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Chief of Case Administration
Office of Chief Counsel
Surface Transportation Board
395 E Street S.W.
Washington, D.C. 20423-0001

ENTERED
Office of Chief Counsel
February 23, 2026
Part of
Public Record

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

Dear Chief of Case Administration:

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 in support of BNSF’s appeal (BNSF-18) of the ALJ’s February 11, 2026 order (Decision No. 10) (the “ALJ Order”). The ALJ Order reflected a clear error of judgment that, if left in place, would lead to manifest injustice, a substantial detriment to the public interest, and undue prejudice to parties seeking to participate fully in this proceeding. *See* 49 C.F.R. § 1115.1(c); *see also* 49 C.F.R. § 1115.9(a)(4).

The issues raised by the ALJ Order are not relevant solely to BNSF. The Order’s prohibition against any non-voluntary discovery prior to the Board’s acceptance of an application will dramatically affect the rights of CPKC and all other parties in this proceeding, and as a practical matter may prevent the Board from deciding this case on a full record. The fact that the ALJ Order allows *voluntary* discovery is no solace given Applicants’ view of their discovery obligations. CPKC’s experience with Applicants’ approach to discovery mirrors BNSF’s: Applicants have repeatedly stonewalled attempts to obtain relevant documents, including those generated by Applicants in the ordinary course related to topics raised by their proposed merger. More than two months ago, CPKC served requests seeking discovery of internal UP and NS documents on topics squarely put at issue by Applicants’ proposed merger, including materials

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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routinely produced in far less consequential Board proceedings. Applicants have refused to search for—let alone produce—records in response to nearly every single one of CPKC’s requests. Incredibly, Applicants have even objected to discovery requests that match *verbatim* the discovery they served on CP and KCS in the *CP/KCS* proceeding.

CPKC requests that the Board consider, in addition to the core legal points addressed in BNSF’s appeal, the practical consequences of the ALJ Order’s discovery bar for the Board’s review of the proposed UP-NS combination.

First, the ALJ Order allowing only “voluntary” pre-application discovery will reinforce and embolden Applicants’ strategy of trying to avoid meaningful discovery by “running out the clock.” To date, *nearly seven months into this proceeding*, Applicants have made sweeping (and meritless) objections to almost every discovery request directed to them. And they have produced *zero* internal documents prepared by UP or NS personnel in the ordinary course of their business reflecting how those railroads think about, analyze, and communicate about the issues raised by the Application when they are doing so in more candid contexts outside of Board advocacy. Applicants have thus far refused to produce any board materials (other than promising but not yet producing some relating specifically to this transaction, but not to consolidation generally), strategic plans, growth forecasts, regularly prepared reports, and internal communications (other than about 50 cover emails to which the trackage rights and other agreements Applicants have produced were appended) that bear on issues raised by their proposed merger.

Second, if further progress on discovery must await a refiled application, or worse the Board’s acceptance of that application, practical considerations may make it impossible to complete the kind of discovery called for in this proceeding within the framework of the statutory limits on the procedural schedule. Even with expedited processes for dispute resolution (that have yet to be adopted), the ALJ Order prohibiting discovery until after the Board accepts an application will place extraordinary and undue pressure on the Board’s proposed procedural schedule. Under the Board’s current proposed procedural schedule, which calls for comments and responsive applications at F+120 (*see* Decision No. 5 at 3), assuming the Board takes 30 days to accept the Application, there would be only 90 days for:

- (1) Applicants and parties seeking discovery to meet and confer about disputes regarding any discovery requests propounded up to that point;
- (2) Applicants to search for and produce any records they *agree* to produce;
- (3) Parties to present any remaining disputes to the ALJ, which will take time for briefing, argument, and resolution (*e.g.*, BNSF’s motion to compel took 33 days from filing to resolution despite there being no hearing or engagement on the proper scope of discovery or any individual request);

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- (4) Applicants to respond to the ALJ's resolution by searching for and producing any additional records they may be ordered to produce;
- (5) Parties to review whatever records are produced by Applicants;
- (6) Parties to issue follow-up discovery requests, if any, and take depositions as to which the produced documents are relevant; and
- (7) Parties to prepare and submit comments and responsive applications reflecting the evidence gleaned from these discovery efforts.

It is noteworthy that, consistent with their goal of making it impossible for parties to undertake meaningful discovery of ordinary-course documents, Applicants have sought to tighten the proposed procedural schedule beyond what they initially proposed. Initially, they sought to reduce the period from application acceptance to the submission of comments to just 75 days (*i.e.*, comments due at F+105), in part based on what is now an obviously false premise that meaningful pre-application discovery was underway. *See UP-7/NS-7* at 2 & Appx. A. And just last week, UP's CEO Jim Vena publicly floated the even-more-outlandish notion that comments should be due within just 45 days (presumably from acceptance), which would effectively nullify any opportunity for parties to create a full and meaningful record to assist the Board's consideration of the proposed merger.²

CPKC believes that expedited processes will be indispensable no matter how much time the Board's schedule provides, and CPKC is prepared to work in good faith to target its discovery requests so as not to require massive enterprise-wide searches for broad categories of documents. But delaying the start of the discovery process until after a refiled application is accepted—let alone filed—could make it impossible as a practical matter to undertake the degree of discovery that this proceeding warrants without holding proceedings in abeyance while the discovery process is completed.

