impossible to enforce.

The conditions that BNSF proposes in the event that the Board permits the proposed transaction to proceed can be sorted broadly into two categories: (i) system-wide or "global" conditions that address harms reaching across the entire combined network, and (ii) targeted conditions addressing specific geographic regions and gateways where the merger's harms would be particularly acute or where the global conditions are not sufficient to address the harms. Each is discussed in turn below.

Interline Preservation Mechanism. The first global condition would keep gateways open by requiring UP/NS to establish a permanent, interline-equivalent haulage program. The program would use standardized proportional rates and include nondiscriminatory service obligations, equipment supply protections, performance standards, and oversight by an independent compliance monitor. This mechanism would allow other Class I carriers to continue quoting end-to-end rates through all gateways, including Chicago, Memphis, New Orleans, St. Louis, and Kansas City, and where the merged carrier would otherwise have the ability to extend its length of haul and foreclose interline competition. This condition is conceptually similar to UP/NS's CGP proposal, except that it does not have the exclusions and limitations of that proposal and actually replicates the UP-BNSF I-5 agreement that even UP and its experts in this matter describe as working well.

Open Access. The second global condition would create a permanent switching right for shippers at qualifying UP/NS solely-served facilities for a cost-based fee. It would require UP/NS to provide switching service at levels comparable to its own linehaul operations and would permit competing carriers to quote rates directly to shippers. It would be enforced through reporting requirements, common-carrier service obligations, and a compliance monitor. Open access is designed to ensure that the merged carrier's ability to exploit market power over captive shippers is no greater than, and ideally less than, UP's market power today. This proposal is structurally similar to the switching that occurs today in Canada, a market that, as UP/NS repeatedly have noted, includes current transcontinental service.

TTX. BNSF requests a condition addressing TTX, the industry's jointly owned railcar pooling company. The merger would give UP/NS 56.81 percent of TTX. UP/NS's offer to reduce that stake to 49 percent would still leave UP/NS as TTX's dominant owner, able to steer its affairs to the disadvantage of competing railroads and their customers, while shifting the cost of the remedy onto other railroads. BNSF requests that, before consummation, TTX's bylaws be amended to require a two-thirds supermajority vote to approve actions by the board of directors.

Pennsylvania Intermodal. Today, BNSF and NS jointly move intermodal traffic between BNSF-served western markets and Pennsylvania through an efficient Chicago interchange. After the merger, UP/NS would have the ability and incentive to make BNSF uncompetitive for these important intermodal movements on both pricing and service. To preserve a competitive alternative, BNSF requests trackage rights on certain NS lines between Chicago and Pennsylvania. BNSF also requests that the Board order UP/NS to provide BNSF with access to and use of key NS intermodal facilities in Pennsylvania, as those facilities may expand, change, or be modified in the future; and order UP/NS to provide haulage service for BNSF traffic moving on the subject NS lines for the period of time necessary to allow BNSF to establish its own service and commence operations consistent with customer needs. These requests are collectively referred to herein as the "Pennsylvania Intermodal Condition."

Gulf Coast. Many Gulf Coast shippers, from Corpus Christi to the Mississippi River, already depend on UP without competitive rail alternatives and pay higher

rates as a result. The merger would make this worse. It would eliminate the CSX–NS competition these shippers rely on today for eastern movements and allow UP to use its increased market power and bundling practices to impose even higher rates. BNSF requests that UP be required to present for Board approval a transaction that would create a neutral, jointly owned terminal or switching railroad. That railroad would serve covered facilities and hand traffic to UP and BNSF on equal terms, with independent dispatching parity. BNSF is willing to open its own solely-served Gulf Coast facilities reciprocally.

New Orleans. After the merger, UP/NS would control dispatching through the New Orleans Gateway and would have no incentive to move other railroads' traffic efficiently. BNSF requests neutral dispatching across the Back Belt and the Huey P. Long Bridge, together with Board-ordered operating procedures, enhanced reporting requirements, and defined escalation mechanisms if dwell and transit times do not improve.

Memphis. Existing infrastructure in Memphis does not allow efficient east–west interchange between BNSF and CSX. BNSF will construct a new crossover connecting BNSF and CSX in downtown Memphis. After the merger, this efficient connection would be critical to maintaining the competitiveness of the Memphis gateway. BNSF requests that the Board override, as necessary, the provisions of a 1965 agreement with UP that could otherwise be used to block this project.

TRRA and KCT. The combined UP/NS would hold 57 percent of the Terminal Railroad Association of St. Louis ("TRRA") and 50 percent of the Kansas City

Terminal Railway ("KCT"), two terminal railroads collectively owned by several Class I railroads, giving UP/NS control of both. BNSF does not oppose CN's anticipated acquisition of NS's interests in TRRA and KCT, which would keep ownership levels of the combined carrier below 50 percent in each railroad. But because that deal remains uncertain, BNSF asks the Board to require 30-day status updates and, if the acquisition does not close within 90 days of approval, to order UP/NS to divest enough of their interests to prevent them from controlling either railroad.

Each of these conditions is tied directly to harm the transaction would cause, and each is necessary to preserve any semblance of the competitive options that shippers have today.

The nature of the conditions needed makes a further point. If the Board does not reject the merger, it will be in the never-ending business of policing it. Each of the conditions BNSF requests needs ongoing oversight to work: service benchmarks, non-discrimination requirements, reporting obligations, compliance monitors, expedited dispute resolution, and escalation mechanisms. These are not one-time fixes that will sit on a shelf in a marketing manager's office. They are permanent regulatory structures, built to restrain a merged carrier that would have both the ability and the incentive to disadvantage its competitors at every turn.

A transaction that requires this much continuing supervision just to approximate today's competitive conditions does not serve the public interest. If the Board nonetheless approves the merger, however, it must impose conditions that match the full scope of the harms the transaction would cause.

1. Legal Standard for Conditions

Under 49 U.S.C. § 11324(c), the Board has broad authority to place conditions on the approval of major mergers. In deciding whether to impose conditions, the Board's overriding concern is the public interest. *Union Pac. Corp.—Control—Mo. Pac. Corp. (UP/MP)*, 366 I.C.C. 462, 562 (1982). The Board imposes conditions where "it finds that the merger produces effects harmful to the public interest (such as a significant loss of competition) that a condition will ameliorate or eliminate." *Canadian Pac. Ry.—Control—Kan. City S. (CP/KCS Decision No. 13)*, FD 36500, slip op. at 4 (STB served Feb. 18, 2022) (*citing Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP Decision No. 44)*, 1 S.T.B. 233, 418 (1996)). Put simply, "[i]f a proposed condition will lessen or eliminate such harm, if it is operationally feasible, and if it will produce public benefits, [the Board] will impose it." *Burlington N. Inc.—Control & Merger—Santa Fe Pac. Corp. (BN/SF Decision No. 38)*, 10 I.C.C.2d 661, 774 (1995); *see* 49 C.F.R. § 1180.1(d); *see also UP/SP Decision No. 44*, 1 S.T.B. at 418; *Canadian Nat'l Ry.—Control—Ill. Cent. Corp. (CN/IC Decision No. 37)*, 4 S.T.B. 122, 141 (1999); *UP/MP*, 366 I.C.C. at 565.

The nexus between the merger and the harm for which the proposed condition would act as a remedy can be found not only in harms the merger creates outright, but also in harms it exacerbates. *UP/SP Decision No. 44*, 1 S.T.B. at 461; *BN/SF Decision No. 38*, 10 I.C.C.2d at 776 (finding an "exacerbated effect provides a sufficient nexus"). And under the Board's current rules, conditions are not limited to restoring the pre-merger status quo: the Board "will condition the approval of Class

I combinations to mitigate *or* ***offset*** harm to the public interest." 49 C.F.R. § 1180.1(d) (emphasis added).

The Board's major merger rules also expressly contemplate conditions that enhance competition. The Board recognized that major mergers "would likely create some anticompetitive effects that would be difficult to mitigate through appropriate conditions," and therefore requires conditions "that would not simply preserve but also enhance competition . . . in ways that strengthen and sustain the rail network as a whole." *Id.*

As the Board already explained in this proceeding, the Major Merger Rules that apply here "place[] greater emphasis in the public interest assessment on enhancing competition while ensuring a stable and balanced rail transportation system," in part because "it is increasingly difficult to remedy certain competitive harms directly and proportionately." *Decision No. 21*, FD 36873, slip op. at 4 n.4, 18–19 (STB served May 28, 2026) (quoting *Major Rail Consol. Procs.*, 5 S.T.B. 539, 546, 554 (2001)). "[O]ffering some new or enhanced rail-to-rail competition or other competitive benefits is likely to be necessary to resolve substantial difficulties so as to tip the balance in favor of the public interest," through such techniques as "the granting of trackage rights, the establishment of shared or joint access areas, the removal of 'paper' and 'steel' barriers, and other techniques that would enhance railroad-to-railroad competition." *Id.* at 19–20 (quoting *Major Rail Consol. Procs.*, 5 S.T.B. at 550, 554). "Thus, the Board's rules highlight the importance of competition-enhancing conditions." *Id.* at 20 (citing 49 C.F.R. §§ 1180.1(a), (c)–(d), 1180.6(b)(10)–

(11)). Because conditions serve the public-interest standard, and that standard now demands enhanced competition, a condition that enhances competition to offset merger harms that cannot otherwise be mitigated is itself remedial and well within the Board's § 11324(c) authority. *See* 49 C.F.R. § 1180.1(c)(2)(iv).

The breadth of the Board's conditioning authority is illustrated by the Board's power to impose conditions over the objections of the applicants and to override private arrangements that would frustrate a remedy. For example, in *BN/SF*, the agency directed the applicants and a settling carrier to strike a compensation provision from their private settlement agreement because "unduly high rentals could undermine the efficacy of a trackage rights remedy that we think is essential to our approval of this merger." *BN/SF Decision No. 38*, 10 I.C.C.2d at 774. In *CN/IC*, the Board ordered the applicants to "modify the CN/KCS Access Agreement to grant KCS access" to additional chemical shippers at Geismar, Louisiana. *CN/IC Decision No. 37*, 4 S.T.B. at 187. And once a transaction is approved, the statutory immunity of 49 U.S.C. § 11321(a) "is not limited to the financial and corporate aspects of the merger, but reaches all changes that logically flow from that transaction." *BN/SF Decision No. 38*, 10 I.C.C.2d at 761.

UP/NS will no doubt characterize BNSF's requested conditions as an effort to protect a competitor rather than competition. That framing misses the point. The Board's concern is the preservation of competition for the benefit of shippers. In rail markets, competing carriers are the means by which that competition reaches its customers. A shipper has a competitive choice only if a second railroad can actually

reach it, quote a rate, and provide service on a level playing field. Each condition BNSF proposes is directed to that end. None guarantees BNSF any traffic or revenue; each preserves the ability of an independent carrier to compete for the shipper's business on the merits, so that the shipper, not the merged carrier, decides which railroad wins it. These types of conditions are how the Board has long preserved structural competition when it approves a transaction that would otherwise eliminate it.

As a condition of approving any major merger, the Board will establish a formal oversight process, requiring applicants to demonstrate "that the merger conditions imposed by the Board are working as intended." 49 C.F.R. § 1180.1(g) (requiring a period of "at least the first 5 years following approval"). Most recently, in *CP/KCS* the Board established an "unprecedented seven-year oversight period along with extensive data-reporting requirements"—confirming that oversight can and should exceed the five-year floor where the scale of the transaction warrants. *Decision No. 35*, FD 36500, slip op. at 5 (STB served Mar. 15, 2023).

2. BNSF's Request for Conditions

a. *Global Conditions*

BNSF requests three system-wide or "global" conditions that address the extensive harms created by the proposed merger. The first global condition would keep gateways open by requiring UP/NS to establish a permanent, interline-equivalent haulage program with transparent rate setting and meaningful enforcement, to be used by all Class I railroads connecting to the merged UP/NS. The second global condition would create a permanent open access switching right for

shippers at qualifying UP/NS solely-served facilities at a cost-based fee. The third global condition would require that TTX's bylaws be amended to require a two-thirds supermajority vote to approve actions by the board of directors.

Consistent with the Board's broad authority to protect the public interest, the Board should adopt these conditions, to ameliorate the "effects harmful to the public interest (such as a significant loss of competition)." *Decision No. 13*, FD 36500, slip op. at 4 (citing *UP/SP*, 1 S.T.B. at 418). As explained below, the BNSF proposed global conditions will produce public benefits and are operationally feasible and should be adopted. *BN/SF Decision No. 38*, 10 I.C.C.2d at 774; *see* 49 C.F.R. § 1180.1(d); *CN/IC Decision No. 37*, 4 S.T.B. at 141.

i. The Board Should Condition Any Approval of the UP/NS Merger on a Transparent, Enforceable, and Effective Gateway Preservation Mechanism.

Today, NS has strong commercial incentives to cooperate with BNSF and other railroads in competing for traffic moving between their respective networks, as does UP with CSX. That competitive dynamic benefits shippers by preserving routing alternatives, constraining rates, and encouraging service innovation. Once NS becomes part of a combined UP/NS system, however, those incentives will disappear. The merged carrier will have a natural incentive to retain traffic on its own network whenever possible and to favor its single-line service over interchange movements involving competing railroads. Carlton VS ¶ 94.

