



SIDLEY AUSTIN LLP  
1501 K STREET, N.W.  
WASHINGTON, DISTRICT OF COLUMBIA 20005  
+1 202 736 8000  
+1 202 736 8711 FAX

+1 202 736 8996  
MJWARREN@SIDLEY.COM

311740

NS-69

July 7, 2026

ENTERED

Office of Chief Counsel

July 7, 2026

Part of

Public Record

Honorable Jenifer J. Soulikias  
Administrative Law Judge  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423-0001

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

Dear Judge Soulikias:

CPKC has demanded that NS provide its definitive legal position on UP's compliance with a 188-page complex commercial contract consisting of 105 sections, hundreds of sub-sections, and a host of detailed representations, warranties, covenants, and conditions.<sup>1</sup> CPKC is not a party to this contract, and UP's and NS's compliance with that contract vis-à-vis each other has no relation to any conceivable position that CPKC might take in this proceeding or to the Board's public interest review of the proposed merger. CPKC's speculations that there might be contract-related communications between NS and UP that relate to issues that are relevant to this proceeding is a red herring, because any such communications would be responsive to existing requests and would be captured by searches NS has agreed to undertake. (In any event, NS is not aware of any responsive Communications.) And CPKC's demands that NS state its legal position as to UP's contract compliance are not relevant to any issue in this proceeding, ask for disclosure of a privileged legal conclusion, and would prejudice NS.

CPKC's Second Set of Discovery Requests consist of two distinct sets of requests. One of these (the "Communication Request") requests "Communications and Documents between UP and NS relating to any allegation or suggestion by NS that UP has failed to comply with UP's obligations under the Merger Agreement." The other (the "Legal Position Requests") are an interrogatory and request for admission that each demand that NS state whether "Union Pacific has complied with its obligations under the Merger Agreement."

The Merger Agreement is a contract between UP and NS.<sup>2</sup> It contains an extensive set of commitments and agreements between the parties on matters ranging from taxes to benefit plans to company equity awards. And it provides that

---

<sup>1</sup> See Amended Application Exhibits 2.1, 2.2, 2.3 ("Merger Agreement").

<sup>2</sup> Certain Union Pacific subsidiaries created for purposes of effectuating the merger are also parties to the Merger Agreement.

any legal action between the parties relating to rights and obligations under the Merger Agreement would be governed by Delaware law and heard in the Delaware Court of Chancery (both with certain exceptions). Merger Agreement at § 8.4.

Very few provisions in the Merger Agreement relate to steps the parties are to take with respect to STB approval. There is of course a condition requiring STB Approval before closing on the transaction (§ 6.1(e)) and provisions guiding reasonable best efforts to obtain that approval (§ 5.8 & schedule). But the Merger Agreement is fundamentally a bilateral contract between UP and NS regarding the commercial terms of the merger that would go forward upon STB approval.

**Communication Request.** CPKC attempts to justify the Communication Request by speculating that there might be communications between UP and NS related to Merger Agreement compliance that include information about other relevant issues in this case. But CPKC ignores that any such hypothetical relevant communications would have been responsive to other discovery requests and captured by the custodial searches NS has already agreed to do, which include, *inter alia*, detailed requests for information on integration planning, proposed conditions, and the impact of the transaction. For example, it is obviously true that “a target’s own views about the competitive effects of a proposed merger” are relevant (CPKC-30 at 3), but NS is already searching for and would produce any such nonprivileged documents that have not already been produced. The Communication Request would require production of hypothetical communications regarding contractual issues even if they had no relation to any relevant public interest issue. And as noted above, as of this date NS is not aware of any Communications responsive to the Communication Request.

**Legal Position Requests.** While CPKC’s motion provides some imaginative speculation about hypothetical contractual compliance Communications that might include relevant information, the Legal Position Requests cannot be justified as a mechanism that might uncover a relevant document. Demands that NS state its legal position as to UP’s contractual compliance are improper for multiple reasons.

First, CPKC blatantly misstates the governing standards by basing its argument on language from the federal rules for interrogatories and requests for admission that does not appear in the STB rules for those discovery mechanisms. See CPKC-30 at 5 (quoting FRCP 33(a)(2) and 36(a)(1)(A) but not disclosing that the quoted language is not in 49 C.F.R. § 1114.26(a) and § 1114.27(a)). The STB “is neither governed nor limited by the Federal Rules,” and the STB’s rules do not include any of the language CPKC relies upon. *Conrail—Aband. Exemption—in Hudson Cty., NJ*, Docket No. AB 167 (Sub-No. 1189X) (served Apr. 28, 2017).

Second, the Legal Requests call for NS to provide a legal conclusion that would necessarily be informed by privileged legal advice. CPKC’s assertion that “adversarial communications” may not be privileged provides no basis for discovery

into NS's internal legal conclusions. And it does CPKC no good to cite instances where parties litigating about contracts were asked about compliance with the contract at issue in those cases, because this is not a contract action and UP's compliance with the Merger Agreement vis-à-vis NS is not at issue.

Third, NS's legal position as to UP's contractual compliance is irrelevant to this proceeding. While the STB's Part 1180 regulations require merger applicants to provide exacting detail about a host of issues, not one of those regulations calls for information on the parties' compliance or noncompliance with their contractual duties toward one another. Nor do any of the STB's information requests in this case have anything to do with Applicants' compliance with contractual duties to each other. Any hypothetical disputes about compliance with the Merger Agreement would be matters for Delaware courts, not the STB.<sup>3</sup>

CPKC's relevance arguments focus on how imagined Communications about contractual compliance might be relevant if they revealed "NS's views" about remedies, or if they showed that "NS has accused UP" of breaching obligations, or if they suggested that "UP and NS are in negotiations that would result in enhanced undertakings." CPKC-30 at 3-4.<sup>4</sup> Arguments that a Communication might include statements about relevant issues cannot show relevance as to the Legal Position Requests, which ask NS to stake out its position on a legal question, not to produce a Communication.

Finally, it would be unduly burdensome and prejudicial to force NS to provide its rival Class I railroads with NS's legal opinions on this issue. Stating such legal positions now could potentially prejudice NS in any future disputes or negotiations about any aspect of the complex Merger Agreement, or prejudice both Applicants by forcing them to air all potential contract compliance disputes at a time when they are focused on carefully planning for integration.

For these reasons, CPKC's motion to compel should be denied.

Sincerely,

/s/ Matthew J. Warren

cc: Parties of Record

---

<sup>3</sup> CPKC does not cite a single merger case where the STB relied upon whether the merging parties had fulfilled all terms of their contract vis-à-vis each other.

<sup>4</sup> NS's references to the invented Communications in CPKC's motion does not imply that any such Communications exist.