

BEFORE THE
SURFACE TRANSPORTATION BOARD

310178

STB FINANCE DOCKET NO. 36873

ENTERED
Office of Chief Counsel
November 13, 2025
Part of
Public Record

UNION PACIFIC CORPORATION AND
UNION PACIFIC RAILROAD COMPANY

— CONTROL —

NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY

CN’S COMMENTS ON THE PROPOSED PROCEDURAL SCHEDULE

Grand Trunk Corporation, on behalf of itself and its U.S. rail operating subsidiaries¹ (collectively, “CN”) respectfully submits that the Board’s proposed procedural schedule² should be modified in three ways to avoid an imbalanced schedule, and to afford all interested parties a full opportunity to participate in this unprecedented proceeding.

First, the Board should make comments, requests for conditions, and responsive applications³ due 150 days from the actual application filing date *or* May 29, 2026, whichever is earlier. Applicants’ notice of intent states that they “anticipate filing their application on or

¹ Bessemer and Lake Erie Railroad Company, Cedar River Railroad Company, Chicago, Central & Pacific Railroad Company, Grand Trunk Western Railroad Company, Illinois Central Railroad Company, Iowa Northern Railway Company, The Pittsburgh & Conneaut Dock Company, and Wisconsin Central Ltd.

² See Decision No. 5, FD 36873 (STB served Sept. 26, 2025).

³ As detailed below, *see infra* Section I.C, CN proposes to leave the deadline for inconsistent and inclusion applications at 90 days from the date when the Board publishes notice of the application (i.e., 120 days from the filing date of the application). See 49 U.S.C. § 11325(b)(2).

before January 29, 2026,”⁴ which could refer to any date in the three-month prefiling notice period and does not provide the “approximate filing date” required by the Board’s regulations.⁵ The Board directed Applicants⁶ to update their anticipated application filing date,⁷ but Applicants have not done so, despite public statements indicating that they may file by the end of November.⁸ Consequently, the Board and interested parties may not receive notice of the approximate filing date until the eve of the filing.⁹

In addition, Applicants have now submitted comments in opposition to their own proposed procedural schedule; there is no justification for Applicants’ request to alter deadlines that they previously proposed.¹⁰ At the same time, Applicants have thus far failed to produce *any* discovery in response to requests CN served over a month ago—including, for example, merger agreement documents that are readily available. And the proposed transaction, if approved, would have wide ramifications on competition in the U.S. railroad industry, impacting shippers, employees, and other stakeholders. CN’s proposed modification ensures the Board and

⁴ UP-1/NS-1, FD 36873 at 2 (July 30, 2025).

⁵ See 49 C.F.R. § 1180.4(b)(1)(iii).

⁶ “Applicants” refers collectively to Union Pacific Corporation (“UPC”) and Union Pacific Railroad Company (collectively, “Union Pacific”) with Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, “Norfolk Southern”).

⁷ See Decision No. 3, FD 36873, slip op. at 2 n.1 (STB served Aug. 28, 2025).

⁸ See, e.g., Union Pacific Corporation (UNP) Q3 FY2025 Earnings Call Transcript, YAHOO FINANCE (Oct. 23, 2025), 25:29, https://finance.yahoo.com/quote/UNP/earnings/UNP-Q3-2025-earnings_call-366754.html; Bill Stephens, *Inside the Merger Mind of Union Pacific CEO Jim Vena*, TRAINS (Aug. 14, 2025), <https://perma.cc/6VL2-YSS5>; Brian Sozzi, *Union Pacific CEO: Trump “Sees the Value” of \$85 Billion Norfolk Southern Deal*, YAHOO FINANCE (Oct. 1, 2025), <https://perma.cc/X5Q3-6UTD>.

⁹ Cf. 49 C.F.R. §§ 1180.4(b)(1), (b)(1)(iii) (contemplating that, in a prefiling notice submitted at least three months before the application is filed, major merger applicants will disclose the approximate filing date).

¹⁰ See UP-7/NS-7, FD 36873 (served Oct. 20, 2025); see also Appendix B.

interested parties will have an appropriate opportunity to consider and weigh in on the proposed transaction, regardless of when the application is filed.

Second, if the Board decides to hold a public hearing—and CN believes it should—the Board should (a) allow focused pre-hearing briefs 20 days prior to the public hearing and (b) move the deadline for final briefs to occur 20 days after the hearing.