UP/NS have suggested that gateway competition can be preserved through commitments to maintain open gateways based on the conditions entered in the CP/KCS transaction. Apr. 30, 2026 Am. App., Vol. 1 p. 91. Such commitments,

however, are insufficient to protect competition because the merged railroad can use pricing, service levels, equipment allocation, or interchange practices to make competing routes commercially unattractive. Physical access to a gateway alone does not ensure meaningful competition. A gateway may remain technically open while interline traffic is effectively displaced through unfavorable rates or degraded service. *See* Williams VS ¶¶ 20, 47, 59–62, 83, 85.

UP itself made these points the centerpiece of its opposition to the CP/KCS merger a few years ago. UP contended that the commitment offered in the CP/KCS transaction was incapable of meaningful enforcement, because the applicants offered no objective definition of "commercially reasonable," provided no metrics or standards for measuring compliance, and effectively asked shippers and regulators to rely on CPKC's "good faith." *See* UP Comments and Request for Conditions, *Canadian Pac. Ry.—Control & Merger—Kan. City S.*, FD 36500, at 8–9 (Feb. 28, 2022). In UP's words, such a promise was "worthless." *Id.* at 69–70.

But UP has conveniently forgotten those statements here, now asserting that the CP/KCS open gateway commitments are sufficient to restrain a behemoth transcontinental railroad with strong incentives and ability to foreclose traffic. The Board should be deeply skeptical of this expedient about-face from UP. It should also look at the actual facts arising from the CP/KCS combination, which show that open gateway commitments reliant on vague "commercially reasonable" requirements are not effectual. Williams VS ¶¶ 59–62. It is therefore clear that the Board should not rely on generalized gateway-opening commitments. Instead, it should require a

permanent, Board-supervised interline preservation mechanism ("IPM") that preserves the same competitive opportunities that exist today.

The proposed IPM would establish a permanent interline-equivalent haulage program modeled on the successful I-5 Agreement framework that has long preserved route competition between BNSF and UP. Under this program, all Class I railroads connecting to UP/NS would have the ability to quote competitive through-rates to NS-served customers and interchange points using objective, standardized proportional rates derived from the merged railroad's own traffic data. The condition would also require UP to provide service, equipment access, interchange performance, and operational cooperation on terms that are at least as favorable as those historically available before the merger. Independent oversight by a Board-approved compliance monitor would ensure that the program remains effective and that violations are addressed promptly. The purpose of the IPM is straightforward: to ensure that the merger does not eliminate the routing options that currently support effective competition between BNSF and UP.

ii. The proposed merger creates significant risks to gateway competition.

The merger would fundamentally alter the incentives that currently govern routing decisions and competitive interactions between the railroads. Hill VS § 7. Today, NS benefits when it cooperates with BNSF to attract traffic that neither carrier could efficiently serve alone. Following the merger, however, the combined UP/NS system would capture a greater share of revenue by retaining traffic entirely on its own network. As a result, the merged railroad would have strong incentives to

favor single-line movements and diminish the attractiveness of interline routes involving BNSF. *Id.*

These concerns are particularly acute at major interchange gateways. Even if gateways remain nominally open, the merged carrier would be incentivized to influence freight flows by adjusting rates, reducing service quality, limiting equipment availability, or adopting interchange practices that make competing routes less attractive. Such actions would gradually erode competition without formally closing any gateway. Morehouse VS §§ I, V.A. The Board therefore cannot assume that gateway access alone will preserve existing competitive conditions. Rather, the Board must adopt enforceable mechanisms that maintain the commercial viability of competing interline routes.

(A) UP/NS's proposed gateway conditions are inadequate.

UP/NS propose to rely principally on the gateway protections adopted in the CP/KCS merger proceeding. UP/NS have also proposed CGP, a proportional rate mechanism for some gateway rates. Neither proposal is adequate for the reasons discussed below.

The CP/KCS commitments are clearly inadequate for the present transaction for several reasons. The size and scope of this transaction dwarf the CP/KCS merger and, if approved, will fundamentally alter the structure of the railroad industry in the United States. Further, the proposed commitment to maintain gateways on "commercially reasonable" terms lacks objective standards and provides no

meaningful benchmark by which compliance can be measured. The proposed conditions are not transparent and cannot be meaningfully enforced.

The CP/KCS transaction was much smaller than the proposed UP/NS combination, raised far fewer competitive concerns, and was considered under the old, more permissive merger rules. In contrast and in UP/NS's own words, the proposed merger is "unprecedented" and would "transform the U.S. supply chain." *See* Notice of Intent to File Application for Approval of Transaction Subject to 49 U.S.C. §§ 11323–25 at 2 (STB filed July 30, 2025). Even if the CP/KCS conditions were effective remedies for the harms caused by that transaction, and they were not, they are wholly insufficient for a transaction on the scope of UP/NS.

UP/NS's voluntary condition is not transparent. UP/NS do not define what constitutes a commercially reasonable gateway rate, establish any formula for determining compliance, or offer any rate ceilings or objective limitations on their discretion. As a result, customers would have no reliable way to determine whether gateway rates are reasonable, arbitrators would lack clear standards for resolving disputes, and the Board would face substantial difficulties in enforcing the commitment.

The inadequacy of the proposal is compounded by the fact that UP/NS do not clearly articulate the mechanics of their commitment. Interested parties must trace the proposal through the Board's prior decision and related pleadings in the CP/KCS proceeding in order to understand its contours. Even then, the commitment ultimately rests on broad concepts rather than concrete obligations. Such an

approach may have been adopted in another proceeding under different circumstances, but it is not sufficient to address the competitive implications of a transcontinental UP/NS merger.

In addition to the CP/KCS condition, UP/NS tout CGP as a competitive enhancement that creates a proportional rate mechanism for certain traffic at some gateways. As explained above, however, CGP does not enhance competition. It also fails to preserve open gateways. CGP is very narrow, time limited, and designed to game the outcomes for UP/NS. CGP sets rates at the high end of very broad groups of traffic which has the effect of immediately pricing out of the market most of the small fraction of traffic CGP covers. *See* Williams VS § V.C; *see also* National Grain and Feed Association, Comments on Completeness of Application at 5 (STB filed Dec. 21, 2025); National Grain and Feed Association, Comments on Applicants' Second Response to Decision 21 at 3–4 (STB filed August 13, 2026); Joint Shippers Association, Motion for Summary Denial at 42–43 (Aug. 6, 2026).

UP/NS's voluntary conditions only address the obligation for the merged carrier to quote rates and put the burden on customers to seek rate relief. They will not prevent the merged railroad from discouraging interline service through pricing decisions and do not in any way address the incentives for the merged carrier to discourage interline traffic through service degradation, equipment restrictions, or unfavorable interchange practices. As discussed above, UP has repeatedly and directly undermined the conditions that made their last transformational merger possible. There is every reason to expect that they would do the same here, if the

Board left compliance with ambiguous commitments in their hands. Consequently, the Board should reject reliance on vague commercial-reasonableness concepts and instead adopt a comprehensive, self-executing interline-preservation mechanism.

iii. The Board should require an interline preservation mechanism similar to the I-5 Agreement.

A permanent interline preservation mechanism offers a more effective and enforceable solution. BNSF is proposing an IPM that would preserve meaningful interline competition by allowing Class I railroads that connect to UP/NS to continue competing for traffic moving to and from locations presently served by UP or NS. In practical terms, the condition would replicate the competitive incentives and routing alternatives that exist today, while still allowing the merged railroad to realize legitimate merger efficiencies.

The BNSF-proposed IPM is in line with UP's position just a few years ago in the CP/KCS transaction. In its comments opposing that merger and requesting conditions, UP argued that CP and KCS's commitment to keep gateways open on "commercially reasonable" terms was effectively worthless because it provided no concrete or enforceable standard for determining whether gateway access was actually being preserved. UP Comments and Request for Conditions, *Canadian Pac. Ry.—Control & Merger—Kan. City S.*, FD 36500, at 69–71 (Feb. 28, 2022). UP emphasized that the applicants themselves could offer no objective definition of "commercially reasonable," and admitted there were "no set metrics" and "no ruler" by which compliance could be measured. *Id.* According to UP, a gateway can remain physically open while being commercially foreclosed through excessive rates or

degraded service, making unenforceable promises little more than an appeal to CPKC's "good faith." *Id.*

For that reason, UP contended that the Board should not rely on vague assurances but should instead impose a concrete prorate condition requiring CPKC to provide Rule 11 gateway rates based on a mileage-based allocation of its single-line rates, thereby giving shippers a clear, objective benchmark that could be readily verified and enforced while preserving genuine competitive access to affected gateways, particularly at the Laredo US/Mexico border crossing.

The BNSF IPM proposal is modeled on the I-5 Agreement, a proven framework that has successfully preserved route competition between BNSF and UP for many years. For its part, UP says that its CGP scheme is similar to the I-5 program, but there are obvious and significant differences between CGP and the I-5 Agreement. As discussed at length above, CGP is temporary and excludes huge swaths of traffic, including intermodal traffic. CGP's arbitrary reliance on rates set at the 70th-percentile of benchmark rates rather than the simple average like the I-5 Agreement gives the game away: create a condition that looks like it addresses a competitive problem but in a way that allows UP to charge customers more.

Unlike UP/NS's gateway proposal, the BNSF IPM proposal is objective, transparent, and self-executing. It establishes clear pricing rules, predictable operating obligations, and independent oversight mechanisms. The IPM would apply to ***all*** traffic that Class I railroads can interline with UP or NS today (unless there is a strong competing option totally independent of UP/NS) and sets haulage rates

based on what UP/NS is charging in the specific markets where a Class I railroad would be trying to compete against them in the future. Rather than depending on case-by-case litigation after competitive harm has occurred, the IPM provides advance safeguards that preserve competition from the outset.

Scope of the Program. The IPM would apply to traffic moving between merged-UP/NS-served origins/destinations and other Class I railroads where there is no practical routing alternative that avoids the merged UP/NS carrier. The condition would cover the full range of UP/NS-served facilities, including manufacturing facilities, storage facilities, transload facilities, automobile ramps, intermodal terminals, port facilities, team tracks, and future facilities developed after merger consummation. The program would also apply to facilities served through short-line railroads, locations where UP/NS possesses rate-making authority, and locations that effectively connect to the national rail network only through UP/NS.

The condition would further preserve competitive access through all interchange gateways, including the major interchange points of Chicago, Memphis, New Orleans, St. Louis, Kansas City, and Birmingham. It would also permit movements through qualifying short-line bridge routes and permit the other Class I railroads including BNSF to select qualifying interchange points at its discretion. This flexibility is critical because it ensures that routing options remain commercially viable and are not constrained by the merged carrier's preferences.

Proportional Rate Methodology. A central feature of the IPM is the creation of a proportional-rate matrix that would be established before consummation

of the merger and updated quarterly. The matrix would provide standardized rate factors applicable to qualifying traffic and could be used in contracts, common-carrier rates, letter quotes, and other pricing arrangements. Importantly, the same rate structure would apply regardless of the interchange point selected, allowing BNSF to compete on equal footing across the network.

The rate factors would be calculated using objective data drawn from the merged carrier's own operations. Specifically, the factors would reflect the arithmetic average revenue per net ton-mile for comparable UP and NS traffic moving between the legacy systems, subject to a two-quarter reporting lag. UP/NS moves including short lines will be treated as single line moves, but revenues paid to short lines and miles travelling on short lines will be excluded from the prop rate calculation. Comparable traffic would be grouped using criteria such as commodity type at the three-digit STCC level, car type, car ownership, shipment size (including unit train shipments), directional movement, and geographic region.[13] Where traffic volumes are insufficient to create reliable data, broader commodity or geographic categories would be used. Mileage and weight calculations would be standardized, and revenues would exclude fuel surcharges, rebates, and refunds.

To facilitate a smooth transition and preserve existing commercial relationships, the program would include a five-year transition period. During that

[13] The initial matrix would relax three-digit to two-digit STCC and freight territory geography criteria as needed to ensure all cells are populated. When there are no comparable shipments in a cell in a future period, prop rates would be adjusted by quarterly changes in average revenue per ton-mile for a given three-digit STCC.

period, competing carriers could elect to rely on inflation-adjusted historical rates or divisions derived from recent pre-merger commercial arrangements rather than immediately transitioning to the matrix methodology. This approach would provide continuity while allowing the long-term structure of the program to become established.

Service Obligations and Operational Protections. Rate protections alone are insufficient if service quality is allowed to deteriorate. Accordingly, the IPM would require the merged railroad to provide service that is at least as good as the historical service provided for BNSF-NS interline traffic prior to the merger. Performance would be measured using objective metrics, including train frequency, transit times, on-time performance, interchange dwell, and adherence to required blocking arrangements. *See generally Updating Class I Rail Carrier Reporting Requirements*, EP 787 (STB served May 8, 2026).

The merged carrier would also be required to cooperate fully in moving proportional-rate traffic. It would be obligated to establish necessary blocks, support efficient interchange operations, and avoid practices that disadvantage IPM traffic. Equipment allocation would be subject to strict nondiscrimination requirements. UP/NS would be required to furnish railcars on the same basis as other traffic, and customers would not be required to identify proportional-rate shipments when requesting equipment. Similarly, UP/NS would be required to accept equipment from other Class I railroads at qualifying interchange points under standardized rules governing car hire and mileage allowances.

