

**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**

CPKC REPLY TO APPLICANTS' MOTION TO PERMIT STAKEHOLDER COMMUNICATIONS

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Canadian Pacific Railway Company d/b/a Canadian Pacific Kansas City and CPKC, on behalf of itself and its U.S. rail carrier subsidiaries (collectively “CPKC”),¹ replies as follows to Applicants’ Motion to Permit Stakeholder Communications (“Mot.”) in this proceeding.

Applicants are proposing—as a sharp break from longstanding Board and ICC practice in merger proceedings—an essentially unrestricted ability to meet privately (*i.e.*, on an ex parte basis) with Board members and Board staff during key stages of this proceeding. CPKC believes that Applicants have gravely underestimated the practical, due process, and fairness concerns associated with allowing ex parte communications in this proceeding.

The scope and context of the proposed transaction calls upon the Board to take the utmost care in ensuring that its processes for reviewing the application—along with comments thereon and potential responsive or inconsistent applications—are thorough, fair, and efficient.

¹ CPKC’s U.S. rail carrier subsidiaries include Soo Line Railroad Company; Central Maine & Quebec Railway US Inc.; Dakota, Minnesota & Eastern Railroad Corporation; Delaware & Hudson Railway Company, Inc.; The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company.

Applicants' proposal is unprecedented in at least two fundamental respects: the sheer size and scope of the railroad enterprises that Applicants are proposing to combine (Applicants themselves say (Mot. at 6) their transaction will be "transformative"), and the first-ever application of the Major Merger rules adopted in 2001, when the Board eliminated the presumption in favor of further rail consolidation.

CPKC believes that these key features of Applicants' proposal—along with others—will have important bearing on the procedural schedule in this proceeding, which CPKC will address in due course. The same features, and the inherent nature of the merger review procedures established by Congress, also have important bearing on the question whether and to what extent the Board should, for the first time ever in a merger proceeding, authorize *ex parte* communications on substantive matters.

CPKC appreciates that *ex parte* communications may in some contexts seem expedient and potentially facilitating better decision-making. In the present setting, however, there are compelling considerations—not the least being fundamental precepts of due process—that counsel great caution in opening the door to such communications.

Applicants note that the Association of American Railroads, of which CPKC is a member, has petitioned the Board (in Ex Parte No. 782) to consider revising its rules to allow *ex parte* communications to some degree in control proceedings involving Class 1 railroads. From CPKC's perspective, the thrust of that Petition was to enable greater use of *ex parte* communications in settings where they posed no threat to fair and transparent decision making, such as "routine, procedural matters" (AAR Petition at 6), "certain types of clarifying communications with staff" (*id.*); and communications in "proceedings where there is only one party" (*id.* at 7). Regarding "communications in transactions involving Class I railroads" (*id.* at

9), CPKC envisioned the Petition kicking off a debate about the kinds of situations where such communications would be permitted. Section 11324(f) applies to a host of such transactions, including trackage rights exemption matters and a host of other matters, with Major Mergers of two Class 1 railroads representing an exceedingly rare and unique context. Although UP and Norfolk Southern apparently had begun private conversations about their proposed combination by the time the AAR Petition was filed,² CPKC did not contemplate the Petition allowing unrestricted ex parte communications in a proceeding to address a transaction of the scale and significance of that under consideration in this proceeding. CPKC believes that *any* authorization of ex parte communications in the present context must be accompanied by robust safeguards of the sort discussed herein.

CPKC begins by reviewing the relevant considerations and concludes by outlining how the Board might structure ex parte communications, if it concludes that the potential rewards from allowing them at all outweigh the risks.

I. THE PRINCIPLES UNDERLYING *FIELDSTON* REMAIN VALID

In 1997, the Board considered the proposal Applicants are making and rejected it. In *Petition of Fieldston Co., Inc. to Establish Procedures Regarding Ex Parte Communications in Railroad Merger Proceedings*, Ex Parte No. 617, 1996 WL 752555 (STB served Jan. 8, 1997) (“*Fieldston*”), the Board determined “not to entertain ex parte communications” in merger cases, concluding that such an approach “promotes efficiency, fairness, and public confidence in the Board’s decisional process.” *Id.* at *2. The basic premise of Applicants’ motion is that *Fieldston*

² See SEC Form S-4 Registration Statement at 81 (filed Sept 16, 2025), *available at* <https://investor.unionpacific.com/static-files/05fc380c-1aa3-4f59-94b6-47a86867fdf1> (“On March 18, 2025, Messrs. George and Vena attended a meeting of the Association of American Railroads in Washington, D.C. While in Washington, D.C., Messrs. George and Vena again discussed at a high level, among other topics, the possibility of creating a transcontinental railroad and whether the timing was right to explore such a transaction.”).

is a relic of a bygone era. They criticize the case as a “nearly 30-year-old decision” (Mot. at 2) and somehow inconsistent with Congress’ “direction” in Section 11324(f)(4) (Mot. at 5).

