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

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

Dear Judge Soulikias:

CPKC’s supplemental brief fails to cite a single case demonstrating that a non-party witness—like Lance Fritz—may be compelled to testify at a deposition absent service of a properly issued subpoena. That is because the relevant statute, rules, and Board precedent make clear that a subpoena must be issued to compel the deposition of a non-party. To the extent CPKC now requests for the first time in its supplemental brief that Your Honor issue a subpoena to compel Mr. Fritz to sit for a deposition, that request should be denied because the burden imposed on Mr. Fritz of appearing for a deposition outweighs any relevant, non-duplicative testimony he might have.

A. CPKC must obtain and serve a subpoena on Mr. Fritz to compel his appearance at a deposition.

CPKC’s brief confuses the permissible scope of discovery under the Board’s rules with the mechanisms for compelling that discovery. Union Pacific does not dispute that the rules allow parties to depose “any person,” including nonparties. *See* 49 C.F.R. § 1114.22(a). But 49 C.F.R. § 1114.22 does not address the mechanism for compelling depositions of persons who are unwilling to appear voluntarily. Instead, the relevant statute, rules, and Board precedent all provide that CPKC must obtain and serve a subpoena to compel a nonparty’s deposition. Non-applicant railroads’ motion to compel Union Pacific to make Mr. Fritz available is both procedurally improper and practically nonsensical. Union Pacific has no control over Mr. Fritz and cannot be ordered to produce a witness that it does not control.

The Board’s process for compelling a witness to appear at a deposition is established by statute, and it requires the party seeking the deposition to obtain a subpoena. Under 49 U.S.C. § 1321(d)(1), “a party to a proceeding pending before the Board may take the testimony of a witness by deposition.” That same section provides the process for compelling a witness to appear for a deposition: “if a witness fails to be deposed . . . under paragraph (1), *the Board may subpoena the witness to take a deposition.*” 49 U.S.C. § 1321(d)(2) (emphasis added). The statute further provides that if a witness disobeys a subpoena, the Board or a party may petition a court to enforce that subpoena and to punish a refusal to obey as a contempt of court. 49 U.S.C. § 1321(c). Thus, the statute provides that (1) a party may take the deposition of a witness, (2) that deposition can be compelled by subpoena issued by the Board, and (3) if the witness disobeys the subpoena, a court may enforce the subpoena and hold the witness in contempt. Service of a properly issued subpoena is necessary because that is the mechanism by which the Board gains authority over a witness and the ability to enforce that authority. As Your Honor correctly recognized, “a non-party witness must be issued a subpoena *duces tecum*” to be compelled to testify at deposition. *Lake Providence Port Comm’n—Feeder Line Application—Line of Delta S. R.R. Located in E. Carroll & Madison Pars., La.*, FD 36447, at 3 (STB served Jan. 16, 2026).

Board decisions consistently recognize that “a non-party to a proceeding can be compelled to respond only to a subpoena issued pursuant to 49 U.S.C. § 1321(c).” *Evergy, Inc., Evergy Metro, Inc., & Evergy Kansas Cent., Inc. v. BNSF Railway Company*, NOR 42180, slip op. at 3 (STB served Sept. 24, 2024). And parties to Board proceedings consistently recognize they must seek a subpoena to compel the deposition of nonparty witnesses. *See, e.g., Ballard Terminal Railroad Company—Acquisition—Woodinville Subdivision*, FD 35731, slip op. at 2–3 (STB served May 17, 2013) (issuing subpoena for deposition of nonparty witness); *E. W. Resort Transp., LLC—Pet. for Declaratory Ord.—Motor Carrier Transp. of Passengers in Colo.*, MCF 21008, slip op. at 2 (STB served June 1, 2005) (same).

CPKC cites just one case that it claims “endorses the reading of Section 1114.22” that a subpoena is not required for a nonparty witness. CPKC Brief at 2 (citing *Application of the National Railroad Passenger Corp. Under 49 U.S.C. 24308(a)—Springfield Terminal Ry. Co., Bos. & Maine Corp., & Portland Terminal Co.*, FD 33381 (STB served May 6, 1997)). But in the cited case, the Board simply noted that its rules provide the means for deposing persons not under a party’s control. *Application of the National Railroad Passenger Corp.*, FD 33381, slip op. at 1 n. 4. Union Pacific does not dispute that 49 C.F.R. § 1114.22(a) allows for depositions of nonparty witnesses. Union Pacific’s argument—which that case does not address—concerns the process for compelling the deposition of a nonparty witness.¹ CPKC also reads too much into the distinction between “any person” in the deposition rule, *see* 49 C.F.R. § 1114.22(a), and “any party” in the rules for document requests and interrogatories, *see, e.g.,* 49 C.F.R. § 1114.26(a), which simply reflects that one deposes a “person” and not a “party.” None of this is relevant to

¹ Additionally, CPKC’s invocation of 49 C.F.R. § 1114.21 also does not support its argument. Union Pacific is not arguing that “a deposition may only be taken of someone who is a party,” as CPKC suggests. CPKC Brief at 3. Rather, Union Pacific’s argument—supported by the law and Board precedent—is that in order to *compel* the deposition of a nonparty, CPKC must obtain and serve a subpoena.

the proper procedure for compelling depositions of nonparty witnesses, which is set forth in 49 U.S.C. § 1321.

