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Hon. Jenifer J. Soulikias
Administrative Law Judge
Surface Transportation Board
395 E Street S.W.
Washington, D.C. 20423-0001

[Email: alj.soulikias.inbox@stb.gov]

Re: Finance Docket No. 36873, *Union Pacific Corp., et al. – Control – Norfolk Southern Corp. at al.*

Dear Judge Soulikias:

I write on behalf of Canadian Pacific Railway Company, d/b/a Canadian Pacific Kansas City and CPKC, and its U.S. rail carrier subsidiaries (collectively “CPKC”)¹ to address the discovery issues posed by BNSF’s Motion to Compel filed January 9, 2026 (BNSF-12) and Applicants’ Reply filed January 29 (UP-24/NS-23) (“Applicants’ January 29 Reply”). Resolution of these issues may have momentous consequences for the conduct of the Board’s review of the UP-NS merger proposal.

Like BNSF, CPKC has served discovery requests on Applicants, the first of which (to which Applicants have not objected) seeks the material Applicants produce to other parties, including BNSF. CPKC has been watching closely as Applicants’ positions regarding the discovery sought by BNSF have formed and solidified, culminating in the striking positions set forth in their January 29 Reply. If accepted, Applicants’ positions will deprive CPKC and other parties of discovery to which they are entitled by Board rules and precedents, and prevent a full

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.

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and fair probing of the veracity of the assertions put forward by Applicants in their soon-to-be-refiled Application.²

At the core of the present dispute is Applicants' strident and sweeping position that they have no obligation to search for or produce ordinary course documents regarding key issues raised by their Application, including the need for a merger to improve interline rail transportation and how competition in the rail industry will be impacted by their proposal. Applicants' categorical refusal cuts across many of BNSF's pending requests, and it has led Applicants to refuse categorically to produce ordinary course documents in response to 25 of CPKC's own requests.³ Among the points that CPKC would emphasize for Your Honor are the following:

1. *Discovery of ordinary course documents is customary in Board merger proceedings.* Other than "board materials that address the proposed transaction" (Applicants' January 29 Reply at 18), Applicants deny any obligation to produce ordinary course documents on key topics that their to-be-filed application will put in issue on the ground that the Board's and the public's assessment of their attempt to remake our nation's rail industry is limited to an "application-centric process" (*id.* at 3) under which "an application and workpapers . . . should normally be sufficient" (*id.* at 14-15). For instance, Applicants contend that they need not produce ordinary course documents addressing the highly relevant topics of "alternatives short of merger" and "competition issues" because they intend to address those topics in their application. (*Id.* at 12-13.) With respect to the broad topic of "competition," Applicants point solely to verified statements of their experts. (*Id.* at 12.)

Applicants are fundamentally wrong about Board process. "The Surface Transportation Board regulations provide for broad discovery." *Lake Providence Port Comm'n-Feeder Line Application*, Finance Docket No. 36447 2025 WL 3773220, at *2 (STB served Dec. 31, 2025); *see also Westinghouse Elec. Corp. v. Alton & S. Ry. Co.*, 1 I.C.C.2d 182, 188 (1984) ("[W]e adopt a liberal approach to discovery requests."). In merger reviews and similar proceedings far less significant than this one, the Board has allowed significant discovery to test the veracity of

² Applicants have stated publicly that their Application will be "refile[d]" within a "few weeks." Statement of CEO Jim Vena, *UP Q4 2025 Earnings Call* (Jan. 27, 2026). And they have indicated that Applicants will continue to rely on the same witnesses and evidence contained in the original Application filed on December 19: just last Thursday, they filed with the Board a set of corrected workpapers for one of Applicants' economists, presumably because they intend to resubmit that witness's testimony in a few weeks. UP-23/NS-22.

³ We have hoped to avoid needing to bring those disputes before Your Honor, and they are not yet entirely ripe for individualized consideration. More than 20 days ago, Applicants told us that they would consider various compromises, but we have heard nothing more from them.

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the claims made in an application, and relied on ordinary course documents in making its decisions. *See, e.g., Stagecoach Grp. PLC – Control – Twin America, LLC*, Docket No. MCF 21035, 2012 WL 113782, at *2 (STB served Jan. 9, 2012) (“The Board also noted that the narrower market definition that it found appropriate corresponded directly with Applicants’ own business documents prepared contemporaneously with Twin America’s formation.”); *Ballard Terminal R.R. – Acquisition & Operation Exemption – Woodville Subdivision*, Finance Docket No. 35731, 2013 WL 4498193, at *3-4 (STB served Aug. 22, 2013) (compelling production of relevant communications); *Canadian Pac. Ry. Co. – Control – Dakota, Minn. & E. R.R. Corp.*, Finance Docket No. 35081, 2008 WL 445815, at *2 (STB served Feb. 20, 2008) (“[A]pplicants’ contention that the data produced in discovery and the upcoming deposition of its expert witness will be sufficient ignores the possibility that an in-house business person may have information and perspectives on competition that are different from or more detailed than those of an expert witness.”). UP’s own recent course of conduct shows that it knows that significant discovery is appropriate even for mergers far smaller than what it is proposing here: in the course of opposing Canadian Pacific’s acquisition of Kansas City Southern, Union Pacific served 192 formal discovery requests (not including subparts) and many additional informal requests for information.