Applicants’ critiques miss the mark. First, *Fieldston* was decided *after* Congress authorized the Board (in Section 11324(f)) to permit ex parte communications in merger cases. As Congress made clear, however, it would remain entirely within the Board’s discretion whether to allow such communications at all. Section 11324(f)(4) itself states that “[n]othing in this subsection shall be construed to require the Board or any of its members or employees to engage in any ex parte communication with any person.” Likewise, the legislative history cited by Applicants states unequivocally that “any such consultations are entirely at the decision maker’s option.”³ Congress has not directed the Board to do anything other than use its discretion in assessing whether and under what conditions to allow ex parte communications.

Second, the fact that *Fieldston* was decided nearly 30 years ago is a virtue not a vice, and entitles the Board’s judgment in that case to more weight, not less. *Fieldston* was decided in the immediate aftermath of the Board’s experience with the last mammoth consolidation proceeding in which UP participated—its acquisition of Southern Pacific in 1996. The Board’s reluctance, in light of its near contemporaneous experience in *UP/SP*, to embrace ex parte communications in merger cases despite Congress’ authorization, speaks volumes, and ought to counsel great caution in opening the door to such communications in the upcoming adjudication of UP’s proposal to acquire Norfolk Southern.

³ H.R. Rep. No. 104-422, at 191 (1995) (Conf. Rep.).

II. AS *FIELDSTON* HELD, THIS PROCEEDING IS NOT AN INFORMAL RULEMAKING BUT AN EVIDENTIARY PROCEEDING THAT IS “ADJUDICATIVE IN FACT”

Applicants’ proposal that ex parte communications be allowed here just as they are in informal rulemakings ignores fundamental difference between the two types of proceedings.

First, unlike informal rulemakings, railroad merger proceedings are not occasions when the agency is asked to broker a compromise solution to some set of challenges facing the industry. In *Fieldston* the Board recognized that “statutory scheme enacted by Congress requires the Board to make its decisions in all cases on the basis of a complete record” and that merger proceedings in particular are “adjudications in fact.” *Fieldston* at *2. Applicants in a rail merger proceeding bear the burden of proving, based on record evidence, that their proposal is in the public interest. *See, e.g.*, 49 C.F.R. § 1180.4(c)(8); *CP/KCS*, Finance Docket No. 36500, Union Pacific Comments (filed Feb. 28, 2022) at 66 (Applicants bear “burden of proving the transaction is in the public interest”). The Board is a decisionmaker, not a policymaker, in these cases. *Fieldston* at *2. Other industry stakeholders are permitted to participate and submit evidence of their own showing that the transaction may not be in the public interest, that it should be conditioned, or that a responsive or inconsistent application should be granted. In all events, Congress expressly intends that decisions in railroad merger cases be grounded in record evidence adduced in a fair and deliberate series of submissions. Merger review proceedings are not evidentiary free-for-alls.⁴

⁴ Among many reflections of this quasi-adjudicative nature of merger cases are Congress’ specification of a one-year limitation on the “evidentiary proceedings” herein (following acceptance of the Application), *see* 49 U.S.C. § 11325(b)(3); its observation that, to the extent the Board authorizes any discretionary ex parte communications such communications would need to be “preserved in the record,” *see* H.R. Rep. No. 104-422, at 191 (1995) (Conf. Rep.); and the fact that the Board will strike evidence submitted outside appropriate bounds, such as impermissible surreply evidence, *see CP/KCS*, Finance Docket No. 36500 (Decision No. 22, served Dec. 13, 2022) (granting in part motions to strike).

