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SPPI Southwest Public Policy Institute

November 18, 2026

Surface Transportation Board
395 E Street SW
Washington, DC 20423-0001

Re: Docket No. FD 36873

Union Pacific Corporation and Union Pacific Railroad Company—Control—Norfolk Southern Corporation and Norfolk Southern Railway Company

Comments of the Southwest Public Policy Institute in support of the Revised Application

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Dear Members of the Board:

The Southwest Public Policy Institute (SPPI) submits these comments in Docket No. FD 36873 in support of the Revised Application submitted before the Surface Transportation Board (STB) by Union Pacific and Norfolk Southern. SPPI is a 501(c)(3) nonprofit research institute and think tank dedicated to advancing better living through better policy.

The Board should approve this transaction. SPPI made that case publicly in October, arguing that a rail merger could help as diesel prices drive the affordability debate.[1] The applicants project that it will move about 2.1 million truckloads a year from highways to rail and save shippers about $3.5 billion annually.[2] They have backed that projection with commitments no prior rail merger has offered. The most determined opposition comes not from the shippers, but from the railroads that would have to compete with a good one. The Board should recognize that opposition for what it is, weigh it as advocacy rather than evidence, and decline to let it delay or dilute a merger that would bring single-line transcontinental service to American shippers for the first time.

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1 Patrick M. Brenner, *Diesel Is Driving the Affordability Debate. A Rail Merger Could Help.*, DC Journal (Oct. 27, 2026), https://southwestpolicy.com/diesel-is-driving-the-affordability-debate-a-rail-merger-could-help/.

2 *Union Pac. Corp.—Control—Norfolk S. Corp.*, Docket No. FD 36873, Fed. Reg. Doc. No. 2026-10751 (May 29, 2026) (describing Applicants' diversion analysis).

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The applicants have met the heightened standard

Under 49 U.S.C. § 11324 and the Board's major merger rules, a transaction of this magnitude must do more than avoid harm; it must enhance competition and serve the public interest.[3] The applicants have voluntarily committed to conditions that address that standard directly. In July they expanded Committed Gateway Pricing to double the shipments eligible and extend it to bulk unit trains; committed to preserve Class I rail options for shippers going from three carriers to two, not only two to one; offered temporary access to alternative rail service if service declines during integration; and created a rate relief process if the promised benefits are not delivered on time.[4] Those are enforceable promises aimed at the very harms opponents allege. The Board should hold the applicants to them, not ask them to prove a negative.

Rivals oppose efficient mergers, not harmful ones

A new paper by Professor Donald J. Kochan of the Antonin Scalia Law School explains why the loudest objections in this record deserve the least weight.[5] SPPI applied that analysis to this proceeding in a policy brief published November 16.[6] If a merger would let the combined carrier raise rates or let service slip, its rivals gain: they can raise their own rates under the same umbrella. If it lowers costs and improves service, rivals lose, because they must match it or lose traffic. A rival therefore has little reason to oppose a merger that harms shippers and every reason to oppose one that helps them.

Economists have long recognized this. William Baumol and Janusz Ordover observed that rivals can be relied on to denounce a combination as anticompetitive precisely when it is beneficial.[7] Joseph Farrell and Carl Shapiro wrote that when rival firms argue a merger would reduce output, agencies "should perhaps infer that they believe the opposite."[8]

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3 49 U.S.C. § 11324; 49 C.F.R. § 1180.1.

4 Press Release, Union Pacific Corp. & Norfolk Southern Corp., *Union Pacific and Norfolk Southern Affirm Strength of Merger Application and Offer Unprecedented New Customer Assurances* (July 27, 2026).

5 Donald J. Kochan, *Merger Review and the Anti-Competitive Self Interest of Competitors in the Commenting Process* (George Mason Univ. L. & Econ. Rsch. Paper Series No. 26-21, Nov. 12, 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=7696678.

6 Patrick M. Brenner & Gregory A. Schroeder, *Consider the Source When Rival Railroads Object* (Southwest Pub. Pol'y Inst. Policy Brief, Nov. 16, 2026), https://southwestpolicy.com/rival-railroads-up-ns-review/.

7 William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 247, 256–57 (1985).

8 Joseph Farrell & Carl Shapiro, *Horizontal Mergers: An Equilibrium Analysis*, 80 Am. Econ. Rev. 107, 114 n.15 (1990).

Four former senior antitrust enforcers made the same point to the Board in this docket in August: the competing railroads "are not disinterested observers of this transaction."[9] When BNSF and CSX warn of higher rates and weaker competition, they are describing an outcome that would enrich them. Their real fear is a stronger competitor.

Courts discount competitor testimony, and so should the Board

The Third Circuit has explained that courts scrutinize enforcement efforts by competitors because their interests "are not necessarily congruent with the consumer's stake in competition."[10] In *United States v. AT&T*, a vertical merger case, the District Court for the District of Columbia found a risk that competitor testimony "reflects self-interest rather than genuine concerns about harm to competition" and held that caution was necessary in weighing it.[11] Judge Frank Easterbrook has urged that suits by horizontal competitors be treated "with the utmost suspicion."[12] A comment to this Board is the same kind of act as a competitor's lawsuit: a request that the government use its power against a rival. It deserves the same suspicion.