Administration and Compliance Monitoring. To ensure efficient administration, all IPM traffic would move under a uniform Board-approved agreement containing standardized operating, commercial, and liability terms. Monthly settlement procedures would simplify billing and payment obligations while reducing transactional complexity.

To ensure timely enforcement, the Board should establish an independent compliance monitor funded by UP/NS. A formal litigation pathway for enforcement that relies on customers making formal filings at the Board can too easily be frustrated by UP's litigation tactics, as demonstrated above in connection with enforcement of the UP/SP merger conditions. The monitor would oversee implementation of the program, review pricing compliance, evaluate service performance, investigate allegations of discrimination, and resolve disputes on an expedited basis. The monitor should also have authority to order corrective action and impose financial penalties for service failures, switching delays, and other violations of the condition. Parties dissatisfied with the monitor's decisions would retain the right to seek Board review. This oversight structure would provide a practical and efficient method for ensuring that the condition remains effective over time and that the competitive protections promised by the Board are realized in practice.

The IPM satisfies the Board's standards for imposing conditions set forth above. *See UP/SP Decision No. 44*, 1 S.T.B. at 418; *CP/KCS Decision No. 13*, FD 36500, slip op. at 4; *BN/SF Decision No. 38*, 10 I.C.C.2d at 774. First, it addresses a

harm created by the merger: the loss of UP's and NS's independent incentives to cooperate with BNSF and other carriers in interline service, and the resulting ability of the combined carrier to foreclose competing routes through pricing, service, and equipment practices. Second, it is operationally feasible: it is modeled on the I-5 Agreement, a proportional-rate framework that BNSF and UP have administered successfully for years. Third, it would produce net public benefits by preserving the routing alternatives, rate discipline, and service incentives that shippers enjoy today.

3. The Board Should Condition Any Approval of the UP/NS Merger on a Comprehensive Open Access Regime for the Merged Transcontinental Railroad.

BNSF also proposes that the Board impose an "open access" condition on UP/NS. BNSF proposes this condition as a targeted response to the unique competitive risks created by the proposed UP/NS merger. The geographic, bargaining, and vertical foreclosure harms from the proposed transaction would be massive, and this condition will address those harms, at least in part. Throughout this proceeding, shippers, receivers, and trade associations have identified a series of harms that result from combining UP and NS into a single transcontinental carrier. Customers have warned that the transaction would substantially increase the concentration of captive traffic, give the merged carrier enhanced ability to bundle competitive and noncompetitive movements, increase leverage over routing and gateway decisions, and leave many shippers more vulnerable to retaliation or other exercises of market power. The BNSF open access condition would address those concerns, to a degree.

The UP/NS merger presents precisely the type of competitive concerns that the Board anticipated when it adopted its Major Merger Rules in 2001. Those rules reflected the Board's recognition that the North American rail industry had already undergone substantial consolidation and that future mergers would occur in an environment characterized by increased concentration and fewer remaining competitive constraints.

As a result, the Board concluded that future merger applicants could no longer rely primarily on traditional efficiency claims and cost savings as justification for major consolidations. *See supra* Legal Standard. The Board determined that many of the excess capacities and operational redundancies that had justified earlier railroad mergers had already been eliminated. Consequently, the benefits of additional consolidation had diminished, while the competitive risks had increased. Recognizing this reality, the Board revised its merger policies to elevate competition to a central public-interest objective. The Board specifically emphasized that future transactions should not merely avoid competitive harm but would require affirmative measures that counteract harms that may be difficult or impossible to remedy once a merger has been consummated.

Among the affirmative measures specifically contemplated by the Board were reciprocal switching arrangements, trackage rights, shared-access agreements, gateway protections, and the elimination of barriers that limit competitive access. The common thread underlying these mechanisms is the Board's recognition that, in a highly concentrated rail industry, preserving and expanding access to competing

transportation options will be necessary to protect shippers from the exercise of geographic market power, to maintain incentives for service quality, innovation, and competitive pricing, and to prevent retaliation from the massive transcontinental railroad.

a. *The UP/NS merger raises exactly the competitive concerns identified in the Major Merger Rules.*

The proposed merger would unite two of the remaining Class I railroads into a single transcontinental network spanning much of the United States. The transaction would significantly increase concentration within an industry that is already dominated by a small number of large carriers. Although many facilities may not currently have physical access to both UP and NS, the agency has long recognized that rail competition extends beyond locations where two railroads directly serve the same customer. *See, e.g.*, *Market Dominance Determinations*, 365 I.C.C. 118 (1981); *Market Dominance Determinations—Product and Geographic Competition*, 3 S.T.B. 937, 946 n.49 (1998).

Geographic competition often constrains carrier behavior even when a shipper is physically served by only one railroad. Railroads compete through a variety of mechanisms that influence customer behavior and investment decisions. Carriers compete for industrial development projects, influence facility siting decisions, provide access to transload facilities, seek to capture traffic through alternative gateways, and compete for long-haul east-west freight movements. The existence of nearby rail alternatives frequently constrains rates and encourages service improvements even where a shipper lacks direct dual service. The competitive

influence of one railroad on another therefore extends far beyond locations where tracks physically overlap.

Today, UP and NS exert precisely these types of competitive constraints on one another across numerous traffic corridors. They compete for freight flows moving between eastern and western markets, compete for traffic moving through interchange gateways, and compete to attract future industrial development. Following the merger, many of those constraints would disappear. The merged carrier would no longer face competition from an independent eastern railroad across substantial portions of the transportation network.

This loss of independent rivalry would increase the merged carrier's ability and incentive to exercise market power, reduce competitive discipline, and diminish customer transportation options. These harms cannot be fully remedied through gateway protections, route-preservation conditions, or other transaction-specific measures. While those remedies may address particular competitive concerns, they do not address the competitive concerns facing the large population of captive and near-captive rail shippers that would remain dependent on the merged system. To address those broader competitive concerns, the Board should require a comprehensive open-access remedy.

An open access condition is also necessary to prevent the merged carrier from exploiting its dominant position by bundling its competitive lanes with solely-served facilities. In its motion for summary denial, the Joint Shippers Association argued:

> The combined captive origins and destinations on UP and NS would give the merged entity a far greater concentration of closed industries than

> any of the other Class I carriers. That could substantially increase the merged carrier's leverage in negotiations with customers to favor its long-haul routes over alternative interline routes by tying its rates on single-line routes to the customer's willingness to use the UP long haul routes on interline moves. This is an extension of the "bundling" problem shippers have long complained about. UP thus would have both the motive and means to engage in vertical foreclosure over this traffic.[14]

In fact, even before accounting for any merger-related traffic shifts, the combined carrier would generate {{ [redacted] }} of all Class I revenues to or from closed shipper locations. Baranowski/Zebrowski VS § 9. This concentration of captive traffic, coupled with UP's documented price maximizing approach, creates the need for a global access condition. *See id.* §§ 14, 15.2; Farmer VS ¶¶ 63, 77; Williams VS ¶ 67.

In addition, a global access condition is necessary to protect customers from the threat of retaliation from the market-dominant merged carrier. The Board has expressed strong concern about the public remarks that Mr. Vena made threatening customers who opposed his merger with rate hikes. Decision No. 28 at 4; Decision No. 45 at 2–3. A workable access remedy would give customers beholden to UP's market power actual transportation options to avoid retaliation in the future without the need to seek intervention by the agency. *See Joint Pet. for Rulemaking to*

[14] JSA Motion for Summary Denial 30 (STB filed Aug. 6, 2026) (citing *Final Offer Rate Review*, Opening Comments of The American Chemistry Council, EP 755 at 25–26 (STB filed Nov. 12, 2019); *Hearing on Revenue Adequac*y, Written Testimony of Olin Corporation, Ex Parte No. 761 at 16–18 (STB filed Nov. 26, 2019); *Competition in the Railroad Industr*y, Supplemental Comments of PPG Industries, Ex. Parte 705 at 2 (STB filed July 15, 2011); *Rail Transportation Contracts Under 49 U.S.C. 10709*, Comments of the American Chemistry Council, Ex Parte No. 676 at 24 (STB filed Feb. 5, 2009) (citing to other shipper comments on bundling)).

Establish a Voluntary Arb. Program for Small Rate Disputes, EP 765, slip op. at 61 (STB served Dec. 19, 2022) (encouraging shippers that believe they are being retaliated against for pursuing permissible regulatory relief to contact the Board's Rail Customer and Public Assistance service or file formal complaints with the agency).

The Board's merger policy expressly contemplates the use of reciprocal switching and related access remedies in circumstances where traditional conditions are insufficient to address merger-related harms. *See Major Rail Consol. Procs.*, 5 S.T.B. at 547 (explaining that the 2001 rules contemplate competitive-enhancement conditions to offset merger-related harms that cannot be directly or effectively mitigated, including, but not limited to, "reciprocal switching arrangements, trackage rights, or elimination of 'paper barriers' on interchange by shortline carriers"). Indeed, a switching condition imposed as part of a major merger approval would not represent the extraordinary regulatory intervention that characterizes stand-alone requests for reciprocal switching under 49 U.S.C. § 11102(c). Rather, it would constitute a systemic remedy specifically identified by the Board in 2001 as appropriate in future Class I transactions that would reduce competition and increase market concentration. *See id.*

Nor would such a condition be unprecedented. UP/NS frequently point to Canada as a successful example of a transcontinental freight-rail system. Yet Canada's regulation of two transcontinental railroads has long included broad access mechanisms designed to preserve competition between two carriers. The existence

of a highly concentrated rail structure has therefore been balanced by regulatory policies that ensure competing carriers can reach traffic that would otherwise be inaccessible. Wilson VS § 6. The same principle should apply here if the Board permits the creation of a transcontinental UP/NS system. Indeed, in an interview earlier this year, UP's CEO Mr. Vena said: "I'm all for reciprocal switching, it gives optionality." Ex. 102, Stuart Chirls, *Rail merger critics should "quit looking backward," says Union Pacific CEO*, FreightWaves (Mar. 10, 2026), https://www.freightwaves.com/news/exclusive-rail-merger-critics-should-quit-looking-backward-says-union-pacific-ceo. Any approval should simultaneously adopt an equally robust competitive-access framework for the transcontinental carrier.

i. Access Proposal

The most effective means of restoring competition lost through the transaction is a broad switching regime that grants eligible shippers access to competing Class I railroads through mandatory switching service provided by the merged carrier. For 25 years, it has been widely recognized that a Class I merger under the Major Merger Rules would include some form of enhanced switching, and it is striking that a meaningful proposal was not included in the Application. *See, e.g.*, Ex. 109, Huneke, William, *Remembering Hunter Harrison's Approach to Enhancing Competition*, Railway Age (Sept. 30, 2026), https://www.railwayage.com/regulatory/remembering-hunter-harrisons-approach-to-enhancing-competition/. Under such a condition, rail customers located at qualifying facilities on UP/NS would be permitted to choose between using the combined UP/NS for the entire transportation movement or using another competing railroad for the linehaul portion of that movement. When a

customer elects the competitive option, UP/NS would perform the local switching service necessary to connect the traffic to the competing carrier at an interchange point.

The objective is straightforward. Many customers are physically served by only one railroad but are located close enough to an interchange point that another carrier could effectively compete for their traffic if provided reasonable access. The BNSF-proposed condition would make that competition possible. Competing railroads would be permitted to market service directly to customers, publish tariffs, offer transportation contracts, quote rates, and compete for business just as they would if they possessed direct physical access to the facility. The only operational distinction would be that UP/NS would perform the switching movement between the customer facility and the interchange.

Eligibility Standards. Eligibility should be determined through clear, objective criteria that minimize disputes and promote certainty. Facilities should automatically qualify as eligible if they are served exclusively by UP, NS, or affiliated short-line railroads and are located within twenty miles of an active physical or revenue interchange with another Class I carrier.[15] Shippers located outside the

[15] For purposes of this proposal the term "affiliated companies" has the same meaning as "affiliated companies" in Definition 5 of the Uniform System of Accounts, 49 CFR part 1201, subpart A: "Affiliated companies means companies or persons that directly, or indirectly through one or more intermediaries control, or are controlled by, or are under common control with, the accounting carrier." *See Reciprocal Switching for Inadequate Servic*e, EP 711 (Sub-No. 2), slip op. at 72 n.43 (STB served Apr. 30, 2024), *vacate*d, *Grand Trunk Corp. v. STB*, 143 F.4th 741 (7th Cir. 2025).

twenty-mile radius should have the ability to petition for eligibility if they can demonstrate that (1) the facility has no physical access to other Class I railroads except through UP, NS, or dependent short line railroads, and (2) the switch would be operationally feasible. There should be a rebuttable presumption that a facility is eligible when inclusion in the open access program would be consistent with how the facility was served prior to the merger.[16] The determination should rely on industry databases maintained by Railinc, the UP and NS switching tariffs or circulars in effect on July 29, 2025, and established interchange records.[17]

Eligibility should not be tied solely to the status quo. New facilities that satisfy the qualification criteria in the future should automatically obtain the same rights without additional Board proceedings. *See UP/SP Decision No. 44*, 1 S.T.B. at 419–20 (1996); *UP/SP Decision No. 10*, 2 S.T.B. 703, 716 (1997). Similarly, facilities that qualify should generally retain those rights indefinitely. A shipper should lose access

[16] For example, eligibility for a facility would be presumed where the facility is served by a local train originating from a serving yard that falls within the twenty-mile radius of an interchange point.

