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BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36873

ENTERED
Office of Chief Counsel
May 8, 2026
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UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY
—CONTROL—
NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN
RAILWAY COMPANY

**UNION PACIFIC'S REPLY TO BNSF RAILWAY COMPANY'S MOTION TO
ENFORCE DECISION NO. 13 AND CANADIAN PACIFIC RAILWAY
COMPANY'S RESPONSE**

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BNSF RAILWAY COMPANY’S MOTION TO ENFORCE DECISION NO. 13
AND CANADIAN PACIFIC RAILWAY COMPANY’S RESPONSE**

Union Pacific Corporation (“UPC”) and Union Pacific Railroad Company (“UP”) (collectively, “Union Pacific”) oppose the Motion to Enforce Decision No. 13 filed by BNSF Railway Company (“BNSF”) (“Motion”) and the Response to the Motion filed by Canadian Pacific Railway Company (“CPKC”) (“Response”). Contrary to the assertions of BNSF and CPKC, Union Pacific complied fully with Decision No. 13.

In Decision No. 13, the Board directed Applicants to “provide the documents described in [the Transaction Related Documents section of] the FTC’s instructions for its premerger notification forms under the [Hart-Scott-Rodino (“HSR”)] Act.”¹ Union Pacific took that directive seriously and implemented a comprehensive, good-faith process to ensure full compliance with the Board’s instructions. Union Pacific conducted a wide-reaching search to identify documents potentially responsive to

¹ Decision No. 13 at 6–7 (served Mar. 18, 2026) (quoting Premerger Notification; Reporting & Waiting Period Requirements (“HSR Rules”), 89 Fed. Reg. at 89363, 89381, 89370–71, 89386 (Nov. 12, 2024)).

Decision No. 13's directive and applied the same document collection, review, and production procedures that it would have used had it been submitting an HSR filing.

The Motion and Response ignore the Board's directive in Decision No. 13 and years of guidance provided by the Federal Trade Commission ("FTC") regarding HSR compliance requirements. Instead, BNSF and CPKC fault Applicants for not producing as many documents as they purportedly expected. But the relevant question is not whether Union Pacific produced documents of a quantity or type that would satisfy BNSF or CPKC. Rather, it is whether Union Pacific properly searched for documents that may be responsive to the HSR Act filing requirements cited by the Board and then produced to the Board all non-privileged and HSR-responsive documents resulting from that collection. Union Pacific did so.

Through their Motion and Response, BNSF and CPKC are attempting to use Decision No. 13 to achieve their own discovery goals outside of the Board's ordinary third-party discovery process, despite the fact that the Board made it clear that Decision No. 13 was neither intended to limit nor substitute for that process. Third-party discovery is well under way—indeed, UP and Norfolk Southern have filed a motion with the Board requesting that it enter Discovery Guidelines so that discovery can proceed expeditiously and efficiently. That process provides the proper avenue through which to resolve BNSF and CPKC's various broad requests.

The Motion should be denied.

ARGUMENT

A. Union Pacific Diligently Followed Established HSR Procedures to Comply with Decision No. 13.

Union Pacific agrees with one key fact presented in the Motion: Decision No. 13 ordered the production of certain documents “that would be turned over in an HSR-reportable transaction.”² That is exactly what Union Pacific did. More specifically, Union Pacific complied with the HSR instructions for the production of Transaction Related Documents that the Board included in Decision No. 13 to establish the contours of its directive.³ The Board further established July 30, 2024 through February 17, 2026 as the time period for responsive documents, and that is the time period that Union Pacific followed.⁴ Thus, the Board received the same documents in Union Pacific’s April 7, 2026 production that the Department of Justice (“DOJ”) and FTC would have received in response to the Transaction Related Documents requirement had an HSR filing been required for Union Pacific’s proposed transaction with Norfolk Southern.

² Mot. at 1.

