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Office of Chief Counsel
September 15, 2026

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

Part of
Public Record

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

Dear Judge Soulikias:

Applicants oppose CPKC's Motion to Compel (CPKC-47) for the following reasons, as set forth in more detail below.

- **Vena Statement.** Union Pacific will produce a video recording of Mr. Vena's statements at the SWARS 2026 Annual Meeting that it has located through a reasonable search, which resolves this dispute.
- **Rocker Statement.** CPKC's motion to compel Union Pacific to supplement its response to Interrogatory No. 8 should be denied. The Interrogatory seeks information that is irrelevant to the Board's consideration of the merits of the merger and extraordinarily sensitive. In the alternative, if Union Pacific is ordered to supplement its response, the additional information provided should be afforded heightened confidentiality protections, which Applicants describe in more detail below.
- **Orr Resignation Documents.** CPKC's motion to compel production of documents concerning Mr. Orr's resignation from Norfolk Southern should be denied. CPKC's speculation that Mr. Orr harbored "dissenting views" about the proposed transaction lacks any support in the discovery record, and CPKC has adequate and proportionate means to obtain information about his departure without compelling production of confidential personnel records.
- **Merger Agreement Drafts.** CPKC's motion to compel production of the drafts of Schedule 5.8 should be denied. Draft versions of Schedule 5.8 are not relevant to

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this proceeding. CPKC's arguments to the contrary rest on a flawed reading of Decision No. 9.

Applicants further address each of the discovery disputes identified in CPKC's Motion in greater detail below.

A. Vena Statements (CPKC 2nd Set to Union Pacific, Request No. 43)

CPKC's Request No. 43 seeks documents "reflecting or memorializing any remarks, comments or presentations by Union Pacific CEO Jim Vena" at any public or closed door events. Although the request is grossly overbroad on its face, CPKC has subsequently clarified that the only relief it seeks in its Motion is production of documents reflecting or memorializing the remarks of Mr. Vena at the SWARS 2026 Annual Meeting. Given CPKC's willingness to narrow the scope of its request to the SWARS 2026 conference, Union Pacific will agree to produce a video recording of Mr. Vena's presentation at the SWARS 2026 Annual Meeting that it has located through a reasonable search to resolve this dispute.¹

B. Rocker Statement (CPKC 2nd Set to Union Pacific, Interrogatory No. 8)

CPKC's Interrogatory No. 8 seeks information regarding the identity of customers who have reported concerns regarding backlash from BNSF and CPKC in response to their support of the proposed merger. In responding to this interrogatory, Union Pacific stated various objections, including raising concerns that disclosure of information sufficient to identify the customers (who reported their concerns in confidence to Union Pacific) would expose those customers to adverse consequences in their dealings with BNSF and CPKC, and questioning the relevance of the information sought. Nonetheless, Union Pacific provided a response to the interrogatory that sufficiently addressed the factual bases underlying Mr. Rocker's statement while avoiding disclosure of irrelevant and extraordinarily sensitive customer information.

Union Pacific's approach is consistent with Board precedent, which provides that "[d]isclosure of extraordinarily sensitive information should not be required without a careful balancing of the seeking party's need for the information, and its ability to generate comparable information from other sources, against the likelihood of harm to the disclosing party." *CSX Corp., et al.—Control—Conrail Inc., et al.*, FD 33388, slip op. at 2 n.9 (STB served Sept. 18, 1997). CPKC does not articulate how the requested information is relevant to the Board's evaluation of the merger. Instead, CPKC's request for relief rests on the tenuous assertion that information sought—information sufficient to identify the customers who feared backlash—is necessary to assess "Mr. Rocker's credibility." Given the failure of CPKC to establish the relevance of the evidence sought, and its extraordinarily sensitive nature, the Motion should be denied. *See CSX Corp., et al.—Control—Conrail Inc., et al.*, FD 33388, slip op. at 8 (STB served Oct. 3, 1997) (The

¹ Although CPKC's Motion makes passing reference to requiring production of "related notes or materials" from the SWARS 2026 conference, Request 43 is limited to documents that "reflect or memorialize" Mr. Vena's remarks, comments or presentation. There is no basis to order production of materials beyond the recording that Union Pacific has agreed to produce.

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Board “cannot allow discovery of extraordinarily sensitive information simply to permit movants the ability to conduct what amounts to a ‘fishing expedition.’”).

