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BEFORE THE SURFACE TRANSPORTATION BOARD

Docket No. FD 36873

ENTERED
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Public Record

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

**SHIPPER ASSOCIATIONS’
MOTION TO REDESIGNATE SCHEDULE 5.8 AS PUBLIC**

Jason D. Tutrone
Karyn A. Booth
Jeffrey O. Moreno
Thompson Hine LLP
1919 M Street, NW, Suite 700
Washington, DC 20036
(202) 336-8800
Jason.Tutrone@ThompsonHine.com
Karyn.Booth@ThompsonHine.com
Jeff.Moreno@ThompsonHine.com

*Counsel for Alliance for Chemical
Distribution, American Chemistry
Council, American Fuel & Petrochemical
Manufacturers, and The Fertilizer
Institute*

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The Alliance for Chemical Distribution (ACD), American Chemistry Council (ACC), American Fuel & Petrochemical Manufacturers (AFPM), and The Fertilizer Institute (TFI) (collectively, Shipper Associations) move the Surface Transportation Board, under Paragraph 10 of the Protective Order,¹ to order Applicants² to redesignate Schedule 5.8 of their Merger Agreement³ as “Public” or, alternatively, “Confidential.”

Schedule 5.8 does not qualify as Confidential Information under the Protective Order. It contains *no* traffic data, *no* shipper identities, *no* rates, *no* cost data, *no* trade secrets, and *no* other protected confidential or proprietary information. Yet Applicants slapped a Highly Confidential designation on it anyway, concealing their own candid assessment of the conditions that the Board may need to impose to ameliorate the merger’s harms.

Applicants have billed this merger as “transformational”—“a win for the American economy, . . . our customers, and . . . our people.”⁴ They have touted its

¹ Decision No. 1, FD 36873, app. at ¶ 10 (STB served Aug. 5, 2025) (Protective Order).

² Applicants are Union Pacific Corporation (UPC), Union Pacific Railroad Company (UP) (UPC and UP, collectively Union Pacific), Norfolk Southern Corporation (NSC), and Norfolk Southern Railway Company (NS).

³ The “Merger Agreement” is the Agreement and Plan of Merger between UPC, Ruby Merger Sub 1 Corporation, Ruby Merger Sub 2 LLC and NSC, dated as of July 28, 2025. (*See* Appl. Vol. 4, Ex. 2.1) Schedule 5.8 is Section 5.8 of the Company Disclosure Schedules to the Merger Agreement. A copy of Schedule 5.8 is attached as Exhibit 1.

⁴ Press Release, Union Pacific Corp. & Norfolk Southern Corp., *Union Pacific and Norfolk Southern to Create America's First Transcontinental Railroad* (July 29, 2025), *available at* <https://investor.unionpacific.com/news-releases/news-release-details/union-pacific-and-norfolk-southern-create-americas-first>.

“significant public benefits”⁵ and called it “an unprecedented opportunity for our country.”⁶ But they have fought to conceal their own arm’s-length assessment of its costs and benefits.

Schedule 5.8 reveals which Board-imposed conditions would allow UPC to pay \$2.5 billion to walk away. It identifies the regulatory conditions that UPC may refuse to accept—conditions that address some of the merger’s most significant potential public harms. Applicants have done everything they can to hide it. They redacted Schedule 5.8 from discovery. They omitted it from their merger application. When the Board ordered them to include it, they designated it Highly Confidential without any apparent regard for whether it qualifies.

The Highly Confidential designation shuts out the very people who must decide whether and how to participate in this proceeding. Rail customers cannot see Schedule 5.8. Shipper associations cannot see it. Elected officials cannot see it. The public cannot see it. Even parties with outside counsel cannot discuss it with their attorneys. Applicants’ designation deprives interested parties of Applicants’ own assessment of the conditions that might address the merger’s harms.

⁵ Press Release, Union Pacific Corp. & Norfolk Southern Corp., *Creating America's First Transcontinental Railroad: Union Pacific and Norfolk Southern's STB Merger Application Details Enhancements to Competition and Public Benefits* (Dec. 19, 2025), available at <https://investor.unionpacific.com/news-releases/news-release-details/creating-americas-first-transcontinental-railroad-union-pacific>.

⁶ (Appl. 1-13.)

