

**REDACTED PUBLIC VERSION**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Finance Docket No. 36873**

**UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY  
– CONTROL –  
NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN  
RAILWAY COMPANY**

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**CPKC'S COMMENTS ON THE COMPLETENESS OF THE AMENDED APPLICATION**

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### CPKC'S COMMENTS ON THE COMPLETENESS OF THE AMENDED APPLICATION

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"),<sup>1</sup> submits these comments on the completeness of Applicants' Amended Application. The Application remains incomplete because, despite the Board's explicit instructions, Applicants elected not to include in their market-impact analyses the projected share information and analysis thereof required by 49 C.F.R. § 1180.7(b) and Decision No. 9. That failure is striking because the Board called out that very deficiency when rejecting Applicants' original submission, explaining that "[t]he point of requiring robust and detailed market-impact analyses . . . is to ensure that any debate over those analyses, and indeed the competitive impact of the transaction, is fully informed and supported by applicants *at the beginning of the proceeding.*" Decision No. 9 at 6 (served Jan. 16, 2026) (emphasis added). The Application is also deficient because Applicants failed to provide access to their complete set of workpapers as required by the Board's Decision No. 3 and reiterated by Decision Nos. 8 and 9, failed to include an application for control of the Kansas City Terminal Railway, and failed to comply fully with the Board's Decision No. 13.

Because the Amended Application is incomplete, the Board should reject it. If the Board determines that the shortcomings in the Application do not rise to the level of incompleteness, or that Applicants might be able to cure the shortcoming without needing to file an entirely new

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<sup>1</sup> 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. CPKC refers to "Union Pacific" as UP herein. Unless otherwise indicated, other capitalized terms used herein follow Applicants' abbreviations. *See* Am. App. at 1-9 to -11 (Table of Abbreviations).

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application, the Board should consider the implications of these issues, along with other developments in this proceeding, for the procedural schedule that would govern this proceeding.

**I. THE AMENDED APPLICATION IS INCOMPLETE BECAUSE IT FAILS TO COMPLY WITH DECISION NO. 9**

The Major Merger Rules require Applicants to submit “full system impact analyses” that “demonstrate the impacts of the transaction—both adverse and beneficial—on competition within regions of the United States and this nation as a whole (including inter- and intramodal competition, product competition, and geographic competition).” 49 C.F.R. § 1180.7(b). In Decision No. 9, the Board found that the initial Application was “incomplete because the full-system impact analyses do not contain Applicants’ ‘projected market shares’ as required by 49 C.F.R. § 1180.7(b).” Decision No. 9 at 5.<sup>2</sup> The Board explained that “detailed market-share projections are necessary under the current major merger regulations because ‘[a]ny railroad combination,’ including an end-to-end combination, ‘entails a risk that the merged carrier would acquire and exploit increased market power.’” *Id.* at 4 (quoting 49 C.F.R. § 1180.1(c)(2)(i)).

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<sup>2</sup> The pertinent requirements for Applicants’ full-system market-impact analysis are:

- (2) Actual *and projected* market shares of originated and terminated traffic by railroad for each major point on the combined system. . . . ;
- (3) Actual *and projected* market shares of revenues and traffic volumes for major interregional or corridor flows by major commodity group. Origin/destination areas should be defined at relevant levels of aggregation for the commodity group in question. The data should be broken down by mode and (for the railroad portion) by single-line and interline routings (showing gateways used);
- (4) For each major commodity group, an analysis of traffic flows indicating patterns of geographic competition or product competition across different railroad systems, showing actual *and projected* revenues and traffic volumes.

49 C.F.R. § 1180.7(b) (emphasis added).

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Applicants' Amended Application still does not comply with this obligation. Applicants explain that they addressed the Board's requirement in Decision No. 9 to include projected market shares in their impact analysis by "present[ing] these post-merger market share projections in the Verified Statement of David Hunt." *See* Am. App. at 1-54 & n.65. In fact, as Appendix E of Mr. Hunt's Amended Verified Statement explains, the data to which Applicants refer are contained not in Mr. Hunt's statement but in three Highly Confidential files buried in his workpapers: (1) "Appendix D1, D2\_80pct\_vFinal.xlsx;" (2) "Appendix E1, E2, E3, E4\_80pct\_vFinal.xlsx;" and (3) "Appendix F1, F2, F3, F4\_80pct\_vFinal.xlsx."<sup>3</sup> *Id.* at 2-592 (Hunt V.S.). Those data include so-called "projected" volumes and revenues for a subset of Applicants' pre-merger traffic (representing 80% of pre-transaction 2023 traffic but not necessarily 80% of anticipated diversions) for between 3,752 and 14,669 rows of specific BEA-to-BEA and STCC4 pairings (in some cases on a rail route-specific basis). But those files do not fulfill Applicants' obligation under the rules or Decision No. 9, for three reasons.

First, the volume and revenue figures that Mr. Hunt provides in his workpapers do not report "market shares" as required by 49 C.F.R. § 1180.7(b) and Decision No. 9. Specifically, Mr. Hunt's workpapers report certain data about *projected tons and revenues* but (a) do not report *shares* by railroad post-merger for the BEA-to-BEA/STCC4 pairings, (b) do not provide the raw data necessary to calculate those shares absent major assumptions, and (c) do not present any meaningful or sensible aggregations of BEA-to-BEA/STCC4 into "major interregional or corridor flows" or "major commodity group[ings]," as required under 49 C.F.R. § 1180.7(b)(3)-(4).

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<sup>3</sup> CPKC provides a summary of the content of the ten "appendices" contained in those workpapers, including information omitted from them, in Appendix A hereto.

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Second, even if Mr. Hunt had reported *percentage shares*, they would not provide the Board (or public, had they not been designated as Highly Confidential), with information that is reliably tethered to the real world. As Mr. Hunt explains, his predictions are driven by modeling of pre- and post-merger outcomes that *are not affected* by the countless real-world factors that led to the actual pre-merger outcomes, but which Mr. Hunt dismisses as “confounding factors.” Am. App. at 2-396 to -98 (Hunt V.S.). Mr. Hunt’s development and reporting of the projected volume and revenue figures in his workpapers was extraordinarily opaque, perhaps deliberately so, but one thing is clear: the only thing Mr. Hunt is qualified to report is what his model tells him to report. Yet only Mr. Hunt provides any evidence purporting to reflect post-merger volumes and revenues from which market shares might be calculated. The Applicants’ “railroad marketing personnel,” who might have been qualified to speak to what UP’s shares really will be post-merger, are silent on that topic.

Third, to make matters worse, Applicants’ putative market-impact witness, Dr. Elizabeth Bailey, expressly *declined to analyze* the projected data in Mr. Hunt’s workpapers. Rather, her Amended Verified Statement declares that those shares are irrelevant to her analysis. *See* Am. App. at 2-46 (Bailey V.S.).

