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UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY
—CONTROL—

NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN
RAILWAY COMPANY

**NORFOLK SOUTHERN'S REPLY TO BNSF RAILWAY COMPANY'S
MOTION TO ENFORCE DECISION NO. 13**

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INTRODUCTION

Norfolk Southern Corporation (“NSC”) and Norfolk Southern Railway Company (“NS”) (collectively, “Norfolk Southern”) file this opposition in response to the Motion to Enforce Decision No. 13 (“BNSF Motion”) filed by BNSF Railway Company (“BNSF”) and the Response to the Motion (“CPKC Response”) filed by Canadian Pacific Railway Company (“CPKC”).

Norfolk Southern fully complied with the letter and spirit of the Board’s Decision No. 13. In that decision, the Board directed Applicants to produce certain types of documents that merging parties are required to submit to the federal antitrust agencies under the Hart-Scott-Rodino (“HSR”) Act. Norfolk Southern conducted a comprehensive custodial search for potentially responsive documents from all relevant individuals (including its corporate officers, directors, and the supervisory deal team lead) and then produced all responsive non-privileged documents that would have been part of a premerger notification to the Antitrust Division of the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) had the HSR Act applied to the proposed transaction.

BNSF’s speculation that Norfolk Southern did not search for documents from custodians such as the Chair of its Board of Directors and its Chief Executive Officer is simply wrong. And its claim that there “must be more” HSR-responsive documents is based on a mischaracterization of what is required under the HSR Act and a failure to acknowledge HSR common practice and FTC/DOJ guidance. In fact, the scale of Norfolk Southern’s production was not unusual for an HSR filing. HSR document instructions are intentionally tailored to capture a unique selection of documents –

not the full panoply of documents that might be produced in more general discovery, which is now underway in this proceeding.

The HSR document requests are targeted by design. They are specifically intended to identify the critical competitive analyses undertaken as parties are evaluating whether to enter into a proposed transaction. The fundamental purpose of the HSR Act is to provide sufficient information for the antitrust agencies to assess whether a proposed transaction can proceed or whether further in-depth review is required. Each year, the DOJ and FTC review thousands of proposed mergers under tight statutory timelines. The streamlined, preliminary merger review process functions because it requires the production of a targeted set of documents reflecting how senior leadership evaluated the competitive impact of a proposed transaction.

Guided by experienced HSR counsel and pursuant to standards set out by the FTC and DOJ in instructions to and interpretations of the HSR form, Norfolk Southern undertook the same process to identify and produce responsive documents used by transaction parties every day to prepare HSR document submissions. Norfolk Southern identified the appropriate custodians, collected and reviewed their documents (including email and electronic documents), and produced non-privileged documents responsive to the HSR document categories that the Board ordered produced. *See* Decision No. 13 at 6–7. Norfolk Southern’s resulting production provided exactly what the HSR process contemplates: the focused set of high-level, decision-making documents intended to reflect the rationale for entering into a

proposed transaction, not an exhaustive compilation of every communication or underlying work product prepared by each and every officer and director.

BNSF's and CPKC's criticisms disregard this well-established governing framework. BNSF's motion repeatedly asserts that there "must be more" documents and assumes, therefore, that because they want more, Norfolk Southern must have flouted the Board's order. Nothing could be further from the truth. That BNSF and CPKC may want more documents does not really matter. The only relevant question is whether Norfolk Southern complied with Decision No. 13. It did. In short, in response to Decision No. 13 and consistent with the HSR Act's instructions and FTC/DOJ guidance, Norfolk Southern searched for, identified, reviewed, and then produced exactly the categories of documents required by the HSR Act and the Board's order. BNSF and CPKC's unsupported speculation to the contrary should be rejected, and the BNSF Motion should be denied.

I. HSR Document Requests and Productions are Narrowly Tailored and Targeted by Design.

The HSR Act envisions a "preliminary antitrust review" of a proposed merger based on "the production of a narrow class of documents." *Premerger Notification; Reporting and Waiting Period Requirements*, 43 Fed. Reg. 33450, 33525 (July 31, 1978); *see also* *Premerger Notification; Reporting and Waiting Period Requirements*, 76 Fed. Reg. 42471, 42474 (July 19, 2011) (describing the "discrete categories of documents" to be included with a premerger notification submission). This approach aligns with the "very short time" for review afforded to DOJ and FTC under the HSR Act, 43 Fed. Reg. at 33525, which establishes a 30-day waiting period from the date

the pre-merger notification is filed during which the FTC or DOJ must conduct a preliminary assessment of proposed transactions. 15 U.S.C. § 18a(a)–(b).