Third, to the extent ex parte communications are permitted, the Board should extend the time for permitted stakeholder ex parte communications until 20 days after rebuttals in support of responsive applications have been submitted.

I. The Board should modify the period for comments, request for conditions, and responsive applications.

CN respectfully submits that a static period of 120 days or fewer following the application's filing is not a reasonable timeline for interested parties' participation in light of Applicants' failure to provide an approximate filing date, as discussed below. CN proposes modifying the proposed procedural schedule so that comments, requests for conditions, and certain responsive applications¹¹ are due by F+150 days *or* May 29, 2026, whichever is earlier. CN's proposal would ensure there is a fair opportunity for interested parties to evaluate and review the proposed transaction and contribute to developing an adequate record. At the same time, the proposed outside due date of May 29, 2026, avoids extending the schedule beyond what is reasonably contemplated based on Applicants' notice of intent. This is because it allows 120 days for these submissions to the extent Applicants file on the only date referenced in their notice of intent, January 29, 2026. To the extent necessary, CN further proposes that the Board adjust all other deadlines that follow comments, requests for conditions, and responsive applications to

¹¹ See *supra* note 3.

be consistent with the intervals established in the Board’s proposed procedural schedule. CN is not requesting that the Board shorten (or extend) any of the deadlines that follow.

A. Applicants’ failure to provide an approximate filing date unfairly disadvantages other parties.

On July 30, 2025, Applicants filed a notice of intent to file an application seeking authority for the acquisition of control by UPC of Norfolk Southern (the “proposed transaction”).¹²

Under 49 C.F.R. § 1180.4(b)(1)(iii), the prefiling notification must “[i]ndicate the approximate filing date of the application.” But in their notice of intent, Applicants stated only that they “anticipate filing their application on or before January 29, 2026,” which could refer to any date in the three-month prefiling notice period. Applicants have stated publicly that they may file as early as November 2025 and ideally no later than early December.¹³ “[O]n or before January 29” is not an approximate filing date, as required by the regulation, and Applicants’ public statements highlight this problem.¹⁴

The Board requested in August that Applicants provide a timely update of when they intend to file their application,¹⁵ but now, with the potential filing dates referenced in Applicants’ public statements approximately one month away, Applicants have yet to submit such an update. Applicants also failed to provide an updated anticipated filing date in their Comments on the

¹² UP-1/NS-1, FD 36873 (filed July 30, 2025).

¹³ See *supra* note 8.

¹⁴ “Approximate” means that major merger applicants do not need to file on the precise date stated in their prefiling notification, but listing the entire three-month period is beyond approximate—it is a failure to provide the required notice.

¹⁵ See Decision No. 3, FD 36873, slip op. at 2 n.1 (STB served Aug. 28, 2025).

Proposed Procedural Schedule.¹⁶

CN's proposed modification to the procedural schedule will ensure that interested parties have a reasonable chance to evaluate the proposed transaction. As the Board has recognized, there is a "high level of interest in this proceeding," a proceeding that has "the potential for numerous and highly complex issues to arise[.]"¹⁷ The prefiling notice period is critical to providing interested parties with an opportunity to consider the potential effects of the proposed transaction, analyze conditions that may be necessary to enhance and preserve competition, and review extensive datasets.

Before commencing this substantive work, interested parties must assemble legal and economic teams to carry out the analysis and advocacy required in a major merger proceeding. Further complicating this task is the fact that the proposed transaction has industry-wide implications, meaning that much of the industry will participate. Applicants themselves have retained at least three STB-facing law firms and five economic firms¹⁸ and, according to Applicants, have been hard at work evaluating the proposed transaction for well over two months.¹⁹ Other interested parties too must assemble teams, request and process extensive datasets and prepare analyses. Applicants' omission of an approximate filing date risks upending

¹⁶ See UP-7/NS-7, FD 36873 (served Oct. 20, 2025). Applicants cannot later blame the government shutdown for their inability to timely provide an updated anticipated filing date. Applicants clearly have no qualms about submitting filings during the ongoing government shutdown, given the October 20 submission of their Comments on the Proposed Procedural Schedule.

¹⁷ Decision No. 5, FD 36873, slip op. at 2 (STB served Sept. 26, 2025).

¹⁸ See attachments to Filing ID 309879 (filed Aug. 5, 2025) and Filing ID 310125 (filed Sept. 30, 2025). Firms have also been engaged by other entities, such as financial institutions, whose interests have been considered to be aligned with Applicants for conflicts purposes. See CN-2, FD 36873 (filed Sept. 5, 2025).