³ Decision No. 13 at 5–7 (citing HSR Rules, 89 Fed. Reg. 89216, 89301–03, 89370, 89386 (Nov. 12, 2024)). This rule was vacated by the U.S. District Court for the Eastern District of Texas, and the Fifth Circuit denied the FTC’s motion for a stay pending appeal. *Chamber of Commerce of the U.S. v. Fed. Trade Comm’n*, 2026 WL 402498 (E.D. Tex. Feb. 12, 2026), *motion to stay pending appeal denied*, No. 26-40094, ECF No. 44-2 (5th Cir. Mar. 19, 2026). For the avoidance of doubt, Union Pacific complied with the “Transaction Related Documents” section of the HSR Form’s Acquiring Person Instructions as published on November 12, 2024, and as reproduced in Decision No. 13.

⁴ Decision No. 13 at 7.

1. Union Pacific Conducted a Diligent and Broad Document Collection in Response to Decision No. 13.

To comply with Decision No. 13, Union Pacific followed long-established practices for complying with the relevant HSR filing requirements. As part of those practices, Union Pacific collected documents from a broad set of repositories and custodians. For example, outside counsel reviewed the contents of the Union Pacific deal team's SharePoint document repository, which the deal team used to store and collaborate on documents regarding the transaction, for potentially responsive materials. Outside counsel also searched the platform Union Pacific uses to make materials available to its board of directors for materials the company provided to the board regarding the proposed transaction.

In addition to searching central repositories, Union Pacific contacted each director to confirm whether they possessed potentially responsive material other than the material they received directly from the company. Union Pacific also identified additional custodians whose records, including emails, would need to be searched to comply with the Decision No. 13's HSR-based instructions, such as the "supervisory deal team lead" and any officers or directors of Union Pacific (inclusive of its controlled entities) who were involved in the analysis and planning for the proposed transaction and who therefore may have created or received responsive documents. In total, Union Pacific identified fourteen individual custodians, exclusive of the board of directors (whose members were searched separately, as noted) whose files potentially contained responsive non-duplicative documents. Union Pacific collected

files from those custodians across the full date range provided by the Board in Decision No. 13.

2. Union Pacific's Collection and Review Met or Exceeded Typical HSR Review Procedures.

After intentionally collecting an over-inclusive set of documents, Union Pacific next applied a typical set of search terms relevant to the HSR document instructions—*e.g.*, terms related to competition, including those that appear in the HSR instructions, as well as transaction-specific terms like the code names the parties used to describe themselves and the proposed merger. After applying these search terms and standard de-duplication protocols across the large set of materials that were collected, Union Pacific identified a set of approximately 32,000 potentially responsive documents that fell within the required date range that were advanced to individual attorney review for responsiveness and privilege.

This was a significant undertaking. A team of 35 licensed attorneys conducted a first-level review of all 32,000 documents, with a smaller team of attorneys conducting a second-level review to confirm responsiveness, check for privilege, and conduct quality control reviews. Union Pacific estimates that compliance with Decision No. 13 required approximately 1,400 hours of work across an outside counsel team that included approximately 50 persons, and cost hundreds of thousands of dollars to complete. Those figures underestimate the total time and expense of compliance, given that they do not include the resources committed to the project by Union Pacific personnel.

3. Union Pacific Produced All Responsive, Non-Privileged Material as Required by Decision No. 13.

Union Pacific's multi-stage review process ultimately identified 40 documents created or received during the date range that were responsive to the Transaction Related Documents instructions, as directed by the Board in Decision No. 13.⁵ This is the same number and set that would have been produced to the DOJ and FTC in response to the Transaction Related Documents section of the HSR form, had an HSR filing been required.

For the avoidance of doubt, Union Pacific adhered fully to the date range established by the Board in Decision No. 13 throughout its collection, review, and production process. It neither refrained from collecting or reviewing any document, nor treated any document as non-responsive, simply because of the document's date.

B. BNSF and CPKC Conflate the Board's Directive in Decision No. 13 with Their Private Discovery Goals.

The allegations of noncompliance presented to the Board by BNSF and CPKC rest on a single, flawed assertion: that a large and significant transaction like the proposed merger of Union Pacific and Norfolk Southern—which BNSF and CPKC both strenuously oppose—*must* have generated additional documents that would be responsive to the instructions of the HSR form.