Applicants point to discovery disputes (mostly in non-merger matters) as justification for not producing ordinary course documents. (*See* Applicants’ January 29 Reply at 4.) The cases concerned (1) rates charged by UP at a few facilities in Wyoming and Idaho, *see FMC Wyoming Corp. v. Union Pac. R.R. Co.*, NOR Docket No. 42022, 1998 WL 44782 (STB served Feb. 5, 1998) (“*FMC Wyoming*”); (2) trackage rights over a 67.8 mile line, *see Atchison, Topeka & Santa Fe Ry. Co. – Operating Rts. – S. Pac. Transp. Co.*, Finance Docket No. 22218, 2025 WL 432778 (STB served Feb. 7, 2025) (“*ATSF Tehachapi Rights*”); (3) control of a terminal switching company, *see Norfolk S. Corp. – Acquisition of Control – Norfolk & Portsmouth Belt Line R.R.*, Finance Docket No. 36836, Decision No. 8 (STB served July 25, 2025) (“*NS/NPBL*”); and (4) coal movement rates, *see Duke Energy Corp. v. Norfolk S. Ry. Co.*, NOR Docket No. 42069, 2002 WL 1730020 (STB served July 26, 2002) (“*Duke Energy*”).⁴ What was overbroad or disproportionate in those discrete matters has little bearing on the scope of discovery appropriate for a merger consolidating over 50,000 route miles in the hands of a single \$250 billion enterprise, the Board’s first review under the more stringent 2001 Major Rail Consolidation Procedures, and a transaction that Applicants acknowledge would, if approved, “shape the next hundred years of American railroading.” *See* Rejected Application, Vol. I at 309.

⁴ Applicants also cite *Canadian Pac. Ltd., – Purchase & Trackage Rts. – Delaware & Hudson Ry.*, Finance Docket No. 31700, 1990 WL 288268, at *2 (ICC served June 20, 1990). But that order did not involve a discovery dispute.

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To the extent those precedents are pertinent, however, they support production of ordinary course documents. In *ATSF Tehachapi Rights*, UP complied with broad early-stage discovery requests for information including ordinary course traffic growth projections and asset valuations going back *seven years*. *ATSF Tehachapi Rights* at *3-5. In *Duke Energy*, the respondent had already produced significant relevant information in response to discovery requests. *Duke Energy* at *3-6. Applicants' decision to cite *FMC Wyoming* is surprising—the only ordinary course documents sought there were the subject of a “complex and voluminous” motion to compel filed by *UP*. *FMC Wyoming* at *1, 5. The Board referred that dispute to an ALJ, *id.*, but the parties then resolved that dispute through meet and confers. *FMC Wyoming*, 1998 WL 802033, at *1 (STB served Oct. 28, 1998). Finally, in *NS/NPBL*—a more recent control case—the Board actually rejected NS's arguments and compelled NS to produce “[a]ll requests for proposals, responses to requests for proposals, term sheets, draft or final contracts or agreements exchanged between NS and any actual or potential customer for whom NS or CSXT moves freight through any East Coast Port from January 1, 2018-present.” *NS/NPBL* at 6.

2. *Discovery of ordinary course documents is especially called for to fulfill the policies underlying the Major Rail Consolidation Procedures.* The Board has established “a heavier burden to show that a major rail combination is consistent with the public interest.” Major Rail Consolidation Procedures, 5 S.T.B. 539, 546 (2001). In adopting its major-merger rules, the Board explicitly said that it would require a higher level of proof that a merger was in the public interest: “[W]e do plan to take a more skeptical, ‘show me’ attitude toward claims of merger benefits and toward claims that no transitional service problems would occur.” *Id.* at 549. As part of this heightened burden, Applicants must prove not only that the proposed transaction would not be harmful, but that it would actually result in “substantial and demonstrable *gains* in important public benefits.” 49 C.F.R. § 1180.1(c) (emphasis added).

