

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET No. FD 36873

310093
ENTERED
Office of Chief Counsel
September 22, 2025
Part of
Public Record

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

RESPONSE OF CSX TRANSPORTATION, INC. TO APPLICANTS' MOTION
TO PERMIT EX PARTE COMMUNICATIONS

John P. Patelli
Steven Armbrust
Jason M. Marques
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 359-3276

Kent A. Gardiner
Shawn R. Johnson
Luke van Houwelingen
Crowell & Moring LLP
1001 Pennsylvania Ave. NW
Washington, DC 20004
(202)-624-2624
srjohnson@crowell.com

John M. Scheib
Gentry Locke Attorneys
101 W. Main Street, Suite 705
Norfolk, VA, 23510
(757)-916-3511
scheib@gentrylocke.com

Louis E. Gitomer
Law Offices of Louis E. Gitomer,
LLC
600 Baltimore Avenue, Suite 301
Towson, MD 21204
(410) 296-2250
Lou@lgraillaw.com

Attorneys for CSX Transportation, Inc.

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36873

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

RESPONSE OF CSX TRANSPORTATION, INC. TO APPLICANTS' MOTION
TO PERMIT EX PARTE COMMUNICATIONS

CSX Transportation, Inc. ("CSXT") respectfully submits this response to the August 29, 2025 motion by Union Pacific and Norfolk Southern (collectively, "Applicants") to waive the Board's prohibition on ex parte communications for this proceeding. CSXT does not oppose the appropriate use of ex parte communications in this proceeding, so long as they comport with fundamental principles that the Board has previously endorsed: if the Board permits ex parte communications, it should adopt safeguards that ensure they are conducted in a way that is efficient, fair to all interested parties,¹ will assist the Board in its decision-making process, and does not undermine public confidence in that process. *Pet. of Fieldston Co. to Establish Procs. Regarding Ex Parte Commc'ns*, 1 S.T.B. 1083, 1084-85 (1996) ("*Fieldston*"). Adherence to those principles will be especially important in the

¹ CSXT agrees with Applicants that any ex parte communications should be limited to parties to the proceeding, consistent with 49 C.F.R. § 1101.2(d). *See* Motion to Permit Stakeholder Communications in Accordance with 49 U.S.C. § 11324(f) ("Motion") at 5, FD 36873 (UP-4/NS-4) (Aug. 29, 2025).

context of this proceeding, where the Board is tasked with review of a transaction that will have wide-reaching impacts. To that end, CSXT explains its position that:

- ex parte communications could help to facilitate the Board’s digestion of the parties’ evidentiary submissions in this proceeding;
- reasonable constraints should be imposed on such communications—on their number, and on the temporal windows in which they can occur—to ensure they are truly helpful, protect due process, and do not overwhelm the Board or the parties; and that
- the Board should be prepared to strictly enforce existing regulations governing disclosure of ex parte communications in informal-rulemaking, to ensure they adequately serve the purpose of this adjudicatory, “on-the-record” proceeding.

I. CSXT does not oppose use of ex parte communications, with limits to ensure they are helpful, efficient, and consistent with due process.

The Board seeks the parties’ immediate views about whether ex parte communications should be permitted in this proceeding “at all.” *Union Pac. Corp.—Control—Norfolk S. Corp. (Decision No. 4)*, FD 36873, slip op. at 2 (STB served Sept. 10, 2025). CSXT agrees that, in principle, ex parte communications could assist the Board’s decision-making, and does not, in principle, oppose their use here. In particular, ex parte communications can facilitate the Board’s digestion of what will be voluminous submissions, by providing parties (Applicants and others) an opportunity to discuss and clarify their submissions after they are filed.

In addition, this proposed transaction will require the Board to define and evaluate critical concepts in its Major Rail Consolidation Procedures as a matter of first impression: whether this merger—and any accompanying conditions—“enhance competition,” 49 C.F.R. §§ 1180.1(a), (c), 1180.6(b)(10), as well as its likely downstream effects, *id.* § 1180.6(b)(12). The Board’s consideration of these new issues will be informed not only by the Applicants’ views, but also by the views of all participating parties that could be impacted by a merger of national scale. *See Fieldston*, 1 S.T.B. at 1085 (rail consolidation proceedings “require the Board to adjudicate conflicting claims by competing parties”). But the principles the Board espoused in *Fieldston* will remain critical even if the Board concludes that its outright prohibition should be waived.

