

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET 36873

UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY

- CONTROL -

**NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY
COMPANY CORPORATION**

**UNITED STATES DEPARTMENT OF JUSTICE – MOTION FOR SUPPLEMENTAL
PROTECTIVE ORDER**

Pursuant to 49 U.S.C. § 11327, the United States Department of Justice respectfully moves the Surface Transportation Board to enter a Supplemental Protective Order to govern the Department's access to confidential information produced in the captioned proceeding. A proposed Supplemental Protective Order is attached as Appendix A.

The Department of Justice seeks to participate in the Board's proceeding in this matter, including by reviewing data and documents of the parties and third parties, as well as interviewing and receiving presentations from such parties, pursuant to the Department's statutory right to intervene as a party to the proceeding under 49 U.S.C. § 11325(b)(1).¹ The Department's participation requires that it have access to the non-public, unredacted version of the Application filed by the parties on December 19, 2025, as well as potentially other documents produced in this matter. These materials necessarily include confidential, proprietary,

¹ The Department filed a Notice of Intent to Participate on November 20, 2025.

commercially sensitive materials subject to the Protective Order entered by the Board on August 5, 2025 (Decision No. 1) (the “Protective Order”).

However, the Protective Order includes three requirements incompatible with statutory and regulatory requirements applicable to the Department. Paragraph 12 of the Protective Order requires any party receiving Designated Material (as that term is defined in the Protective Order) to destroy that material immediately upon, at the earlier of, withdrawal from the matter or the completion of the proceedings. Destruction of Designated Material as required by the Protective Order may run afoul of the Department’s obligations to retain materials that are subject to the Federal Records Act. *See* 44 U.S.C. § 3101 *et. seq.* Likewise, paragraph 11 prohibits use of any Designated Material for any purpose other than the proceedings before the Board. Given the Department’s law enforcement function, the Department routinely retains the ability to use information it obtains in any proceedings or investigation for any law enforcement purpose and a blanket requirement for the Department to destroy all Designated Material would unnecessarily hamper the Department’s ability to carry out its law enforcement function. Additionally, paragraphs 7 and 8 require that all Department employees that are given access to Designated Material sign the Undertakings set forth in Exhibits A and B. Such a requirement is unnecessary given the Department’s confidentiality policies. *See* Justice Manual 1-7.100.² The proposed

² Justice Manual, § 1-7.100 – General Need for Confidentiality, available at <https://www.justice.gov/jm/justice-manual> (“Much of DOJ’s work involves non-public, sensitive matters. Disseminating non-public, sensitive information about DOJ matters could violate federal laws, employee non-disclosure agreements, and individual privacy rights; put a witness or law enforcement officer in danger; jeopardize an investigation or case; prejudice the rights of a defendant; or unfairly damage the reputation of a person. DOJ personnel should presume that non-public, sensitive information obtained in connection with work is protected from disclosure, except as needed to fulfill official duties of DOJ personnel, and as allowed by court order, statutory or regulatory prescription, or case law and rules governing criminal and civil discovery. Other than as necessary to fulfill DOJ official duties, disclosure of such information to anyone, including to family members, friends, or even colleagues, is prohibited and could lead to disciplinary action. Unauthorized disclosures of sensitive personal or proprietary information could lead to criminal prosecution or administrative action.”).

Supplemental Protective Order would be signed by an individual authorized to do so on behalf of the Antitrust Division of the U.S. Department of Justice.

The Department recognizes that unrestricted disclosure of confidential, proprietary, or commercially sensitive information and data could cause competitive injury to the parties. Issuance of the proposed Supplemental Protective Order protects against such disclosure while accommodating the Department's legal obligations and law enforcement function, as set forth in the preceding paragraph. The proposed Supplemental Protective Order, unlike the generally applicable Protective Order, would allow the Department to retain Designated Material if required by law and use Designated Material for law enforcement purposes outside of this proceeding, and would relieve the Department of the obligation to have its employees sign any undertakings.

For the reasons stated above, the Department respectfully requests the Board enter a Supplemental Protective Order in the form in the attached Appendix.

Respectfully submitted,

/s/ Patricia C. Corcoran

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February 4, 2026

APPENDIX A

SUPPLEMENTAL PROTECTIVE ORDER

1. For purposes of this Supplemental Protective Order, the defined terms contained in the Protective Order entered as the Appendix to Decision No. 1 on August 5, 2025, will apply.
2. Subject to the protections set forth in this Supplemental Protective Order any Designated Material may be provided to the U.S. Department of Justice (“Department”), and the Department may attend any deposition at which Designated Material is used or discussed.
3. Designated Material must not be used by the Department for any purposes other than for (a) the Proceedings, (b) as otherwise permitted or required by law, court order, or regulation, or (c) for law enforcement purposes.
4. The Department must not include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the Board, unless the pleading or other document is submitted under seal, in a package clearly marked on the outside as Confidential Materials Subject to Protective Order.” All pleadings and other documents so submitted must be kept confidential by the Board and must not be placed in the public docket in the Proceedings except by order of the Board or of an administrative law judge or other officer in the exercise of authority lawfully delegated by the Board. If the Department submits anything to the Board containing Designated Material, the Department must file simultaneously a redacted version.
5. The Department must not include Designated Material in any pleading, brief, discovery request or response, or other document submitted to any forum other than this Board in the Proceedings unless (a) the pleading or other document is submitted under seal in accordance with a protective order that requires the pleading or other document to be kept confidential by that tribunal and not be placed in the public docket, or (b) the pleading or other document is submitted in a sealed package clearly marked, “Confidential Materials Subject to Request for Protective Order,” and is accompanied by a motion to that tribunal requesting issuance of a protective order that would require the pleading or other document be kept confidential and not be placed in the public docket, and requesting that if the motion for protective order is not issued by that tribunal, the pleading or other document be returned to the filing party.
6. The Department must not present or otherwise use any Designated Material at a Board hearing in the Proceedings, unless the Department has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting such Designated Material to the Board, to an administrative law judge or to another officer to whom relevant authority has been lawfully delegated by the Board, and has accompanied such submission with a written request that the Board, administrative law judge, or other officer (a) restrict attendance at the hearing during any discussion of such Designated Material, and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material.
7. To the extent that materials reflecting Confidential or Highly Information are provided to the Department by a party in the Proceedings, and are held and/or used by the Department in

compliance with the terms of this Supplemental Protective Order, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. §§ 11323 or 11904 or of any other relevant provision of the ICCTA.

8. Upon completion of the Proceedings, including any petitions for reconsideration, appeals, or remands, the Department must destroy all Designated Material unless (a) the Department is otherwise required by law to retain certain information or documents, for example to comply with the Department's Federal Records obligations, or (b) the information or documents may be used for other law enforcement purposes.
9. The Department agrees to comply fully with all of the provisions of this Supplemental Protective Order unless the Board or an administrative law judge or other officer exercising authority lawfully delegated by the Board determines that good cause has been shown warranting suspension of any of the provisions herein.
10. Nothing in this Supplemental Protective Order restricts the right of any party to disclose voluntarily any Confidential Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party.

/s _____

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Department of Justice's Motion for Supplemental Protective Order has been electronically filed with the Surface Transportation Board and served on all parties of record in this proceeding by electronic mail this 4th day of February 2026.

/s/ Don Amlin

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