BNSF and CPKC, despite being represented by law firms that have experienced HSR practitioners among their ranks, provide no support for this core

⁵ As noted in the privilege log that was included with Union Pacific's April 7 production in response to Decision No. 13, four of these documents were withheld as privileged and thirteen were produced in partially redacted form.

assertion. That is because they cannot: neither the HSR Rules nor the guidance provided by the FTC say anything at all about how large a compliant HSR document production should be, nor do they link HSR document productions to the size or type of a transaction in any way. And, of course, counsel for BNSF and CPKC are careful not to suggest that they regularly produce materially larger sets of documents on behalf of their own numerous HSR clients.

As described above, Union Pacific implemented and executed a diligent process designed specifically to identify, collect, and produce the documents required by Decision No. 13. Although the production may not have satisfied BNSF and CPKC's aspirations for their own discovery—a completely different process subject to different rules and that has been proceeding separately from the more targeted request the Board made in Decision No. 13—Union Pacific's document production here was fully compliant with the requirements of the HSR Rules for Transaction Related Documents, and thus with the directive in Decision No. 13.

1. The HSR Instructions Incorporated by Decision No. 13 Require a High-Value but Targeted Set of Documents.

Unlike the far more comprehensive Application requirements of the Board or of a DOJ/FTC “second request,” which the DOJ described in its submission to the Board,⁶ the requirements of an HSR filing and the HSR form's instructions that the Board reproduced in Decision No. 13 focus by design on a core set of high-level documents created in a company's ordinary course of evaluating transactions. For

⁶ Antitrust Division of the United States Department of Justice Letter at 2 (filed Mar. 3, 2026).

example, the Transaction Related Documents section of the HSR form—the specific language in Decision No. 13—calls for those documents “prepared by or for any officer(s), director(s), or supervisory deal team lead” for the express purpose of “evaluating or analyzing” the proposed transaction with respect to a few discrete topics.⁷ As a result, the antitrust agencies receive with HSR filings key documents created during the ordinary course of a company’s evaluation and analysis of a transaction, and not documents created for some other purpose or audience that may not reflect the real-time considerations of the decisionmakers.

By incorporating and quoting the requirements of the Transaction Related Documents section of the HSR form, the Board provided clear parameters for the documents that it was directing the Applicants to provide, including:

- (i) The document must have been prepared by or for Union Pacific officers, directors, or, for a subset of documents, the supervisory deal team lead;
- (ii) The document must have been created for the purpose of evaluating or analyzing the acquisition with respect to antitrust topics, or serving as a Confidential Information Memorandum; and
- (iii) The document must reflect evaluation of the applicable antitrust issues (e.g., market shares, competition, competitors, markets, potential or

⁷ See Decision No. 13 at 6–7 (citing HSR Rules, 89 Fed. Reg. 89216, 89301–03, 89370, 89386 (Nov. 12, 2024)).

sales growth or expansion into product or geographic markets, or synergies and efficiencies).⁸

In addition, certain documents are explicitly not responsive (*e.g.*, certain ordinary course documents and/or financial data shared during due diligence⁹; certain third-party documents created outside an engagement with the Applicants¹⁰; or certain financial models that do not have stated assumptions¹¹).

As a result, Decision No. 13 did not require Union Pacific to produce all documents that may discuss competition or similar topics and that were created between July 30, 2024 and February 17, 2026, as BNSF and CPKC appear to have desired. Rather, Union Pacific produced the full, targeted set of documents that were created within those dates and were responsive to the criteria adopted by the Board.

2. Union Pacific Diligently Consulted and Followed Interpretive Guidance Related to the Scope of the HSR Rules for Transaction Related Documents

In complying with Decision No. 13, Union Pacific followed decades of FTC formal and informal guidance interpreting and applying the HSR premerger filing requirements, as is expected for any company completing an HSR filing.¹²

⁸ See Decision No. 13 at 6–7 (quoting HSR Rules, 89 Fed. Reg. at 89370–71, 89386 (Nov. 12, 2024)).

⁹ Decision No. 13 at 6 (quoting HSR Instructions for “Confidential Information Memoranda,” 89 Fed. Reg. at 89370, 89386 (Nov. 12, 2024)).

¹⁰ Decision No. 13 at 7 (quoting HSR Instructions for “Third-Party Studies, Surveys, Analyses, and Reports,” 89 Fed. Reg. at 89370, 89386 (Nov. 12, 2024)).

¹¹ Decision No. 13 at 7 (quoting HSR Instructions for “Synergies and Efficiencies,” 89 Fed. Reg. at 89371, 89386 (Nov. 12, 2024)).

