

REDACTED PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

CPKC-17

FINANCE DOCKET NO. 36873

3111211

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

ENTERED
Office of Chief Counsel
April 28, 2026
Part of
Public Record

CPKC’S RESPONSE TO BNSF’S MOTION TO ENFORCE DECISION NO. 13

Canadian Pacific Railway Company, d/b/a Canadian Pacific Kansas City and CPKC, on behalf of itself and its U.S. rail carrier subsidiaries (collectively “CPKC”),¹ writes to support BNSF’s Motion to Enforce Decision No. 13 (BNSF-22), filed April 27, 2026, and, in connection with the Board’s consideration of that Motion, to highlight the important role that the Board’s power to impose sanctions plays in ensuring the integrity of its proceedings.

In Decision No. 13, the Board ordered Applicants to produce ordinary-course records created over a 568-day period between July 30, 2024 and February 17, 2026. As the Board recognized in Decision No. 13, those records are “necessary to facilitate its review” of the proposed transaction and “whether [it] is likely to have the effects attributed to it by Applicants and whether the transaction is consistent with the public interest.” Decision No. 13 at 5.

Applicants chose not to take the Board’s directive seriously. In total, Applicants collectively produced just 74 documents from that 18-month period. All of those documents

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.

REDACTED PUBLIC VERSION

were generated during a 140-day period between March 13, 2025 and July 30, 2025.² It is not credible that the sum total of non-privileged records created or reviewed by senior executives of UP and NS analyzing the alleged synergies of the most consequential merger in this industry's history would number in the double digits or that between them they generated and received a mere 16 non-privileged emails addressing those issues over a 568-day period.

BNSF's motion accurately identifies many of the deficiencies in Applicants' production. We highlight that UP's own S-4 SEC filing, which is subject to the securities laws' prohibition against misstating or omitting material facts, confirms Applicants' failure to comply with the Board's order. UP's S-4 includes a "Background of the Mergers" section, which details the timeline of the merger, *i.e.*, the Transaction for HSR purposes. *See* Union Pacific Corp., Registration Statement (Form S-4) (Sept. 16, 2025); *see also* 17 C.F.R. § 240.14a-101. It identifies several executive and board meetings that occurred before March 2025 and plainly would have involved analysis and the preparation of documents responsive to Decision No. 13. Yet, for example, Applicants did not produce records that were prepared in connection with the following developments listed in the S-4 related to their intense discussions and analyses of transcontinental railroad consolidation:

- (1) the December 12, 2024 meeting between Jim Vena and other Union Pacific board members regarding "opportunities to grow the railroad," including through a "merger with another railroad to create a transcontinental railroad and enhance value for Union Pacific shareholders;"
- (2) the December 18, 2024 discussion between Mark George and Jim Vena regarding "the potential benefits of creating a transcontinental railroad, the current industry, and regulatory environment and whether the timing was right to explore such a transaction;"

² { [REDACTED] }

REDACTED PUBLIC VERSION

- (3) the January 28, 2025 meeting of NS’s board of directors wherein Mark George discussed the potential benefits and drawbacks of a merger with UP, including “the potential benefits and drawbacks of creating a transcontinental railroad;”
- (4) the March 24, 2025 meeting of NS’s board of directors wherein the board “further discussed industry trends and developments and various strategic options, including the potential benefits and drawbacks of industry consolidation, including a potential transaction to form a transcontinental railroad;”
- (5) the April 22, 2025 update Mark George provided to NS’s board of directors regarding his outreach to Jim Vena and the board’s subsequent discussion in support of exploring the merger further; and
- (6) the May 8, 2025 meeting of NS’s board of directors wherein the board “discussed Mr. George’s expected upcoming meeting with Mr. Vena . . . [and] the potential benefits and risks of a merger with Union Pacific as compared to other strategic alternatives.”

Applicants are telling the SEC and investors one thing about how the merger was negotiated and another thing to the Board.

On their own, these deficiencies demand correction and warrant stern rebuke from the Board. In addition, CPKC urges the Board to consider deploying, at a time the Board deems appropriate, other tools available to it to ensure that Applicants’ already-documented resistance to discovery does not impede this proceeding. The appropriateness of sanctions is particularly compelling given UP’s established history of flouting Board orders in other proceedings. Just two years ago, the Board recounted how UP’s “repeated failures to comply with Board orders and requests for information” as part of the Board’s oversight of UP’s recent embargoes “bordered on the contumacious and cannot be viewed as acceptable conduct by a railroad.”

