

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36873

UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY
—CONTROL—
NORFOLK SOUTHERN CORPORATION, NORFOLK SOUTHERN RAILWAY COMPANY

**MOTION TO PERMIT BOARD-INITIATED EX PARTE COMMUNICATIONS
AND TECHNICAL CONFERENCES**

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INTRODUCTION

The hundreds of notices of intent to participate filed with the Surface Transportation Board (“Board”) before the September 30, 2026 deadline confirm the extraordinary public interest in this proceeding. Applicants welcome the public support of so many stakeholders who have recognized the benefits of the proposed transaction, and Applicants are engaging with other stakeholders to answer questions and address legitimate potential concerns. Applicants have worked hard to answer questions from the Board comprehensively and to anticipate what information would be helpful to the Board in its review. But Applicants believe that the merger review process would be materially improved for all parties if the Board exercises its ability to address questions and issues directly through ex parte communications, as Congress has permitted the Board to do.

Applicants therefore submit this motion to permit Board member-initiated ex parte communications and technical conferences when members believe such communications would be useful to address particular issues. Applicants’ motion proposes a more targeted process than their prior request that the Board permit ex parte stakeholder communications pursuant to 49 U.S.C. § 11324(f). The Board denied that request in Decision No. 21, but stated that it would revisit the question “if the Board identifies specific issues for which ex parte communications would have particular value.” Decision No. 21, at 36 (served May 28, 2026).

Applicants respectfully recognize the importance of ensuring that each Board member has the information and procedural tools he or she considers useful in evaluating the record. Recent statements in this proceeding reflect the care with which the Board is approaching both its threshold review and merits review. Applicants welcome that scrutiny. The process proposed here is designed to assist the Board in that work by allowing any member, at his or her sole

discretion, to identify specific issues in writing and receive focused responses through procedures that preserve transparency and the integrity of the public record.

ARGUMENT

I. Board-Requested Ex Parte Communications and Technical Conferences Will Promote Transparency and a Thorough Review of the Proposed Transaction.

The structured, Board member-controlled ex parte communications and technical conferences Applicants request would help the Board evaluate an extensive evidentiary record that has grown substantially through supplementation, discovery, and ongoing work with the Federal Railroad Administration and the Board's environmental staff.

Applicants have filed thousands of pages of testimony, analysis, and supporting documentation across their initial Application, the Amended Application, and the supplemental filings directed by the Board in Decision No. 21. Those submissions address every element of the Board's major merger regulations: competitive impacts at thousands of individual shipper facilities and across dozens of commodity groups and geographic corridors; public benefits including truck-to-rail and rail-to-rail diversion projections supported by detailed econometric modeling; an Operating Plan spanning the combined 52,000-mile network; a Service Assurance Plan with quantitative benchmarks; passenger rail impact analyses; environmental disclosures; labor commitments; and proposed voluntary conditions. The supporting workpapers alone comprise hundreds of gigabytes of data, and the record will continue to expand as the proceeding advances.

As of the date of this filing, Applicants also have produced over four million pages of documents and nearly 4,000 gigabytes of data in discovery, and the most senior officers of both companies, including the Chief Executive Officers, Chief Financial Officers, Chief Marketing Officers, and Chief Operating Officers of Union Pacific and Norfolk Southern, have been made available for deposition. This level of disclosure reflects Applicants' commitment to ensuring

that all parties and the Board have access to the information needed to evaluate the proposed transaction.

The expert analyses underlying the Application required months of intensive data collection, modeling, and analysis. Dr. Bailey’s competitive impact analysis examined competitive conditions at *every* point (not merely the “major” points required by the Board’s regulations) on the combined 52,000-mile network across dozens of commodity groups, assessing actual and projected market shares, geographic competition patterns, and the effects of proposed conditions at a level of granularity that is unprecedented in the history of rail merger proceedings. Dr. Israel’s vertical foreclosure analysis is similarly detailed. Mr. Hunt’s diversion study analyzed data across thousands of origin-destination pairs to project truck-to-rail and rail-to-rail conversion. The extensive supporting workpapers document the data, assumptions, and methodological choices underlying these analyses.

