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CPKC-66

EXPEDITED CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36873

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

CPKC's MOTION TO ENFORCE DECISION NO. 43

CPKC[1] respectfully moves the Board under 49 C.F.R. § 1114.31(b) to order UP to comply with Judge Soulikias's order that UP provide a redesignated copy of the video, without the "Confidential" designation, of its CEO's March 2026 address to about 900 shippers at the annual conference of the Southwest Association of Rail Shippers ("SWARS"). No justification exists for UP's disregard of Judge Soulikias's instruction to produce a public version of the video by last Friday—two days after UP's deadline to appeal lapsed. UP's refusal to comply with Judge Soulikias's order appears to be a calculated strategy of running out the clock over the few remaining days before the November 18 deadline for shippers and others to file comments in this proceeding. The Board should order compliance immediately.[2]

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[1] "CPKC" means, collectively, Canadian Pacific Railway Company d/b/a Canadian Pacific Kansas City on behalf of itself and its U.S. rail carrier subsidiaries, including 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.

[2] CPKC is filing this motion seeking expedited issuance of an order compelling compliance with the ALJ's order because the normal process for considering UP's bad faith and meritless appeal would

Background. The SWARS address attracted congressional attention on July 16 and the Board's on July 22.[3] CPKC requested from UP a video recording of the SWARS address on July 31. On August 7, UP objected on the ground that the address was not "relevant." CPKC-58, Ex. A. Following weeks of correspondence with UP, CPKC moved to compel production of the video on September 10. *See* CPKC-47, at 1-2. UP agreed to produce a copy on September 15 and ultimately did produce one on October 1—but designated it "Confidential Information" under Decision No. 1. On October 6, CPKC filed a motion to require UP to redesignate the video as public. *See* CPKC-58, at 1-2. A coalition of shipper associations filed a brief supporting the redesignation motion on October 9. ACC-8 / ACD-8 / AFPM-8 / NITL-5 / TFI-8, at 1-3. UP resisted reclassification, arguing that the video was proprietary because UP had paid to have it created. *See* UP-116, at 1-2. Oral argument was held October 16.

By decision served on Friday, October 23, Judge Soulikias granted CPKC's motion and ordered UP to "provide the video recording without the 'Confidential' designation by October 30, 2026." Decision No. 43, at 9 (served Oct. 23, 2026). Judge Soulikias set this date to "enable[] UP to appeal this order to the Board, if it chooses (without letting the cat out of the bag)." *Id.* at 6.

Under the Board's order setting deadlines applicable to this proceeding, "any appeal to a decision issued by the ALJ must be filed within five calendar days of the date of the ALJ's decision." Decision No. 30, at 11 (served Aug. 18, 2026). Wednesday, October 28, was the fifth

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merely reward UP with the delay it is seeking. CPKC anticipates responding on Wednesday to UP's appeal and motion for stay if the video has not been provided (or ordered to be produced) by then, in which case the relief requested by this motion may be considered by the Board in conjunction with its consideration of those matters.

[3] *See* Decision No. 28 at 4 (STB served July 22, 2026); Letter from U.S. Senator Tammy Baldwin to Chairman Patrick J. Fuchs, Vice Chairman Michelle A. Schultz and Members Karen J. Hedlund & Richard J. Kloster, Surface Transportation Board (July 16, 2026), at 1.

calendar day after Judge Soulikias's ruling. UP did not file an appeal before the deadline. On October 30, instead of producing a copy of the SWARS address without the Confidential designation as Judge Soulikias ordered, UP filed (1) an untimely appeal (UP-124), and (2) a separate motion requesting "that the Board act on an emergency basis" to "immediately stay Decision No. 43 insofar as it orders the redesignation of the video from Confidential to public." UP-125, at 1-5.