The antitrust agencies acknowledge “that they may not gain access to some relevant documents at the time of [DOJ and FTC’s] initial review” given the limited scope of documents required at the premerger notification stage. 43 Fed. Reg. at 33526. And in fact, the antitrust agencies that have been charged with interpreting and implementing the HSR rules have explicitly excluded certain categories of documents as falling outside of the select competitive analyses HSR seeks. An HSR submission was never designed to replace full-fledged discovery. *Id.* at 33526.

There is no requirement in the statutory scheme, regulations, or agency guidance on the number of documents that must or should be included in an HSR filing. Indeed, the number of documents typically submitted can vary wildly from transaction to transaction depending on the specific circumstances. The FTC has recognized that the number of documents submitted is case-specific, often turning on a deal’s complexity, the duration of negotiations, the amount of analyses prepared by parties, and the intensity of competitive overlaps, and that, for certain transactions, few documents may be responsive. *Premerger Notification; Reporting and Waiting Period Requirements*, 88 Fed. Reg. 42178, 42207–08 (June 29, 2023); *see* Fed. Trade Comm’n, Item 4(c) Tip Sheet (Nov. 28, 2026), https://www.ftc.gov/system/files/ftc_gov/pdf/Tip-Sheet-Item-4c.pdf (“Item 4(c) Tip Sheet”¹). Leading HSR practitioners

¹ Under another version of the HSR premerger notification form, content related to “Competition Documents,” “Confidential Information Memoranda,” and “Third- (continued...) ”

have also acknowledged that there are no specified quantity limits for the various categories of required documents—on the contrary, for example, “[f]inal versions of transaction-related documents are often limited in number.” Philip Algieri, Managing Document Submissions Under the FTC and DOJ’s Proposed HSR Requirements, *THE ANTITRUST SOURCE* (Dec. 2023), <https://kpmg.com/kpmg-us/content/dam/kpmg/pdf/2024/managing-document-submissions-under-ftc-doj-requirements.pdf>.

The only relevant question then is whether reasonable steps were taken to identify and produce responsive documents. And there can be no question that Norfolk Southern did just that.

II. Norfolk Southern Complied Fully with Decision No. 13.

The Board directed Norfolk Southern to provide the documents “that DOJ and FTC request from parties as a matter of course when reviewing proposed mergers under the HSR Act.” Decision No. 13 at 5 (citing 15 U.S.C. § 18a; 16 C.F.R. § 803.1(a)). More specifically, the order required the production of documents related to: “Competition Documents,” “Confidential Information Memoranda,” “Third-Party Studies, Surveys, Analyses, and Reports,” and “Synergies and Efficiencies” as defined by the HSR Notification and Report Form. *Id.* at 6–7; *see* Fed. Trade Comm’n, HSR Form Instructions at 7, https://www.ftc.gov/system/files/ftc_gov/pdf/acquired-person-instructions-october-2024.pdf (“HSR Form Instructions”). Norfolk Southern complied

Party Studies, Surveys, Analyses, and Reports” were commonly referred to as Item 4(c). Content related to “Synergies and Efficiencies” was referred to as Item 4(d).

with Decision No. 13 by performing the same identification, review, and production of documents that any entity would undertake in preparing an HSR filing.

The HSR instructions define the scope of these categories of documents as including: (1) all studies, surveys, analyses and reports prepared by or for any officer or director or supervisory deal team lead, (2) for the purpose of evaluating or analyzing a proposed transaction, (3) with respect to the following topics: “market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets” or “synergies and/or efficiencies.” HSR Form Instructions at 7. Only documents that comply with all three requirements are responsive to the HSR Act (and thus the Board’s order). This explicit guidance reflects the antitrust agencies’ determination to ensure that only these specific categories of documents accompany an HSR filing. Norfolk Southern carefully applied this guidance, and the documents produced in response to Decision No. 13 are the same set of documents that would have accompanied an HSR filing if one had been required for the proposed transaction.²

A. Norfolk Southern Followed HSR Review Protocols To Identify Relevant Custodians.

The threshold requirement for a responsive document in these circumstances is that it be prepared by or for an officer, director, or supervisory deal team lead. Therefore, Norfolk Southern began its compliance efforts by identifying the directors, officers, and supervisory deal team lead of Norfolk Southern Corporation, the

² The Board also ordered the production of “Confidential Information Memoranda.” However, no such documents were created or received by Norfolk Southern for the proposed transaction.

ultimate parent entity, and Norfolk Southern Railway Company, its wholly-owned subsidiary.