Third, the Board should take this opportunity to reject the false premise of Applicants' resistance to any discovery of their ordinary-course documents reflecting Applicants' internal views on the key issues raised by their proposed merger. Applicants' refusal to search for and produce these types of records 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 requests. But these types of records are not just subject to discovery under Board rules,

² Barclays 43rd Annual Industrial Select Conference (Feb. 18, 2026), Tr. at 3 (remarks of Jim Vena) ("And hopefully, the STB looks at that and says, they don't need the 90 days for that and give them 45 days because they've already been looking at that application for a while.") (Excerpts are Exhibit 1 hereto). In the event Applicants actually present such a suggestion to the Board, CPKC will oppose it strenuously.

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they are critical for parties to build a record on which the Board can make an informed decision about whether the proposed merger serves the public interest.

Applicants' reliance on past precedents to resist discovery of these records is curious given that this is the first-ever merger to be considered under the 2001 Merger Rules, which 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 those Rules, the Board emphasized that it "plan[ned] 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. Applicants now must demonstrate not only that the proposed transaction would not be harmful, but also adduce evidence to prove the "substantial and demonstrable *gains* in important public benefits." 49 C.F.R. § 1180.1(c) (emphasis added). This heightened burden of proof calls for more—not less—discovery to support a probing assessment by the Board of the veracity and reliability of the claims Applicants make in support of their proposed merger. And it renders irrelevant Applicants' protestations about the kinds of discovery that might have been deemed overbroad or disproportionate in rate disputes and other non-merger proceedings (*see* UP-24/NS-23 at 15-17). Put another way, Applicants' effort to escape discovery of their ordinary-course documents is particularly stunning in a proceeding that will, more than any other in history, shape the next century of American railroading.

Applicants' preposterous position that robust, timely discovery is not needed here is also contrary to Board precedent. "The Surface Transportation Board regulations provide for broad discovery." *Lake Providence Port Comm'n – Feeder Line Application – Line of Delta S. R.R. Located in E. Carroll & Madison Parishes, LA*, Finance Docket No. 36447 (STB served Dec. 31, 2025) at 2 (ruling of ALJ Soulikias); *see also Westinghouse Elec. Corp. v. Alton & S. Ry.*, 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 claims made in an application and has relied on ordinary-course documents to render decisions in those proceedings. *See, e.g., Stagecoach Group PLC – Control – Twin America, LLC*, Docket No. MCF 21035 (STB served Jan. 11, 2012) at 3 ("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 – Woodinville Subdivision*, Finance Docket No. 35731 (STB served Aug. 22, 2013) at 4-5 (compelling production of relevant communications); *Canadian Pac. Ry. Co. – Control – Dakota, Minn. & E. R.R. Corp.*, Finance Docket No. 35081 (STB served Feb. 20, 2008) at 3 ("[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.").

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Applicants' position is also inconsistent with past practice in much smaller merger cases decided under the pre-2001 rules. For example, in *CP/KCS*, in response to discovery requests served by UP, NS, and other parties, CP and KCS produced a large number of ordinary-course documents (including in the form of emails, memos, Excel spreadsheets, PowerPoint presentations, and others) on such topics as their pre-merger traffic forecasts, their marketing strategies, consideration of merger issues by their boards of directors, their efforts to improve service and grow traffic through interline collaborations, and their approach to and analysis of rail pricing, among many others.

By contrast, the kinds of ordinary-course documents that Applicants have categorically refused to commit to searching for or producing are central to the Board's evaluation of Applicants' public interest claims. Other than "board materials that address the proposed transaction" (UP-24/NS-23 at 18), Applicants have so far refused to commit to search for and produce any ordinary-course documents on key topics put at issue by their proposed merger. They attempt to justify that approach by claiming that the Board'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"—advocacy documents not created in the normal course "should normally be sufficient." *Id.* at 14-15. Accordingly, Applicants argue 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. Yet on the broad topic of "competition," Applicants point solely to verified statements of their experts submitted with their initial Application. *Id.* at 12. In other words, according to Applicants, the Board's review of their merger should be based on advocacy documents and table-top exercises by paid experts shorn of any records reflecting how their railroads actually conduct business.

Ironically, Applicants' decision to rely on the opinions of Dr. Mark Israel and Dr. Elizabeth Bailey to advance their claims about the merger's competitive impacts perhaps best illustrates why ordinary-course documents will be critical to the Board's review. Courts charged with critically evaluating Dr. Israel's and Dr. Bailey's previous work have criticized their opinions precisely because they were undermined by the ordinary-course records of their clients:

- "[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, 388 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).

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- “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).

The Board in this proceeding will similarly be tasked with critically evaluating the claims Applicants put forward through their paid experts Dr. Israel and Dr. Bailey. It should do so with the benefit of ordinary-course documents that can only be obtained from robust discovery of the sort that Applicants have resisted.

