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BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36873

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

UNION PACIFIC'S APPEAL OF ALJ'S ORDER REDESIGNATING CONFIDENTIAL MATERIAL AS PUBLIC

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Union Pacific appeals the portion of Decision No. 43 (served October 23, 2026) in which Administrative Law Judge Jenifer J. Soulikias (the "ALJ") granted a motion filed by Canadian Pacific Railway Company ("CPKC") and ordered Union Pacific to redesignate as public its proprietary recording of Union Pacific CEO Jim Vena's address at the Southwest Association of Rail Shippers ("SWARS") annual conference ("Union Pacific's Recording").[1]

Union Pacific and Norfolk Southern ("Applicants") have committed to transparency throughout this proceeding. They have submitted approximately 7,000 pages of application-related material, supported by hundreds of gigabytes of

[1] This appeal is timely under 49 C.F.R. § 1115.9(b) because it is filed within seven days of the service of Decision No. 43. Union Pacific understands Decision No. 43 to temporarily stay the requirement that it reproduce the recording as public pending the resolution of this appeal. Decision No. 43 at 6 ("No party (or person who has signed the Undertaking) shall use the video for any purpose in violation of the 'Confidential' designation *until* UP provides the video without the 'Confidential' designation. This enables UP to appeal this order to the Board, if it chooses (without letting the cat out of the bag).") (emphasis added). Should the Board disagree with this reading of Decision No. 43, Union Pacific has simultaneously moved for a temporary stay pending resolution of the instant appeal. UP-125.

electronic workpapers, and have produced more than 4 million pages of additional material in response to party discovery. In providing this vast quantity of material, Applicants have relied on the Board's protective order entered in this proceeding ("Protective Order"). The Protective Order ensures that non-public material produced by Applicants and other parties is used solely to build the record on which the Board will evaluate the merits of this proceeding, not for impermissible purposes.

Redesignating Union Pacific's Recording as public would be inconsistent with the Protective Order and is unnecessary to build the record in this proceeding. CPKC and all other parties to this proceeding have access to Union Pacific's Recording under the Protective Order. CPKC's motion was an attempt to misuse the Board's discovery process to make Union Pacific's proprietary material available for use outside this proceeding. CPKC has repeatedly shown that its objective is not to build the record to assist the Board in evaluating the proposed transaction, but to prevent consideration of the transaction's merits.[2] The ALJ erred in granting CPKC's motion.

An interlocutory appeal of Decision No. 43 is appropriate because Union Pacific may suffer "substantial irreparable harm" and "undue prejudice" unless the decision is reversed. 49 C.F.R. § 1115.9(a)(4) (providing for interlocutory appeal where a "ruling may result in substantial irreparable harm … or undue prejudice to a party"). If Decision No. 43 stands, Union Pacific's Recording will be available for any party or

[2] In August 2026, CPKC, along with BNSF, CSX, and the Joint Shipper Associations, filed a motion to dismiss the proceeding. CPKC-38; BNSF-46; CSXT-19; ACC-6/ACD-6/AFPM-6/NITL-3/TFI-6. On October 30, 2026, CPKC filed a letter similarly attempting to derail the Board's process for developing the record and evaluating this merger on the basis of the factual record and the merits. CPKC-64.

non-party to edit, clip, manipulate, and distribute for any purpose outside this proceeding. No later ruling could undo that harm.

The Board should grant Union Pacific's appeal because reversal of Decision No. 43 is necessary to correct a clear error of judgment and to prevent manifest injustice. 49 C.F.R. § 1115.1(c). The Protective Order expressly protects "confidential, proprietary, or commercially sensitive information." Decision No. 1 at 2. Union Pacific's Recording—a recording that Union Pacific paid for, owns, and has never publicly released—falls within the definition of protected Confidential Information. The ALJ reached a different conclusion by applying requirements the Protective Order does not contain. The ALJ's reasoning would permit any party's proprietary discovery materials to be redesignated as public and used by competitors outside this proceeding, defeating the Protective Order's purpose of limiting such material to use in this proceeding.

The ALJ's alternative holding that the public interest favors redesignation is also clearly erroneous. Designation of Union Pacific's Recording as Confidential does not limit any party's ability to present Union Pacific's Recording to the Board, and it does not restrict any stakeholder's participation in this proceeding. For these reasons, Union Pacific respectfully requests that the Board reverse Decision No. 43.

In the alternative, if the Board concludes that Union Pacific's Recording should be produced in a manner that makes it accessible to the public, Union Pacific would be willing to post the material on its website.[3] However, the Board should not

[3] Union Pacific would post the material at https://www.up-nstranscontinental.com/

redesignate the material as public. Rather, the Board's order should provide that Union Pacific's Recording remains subject to the restrictions applicable to Confidential material—that is, the Board should expressly preclude parties and non-parties from using the material outside of this proceeding. As a result, non-parties could review Union Pacific's Recording, but neither parties nor non-parties could reproduce or otherwise use Union Pacific's Recording for any purpose outside this proceeding.