1. At bottom, the Board should redesignate Schedule 5.8 as public. Schedule 5.8 does not qualify as Confidential Information under the Protective Order. It does not contain protected proprietary or confidential information.
2. Applicants have no legitimate interest in protecting Schedule 5.8 because it contains nothing their competitors or customers could use against them outside this proceeding.
3. The current designation prejudices interested parties by depriving them of Applicants' own assessment of the conditions that may be necessary to address their merger's harms, which is essential to evaluating whether the transaction serves the public interest and making crucial advocacy decisions. If the Board declines to make Schedule 5.8 public, it should at minimum redesignate it as Confidential to permit party access.

Background

The Protective Order Framework. On August 5, 2025, the Board entered a Protective Order in this proceeding to safeguard confidential, proprietary, and commercially sensitive information.⁷ The Protective Order distinguishes three information categories: public, confidential, and highly confidential.

The Protective Order defines "Confidential Information" as "traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost workpapers), the

⁷ Decision No. 1, FD 36873 slip op. (STB served Aug. 5, 2025).

identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts with shippers, confidential financial and cost data, and other confidential or proprietary business information.”⁸

Confidential material may be viewed by a party’s employees, counsel, consultants, and agents who have signed a confidentiality undertaking.⁹

Highly Confidential information is a subset of confidential information, “such as material containing shipper-specific rate or cost data or other competitively sensitive or proprietary information.”¹⁰ Stricter access restrictions govern Highly Confidential material: it is accessible only to outside counsel and outside consultants—not to employees of a party.¹¹ Any party may challenge another party’s Confidential or Highly Confidential designation by filing a motion with the Board or an Administrative Law Judge.¹²

Information not designated Confidential or Highly Confidential is public. The Protective Order does not shield this information from disclosure. If a party files this information with the Board, the Board will place it in the public docket.

The Public Interest Standard. The Board’s review of this merger is governed by 49 U.S.C. § 11324, which directs the Board to approve a transaction

⁸ Protective Order ¶ 1(b).

⁹ Protective Order ¶ 7.

¹⁰ Protective Order ¶ 6.

¹¹ Protective Order ¶ 8.

¹² Protective Order ¶ 10.

only if it finds the transaction “consistent with the public interest.”¹³ In making that determination, the Board balances the benefits of the merger against “anticompetitive effects, potential service disruptions, or other merger-related harms.”¹⁴ The Board has broad authority to impose conditions to address harms that would otherwise make approval inconsistent with the public interest.¹⁵

Applicants’ Attempts to Conceal Schedule 5.8. Schedule 5.8 identifies “Non-Required Restrictions”—regulatory conditions that would allow Union Pacific to walk away from the merger. Section 5.8(c) of the Merger Agreement states that Union Pacific need not accept any Non-Required Restriction, Voting Trust Restriction, or Prior Transaction Restriction—any of which constitutes a “Materially Burdensome Regulatory Condition.”¹⁶ Merger Agreement Section 6.3(e) further states that the absence of any Materially Burdensome Regulatory Condition is a condition to closing.¹⁷ If the Board imposes a Materially Burdensome Regulatory Condition, including a Non-Required Restriction listed in Schedule 5.8, Union Pacific can terminate the Merger Agreement by paying a \$2.5 billion Regulatory Termination Fee.¹⁸

¹³ 49 U.S.C. § 11324(c).

¹⁴ 49 C.F.R. § 1180.1(c).

¹⁵ 49 U.S.C. §11324(c); 49 C.F.R. § 1180.1(d); *Canadian Pacific Railway—Control—Kansas City Southern*, FD 36500, slip op. at 20 (STB served Mar. 15, 2023).

¹⁶ (Appl. 4-74 to -75.)

¹⁷ (*Id.* at 4-87.)

¹⁸ (Merger Agreement § 7.3(b)(i), Appl. 4-90 to -91.)

From the outset of this proceeding, Applicants have tried to hide Schedule 5.8. In the months leading to the Merger Application, several parties served discovery requests seeking the complete Merger Agreement.¹⁹ But Applicants redacted Schedule 5.8 from the Merger Agreement documents they produced.