First, consolidation procedures must be decided promptly, requiring the Board “to adhere to a strict timetable and to impose and maintain a schedule” for the proceedings. *Fieldston*, 1 S.T.B. at 1085. Time will be a finite resource—for the Board as well as the parties, who must be afforded an opportunity to respond to any supplementation provided via ex parte communications.

Second, this proceeding is a quasi-adjudicatory proceeding, “subject to requirements for procedural due process.” *Id.* (citing *D.C. Fed’n of Civic Ass’ns v. Volpe*, 549 F.2d 1231, 1247-49 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972)). The “principles of fairness,” including actual fairness and the “public’s perception of, and confidence in” the Board’s decision-making process, are “critical to the Board’s rail merger procedures.” *Id.* And the Board’s statute “demand[s] that the Board

accord equal access to all members of the public[.]” *Id.* In *Fieldston*, this “militat[ed] against a process under which the Board would decide issues based on any off-the-record considerations,” *id.*, and contributed to its decision not to entertain any ex parte communications in rail merger proceedings. The number of parties with an interest in this nation-wide transaction will be especially large. Any ex parte communications must occur in an orderly manner to ensure due process constraints can be satisfied without creating an inefficient free-for-all. We recommend a strict temporal window be adopted for when such communications will be entertained, and that strict limits be imposed on the number any interested party (Applicants or otherwise) is permitted. This in turn will ensure equal access does not swamp the Board’s or other parties’ limited time.

Third, the Board’s decision in this case must be based on its merits as “set out in the record before the agency.” *Id.* (recognizing that rail merger proceedings, though not formal “adjudications” under the Administrative Procedure Act, “remain adjudications in fact” which “require the Board to adjudicate conflicting claims by competing parties”). Any ex parte communications must come with effective disclosures to ensure that other parties are apprised of their content and able to respond, as part of the record on which the Board must base its decision.

II. The timing for ex parte communications should not give Applicants unbalanced access to the Board.

Applicants’ specific proposals for the timing for ex parte communications in this proceeding would not adhere to these core principles. The start and end of

Applicants’ proposed temporal window for ex parte communications both unfairly advantage Applicants at other parties’ expense.

At the front end, we understand the Applicants want to begin ex parte communications even before they file their Application. Motion at 5 (proposing that meetings could begin immediately “when the Board grants this motion”). If the Board grants Applicants’ broader request to waive *Fieldston*’s prohibition, it should not permit ex parte communications before the Application is filed.

The Board has directed interested parties to address the details of how ex parte communications should be permitted in their comments on the forthcoming proposed procedural schedule. *Decision No. 4*, FD 36873, slip op. at 2. CSXT thus understands that the Board intends to permit such communications (if at all) only *within* that procedural schedule, *i.e.*, beginning with the filing of the Application.

CSXT supports this approach. Until the Application is filed, there will be no “schedule” within which communications could occur that (1) are efficient, (2) fair to all interested parties, and (3) can be of actual use *to the Board* in its decision-making. There will be no Application or responsive submissions that can be supplemented or clarified for the Board or its staff. Indeed, the public perception of any such communications would be that they are intended to solicit pre-decisional views from the Board on what the new rules require of their Application.² But the

² To the extent the Applicants have questions “regarding the format of or information to be included in the application[,]” the Board has already assigned a Board staff liaison to “provide informal opinions and interpretations” for that purpose. *Union Pac. Corp.—Control—Norfolk S. Corp. (Decision No. 3)*, FD 36873, slip op. at 2 (STB served Aug. 28, 2025)

Applicants currently have the benefit of the same text and precedent as all other parties. It is for the actual proceedings, triggered by their Application, to build the record that will support the Board's ultimate decision.