[17] In crafting this proposal, BNSF sought to establish bright line tests that would allow customers to easily identify whether they are eligible for switching. BNSF recognizes that the Board has spent a great deal of energy thinking about the practicalities of various switching proposals and would not object to an alternative formulation for eligibility here. *See, e.g.*, *Reciprocal Switching for Inadequate Service*, EP 711 (Sub-No. 2), slip op. at 67–74 (STB served Apr. 30, 2024) (codified at 49 C.F.R. § 1145), *vacate*d, *Grand Trunk Corp. v. STB*, 143 F.4th 741 (7th Cir. 2025). In connection with that determination, however, BNSF notes that this proposal would be authorized by the Board's broad authority to condition its approval of a control application under 49 U.S.C. § 11324(c), not its authority to prescribe reciprocal switching agreements in terminal areas under 49 U.S.C. § 11102(c) or its general rulemaking authority under 49 U.S.C. § 1321, and as such is not subject to the limitations imposed by those sections.

rights only if an independent competing railroad later constructs a direct physical connection to the facility or if rail service to the facility is permanently abandoned. If a supporting interchange is subsequently removed, UP/NS should remain obligated to provide switching service through the nearest feasible alternative interchange at equivalent rates and service levels. Railroad-owned facilities, however, should not be eligible for participation in the program.

Switching Charges. To ensure transparency and predictability, switching charges should be based on the merged railroad's Uniform Railroad Costing System ("URCS") data and calculated using publicly available formulas. Charges should be updated annually using current cost information and published in a public tariff available to all interested parties.

Fees would be based on fully-allocated URCS costs for a terminal switch on one end of a linehaul revenue move, covering 10-rail mile distance bands. Charges would account for the cost of moving railcars between a customer facility and a serving yard, the additional costs of interterminal switching necessary to transfer traffic to another railroad, the distance between the facility and the interchange, and operational differences between unit-train and non-unit-train traffic.

Based upon the supporting cost analysis, interterminal switching involves approximately twenty percent greater complexity than ordinary industry switching because traffic must be delivered to another carrier rather than incorporated into the

railroad's own linehaul operations.[18] Accordingly, switching charges should include a corresponding twenty percent adjustment.

To protect shippers from excessive rate escalation, annual increases should be capped so that switching charges cannot rise faster than the industry's Railroad Cost Adjustment Factor-Unadjusted ("RCAF-U"). This safeguard would provide pricing certainty while still allowing the merged carrier to recover its costs.

Service Requirements. Access rights are meaningful only if accompanied by service obligations that ensure the competitive option functions in practice. Accordingly, the combined UP/NS should have a common-carrier obligation to perform switching service at service levels at least equal to those provided for its own linehaul traffic moving through the same facilities and yards. The proposal is intended to create genuine competition, not merely theoretical access.

Performance should be evaluated using objective operational metrics, including the number of switching opportunities provided each week, industry spot-and-pull performance, transit times between the facility and interchange, and expanded reporting requirements under EP 787. These metrics would allow the Board, competitors, and customers to monitor whether UP/NS is providing competitive traffic with service comparable to that enjoyed by its own traffic.

[18] Based on the Statement 7-63 special study used to determine URCS switching costs, Explanation of Rail Cost Finding Procedures and Principles Relating to the Use of Costs (1963), interterminal switches are 20% more complicated than industry switches due to continuing from the serving yard to another carrier's interchange rather than directly onto a linehaul train.

Firm implementation timelines should ensure prompt availability of service. Where switching operations already exist, service should commence within seven days after a shipper accepts a competing carrier's rate proposal. Where new switching operations must be established, service should begin within thirty days. Once implemented, UP/NS should be required to accommodate changes in traffic volume, destinations, commodities, and customer requirements to the same extent that it does for its own traffic.

Enforcement and Oversight. A comprehensive enforcement mechanism is necessary to ensure that the rights established by the condition remain meaningful over time. All traffic should move pursuant to a standardized agreement approved by the Board that establishes uniform commercial and operating terms applicable to all participants. These provisions should include equal treatment of rail cars owned by different carriers, standardized liability rules, equal access to rail facilities and yards, and uniform operating procedures governing switching service.

The condition should also establish an independent compliance monitor funded by UP/NS and charged with overseeing implementation of the program. The monitor should possess authority to resolve disputes on an expedited basis, investigate claims of service degradation or lack of operational parity, determine whether switching service has been improperly delayed, and impose financial penalties for violations. Such oversight would provide a practical mechanism for ensuring compliance without requiring parties to repeatedly initiate lengthy Board proceedings. Parties

dissatisfied with the monitor's decisions would retain the right to seek review before the Board.

The open access condition satisfies the standards described in Part VII.B.1. The harm it addresses—the loss of geographic and corridor competition between UP and NS, and the merged carrier's increased ability to bundle captive and competitive traffic—is created or, at a minimum, exacerbated by the merger. *See BN/SF Decision No. 38*, 10 I.C.C.2d at 776. Because those losses cannot be remedied "directly and proportionately" facility by facility, the Board's rules authorize conditions like switching that "mitigate or offset" the harm. 49 C.F.R. § 1180.1(d); *Decision No. 21*, FD 36873, slip op. at 18–20 (STB served May 28, 2026). The condition is also operationally feasible: it relies on facilities used for existing interchanges. Ultimately, the open access condition would produce substantial public benefits by giving solely-served shippers a real competitive alternative and a means of avoiding retaliation by UP.

4. The Board Should Condition Any Approval on Changes to TTX's Governance Structure.

a. *UP/NS's proposed condition regarding TTX is insufficient.*

UP/NS acknowledge the central role that TTX plays in the railroad industry and that, if approved, the merger of UP and NS would create a dominant carrier in the TTX governing structure. Apr. 30, 2026 Am. App., Vol. 1, pp. 32–33, 87–89. But like other harms caused by the proposed merger, UP/NS have placed the burden for solving the competitive problems caused by their proposed transaction on the Board and harmed stakeholders.

UP/NS propose divesting the shares necessary to reach 49 percent through TTX's existing stock transfer procedures. Under that process, TTX itself and then the other current owners would have opportunities to acquire UP/NS shares before they could be sold elsewhere. Williams VS ¶¶ 88, 94. Such an approach would not eliminate the problems caused by the transaction and would result in an undeserved financial windfall for UP/NS.

TTX is a rail car pooling company that is jointly owned by seven participating rail carriers. TTX owns and manages, on behalf of its owners, a fleet of flatcars that are used in rail transportation of containers, truck trailers, automobiles, lumber, extra-dimensional loads, and other commodities. *See TTX Co., et al.—Appl. for Approval of Pooling of Car Servs. with Respect to Flatcars*, FD 27590 (Sub-No. 4), slip op. at 2 (STB served Oct. 1, 2014). In addition to its flatcar pool, TTX also owns and operates pools of boxcars and gondolas. *See Am. Rail Box Car Co. & Trailer Train Co. et al.—For Approval of the Pooling of Car Serv. with Respect to Box Cars*, 347 I.C.C. 862 (1974) (approving boxcar pool); *Railgon Co. & Trailer Train Co.—Pooling of Car Serv. Regarding Gondola Cars*, FD 29121 (ICC served Mar. 17, 1980) (approving gondola pool). TTX also operates the national pool of multilevel autorack cars as an agent for the railroad participants, and a pool of railroad-owned boxcars. *The Baltimore & Ohio R.R.—Pooling of Car Serv. Regarding Multi-Level Cars*, FD 29653 (ICC served Aug. 19, 1981*); Railroad Car Service Pooling Appl. (Boxcars)*, FD 30969 (ICC served Oct. 9, 1987). The current ownership interests in TTX are set forth below.

Rail Carrier Owner	Percentage
UP	37.03
CSX	19.78
NS	19.78
BNSF	17.4
CN	3.2
CPKC	2.2
FXE	0.6

As a result of the merger, UP/NS would increase their collective ownership of TTX to 56.81 percent. UP/NS propose to address concerns arising from the combined railroad's post-merger ownership interest in TTX by committing to reduce their ownership share below 50%. Apr. 30, 2026 Am. App., Vol. 1 pp. 32–33; July 27, 2026 Supp., p. 47. While UP/NS's proposal would eliminate formal majority ownership, it would not eliminate the proposed transaction's anticompetitive impact of giving the merged carrier an increased ability to exert significant influence over TTX, nor does it fully resolve questions regarding the practical effects of concentrating such a large ownership stake in a single Class I railroad. UP/NS's reliance on TTX's governance structure, existing pooling arrangements, and ongoing Board oversight to prevent discriminatory conduct are also insufficient to prevent the merged UP/NS from dominating TTX's priorities. July 27, 2026 Supp., pp. 48–51.

Although the proposal would prevent mathematical majority ownership, it would leave the merged railroad with by far the largest ownership stake in TTX and a level of economic influence unmatched by any other participant. *See* Williams VS ¶ 89. As explained by Mr. Williams, a shareholder holding nearly half of the company's equity would retain significant ability to influence corporate priorities,

investment decisions, fleet deployment policies, governance outcomes, and strategic initiatives. Williams VS ¶¶ 88–89, 91–93.

The proposal therefore does not fully address the concern that a combined UP/NS could use its position within TTX to advance its own commercial interests in ways that disadvantage competing railroads and their customers. *See* Carlton VS ¶¶ 208–09. While UP/NS emphasize TTX's governance protections and nondiscrimination obligations, those protections were developed in the context of a broadly distributed ownership structure and would not be sufficient to offset the incentives created by the emergence of a single dominant owner.

UP/NS's preferred divestiture mechanism also raises concerns regarding the distributional consequences of the proposed remedy. Under the proposal, TTX, the remaining railroad owners, or a third party if no participating railroad buys the shares, would be required to acquire the shares necessary to reduce UP/NS's ownership to 49 percent. In each case, the economic effect is the same: UP/NS would receive compensation for relinquishing ownership interests that became necessary only because of the merger. The railroads most likely to purchase those shares are the same carriers whose competitive positions may be harmed by the transaction. Consequently, UP/NS's proposed remedy effectively requires other industry participants to finance UP/NS's compliance with a merger condition while providing UP/NS with a substantial financial windfall. Rather than internalizing the costs associated with resolving the control issues created by the transaction, the proposal shifts those costs to other market participants. Williams VS ¶ 94.

The same concern exists under UP/NS's alternative governance proposals. Whether excess shares are placed in a special-purpose vehicle, voted in accordance with the preferences of other shareholders, or ultimately sold to another purchaser, UP/NS preserve the economic value associated with those shares and may realize substantial proceeds from any future divestiture. Thus, each version of the proposal allows the combined railroad to retain or monetize value created by ownership interests that raise merger-related concerns, while the costs of addressing those concerns are borne by TTX, other railroads, or the broader industry.

The proposal to permit eventual acquisition by a non-railroad third party presents an additional and potentially more fundamental problem. TTX's historical success has rested on an ownership structure under which the principal beneficiaries of the railcar pool are also its owners. Williams VS ¶ 95. Because participating railroads both fund and rely upon TTX's assets, they possess strong incentives to manage the fleet efficiently, expand capacity when needed, and operate the company for the benefit of the rail network as a whole. *E.g.*, *id.* A non-railroad owner, by contrast, would have every incentive to increase returns on the fleet and would be far less likely to continue practices such as offering rebates or discounts designed to produce "net-zero profit beyond plan" outcomes. *Id.* Likewise, such an owner could be expected to take a different approach to capital investment decisions, favoring strategies that preserve tight equipment supply and higher lease rates rather than investing in additional equipment that could depress utilization charges or reduce the value of its broader railcar leasing portfolio. *Id.*

There would also be concerns regarding the confidentiality of TTX's pricing and fleet utilization information. A non-railroad owner that also controlled competing railcar assets could potentially use insights derived from TTX operations to optimize pricing across its own fleets, effectively raising the market price floor for like-kind equipment. In that scenario, TTX would no longer function as a moderating influence on railcar costs but instead could become a vehicle for maximizing industry-wide equipment pricing, regardless of whether railcars were actually in short supply. Ultimately, higher railcar usage charges would increase costs throughout the rail network, affecting not only railroads but also shippers and, ultimately, the customers they serve.

Introducing a non-railroad investor would alter those incentives. Unlike railroad owners, a financial or other third-party investor would be motivated principally by return on investment rather than network efficiency, service quality, or industry-wide benefits. Over time, the presence of such owners could place pressure on TTX to prioritize financial returns over the cooperative objectives that have historically made the pooling arrangement successful. Williams VS ¶ 96.