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**A. Applicants Did Not Present the Projected Market Shares Required by the Board's Rules**

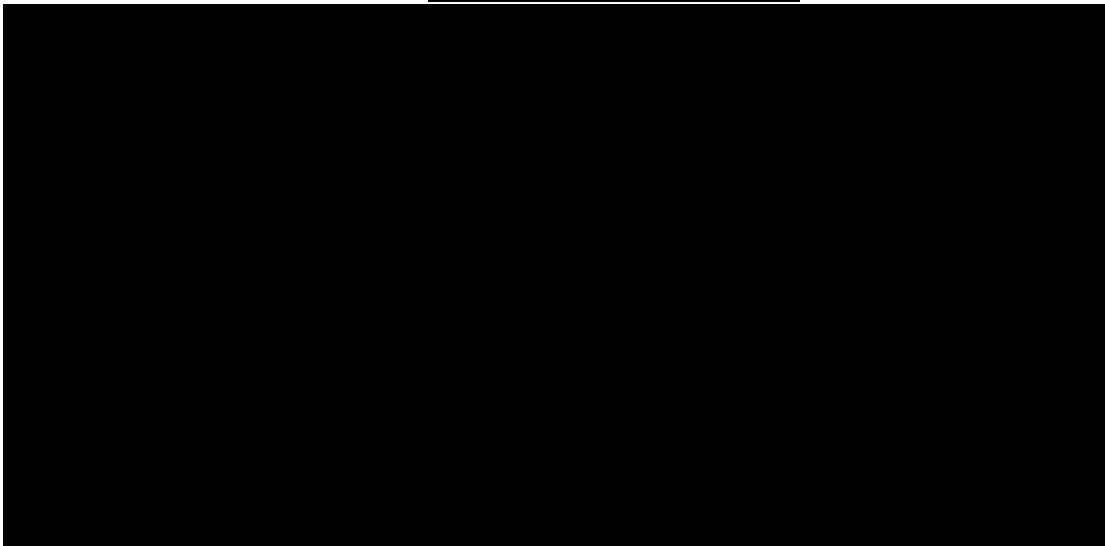
**1. Mr. Hunt's Workpapers Do Not Report Shares or Provide Sufficient Data for Interested Parties to Anticipate Applicants' Claimed Shares**

Mr. Hunt's workpapers do not provide the "projected shares" required by the Board and the Major Merger Rules. As shown in Appendix A, most of Mr. Hunt's tables do not report share information by railroad, and many report no share information at all.<sup>4</sup>

Table 1 below summarizes the missing share calculations.

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<sup>4</sup> Mr. Hunt's tables also contain glaring errors that render them unreliable. For example, his Table E2 reports zero pre-merger rail movements for STCC {{[REDACTED]}}, as reflected in the illustrative snapshot below. It is implausible that there are no pre-merger rail movements of major commodities like {{[REDACTED]}} by any U.S. railroad.



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**TABLE 1**

<b>HUNT “APPENDIX”</b>	<b>OMITTED PROJECTED SHARES</b>
D1	No projected shares for railroads other than UP+NS; projected UP+NS shares only for originations of all rail traffic at 33 BEAs
D2	No projected shares for railroads other than UP+NS; projected UP+NS shares only for terminations of all rail traffic at 33 BEAs
E1	No projected shares for any railroads, including UP+NS
E2	No projected shares for any railroads, including UP+NS
E3	No projected shares for any railroads, including UP+NS
E4	No projected shares for any railroads, including UP+NS
F1	No projected shares for any railroads, including UP+NS
F2	No projected shares for any railroads, including UP+NS
F3	No projected shares for any railroads, including UP+NS
F4	No projected shares for any railroads, including UP+NS

This plainly falls short of Applicants’ obligations and renders their Amended Application materially incomplete. Applicants consciously chose not to present the “projected shares” that the Board expressly required. And even if it were a straightforward matter to use the data Mr. Hunt provides to calculate the shares that Mr. Hunt omitted (which it is not), parties would still have no way of knowing *Applicants’ position* regarding their post-merger shares at the outset of this proceeding. That is precisely why the Board rejected their prior Application as incomplete in Decision No. 9 and ordered them to perform that analysis. Decision No. 9 at 6.

**2. Mr. Hunt’s Workpapers Do Not Reflect a Meaningful Aggregation of Data into Major Interregional or Corridor Flows or Major Commodity Groupings**

Even if Applicants had reported actual projected “share” data in the thousands of rows set forth in Mr. Hunt’s various appendices, Applicants still would not have complied with 49 C.F.R.

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§ 1180.7(b) and Decision No. 9, which require Applicants to do more than simply produce spreadsheets listing thousands of specific BEA-to-BEA/STCC4 pairings. The Board’s Major Merger Rules plainly contemplate that Applicants would make at least some attempt to address flows across more aggregated commodity or geographic groupings. Specifically, they demand that applicants proposing a major merger submit “full system impact analyses” that provide “[a]ctual and projected market shares of revenues and traffic volumes for major interregional or corridor flows” and “major commodity group[s].” 49 C.F.R. § 1180.7(b)(2), (3). The thousands of rows of very specific BEA-to-BEA data reported by Mr. Hunt reflect raw data that might—if they provided meaningful projections of real-world post-merger shares—help inform market share calculations. But they are no substitute for a meaningfully aggregated assessment by Applicants of UP’s post-merger share of traffic and revenues in key traffic flows and geographic regions. Applicants are more than capable of aggregating traffic flows when it suits them, as shown by their frequent invocation of the alleged benefits their merger would bring to the “Watershed” region of the country. Their failure to do so here should not be deemed a satisfactory response to Decision No. 9 or compliance with 49 C.F.R. § 1180.7(b).

**B. The Data in Mr. Hunt’s Workpapers Do Not Reflect Any Reliable “Projections” of Real-World Traffic Volumes or Revenues**

Even if Mr. Hunt had reported *percentage shares*, they would not be reliably tethered to the real world. Mr. Hunt’s rail-to-rail diversion predictions are driven by his modeling of pre- and post-merger outcomes that is *not affected* by the countless real-world factors that led to the actual pre-merger outcomes. Mr. Hunt is up-front in saying that he dismissed these considerations as “confounding factors.” Am. App. at 2-396 to -98 (Hunt V.S.).

This feature of Mr. Hunt’s diversion analysis fundamentally shaped the projected volume and revenue figures reported in Mr. Hunt’s workpapers in ways that make them inherently

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unreliable. CPKC's analysis of Mr. Hunt's new methodologies is ongoing, and CPKC anticipates addressing these issues on the merits if and when the Amended Application is accepted. For now, the question is whether Applicants have satisfied their obligation to present meaningful projections of post-merger shares by instructing Mr. Hunt to report modeled figures that are in many cases obviously at odds with reality, and, in all cases, an unreliable basis for guessing at what the post-merger world portends. For example, Mr. Hunt acknowledges that he had to revise his model to address concerns raised by CN, including by "capp[ing]" diversions so that projected "UP-NS traffic does not exceed observed total market traffic on particular lane." Am. App. at 2-399 (Hunt V.S.). What this is saying is that Mr. Hunt's model *often predicts* a magnitude of diversions that, when added to UP's actual pre-merger traffic, would give it a market share in excess of 100%. And Mr. Hunt "solved" this problem by forcing his model to predict lesser diversions. From CPKC's perspective, the problem is not solved but revealed: his model does a terrible job of predicting anything upon which the Board and the public can rely.

Given Mr. Hunt's acknowledgement that "thousands of railroad marketing personnel" have knowledge of the myriad "unmeasured market conditions" bearing on how rail transportation decisions are made in the real world that Mr. Hunt lacks (Am. App. at 2-397), it is strange that Applicants chose to have Mr. Hunt, and Mr. Hunt alone, address the question of Applicants' post-merger market shares. Their failure to put forward any such evidence reliably tethered to the real world strikes CPKC as not fully compliant with the Board's instructions in Decision No. 9, which was to "project the market-share increases *that Applicants are plainly expecting.*" Decision No. 9 at 6 (emphasis added).