Fieldston also correctly observed that merger proceedings “require the Board to adjudicate conflicting claims by competing parties,” which is a touchstone in the caselaw for triggering “requirements for procedural due process.” *Id.* at *2. When the Board later decided to authorize ex parte communications in the informal rulemaking context, it expressly relied on caselaw tolerating ex parte communications “so long as the proceedings were not quasi-adjudicative in nature,” and it contrasted those situations with ones “involving competing claims for a valuable privilege.”⁵ The Board recognized in *Fieldston* that the deference according Board determinations in merger cases depends on the degree of fairness and objectivity of the decisionmaker’s processes. As *Fieldston* explained, “requirements for fairness underlying all provisions of the ICCTA demand that the Board accord equal access to all members of the public and militate against a process under which the Board would decide issues based on any off-the-record considerations.” *Fieldston* at *2. Nothing whatsoever has changed about these vitally important due process and fairness considerations since *Fieldston* was decided.

Second, and potentially of greater practical import, unlike informal rulemakings, merger proceedings are subject to statutory timelines that limit the Board’s ability to adjust the schedule to accommodate parties’ participation in ex parte communication and reviewing and responding to the ex parte communications of others, all while *simultaneously* participating in discovery, analyzing the written evidentiary submissions, and preparing responsive evidentiary submissions. The Board was sympathetic to these pressures in the context of informal rulemakings, observing that it would “be cognizant of such constraints” when establishing deadlines and noting that parties may also seek extensions. *Ex Parte No. 739* at 19. The one-

⁵ *Ex Parte Communications in Informal Rulemaking Proceedings*, Ex Parte No. 739 (STB served Mar 5, 2018) (“*Ex Parte No. 739*”) at 2-3 & n.5.

year limit on evidentiary proceedings in this case will not allow for similar flexibility, as CPKC will address further in its comments on the proposed schedule.

III. THE BOARD SHOULD APPROACH EX PARTE COMMUNICATIONS WITH GREAT CAUTION

CPKC well appreciates that there may be situations that arise in any merger proceeding in which ex parte communications might be seen as facilitating efficient information flow between parties and the Board. CPKC's concern is that opening the door to such communications could lead to extraordinary fairness risks and unmanageable burdens on the Board and the parties. CPKC urges the Board to consider, in particular, the following safeguards to address the practical and fairness-related implications of any potential process for ex parte communications.

Need for Equal Access to the Board and Board Staff

As *Fieldston* concluded in 2007, basic fairness requires that all parties—not just Applicants—be allowed equal access to the Board and Board Staff. To the extent Applicants meet to discuss some set of issues in this proceeding, opportunities should be provided to others having an interest in those issues also to interact with the Board on the same issues. This may create difficult scheduling issues, and consume the resources of Board staff, but any other approach is unthinkable unless the process were strictly limited to invitations by the Board seeking clarification or amplification of points made in written evidence already submitted by a party. In the latter case, there may be no need for responsive ex parte communications, since the clarifications or amplifications could be responded to in subsequent written submissions (as Applicants suggest, *see* Mot. at 5).

Need for Full Disclosure, Not Mere Summaries

Second, it is axiomatic that in merger proceedings parties must have opportunities to evaluate and respond to all of the evidence put forward by Applicants and others, including that adduced in ex parte sessions. Applicants acknowledge (Mot. at 5) that other parties would be

entitled to “respond to ... disclosed communications in their written submissions due after” Applicants’ proposed window for ex parte communications closes.⁶ Realistically, however, a mere “summary” of the topics discussed in an ex parte session will not provide sufficiently specific information to enable a useful response.

Consider, for example, UP’s summary of an ex parte meeting it had with Member Primus in Ex Parte No. 711 in 2021. UP’s summary included the following:

“Vice Chairman Primus asked what Union Pacific has done to address the concerns driving customer demands for an EP 711 remedy. Union Pacific described some of the substantial investments made to support Union Pacific customers, including investments in: transload sites; backloading opportunities; equipment; and technology increasing service transparency. Union Pacific also described efforts to provide customers with strong service product through reductions in the excess network inventory introduced in response to increased transit times caused by various phenomena (*e.g.*, wildfires).”⁷

While this synopsis is useful in the context of an informal rulemaking, a generic message of this sort lacks specificity about the precise question being asked of UP or the precise nature of the “investments” and “efforts” that UP described in response to that question. In a merger proceeding, those matters would be relevant to the question whether UP’s proposed transaction served the public interest, yet the lack of specificity would deprive other parties of a fair opportunity (absent burdensome, and maybe even untimely, further discovery of Applicants) to reply to whatever evidence UP conveyed in the ex parte session.