¹² The Transaction Related Documents requirement that the Board incorporated in its directive in Decision No. 13 is nearly identical to “Item 4(c)” and “Item 4(d)” of the (continued...)

The guidance provided on the FTC’s website implements the objective of the HSR filing requirements—to identify a small set of high-value documents for the antitrust agencies’ initial screening evaluation—and thus focus on key documents utilized or created by officers, members of the board of directors, or the supervisory deal team lead in evaluating a proposed transaction. In that context, the sources clarify that expansive categories of documents are *not* responsive to the Transaction Related Documents section of the HSR instructions, including (i) drafts of responsive documents, unless the draft was provided to a member of the board of directors, or there was no final version¹³; (ii) duplicative responsive documents¹⁴; (iii) certain documents that contain otherwise responsive content, but that were not created for the purpose of evaluating or analyzing the acquisition with respect to antitrust issues

version of the HSR Form that was in place prior to February 2025. Both have a long history in the HSR rules, including in the now-in-place rules. *Compare* Instructions to FTC Form C4 (rev. 02/04/23) at VI-VII, https://www.ftc.gov/system/files/ftc_gov/pdf/HSR-Form-Instructions.pdf, *with* Acquiring Person FTC Form C4 (rev. October 2024) at 8–9, https://www.ftc.gov/system/files/ftc_gov/pdf/acquiring-person-instructions-october-2024.pdf *and* Acquired Person FTC Form C4 (rev. October 2024) at 7, https://www.ftc.gov/system/files/ftc_gov/pdf/acquired-person-instructions-october-2024.pdf. Additionally, because of the vacatur of the rulemaking, see *supra* note 3, the prior rules have been reinstated. See HSR Notification Forms, Instructions and Guidance (updated Mar. 23, 2026), <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-notification-forms-instructions-guidance>. However, for the avoidance of doubt, Union Pacific adhered to the form instructions that accompanied the November 12, 2024 rulemaking and were included in Decision No. 13.

¹³ See Item 4(c) Tip Sheet at 4, FTC.GOV (Nov. 28, 2016), <https://www.ftc.gov/system/files/attachments/hsr-resources/4ctipsheet.pdf>; PNO Guidance on Item 4(d), FTC.GOV, <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-notification-forms-instructions-guidance/pno-guidance-item-4d>; HSR Rules, 89 Fed. Reg. at 89303 (Nov. 12, 2024) (rejecting a proposal to require draft documents, but clarifying that any document sent to any member of the board of the directors should not be treated as a draft).

¹⁴ HSR Rules, 89 Fed. Reg. at 89364, 89381 (Nov. 12, 2024).

(e.g., communicating the details of the transaction to shareholders)¹⁵; and (iv) documents prepared for the purpose of planning regulatory clearance strategy or preparing other regulatory filings, including all drafts of such filings (such as SEC filings or the STB application) unless they were also prepared to facilitate the analysis of the acquisition by the company.¹⁶

3. The Size of Union Pacific's Production Is Not Indicative of Compliance or Non-Compliance with Decision No. 13.

The individual circumstances of each party to a transaction, and the methods they ordinarily employ in evaluating a transaction, determine the size of an HSR production. There is no “right” or “wrong” number of documents. For example, acquisitions in which the parties have a limited understanding of each other often require the preparation of many documents in order to educate the executives and inform the decision whether or not to enter into the transaction, even if the transaction is relatively small. In contrast, when the parties are already familiar with each other's business, markets, and competitive landscape, as here, there are often few documents that are responsive to the Transaction Related Documents requirement, even in situations where the transaction is large. And given that the parties' networks here are complementary and overlap very little, as explained in detail in their Application, it is unsurprising that relatively few high-level documents

¹⁵ See Item 4(c) Tip Sheet at 4, FTC.GOV (Nov. 28, 2016), <https://www.ftc.gov/system/files/attachments/hsr-resources/4ctipsheet.pdf>.

¹⁶ See HSR Informal Interpretation 1301012, <https://www.ftc.gov/legal-library/browse/hsr-informal-interpretations/1301012>.

analyzing or evaluating the transaction with respect to factors such as competition and market shares were created.