For that reason, UP/NS's proposals fail to solve the problems created by the merger. If the shares remain with UP/NS, the merged railroad retains substantial influence over TTX despite falling below the 50-percent threshold. If the shares are transferred to other railroads, those carriers effectively fund a financial benefit for UP/NS in order to remedy a problem created by the merger. If the shares are transferred to a non-railroad investor, the ownership structure that has long aligned

TTX's incentives with the interests of the rail industry may be undermined. Accordingly, each of UP/NS's proposed approaches leaves significant unresolved concerns regarding influence, fairness, and the long-term governance of TTX, suggesting that the proposed remedies may not adequately address the competitive and institutional issues created by the transaction.

i. The Board should condition any approval on the amendment of TTX's governance structure.

To mitigate the harm created by UP and NS's dominant position in TTX, the Board should require, as a condition of any approval of the merger, that TTX's governing documents be amended to require votes of the board of directors be approved by a two-thirds supermajority. Such votes would include amendments to bylaws, changes in railcar allocation methodologies, major capital expenditures, acquisitions or dispositions of assets, changes in governance structure, and other strategic decisions. A two-thirds supermajority requirement would prevent any single railroad, including a merged UP/NS, from unilaterally directing TTX's affairs even if it possessed a very large ownership interest. *Id.* ¶ 95. Instead, meaningful changes would require broad consensus among TTX's owner railroads.

To accomplish this, the Board should impose a condition that prior to consummation, UP/NS cause TTX's bylaws to be amended to require a two-thirds vote to take the actions described above. To the extent necessary, the Board has the authority to require these changes under 49 U.S.C. § 11321(a). For example,

ARTICLE III
Directors
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Section 6. Any vote of the Board of Directors, including any action to amend, alter, or repeal these Bylaws shall require the affirmative vote of at least two-thirds (2/3) of the total voting power of the outstanding shares of capital stock entitled to vote thereon, voting together as a single class.

This approach would build upon TTX's existing cooperative governance model rather than fundamentally restructuring ownership rights and giving UP/NS a financial windfall. It would also help ensure that decisions affecting the industry-wide railcar pool reflect the interests of a broad cross-section of participating railroads rather than those of the largest shareholder.

5. Geographic Conditions

a. *The Board Should Grant BNSF Trackage Rights on NS Lines from Chicago to Pennsylvania, Together With Certain Related Requests, to Preserve Competition in This Market.*

Pennsylvania is one of the most important locations for intermodal traffic in the country. NS serves many Pennsylvania intermodal shippers exclusively, especially shippers located near Pittsburgh and in eastern Pennsylvania. *See* Williams VS ¶¶ 17, 82. Today, BNSF and UP both move significant intermodal traffic between western markets and Pennsylvania under interline arrangements with NS. From west-to-east, BNSF moves traffic from BNSF-served western locations, primarily Southern California, to Chicago, IL, where it interchanges the traffic with NS. NS then moves the traffic to intermodal facilities in Pennsylvania. BNSF and NS also provide westbound service from Pennsylvania to BNSF-served western markets. UP similarly moves traffic between western locations and Chicago for

interchange with NS. *See* Sep. 4, 2026 Am. App., Vol. 2 pp. 638–39, 678–79, Gehringer/Orr VS ¶ 56 & fig. 3, 153 & fig. 14. BNSF and UP compete vigorously for the western portion of these movements. NS is currently incentivized to work with both BNSF and UP to provide this intermodal service to customers.

A merger of UP and NS would change those incentives to work with BNSF to provide this important intermodal service and would result in BNSF's foreclosure from the relevant intermodal market. Indeed, UP/NS have announced that, if their merger is approved, they plan to introduce new intermodal service options from western locations to Pennsylvania and the Northeast, including a Southern California-Northeast service and a Northern California-Northeast service. *See id.* pp. 692–93, 723, Gehringer/Orr VS ¶ 185 & fig. 19, 243 & fig. 30. Accordingly, if the Board approves the merger, UP/NS would be incentivized to create as much density as possible on the new UP/NS single-line service routes by diverting traffic that currently moves under the BNSF/NS interline arrangement. Additionally, even without the new service, UP/NS would have both the ability and incentive to divert existing BNSF/NS traffic to UP/NS and to ensure that BNSF is not a competitive option for this traffic from a pricing and service perspective. Over time, this would result in the elimination or reduction of competition for intermodal traffic moved between Pennsylvania and western intermodal locations.

UP/NS's own Application shows that the merged carrier would foreclose BNSF from important intermodal locations in Pennsylvania. The combined UP/NS would originate {{ [redacted] }} of interline intermodal shipments to and from Pennsylvania even

before accounting for merger-related traffic shifts. Baranowski/Zebrowski VS § 9. Messrs. Zebrowski and Baranowski further explain that, viewed correctly and properly applied, UP/NS's own rail-to-rail diversion model shows that on typical lanes where a future UP/NS route would compete against a dependent interline route, the UP/NS route would capture over 90% of traffic, whether intermodal or carload. *Id.* § 6.3. They conclude that the merger would realign east-west freight flows from four transcontinental routes to one dominant UP/NS route, with the remaining non-UP/NS routes carrying less traffic to support frequent, efficient service. *Id.* § 7.

UP/NS like to compare their proposed transaction to the recent CP/KCS merger, notwithstanding its drastically different scale. In the CP/KCS proceeding, UP argued that the applicants in CP/KCS "would face enormous post-merger pressure to divert traffic from existing KCSM interline service to CPKC single-line service using strategies that reduce shippers' existing competitive options" and that "CPKC would have the ability to implement such anticompetitive strategies by raising rates shippers must pay for interline service or degrading the quality of service shippers receive when using interline service." UP Comments and Request for Conditions, *Canadian Pac. Ry.—Control & Merger—Kan. City S.*, FD 36500, at 26 (Feb. 28, 2022). The exact same arguments apply to the proposed UP/NS merger, as discussed in the Verified Statement of Jon Gabriel. UP cannot credibly dismiss here the same competitive concerns that it emphasized before the Board in CP/KCS.

Additionally, as explained in the Verified Statement of Dennis W. Carlton, Ph.D., submitted as Exhibit 12-C to the Responsive Application, a combined UP/NS

can engage in foreclosure that harms competing rail carriers like BNSF. BNSF Responsive Appl., Ex. 12-C, Carlton VS ¶ 21. Dr. Carlton concludes that, "[t]o the extent a combined UPNS can foreclose BNSF from serving [the subject] routes, the [p]roposed [t]ransaction would have the potential to adversely affect {{ }} of BNSF's revenues from corridors related to the Pennsylvania Intermodal Condition." *Id.* ¶ 15. Dr. Carlton further concludes that "[t]he approval of the trackage rights BNSF is requesting would address, at least to some extent, the potential for harm arising from the [p]roposed [t]ransaction, as it would preserve at least some of the ability BNSF currently has today to serve its intermodal shippers." *Id.* ¶ 25. He finds that, "the approval of the requested trackage rights would address, at least to some extent, the risk of negative impact of competition on BNSF for the area covered by the Pennsylvania Intermodal Condition and resulting harm to the rail network." *Id.* ¶ 26.

In the Verified Statement of Nicholas Hill, PhD, submitted in full with BNSF's Comments, Dr. Hill concludes, in pertinent part, that the Pennsylvania Intermodal Condition is likely to mitigate the risk of vertical foreclosure if the Board approves the UP/NS merger. *See* Hill VS § 9.2. Dr. Hill finds that "[t]he part of Pennsylvania that would be affected by the Pennsylvania Intermodal Condition . . . is an important location for intermodal traffic," and that "[t]he corridors originating or terminating in the affected area of Pennsylvania are also particularly important to BNSF." *Id.* Dr. Hill also finds that the Pennsylvania Intermodal Area, as that term is used in his Verified Statement, "is also at material risk of foreclosure." *Id.* Dr. Hill concludes that "[t]he Pennsylvania Intermodal Condition would mitigate harm by lowering the

probability that BNSF . . . would be foreclosed from serving shippers." *Id.* He further concludes that "[t]his would help preserve competition and benefit shippers." *Id.* BNSF is submitting an excerpt from the Hill Verified Statement as Exhibit 12-D to the Responsive Application.

To preserve competition for intermodal shipments to and from Pennsylvania, and prevent other harms to the rail network generally from reduced traffic on BNSF and other railroads that compete with UP and NS, the Board should grant BNSF the following relief.

First, the Board should grant BNSF trackage rights on certain NS lines between Chicago, IL and Bethlehem, PA. BNSF is concurrently filing a Responsive Application in Docket No. FD 36873 (Sub-No. 33), seeking Board authority for these trackage rights. The subject lines are described in detail in Appendix 3 to the Responsive Application. These trackage rights would be "overhead" with exceptions that would allow BNSF to access four existing intermodal facilities described below, along with any new intermodal facilities that are served by the subject lines, including through connection or interchange with any other carrier or private switching railroad serving such intermodal facilities.

Although BNSF has experienced significant challenges implementing merger-related trackage rights, particularly those granted to BNSF in connection with the UP/SP merger, BNSF believes that the trackage rights requested here can be implemented successfully due to their targeted scope and operating protections that

ensure that BNSF receives non-discriminatory treatment, including dispatching parity. *See supra* § VII.A; BNSF Responsive Appl., Ex. 13-A, Operating Plan at 32.

Second, the Board should order UP/NS to provide BNSF with access to and use of NS's Pittsburgh, Harrisburg, and Rutherford intermodal facilities, as those facilities may expand, change, or be modified in the future. BNSF also intends to obtain access to Phoenix Rail's Bethlehem intermodal facility through a separate commercial agreement with Phoenix Rail. These four facilities are important intermodal destinations, and access to these facilities is critical to providing competitive intermodal service in Pennsylvania. BNSF is willing to discuss consolidation of Harrisburg and Rutherford traffic at Rutherford to streamline operational efficiency and impacts. BNSF Responsive Appl., Ex. 12-A, Nov. 18, 2026 Verified Statement of Jon Gabriel ("Gabriel VS") at 6 n.6.

Third, the Board should order UP/NS to provide haulage service for BNSF traffic moving on the subject NS lines between Chicago, IL and Bethlehem, PA, for the period of time necessary to allow BNSF to establish its own service and commence operations consistent with customer needs. As discussed in the Verified Statement of Jon Gabriel, submitted as Exhibit 12-A to the Responsive Application, a haulage arrangement would replicate BNSF's existing commercial access on a short-term basis by allowing BNSF to price the full movement between BNSF-served western markets and NS-served facilities in Pennsylvania, while UP/NS hauls the traffic for a limited period of time. *Id.* at 28.

The Pennsylvania Intermodal Condition is further described in the Responsive Application. In addition to preserving competition, the Pennsylvania Intermodal Condition would also produce public benefits, as discussed further in Mr. Gabriel's Verified Statement. For example, BNSF will be able to use its extensive experience in intermodal transportation to develop improved service offerings and more reliable service for customers. *Id.* at 29. Additionally, BNSF anticipates that the Pennsylvania Intermodal Condition would have no adverse environmental effects, no adverse impacts on its employees, and no adverse impacts on passenger service. *Id.* at 29–30.

b. *If the Board Approves the Merger, it Must Require a Neutral Terminal Railroad to Serve the Gulf Coast.*

The Gulf Coast is a critical center for petrochemical facilities; indeed, it is widely acknowledged to be the largest, most developed concentration of petroleum and chemical facilities in the world and, by far, the largest, most important such area in the United States. Moreover, the Gulf Coast is also one of the largest, most rail-dependent, and least competitive rail markets in North America, and UP already holds the dominant share of its captive traffic. *See* Baranowski/Zebrowski VS §§ 15.1–15.2; Williams VS ¶¶ 97–99. The merger would extend UP's reach to the far end of many more movements that originate or terminate in the Gulf Coast. It would convert many of today's UP interline choices into a single UP/NS system. It would give the merged carrier new leverage to use bundling and tie-in sales to raise rates across a customer's entire footprint—including at facilities where the customer has a competitive choice today. Carlton VS ¶¶ 142, 157–169, 223–24; Williams VS ¶¶ 96–

101; Baranowski/Zebrowski VS § 15.3. And the merger would also give UP/NS stronger incentives to favor its own long-haul traffic over competing carriers on the shared Gulf Coast network it controls. Morehouse VS § V.B.

To remedy those harms, BNSF requests that the Board condition any approval on a requirement that UP, within six months of the effective date of the Board's decision, present for Board approval a transaction under which a neutral terminal or switching railroad would directly serve facilities in the Gulf Coast region currently served by UP or BNSF (the "Gulf Coast Condition"). *See* Williams VS ¶¶ 102, 104; Morehouse VS §§ V, V.B. The Gulf Coast Condition applies a proven operating model—the same model that has served the Houston Ship Channel through the Port Terminal Railroad Association ("PTRA") for a century—to the region where it is most needed. Morehouse VS § V.B. It does not require divestiture of assets. BNSF will contribute its own Gulf Coast operations and open its own closed facilities on the same terms. Williams VS ¶ 102; Morehouse VS § V.B. It is supported by the verified statements of Tom Williams, BNSF's Executive Vice President and Chief Marketing Officer, Craig Morehouse, BNSF's Chief Operations Officer, Dr. Dennis W. Carlton of Compass Lexecon, Dr. Nicholas Hill of Bates White Economic Consulting, and Michael R. Baranowski and Nathaniel S. Zebrowski of FTI Consulting.

i. The Gulf Coast Condition

For purposes of the condition, the Gulf Coast region extends from Corpus Christi, Texas, east to the west bank of the Mississippi River and comprises seven Bureau of Economic Analysis ("BEA") economic areas: Corpus Christi, TX (BEA 132); Houston-Galveston-Brazoria, TX (BEA 131); Beaumont-Port Arthur, TX (BEA 87);

Lake Charles, LA (BEA 86); Lafayette, LA (BEA 85); Baton Rouge, LA-MS (BEA 84); and New Orleans, LA-MS (BEA 83). *See* Williams VS ¶ 96; *see also* Baranowski/Zebrowski VS § 15.1 & Fig. 53; Carlton VS ¶ 214; Hill VS § 9.3 n.127.