¹⁹ See UP-7/NS-7, FD 36873 at 2 (served Oct. 20, 2025).

the critical pre-filing period, including both substantive and organizational efforts.

Substantive work during the pre-filing notice period also includes important pre-filing discovery requests to allow interested parties to obtain the necessary data and documents to begin to understand the potential competitive impacts of the transaction. Applicants now boldly assert that the period for comments, requests for conditions, and responsive applications can be shortened by 15 days from their initial proposal, from F+120 to F+105. Applicants attempt to justify this departure on the basis that their prior proposal was premised on discovery beginning after their application was accepted and “Applicants have already begun responding to discovery requests from interested parties.”²⁰ Applicants’ assertion is contrary to precedent and not supported by the record. Nowhere in Applicants’ proposed procedural schedule is there any reference to, let alone a proposed start date for, discovery.²¹ Such an assumption would make little sense given the Board has consistently recognized that discovery may commence prior to the filing of an application.²²

Further, although Applicants claim they have begun responding to discovery requests, as of the time of CN’s filing, Applicants had failed to produce *any* of the discrete materials responsive to CN’s first set of discovery requests, over a month after those requests were served.²³ As one example: Applicants have not even produced the disclosure schedules,

²⁰ *Id.* at 3.

²¹ *See* UP-2/NS-2, FD 36873 (filed July 30, 2025).

²² *See, e.g.,* Decision No. 5, *Norfolk S. Corp.—Acquis. of Control—Norfolk & Portsmouth Belt Line R.R.*, FD 36836, slip op at 6-7 (STB served June 13, 2025); Decision No. 3, *Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500, slip op. at 3 (STB served Apr. 21, 2021); *CSX Corp.—Control & Merger—Pan Am Sys., Inc.*, FD 36472 (parties engaged in pre-application discovery without the Board making an affirmative statement).

²³ CN served its first set of discovery requests on Applicants on September 23, 2025, seeking narrow categories of priority data and documents (“RFPs”). Despite the RFPs including several requests for discrete and easily accessible sets of materials—such as the disclosure

exhibits, and appendices to the merger agreement for the proposed transaction, and have indicated that they do not intend to produce the whole merger agreement on the basis that some portions thereof are subject to a yet to be identified privilege claim. Similarly, CN's RFPs requested documents reflecting the two-to-one customers referenced in Applicants' public statements. Despite the minimal burden involved in producing such materials, Applicants have yet to produce any documents to CN, over a month after CN requested them.²⁴

Thus, rather than support a shorter period of review, Applicants' efforts to stall relevant discovery demonstrate why the procedural schedule must provide interested parties with sufficient time to evaluate the proposed transaction.

B. The nature of the proposed transaction supports a comprehensive review and comment period.

Second, CN's proposal is warranted given the nature of the proposed transaction. If approved, the proposed transaction would bring together two of the largest railroad companies in

schedules, exhibits, and appendices to the merger agreement—on the RFPs' response deadline Applicants served CN with lengthy responses and objections, with no accompanying production of responsive materials. CN promptly met and conferred with each Applicant to request a rolling production of responsive materials. Now over a month after serving its initial discovery requests, Applicants have yet to produce any documents or data to CN. The abbreviated length of the pre-filing period is compounded by Applicants' unreasonable delay in responding to important pre-filing discovery requests. The Board and courts have found delays in producing readily accessible and discrete materials to be unreasonable and cautioned parties that engage in such efforts to delay discovery. *See Oversight Hearing Pertaining to Union Pac. R.R.'s Embargoes*, EP 772 (STB served Apr. 17, 2024).

²⁴ Documents have yet to be produced despite multiple rounds of meet and confers with counsel for each UP and NS. Although Applicants have stated initial productions are forthcoming during the week of October 27-31, CN has limited visibility into what those productions may include. Outside counsel for UP, for example, has represented that UP "is preparing the materials responsive to Request 1" (i.e., the already-largely public merger agreement) and expects "to produce those materials" as well as information responsive to Request 8 (i.e., documents relating to two-to-one customers) on the same timing.

the U.S., resulting in one spanning over 50,000 miles across 43 states.²⁵ The combined railroad would become the largest Class I railroad by route miles, number of employees, states covered, **and** enterprise value with an anticipated enterprise value of \$250 billion, over \$50 billion larger than the remaining three publicly traded Class I railroads combined.²⁶ A potential transaction of this size and scope could erode rail-to-rail competition in certain markets, and result in significant service disruptions across the U.S. to the severe detriment of U.S. shippers. The potential transaction thus requires an analysis of numerous complex issues impacting U.S. shippers, rates, rail traffic, and competition each at a localized and national level across the U.S.