NSC has 12 board members and 36 officers. NS has four directors and 40 officers. There is considerable overlap between the officers and directors of the two corporations, with all NS directors and all but 4 NS officers also being officers or directors of NSC. The supervisory deal team lead, Michael McClellan, is also an officer of both NSC and NS. The final list of potentially relevant custodians—individuals who were corporate officers or directors of either company or the supervisory deal team lead—included 51 individuals.

Moving to the second step of identifying the relevant universe of individuals from whom to collect documents, it is not enough for someone to simply be an officer, director, or supervisory deal team lead. For HSR purposes, the individual also must be reasonably likely to have documents responsive to the HSR document requests at issue. Put another way, (1) an individual must actually be involved in analyzing or evaluating a proposed transaction; and (2) that evaluation and analysis must have been with respect to “market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets” and “synergies and/or efficiencies” related to the transaction. Individuals not involved in evaluating a proposed transaction, or involved only with evaluations of other subject matters, for instance, would not be reasonably likely to have documents responsive to the HSR Act.

Accordingly, Norfolk Southern analyzed each of the 51 potentially relevant custodians to apply these standards and determine the universe of individuals reasonably likely to have responsive documents. This determination was informed by interviews and/or knowledge of when those individuals became aware of or involved in analyzing or evaluating the proposed transaction, and whether their involvement related to evaluating or analyzing the proposed transaction with respect to “market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets” and “synergies and/or efficiencies.” This comprehensive analysis resulted in the identification of 29 individuals (the “Relevant Custodians”) from whom potentially responsive documents were sought.

B. Norfolk Southern Collected, Reviewed, and Produced Responsive Documents From the Relevant Custodians.

Norfolk Southern then worked with experienced outside antitrust and eDiscovery counsel to collect potentially responsive material (*e.g.*, emails, electronically stored documents, handwritten notes) from each Relevant Custodian. In addition to these custodial files, Norfolk Southern also collected materials from Diligent, Norfolk Southern’s repository for all materials provided to or presented at board and board committee meetings. Searches for potentially responsive documents spanned from July 30, 2024 through February 17, 2026, matching the time period specified in Decision No. 17.

Norfolk Southern’s outside counsel then conducted a thorough review of the collected documents consistent with standard review protocols. This collection resulted in a universe of over 20,000 documents that were subsequently reviewed by

attorneys from two outside law firms. Finally, responsive documents were reviewed for claims of privilege. Non-privileged documents were produced, while privileged documents were either withheld or appropriately redacted and logged in accordance with the Board's order. This robust review process resulted in the identification of 82 responsive documents, 38 of which were non-privileged and produced.

The search and review process undertaken by Norfolk Southern was comprehensive, reasonable, and completely consistent with HSR document reviews conducted by sophisticated HSR counsel in thousands of transactions a year. The process fully complied with the Board's Decision No. 13.

III. BNSF's and CPKC's Criticisms of Norfolk Southern's Production Are Meritless Speculation.

As explained above, the HSR premerger notification program was not designed to inundate DOJ and FTC with every conceivable document related to a proposed transaction. Quite the contrary, in fact. And Norfolk Southern's compliance process was robust and unimpeachable.

Speculation from BNSF and CPKC to the contrary leads to three general complaints: (1) there "must have" been more documents, (2) they "must have" failed to search the relevant individuals, and (3) they "must have" withheld responsive materials. BNSF and CPKC are simply wrong.

A. BNSF and CPKC's complaints about the volume of documents produced by Norfolk Southern are misleading and inaccurate.

BNSF complains that there "must be more" documents relative to a transaction of this size. BNSF Motion at 7. But, again, the HSR Act does not require that a specific number of documents be produced. Instead the focus of an HSR production is on the

author, recipient, and content of the documents and whether the documents fall into responsive categories. Documents that merely reference the proposed transaction are not necessarily responsive; they must contain evaluations and analyses of the proposed transaction with respect to the relevant subject matter. *See* Decision No. 13 at 6–7.