If Union Pacific is required to supplement its response to Interrogatory 8, production of such information should be conditioned on that information being limited in distribution to a small number of specifically identified outside counsel for the railroads referenced in Mr. Rocker’s July 9 statement. To receive this information, the outside counsel must identify the names of three or fewer outside counsel at each railroad who will receive the information and have each counsel confirm in writing that they will not share the designated information with any other individuals who are not approved to receive it.

C. Orr Resignation Documents (CPKC’s 2nd Set to Union Pacific, Request No. 36; CPKC 3rd Set to Norfolk Southern, Request No. 34)

CPKC’s motion to compel production of documents concerning John Orr’s resignation from Norfolk Southern should be denied. CPKC speculates that Mr. Orr may have harbored “dissenting views” about the proposed transaction, but it cites no support for that conjecture in any produced document, deposition testimony, or public statement. *See* CPKC-47 at 3. {{

}} And CPKC’s claim that the circumstances surrounding Mr. Orr’s departure might be relevant to “the adequacy of the Operating Plan” makes little sense, since he resigned five months after he co-verified the Operating Plan for the original application and one month after he co-verified the Operating Plan for the Amended Application.

Documents regarding an individual employee’s departure are sensitive by their nature, and CPKC is not entitled to a “fishing expedition” into such documents when it has failed to establish a reasonable basis for believing that the records it is seeking have the slightest relevance to whether or not the proposed transaction is in the public interest. *Duke Energy Corp. v. Norfolk S. Ry.*, Docket No. NOR 42069, at 4 (STB served July 26, 2002). Even if Mr. Orr’s departure had any relevance to issues in this proceeding, CPKC has adequate and proportionate means to obtain information about that departure without compelling production of confidential personnel records. At this point CPKC has had the opportunity to depose Mr. Orr’s replacement Brian Barr, has participated in multiple depositions of NS witnesses who were asked about Mr. Orr’s departure, and has received approximately 700 documents from Mr. Orr’s custodial files plus hundreds of additional documents that involve Mr. Orr. And if CPKC wishes it can question future Norfolk Southern deponents concerning their knowledge of Mr. Orr’s departure or seek to subpoena Mr. Orr himself. Additional discovery into sensitive personnel records is unwarranted and unduly burdensome. *Atchison, Topeka & Santa Fe Ry.—Operating Rts.—S. Pac. Transp. Co.*, FD 22218, slip op. at 3 (STB served Feb. 7, 2025) (discovery may be denied where “unduly burdensome in relation to the likely value of the information sought.”).

D. Merger Agreement Drafts (CPKC’s 2nd Set to Union Pacific, Request No. 13; CPKC’s 3rd Set to Norfolk Southern, Request No. 12)

As Your Honor has previously observed, this is not a breach of contract action. Discovery of Applicants’ negotiation of the Merger Agreement is not relevant to the Board’s consideration

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of the proposed merger. CPKC’s assertion that the Board “explicitly recognized the relevance of these provisions” is false. CPKC-47 at 3. The language cited by CPKC from Decision No. 9 is nothing more than the Board’s articulation of the dispute. Indeed, CPKC’s motion notes only that “the Board *referenced* commenters’ concerns,” not that the Board adopted or agreed with those concerns. CPKC-47 at 4 (emphasis added).

In ordering Applicants to produce Schedule 5.8, the Board relied on an entirely different basis. Decision No. 9 rested explicitly on “the plain text of the Board’s regulations” with respect to required components of the Application, specifically 49 C.F.R. § 1180.6(a)(7)(ii). Decision No. 9 at 8. The Board did not undertake an independent analysis of the standalone relevance of Schedule 5.8 in Decision No. 9. There was no need to do so, because the Board interpreted 49 C.F.R. § 1180.6(a)(7)(ii) as requiring submission of all final agreements “pertaining to the proposed transaction,” and determined that Schedule 5.8 fell within the scope of that requirement.

Even if one were to accept CPKC’s flawed interpretation of Decision No. 9, its argument still fails. CPKC asserts that the Board concluded that Schedule 5.8 is relevant because it “reflect[s] UP’s bottom line on regulatory conditions.” CPKC-47 at 4 (internal citations omitted). That may be true with respect to the final, executed version of Schedule 5.8. But that logic certainly does not apply to draft versions of the agreement, which, by definition, did not constitute the “bottom line” on conditions. CPKC has already received that information in the final version of Schedule 5.8 and can independently evaluate the sufficiency of those conditions as it sees fit. The drafts of Schedule 5.8 are neither necessary for nor relevant to that analysis.

* * *

For the foregoing reasons, Applicants respectfully request that CPKC’s motion to compel be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of September, 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/ Molly Brown

EXHIBIT 1

Filed under seal pursuant to the Protective Order