The proposed transaction would not only be unprecedented given its size, but also in its review. The standard to be applied in reviewing the proposed transaction will be new to all parties, including the Board, adding to the complexity of the proceeding and to the already sizable analysis the proposed transaction will require. The proposed transaction will be the first “Major” transaction reviewed under the Board’s 2001 merger rules, which require Applicants to show that the proposed transaction will not only preserve, but enhance competition.²⁷ The Board’s review will thus set the precedent for the review of future major transactions. The

²⁵ Press Release, *Union Pacific and Norfolk Southern to Create America’s First Transcontinental Railroad*, UNION PACIFIC, July 29, 2025, <https://perma.cc/2ZHG-DATW>.

²⁶ See *id.*; see also Largest Railway Operating Companies by Market Cap, COMPANIES MARKET CAP, <https://perma.cc/E87F-HWTD> (Accessed Oct. 25, 2025); Union Pacific Corp., Annual Report (Form 10-K) (Dec. 31, 2024); Burlington Northern Santa Fe, LLC, Annual Report (Form 10-K) (Dec. 31, 2024); Norfolk Southern Corp., Annual Report (Form 10-K) (Dec. 31, 2024); CSX Corp., Annual Report (Form 10-K) (Dec. 31, 2024); Canadian National Railway Co., Annual Report (Form 40-F) (Dec. 31, 2024); Canadian Pacific Kansas City Ltd., Annual Report (Form 10-K) (Dec. 31, 2024).

²⁷ 49 C.F.R. § 1180.1(c); see, e.g., *Major Rail Consol. Proc.*, 5 S.T.B. 539, 550 (“[W]e believe that offering 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.”); *Major Rail Consol. Proc.*, 5 S.T.B. at 554.

Board will need to carefully consider how best to conduct a public interest analysis under this new standard, which characteristics should factor into that analysis, and which legal standards should apply in evaluating competition. By ensuring that the record is developed fairly, CN's proposed modifications will allow the Board to grapple with the complex legal issues in this case and set a well-considered and reasoned precedent that incorporates comprehensive input from interested parties upon which future cases can rely.

Applicants claim that their work over the past two plus months has confirmed that “because of the merger’s end-to-end nature, the transaction does not present any complex competitive or operating issues” and thus the proposed schedule can be shortened in various ways.²⁸ This is not so. As Applicants themselves have recognized,²⁹ the proposed transaction involves overlapping markets and customers; therefore, it is inaccurate for Applicants to call it an “end-to-end” transaction. Additionally, even if Applicants were correct, as the Board has recognized, the end-to-end nature of a proposed railroad transaction does not reduce the need for competitive analysis.³⁰ Union Pacific itself recently cautioned the Board in a prior merger proceeding against “rely[ing] on a flawed and unsupported presumption that [a] vertical merger

²⁸ UP-7/NS-7, FD 36873 at 2 (served Oct. 20, 2025).

²⁹ See, e.g., V. James Vena & Jennifer L. Hamann, Question and Answer Presentation at the Morgan Stanley 13th Annual Laguna Conference, (Sept. 10, 2025); Frequently Asked Questions, UNION PACIFIC & NORFOLK SOUTHERN, <https://perma.cc/S49B-7QMR> (acknowledging overlap locations between UP and NS).

³⁰ See Decision No. 35, *Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500 et al., slip op. at 4 (STB served Mar. 15, 2023) (stating that “end-to-end mergers, however, can pose competitive risks” and overturning “prior agency precedent that did not sufficiently recognize such concerns.”); see also Comment of the United States Department of Justice, *Norfolk S. Corp.—Acquis. of Control—Norfolk & Portsmouth Belt Line R.R.*, FD 36836 at 3-4 (filed Aug. 27, 2025) (detailing the competitive harms that can arise when a firm forecloses competitors by limiting access to products or services that its competitors also use to compete).

cannot harm competition, at a time of increasing concern regarding the possible competitive effects of vertical mergers, with only Applicants’ vague assurances as a backstop.”³¹