⁶ Under Applicants’ proposed schedule, however, the only “written submissions” allowed after Day 150 would be those of Applicants and parties commenting on, or offering rebuttal in support of, responsive applications, and all parties opportunity to file briefs. CPKC intends to comment further on the proposed schedule in due course.

⁷ Ex Parte 711 (Sub-No. 1), Summary of Ex Parte Meeting between Union Pacific R.R. and STB Vice Chairman Robert Primus (filed Dec. 9, 2021).

The problem would be especially acute to the extent that the content of any ex parte communications goes beyond the content already set forth in Applicants' (or other parties') formal written evidentiary submissions. CPKC is not suggesting that Applicants or other parties would willfully (and inappropriately) sandbag opponents by reserving important evidence for ex parte sessions, but it seems inevitable that such sessions would cover new ground. Indeed, the Board's order adopting rules for ex parte communications in informal rulemakings notes that those communications "allow Board Members to obtain clarification and seek additional information regarding arguments contained in the written opening comments." *Ex Parte No. 739* at 17.

CPKC does not doubt the potential value of such interactions, but merger proceedings call for extra caution. In a merger proceeding, all parties are entitled—and need—to know not just the general nature of any "clarification" or "additional information," but instead need to know the actual, specific information so conveyed. Otherwise, they would have no ability to incorporate that information into the responsive evidence they are entitled to submit. And they would need to know that information with sufficient time to incorporate it into their responsive evidence.

Parties in merger cases, of course, are accustomed to seeking clarifications through the discovery process, and parties could likewise seek to compel other parties to disclose the precise content of their ex parte communications by asking for those details in discovery or taking the depositions of meeting participants. But discovery takes time and can impose considerable burdens.

CPKC recommends that a better approach would be to require that parties engaging in permitted ex parte communications arrange for an expedited transcript of the communication (in

addition to filing all written materials shared or shown to the Board or Board Staff).⁸ Any confidential content could be redacted from the public record version of such transcripts. This approach is consistent with how the Board has handled its engagement with merging parties over technical issues.⁹ Having a concrete record of what was said would allow a fair and timely opportunity for parties to respond to whatever evidence or argument was made rather than having to guess at that content based on a cryptic summary.

Need for Procedural Windows Free from Ex Parte Communication

Third, were ex parte communications allowed throughout the Board's procedural schedule—whatever that turns out to be—it would be highly disruptive to parties needing time to prepare their own evidentiary submissions.

CPKC proposes that the Board limit the period for ex parte communications to discrete windows (of 30-60 days) following each round of evidence provided for by the procedural schedule, with that window closing no less than 20 days prior to the date for the next round of evidence. These limits would allow for ex parte communications enabling the Board to understand better the evidence filed by Applicants and other parties while allowing the preparation of responsive evidence without undue disruption by an ongoing cascade of further ex parte communications.

⁸ CPKC would suggest that transcripts be provided within five days of the ex parte communication to outside counsel and consultants that have executed Highly Confidential Protective Order undertakings and posted on the Board's website within one week.

⁹ See e.g., *CP/KCS*, Finance Docket No. 36500 (Decision No. 36, served May 1, 2023) (denying third party access to conference respecting oversight data reporting, but providing that a "transcript will be added to the public record"); *CSX Transportation, Inc. – Acquisition of Operating Easement – Grand Trunk Western R.R.*, Finance Docket No. 35522 (STB served Oct. 14, 2016) (scheduling technical conference with CSX to address post-transaction crossing issues and providing that "a transcript of the conference will be placed in the public docket").

The Board also should implement a scheduling protocol that would require advance notice of scheduled ex parte communications so that other parties interested in their own responsive meetings could schedule sessions of their own during the window and avoid being shut out of the process by the closing of the ex parte window.

CONCLUSION

CPKC urges the Board to impose the safeguards summarized above to the extent it concludes that any ex parte communications should be allowed in this proceeding, contrary to the longstanding practice in merger cases.

Respectfully submitted,



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Dated: September 19, 2025

CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of September, 2025, a true and correct copy of the foregoing CPKC Reply to Applicants' Motion to Permit Stakeholder Communications was served by first-class mail or email on all parties of record in this proceeding, the Secretary of Transportation, the Attorney General of the United States, and Administrative Law Judge Jenifer Soulikias.



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