Oversight Pertaining to Union Pac. R.R. Embargoes, Ex Parte No. 772 (STB served Apr. 17, 2024) (“*Embargoes*”) at 1. In that matter, the Board highlighted the stunning nature of UP’s obstinacy by noting that “[r]arely has a rail carrier engaged in such delay and obfuscation in response to the Board’s requests for information.” *Id.* at 3. The Board ultimately issued UP a clear warning: “Going forward, the Board fully expects UP, like all other members of the

REDACTED PUBLIC VERSION

industry, to responsibly, timely, and candidly comply with such Board requests for information and will not tolerate the type of conduct exhibited by UP in this docket.” *Id.*

The *Embargo* case was merely one example of UP’s longstanding practice of defying the Board. *See, e.g., Union Pac. R.R. – Construction and Operation Exemption – In Maricopa Cnty., Ariz.*, Finance Docket No. 36501 (STB served Nov. 14, 2024) at 3 (expressing the Board’s “disapproval of the deficiencies in the material UP produced in response to the directives in the Board’s December 2023 Decision” where UP had failed to comply with the Board’s instructions, had failed to produce responsive materials, and had included an “improper and inadequate privilege log”); *Urgent Issues in Freight Rail Service – R.R. Reporting*, Ex Parte No. 770 (Sub-No. 1) (STB served June 13, 2022) at 15 (“UP’s May 20 response to the Board’s May 6 Order was by far the worst of all the Carriers and reflected an attitude of indifference to the documented effects of its service deficiencies on its customers and of disregard for the Board’s statutory oversight of the freight rail industry.”).

Under both 49 C.F.R. § 1114.31(b) and the Board’s inherent and discretionary authority to oversee the conduct of its proceedings, the Board has available to it a wide array of sanctions to address a party’s failure to comply with Board orders compelling production of records. The Board has recognized that those tools include “(1) restricting [Applicants’] ability to introduce evidence; (2) declining to accept as true certain facts as claimed; (3) striking out all or any part of any of [Applicants’] pleading; (4) staying further proceedings until the order is obeyed; or (5) dismissing the proceeding.” *Denver & Rio Grande Ry. Hist. Foundation d/b/a Denver & Rio Grande R.R., L.L.C. – Petition for Declaratory Order*, Finance Docket No. 35496 (STB served Apr. 30, 2012) at 2.

REDACTED PUBLIC VERSION

Three of these tools may have particular merit in addressing the kind of misconduct reflected in Applicants' responses to Decision No. 13 and may guard against a recurrence of such behavior during the course of this proceeding.

1. ***Abeyance Pending Compliance with Board's Order.*** The Board should consider holding this proceeding in abeyance until the Board is satisfied that Applicants have fully complied with its order. The Board directed Applicants to produce by April 7 several categories of ordinary-course documents because these materials were "critical[ly] important[t]" and "necessary to facilitate its review" of what may be the most significant rail merger in North American history. Decision No. 13 at 5-6 (citation omitted). The Board explained that those materials were needed to "determin[e] whether the proposed transaction is likely to have the effects attributed to it by Applicants and whether the transaction is consistent with the public interest, which requires consideration of the proposal's competitive effects." *Id.* at 5.

If an application were refiled and accepted, the Board would be subject to statutory deadlines regarding the conduct of its review proceedings. 49 U.S.C. § 11325(a); (b). The Board could conclude that those deadlines should not begin to run until Applicants comply with Decision No. 13 by providing it and interested parties with materials that have already been determined to be "critical[ly] important[t]." The Board has previously recognized that abeyance is an appropriate remedy for a party's failure to comply with a Board order compelling production of information necessary to assist the Board's review of a control application. *See* 49 C.F.R. § 1114.31(b)(2)(iii); *see also Denver & Rio Grande Ry. Hist. Found.*, Finance Docket No. 35496 (STB served Apr. 30, 2012) at 2 ("Under the Board's regulations . . . , a failure to respond timely may result in sanctions such as the Board . . . staying further proceedings until the order is obeyed."); *cf. Canadian Pac. Ry. – Control – Kansas City Southern*, Finance Docket No. 36500,

REDACTED PUBLIC VERSION

Decision No. 16 (STB served Mar. 16, 2022) at 3 (suspending procedural schedule while Applicants provide Board with requested data).