Because the Board has never before applied the “heavier burden” of the major merger rules before, Applicants' protestations regarding what discovery requests were considered overbroad or disproportionate in rate disputes and similar proceedings—even if they were true—do not control the first application of the Board's heightened standards to this “unprecedented” transaction. See Finance Docket No. 36873, Decision No. 9 at 9 (STB served Jan. 16, 2026). Put another way, the higher burden facing Applicants makes their effort to avoid producing ordinary course documents particularly stunning.

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3. Discovery of ordinary course documents is especially called for because courts have rejected the opinions of the economic experts Applicants have chosen to substantiate their competition claims precisely for offering testimony inconsistent with ordinary course documents. In their rejected application, Applicants insisted that the proposed transaction would be procompetitive based on theory and models developed by Dr. Mark Israel and Dr. Elizabeth Bailey. But courts have previously rejected Dr. Israel's and Dr. Bailey's theories and models because they were contrary to ordinary course documents:

- “[T]he Court does not find Dr. Israel’s analysis compelling because it is plainly at odds with the overwhelming documentary evidence” *FTC v. IQVIA Holdings Inc.*, 710 F. Supp. 3d 329, n.29 (S.D.N.Y. 2024).
- “Dr. Bailey has not provided the Court with what is economically and geologically *feasible* in the next several years. On the other hand, the FTC has presented ordinary course business documents and statements” *FTC v. Peabody Energy Corp.*, 492 F. Supp. 3d 865, 912 (E.D. Mo. 2020) (emphasis in original).
- “In his lengthy testimony, Dr. Israel also demonstrated a misunderstanding and misapplication of antitrust concepts, rendered opinions based on false assumptions, and failed to account for the circumstances” *United States v. Am. Airlines Grp. Inc.*, 675 F. Supp. 3d 65, 102 (D. Mass. 2023), *aff’d*, 121 F.4th 209 (1st Cir. 2024).

Judicial preference for ordinary course documents over the theory and models of Dr. Israel and Dr. Bailey is consistent with the general view of the Department of Justice and the Federal Trade Commission that “evidence created in the normal course of business is more probative than evidence created after the company began anticipating a merger review.” U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, MERGER GUIDELINES § 4.1 (Dec. 18, 2023).

4. By withholding obviously relevant material, Applicants are fabricating a timing crisis in the coming months. Applicants announced their proposed transaction in July 2025. The Board gave them the opportunity to comment on the proposed procedural schedule, *see* Finance Docket No. 36873, Decision No. 5 (STB served Sept. 26, 2025), and if they thought they needed more time to fulfill their discovery obligations, they could have said so. Instead, in November 2025, they asked the Board to *shorten* the procedural schedule—explaining that they had previously expected to only be able to respond to discovery “after the Board accepted the Application,” but thanks to the prompt appointment of Your Honor, they had already been able to “beg[i]n responding to discovery requests from interested parties.” UP-7/NS-7 at 2-3. If Applicants had actually wanted to facilitate a smooth review process for the Board, ordinary

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course documentation allowing interested parties and the Board to test the veracity of their claims would have been produced already, either as part of their now-rejected Application or in response to discovery requests (as they implied they were doing back in November). The seven months since the proposed deal was announced would have been more than enough time to comply with even a Second Request in a Department of Justice or Federal Trade Commission merger investigation. Yet the only ordinary course documents Applicants have produced consist of a handful of human resource policies that would seem to have little if anything to do with the core public interest issues in this proceeding.

Applicants' invocation of "an evidentiary phase that must be completed within one year" (Applicants' January 29 Reply at 3) helps reveal their reasons for hiding the ball. Delaying production of clearly relevant material could prevent their experts' theories and models from being rigorously examined for consistency with Applicants' actual business practices as reflected in their ordinary course business documents—something that is particularly appropriate in this major merger—and back the Board into ruling on an undeveloped record. What should instead happen is that Applicants should be required to make a substantial document production promptly, well in advance of depositions, allowing a complete record for the Board's review to develop in an orderly fashion.

The principle that Applicants must produce ordinary course documents in response to requests relating to topics put in issue by their Application is ripe for review, and we respectfully urge Your Honor to schedule a hearing promptly to ensure a sensible production schedule that will enable the Board to assess the relation between the soon-to-be-filed Application and the real world as reflected in Applicants' ordinary course documents.

Respectfully submitted,



David L. Meyer
Attorney for CPKC

cc: All Parties of Record
Joseph J. Matelis (Sullivan & Cromwell LLP)
Dylan M. Aluise (Sullivan & Cromwell LLP)
Nizam Hasham (CPKC)

CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of February 2026, a true and correct copy of the foregoing 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.

/s/ Kiera S. Judge
Kiera S. Judge