Finally, regardless of a transaction's size or significance, an HSR filing is simply a screening tool for the antitrust agencies. Relative to the far more comprehensive Application requirements of the STB, an HSR filing is somewhat modest, requiring the filing person to submit a small amount of information and a "number of genuinely important documents" to support the agencies' initial consideration regarding whether a transaction may violate the antitrust laws and is thus worth further investigation.¹⁷ The document requirements of an HSR filing are therefore not intended to be as broad or as comprehensive as a Request for Additional Information and Documentary Material, or "second request," which is the antitrust agencies' primary investigative tool for merger reviews that raise potential competitive issues. Just as in this proceeding, the Board's request that Union Pacific and Norfolk Southern provide documents that would have accompanied an HSR filing should not be used by BNSF and CPKC to supplant the detailed Application-centric process the Board has instituted as its primary tool for evaluating potential competitive concerns.

4. Decision No. 13 Was Not Designed to Provide BNSF and CPKC With Broad Discovery

The Board issued Decision No. 13 for a specific purpose: to "direct Applicants to provide *certain* transaction-related documents."¹⁸ The Board remarked that Decision

¹⁷ See 43 Fed. Reg. 33450, 33526 (July 31, 1978).

¹⁸ Decision No. 13 at 5 (emphasis added).

No. 13 was neither intended to limit nor substitute for the Board’s ordinary third-party discovery process.¹⁹ Through their Motion and Response, BNSF and CPKC are attempting to use Decision No. 13 to achieve their own discovery goals outside of the Board’s normal processes.

The Board appointed Administrative Law Judge (“ALJ”) Soulikias to hear and resolve discovery disputes on August 28, 2025. On February 11, 2026, in Decision No. 10, ALJ Soulikias declined to compel discovery while no application was pending with the Board.²⁰ As of April 30, 2026—the submission date of Applicants’ Revised Application—the Board has now ordered “discovery to proceed before the ALJ so that interested parties may prepare their own submissions.”²¹ This process provides the proper avenue through which to resolve BNSF and CPKC’s various broad requests. Indeed, on May 7, 2026, Applicants filed a motion with the Board requesting that it enter Amended Discovery Guidelines so that discovery can proceed expeditiously and efficiently.²² BNSF and CPKC should not be permitted to distract from that process by making unsupported accusations that Applicants failed to comply with Decision No. 13.

¹⁹ *Id.* at 7 (“Nothing in this decision limits the scope of additional information and/or documents that may be appropriately requested or ordered produced in discovery if and when the Board accepts a revised application.”).

²⁰ Decision No. 10 at 3 (STB served Feb. 11, 2026).

²¹ Decision No. 17 at 2 (STB served Apr. 30, 2026).

²² *See* UP-48/NS-46 (filed May 7, 2026).

C. The Documents Alleged by BNSF and CPKC to Have Been Inappropriately Withheld by Union Pacific Were Either Non-Responsive, Non-Existent, or Included in Union Pacific's Production or Privilege Log.

BNSF and CPKC have alleged that Union Pacific's production is incomplete based on entirely unsupported assumptions that certain documents must exist and would have been responsive. Those allegations are addressed in turn below.

1. Synergies and Efficiencies Analyses and Financial Modeling

BNSF repeatedly alleges that Union Pacific did not produce modeling that supported their internal revenue and synergies assessments. This is simply incorrect. Union Pacific produced the complete final financial model as required under HSR rules whenever such models were created by or for officers or directors of the company, as well as other responsive materials that discuss deal synergies.²³

The title of the final financial model produced by Union Pacific—"Project Opal Financial Model"—indicates that this document contains exactly the information sought by BNSF. That detailed financial model, which evolved throughout the course of the deal, includes over 100 tabs containing information BNSF claims was not produced.²⁴

²³ See UP-STB-D13-0000360 ("Project Opal Financial Model"); *see also, e.g.*, UP-STB-D13-0000349 ("Project Opal Update; Revenue Synergy Deep Dive"); UP-STB-D13-0000452 ("Revenue Synergies"); UP-STB-D13-0000483 ("Project Pegasus Productivity Synergies"); UP-STB-D13-0000617 ("Project Opal Synergy Update").

²⁴ See UP-STB-D13-0000360 ("Project Opal Financial Model").