Applicants also have worked closely and cooperatively with the Board’s Office of Environmental Analysis and the Federal Railroad Administration throughout this proceeding, as required by the Board’s regulations. That collaboration has included extensive submissions, consultations, and responses to information requests from both agencies—work that reflects Applicants’ commitment to a thorough, orderly, and transparent review process.

Applicants nonetheless recognize that a record of this volume, breadth, and complexity presents challenges. This proceeding raises novel questions involving the application of 25-year-old merger rules not previously applied in any actual transaction, much less one of this magnitude. Because this proceeding is breaking new ground, even experienced practitioners and agency staff may benefit from direct, structured opportunities to identify the parts of the record that speak most directly to the questions individual Board members consider most important. That is the gap the proposed ex parte meetings are designed to address. If either the Board or

Board staff believes that an analysis is unclear, a workpaper is difficult to navigate, or a methodological choice requires explanation, Applicants seek an opportunity to address that or any other specific question directly and transparently.

Some parties have suggested that the scope of Applicants' voluntary conditions bears on the completeness or candor of Applicants' submissions. Applicants firmly and respectfully disagree. The conditions proposed in the Application reflect Applicants' genuine assessment of the minimal competitive harms created by the transaction and the remedies appropriate to address those minimal harms. The procompetitive effects of this end-to-end, non-overlapping transaction (including the creation of single-line service across 88,000 county-to-county lanes and meaningful new competition in watershed markets) are themselves substantial competitive enhancements that will directly benefit shippers. Committed Gateway Pricing ("CGP") was designed as an additional, targeted mechanism for extending those benefits to traffic that would not otherwise benefit from single-line service. It is the enhancement on top of an already-enhanced competitive landscape, and not the sum of what this transaction offers.

The record also demonstrates that Applicants have not approached this proceeding with a fixed posture. From the outset, Applicants recognized that the first application to be reviewed under the new merger rules would require open lines of communication, and thus at the start of the process they asked the Board to allow ex parte communications for all stakeholders. Applicants provided all information they reasonably believed was required by the Board's regulations and fully complied with all subsequent requests for clarification and supplementation within the required deadlines. For example, the July supplemental filings were a direct response to stakeholder feedback, productive negotiations with Canadian National, and, critically, questions from the Board in Decision No. 21 that invited Applicants to consider ways to address certain issues. In response, Applicants expanded the scope of CGP to reach additional traffic.

They added a new competitive access mechanism to further address service integration concerns during the transition period. They committed to preserving rail access for 3-to-2 shippers to protect competitive options that would otherwise potentially be affected by the transaction. They added an alternative dispute resolution program for rate disputes in the event the merger's projected benefits are not realized on schedule. And they worked collaboratively with Canadian National to develop commitments that address potential competitive concerns at key gateways.

Proposing conditions calibrated to actual competitive harm is not a lack of transparency; it is fidelity to the Board's own framework. Conditions are tools for addressing demonstrated harm, not mechanisms for redistributing competitive advantage to parties who would prefer a new or different market structure. The record reflects an iterative, good-faith process in which stakeholder input and the Board's questions prompted Applicants to revisit and expand their proposed voluntary conditions. Ex parte meetings would allow that process to continue by giving individual Board members a direct, structured, and fully disclosed mechanism to identify issues they believe warrant further attention before the reply record closes.

II. Applicants Propose Member-Controlled Meetings Within the Existing Procedural Schedule.

Rather than party-initiated ex parte meetings, Applicants now propose Board member-initiated ex parte meetings, thus giving Board members discretion to seek meetings on topics of interest with any party. Individual Board members would have the ability to request ex parte meetings and determine the scope of such meetings, consistent with the Board's expressed intent that it "will issue a decision inviting such communications and providing for any necessary safeguards." Decision No. 21, at 36. Any individual Board member who wishes to have a meeting with any party could contact that party through Board staff and specify in writing before the meeting the particular issues he or she wishes to address. That written identification of issues would be made public contemporaneously. No member is obligated to request ex parte meetings,

and no member may be required to have an ex parte meeting by any party. Similarly, no party is obligated to agree to a requested ex parte meeting, and a party's refusal to participate in an ex parte meeting shall not be considered by the Board when ruling on the merits of any requests made by that party.