Whether the proposed transaction raises complex competition or operating issues goes to the very heart of the Board’s evaluation and should not be prejudged before the Board and interested parties have a meaningful opportunity to evaluate the proposed transaction. And as discussed, Applicants have sought to avoid evaluation of these very issues by failing to timely produce highly responsive and easily accessible documents.³²

C. CN’s proposed modifications are consistent with statutory deadlines.

Finally, CN’s proposed modifications are consistent with the statutory deadlines. Certain categories of responsive applications—inconsistent applications and applications for inclusion in the transaction—are statutorily required to be filed within 90 days of the Board’s “notice of the application.”³³ CN’s proposed procedural schedule does not, however, propose a modification to the deadline for inconsistent applications or applications for inclusion. CN’s proposal would modify the deadline for comments, requests for conditions, and only those categories of responsive applications *not* subject to statutory deadlines. Further, this adjustment of deadlines

³¹ UP-10, *Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500 at 34, 44 (filed Feb. 28, 2022) (stating that a presumption that a proposed end-to-end merger “has no anticompetitive effects would be inconsistent with current competition enforcement policy and the modern economic analysis that supports it”).

³² That Applicants have been able to proceed quickly in their evaluation of the proposed transaction speaks only to the fact that they currently, and exclusively, possess all the necessary information to evaluate the proposed transaction. That does not justify depriving interested parties of the opportunity to meaningfully participate and evaluate the proposed transaction. To the contrary, the significant information asymmetry between Applicants and interested parties further supports modifying the procedural schedule as CN has proposed, not shortening it.

³³ 49 U.S.C. § 11325(b)(2); *see also Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500 et al., slip op. at 6 (STB served July 1, 2022) (acknowledging that the deadline in § 11325(b)(2) applies only to inconsistent and inclusion applications).

in the proposed schedule would only have an effect if Applicants file their application earlier than January 29, 2026 (which, again, is the only date stated in Applicants' prefiling notice).

CN respectfully submits that making comments, requests for conditions, and responsive applications (excluding inconsistent and inclusion applications) due by the earlier of May 29, 2026 or F+150 will ensure interested parties have a reasonable opportunity to evaluate the proposed transaction and contribute to development of the record.³⁴ Should the Board modify the procedural schedule in this way, the Board should similarly adjust the deadlines for the submission of environmental materials related to responsive applications (excluding inconsistent and inclusion applications) from F+115 to the earlier of May 26, 2026 or F+145 to keep the two deadlines aligned, and should further adjust all other deadlines that follow submission of comments, requests for conditions, and responsive applications as necessary to maintain the existing intervals between deadlines.³⁵

³⁴ If the Board is inclined to keep together all deadlines proposed for Day 120, the Board should exempt this proceeding from the deadline in § 11325(b)(2) and modify all of the Day 120 deadlines, as application of the deadline in § 11325(b)(2) is not necessary to carry out the Rail Transportation Policy of 49 U.S.C. § 10101 and is not needed to protect shippers from the abuse of market power. See 49 U.S.C. § 10502(a); see also *Rio Grande Indus.—Control—S. Pac. Transp. Co.*, FD 32000, 1988 ICC LEXIS 2, at *5-6 (ICC decided Jan. 12, 1988) (“In modifying the statutory schedule, we find authority . . . in the exemption authority of 49 U.S.C. 10505. Thus, we also propose to exempt this proceeding from the procedural requirements of 49 U.S.C. 11344 and 11345, and in their stead adopt the schedule set out in the Appendix to this decision.”). To the contrary, exempting this proceeding from the deadline of § 11325(b)(2) will ensure shippers and other parties are afforded an appropriate opportunity to consider and respond to the myriad issues that a proposed transaction of this magnitude is likely to raise.

³⁵ For example, if CN's proposed modification is adopted, the Board should also extend the deadline for preliminary comments from DOJ and DOT, if any, to be due F+165 or June 15, 2026, whichever is earlier. Such a modification would mirror the cadence of submissions by interested parties included in the Board's proposed procedural schedule. See Appendix A.

II. The proposed procedural schedule should be modified to permit both pre-hearing and post-hearing briefs from potentially interested parties.

The proposed procedural schedule currently contemplates final briefing due 270 days from the application filing date, prior to a potential public hearing.³⁶ As an initial matter, CN posits that such a hearing would certainly be necessary given the nature and potential impact of the proposed transaction. CN also proposes modifying the procedural schedule to permit limited pre-hearing briefs and to make final briefs due 20 days following the Board's public hearing.