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**C. Applicants Did Not Provide the *Analysis* of Projected Shares That the Board Required in Decision No. 9**

The Major Merger Rules and Decision No. 9 demand more than just presenting raw data on shares, much less on tonnage and revenues. Rather, the Board determined that the initial application was incomplete because Dr. Bailey’s “*analyses* d[id] not reflect the consolidated company’s marketing plan.” Decision No. 9 at 6 (emphasis added and citation omitted). Mr. Hunt, who reported the projected data, offers no “market impact” analysis of his data. Nor does Dr. Bailey (or any other Applicant witness). Instead, Dr. Bailey doubles down on her prior approach. Her Electronic Appendices D, E, and F purport to report something called “projected” UP and NS revenues and traffic volumes but merely shift actual revenue and volume levels in 2023 from the “interline” column to the single-line column. Bailey V.S. App’x Tables D1-D2, E1-E4, and F1-F4. Dr. Bailey does not present or analyze *any projections* relating to merger impacts, which is precisely what the Board found to be deficient in Decision No. 9. *See* Decision No. 9 at 5. Indeed, Dr. Bailey not only refused to analyze Mr. Hunt’s “projections,” she apparently did not even look at them, as reflected in her statement that she merely “underst[oo]d that additional tables in the Hunt VS supplement [her own] market shares by incorporating the projected impact of rail-to-rail and truck-to-rail diversions.” Am. App. at 2-90 (Bailey V.S.); *see id.* at 2-46 (“[I]t would not be appropriate as a matter of economic analysis to consider the diverted traffic and any associated increases in the post-merger firm’s market shares, even those that come at the expense of the parties’ competitors. ...”). That is not the analysis required by the Major Merger Rules and Decision No. 9. *See* 49 C.F.R. § 1180.7(b); Decision No. 9 at 6.

\* \* \*

Applicants will no doubt quarrel that they do not think the projected shares required by the Board are economically meaningful, in line with what Dr. Bailey contends, and that

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interested parties are free to use the data Applicants have provided to make whatever arguments they wish in this proceeding. But that was already true with respect to Applicants' initial incomplete Application. Interested parties could have tried to comb through the data to show how huge UP's post-merger market shares would be—only to have Applicants critique those market share estimates at the reply stage. But the point of the Board's Decision No. 9 was to put the burden of presenting those analyses in the first instance on Applicants, so that “any debate over those analyses, and indeed the competitive impact of the transaction, is fully informed and supported by applicants *at the beginning of the proceeding.*” Decision No. 9 at 6 (emphasis added). Because Applicants have chosen not to shoulder that burden, the Amended Application remains incomplete.

It is unclear what Applicants are trying to hide by declining to report and analyze projected market shares as required by the Major Merger Rules and Decision No. 9. But taking the raw data reported by Mr. Hunt at face value and calculating shares based on certain common sense aggregations shows that the shares Applicants declined to report expose that UP and NS already have significant dominance over meaningful traffic flows, which the proposed merger will only strengthen. For example:<sup>5</sup>

**Chemicals or Allied Products (STCC 28, including plastics) between the Gulf Coast and Northeast/Mid Atlantic.** For Chemicals from the Gulf Coast to the Northeast/Mid-Atlantic, Mr. Hunt's tables provide data indicating total 2023 rail revenues of {{ [REDACTED] }}. Based on revenue data he reports, in 2023 UP had a {{ [REDACTED] }} share at the origination end of this flow and NS has a {{ [REDACTED] }} share at the termination end. Together, UP and NS participated in

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<sup>5</sup> Appendix B hereto explains how the shares described below were calculated using Mr. Hunt's data and what assumptions had to be made to derive these figures.

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{{[REDACTED]}} of actual 2023 traffic, which Mr. Hunt’s “projections” suggest would increase to {{[REDACTED]}} following the proposed merger.

**Motor Vehicles (STCC 3711) from Detroit to the West.** For motor vehicles from Detroit to the West, Mr. Hunt’s tables provide data indicating total 2023 rail revenue of {{[REDACTED]}}. Based on revenue data he reports, NS had a {{[REDACTED]}} share at the origination end of this flow in 2023 and UP had a {{[REDACTED]}} share at the termination end. Together, UP and NS participated in {{[REDACTED]}} of actual 2023 traffic, which Mr. Hunt’s “projections” suggest would increase to {{[REDACTED]}} following the proposed merger.

**Primary Metal Products (STCC 33) from the Rust Belt.** For primary metal products from the Rust Belt, Mr. Hunt’s tables provide data indicating total 2023 rail revenue of {{[REDACTED]}}. Based on revenue data he reports, in 2023 NS had a {{[REDACTED]}} share at the origination end of these flows, NS had a {{[REDACTED]}} share at the termination end, and UP had a {{[REDACTED]}} share at the termination end. Together, UP and NS participated in {{[REDACTED]}} of actual 2023 traffic, which Mr. Hunt “projects” would remain at {{[REDACTED]}} following the proposed merger.

We include these examples as illustrative of the serious market power concerns posed by the proposed UP-NS merger, which the Amended Application fails to disclose. Applicants may dispute CPKC’s calculation of these shares, which reflect substantial work and assumptions based on the incomplete data and analyses provided by Applicants. To the extent Applicants do dispute them, however, it would only serve to underscore why it was incumbent upon Applicants to provide their own view of projected market shares “*at the beginning of the proceeding.*” Decision No. 9 at 6 (emphasis added).

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### II. THE AMENDED APPLICATION COULD BE REGARDED AS INCOMPLETE FOR AT LEAST THREE ADDITIONAL REASONS

#### A. The Amended Application Fails to Provide Complete Workpapers as Required by Board Orders in this Proceeding

Despite Applicants' belated provision on May 3 of encryption keys for numerous critical files among Applicants' workpapers, *see* Decision No. 19 at 1 (served May 5, 2026), CPKC has identified numerous other gaps in Applicants' workpapers that have prevented CPKC from fully assessing the completeness of the Application (or beginning the task of analyzing and/or responding to key aspects of it from a public interest perspective). CPKC and BNSF have communicated with Applicants about those gaps. Applicants have responded to BNSF by acknowledging the need to provide a significant number of missing workpapers, but they have not yet responded to CPKC. *See* BNSF's May 5, 2025 Email to Applicants; Applicants' May 7, 2025 Email to BNSF; CPKC's May 7, 2026 Letter to Applicants (collected in Appendix C hereto). CPKC specifically reserves the right to call attention to additional issues of incompleteness at such time as the workpaper gaps are corrected.

The Board has repeatedly reiterated that access to these workpapers is of vital importance to interested parties' ability to review the claims of the application. The Board ordered for "all evidentiary submissions filed" concerning Applicants' proposed merger, "[a]ll files and data should be fully accessible and modifiable by anyone authorized to view the evidence of the case." Decision No. 3 at 4, 7 (served Aug. 28, 2025) (emphasis added). The Board directed that "all documents *and evidence* referenced in a filing must be specifically cited and *included in the electronic workpapers.*" *Id.* at 6 (emphasis added). And the Board was forced to reiterate this point following the initial Application, when it had to order Applicants to file an explanation of the replacement workpaper files submitted after the initial Application. *See* Decision No. 8 (served Jan. 2, 2026); *see also* Decision 9 at 15. Despite these warnings, these issues have

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persisted with the submission of the Amended Application and have greatly hindered CPKC and other parties' ability to understand the analyses presented in the Amended Application.