CPKC will address UP's appeal and emergency stay motion on or before Wednesday, November 4, consistent with the deadlines set forth in Decision No. 30. CPKC makes this motion to address UP's ongoing non-compliance with Decision No. 43 and to request that the Board order UP to produce a reclassified version of the video forthwith.[4]

Argument. UP has willfully violated, and is continuing to willfully violate, Judge Soulikias's ruling, which unambiguously required UP to produce a copy of the video "without the 'Confidential' designation by October 30, 2026." Decision No. 43, at 9. UP did not appeal that ruling before the October 28 deadline for appealing. There could be no good faith basis for UP to think it could appeal after October 28, especially given that Applicants are charged with an obligation to read the Board's orders in this proceeding. UP's failure to produce a redesignated copy of the video last Friday is nothing short of contemptuous. *See, e.g.*, *Consol. Rail Corp.—Abandonment Exemption—In Hudson County, NJ*, AB Docket No. 167 (Sub-No. 1189X), et al. (served Jan. 26, 2017), at 3 ("An interlocutory appeal under § 1115.1 and § 1115.9 does not stay the effect of the FERC ALJ's October 2016 Decision pending a Board ruling on the appeal."); *Consol. Rail Corp.—Abandonment Exemption—In Hudson County, NJ*, AB Docket No. 167

[4] CPKC has possession of the version of the video that UP classified as Confidential Information under Decision No. 1. In accordance with Decision No. 43, CPKC has continued to treat it as Confidential Information.

(Sub-No. 1189X), et al. (STB served Apr. 28, 2017) at 4-11 (affirming sanctions terminating party's participation in proceeding and awarding attorney's fees based on party's failure to comply with ALJ's discovery order); *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").

UP is wrong that Judge Soulikias "temporarily stay[ed] the requirement that it reproduce the recording as public pending the resolution of this appeal." UP-124, at 2 n.1. Judge Soulikias did not mention, let alone purport to change, the deadlines set in Decision No. 30. Rather, she gave UP the opportunity to pursue an appeal. UP chose not to appeal before the deadline for appealing passed. Nor did Judge Soulikias's ruling purport to relieve UP of its obligation to produce the video if UP decided to pursue an untimely appeal. She told UP to produce the video by last Friday. UP did not.

The Board has broad discretion to "make such orders . . . as are just" with respect to the failure to adhere to production obligations. 49 C.F.R. § 1114.31(b)(2). At a minimum, the Board should order UP to comply with Judge Soulikias's ruling immediately by producing the SWARS video without the "Confidential" designation.[5] UP was aware of the deadline to appeal

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[5] UP's suggestion that the Board rewrite the ALJ's order to allow UP to maintain restrictions on the use and disclosure of the video by allowing UP "to make Union Pacific's Recording available for public review on [UP's] website while preserving the Confidential designation and use restrictions established in the Protective Order," UP-124, at 15, is preposterous. *First*, modifying Judge Soulikias's order after UP failed to appeal it in a timely fashion would set a dangerous precedent incentivizing others to flout the Board's procedures. *Second*, UP waived this argument by not raising it with Judge Soulikias. *See CSX Corp. & CSX Transportation, Inc., Norfolk Southern Corp. & Norfolk Southern Railway Co.—Control & Operating Leases/Agreements—Conrail Inc. & Consolidated Rail Corp*., Finance Docket No. 33388 (STB Decision No. 32 served Sept. 12, 1997), at 2–3 & n.5 (declining to consider new objection not raised before ALJ); *Consol. Rail Corp.—Abandonment Exemption—In Hudson County, NJ*, AB Docket No. 167 (Sub-No. 1189X), et al. (STB served Apr. 28, 2017), at 7-8 n.8 ("A reviewing court generally

and chose not to follow that deadline, instead making a filing after business hours on Friday evening, thereby ensuring at least three days of delay before the relief ordered by the ALJ could be effectuated.