If a meeting is requested, the process would be transparent from beginning to end. The Board member's written identification of the issues to be discussed would be made public before the meeting, and a meeting summary would be produced and filed on the docket consistent with the procedures set forth in 49 C.F.R. § 1102.2(g). Following any ex parte meeting, the party that participated would be required to file a written summary within two business days summarizing the date and attendees, the issues identified by the Board member, and the substance of any arguments or data presented. *See* 49 C.F.R. § 1102.2(g)(4). The Board would review the summary and post it on the public docket, thereby providing public notice of the communication and an opportunity for other parties to respond in writing.

Nothing in this proposal would alter the procedural schedule, prevent any interested party from being heard through the established record process, or allow any party to place undisclosed evidence before the Board. To the contrary, the requested procedures are designed to make the Board's questions more visible, make the parties' responses more focused, and ensure that any oral communication is reflected in the public docket.

III. The Proposal Implements Congress's Intent While Honoring the Concerns Expressed in *Fieldston* and Decision No. 21.

Congress provided "express authorization" for ex parte communications in rail merger proceedings in response to "complaints that the former ICC process did not allow sufficient procedural flexibility to allow informal consultation to identify areas of concern at an early stage of the approval process." H.R. Rep. No. 104-422, at 191 (1995) (Conf. Rep.). This proposal for

Board member-initiated ex parte meetings implements that intent in a form tailored to address the specific concerns the Board has expressed.

The concerns expressed in *Fieldston*¹ and in Decision No. 21 centered on three risks: that ex parte communications would burden the agency with reducing oral exchanges to writing; that they would impede the Board's ability to maintain a strict timetable; and that they would undermine public confidence in the integrity of the record. The burden of reducing communications to writing is removed by placing the disclosure obligation on the participating party using the memorandum procedure the Board has already found workable in informal rulemakings. The risk of timetable disruption is eliminated by placing decisions on what meetings are held entirely within the discretion of Board members. The transparency concern is addressed by making public the issues identified by Board members for discussion, a summary of the ex parte meeting, and any presentations made to the member.

IV. The Board Should Consider Technical Conferences.

Applicants also request that the Board consider technical conferences between Board staff and expert witnesses. Such conferences would not provide an additional opportunity to advocate the merits; their purpose would be to help Board staff efficiently locate and understand analytical work already in the record. A merger application of this scale involves complex economic models, large datasets, and extensive workpapers. Questions about how an exhibit was derived, what assumptions underlie a particular model, or where a particular sensitivity analysis appears in the workpapers concern navigation and technical explanation, not legal argument. Parties' experts are best positioned to provide that guidance directly to the staff economists, engineers, and attorneys evaluating the record.

¹ See *Pet. of Fieldston Co., Inc. To Establish Procs. Regarding Ex Parte Commc'ns In R.R. Merger Procs.*, Docket No. EP 619 (STB served Jan 8, 1997).

Applicants would make available, on request and on dates and at times convenient to Board staff, the relevant expert witnesses and technical personnel (including their principal expert witnesses) to respond to staff questions. At Board staff's request, Applicants would also provide written responses to specific technical questions to assist staff in navigating the existing record. If requested, other parties could have the same opportunity to participate in their own technical conferences with Board staff and provide written responses. The sessions would address individual subject areas, such as the competitive impact analyses, the diversion modeling, the operating plan, the workpaper architecture, or whatever topics staff identifies as priorities.

CONCLUSION

For the foregoing reasons, Applicants respectfully request that the Board grant this motion and issue a decision permitting Board-initiated ex parte communications and staff-requested technical conferences with experts, subject to such procedures as the Board deems appropriate to ensure transparency, preserve the integrity of the public record, and assist the Board in evaluating the proposed transaction on a complete and well-understood record.

Respectfully submitted,

/s/ Raymond A. Atkins

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CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of October 2026, the foregoing Motion to Permit Board-Initiated Ex Parte Communications and Technical Conferences was served by first-class mail or more expeditious means on all parties of record in this proceeding.

/s/ Molly Brown

Molly Brown