The Applicants' proposal would also close the period for ex parte communications at a time that would advantage their advocacy and prejudice other parties. The Applicants propose to conclude this period soon after written comments on their primary application and any responsive applications are due, but well before their own rebuttals will be submitted. Motion at 5. With no other limits, Applicants could communicate ex parte with the Board and staff in an effort to determine what Applicants should focus on in their own rebuttal and responses to any responsive applications. But no similar period would be provided after the *Applicants'* responses, before the submission of rebuttals by other parties supporting any responsive applications. This inconsistent approach could undermine public confidence in the Board's decision-making process. Ex parte communications should either be permitted—or not—on a consistent basis.

As explained above, CSXT believes the most efficient and appropriate use of ex parte communications will be during a window after a party's evidentiary submission is filed, during which the submitting party can facilitate the Board's review of that submission. CSXT intends to provide more specific comments on the appropriate temporal window(s) for, and numeric limits on, such communications once a proposed schedule is issued for comment.

III. The Board should apply strict disclosure requirements for any ex parte communications that it chooses to permit in this proceeding.

The Applicants propose that any ex parte communications should comply with 49 C.F.R. § 1102.2(g)'s written disclosure requirements. Section 1102.2(g) is expressly limited to informal rulemakings, which unlike this proceeding, do not “require the Board to adjudicate conflicting claims by competing parties.” *Fieldston*, 1 S.T.B. at 1085. Even though this regulation is designed for different circumstances, CSXT believes its requirements could be useful and even sufficient here, so long as they are applied strictly, consistent with the importance of the issues the Board must decide here on their merits as “set out in the record before the agency.” *Id.* The Board should enforce strict compliance with key features of § 1102.2(g), including that parties who engage in ex parte communications must:

- provide the Board with a memorandum that records all attendees by name and title;
- summarize in that memorandum the “the data and arguments presented” during the meeting, with “sufficient[] detail” to describe the “substance of the presentation”;
- attach to the memorandum all written or electronic material not only “given,” but also “shown,” to the Board or staff during the meeting;
- submit that memorandum “no later than two days after” the communication, so the Board can review and promptly post it to the docket and other parties then may fairly respond (via their own ex parte communications or in any forthcoming written submissions).

Id. § 1102.2(g)(4)(i), (ii), (v). If the Board decides to allow ex parte communications in this proceeding, it should make clear that it expects parties engaging in those communications to provide substantial detail about their content, consistent with the on-the-record, evidentiary nature of this proceeding.³

*

*

*

³ The letter of § 1102.2(g), supported by admonition from the Board that it expects robust and detailed disclosure, may suffice to provide on-the-record disclosure that adheres to the Board’s principles. In practice, however, disclosures under § 1102.2(g) in informal rule-making contexts have often lacked the detail that will be needed in a proceeding of this type. Section § 1102.2(g)(4)(ii) provides that the Board or staff “may ask presenters to resubmit memoranda that are not sufficiently detailed.” The Board should be prepared to exercise that authority.

Consistent with the Board's directive, CSXT intends to address the question of the appropriate time window and frequency for ex parte communications in more detail in the context of its comments on the proposed procedural schedule.

Respectfully submitted,



John P. Patelli
Steven Armbrust
Jason M. Marques
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 359-3276

Kent A. Gardiner
Shawn R. Johnson
Luke van Houwelingen
Crowell & Moring LLP
1001 Pennsylvania Ave. NW
Washington, DC 20004
(202)-624-2624
srjohnson@crowell.com

John M. Scheib
Gentry Locke Attorneys
101 W. Main Street, Suite 705
Norfolk, VA, 23510
(757)-916-3511
scheib@gentrylocke.com

Louis E. Gitomer
Law Offices of Louis E. Gitomer, LLC
600 Baltimore Avenue, Suite 301
Towson, MD 21204
(410) 296-2250
Lou@lgraillaw.com

Attorneys for CSX Transportation, Inc.

Dated: September 22, 2025

CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of September 2025, I caused a true and correct copy of the foregoing Response of CSX Transportation, Inc. to Applicants' Motion to Permit ex Parte Communications to be served by first-class mail or email on all parties of record in this proceeding, the Secretary of Transportation, the Attorney General, and Administrative Law Judge Jenifer Soulikias.



Shawn R. Johnson