B. CPKC’s alternative request for a subpoena should be denied.

Your Honor should deny CPKC’s alternative request for issuance of a subpoena because CPKC has not shown that the value of the information Mr. Fritz may provide outweighs the burden of forcing him to appear at a deposition.

Nonparty discovery, including depositions of nonparties, is subject to the balancing test set forth in the Board’s decision in *BNSF Railway Company Coal Dust Mitigation Tariff Provisions (Coal Dust)*, FD 35557, slip op. at 4 (STB served June 25, 2012). In *Coal Dust*, the Board held that “where the information is sought from a nonparty, greater weight should be given to the burden and thus a stronger showing of relevance is required.” *Id.* Therefore, “the more tangential the nonparty is to the proceeding, the greater the weight given to the burden being imposed in the balancing test.” *Id.* As the Board later summarized, “the balance between the relevance of the information sought and the burden of producing it hinges on the nonparty’s relationship to the proceeding; if the nonparty is a stranger to the litigation (*i.e.*, has no clear interest in the proceeding and will not be directly affected by its outcome) and responding to a subpoena to compel would be expensive, oppressive or burdensome, then a strong foundation regarding the relevance of the information sought is required.” *See Ballard Terminal Railroad Company—Acquisition—Woodinville Subdivision*, FD 35731, slip op. at 3 (STB served May 17, 2013).

Here, Mr. Fritz is not likely to have relevant and non-duplicative testimony. Mr. Fritz stepped down as CEO of Union Pacific in 2023. The non-applicant railroads state they want to question Mr. Fritz about Union Pacific’s merger analysis in 2021, *see* BNSF-52/CPKC-45/CSXT-24, at 5, but CPKC has already had an opportunity to question John Turner, who was directly involved in preparing and presenting the 2021 merger analysis. *See* Exhibit 1 (Turner deposition transcript excerpts). CPKC will also have the chance to question Eric Gehringer, Jennifer Hamann, and Kenny Rocker, company executives who were all at Union Pacific in their same positions in 2021 and who were involved in the merger analysis. *See* BNSF-52/CPKC-45/CSXT-24, Ex. 25. Union Pacific has also produced numerous slide decks and other documents reflecting the earlier merger analysis. A deposition of Mr. Fritz is simply not needed given the other available sources of information the non-applicant railroads have about this 2021 merger analysis, which in any event is five years old and entirely tangential to the Board’s consideration of the proposed UP/NS merger in 2027.²

CPKC also states that it wants to question Mr. Fritz about “the likely effects of a transcontinental merger on the industry, strategic alternatives to transcontinental mergers, and the

² Non-applicant railroads also indicated that they wish to question Mr. Fritz about a merger analysis that was conducted more than a decade ago in 2015. *See* BNSF-52/CPKC-45/CSXT-24, at 5. A merger analysis that was conducted eleven years ago is irrelevant to the Board’s consideration of the proposed merger and does not justify the burden of requiring Mr. Fritz to appear at a deposition.

likelihood of further industry consolidation were a transcontinental merger to be approved.” *See* BNSF-52/CPKC-45/CSXT-24, at 5. But CPKC fails to explain why Mr. Fritz’s opinion on these topics is particularly relevant to the Board’s consideration of the merger. Any testimony that Mr. Fritz would have on these topics is outdated and Union Pacific has offered for deposition individuals who are currently employed by Union Pacific and can testify to these issues—including its current CEO, Jim Vena. Further, to the extent that non-applicant railroads want other CEO-level views on industry strategy topics, they have already deposed Norfolk Southern CEO Mark George.

Balanced against the limited relevance of Mr. Fritz’s testimony, the burden of requiring Mr. Fritz to testify at a deposition is high. Under the test set forth in *Coal Dust*, Mr. Fritz is “a stranger to the litigation” with no clear interest in the proceeding. *Coal Dust*, FD 35557, slip op. at 4. Further, the discovery sought is “expensive, oppressive or burdensome.” *Id.* Depositions are long and stressful events—lasting up to seven hours on the record and subjecting the witness to sustained, and sometimes aggressive, questioning. Accordingly, “a strong foundation regarding the relevance of the information sought” is required. *Coal Dust*, FD 35557, slip op. at 5. The reasons provided by non-applicant railroads to depose Mr. Fritz—to ask him about outdated analysis and general industry practices that numerous other witnesses currently employed by Union Pacific can testify to—do not even come close to meeting that requirement. Under the test set forth in *Coal Dust*, Mr. Fritz is a nonparty witness, any relevant testimony would be duplicative of existing deponents, and the burden of appearing at deposition is great. Therefore, CPKC’s alternative request for issuance of a subpoena should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 24th 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

REDACTED VERSION – TO BE PLACED ON PUBLIC RECORD

EXHIBIT 1

Filed under seal pursuant to the Protective Order