### **B. The Amended Application Fails to Include an Application to Control the Kansas City Terminal Railway**

Applicants have significantly expanded their treatment of the Kansas City Terminal Railway ("KCT"), perhaps because of concern that UP will be seen as acquiring control of that carrier, but Applicants are not seeking control authority. *See* Am. App. at 1-81 to -86. CPKC disagrees with Applicants' analysis. Today, KCT is jointly owned by UP, NS, CPKC, and BNSF, with no carrier holding more than 41.67% of shares or more than five of 12 carrier representatives on the board. *See id.* at 1-165. Applicants acknowledge that UP's acquisition of NS's interest would give post-merger UP 50% ownership of KCT and representatives constituting half of the KCT board. CPKC believes that Applicants are wrong about whether this outcome would lead to UP's de facto control of KCT. The Board's precedents make clear that ownership of 50% or less can entail control when there is not another equal 50% owner, and that the power to veto proposed initiatives of the other owners, which UP's 50% position would provide, constitutes "negative" control even if it does not mean that the controlling entity can dictate every aspect of the organization's day-to-day operations.<sup>6</sup> *See, e.g., Norfolk & Western Ry. & New York, Chicago & St. Louis R.R. Merger, Etc.*, 324 I.C.C. 1, 32-33 (1964) ("*N&W/Nickel Plate*") (30% owner with veto power "had at least a power to control"); *Greyhound Corp – Control – Texas New Mexico & Oklahoma Coaches, Inc.*, 101 M.C.C. 655, 666-67 (1967) (citing *N&W/Nickel Plate*) (power to control does not depend on ownership of a

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<sup>6</sup> It is perhaps telling that the arrangement Applicants claim to be working out with TRRA involves UP owning *less than 50%* of that carrier, and having *less than 50%* of that carrier's voting directors. Am. App. at 1-402 to -403 (Novak V.S.).

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majority of carrier's stock); *Transcontinental Bus Sys., Inc. v. Greyhound Corp.*, 104 M.C.C. 524, 526, 554 (1968) (control by 45% owner can arise from ability to influence carrier actions through "negative or restrictive control"). CPKC leaves to the Board's assessment whether UP's failure to seek control authority now makes the Amended Application incomplete. CPKC notes, however, that UP would be proceeding at its peril if it declines to seek control authority, as CPKC intends to raise this issue, and the adverse public-interest consequences of UP control, in its Comment if the Board were to accept the Amended Application as complete.

**C. The Amended Application is Incomplete Because Applicants Failed to Comply With Decision No. 13**

The Application is also incomplete because Applicants have not provided the full universe of "HSR" information required by the Board in Decision No. 13 (served Mar. 18, 2026). Pursuant to 49 U.S.C. § 1321(b)(3) and 49 C.F.R. § 1180.4(c)(2)(v), which governs the content of applications, the Board has the authority to direct Applicants to "submit such additional information to support [their] application as the Board may require." 49 C.F.R. § 1180.4(c)(2)(v); *see* 49 U.S.C. § 1321(b)(3) (conferring this authority). In Decision No. 13, the Board invoked its statutory authority to require Applicants to provide prior to filing the Amended Application certain categories ordinary-course documents that the Board declared necessary to "determining 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." Decision No. 13 at 5. Yet, as detailed in BNSF's Motion to Enforce (BNSF-22) and CPKC's submission in support thereof (CPKC-17), Applicants failed to produce the information required by Decision No. 13. While UP and NS maintain that their productions are complete, those contentions are disproven by UP's federal securities filings that list numerous merger-related events, including board-level discussion of the "potential benefits and drawbacks of creating a transcontinental railroad," as to

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which no documents were produced. *See* CPKC-17, at 2-3.<sup>7</sup> Because Applicants have not produced the “additional information” the Board ordered them to produce, the Amended Application as incomplete. *See* 49 U.S.C. § 1321(b)(3); 49 C.F.R. § 1180.4(c)(2)(v), (c)(7).

**III. THE BOARD SHOULD REJECT THE AMENDED APPLICATION AS INCOMPLETE OR, AT MINIMUM, ESTABLISH A SCHEDULE THAT WILL PERMIT A FULL AND FAIR EVALUATION OF THE EVIDENCE BEARING ON THIS PROPOSED MERGER**

Because Applicants failed to provide or analyze the market share projections as required by the Board’s rules and Decision No. 9, the Amended Application is incomplete, and the required remedy is rejection. *See* Decision No. 9 at 2 (citing 49 U.S.C. § 11325(a) and 49 C.F.R. § 1180.4(c)(7)(ii)). Rejection is particularly appropriate given that the Board expressly instructed Applicants regarding these deficiencies in Decision No. 9.

Even if the Board were to determine that the shortcomings in the Application do not necessitate rejection or that Applicants might be able to cure them without needing to file an entirely new application, the Board should consider the implications of the issues raised herein, along with other developments in this proceeding, for the procedural schedule that would govern this proceeding if and when the application is deemed complete.<sup>8</sup> At minimum, the Board

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<sup>7</sup> For example, NS claims that its failure to produce a single document from its board meetings on January 28, March 24, April 22, or May 8, 2025 is excusable because the related materials did not “discuss the proposed transaction,” (NS-47 at 14), but that claim is facially implausible. In UP’s S-4, Applicants represented that these meetings discussed “the potential benefits and drawbacks of creating a transcontinental railroad” (January 28, 2025), “a potential transaction to form a transcontinental railroad” (March 24, 2025), “the possibility of a merger between Norfolk Southern and Union Pacific” (April 22, 2025), and “the potential benefits and risks of a merger with Union Pacific” (May 8, 2025).

<sup>8</sup> As further detailed in CPKC’s April 28, 2026 submission respecting Applicants’ failure to comply with Decision No. 13 (CPKC-17), the Board also should consider using other available tools to ensure the integrity of its proceedings. One option would be to draw the inference from Applicants’ refusal to provide post-merger market shares that those shares are high and demonstrate a less competitive post-merger environment. *See, e.g., FTC v. H.J. Heinz Co.*, 246 F.2d 708, 715-17 (D.C. Cir. 2001) (explaining that high market shares establish a prima facie case of illegality and discussing the competitive effects of duopoly). It would thus be appropriate for the Board to establish an evidentiary presumption of competitive harm that Applicants could seek to rebut through the introduction of

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should not *commence* a procedural schedule until Applicants supplement their Amended Application to provide the missing content regarding projected market shares. The shortcomings in the Amended Application, along with other developments since the initial Application was rejected as incomplete, also underscore the vital importance of three modifications to the Board's Proposed Schedule that CPKC proposed last November: (1) a schedule that takes advantage of the full extent of the statutory time period for evidentiary proceedings, *see* CPKC-5 at 6-15, (2) the need for expedited discovery procedures to facilitate the completion of long-delayed discovery, for which there would be inadequate time were Applicants permitted to maintain the obstructionist pattern that has characterized their behavior for the past four months, *see id.* at 27-29, and (3) the appropriateness of inserting into the schedule an opportunity for interested parties to file sur-reply comments responding to new arguments and evidence advanced by Applicants for the first time in their replies to Comments, *see id.* at 15-21.

***Discovery Failures.*** Experience with discovery in this proceeding since the first discovery requests were served on Applicants last December bears out the need for (a) a schedule that makes full use of the statutory time period for evidentiary proceedings and (b) expedited discovery processes that allow for meaningful discovery—including document production and depositions—in support of comments on the public interest issues raised by the Amended Application. The Board should take account of the woeful (and willful) lack of

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compelling evidence to the contrary. *See id.* at 720 (discussing the “proof of extraordinary efficiencies” needed to rebut the presumption of competitive harm that duopoly causes). CPKC provided citations supporting the establishment of evidentiary presumptions in its prior submission (CPKC-17) discussing Applicants’ failure to comply with the Board’s instruction to provide ordinary-course documents. *See generally 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”).

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progress Applicants have made in responding to discovery requests since last December, not to mention the shortcomings in Applicants' response to Decision No. 13.

Applicants have yet to produce a single ordinary-course document in response to the requests CPKC served in early December, four-and-a-half months ago (other than records produced in response to Board orders issued in Decision No. 13). At every opportunity, Applicants have taken the maximum time allowed by the Board's regulations to serve objections, to respond to motions, and to drag out the process through slow responses to meet and confer correspondence.