Delay is the rivals' real objective

Opposition need not defeat a merger to pay off. Delay, discovery and conditions all raise the merged carrier's costs, and a competitor that cannot match a stronger rival in the market can still slow it in the docket.[13] BNSF and CSX moved for summary denial, asking the Board to reject the application without reaching its merits, and both asked for the longest procedural schedule the statute allows.[14] Every month of delay is a month in which shippers wait for transcontinental single-line rail service and rivals keep traffic they would otherwise have to fight for. The Board should not reward that strategy with more time or more conditions.

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9 Comments of Former Senior Antitrust Enforcers (Alden F. Abbott, Abbott B. Lipsky, Jr., Gregory J. Werden & Mark Whitener) at 5, Docket No. FD 36873 (filed Aug. 12, 2026).

10 *Alberta Gas Chems. Ltd. v. E.I. du Pont de Nemours & Co.*, 826 F.2d 1235, 1239 (3d Cir. 1987).

11 *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 211–12 (D.D.C. 2018).

12 Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 35 (1984).

13 Kochan, *supra* note 5, pts. III, V; *see* Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 Am. Econ. Rev. 267 (1983).

14 *Union Pac. Corp.—Control—Norfolk S. Corp.* (Decision No. 30), Docket No. FD 36873, 91 Fed. Reg. 53,927 (Aug. 20, 2026).

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Rivals wear the shippers' mask

Competitors rarely say they fear a stronger rival; they say they fear for shippers. Public choice scholars call this "masking": a private interest presented in public-interest terms.[15] It often comes with what Bruce Yandle called a "bootleggers and Baptists" coalition, in which parties with a financial stake stand beside parties with a sincere public concern and borrow their credibility.[16] A competing railroad that makes a shipper's argument does not add a second voice for shippers. It adds an interested party, and the Board should count it as one.

Canadian National's opposition had a price

The record shows how much of the rivals' concern is negotiable. Canadian National publicly insisted that the applicants demonstrate real competitive enhancements.[17] It then settled, contingent on approval, for Norfolk Southern's interests in the Terminal Railroad Association of St. Louis and the Kansas City Terminal Railway, a share of the Peoria and Pekin Union Railway, and selection to serve certain shipper facilities.[18] A competitor whose objections dissolve once it is paid in track and terminal stakes was not speaking for shippers. The Board should read the remaining rivals' demands the same way.

The vertical objection has been answered

The strongest argument against an end-to-end merger is that the combined carrier could disadvantage rivals at the gateways where traffic changes hands, and the Board has rightly declined to presume such combinations are harmless.[19] But the applicants have met that concern with an Open Gateway Commitment modeled on conditions the Board itself has adopted in recent mergers, together with Committed Gateway Pricing and the 2-to-1 and 3-to-2 protections.[20]

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15 Kochan, *supra* note 5, pt. VII.

16 Bruce Yandle, *Bootleggers and Baptists—The Education of a Regulatory Economist*, Regulation, May/June 1983, at 12; Kochan, *supra* note 5, pt. VIII.

17 *STB Accepts UP-NS Revised Merger Application; Delays Proceedings*, Railway Age (May 29, 2026) (quoting Canadian National).

18 Decision No. 30, 91 Fed. Reg. at 53,928–29.

19 *Id.* at 53,931 (citing *Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500, slip op. at 3, 19, 47 (STB served Mar. 15, 2023)).

20 Press Release, Union Pacific Corp. & Norfolk Southern Corp., *STB Should Reject Opponents' Baseless Prima Facie Challenges* (Aug. 2026); Press Release, *supra* note 4.

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The question is no longer whether gateway foreclosure is possible in theory; it is whether these commitments prevent it. That is a question for evidence, and competitor rhetoric is not evidence. As the former enforcers put it, competitor input is most reliable when it rests on concrete, verifiable facts, not generalized assertions about concentration or speculation about future harm.[21]

What we ask of the Board

1. **Approve the Revised Application** with the applicants' commitments, including Committed Gateway Pricing, the Open Gateway Commitment, the 2-to-1 and 3-to-2 protections, the service protections and the rate relief process, as enforceable conditions.
2. **Weigh competing railroads' filings as advocacy.** Identify which filings come from competing carriers, credit their claims only where they rest on traffic, rate, interchange or service data the applicants and the Board can test, and state the weight given.
3. **Decline conditions that serve rivals rather than shippers.** For each condition a competing railroad requests, ask whether it remedies a demonstrated harm to shippers or simply hands the competitor traffic, access or assets.
4. **Hold the schedule.** Decide the application on the schedule the Board has set, without further extensions sought by the applicants' competitors.

We appreciate the Board's consideration of these comments.

Respectfully submitted,

Patrick M. Brenner
President

Gregory A. Schroeder
Executive Vice President

21 Comments of Former Senior Antitrust Enforcers, *supra* note 9, at 5.

Certificate of Service

I certify that I have this day served copies of this document upon all parties of record in this proceeding, by email or first-class mail.

Dated: November 18, 2026

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