Any further delay would only reward UP's strategy. The Board also has broad discretion to order additional relief under § 1114.31(b)(2), especially insofar as UP's conduct with respect to its obligation to adhere to Judge Soulikias's order is part of a pattern of conduct, as outlined in CPKC's letter filed last Friday regarding the broader implications of the pattern of misconduct reflected in the Vena video. *See* CPKC-64; *see also Oversight Pertaining to Union Pac. R.R. Embargoes*, Ex Parte No. 772 (STB served Apr. 17, 2024), at 1-3 (describing how UP's discovery conduct "bordered on the contumacious and cannot be viewed as acceptable conduct by a railroad subject to the Board's statutory authority" and warning that "[g]oing forward, the Board fully expects UP, like all other members of the industry, to responsibly, timely, and candidly comply with such Board requests for information and will not tolerate the type of conduct exhibited by UP in this docket").

As mentioned above, CPKC will respond by Wednesday to UP's untimely appeal and stay motion in the event the Board has not already enforced the ALJ's order. But insofar as it is relevant to the relief CPKC seeks in this motion, CPKC provides the following observations.

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will not consider an argument that was not raised before the agency at the time appropriate under its practice" (quoting *BNSF Ry.* v. *STB*, 453 F.3d 473, 479 (D.C. Cir. 2006))). UP's position was simply to resist any public release of the video. *See* UP-116, at 1-3. *Third*, UP's proposal is absurd on its face. UP's proposal would, among other things, (a) channel those eager to view the video onto UP's webpage propagandizing its views about the proposed merger, (b) give UP control over how the public could view the video, (c) prohibit making copies of the video, and thereby interfere with communication with others about particular portions of it, and (d) maintain an in terrorem threat of UP pursuing some form of sanctions for any public reference to the video to which UP might object. The Board should not countenance UP's attempt to seek retroactive modification of the terms of an order that it chose not to appeal in a timely fashion, has already violated, and continues to violate.

1. UP's appeal is unlikely to succeed for the straightforward reason that it is untimely and the ALJ ruling redesignating a video of a public speech as public was undoubtedly correct. The Board has ordered that "any appeal to a decision issued by the ALJ must be filed within five calendar days of the date of the ALJ's decision." Decision No. 30, at 11. Judge Soulikias's decision was issued on October 23. The deadline to appeal came and went on October 28. As the Board has already concluded in this proceeding—at UP's urging—untimely appeals should be denied. Decision No. 13, at 4-5 (served March 18, 2026). Beyond that threshold deficiency, UP cannot show that Judge Soulikias's conclusion—that a video of an address that UP's CEO made to about 900 people, including, presumably, the very shippers in the audience that UP claims support its merger, fails to qualify as "Confidential Information" under Decision No. 1—will cause "substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party," 49 C.F.R. § 1115.9(a)(4), or constitutes a "clear error of judgment" or will result in "manifest injustice." 49 C.F.R. § 1115.1(c).

2. Disclosure of the video would not result in irreparable injury. Congress has publicly disclosed the substance of the video: "threatening to retaliate against stakeholders who oppose their merger application." CPKC-64, Ex. H. UP has publicly denied it: "Union Pacific did not threaten anyone." CPKC-64, Ex. L. The result of disclosing the video will be that the public can decide. UP cites no precedent to support its claim that irreparable injury arises under these circumstances.

3. Continued delay of the production of the video—which should have occurred over the summer without the extensive motion practice UP's intransigence required—is contrary to the public interest and would harm other parties to this proceeding. As Judge Soulikias correctly observed, the public has a substantial interest in disclosure of the video. Decision No.

43, at 5. Among other things, the shipper associations that supported CPKC's motion "cannot reveal the contents of the video or Mr. Vena's speech to shippers to see if they want to file comments as non-parties without violating the Protective Order." *Id.* The deadline to file comments is rapidly approaching, and every day that passes while the video remains secret is significant.

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CPKC respectfully requests that the Board order UP to comply with Decision No. 43 and produce a redesignated copy of the SWARS video without the "Confidential" designation, along with whatever other relief the Board deems appropriate.

Respectfully submitted,



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Dated: November 2, 2026

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November 2026, I caused a copy of the foregoing 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 Law Judge Jenifer Soulikias.

/s/ *Andrea L.R. Pillai*

Andrea L.R. Pillai