CN sees the utility in pre-hearing briefing, as proposed in Decision No. 5. A focused pre-hearing brief will be particularly beneficial to the Board in this proceeding given the complexity of the proposed transaction, the new standard of review, and the extensive factual analysis required. Pre-hearing briefs will save the Board time by identifying the key facts and evidence in the case ahead of a hearing, reducing the effort otherwise required of staff to summarize previously filed materials. Pre-hearing briefs could also suggest questions that Board Members may want to pose at the hearing. This will allow the Board to devote more time to considering the complex legal and factual questions at issue. CN believes such pre-hearing briefing can be limited in both scope and number of pages to avoid inundating the Board in advance of the hearing. CN therefore proposes to modify the proposed procedural schedule to allow for limited pre-hearing briefs focused on introducing major issues and identifying the key evidence for the Board ahead of the hearing.

CN also proposes to modify the procedural schedule to make final briefs due 20 days *after* the Board's hearing. Post-hearing briefs often serve as an important summation of the evidence and can facilitate an efficient resolution. The Board has previously recognized that

³⁶ Decision No. 5, FD 36873, slip op. at 3-4 (STB served Sept. 26, 2025).

post-hearing briefs “would be beneficial” and modified the procedural schedule in the most recent major merger proceeding to allow for post-hearing briefs.³⁷ Post-hearing briefs will allow parties to account for all evidence in the record and will provide the Board with more comprehensive and helpful briefing.³⁸

Although both pre- and post-hearing briefing has not been the Board’s typical practice in prior merger proceedings, it is standard in other major merger proceedings tried in federal court.³⁹ Such a briefing schedule allows parties to both (1) orient issues for consideration in advance of the hearing and (2) provide a summation of the evidence presented in the record, including during the hearing. CN respectfully submits that such a practice would be beneficial to the Board, especially in a proceeding such as this one, which will undoubtedly involve an extensive and complicated record and many interested parties.

III. If the Board waives the prohibition on ex parte communications, it should modify Applicants’ proposed period for such communications.

On August 29, 2025, Applicants filed a motion asking the Board to waive the prohibition

³⁷ Decision No. 22, *Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500 et al., slip op. at 3 (STB served July 22, 2022); *see also Sunbelt Chlor Alkali P’ship v. Norfolk S. Ry.*, NOR 42130, slip op. at 2 (STB served July 15, 2013) (“the Board requires final briefs to narrow and focus the issues for the Board’s benefit in analyzing the record”).

³⁸ Applicants now request that the Board provide in the procedural schedule that “any hearing will occur and the record will close no more than 30 days after final briefs are due.” UP-7/NS-7, FD 36873 at 3 (served Oct. 20, 2025). CN disagrees with this proposed modification as CN believes, as detailed above, that the Board would benefit from post-hearing briefs.

³⁹ Other recent large scale merger proceedings have allowed for both pre- and post-hearing briefing. *See* Schedule and Case Management Order, *United States v. UnitedHealth Grp. Inc.*, No. 24-cv-03267 (D. Md. Feb. 21, 2025), ECF No. 114 at 3 (scheduling pre-hearing and post-hearing briefing); Case Management and Scheduling Order, *FTC v. Tapestry-Capri*, No. 24-cv-03109 (S.D.N.Y. May 1, 2024), ECF No. 71 at 19 (same); Scheduling and Case Management Order, *United States v. Jetblue*, No. 23-cv-10511 (D. Mass. Apr. 6, 2023), ECF No. 79 at 2, 4-5 (same); Joint Stipulated Discovery Plan and Briefing Schedule, *FTC v. Meta Platforms*, No. 22-cv-04325 (N.D. Cal. Sept. 6, 2022), ECF No. 86 at 7-8 (same).

on ex parte communications established in *Petition of Fieldston Co. to Establish Procedures Regarding Ex Parte Communications in Railroad Merger Proceedings*, 1 S.T.B. 1083 (1996).⁴⁰

As stated in CN’s reply to the Motion, CN supports a waiver of the *Fieldston* prohibition, but disagrees with Applicants’ proposed schedule for such communications.⁴¹ Consistent with the Board’s instruction, CN writes further here to comment on the scheduling of such communications.⁴²