The core elements of the Gulf Coast Condition are as follows:

- ***Neutral terminal service***. A neutral terminal or switching railroad would directly serve facilities in the region that are currently served by UP or BNSF, replacing current UP or BNSF service. The terminal railroad would handle switching, train building, and local distribution within the terminal territory, and would interchange traffic with UP, BNSF, and other participating line-haul carriers at nearby hand-off points. Williams VS ¶ 102.

- ***Ownership and governance***. The terminal railroad would be jointly-owned and managed by UP and BNSF, much like PTRA, with other railroads such as CPKC or CSX participating as they see fit. Participating Class I carriers would have equal voting power, and any action with a substantial effect on operations, maintenance, or administration would require a unanimous vote. The terminal railroad could hire a third-party operator, or could handle operations itself. Williams VS ¶ 102.

- ***No divestiture***. The condition does not require the transfer or divestiture of existing asset ownership. *Id.*

- ***Neutral dispatching***. The terminal railroad or its operator would perform dispatching within the terminal territory by implementing nondiscrimination and parity principles for all movements, potentially in coordination with the existing consolidated dispatching operations at Spring, Texas. Morehouse VS § V.B.

- ***Access to closed facilities and reciprocity***. UP and BNSF will open their own closed facilities in the region and contribute their own regional operations on the same basis. Williams VS ¶ 104; Morehouse VS § V.B.

- ***Process***. After the Board imposes the Gulf Coast Condition, UP would coordinate with stakeholders and present the implementing transaction to the Board within six months of any decision approving the merger. The Board would then evaluate any necessary operating authorizations when UP presents the transaction. Williams VS ¶ 102.

The Gulf Coast Condition would allow BNSF and any other participating railroads to compete on the merits with UP for line-haul traffic to and from Gulf Coast facilities that are closed today by quoting line-haul rates for that business. A customer with facilities throughout the region could obtain a comprehensive competitive proposal from another railroad that would cover all of its Gulf Coast plants. UP would continue to win business where it offers the best combination of price and service, but it would no longer be able to use bundling or tie-in sales to leverage a customer's captivity at one Gulf Coast facility to raise rates or dictate terms at other facilities where the customer has a competitive choice. *See* Williams VS ¶ 103.

ii. The Gulf Coast Is a Uniquely Important, Rail-Dependent, Captive Market.

The Gulf Coast is unique among the areas served by rail in North America. It has an unmatched density of rail customers that rely on the entire national rail network, often shipping from multiple origins to multiple destinations served by different railroads, in markets where the optimal origins and destinations shift as commodity prices move internationally. Baranowski/Zebrowski VS § 15. Rail carload revenues originating or terminating in the region totaled {{{ [redacted] }}} in 2023—approximately {{{ [redacted] }}} of all U.S. rail carload revenues. *Id.* § 15.1 & fig. 54. Each of the seven Gulf Coast BEAs has, on average, {{{ [redacted] }}} customer facilities that shipped at least 1,000 carloads in 2023, compared with an average of {{{ [redacted] }}} in BEAs outside the region. *Id.* § 15.1. The region is equally important to the interline network: as Dr. Hill explains, interline revenue in the region totaled {{{ [redacted]

}}} in 2023, or {{{ [redacted] }}} of all U.S. interline freight rail revenue, and BNSF's own Gulf Coast interline revenue was nearly {{{ [redacted] }}}, or {{{ [redacted] }}} of its total interline revenue. Hill VS § 9.3.

The composition of that traffic leaves Gulf Coast customers with few alternatives to rail. Approximately {{{ [redacted] }}} of Gulf Coast rail revenue is carload traffic, and more than half—over {{{ [redacted] }}} in 2023—is generated by chemicals, plastics, and petroleum-derived hazardous materials such as ethylene, propylene, and butadiene. Baranowski/Zebrowski VS § 15.1. These high-value, often hazardous products do not move economically by truck over long distances; for these customers, rail is often the only practical option. *Id.*; Williams VS ¶ 97.

Many Gulf Coast customers lack a competitive rail alternative. Approximately one-third of rail-served customer facilities in the region are "closed," or limited to line-haul service by only one railroad, and those facilities account for roughly {{{ [redacted] }}} of Gulf Coast rail revenue. Baranowski/Zebrowski VS § 15.2. UP is by far the largest holder of that captive traffic: roughly {{{ [redacted] }}} of the region's closed facilities—more than {{{ [redacted] }}} facilities—are closed on UP, and UP accounts for more than {{{ [redacted] }}} of closed-access revenue. BNSF, by comparison, accounts for about {{{ [redacted] }}} of closed facilities and only about {{{ [redacted] }}} of closed-access revenue. *Id.* UP's captive facilities include some of the largest chemical, plastics, and energy plants in the country. Williams VS ¶ 98; Baranowski/Zebrowski VS § 15.2.

Captivity to UP in the Gulf Coast carries a price. On shipments between a closed UP Gulf Coast location and a competitive eastern location, the UP closed side

charged on average {{ [redacted] }} more per ton-mile than the competitive segment. Baranowski/Zebrowski VS § 15.2 & fig. 56. That higher price is driven largely by UP's higher rates. In 2023, UP's revenue-to-variable cost ("R/VC") ratios on Gulf Coast carload traffic exceeded BNSF's ratios on all nine commodity categories for originating traffic that were examined. *Id.* § 15.2 & fig. 57. Likewise, for the same period, UP's R/VC ratios exceeded BNSF's for all twelve commodity categories for terminating traffic that were examined. *Id.* § 15.2 & fig. 58. Customers report the same dynamic: at facilities where they have no alternative to UP, they have little ability to push back on rates or service terms. Williams VS ¶ 98.

iii. The Merger Would Harm Gulf Coast Customers.

The UP/NS merger would reduce horizontal competition for Gulf Coast traffic. Even judged by UP/NS's own analytical tools, the merger would eliminate meaningful rail-to-rail competition for Gulf Coast traffic, affecting billions of dollars in annual rail revenue and raising Gulf Coast customers' rail costs. To measure that harm, Dr. Carlton applied the corrected versions of UP/NS's own competition screens to Gulf Coast traffic. For competition between corridors, the HHI-based structural presumption in the 2023 Merger Guidelines is triggered for {{{ [redacted] }}} origin-commodity pairs associated with {{{ [redacted] }}} and {{{ [redacted] }}} destination-commodity pairs associated with {{{ [redacted] }}} in 2023 Gulf Coast rail revenue (at the four-digit STCC level). Carlton VS ¶ 216 & figs. 32–33. For competition within corridors, Dr. Carlton's alternative implementation of UP/NS's algorithms identifies {{{ [redacted] }}} corridors involving the Gulf Coast that will lose alternatives and result in, at most, three routes with at least one independent option, totaling over {{{ [redacted] }}} in

2023 rail revenue. *Id.* ¶ 221 & fig. 34. And applying a refined version of Dr. Israel's own pricing regression, Dr. Carlton estimates that the merger would increase rail expenses for Gulf Coast shipments by as much as {{{ [redacted] }}} per year. *Id.* ¶¶ 221–223 & fig. 35. These harms are concrete, quantified losses of existing competition that Gulf Coast customers would bear only because of this merger, and that the Board must remedy if it approves the transaction.

The merger would extend UP's captive-facility leverage to both ends of many more Gulf Coast movements. An additional, equally, if not more, significant harm is vertical and arises in the context of price negotiations that span multiple routes. Many of the largest Gulf Coast customers operate numerous facilities, some captive to UP and others open to competition, and they typically negotiate with railroads for a broad package of traffic rather than lane by lane. Williams VS ¶ 65; Baranowski/Zebrowski VS §§ 15.2–15.3. When UP negotiates with such a customer, it uses the customer's dependence at its closed facilities as leverage to win—and to extract higher rates on—traffic at the facilities where the customer has a choice. Williams VS ¶¶ 65, 99–100. BNSF regularly encounters customers that are reluctant to move open traffic away from UP, even in the face of a competitive offer, because they expect UP to take that decision into account in setting rates and service at their captive plants. *Id.* ¶ 100. In economic terms, the merger would weaken these shippers' bargaining position: as Dr. Carlton explains, a combined UP/NS with greater scale and more closed facilities to leverage in contract negotiations can

extract more from shippers whose fallback options have narrowed. Carlton VS ¶¶ 142, 223.

Today, that leverage is constrained because much Gulf Coast traffic ultimately moves to eastern destinations UP does not serve, where NS and CSX compete for the eastern leg. Baranowski/Zebrowski VS § 15.3; Williams VS ¶¶ 101–02. A customer whose Gulf Coast plant is captive to UP still benefits from competition at the other end of the move. Baranowski/Zebrowski VS § 15.3. The merger would remove that constraint for many movements: a shipment from a UP-captive Gulf Coast facility to an NS-served eastern destination would be controlled by a single carrier from origin to destination. *Id.* § 15.3 & fig. 59. Every facility that becomes UP/NS-served at both ends of a move adds to the leverage UP/NS brings to the bargaining table. And as the share of a customer's traffic that can move only on UP/NS grows, the customer's ability to walk away shrinks. Williams VS ¶ 101; Baranowski/Zebrowski VS § 15.3. Dr. Hill reaches the same conclusion through a foreclosure analysis: because so much Gulf Coast traffic already depends on UP, the merger "will likely give UP greater bargaining leverage over shippers who use UP-only stations and NS for another leg of their routes," placing the region "at material risk of foreclosure." Hill VS § 9.3.

The merger expands the combined carrier's opportunities to tie the sale of rail services across corridors—for example, services a customer today buys separately from UP and from NS—and thereby to raise its expected profits at the expense of customers. Carlton VS ¶¶ 157–65. In Dr. Carlton's illustration, tying allows the merged carrier to increase its expected profit while reducing the customer's expected

surplus. *Id.* ¶¶ 163–65. The merger also creates new opportunities to evade rate regulation by tying a regulated, sole-served segment to a competitive segment within the same corridor. Given that a carrier that can provide end-to-end service is not obligated to quote a separate bottleneck rate, the merged carrier can require a bundle, foreclose the competing interline carrier, and raise the customer's total price. *Id.* ¶¶ 158–59, 166–69. Those mechanisms are precisely suited to the Gulf Coast, where UP-captive chemical origins feed eastern destinations currently contested by NS and CSX. *Id.* ¶¶ 224–25; Williams VS ¶¶ 99, 101. Dr. Carlton identifies Gulf Coast chemical shippers with UP-captive Gulf Coast traffic and NS-captive traffic elsewhere that are exposed to cross-corridor tying, and estimates that approximately {{{ [redacted] }}} in "open to closed" shipments originating or terminating in the Gulf Coast are at risk from tie-in within corridors. Carlton VS ¶ 224 n.347; Williams VS ¶¶ 99, 101.

The merger would strengthen UP's incentive to favor its own traffic on the Gulf Coast Network. The Gulf Coast network—particularly around Houston—is characterized by a dense concentration of rail-served facilities, a complex patchwork of track ownership, trackage rights, and switching access that is the product of historical merger settlements, and a heavy volume of traffic that makes it prone to congestion and service disruption. Morehouse VS § V.B; Baranowski/Zebrowski VS § 15. Much of BNSF's presence in the region depends on trackage rights over UP lines and switching access obtained as conditions of the UP/SP merger. *Id.* § 15.1.

Where one railroad controls switching or dispatching for a competitor, its operating incentives will always be to serve its own traffic first. Morehouse VS § V.B. That incentive will be stronger after the merger, as UP/NS concentrates more long-haul traffic on its Gulf Coast lines, including the Northeast-to-Mexico "superhighway" it plans to run through the region. *Id.* BNSF already experiences this today on the UP lines it uses under its UP/SP trackage rights, where BNSF's trains move only when UP's dispatchers allow and routinely suffer lengthy delays and unplanned re-crews. *See* Farmer VS ¶¶ 51–54. The merger will make this worse as UP/NS runs more of its own long-haul traffic over those same lines. The Board need not speculate about the consequences: the UP/SP integration produced a network-wide meltdown centered on Houston that required the Board to clean up the mess. Morehouse VS § IV.A.

iv. UP/NS's Proposed Commitments Do Not Address the Gulf Coast Harm.