BNSF's allegations are also not consistent with the guidance on the FTC's website concerning synergy documents. Contrary to BNSF's assertions, Union Pacific was not required under the HSR rules to produce *every* synergies-related document in its files, nor even every such document that was prepared by or for an officer or director of Union Pacific.²⁵

For example, documents that contain a passing reference to synergies without a quantified dollar amount are not considered responsive per FTC guidance.²⁶ Email chains that include input into a substantive synergies document are also not considered responsive, as long as the substantive synergies document is produced.²⁷ Drafts or different iterations of synergies reports do not need to be produced as long as the final version of the report is produced, or the latest version if no final version exists.²⁸

In short, and contrary to BNSF's allegations, Union Pacific did not "cherry-pick" excerpts of the analyses supporting the synergies calculations. Rather, Union Pacific specifically produced those documents that were responsive to the instructions

²⁵ See, e.g., PNO Guidance on Item 4(d), FTC.GOV, <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-notification-forms-instructions-guidance/pno-guidance-item-4d> (providing examples of which synergy documents are and are not required to be produced when some documents serve as inputs to other documents).

²⁶ See *Premerger Notification Practice Manual* (5th ed. 2015) #185 (describing and citing informal interpretations provided on the FTC website).

²⁷ See *id.*; see also PNO Guidance on Item 4(d), FTC.gov, <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-notification-forms-instructions-guidance/pno-guidance-item-4d>.

²⁸ See *Premerger Notification Practice Manual* (5th ed. 2015) #185 (describing and citing informal interpretations provided on the FTC website).

the Board provided in Decision No. 13 and consistent with guidance published on the FTC’s website regarding responsiveness to Decision No. 13’s HSR instructions.

2. Concessions

BNSF’s and CPKC’s complaints about the quantity of concessions-related documents are similarly misplaced. They ignore a crucial limitation on the responsiveness of concessions-related documents: To the extent that documents about concessions were prepared for the purposes of planning regulatory approval strategy or for preparing the STB application, and not for purposes of evaluating or analyzing the acquisition itself, Union Pacific would not need to submit such documents as part of an HSR filing.

Under guidance provided by the FTC, documents about regulatory strategy and submissions to other authorities, including the STB, are not responsive for purposes of an HSR filing unless prepared for the purpose of evaluating or analyzing the acquisition, even if they otherwise include content regarding topics like competition or market shares. The FTC specifically carved out documents prepared for other purposes in the original rule,²⁹ and has repeatedly reiterated in informal guidance that documents prepared for the purpose of other regulatory proceedings are not required even if they otherwise contain responsive content.³⁰

²⁹ See 43 Fed. Reg. at 33525 (“Documents relating to other matters, such as pension arrangements, labor contracts, financing agreements or securities matters need not be supplied.”).

³⁰ Federal Trade Commission, 0610009 Informal Interpretation PNPM #181 (Oct. 6, 2006), <https://www.ftc.gov/legal-library/browse/hsr-informal-interpretations/0610009>.

Moreover, even assuming that concession analyses prepared specifically for the Board's application process were somehow responsive to Decision No. 13, they would constitute regulatory strategy involving or conveying legal advice from both in-house and outside legal counsel, and thus would properly be treated as privileged.

3. Documents Relating to Meetings Outlined in S-4 Filing

BNSF and CPKC's allegations stemming from Union Pacific's Form S-4 filing further misconstrue the obligations imposed by the Board in Decision No. 13.

First, Union Pacific's document collection and review included the entire date range that encompasses the meetings and communications listed in the Form S-4. To the extent Union Pacific identified non-privileged, responsive documents during the time period specified by the Board, they were produced.

Second, SEC rules require parties to report in a Form S-4 Registration Statement certain background and meetings about the potential transaction. Specifically, Item 6 of Form S-4 requires parties to a merger agreement to "[d]escribe any past, present or proposed material contracts, arrangements, understandings, relationships, negotiations or transactions" between the parties during the three most recently completed fiscal years. Although the SEC has not provided guidance on its views as to what meetings are covered by this requirement, it is generally interpreted broadly by the SEC staff and filers. In addition, state fiduciary duties require companies to provide shareholders with material information related to the transaction. As a result, in the interest of completeness the disclosures in a Form S-4 may be broader and cover more topics than "the acquisition" that is reported in an HSR filing and regarding which Transaction Related Documents must be submitted.