When Applicants filed the Application on December 19, 2025, they did not include Schedule 5.8 despite 49 C.F.R. § 1180.6(a)(7)(ii)’s requirement to file “any contract or other written instrument entered into, or proposed to be entered into, pertaining to the proposed transaction.” Applicants “did not attempt to justify their omission under the Board’s regulations, despite that [Schedule 5.8 was] already the subject of discovery disagreements when the Application was filed.”²⁰

Later, after multiple parties asked the Board to reject the Application as incomplete for failing to include Schedule 5.8, Applicants continued to withhold it.²¹ In reply, Applicants responded that they redacted Schedule 5.8 “to protect privileged material” that was “shielded from discovery by recognized privileges.”²² Still, Applicants “[did] not specify which privilege they contend applies.”²³ The Board ultimately rejected this privilege claim, noting that “it is difficult to imagine

¹⁹ (*See, e.g.*, CN. Motion, Ex. 1 at 5, Jan. 8, 2026; BNSF Ry. Motion, Ex. 2 at 9, Jan. 9, 2026.)

²⁰ *Union Pac. Corp.—Control—Norfolk S. Corp. (Decision No. 9)*, FD 36873, slip op. at 9 (STB served Jan. 16, 2026).

²¹ (*See, e.g.*, CN Comments, 27-31, Dec. 29, 2025; CPKC Comments, at 9-14, Dec. 29, 2025; CSX Comments, at 9, Dec. 29, 2025.)

²² UP-17/NS-15, at 26.

²³ *Decision No. 9*, slip op. at 9.

a privilege claim that would apply” and “it is noteworthy that Applicants did not even make an attempt” to identify the privilege.²⁴

On January 16, 2026, the Board rejected the Merger Application because, among other reasons, it did not contain all “contracts or other written instruments entered into . . . pertaining to the proposed transaction,” including Schedule 5.8.²⁵ The Board ordered Applicants to include Schedule 5.8 in any revised application.²⁶

Having failed to withhold Schedule 5.8 on privilege grounds, Applicants changed tactics. On January 27, 2026, Applicants produced it as Highly Confidential under the Protective Order. But Schedule 5.8 contains no shipper-specific rate data or other competitively sensitive information. It contains only Applicants’ list of conditions they refuse to accept, revealing their own assessment of the harms this merger could cause and the remedies that could address them.

Argument

Against this backdrop of concealment, the Board must now evaluate Applicants’ confidentiality designation. The Protective Order permits parties to challenge such designations,²⁷ and the Board assesses whether materials merit the claimed protection and whether the designation prejudices challengers.²⁸ In doing

²⁴ *Id.*

²⁵ *Id.* at 8 (quoting 49 C.F.R. § 1180.6(a)(7)(ii)).

²⁶ *Id.* at 9.

²⁷ Protective Order ¶ 10.

²⁸ See *Application of the National Railroad Passenger Corp. Under 49 U.S.C. § 24308(e)—CSX Transportation, Inc. and Norfolk Southern Corporation*, FD 36496, slip op. at 4 (STB served Jan. 28, 2022) (citing *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp.*, FD 32760, slip op. at 6 (ICC served Oct. 27, 1995)).

so, the Board seeks an “appropriate balance between legitimate access and legitimate protection.”²⁹ It has recognized that “unrestricted disclosure of confidential, proprietary, or commercially sensitive material could cause serious competitive injury” to a party if used for “business or commercial purpose[s]” other than the proceeding at hand.³⁰ But to justify a Highly Confidential designation, a party must “do more than simply assert a desire to keep a document confidential.”³¹

Applicants cannot clear this bar. Schedule 5.8 fails the test on every count: it does not meet the definition of confidential or highly confidential information; it contains nothing that could competitively harm Applicants; and its designation prejudices interested parties by hiding Applicants’ candid assessment of the conditions that may be necessary to address the merger’s harms.

I. Schedule 5.8 does not qualify as Confidential Information under the Protective Order

Schedule 5.8 does not meet the definition of Confidential Information or Highly Confidential information under the Protective Order and thus does not merit protection. Traditionally, the confidential or highly confidential designations apply

²⁹ *Cent. Or. & Pac. R.R., Inc.—Abandonment and Discontinuance of Service—In Coos, Douglas, and Lane Counties, OR*, STB Docket No. AB-515 (Sub-No. 2), slip op. at 4 (Aug. 15, 2008).