* * *

The Board should grant BNSF’s appeal and remand for proceedings before the ALJ with appropriate instructions concerning the importance of prompt and expeditious discovery, including discovery of Applicants’ internal ordinary-course documents relating to the issues raised by Applicants’ unprecedented merger proposal.

Respectfully submitted,



David L. Meyer
Attorney for CPKC

cc: All Parties of Record

**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**

EXHIBIT 1

**TRANSCRIPT OF BARCLAYS 43RD ANNUAL
INDUSTRIAL SELECT CONFERENCE
(FEB. 18, 2026)
(EXCERPTS)**

Barclays 43rd Annual Industrial Select Conference

Company Participants

- Jennifer Hamann, Executive Vice President and Chief Financial Officer
- Jim Vena, Chief Executive Officer
- Kenny Rocker, Executive Vice President, Marketing and Sales

Other Participants

- Brandon Oglenski, Barclays Investment Bank, Union Pacific Corporation

Presentation

Brandon Oglenski {[BIO 15384860 <GO>](#)}

Good morning, everyone. Welcome to day two of Barclays 43rd Annual Industrial Select Conference. I'm Brandon Oglenski, airline and transport analyst, and very excited to have up next Union Pacific. We're joined by Jim Vena, CEO; Jennifer Hamann, CFO; and Kenny Rocker, Head of Marketing and Sales.

Questions And Answers

Q - Brandon Oglenski {[BIO 15384860 <GO>](#)}

So, very excited to talk about a lot of developments here on the M&A front and on your business. But for those that have done this already, let's just queue up question number one for the audience real quick. Do you currently own UNP: yes, overweight; market weight; three, underweight; or four, no?

A - Jim Vena {[BIO 7117749 <GO>](#)}

Can I get the names for underweight?

Q - Brandon Oglenski {[BIO 15384860 <GO>](#)}

Okay. That's a (multiple speakers). Question number two, please. In your -- what's your general bias towards Union Pacific right now: positive, negative or neutral? Okay. And then, question number three, please. In your opinion, through-cycle EPS for Union Pacific will be above peers, in line with peers, or below peers? And thanks to everyone for participating. We do publish these at the end of the conference. All right, Jim, maybe somewhat of a favorite audience here.

A - Jim Vena {[BIO 7117749 <GO>](#)}

Yeah, I thought maybe one of the UP people in the crowd with a button there would have tried to skew it, but thank God, you didn't, Diana.

Q - Brandon Oglenski {[BIO 15384860 <GO>](#)}

Well, thank you for coming to Miami, especially during a busy time for you guys. I think yesterday, you made a filing with the STB, effectively saying that the refiling of the application for the merger with Norfolk Southern would be end by April 30th.

So, bottom line is, there's a process; we knew it. I think if today somebody was writing the regulations, they'd be different, but it is what it is and it is a process. So, we went through the process first to put the application in, and that was important for us to cover off all those key areas that the STB is responsible for. Is it in public interest? Does it enhance competition? Is it good for employees, the environmental? And we put that all in that application and we made sure we did that. And because it was a bolt-on with a very small piece and a very -- of overlap and a very small piece of 2:1 customers, we dealt with that. So, they said that we needed to give them some more information.

Last week, through the liaison, they told us that the way they wanted to see that information was different than we thought three weeks ago when -- after they had sent it back to us to put more information in. So -- and we were -- by regulation, we had to give them an answer on the 17th whether we were going to reapply and what -- when they could expect the application. So, we put out yesterday that it's the end of April. That's what it's all -- that's all it is, is just going through the process. Now, I'm hoping we're working hard and the contractors, we've hired the economists, right, the traffic studies, people that are doing this separately from us because they've got some expertise on that; they need some time to do that. And that's where we are, Brandon.

I don't know if you too have any comments on where the...

A - Kenny Rocker {BIO 17450476 <GO>}

No.

A - Jim Vena {BIO 7117749 <GO>}

No? You guys are good? I'm going to bring them in as much as I can, Brandon, if you don't mind.

Q - Brandon Oglenski {BIO 15384860 <GO>}

Sure. And on process, so, assuming that you did file by April 30th, what's next steps?

A - Jim Vena {BIO 7117749 <GO>}

Well, it's laid out. In general what happens is they give any constituent time to be able to look at the -- look and formally respond to the application. And I'm sure they've been working at it because it's not substantive change of what we're doing to it. So, they're going to have a few extra months. And hopefully, the STB looks at that and says, they don't need the 90 days for that and give them 45 days because they've already been looking at that application for a while. But that happens. Then there could be hearings, then there could be back and forth before we get to the end.

Yeah. Listen, it's different than the way I do business. I made a decision on some stuff that we're buying (technical difficulty) for our company and I think it took me 20 minutes last night with Jennifer and we pounded it out and we're done. So, I like to do things in 20 minutes, and some things take a little bit longer. But we knew it, Brandon. This is not a surprise. If it was a surprise, then people out in the audience and online should think, holy cow, that Union Pacific leadership doesn't understand. We understand. And -- but we also want to try to speed it up. It is what it is.

Q - Brandon Oglenski {BIO 15384860 <GO>}

Does this push back the idea that the deal could close mid next year or early next year?