2. ***Adverse Inferences.*** The Board also should consider drawing adverse evidentiary inferences on the topics addressed in the categories of ordinary-course documents Applicants have refused to produce. Applicants have failed to provide the materials that the Board said it needed to review the merits of Applicants' claims about the proposed merger. It would thus be appropriate for the Board to draw an adverse inference that Applicants' ordinary-course documents do not support the conclusions they might advance in support of the proposed merger through the testimony of their paid experts and other evidence. *See Coats & Clark Sales Corp. – Petition for Declaratory Order – Certain Rates & Practices of Lee Way Holding Co.*, Docket No. 40299 (ICC served Mar. 2, 1994) at 1 (granting petitioner's request for an adverse inference where the respondent "disregarded express Commission directives . . . to submit the required evidence"). Given the breadth of the Board's order, that adverse inference could—and should—extend to any claims they might advance about merger synergies, efficiencies, competition, and potential for sales growth, or expansion into product or geographic markets.

3. ***Evidentiary Preclusion.*** The Board should also consider precluding Applicants from introducing any evidence in these proceedings on the subjects covered by the documents that should have been produced under Decision No. 13 but were withheld by Applicants. *See, e.g., AEP Texas N. Co. v. BNSF Ry.*, Docket No. 41191 (Sub-No. 1) (STB served Sept. 10, 2007) at 81 (prohibiting BNSF from introducing rebuttal evidence that it had failed to produce in discovery); *Application of the National R.R. Passenger Corp. Under 49 U.S.C. § 24308(e) – CSX Transp. & Norfolk Southern Ry.*, Finance Docket No. 36496 (STB served July 22, 2022) at 5 (noting that a party who failed to produce required discovery "will not be permitted to use or rely

REDACTED PUBLIC VERSION

on any data or information . . . that has not been produced or otherwise already been made available”); *Wisconsin Power & Light Co. v. Union Pac. R.R.*, Docket No. 42051 (STB served June 21, 2000) at 5 (noting that, if UP failed to fully comply with the ALJ’s order, petitioners could later “fil[e] an appropriate motion to strike any materials submitted by UP that were inappropriately withheld during discovery”). Such a sanction would preclude Applicants from submitting other records allegedly supporting claims they might make about merger synergies, efficiencies, competition, and potential for sales growth, or expansion into product or geographic markets, including their alleged readiness to handle the technical complexities of a massively expanded network.

CONCLUSION

For the foregoing reasons, the Board should grant BNSF’s Motion and, in addition to requiring the prompt supplementation of Applicants’ April 7 production, consider additional steps aimed at deterring Applicants from engaging in further efforts to further resist appropriate disclosure of records through discovery and other Board processes in this proceeding. If the Board determines that sanctions are not yet warranted, it should not hesitate to sanction Applicants for any further obstructionist behavior that prevents an appropriately thorough review of the public interest consequences of the transaction.

REDACTED PUBLIC VERSION

Respectfully submitted,



CANADIAN PACIFIC RAILWAY COMPANY
Cassandra P. Quach
7550 Ogden Dale Road S.E.
Calgary, AB T2C 4X9 Canada
Email: Cassandra.Quach@cpkr.com

Nizam Hasham
1290 Central Parkway West, Suite 800
Mississauga, ON L5C 4R3 Canada
Email: Nizam.Hasham@cpkr.com
Telephone: (888) 333-6370

**THE KANSAS CITY SOUTHERN RAILWAY
COMPANY**
David C. Reeves
427 West 12th Street
Kansas City, MO 64105-1403
Email: David.Reeves@cpkr.com
Telephone: (816) 983-1387

David L. Meyer
LAW OFFICE OF DAVID L. MEYER
1105 S Street, N.W.
Washington, D.C. 20009
Email: David@MeyerLawDC.com
Telephone: (202) 294-1399

Joseph J. Matelis
C. Andrew Gerlach
Dylan M. Aluise
SULLIVAN & CROMWELL LLP
1700 New York Avenue, N.W.
Suite 700
Washington, D.C. 20006-5215
Emails: matelisj@sullcrom.com
gerlacha@sullcrom.com
aluised@sullcrom.com
Telephone: (202) 956-7500

Attorneys for CPKC

Dated: April 28, 2026

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April 2026, I caused a copy of the foregoing response to be served by email or by first-class mail, postage prepaid, on all parties of record in this proceeding, the Secretary of Transportation, the Attorney General of the United States, and Administrative Judge Jenifer Soulikias.

/s/ Kiera S. Judge

Kiera S. Judge