UP/NS's voluntary commitments do nothing to address these harms. CGP applies to roughly {{{ [redacted] }}} of U.S. rail units and {{{ [redacted] }}} of Class I interline units—and is limited to manifest traffic interchanged at four gateways. Baranowski/Zebrowski VS § 8 & tbl. 25. As explained above, CGP excludes Toxic Inhalation Hazard and Poison Inhalation Hazard shipments, a significant category of Gulf Coast chemical traffic. It expires five years after merger approval. *Id.* § 8; Carlton VS ¶ 173 n.278. And it does not enhance competition: no carrier will compete harder and no customer will gain an additional alternative as a result of CGP. Carlton VS ¶ 174. The Open Gateway Commitment offers no concrete pricing

standard for what constitutes "commercially reasonable terms" and no enforcement mechanism. Baranowski/Zebrowski VS § 8. Neither commitment gives a captive Gulf Coast customer a second railroad at its plant, and neither constrains the merged carrier's ability to bundle open and captive traffic.

v. The Gulf Coast Condition Satisfies the Board's Standards.

As set forth in Section VII.B.1 above, the Board has broad authority under 49 U.S.C. § 11324(c) to condition approval of a major merger, and its "overriding concern is the public interest." *UP/MP*, 366 I.C.C. at 562. The Board imposes a condition where "the merger produces effects harmful to the public interest (such as a significant loss of competition) that a condition will ameliorate or eliminate." *Decision No. 13*, FD 36500, slip op. at 4 (citing *UP/SP Decision No. 44*, 1 S.T.B. at 418). "[I]f a proposed condition will lessen or eliminate such harm, if it is operationally feasible, and if it will produce public benefits, [the Board] will impose it." *BN/SF Decision No. 38*, 10 I.C.C.2d at 774; *see* 49 C.F.R. § 1180.1(d); *CN/IC Decision No. 37*, 4 S.T.B. at 141. And under the current rules, the Board "will condition the approval of Class I combinations to mitigate or *offset* harm to the public interest." 49 C.F.R. § 1180.1(d) (emphasis added). The Gulf Coast Condition satisfies each of these requirements.

The condition would remedy the harm that the merger would create and exacerbate. UP/NS will argue that Gulf Coast facilities captive to UP are already closed, and that the merger would not change this scenario. That argument misapprehends both the harm and the governing standard. The merger would inflict

both horizontal and vertical competitive harms on Gulf Coast shippers, and UP's existing market power over those shippers is no reason to permit a transaction that would leave them in an even worse position when negotiating rail rates and other shipment terms. Indeed, it would be exactly backward to permit a merger to harm shippers because they are already served by only one railroad at one end of their move. The law does not require that result: the required nexus between the merger and the harm a condition remedies exists not only where the merger creates a harm outright, but also where it exacerbates one. *UP/SP Decision No. 44*, 1 S.T.B. at 461; *BN/SF Decision No. 38*, 10 I.C.C.2d at 776 (an "exacerbated effect provides a sufficient nexus").

Put simply, BNSF does not ask the Board to remedy UP's pre-merger market power; rather, the proposed condition targets the merger's expansion of that power: today, the competition between NS and CSX at the eastern end of Gulf Coast movements disciplines UP's pricing on captive origins, and after the merger that discipline disappears for every movement that becomes single-line UP/NS. Baranowski/Zebrowski VS § 15.3; Williams VS ¶¶ 96, 101. Each such movement, in turn, increases the leverage UP/NS can bring to bear through bundling on the customer's open facilities. Williams VS ¶¶ 65, 101; Carlton VS ¶¶ 142, 157–69, 223–24. The quantified horizontal effects of the merger in the Gulf Coast likewise confirm that the harm is real and merger-related. Carlton VS ¶¶ 217, 220, 222.

The condition is narrowly tailored to mitigate and offset the merger's harm. Under the Board's current rules, conditions are not limited to restoring the

pre-merger status quo; the Board "will condition the approval of Class I combinations to mitigate or offset harm to the public interest." 49 C.F.R. § 1180.1(d). Here, the merger's bundling harms cannot be remedied "directly and proportionately" by restoring the specific competition lost at each eastern destination. Decision No. 21 at 18–19 (quoting *Major Rail Consol. Procs.*, 5 S.T.B. at 546). The Gulf Coast Condition is nonetheless confined to a defined region in which those harms are acute. Baranowski/Zebrowski VS § 15.3; Carlton VS ¶¶ 214–25; Hill VS § 9.3. It is reciprocal: BNSF will contribute its own operations and open its own closed facilities. Williams VS ¶ 104; Morehouse VS § V.B. It does not require divestiture of assets, guarantee BNSF any traffic, or regulate UP's rates; UP will continue to win business wherever it offers the best combination of price and service. Williams VS ¶¶ 102–03. The beneficiaries are Gulf Coast customers, who would be able to obtain a comprehensive competitive proposal for all of their regional facilities—the only practical counterweight to the merged carrier's ability to leverage captive plants against open ones. *Id*. ¶¶ 96–104.

The condition is operationally feasible and builds on a proven model. A condition must be operationally feasible. 49 C.F.R. § 1180.1(d). The Gulf Coast Condition meets that requirement because it applies an operating model that has worked for decades. Terminal railroads are not a new or untested concept. Morehouse VS § V.B. PTRA has provided neutral switching along the Houston Ship Channel since 1924; today it operates as a Class III carrier over roughly 170 miles of track, with seven serving yards and 20 bridges, handling thousands of cars each day

for well over one hundred customers—many of them major chemical and plastics producers. Each Class I member has an equal vote; and no action having a substantial effect on operations, maintenance, or administration can pass without a unanimous vote. No single owner, particularly a merged carrier with the dominant share of the region's traffic, should be able to steer a shared, neutral asset to its own advantage. Equal votes with unanimity on major actions ensure that each participant's protection does not depend on the size of its ownership stake or traffic share.

These arrangements work because a terminal railroad allows the facilities, yards, and track in a congested area to be operated as a single, coordinated system rather than a collection of competing and overlapping networks. *Id.* Today, UP and BNSF each operate their own yards, crews, and local service in the Gulf Coast, often in close proximity and frequently serving neighboring facilities. *Id.*; Baranowski/Zebrowski VS § 15.1. A neutral terminal railroad could plan local service across the territory, use yards and track based on where capacity actually exists rather than on who owns it, and develop a unified operating plan, creating opportunities to reduce costs and improve service. Morehouse VS § V.B.

Mr. Morehouse acknowledges that establishing a terminal railroad across a territory of this size will require careful planning—including the infrastructure the terminal railroad will operate over, the locations at which traffic will be interchanged with the line-haul carriers, the handling of movements within the region, and crew access and entry points into the territory. But based on his experience, Mr.

Morehouse is confident that with careful planning by UP and good-faith collaboration between the carriers under the Board's oversight, it can be implemented successfully. *Id.*

Alternatives would not remedy the harm. BNSF considered and rejected potential alternative remedies for the harm identified here. But the circumstances of the Gulf Coast region are unique. The solutions that may be broadly beneficial across the network—such as BNSF's proposed mechanism for preserving open gateways and for an open access regime—or that may work for a particular market—such as Pennsylvania intermodal traffic—would not necessarily work in the Gulf Coast.

Trackage rights work for BNSF's Pennsylvania Intermodal request because that service consists of intermodal trains running over a single NS main line to a handful of facilities. In the Gulf Coast, by contrast, the harm arises at hundreds of facilities requiring daily local switching on a congested, capacity-constrained network that is already a patchwork of trackage rights, where UP would be in control of every local move. BNSF's fraught experience implementing its UP/SP trackage rights confirms the point.

Similarly, BNSF's IPM and "open access" proposals may not work well enough in the Gulf Coast region. Those conditions govern the terms on which traffic is priced and interchanged; they do not change who controls the local track, yards, and dispatching over which Gulf Coast traffic moves. Switching/haulage rights into closed facilities would leave UP in control of dispatching and the "last mile" and would

give UP the ability to favor its own traffic over that of its competitors—a concern that will only grow as a combined UP/NS prioritizes its own high-density flows through the region. Morehouse VS § V.B. As long as UP/NS controls that infrastructure in the Gulf Coast, it will have both the incentive and the ability to prioritize its own traffic—including its planned Northeast-to-Mexico 'superhighway'—over the traffic of competitors that depend on access to the same line. *Id.*

Only a neutral operator in the Gulf Coast region, with its own employees implementing dispatching parity, would place competing carriers on an equal operational footing. *Id.*

The condition produces net public benefits. A condition must also produce net public benefits. 49 C.F.R. § 1180.1(d). The Gulf Coast Condition would do so by offsetting, for Gulf Coast customers, the competitive pressure the merger would otherwise eliminate. Today, competition at the eastern end of many Gulf Coast movements constrains UP's pricing at captive origins. A neutral terminal railroad would preserve the substance of that constraint by allowing customers to obtain competing proposals covering all of their Gulf Coast facilities. That, in turn, would prevent the merged carrier from using captivity at one facility to dictate rates and terms at others. Because the merger's harms would be difficult to mitigate directly, a condition that offsets those harms is remedial and well within the Board's § 11324(c) authority. *See* 49 C.F.R. § 1180.1(d). The benefits are concrete. They reach products such as chemicals, plastics, and fuels that flow directly into everyday consumer costs. Baranowski/Zebrowski VS § 15.1; *see* Carlton VS ¶ 212. The condition also promises

operating benefits: more efficient use of pooled Gulf Coast assets and nondiscriminatory local service in a region prone to congestion. Morehouse VS § V.B.

vi. Relief Requested.

BNSF requests that the Board order the following as a condition of any approval:

Within six months of the effective date of the Board's final decision, UP shall present to the Board for approval a transaction establishing a neutral terminal or switching railroad to directly serve all UP and BNSF rail-served facilities in the Gulf Coast region (BEAs 83, 84, 85, 86, 87, 131, and 132), all of which shall open to line-haul service from UP or BNSF together with an operating plan and any applications or exemption requests necessary for the terminal railroad's operating authority.

The terminal railroad shall be jointly owned and governed by UP and BNSF (with other Class I carriers permitted to participate) or operated by a qualified third-party shortline or switching railroad, subject to governance providing participating carriers equal voting power and requiring unanimous consent for actions having a substantial effect on operations, maintenance, or administration.

The terminal railroad shall perform switching, train building, local distribution, and dispatching within the terminal territory through its own employees, on a line-haul-carrier-neutral basis, and shall interchange traffic with UP, BNSF, and other participating carriers at agreed hand-off points.

The transaction shall not require the transfer or divestiture of existing asset ownership. BNSF shall contribute its regional operations and open its closed facilities in the region on the same basis.

BNSF shall cooperate in good faith with UP to refine and implement UP's plan, and the Board shall retain jurisdiction to resolve disputes, to review the plan's adequacy, and to monitor implementation during the oversight period.

c. *The Board Should Require Independent Neutral Dispatching, Operating Procedures and Reporting Requirements to Preserve Competitive Access through the New Orleans Gateway.*

If the Board approves the transaction, it should require UP/NS to install an independent, neutral dispatcher over key gateway infrastructure in New Orleans, including the HPL Bridge and the Back Belt, along with enforceable operating protocols, reporting requirements, and performance thresholds that would trigger additional Board remedies if gateway performance deteriorates. As described in Mr. Morehouse's verified statement, such conditions are necessary to preserve meaningful rail competition in New Orleans and to ensure that UP/NS's dispatching authority over shared gateway infrastructure does not impair non-Applicant railroads' access to the gateway. Morehouse VS § V.C.

New Orleans is one of the most complex and strategically significant rail gateways in the United States. *See* Williams VS ¶ 80. It is the only major Gulf Coast city where all Class I railroads, Amtrak, the New Orleans Public Belt Railroad ("NOPB"), and multiple short lines connect through a network of infrastructure serving rail customers across the Gulf Coast, the Southeast, and the West. According to Mr. Morehouse, freight movements through the gateway depend heavily on shared infrastructure that is currently dispatched and controlled by two independent railroads, UP and NS. *Id.* §§ I, V.C(i). Specifically, UP dispatches the Huey P. Long

("HPL") Bridge and its associated junctions, while NS owns and operates the Back Belt, the principal freight bypass route through New Orleans. Because BNSF accesses the gateway from the west and neither owns nor controls the HPL Bridge, the Back Belt, or other key infrastructure, it is particularly dependent on fair, efficient, and nondiscriminatory access to the gateway's shared infrastructure to reach interchange partners and customers. *Id.* § V.C(i).

Approval of the merger would fundamentally alter dispatching control of the New Orleans gateway. As Mr. Morehouse explains, traffic moving over shared, critical gateway infrastructure would become subject to the dispatching and operational decisions of a single combined railroad. Merger approval would therefore concentrate control over infrastructure critical to both freight and passenger operations, granting the combined carrier substantial influence over the routing, prioritization, and movement of competing traffic through New Orleans. *Id.* §§ I, V.C(iii).

The Board has long recognized the importance of preserving competitive alternatives through the New Orleans gateway. For example, in UP/SP, the Board found that access arrangements "permitting BNSF to provide a competitive alternative in the Houston-Memphis and Houston-New Orleans corridors" were "in [the] public interest." *See UP/SP Decision No. 44*, 1 S.T.B. at 448. Given New Orleans's continued importance as one of the nation's principal rail interchange gateways, the concentration of dispatching and operational control resulting from the merger poses risks not only to competition, but also to network resiliency and service

reliability. Those risks are particularly acute because the New Orleans gateway is "often congested and subject to weather disruptions." *See Canadian Pac. Kan. City Ltd.—Acquis. & Operation—Meridian & Bigbee R.R., L.L.C.*, FD 36732, slip op. at 11 (STB served Oct. 17, 2024). In such circumstances, preserving routing flexibility and competitive alternatives helps ensure that localized service disruptions within the New Orleans gateway do not spread throughout the national rail network.