Indeed, HSR guidance makes clear that many categories of common deal-related documents should be excluded from HSR productions. The FTC and DOJ are clear that among the common exclusions are:

- “[P]ress releases, as well as presentations to and Q&As prepared for investors, lenders, rating agencies, employees, vendors, or customers” are not responsive “even if they contain Item 4(c) content[.]” (ABA Premerger Notification Practice Manual § 179 (citing HSR Informal Interpretation Letter, # 1204008 (Apr. 19, 2012)));
- “[O]rdinary course documents, including strategic plans or corporate overviews, are not responsive to Item 4(c) even if they contain an evaluation or analysis of ‘market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets,’ that is ‘4(c) content.’” (Item 4(c) Tip Sheet at 1);
- Materials not prepared for the purpose of analyzing or evaluating the proposed transaction such as ordinary course documents or integration materials created after the decision to enter into a transaction has been made. (Premerger Notification Practice Manual § 181 (Item 4(c) does not encompass documents that are not “prepared for the business purpose of deciding whether to engage in the proposed transaction.”); (HSR Informal Interpretation Letter, # 0804009 (Apr. 17, 2008)); (43 Fed. Reg. 33,450, 33,525–26 (July 31, 1978)));
- Documents that simply contain “just terms such as ‘competitor’ or ‘market.’” (Item 4(c) Tip Sheet at 3; ABA Premerger Notification Practice Manual § 179 (“The mere use of words such as ‘competition’ or ‘market,’ . . . is not enough[.]”));
- “A third party’s study on competition in the relevant industry” not commissioned specifically for the transaction. (ABA Premerger Notification Practice Manual § 182);

- Emails discussing “input into the final version of a substantive synergies document” need not be produced so long as “the substantive synergies document is submitted.” (Fed. Trade Comm’n, PNO Guidance On Item 4(d), <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-notification-forms-instructions-guidance/pno-guidance-item-4d> (“PNO Guidance On Item 4(d)”));
- “[I]f a document makes a passing reference to synergies with no quantified dollar amount attached (e.g., ‘the deal will result in synergies’), it does not need to be submitted[.]” ((ABA Premerger Notification Practice Manual § 185 (citing HSR Informal Interpretation Letter, # 1109010 (Sept. 16, 2011))));
- “[F]inancial model[s]” that do not state the assumptions on which they are based are not responsive. (PNO Guidance on Item 4(d), <http://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/pno-guidance-item-4d>);
- “[D]ue diligence requests or questions . . .” (ABA Premerger Notification Practice Manual § 179 (citing HSR Informal Interpretation Letter, # 0706019 (June 26, 2007))):
- Documents “whose purpose is to give updated guidance to the investment bankers so they can advise the company about whether a sale might be possible.” (ABA Premerger Notification Practice Manual § 179 (citing HSR Informal Interpretation Letter, # 1206013 (June 11, 2012))); and
- Materials prepared in anticipation of regulatory proceedings or to secure necessary regulatory approvals do not constitute documents prepared “for the purpose of evaluating or analyzing” an acquisition. (ABA Premerger Notification Practice Manual § 181), (43 Fed. Reg. 33,450, 33,525 - 26 (July 31, 1978))).

BNSF and CPKC’s accusations that Norfolk Southern failed to comply with its obligation to search for responsive materials throughout the Board’s entire time period, as explained above, is simply false. BNSF Motion at 8–9; CPKC Response at 2–3. Although BNSF and CPKC feign surprise that so few HSR-responsive documents exist, the limited number of documents responsive to the tailored scope of the HSR Act requirements is unsurprising given the speed at which the transaction came together and the limited number of individuals privy to the details of the

proposed transaction until very close to signing. Indeed, the vast majority of the Relevant Custodians only learned of the proposed transaction in May of 2025. And while initial conversations between very senior executives within the two companies commenced in late December of 2024, these were high level discussions that simply did not result in the creation of responsive documents.

B. Norfolk Southern Searched Files for all Relevant Custodians as Required Under the HSR Act.

BNSF and CPKC also argue that Norfolk Southern failed to include relevant custodians in its production set, asserting that the files of relevant team members (in particular members of the company's deal team working group) were not searched. BNSF Motion at 6–7 (citing NS_STB_00001303 at 307). They are wrong. If members of the working group met the criteria to be a relevant custodian, described at length above, then their files were collected, reviewed, and responsive documents were produced. Individuals who were not searched did not meet these criteria. They either were not officers, directors, or supervisory deal team lead or they could not be reasonably expected to have responsive documents as they did not have responsibilities for analyzing or evaluating the proposed transaction as it relates to the responsive categories under the HSR Act. This same analysis was applied to the entire deal team working group identified by BNSF in its motion.