As other submissions before the Board have explained,<sup>9</sup> Applicants have chosen not to provide meaningful discovery despite the passage of more than nine months since they signed their merger agreement. Table 2 below summarizes the categories of documents Applicants have produced in discovery in the five months since discovery requests were served upon them (and inclusive of their (inadequate) April 7 "HSR" production in response to Decision No. 13). These materials are almost entirely devoid of the types of ordinary-course records that would allow parties and, in turn, the Board to meaningfully evaluate the claims Applicants advance in their Amended Application.

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<sup>9</sup> See, e.g., CPKC-17 at 1-2; BNSF-22 at 5-12; BNSF-18 at 9-10; BNSF-12 at 3; CPKC-14 at 1-2. Applicants' foot-dragging discovery performance to date certainly provides no basis for *shortening* the schedule, particularly given the extensive revisions Applicants made to their traffic diversion analyses, operating plan, operating expense calculations, and competitive analyses, with nearly 100% of Applicants' workpapers being entirely new. And despite Applicants' renewed claims that discovery is "now underway," NS-47 at 1-2, they have had over six months to meaningfully engage in the discovery process and have done nothing.

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**TABLE 2**

CATEGORY OF DOCUMENTS	APPROX. NUMBER PRODUCED
Miscellaneous contracts and agreements (mostly joint facility agreements)	2,611
Operational summary documents ( <i>e.g.</i> , timetables, traffic density maps, and tonnage charts)	141
Ordinary-course documents concerning the proposed transaction produced only in response to Board Decision No. 13	74
Data files ( <i>e.g.</i> , switching data, car event data, haulage data and other miscellaneous operational datasets) (not including workpapers)	62
Form letters ( <i>e.g.</i> , form support letters drafted by Applicants that third parties can sign and send to the Board expressing support for the proposed transaction)	61
HR policies, public advocacy papers prepared by Applicants, and other miscellaneous materials of minimal relevance ( <i>e.g.</i> , a 70-year-old newspaper article, old ICC filings and decisions)	39
Other NS board of directors documents relating to the transaction, eight of which were also produced in response to Board Decision No. 13	12
<b>TOTAL</b>	<b>3,000</b>

Apart from the (incomplete) production by Applicants of HSR materials in response to Decision No. 13, the only ordinary-course documents produced by Applicants in response to discovery requests issued by parties to this proceeding have been four board-level documents relating to NS’s consideration of the transaction, two of which were heavily redacted. NS’s defense of its compliance with Decision No. 13, filed earlier today, appears to concede the existence of numerous categories of highly relevant ordinary-course documents that NS asserts (dubiously) it was not obligated to provide under the literal terms of that decision, but that it also has *not even begun to produce* in response to requests served more than six months ago, including (among other things) (1) “Ordinary course documents, including strategic plans or corporate overviews . . . even if they contain an evaluation or analysis of ‘market shares,

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competition, competitors, markets, potential for sales growth or expansion into product or geographic markets,” (2) “Ordinary course documents or integration materials created after the decision to enter into a transaction has been made,” and (3) “Emails discussing ‘input into the final version of a substantive synergies Document.’” NS-47 at 10 (citations omitted).

As the Board recognized in Decision No. 13, “ordinary course documents are likely to provide valuable insight into the proposed transaction’s effects because they reflect[] real-time business decisions and forecasts concerning the merging parties’ operations, and views of past, present, and future market conditions,” and are thus “of critical importance in evaluating a merger, and may be more probative than party advocacy, expert analysis, and self-serving statements provided to support a merger application.” Decision No. 13 at 5-6 (citations and quotation marks omitted). But Applicants have stonewalled for the nine months since they signed their merger agreement. Applicants have produced no ordinary-course documents addressing their pricing strategies, growth strategies, or marketing strategies prepared out of the merger context. Tellingly, the handful of documents actually discussing the proposed transaction were only produced because of the explicit direction to do so in Decision No. 13.

Applicants’ lack of progress in producing ordinary-course documents impedes the ability to assess whether the claims in the Amended Application have any real-world connection to the way Applicants actually conduct themselves in the marketplace. And obtaining full discovery from Applicants is also a crucial predicate to taking depositions of Applicants’ witnesses. But Applicants’ course of conduct demonstrates that meaningful discovery will likely require litigation before Judge Soulikias. The Board’s schedule and discovery processes should accommodate that reality, taking into account the incompleteness of the Amended Application.

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The procedural schedule should permit sufficient time for the parties to obtain ordinary-course records from Applicants, depose Applicants' witnesses using those records, and thoughtfully incorporate those records into comments on the merits of the Amended Application. If there were ever a merger that called for the Board to maximize the evidentiary period provided by Congress to allow parties and Board to fully probe a proposed merger, it is this one—the first ever to be decided under the 2001 Major Merger Rules and the one that may ultimately result in an industry-altering duopoly. *See* 49 U.S.C. § 11325(b)(3); *see also Major Rail Consolidation Procedures*, 5 S.T.B. 539, 549, 581-82 (2001) (recognizing that “another merger involving two very large railroads would not likely be an isolated event, but instead would trigger responsive proposals that, if granted, could well lead to a transcontinental railroad duopoly”).

***Applicants' Failure to Engage Up-Front on Key Issues.*** The Board also should take account of Applicants' conscious choice not to augment their Application's treatment of a host of key issues that will be central to this proceeding. On many of the key public interest questions raised by the proposed transaction, Applicants have presented at best a barebones treatment, no doubt expecting that they will have the opportunity to supplement the record in their rebuttal, when other parties would ordinarily have no opportunity to respond. That approach underscores the importance of providing commenters an opportunity to submit sur-replies to respond to arguments and evidence put forward by Applicants for the first time in their responses to parties' Comments. *See* CPKC-5 at 15-21. For example:

- As explained above, Applicants have chosen not to address the extraordinarily high shares of rail traffic in which UP and NS already participate. They further decline to assess the competitive implication of the increases in those shares that they predict will result from their proposed transaction. It appears that Applicants

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intend to address these issues, if at all, for the first time in their reply submission to which other parties would generally have no opportunity to respond.

- Applicants similarly have not seriously engaged on the implications of downstream consolidation leading to a transcontinental duopoly or two-railroad North America. *See* CPKC-7 at 14-17. Applicants' only addition to their initial Application was a reference to BNSF's statements about its lack of interest in consolidation at this time. Am. App. at 1-95 to -97. Yet we now know that Applicants {{ [REDACTED] [REDACTED] }}, as shown by a handful of documents that showed up in their HSR productions. *See* {{ [REDACTED] [REDACTED] }}<sup>10</sup> It appears that Applicants intend to provide their only serious treatment of this issue that was central to the Board's 2001 Major Merger Rules in their reply submission, to which other parties would generally have no opportunity to respond.

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<sup>10</sup> One UP document revealed how {{ [REDACTED] [REDACTED] }}  
[REDACTED]

[[ [REDACTED] ]]

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- Applicants continue to provide only a barebones set of assertions about which of the specific benefits they claim for their proposed transaction cannot be achieved by means short of merger, and if not, why not. Applicants have addressed this issue only at a very high level. At times they suggest that 100% of all claimed benefits can be accomplished *only* via merger. *See* Am. App. at 2-228 (Israel V.S.) (“Bringing the two railroads under common ownership and control is the only solution that corrects the railroads’ suboptimal incentives. Thus, there is no question that the merger’s benefits are, in fact, the result of the merger itself. They cannot be obtained by other means.”). Elsewhere they take a less strident position, but without delineating what requires a merger and what does not. *See id.* at 2-44 (Bailey V.S.) (“These investments are unlikely to occur *in full* without the proposed merger.”) (emphasis added). Applicants no doubt anticipate presenting in their reply—to which other parties generally cannot respond—whatever evidence they might muster about why, for example, UP could not work with NS to operate more run-through trains or run-through blocks or to take other initiatives without needing to merge. Applicants adopt that stratagem despite the Board’s statement in adopting the 2001 Major Merger Rules that the Board would “need a full awareness of *which of the claimed benefits* are obtainable only through a merger so that we can fairly weigh them against potential harm” and its resulting decision to “require applicants to address the question of whether the *particular merger benefits* upon which they are relying could be achieved by means short of merger.” *Major Rail Consolidation Procedures*, 5 S.T.B. at 559 (emphasis added).