Applicants propose to conclude the permitted period for ex parte meetings on Day 150 of their proposed procedural schedule.⁴³ Citing 49 C.F.R. § 1102.2(g)(1), which permits ex parte communications until 20 days before the deadline for reply comments in informal rulemaking proceedings, Applicants state that cutting off the period for ex parte meetings at Day 150 would “allow[] parties ample time to respond to the disclosed communications in their written submissions due after that date.”⁴⁴ Applicants’ proposal, however, unnecessarily eliminates the opportunity for ex parte discussions regarding record developments after Day 150. Day 150 of Applicants’ proposed schedule would be 60 days prior to the filing date of Applicants’ rebuttal and 90 days prior to the filing of rebuttals in support of responsive applications.⁴⁵

As the Association of American Railroads (“AAR”) argued persuasively in a recent petition for rulemaking, referring to the time limitation in § 1102.2(g)(1):

⁴⁰ UP-4/NS-4, FD 36873 (filed Aug. 29, 2025) [hereinafter Mot.].

⁴¹ CN-3, FD 36873 at 1-2 n.2 (filed Sept. 17, 2025).

⁴² See Decision No. 5, FD 36873, slip op. at 4 n.9 (STB served Sept. 26, 2025).

⁴³ Mot. at 5.

⁴⁴ *Id.*

⁴⁵ See UP-2/NS-2, FD 36873, App. A (filed July 30, 2025). Under the latest schedule Applicants now propose, Day 150 would be 30 days prior to the filing date of Applicants’ rebuttal and 60 days prior to the filing of rebuttals in support of responsive applications. UP-7/NS-7, FD 36873 (served Oct. 20, 2025).

[T]he regulations render it utterly impossible to discuss arguments or evidence presented in reply comments absent a Board order in a particular proceeding extending the time for ex parte meetings. Issues can and do arise in reply comments for which public engagement could be beneficial, especially in rulemakings in which technical data is sought or submitted. The current policy of prohibiting communications after the cutoff of 20 days before replies are due—even if such communications are publicly disclosed—inhibits discussions on all of the issues in the record, which could clarify evidence and arguments presented and facilitate a more informed decision-making process.⁴⁶

Here, too, issues are likely to arise in rebuttal filings for which public engagement could be beneficial—certainly, this is a proceeding in which technical data will be sought and submitted.

Rather than prematurely closing discussions on issues in the record, the Board should allow the period for ex parte meetings to run until 20 days after the filing date for rebuttal in support of responsive applications. With public disclosure by summary and a modest opportunity to submit written comments in response to those summaries—for example, making written responsive comments due 20 days from the close of the ex parte meeting period—this approach would appropriately account for the importance of allowing engagement on issues addressed on rebuttal.⁴⁷

Doing so prospectively, rather than changing the ex parte meeting period later in the procedural schedule⁴⁸ would provide better procedural clarity and efficiency by avoiding the need to issue additional decisions extending the time period later in the proceeding.⁴⁹

⁴⁶ AAR Pet. 15, *Pet. for Rulemaking—Amends. to Reguls. Governing Ex Parte Commc’ns*, EP 782 (filed May 16, 2025).

⁴⁷ See *id.* at 15; *Final Offer Rate Review*, EP 755, slip op. at 3-4 (STB served May 15, 2020) (permitting post-comment period ex parte meetings and authorizing written comments in response to meeting summaries).

⁴⁸ See Mot. at 5.

⁴⁹ See AAR Pet. 15, *Pet. for Rulemaking—Amends. to Reguls. Governing Ex Parte Commc’ns*, EP 782.

IV. Conclusion

For the reasons set forth in this submission, CN respectfully requests that the Board modify the procedural schedule to (1) make comments, requests for conditions, and responsive applications due by 150 days from the actual application filing date or May 29, 2026, whichever is earlier; (2) allow limited scope pre-hearing briefs 20 days prior to any public hearing and move the deadline for final briefs to occur 20 days after the hearing; and (3) to the extent ex parte communications are permitted, extend the time for permitted stakeholder ex parte communications until 20 days after rebuttals in support of responsive applications have been submitted, as detailed above and in Appendix A.