BNSF further suggests that Norfolk Southern failed to search the custodial files of key directors and officers, particularly the Chair of the Board of Directors Richard Anderson, CEO Mark George, Vice President and Treasurer Michael Barr, and the Supervisory Deal Team Lead, Michael McClellan. *See* BNSF Motion at 8–9.

They are wrong. All of these individuals were identified as part of the Relevant Custodians subject to search and BNSF offers no evidence to the contrary.

As a supposed example of Norfolk Southern's noncompliance, BNSF points to a purported failure to produce emails between Yannik Thomas, Norfolk Southern's Vice President Network Design and Optimization, and Michael Barr, Norfolk Southern's Vice President Treasurer, IR and Integrated Resource Planning. BNSF alleges responsive emails must exist because Mr. Thomas wrote in an email with another executive that he had been discussing the proposed transaction with Mr. Barr. BNSF's assumptions are ill-founded. The referenced "discussions" easily could have been verbal and not by email, and even if they were by email, BNSF has no basis to assume that whatever they said actually makes the emails responsive. Both Mr. Thomas and Mr. Barr were Relevant Custodians whose files were collected, reviewed, and produced. And Norfolk Southern's production did in fact include an email between Mr. Thomas and Mr. Barr. *See* NS_STB_00001421. No further responsive documents existed.

C. BNSF's accusations about "missing" documents regarding competition and synergies/efficiencies cannot be sustained.

BNSF and CPKC hypothesize that certain discussions that Applicants have publicly disclosed must have included documents analyzing competition, synergies, and efficiencies related to the proposed transaction. *See* BNSF Motion at 10, 12; CPKC Response at 2. BNSF explicitly presumes to know what documents Norfolk Southern's executives "would have been demanding" during the analysis and evaluation of the deal and implicitly asserts that they would be responsive to the

Decision No. 13. BNSF Motion at 7. These assumptions are unsupported and cannot outweigh the fact of Norfolk Southern's thorough search and production.

For instance, it is not surprising that high level discussions between CEOs exploring a potential transaction did not have "pre-meeting prep or post-meeting materials" containing HSR-responsive materials. Indeed, the documents Norfolk Southern provided show that the "post-meeting report" for at least one of these meetings was provided verbally by Mr. George to the Board. *See* NS_STB_00000567 at 577.

BNSF also faults Norfolk Southern for not providing the full analysis or modeling supporting the conclusions in a section of a broader transaction-related presentation or the underlying analysis for a presentation on merger synergies. BNSF Motion at 10 (citing NS_STB_00001303 at -311); Motion at 12 (citing NS_STB_00000003 at -39–41). Here again, after a comprehensive search and review, Norfolk Southern did not locate any additional responsive materials underlying this study or presentation that were responsive.

CPKC states that Norfolk Southern did not produce any records prepared in connection with four Board meetings on January 28, March 24, April 22, and May 8, 2025. CPKC Response at 3. As noted above, Norfolk Southern reviewed the Board materials for those four meetings—which include meeting minutes, presentation decks, and other materials—and identified no responsive material, as the materials did not discuss the proposed transaction let alone the categories of transaction-related content covered by the Board's Decision No. 13.

BNSF's and CPKC's accusations that Norfolk Southern did not comply with the Board's order is not based on any evidence that Norfolk Southern did not follow a deliberate and thorough HSR review and production process. Instead, their demands are an attempt to transform the targeted search and production contemplated by Decision No. 13 into a sweeping Second Request-type production like that demanded by CPKC and BNSF in their discovery requests. Here, discovery is already occurring under the supervision of Administrative Law Judge Soulikias and will allow reasonable production of materials beyond the limited HSR-responsive documents the Board requested in Decision No. 13. The only question before the Board now is whether Norfolk Southern complied with Decision No. 13, and as demonstrated above, it clearly did.

CONCLUSION

For the reasons above, BNSF's Motion to Enforce Decision No. 13 should be denied, and CPKC's request in its response for sanctions for alleged noncompliance with Decision No. 13 should also be denied.

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 in this proceeding, the Secretary of Transportation, the Attorney General of the United States, and Administrative Law Judge Jenifer Soulikias.

/s/ Stephen S. Laudone

Stephen S. Laudone