Put differently, just because a meeting or communication is listed in a Form S-4 does not necessarily mean that a party has started considering “the acquisition” in an HSR sense for Item 4(c) and 4(d) documents. Companies routinely consider and discuss with each other potential strategic and growth opportunities before deciding to pursue a transaction that do not necessarily constitute an HSR-reportable transaction.

Third, several of the dates listed in the Form S-4 reflect contact between the CEOs of Union Pacific and Norfolk Southern for the limited purpose of scheduling future preliminary meetings to discuss a potential transaction. Some of the other dates listed on the Form S-4 refer to routine meetings that were not scheduled for the purpose of discussing a possible transaction. Indeed, Union Pacific did not have approval by the Board of Directors to formally engage in discussions with Norfolk Southern about the proposed transaction until April 2025, as listed on the Form S-4. Given the informal or preliminary nature of the discussions that occurred on several of the dates listed in the Form S-4, a lack of written materials associated with those discussions is wholly unsurprising and not, as BNSF and CPKC argue, evidence of a failure to comply with Decision No. 13.

Fourth, Union Pacific did not exclude documents during the time period specified by the Board based on a concept of a “clean break” as asserted by BNSF. That concept is explained by the FTC as a possible basis for shortening the relevant date range for potentially responsive documents. The FTC explains that one need not go back to the furthest date in the past when the acquisition was being considered if,

at a more recent date in the past, there was a “clean break” in negotiations between the parties. But unlike a typical HSR filer, Union Pacific did not establish its own responsive date range for purposes of complying with the Board’s Decision No. 13. Instead, the date range was provided by the Board. Union Pacific’s collection, review, and production processes adhered to that date range.

4. Date Range

BNSF alleges that the Applicants have intentionally limited the scope of responsive documents based on document dates. This is false. As HSR practitioners are aware, it is not uncommon for parties to file limited or no responsive documents post-signing, because after signing, parties to a transaction are often not engaging in evaluations or analyses of the acquisition, but rather are undertaking steps to effectuate the transaction, explain it to stakeholders, or secure regulatory clearance and other approvals. Further, and as described above, Union Pacific did not consider the date of a document when determining whether a document was responsive to the Board’s request. To the extent that a document created between July 30, 2024 and February 17, 2026 was responsive, it was produced.

5. Number of Documents Produced vs. Numbers of Emails Produced

As explained above, Union Pacific collected thousands of emails from the relevant custodians, across the full date range provided by the Board. Depending on a company’s operations, however, it is not uncommon in HSR filings to include few, if any, responsive emails. FTC guidance states that emails are not responsive if the only responsive content is in the attachment(s) to the email, in which case the

responsive attachment(s) must be produced but the cover email is considered not responsive.³¹ The guidance on the FTC's website further recognizes that email discussions are often part of the process of drafting documents, meaning they frequently do not contain any analysis that is independent of or separate from the final report (which must be provided if responsive).³² After applying this guidance, Union Pacific produced all non-privileged, responsive emails in response to Decision No. 13 that it would have produced with an HSR filing.

CONCLUSION

For the foregoing reasons, the Motion should be denied.

³¹ See Item 4(c) Tip Sheet at 3, FTC.GOV (Nov. 28, 2016), <https://www.ftc.gov/system/files/attachments/hsr-resources/4ctipsheet.pdf> (“If an email contains no 4(c) content, but one of its attachments does, that attachment should be included as a separate 4(c) submission, assuming that it meets the other criteria.”).

³² See PNO Guidance on Item 4(d), FTC.GOV, <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-notification-forms-instructions-guidance/pno-guidance-item-4d> (“If a series of emails discusses input into the final version of a substantive synergies document, the emails are not responsive to Item 4(d)(iii) as long as the substantive synergies document is submitted in response to Item 4(d)(iii).”).

Respectfully submitted,

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May 8, 2026

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2026, the foregoing document was served by first-class mail or email on all parties of record to this proceeding, the Secretary of Transportation, the Attorney General of the United States, and Administrative Law Judge Jenifer Soulikias.

/s/ Daniel Damitio