³⁰ *Trailer Bridge, Inc. v. Sea Star Lines, LLC*, STB Docket No. WCC-104, slip op. at 2 (served May 10, 2000); *see also* Decision No. 1, FD 36873, slip op. at 2 (STB served Aug. 5, 2025), (prohibiting the use of information produced in this proceeding for any other business or commercial purpose).

³¹ *Stagecoach Group PLC & Coach USA, Inc., et al.—Acquis. of Control—Twin Am., LLC*, MC-F 21035, slip op. at 6 (STB served Feb. 8, 2011) (declining to hold a document confidential where a party failed to assert any commercial disadvantage if the document were to be made available to the public).

to documents containing the most sensitive and commercially valuable information, such as “shipper-specific rate or cost data.”³² As set forth above, the Protective Order defines Confidential Information to include traffic data, shipper identities in conjunction with traffic data, confidential terms of contracts with shippers, and confidential financial and cost data.³³ The Highly Confidential designation applies to a subset of this information, “such as material containing shipper-specific rate or cost data or other competitively sensitive or proprietary information.”³⁴

Schedule 5.8 falls outside these designations entirely. It contains no traffic data, shipper identities, confidential terms of contracts with shippers, or shipper-specific rate or cost data. Instead, as Applicants describe it, Schedule 5.8 is the part of the Merger Agreement that “addresses the allocation of regulatory risk between UPC and NSC” and “identifies the outer limits of conditions to the merger that UPC is obligated to NSC to accept.”³⁵

³² Protective Order ¶ 6; *see also CSX Corporation et al.—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corporation*, STB Docket No. FD 33388, Decision No. 1 at 1, 4 (served Apr. 16, 1997) (noting that exchange of “traffic data and tapes” could implicate 49 U.S.C. § 11904 and approving highly confidential designation); *Capital Materials Incorporated—Petition for Declaratory Order—Certain Rates and Practices of Norfolk Southern Railway Company*, STB Docket No. NOR 42068, at 5, 8 (served Apr. 19, 2002) (highly confidential designation included “traffic data” and “other competitively sensitive information,” and was appropriate because “disclosure of confidential, proprietary, or commercially sensitive material could cause serious competitive injury”).

³³ Protective Order ¶ 1(b).

³⁴ Protective Order ¶ 6.

³⁵ (Applicants’ Reply 26, Jan. 2, 2026.)

Nothing in Schedule 5.8 resembles the shipper-specific traffic data, waybills, cost workpapers, or other specific categories that the Protective Order’s confidentiality provisions protect. While the Protective Order includes a catch-all reference to “other competitively sensitive or proprietary information”,³⁶ that provision must be read in context with the specific categories it follows.³⁷ Further, as explained in Part II below, Schedule 5.8 is not competitively sensitive or proprietary. At bottom, Applicants’ designation of Schedule 5.8 as Highly Confidential is inconsistent with the Protective Order’s plain language and calculated to shield material terms of the transaction from public scrutiny.

II. Applicants have no legitimate need to protect Schedule 5.8.

Disclosing Schedule 5.8 would not competitively harm Applicants. That alone defeats the Highly Confidential designation.

Schedule 5.8 contains no trade secrets, no business strategies, no proprietary rate data, no customer contract terms, and nothing else competitors or customers could exploit outside this proceeding. It identifies the merger conditions that allow UPC to walk away. A customer could not use it to bargain for better rates. A supplier would find nothing relevant. And a competitor could not learn anything about Applicants’ business strategy or operations that the public merger application does not already reveal.

³⁶ Protective Order ¶ 6.

³⁷ *See Fischer v. United States*, 603 U.S. 480, 487 (2024) (applying the interpretive principle *ejusdem generis*, under which general terms at the end of a list are limited by the specific items that precede them).

Further, nothing in Schedule 5.8 would give anyone bargaining leverage outside this proceeding. Applicants warn that access would give parties a “tremendous benefit in bargaining for concessions if they knew UPC’s bottom line.”³⁸ But the issue is not whether Schedule 5.8 would provide a tremendous benefit in bargaining for concessions *in this proceeding*. If that were the case, Applicants could use the Protective Order to hide any evidence that cuts against them.