BACKGROUND

Union Pacific CEO Jim Vena delivered the "Railroad Executive Keynote Address" at the SWARS 2026 Annual Meeting, held March 16–17, 2026, in Houston, Texas. Attendance at the conference was limited to registered attendees who paid a fee, and the event was not livestreamed or otherwise broadly disseminated. UP-116 at 2 n.3. Union Pacific paid for a video recording of Mr. Vena's address and owns that recording. Union Pacific has never published, posted, or otherwise distributed Union Pacific's Recording to the public. *Id.* at 1–2.

On July 17, 2026, Senator Tammy Baldwin submitted a letter to the Board regarding Mr. Vena's remarks at the SWARS conference. Decision No. 43 at 2–3. On July 22, 2026, the Board acknowledged that letter in Decision No. 28, stating that it "expects all parties to agency proceedings to refrain from statements or conduct that could deter public participation" and that it "will not tolerate retaliation." Decision No. 28 at 4.

CPKC subsequently sought production of Union Pacific's Recording in discovery. CPKC-58 at 1 & Ex. A. On October 1, 2026, Union Pacific produced the

video through the discovery process and designated it "Confidential" under the Protective Order. *Id.* at 1. The Protective Order defines "Confidential Information" to include, among other things, "other confidential or proprietary business information." Decision No. 1, App. ¶ 1(b).

On October 2, 2026, CPKC and counsel for the Joint Shipper Associations ("JSA") each asked Union Pacific to redesignate Union Pacific's Recording as public. CPKC-58 at 1; ACC-8/ACD-8/AFPM-8/NITL-5/TFI-8 ("JSA Letter"), Ex. B. Union Pacific explained to the JSA that the recording was properly designated because Union Pacific "paid for the recording to be created, owns the copy in its possession, and has not distributed the video to the public," and that the designation still permits any party to use the video "for the preparation and presentation of evidence and arguments in this proceeding." JSA Letter, Ex. B.

On October 6, 2026, CPKC filed a letter motion asking the ALJ to direct Union Pacific to redesignate Union Pacific's Recording as public or, in the alternative, asking the Board to resolve the issue. CPKC-58 at 2. CPKC argued that the SWARS conference was a public event and that any confidentiality interest was outweighed by the public interest in disclosure. *Id.* On October 9, 2026, the JSA filed a letter brief supporting CPKC's motion. JSA Letter at 1.

Union Pacific opposed the motion on October 13, 2026. UP-116. Union Pacific explained that Union Pacific's Recording is proprietary business information that the Protective Order permits it to designate as Confidential, and that the designation fully preserves every party's ability to use the video in this proceeding. Union Pacific

further explained that lifting the designation would allow CPKC—one of Union Pacific's principal competitors and a leading opponent of the transaction—and others to circulate excerpts of the video, stripped of their context, outside this proceeding. *Id.* at 1–3.

Following a discovery conference on October 16, 2026, the ALJ issued Decision No. 43, granting CPKC's motion. Decision No. 43 at 1, 9. The ALJ concluded that Union Pacific's Recording is not "confidential or proprietary business information" under the Protective Order and, in the alternative, that "the public's interest weighs in favor of redesignating the video recording as public." *Id.* at 5. She ordered Union Pacific to provide the video without the Confidential designation by October 30, 2026, and directed that no party use the video in violation of the designation until then, so as to permit Union Pacific to seek review by the Board. *Id.* at 6, 9–10.

ARGUMENT

A. The Redesignation of Union Pacific's Recording as Public May Result in Substantial Irreparable Harm and Undue Prejudice to Union Pacific.

An interlocutory appeal is proper where the ruling below "may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party." 49 C.F.R. § 1115.9(a)(4). Decision No. 43 plainly meets that standard.[4]

[4] In the alternative, Decision No. 43 satisfies 49 C.F.R. § 1115.9(a)(2) because it effectively "grants a request for the inspection of documents not ordinarily available for public inspection." Union Pacific commissioned its recording and has never publicly released it, and Decision No. 43 strips it of the protection afforded by the Protective Order. UP-116 at 1–2.

The potential harms that may result from redesignating Union Pacific's Recording as public cannot be undone. Once the Confidential designation is removed, the video may be used in any manner, by any person, for any purpose—including purposes wholly unrelated to this proceeding. The ALJ herself recognized that disclosure is irreversible: she barred use of the video in violation of its Confidential designation pending production specifically so that Union Pacific could appeal "without letting the cat out of the bag." Decision No. 43 at 6. If the Board does not intervene now, no later ruling can restore the protection that Decision No. 43 removes.

The prejudice to Union Pacific is equally clear. The movant, CPKC, is one of Union Pacific's principal competitors and a leading opponent of the transaction. UP-116 at 3. Redesignation does nothing to aid any party in building the record before the Board, because every party that has signed the appropriate undertaking to the Protective Order already has full access to the video and may use it in this proceeding. *Id.* at 2. The only thing redesignation accomplishes is to permit Union Pacific's competitors and other opponents to use the video outside this proceeding—not to argue the merits of the transaction, but to use it for some other, improper purpose. That is precisely the kind of use the Protective Order forbids. Decision No. 1, App. ¶ 11 (barring use of designated material for "any business, commercial, strategic, or competitive purpose").