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Given Applicants' approach and the importance of issues such as these to the Board's public-interest assessment of this unprecedented merger, the Board should preclude potential strategic sandbagging by Applicants by including in the procedural schedule an opportunity for non-Applicants to file sur-replies, as CPKC proposed in its previous comments on the Board's Proposed Procedural Schedule (CPKC-5).

### **CONCLUSION**

For the foregoing reasons, the Amended Application is incomplete. CPKC requests that the Board reject it and order appropriate relief to ensure that the procedural schedule in this proceeding takes account of Applicants' failure and ensures the public's ability to meaningfully participate in these proceedings.

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Respectfully submitted,



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*Attorneys for CPKC*

Dated: May 8, 2026

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 8th day of May, 2026, I caused a copy of the foregoing CPKC's Comments on the Completeness of the Amended Application 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

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**BEFORE THE  
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**Finance Docket No. 36873**

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NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN  
RAILWAY COMPANY**

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**APPENDIX A**

**DESCRIPTION OF INFORMATION  
PROVIDED IN AND OMITTED BY THE HUNT  
“MARKET SHARE APPENDIX” WORKPAPERS\***

<b>HUNT APPENDIX TABLE</b>	<b>LEVEL OF AGGREGATION</b>	<b>INFORMATION REPORTED</b>	<b>INFORMATION NOT REPORTED</b>
D1	33 Origin BEAs	<ul style="list-style-type: none"><li>• Actual total of rail carloads originated within a BEA</li><li>• Originated actual shares of all carloads within a BEA for individual railroads</li><li>• Originated projected shares of all carloads within a BEA for UP+NS</li></ul>	<ul style="list-style-type: none"><li>• No projected total of rail carloads within a BEA</li><li>• No projected carloads for UP+NS that align with the Operating Plan</li><li>• No projected shares of carloads for other railroads</li></ul>
D2	33 Destination BEAs	<ul style="list-style-type: none"><li>• Actual total of rail carloads terminated within a BEA</li><li>• Terminated actual shares of all carloads within a BEA for individual railroads</li><li>• Terminated projected shares of all carloads within a BEA for UP+NS</li></ul>	<ul style="list-style-type: none"><li>• No projected total of rail carloads within a BEA</li><li>• No projected carloads for UP+NS that align with the Operating Plan</li><li>• No projected shares of carloads for other railroads</li></ul>

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\* All of Mr. Hunt’s “market share” workpapers cover only 80% of Applicants’ traffic.

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<b>HUNT APPENDIX TABLE</b>	<b>LEVEL OF AGGREGATION</b>	<b>INFORMATION REPORTED</b>	<b>INFORMATION NOT REPORTED</b>
E1	BEA-BEA-STCC4	<ul style="list-style-type: none"> <li>• Actual traffic volume in tons for all modes and UP+NS</li> <li>• Projected traffic volume in tons for UP+NS</li> <li>• Shares by mode (but no shares for projected traffic volume in tons)</li> </ul>	<ul style="list-style-type: none"> <li>• No projected traffic volume in tons for other railroads</li> <li>• No projected traffic volume for UP+NS that aligns with the Operating Plan</li> <li>• No actual traffic volume in tons for UP and NS individually</li> <li>• No projected shares by mode</li> <li>• No shares of actual or projected traffic volume in tons for any railroad</li> <li>• No sensible aggregations</li> </ul>
E2	BEA-BEA-STCC4-Route	<ul style="list-style-type: none"> <li>• Actual traffic volume in carloads by single-line and interline by specific routing</li> <li>• Actual traffic volume in tons by rail single-line and interline, by specific routing, as well as tons for non-rail</li> <li>• Projected traffic volume in tons by rail single-line and interline by specific routing</li> <li>• Shares of actual traffic volume in tons by rail single-line and interline by specific routing, and by non-rail</li> <li>• Projected shares of tons by rail single-line and interline by specific routing</li> </ul>	<ul style="list-style-type: none"> <li>• No projected traffic volume in tons for non-rail</li> <li>• No projected traffic volume for UP+NS that aligns with the Operating Plan</li> <li>• No projected traffic volume in carloads for any railroad</li> <li>• No shares or projected shares by railroad</li> <li>• No sensible aggregations</li> </ul>
E3	BEA-BEA-STCC4	<ul style="list-style-type: none"> <li>• Actual revenues for all modes and UP+NS</li> <li>• Projected revenues for UP+NS</li> <li>• Shares of revenue by mode (but no shares for projected revenues)</li> </ul>	<ul style="list-style-type: none"> <li>• No actual revenue for UP and NS individually</li> <li>• No projected revenues for UP+NS that align with the Operating Plan</li> <li>• No projected revenues for other railroads</li> <li>• No projected shares by mode</li> <li>• No shares of actual or projected revenues for any railroad</li> <li>• No sensible aggregations</li> </ul>

**REDACTED PUBLIC VERSION**

<b>HUNT APPENDIX TABLE</b>	<b>LEVEL OF AGGREGATION</b>	<b>INFORMATION REPORTED</b>	<b>INFORMATION NOT REPORTED</b>
E4	BEA-BEA-STCC4-Route	<ul style="list-style-type: none"> <li>• Actual revenues by rail single-line and interline by specific routing, as well as revenue for non-rail</li> <li>• Projected revenues by rail single-line and interline by specific routing</li> <li>• Shares of actual revenues by rail single-line and interline by specific routing, and by non-rail</li> <li>• Projected revenue shares by rail single-line and interline by specific routing</li> </ul>	<ul style="list-style-type: none"> <li>• No projected revenue for non-rail</li> <li>• No projected revenues for UP+NS that align with the Operating Plan</li> <li>• No assignment of the portion of route revenues accrued to each railroad on the routing</li> <li>• No actual shares or projected shares of revenue by railroad</li> <li>• No sensible aggregations</li> </ul>
F1	BEA-BEA-STCC4	<ul style="list-style-type: none"> <li>• Actual carloads by originating railroad and destination railroad for each unique BEA-BEA-STCC4 grouping</li> <li>• UP+NS projected originating carloads</li> <li>• UP+NS projected terminating carloads</li> </ul>	<ul style="list-style-type: none"> <li>• No projected originating or terminating carloads for other railroads</li> <li>• No projected originating or terminating carloads for UP+NS that align with the Operating Plan</li> <li>• No actual or projected shares of originated or terminated carloads for any railroad</li> <li>• No sensible aggregations</li> </ul>
F2	BEA-BEA-STCC4	<ul style="list-style-type: none"> <li>• Same as F1, sorted by destination</li> </ul>	<ul style="list-style-type: none"> <li>• Same as F1</li> </ul>
F3	BEA-BEA-STCC4	<ul style="list-style-type: none"> <li>• Actual revenues by originating railroad and destination railroad for each unique BEA-BEA-STCC4 grouping, sorted by origin</li> <li>• UP+NS projected originating revenues</li> <li>• UP+NS projected terminating revenues</li> </ul>	<ul style="list-style-type: none"> <li>• No actual or projected originating or terminating revenues for other railroads</li> <li>• No projected originating or terminating revenues for UP+NS that align with the Operating Plan</li> <li>• No shares of originated or terminated revenues for any railroad</li> <li>• No sensible aggregations</li> </ul>
F4	BEA-BEA-STCC4	<ul style="list-style-type: none"> <li>• Same as F3, sorted by destination</li> </ul>	<ul style="list-style-type: none"> <li>• Same as F3</li> </ul>

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**APPENDIX B**

**EXPLANATION OF MARKET SHARE CALCULATIONS BASED ON HUNT DATA**

This Appendix explains how we attempted to derive market share projections from the raw data reported in Mr. Hunt's workpapers. The results provided are given in terms of revenue shares and are limited to rail revenues.