The merger-related harms arising from consolidated dispatching authority within the New Orleans gateway are not merely theoretical. UP/NS acknowledge that the UP-NS Growth Plan will fundamentally restructure operations at the New Orleans gateway. In their merger application, UP/NS characterize New Orleans as one of the "central interchange gateways" between UP and NS where "delays and costs accumulate." Apr. 30, 2026 Am. App., Vol. 1 p. 13. UP/NS further contend that the UP-NS Growth Plan includes new intermodal lanes from southern Texas (Houston and Laredo) via the New Orleans gateway. Sep. 4, 2026 Am. App. Vol. 2 p. 475, Hunt VS. At the same time, UP/NS identify New Orleans as one of the gateways where the risk of merger-related service disruptions will be highest due to the extent of planned operational changes, while simultaneously projecting increased traffic levels, including an additional eight trains per day on the Back Belt corridor. Sep. 4, 2026 Am. App., Vol. 2 pp. 1032–33, Turner VS ¶¶ 409–10. UP/NS expressly contemplate restructuring operating control and interchange flows within the New Orleans gateway by reducing the quantity of interchange moves between UP, NS, and other connecting carriers and shifting BNSF's interchange with NS from NS's

Oliver Yard to a UP/NS-BNSF interchange at UP's Avondale Yard. Sep. 4, 2026 Am. App., Vol. 2 pp. 715–16, Gehringer/Orr VS ¶¶ 225–27.

In adopting the Major Merger Rules, the Board recognized that preserving major gateways requires more than maintaining a physical interchange. The rules require UP and NS to keep major gateways open, and the Board recognized that gateways must remain open "not just physically but economically" to preserve meaningful competitive routing options. *See Major Rail Consol. Procs.*, 5 S.T.B. at 563. The Board has also recognized that dispatching control can materially affect the competitive value of access rights and has required safeguards to ensure the "equal treatment of all trains without regard to ownership." *See UP/SP Decision No. 44*, 1 S.T.B. at 403–04.

Here, the Board cannot reasonably conclude that competition will be preserved, much less enhanced, merely because the non-Applicant carriers retain theoretical access rights to key infrastructure within the New Orleans gateway. Given UP/NS's planned operational restructuring and projected traffic growth, the continued existence of those access rights alone cannot ensure that gateway access will remain competitively meaningful and nondiscriminatory following consummation.

This concern is not hypothetical. As detailed by Mr. Morehouse, a seven-day field study conducted by BNSF operations personnel found that congestion and train delays on critical portions of the Back Belt frequently occurred despite the absence of infrastructure failures and were driven primarily by dispatching decisions, crew

availability, and downstream congestion. Morehouse VS § V.C(ii). Where a single railroad controls dispatching over capacity-constrained gateway infrastructure, its dispatching decisions can materially affect both the movement of traffic and the ability of competing carriers to exercise their access rights. As the Board has previously recognized, access rights may have limited competitive value absent safeguards ensuring that dispatching authority is exercised without discrimination. *See UP/SP Decision No. 44*, 1 S.T.B. at 403–04.

As such, if the Board approves the transaction, it should impose conditions addressing operational control of the New Orleans gateway. Such conditions are particularly warranted given UP/NS's consolidated dispatching authority and their plans to increase traffic and to restructure operations within the gateway. Specifically, BNSF requests that the Board require the installation of an independent neutral dispatcher with authority over the following shared infrastructure routinely used by multiple carriers in New Orleans: the HPL Bridge, West Bridge Junction, East Bridge Junction, the East Bridge Interlocker and CN/IN Connection, the Back Belt, Elysian Fields Junction, Northeast Tower Junction, Oliver Junction, any connections between the HPL Bridge and the Back Belt, and any other shared infrastructure used by multiple carriers. The Board should further require periodic reporting by all Class I railroads, NOPB, and, where applicable, Amtrak on key gateway performance metrics and establish objective performance thresholds based on transit times, dwell, congestion, route blockages, and interchange performance measured against pre-merger conditions.

d. *The Board Should Exercise Its Authority Under 49 U.S.C. § 11321(a), if Necessary, to Protect the Proposed BNSF-CSX Kentucky Street Connection in Memphis.*

Memphis is also one of the nation's critical rail gateways. Effective competition at this gateway depends on access to efficient interchange opportunities. If approved, the transaction would increase UP/NS's ability to internalize traffic on single-line routes, making competitive interchange alternatives even more important for customers. As detailed in Mr. Morehouse's verified statement, BNSF already has plans to construct a crossover connecting BNSF-owned track and CSX-owned track at Kentucky Street in downtown Memphis. The connection would establish a direct and efficient BNSF-CSX interchange, expand competitive options for shippers, and help preserve Memphis as an open and competitive gateway. Morehouse VS § V.D.

BNSF does not require Board authority for the track construction, because it will merely connect existing rail facilities and will not extend BNSF rail service into new territory or permit entry into a new market. *See, e.g.*, *Mo. Pac. R.R. & S. Pac. Transp. Co.—Construction & Operation Exemption—Avondale, LA*, FD 33123 (STB served July 11, 1997). However, if the Board approves the UP/NS merger, it should, to the extent necessary, exercise its authority under 49 U.S.C. § 11321(a) to override any contractual restrictions that could otherwise be used to impede the construction, operation, or use of the connection. 49 U.S.C. § 11321(a) authorizes the Board to override contractual restrictions when necessary to carry out an approved transaction. *See Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 134 (1991); *CSX Corp.—Control and Operating Leases/Agreements—Conrail Inc.*, 3

S.T.B. 196 (1998); *Consol. Coal Sales Co. v. Consol. Rail Corp.*, FD 34169 (STB served May 24, 2002).

According to Mr. Morehouse, the current configuration of the Memphis gateway affords UP and NS more efficient access to CSX than BNSF. UP can interchange traffic directly with CSX in Memphis, while NS and CSX operate in close proximity within the gateway. By contrast, BNSF's current interchange route with CSX is longer than the direct route available to UP and is subject to operational constraints, including segments where train speeds are restricted to {{ [redacted] }}. Morehouse VS § V.D.

The need for the BNSF-CSX connection is underscored by UP/NS's own description of the transaction. UP/NS identify Memphis as a key gateway in the "watershed region," project substantial traffic benefits from integrated single-line service in the region, and tout the merger's ability to reduce interchange-related inefficiencies. *See* Apr. 30, 2026 Am. App., Vol. 2 pp. 406–07, Novak VS App'x A; Sep. 4, 2026 Am. App., Vol. 2 pp. 863–64, 1003, Turner VS ¶¶ 329–30. Yet UP/NS acknowledge that Memphis is among the gateways expected to experience the "most merger-related operational changes" and among those facing the highest risk of "merger-related service disruptions." *See* Sep. 4, 2026 Am. App., Vol. 2 pp. 1032–33, Turner VS ¶¶ 409–10.

As the combined UP/NS railroad increasingly internalizes east-west traffic on single-line routes, BNSF will become increasingly reliant on efficient interchange with CSX to provide competitive access to eastern markets through Memphis. To

preserve that competition, BNSF will construct a crossover connection at Kentucky Street, connecting BNSF-owned track to CSX-operated track, creating a direct BNSF-CSX interchange in Memphis. Morehouse VS § V.D. Without this connection, the merger would diminish the effectiveness of competitive interchange alternatives and reduce transportation options available to shippers moving through this critical gateway.

On April 23, 2026, BNSF notified UP of its intent to construct the BNSF-CSX connecting track. Because UP conducts trackage rights operations over the affected BNSF-owned track, BNSF provided the notice as a courtesy. The notice requested that UP raise any questions or concerns within 21 days (by May 14, 2026), and stated that, absent a response, BNSF intended to proceed with the project and would separately provide engineering drawings and coordinate construction windows. To date, UP has not formally responded to BNSF's notice.

As explained by Mr. Morehouse, BNSF is concerned that UP may seek to rely on an overly broad interpretation of provisions in preexisting agreements governing operations within the Memphis gateway between the carriers, in order to challenge, delay, or restrict construction, operation, or use of the proposed connection. Morehouse VS § V.D; *see, e.g.*, Ex. 103, Supplemental Agreement between Union Pacific & Missouri Pacific Railroad Company (F-1775-0-5); Ex. 104, Trackage Rights Agreement between BNSF Railway Co. & Union Pacific Railroad Company (BF-57851-Main-0); Ex. 105, Agreement between Union Railway Co. & Missouri Pacific Railroad Company Trackage Rights at Memphis, TN, 1966 TRA Decision. Although

BNSF believes that any such objection would lack merit, a merged UP/NS would nevertheless have a strong incentive to invoke these agreements to impede the implementation of a connection that would provide customers with a competitive alternative route within the Memphis gateway. Indeed, UP has a history of using litigation, procedural obstacles, and strained interpretations of contractual and regulatory provisions to delay, impede, or stymie competition-enhancing measures, often deriving strategic advantage from the resulting delay, expense, and uncertainty, even where its underlying position ultimately proves unsuccessful.

BNSF believes that these agreements permit the construction and use of the proposed connecting track. However, if the agreements are ultimately construed to limit such construction or operation, the Board should ensure, if it approves the UP/NS transaction, that no real estate holding, contractual provision, operating restriction, consent requirement, or similar agreement may be used to prevent or impede BNSF's construction, operation, or use of the proposed connection.

To the extent necessary, the Board should therefore exercise its authority under 49 U.S.C. § 11321(a) to render inapplicable any contractual restriction that would interfere with implementation or use of the connection. Such relief would preserve efficient BNSF-CSX interchange opportunities, enhance fluidity within the Memphis gateway, and maintain a meaningful competitive alternative to the single-line service offerings of a combined UP/NS.

e. *BNSF Does Not Oppose CN's Anticipated Acquisition of NS's Ownership Interests in TRRA and KCT.*

TRRA is a rail carrier collectively owned by UP, NS, BNSF, CSX, and CN. UP-68/NS-66 at 5 (STB entered July 7, 2026). KCT is a rail carrier collectively owned by UP, NS, BNSF, and CPKC. *Id.* If the UP/NS merger were to be approved, the combination of UP's and NS's ownership interests (57% of TRRA, 50% of KCT) would cause the merged railroad to obtain control of TRRA and KCT.

Therefore, absent a plan for divestiture, UP/NS should have sought separate authority from the Board for control of each railroad. But in their Amended Application, UP/NS ultimately declined to request such control authority, instead indicating that they would find a way to cause a combined UP/NS to not control TRRA and claiming that the combined UP/NS 50% interest in KCT would not actually result in control.

UP/NS's plans with respect to TRRA have whipsawed throughout this proceeding, including a bizarre request for a freestanding side proceeding for the Board to select amongst a number of hypothetical, half-formed divestiture options. BNSF addressed this process in detail in BNSF-41, filed on July 20, 2026. The Board rejected UP/NS's proposal in Decision No. 30, served on August 18, 2026.

Although it remains unclear precisely how UP/NS will avoid acquiring or exercising control over TRRA and KCT, UP and CN have publicly announced, and UP/NS have represented to the Board, that CN will acquire NS's ownership interests in TRRA and KCT, contingent on Board approval and completion of the merger.

BNSF, a joint owner of TRRA and KCT, does not oppose the anticipated acquisition by CN of NS's ownership interests in TRRA and KCT. The anticipated acquisition would prevent the combined UP/NS from holding 50% or more of the ownership interests in these entities. But given the uncertain status of the UP/CN agreement with respect to TRRA and KCT, the Board should hold UP/NS to the representations made in their second response to Decision No. 21, filed July 27, 2026, regarding the anticipated acquisition by CN of NS's ownership interests in TRRA and KCT. Additionally, the Board should require UP/NS to submit an update on the status of CN's anticipated acquisition every 30 days following any Board decision approving the merger transaction, until the acquisition by CN is completed.

If, for any reason, the anticipated acquisition by CN is not completed within 90 days following approval, the Board should order UP/NS to divest sufficient ownership interests in TRRA and KCT to one or more parties not affiliated with UP/NS, subject to Board approval, to prevent UP/NS from holding 50% or more of the ownership interests in, or otherwise exercising control over, TRRA and KCT.

BNSF believes that a condition intended to prevent UP/NS from holding 50% or more of the ownership interests in TRRA and KCT would prevent UP/NS from controlling those carriers and provide sufficient protections given the nature and characteristics of these terminal railroads and their ownership structure. This stands in contrast to the issues raised regarding TTX above. The governance of TRRA and KCT does not present the same concerns that would be present if UP/NS were permitted to retain such an ownership interest in TTX. UP/NS would not be able to

dominate important decisions by TRRA and KCT or act in ways that harm their competitors as they would in the case of TTX.

CONCLUSION

UP/NS promise that the proposed merger will fundamentally transform the rail industry. The record unequivocally shows it will be transformed for the worse: higher prices, less choice, degraded service, fewer routes, imaginary benefits, and permanent imbalance. The UP/NS merger is not in the public interest. The Board should deny UP/NS's Amended Application.

[*Signature page follows.*]

Respectfully submitted,

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Dated: November 18, 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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November 18, 2026