Respectfully submitted,

/s/ Sara Y. Razi

Sara Y. Razi
Abram J. Ellis
Lindsey Bohl
Simpson Thacher & Bartlett LLP
900 G Street, NW
Washington, DC 20001
(202) 636-5500
sara.razi@stblaw.com
aellis@stblaw.com
lindsey.bohl@stblaw.com

Olivier Chouc
CN
935 de La Gauchetière Street West
16th Floor
Montréal, QC H3B 2M9
CANADA

Kathryn J. Gainey
Christopher K. Diamond
CN
975 F Street, NW, Suite 301
Washington, DC 20004
kathryn.gainey@cn.ca
christopher.diamond@cn.ca

Thomas J. Litwiler
Valerie O. Quinn
Fletcher & Sippel LLC
29 North Wacker Drive
Chicago, IL 60606-3208
(312) 252-1508
tlitwiler@fletcher-sippel.com
vquinn@fletcher-sippel.com

Attorneys for CN

Dated: October 27, 2025

APPENDIX A

CN'S PROPOSED PROCEDURAL SCHEDULE

F	Primary application and any related application(s) filed.
F+30	Board notice of acceptance of primary application and any related application(s) to be published in the Federal Register.
F+45	Notices of intent to participate due.
F+60	Proposed Safety Plan (SIP) due.
F+75	Descriptions of anticipated responsive, including inconsistent, applications due. Petitions for waiver or clarification with respect to such applications due.
F+115	Responsive environmental information and environmental verified statements for inconsistent and inclusion applicants due.
F+120	Inconsistent applications and applications for inclusion in the transaction due.
F+145 or May 26, 2026, whichever is earlier	Responsive environmental information and environmental verified statements for responsive applicants (excluding inconsistent and inclusion applicants) due.
F+150 or May 29, 2026, whichever is earlier (“Comment Deadline”)	Comments, protests, requests for conditions, and any other evidence and argument in opposition to the primary application or any related applications(s) due (except filings from DOJ and DOT). Responsive applications, excluding inconsistent applications and applications for inclusion in the transaction, due.
F+150	Notice of acceptance of inconsistent applications and applications for inclusion in the transaction, if any, published in the <u>Federal Register</u>.
+15 after Comment Deadline	Preliminary comments from DOJ and DOT, if any, due.
+30 after Comment Deadline	Notice of acceptance of responsive applications (excluding inconsistent and inclusion applications), if any, published in the <u>Federal Register</u>.
+60 after Comment Deadline	Responses to comments (including those of DOJ and DOT, if any), protests, requests for conditions, and other opposition due. Rebuttal in support of the primary application and any related application(s) due. Responses to responsive, including inconsistent, applications due.
+90 after Comment Deadline	Rebuttals in support of responsive, including inconsistent, applications due.
+110 after Comment Deadline	Conclusion of period for ex parte communications.
20 days prior to public hearing	Pre-hearing briefs due.

TBD	Public hearing (if necessary).
20 days after public hearing	Final briefs due. (Close of the record.)
TBD	Service date of final decision.

APPENDIX B

APPLICANTS' PROPOSED PROCEDURAL SCHEDULES

Original	Revised (Oct. 20)	
F	F	Primary application and any related applications filed.
F+30	F+30	Board notice of acceptance of primary application and related application published in the Federal Register; Board designation of Administrative Law Judge to handle discovery matters.
F+45	F+45	Notices of intent to participate due.
F+60	F+60	Proposed Safety Integration Plan to be filed with the Office of Environmental Analysis and the Federal Railroad Administration.
F+75	F+75	Descriptions of anticipated responsive, including inconsistent, applications due. Petitions for waiver or clarification with respect to such applications due.
F+120 (including DOJ and DOT)	F+105 (except DOJ and DOT)	Comments protests, requests for conditions, and any other evidence and argument in opposition to the primary application or any related applications due. Responsive, including inconsistent, applications due.
F+115	F+115	Responsive environmental information and environmental verified statements for inconsistent and inclusion applicants due.
N/A	F+120	Preliminary comments from DOJ and DOT, if any, due.
F+150	F+135	Notice of acceptance of responsive, including inconsistent, applications, if any, published in the Federal Register.
F+210	F+180	Responses to comments, protests, requests for conditions, and other opposition due, including to DOJ and DOT filings. Rebuttal in support of the primary application and any related application(s) due. Responses to responsive, including inconsistent, applications due.
F+240	F+180	Rebuttals in support of responsive, including inconsistent, applications due.
F+270	F+225	Final briefs due.
F+300	F+255	Public hearing (if necessary). (Close of the record.)
F+390	F+345	Service date of final decision. (90 days after close of the record)
F+420	F+375	Effective date of final decision.

CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of October, 2025, I caused a true and correct copy of the foregoing CN's Comments on the Procedural Schedule 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.

/s/ Andrew Bernstein

Andrew Bernstein

Sr. Paralegal Manager

Simpson Thacher & Bartlett LLP