Applicants also have no reasonable expectation of privacy here. Schedule 5.8 is not privileged. The Board already rejected that claim.³⁹ Instead, Schedule 5.8 is part of the Merger Agreement, which Applicants negotiated at arm’s length as adversaries. It reflects how Applicants allocated regulatory risk, not proprietary business operations, customer relationships, or competitive strategies that parties typically expect to remain confidential.

Schedule 5.8 has no relevance outside this proceeding. It should not be shielded from disclosure.

III. Schedule 5.8’s confidential designation prejudices interested parties.

Applying the Protective Order’s access restrictions to Schedule 5.8 undermines meaningful participation in this proceeding. The Highly Confidential designation bars interested parties from accessing Schedule 5.8 entirely. Only outside counsel and outside consultants may see it, not the parties themselves. Rail

³⁸ (Applicants’ Reply 26, Jan. 2, 2026.)

³⁹ *Decision No. 9*, slip op. at 9.

customers, shipper trade associations, elected officials, Applicants' shareholders, and the public cannot review Schedule 5.8. Even parties with outside counsel cannot discuss it with their attorneys. This impairs their ability to evaluate conditions, assess risks, or provide informed input.

The prejudice runs deeper still. Schedule 5.8 identifies conditions so significant that Union Pacific would pay \$2.5 billion to escape them. These are not hypothetical concerns—they are the conditions Applicants fear as likely outcomes of this proceeding. They thus provide a credible roadmap to what Applicants have identified as the merger's greatest potential risks to the public interest.

That roadmap matters. With it, shippers can identify the conditions Applicants have deemed potentially necessary, discern the underlying potential harms those conditions address, and assess whether Applicants' voluntary conditions adequately remedy those harms. Without it, they face significant constraints in making informed decisions about whether to participate, what experts to retain, or what conditions to propose.

Outside counsel cannot fill this gap. Strategic decisions, including those about resource allocation, expert engagement, and participation level, require input from the parties themselves. To provide this input, Shippers must assess how Non-Required Restrictions relate to their own operations and supply chains. Elected officials must evaluate whether the merger's risks to their constituents may implicate a Non-Required Restriction. Parties cannot delegate these judgments to lawyers who cannot share what they know.

Dozens of federal and state lawmakers have urged careful evaluation of this merger, relaying constituent concerns that it will reduce competition and harm the public interest. The Board has promised “a rigorous and comprehensive review.”⁴⁰ Rigorous review demands informed participation. Parties cannot participate meaningfully if they cannot see Applicants’ own assessment of what remedies the merger may require. Transparency is consistent with the Board’s stated view that “the general public has an interest in Board proceedings being as open and transparent as possible.”⁴¹

Conclusion

For the foregoing reasons, Shipper Associations respectfully request that the Board order Union Pacific to redesignate Schedule 5.8 from highly confidential to public. Alternatively, Shipper Associations request that the Board order Union Pacific to redesignate Schedule 5.8 from highly confidential to confidential material.

⁴⁰ Letter from Chairman Fuchs, Vice Chairman Schultz, and Member Hedlund to Lawmakers, FD 36873, Doc ID 310869 (Feb. 13, 2026).

⁴¹ *Urgent Issues in Freight Rail Serv.—R.R. Reporting*, EP 770 (Sub-No. 1), slip op. at 5 (STB served Mar. 14, 2024) (quoting *Oversight Hearing Pertaining to Union Pacific Railroad Company’s Embargoes*, EP 772, slip op. at 5 n.11 (STB served May 15, 2023)).

Respectfully submitted,

/s/ Jason D. Tutrone

Jason D. Tutrone

Karyn A. Booth

Jeffrey O. Moreno

Thompson Hine LLP

1919 M Street, NW, Suite 700

Washington, DC 20036

(202) 336-8800

Jason.Tutrone@ThompsonHine.com

Karyn.Booth@ThompsonHine.com

Jeff.Moreno@ThompsonHine.com

*Counsel for Alliance for Chemical
Distribution, American Chemistry
Council, American Fuel &
Petrochemical Manufacturers, and The
Fertilizer Institute*

Dated: April 14, 2026

Exhibit 1 (Redacted)

Certificate of Service

I certify that on April 14, 2026, I served a copy of this document by email or first-class mail, postage pre-paid, upon all parties of record in this proceeding and the parties listed below.

/s/Jason D. Tutrone

Jason D. Tutrone