**1. Chemicals or Allied Products (STCC 28, including plastics) between the Gulf Coast and Northeast/Mid Atlantic.**

- Mr. Hunt's data set was limited to include only data for Chemicals and Allied Products (STCC 28, including plastics) from the Gulf Coast to the Northeast/Mid Atlantic.
- The BEAs included in this calculation were:  
  
For traffic originating from the Gulf Coast: (083) New Orleans, LA-MS, (084) Baton Rouge, LA-MS, (086) Lake Charles, LA, (087) Beaumont-Port Arthur, TX, (131) Houston-Galveston-Brazoria, TX.  
  
For traffic terminating in the Northeast/Mid Atlantic: (003) Boston-Worcester-Lawrence-Lowell-Brockton, MA-NH-RI-VT, (010) New York-No. New Jer.-

Long Island, NY-NJ-CT-PA-MA-VT, (012) Philadelphia-Wilmington-Atl. City, PA-NJ-DE-MD, (013) Washington-Baltimore, DC-MD-VA-WV-PA.

**2. Motor Vehicles (STCC 3711) from Detroit to the West.**

- Mr. Hunt’s dataset was limited to include only data for Motor Vehicles (STCC 3711) from Detroit to the West.
- The BEAs included in this calculation were:  
  
For traffic originating from Detroit: (057) Detroit-Ann Arbor-Flint, MI.  
  
For traffic terminating in the West: (064) Chicago-Gary-Kenosha, IL-IN-WI, (084) Baton Rouge, LA-MS, (096) St. Louis, MO-IL, (099) Kansas City, MO-KS, (125) Oklahoma City, OK, (127) Dallas-Fort Worth, TX-AR-OK, (131) Houston-Galveston-Brazoria, TX, (134) San Antonio, TX, (141) Denver-Boulder-Greeley, CO-KS-NE, (152) Salt Lake City-Ogden, UT-ID, (158) Phoenix-Mesa, AZ-NM, (160) Los Angeles-Riverside-Orange County, CA-AZ, (163) San Francisco-Oakland-San Jose, CA.

**3. Primary Metal Products (STCC 33) from the Rust Belt.**

- The dataset was limited to include only data for Primary Metal Products (STCC 33) from the Rust Belt.
- The BEAs included in this calculation were:  
  
For traffic originating from the Rust Belt: (052) Wheeling, WV-OH, (053) Pittsburgh, PA-WV, (055) Cleveland-Akron, OH-PA, and (056) Toledo, OH.  
  
Terminating included all observed BEAs.

#### 4. Calculation of Shares

- Terminating shares were calculated for UP and NS within the corridor. For the NS terminating share, CPKC identified routings that listed NS as the terminating railroad. Revenues associated with those routes were summed and divided by total rail revenues within the corridor to produce the NS terminating share. The same methodology was applied to calculate the UP terminating share, using routings that listed UP as the terminating railroad.
- Originating shares were calculated for UP and NS within the corridor. For the NS originating share, CPKC identified routings that listed NS as the originating railroad. Revenues associated with those routes were summed up and divided by total rail revenues within the corridor to produce the NS originating share. The same methodology was applied to calculate the UP originating share, using routings that listed UP as the originating railroad.
- UP and NS participating shares were calculated by identifying all routings that included either UP or NS. All revenues associated with those routes that include either UP or NS were summed up and then divided by the total rail revenues within that corridor.

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**APPENDIX C**

**CORRESPONDENCE REGARDING GAPS IN WORKPAPERS ACCOMPANYING AMENDED  
APPLICATION**

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RAILWAY COMPANY**

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**APPENDIX C.1**

**BNSF'S MAY 5, 2026 EMAIL TO APPLICANTS**

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**Subject:** [EXTERNAL] RE: FD 36873 - BNSF Request for Meet and Confer  
**Attachments:** Summary of Missing Workpapers and Intermediate Tables in UPNS Refiled Application.xlsx

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**From:** Thompson, McClain <[mcclain.thompson@kirkland.com](mailto:mcclain.thompson@kirkland.com)>  
**Sent:** Tuesday, May 5, 2026 9:03 PM  
**To:** Kelly, Kevin <[Kkelly@cov.com](mailto:Kkelly@cov.com)>; Enson, Eric <[EEnson@crowell.com](mailto:EEnson@crowell.com)>; Warren, Matthew J. <[mjwarren@sidley.com](mailto:mjwarren@sidley.com)>; William Mullins <[wmullins@mullinslawgroup.net](mailto:wmullins@mullinslawgroup.net)>; Rosenthal, Michael <[mrosenthal@cov.com](mailto:mrosenthal@cov.com)>; zzExt-dludwin <[dludwin@cov.com](mailto:dludwin@cov.com)>; Harrison, Caroline <[CHarrison@cov.com](mailto:CHarrison@cov.com)>; Korman, Marc <[mkorman@sidley.com](mailto:mkorman@sidley.com)>; Atkins, Raymond <[ratkins@sidley.com](mailto:ratkins@sidley.com)>  
**Cc:** Donovan, Daniel T. <[ddonovan@kirkland.com](mailto:ddonovan@kirkland.com)>; McCarrick, T.J. <[tj.mccarrick@kirkland.com](mailto:tj.mccarrick@kirkland.com)>; zzExt-aellis <[aellis@stblaw.com](mailto:aellis@stblaw.com)>; Razi, Sara Y. <[Sara.Razi@stblaw.com](mailto:Sara.Razi@stblaw.com)>; Bohl, Lindsey C. <[Lindsey.Bohl@stblaw.com](mailto:Lindsey.Bohl@stblaw.com)>; David Meyer <[david@meyerlawdc.com](mailto:david@meyerlawdc.com)>; Matelis, Joseph J. <[Matelisj@sullcrom.com](mailto:Matelisj@sullcrom.com)>; \*pdenton@steptoe.com <[pdenton@steptoe.com](mailto:pdenton@steptoe.com)>; \*tstrafford@steptoe.com <[tstrafford@steptoe.com](mailto:tstrafford@steptoe.com)>; Reilly, Matt <[matt.reilly@kirkland.com](mailto:matt.reilly@kirkland.com)>; Cunningham, Rich <[rich.cunningham@kirkland.com](mailto:rich.cunningham@kirkland.com)>; Damitio, Daniel <[DDamitio@cov.com](mailto:DDamitio@cov.com)>; Scheib, John M. <[scheib@gentrylocke.com](mailto:scheib@gentrylocke.com)>; Fanchiang, Eric <[EFanchiang@crowell.com](mailto:EFanchiang@crowell.com)>; Gardiner, Kent <[KGardiner@crowell.com](mailto:KGardiner@crowell.com)>; van Houwelingen, Luke <[LVanHouwelingen@crowell.com](mailto:LVanHouwelingen@crowell.com)>; \*Avia.Gridi@stblaw.com <[Avia.Gridi@stblaw.com](mailto:Avia.Gridi@stblaw.com)>; Aluise, Dylan M. <[aluised@sullcrom.com](mailto:aluised@sullcrom.com)>; Hynes, Samantha F. <[hyness@sullcrom.com](mailto:hyness@sullcrom.com)>; Golden, Nathan H. <[goldenn@sullcrom.com](mailto:goldenn@sullcrom.com)>  
**Subject:** [EXTERNAL] RE: FD 36873 - BNSF Request for Meet and Confer

Sidley, Covington Teams – Although our review is ongoing, we have identified 181 missing work papers, intermediate datasets, and files that are needed to re-run applicant’s backups and verify output. All should have been provided with the application last Thursday morning. Please see attached for a summary chart. Please let us know your position by this Thursday, so we can evaluate next steps. Thanks, McClain

### McClain Thompson

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Finance Docket No. 36873**

**UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY  
– CONTROL –  
NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN  
RAILWAY COMPANY**

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**APPENDIX C.2**

**APPLICANTS' MAY 7, 2026 RESPONSE TO BNSF**

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**Subject:** [EXTERNAL] RE: FD 36873 - BNSF Request for Meet and Confer  
**Attachments:** Responses to BNSF workpaper requests 050726.xlsx

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**From:** Rosenthal, Michael <[mrosenthal@cov.com](mailto:mrosenthal@cov.com)>  
**Sent:** Thursday, May 7, 2026 10:57:23 PM  
**To:** Thompson, McClain <[mcclain.thompson@kirkland.com](mailto:mcclain.thompson@kirkland.com)>  
**Cc:** Donovan, Daniel T. <[ddonovan@kirkland.com](mailto:ddonovan@kirkland.com)>; McCarrick, T.J. <[tj.mccarrick@kirkland.com](mailto:tj.mccarrick@kirkland.com)>; zzExt-aellis <[aellis@stblaw.com](mailto:aellis@stblaw.com)>; Razi, Sara Y. <[Sara.Razi@stblaw.com](mailto:Sara.Razi@stblaw.com)>; Bohl, Lindsey C. <[Lindsey.Bohl@stblaw.com](mailto:Lindsey.Bohl@stblaw.com)>; David Meyer <[david@meyerlawdc.com](mailto:david@meyerlawdc.com)>; Matelis, Joseph J. <[Matelisj@sullcrom.com](mailto:Matelisj@sullcrom.com)>; \*pdenton@steptoe.com <[pdenton@steptoe.com](mailto:pdenton@steptoe.com)>; \*tstrafford@steptoe.com <[tstrafford@steptoe.com](mailto:tstrafford@steptoe.com)>; Reilly, Matt <[matt.reilly@kirkland.com](mailto:matt.reilly@kirkland.com)>; Cunningham, Rich <[rich.cunningham@kirkland.com](mailto:rich.cunningham@kirkland.com)>; Damitio, Daniel <[DDamitio@cov.com](mailto:DDamitio@cov.com)>; Scheib, John M. <[scheib@gentrylocke.com](mailto:scheib@gentrylocke.com)>; Fanchiang, Eric <[EFanchiang@crowell.com](mailto:EFanchiang@crowell.com)>; Gardiner, Kent <[KGardiner@crowell.com](mailto:KGardiner@crowell.com)>; van Houwelingen, Luke <[LVanHouwelingen@crowell.com](mailto:LVanHouwelingen@crowell.com)>; \*Avia.Gridi@stblaw.com <[Avia.Gridi@stblaw.com](mailto:Avia.Gridi@stblaw.com)>; Aluise, Dylan M. <[aluised@sullcrom.com](mailto:aluised@sullcrom.com)>; Hynes, Samantha F. <[hyness@sullcrom.com](mailto:hyness@sullcrom.com)>; Golden, Nathan H. <[goldenn@sullcrom.com](mailto:goldenn@sullcrom.com)>; Kelly, Kevin <[Kkelly@cov.com](mailto:Kkelly@cov.com)>; Enson, Eric <[EEEnson@crowell.com](mailto:EEEnson@crowell.com)>; Warren, Matthew J. <[mjwarren@sidley.com](mailto:mjwarren@sidley.com)>; William Mullins <[wmullins@mullinslawgroup.net](mailto:wmullins@mullinslawgroup.net)>; zzExt-dludwin <[dludwin@cov.com](mailto:dludwin@cov.com)>; Harrison, Caroline <[CHarrison@cov.com](mailto:CHarrison@cov.com)>; Korman, Marc <[mkorman@sidley.com](mailto:mkorman@sidley.com)>; ratkins <[ratkins@sidley.com](mailto:ratkins@sidley.com)>; Krovoza, Charlotte <[CKrovoza@cov.com](mailto:CKrovoza@cov.com)>  
**Subject:** [EXTERNAL] RE: FD 36873 - BNSF Request for Meet and Confer

McClain,

We have completed a review of the 181 files you identified. We provide specific responses in the attached table.

As reflected in the table, most of the files are not workpapers. Rather, they are temporary files generated in the process of producing workpapers from underlying data. Our consultants generally provided the underlying data and the instructions and programs needed to process the data to create the workpapers that support their statements. To the extent you wish to retrace their work, including recreating the temporary files, the readme files included with the consultants' workpaper productions provide detailed instructions for running the programs that generate those files during the process of producing the workpapers. If you encounter any difficulty with the instructions, we would be happy to connect you with our consultants for further assistance.

As also reflected in the table, a number of other files on your list were not missing from the production, but some could have appeared to be missing because they were placed in the wrong folder or because a script contains an outdated reference. In some cases, we recognized that files were mistakenly listed in our index as workpapers. We identified 19 workpapers that arguably should have been included in the original upload but were not. We expect to provide those workpapers, updated scripts, relocated workpapers, and an updated index through Covington's Kiteworks FTP site on Friday.

If you have any questions about specific files or our specific responses, please let us know, and we will do our best to address them.

Regards,

Mike  
**Michael L. Rosenthal**

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**COVINGTON**

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**Finance Docket No. 36873**

**UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY  
– CONTROL –  
NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN  
RAILWAY COMPANY**

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**APPENDIX C.3**

**CPKC'S MAY 7, 2026 LETTER TO APPLICANTS**

# SULLIVAN & CROMWELL LLP

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## CONTAINS HIGHLY CONFIDENTIAL INFORMATION

May 7, 2026

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

Dear Counsel:

I write on behalf of CPKC regarding the workpapers underlying Applicants' Amended Application filed April 30, 2026 (UP-39/NS-37). Although our review remains ongoing, we have identified gaps in the workpapers underlying the Operating Plan sponsored by Eric Gehringer and John Orr, David Hunt's Verified Statement, the Service Assurance Plan sponsored by John W. Turner, and Dr. Elizabeth Bailey's Verified Statement.

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Michael L. Rosenthal  
Laura F. Wu  
Kevin M. Kelly  
Matthew J. Warren

-8-

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The questions above are intended to clarify the location and availability of the relevant materials and to ensure that the workpapers are sufficiently complete to permit independent replication.

Please rectify these deficiencies promptly so that all parties can meaningfully examine Applicants' evidence and assess its implications for the completeness of the Application and the public interest. CPKC's review is ongoing and additional questions may follow. CPKC reserves the right to comment further on the completeness of the Amended Application in its forthcoming submission, to be filed on May 8, 2026, pursuant to Decision Nos. 15 and 19.

Respectfully submitted,

/s/ Joseph J. Matelis  
Joseph J. Matelis  
*Attorney for CPKC*

cc: David L. Meyer (Law Office of David L. Meyer)  
Dylan M. Aluise (Sullivan & Cromwell LLP)

[REDACTED]