The ALJ acknowledged the risk that the video could be used for improper purposes, particularly if it is selectively edited, but then concluded that "[t]he remedy

is for the entire video to be designated as public" under the "rule of completeness." The ALJ reasoned that "[i]f someone takes a snippet or excerpt out of context, then the entire exchange or video should be provided for context." Decision No. 43 at 5–6. As a practical matter, however, redesignating the entire video without use restrictions will do nothing to stop other parties or members of the public from clipping it, selectively editing it, or circulating excerpts stripped of their context. If the video is simply designated public, nothing restrains how it is used. And nothing requires an excerpt to be accompanied by the full recording. Nor would those seeking to misuse the video have any incentive to include the full context. And because the use of the video would not be limited to this proceeding, Union Pacific may never have the opportunity to directly rebut any distortions of the recording. The purpose of circulating excerpts outside this proceeding would be to portray Union Pacific as unfavorably as possible, and that purpose is served by the clip, not by the context.

The ALJ's reliance on the rule of completeness is also misplaced in principle. The rule is an evidentiary doctrine. It allows a tribunal to require that the remainder of a writing or recording be introduced so the factfinder is not misled. Fed. R. Evid. 106. Union Pacific's concern, however, is not how Union Pacific's Recording is used *within* this proceeding, where the parties and the Board all have the ability to access the full recording. UP-116 at 2. Parties with access to the full video in its entirety understand the entire context. Rather, Union Pacific's concern is how CPKC and others choose to strip away that context in order to create a narrative untethered from facts and reality. The rule of completeness has no force in private meetings or

presentations, where Union Pacific would have no awareness of the use of its video and therefore no opportunity to respond by providing appropriate context. Decision No. 43 thus invokes a doctrine meant to guard against misleading excerpts to order the very redesignation that makes such excerpts possible. Only appropriate use restrictions can protect against the excerpting risk that the ALJ acknowledged in Decision No. 43.

B. The ALJ Erred in Rejecting Union Pacific's Proprietary Interest in Its Recording.

The Protective Order defines "Confidential Information" to include not only traffic data, shipper contract terms, and cost data, but also "other confidential *or* proprietary business information." Decision No. 1, App. ¶ 1(b) (emphasis added); *see also id.* at 2 ("Unrestricted disclosure of confidential, proprietary, or commercially sensitive information or data could cause serious competitive injury to the parties."). The disjunctive is deliberate: information may qualify because it is proprietary, even if it does not otherwise belong to the other listed categories of "Confidential" information. "Proprietary information" is "[i]nformation in which the owner has a protectable interest." Black's Law Dictionary (11th ed. 2019). Union Pacific's Recording falls squarely within that definition. Union Pacific paid for the recording to be created and owns it. Union Pacific has never released the video publicly; it has intentionally kept the recording confidential, and it is entitled to decide whether, when, how, and to whom the video is disseminated. UP-116 at 1. The video left Union Pacific's control only through compelled discovery in this proceeding, which does not waive its protected status. *Id.* at 1–2 (citing *Norfolk S. Corp.—Acquisition of*

Control—Norfolk & Portsmouth Belt Line R.R., FD 36836 (STB served Aug. 27, 2025)).

Respectfully, the ALJ's contrary conclusion rests on requirements that do not appear in the Protective Order. The ALJ concluded that "[o]wnership is not enough" and that a designation requires a "confidential business nexus." Decision No. 43 at 5. The ALJ also noted that Union Pacific had not copyrighted the recording or restricted recording by attendees at the SWARS conference. *Id.* at 4–5. However, none of these conditions imposed by the ALJ are found in the text of the Protective Order. The Protective Order does not require a party to register a copyright, police an audience, or articulate a competitive-harm theory before designating its own proprietary material. In applying conditions that the Protective Order does not contain, Decision No. 43 committed a clear error of judgment. 49 C.F.R. § 1115.1(c).

Nor does the hypothetical discussed in Decision No. 43 justify these additional requirements. The ALJ posited a scenario in which a Canadian Pacific executive, before the CPKC merger, gave a presentation endorsing rail mergers to an audience that included Union Pacific personnel. In this scenario, Union Pacific later sought the recording in discovery to "show the Board that CPKC thinks that mergers are good," and CPKC designated the recording as proprietary because it "was recorded and then never shared after the event." Decision No. 43 at 4–5.

The ALJ relied in part on this scenario to conclude that a party "cannot shield from public view any information that may be harmful to its case." *Id.* at 5. But a Confidential designation would not prevent Union Pacific from doing anything the

hypothetical contemplates. Union Pacific could file the entire recording with the Board, cite it in its evidence and argument, and urge the Board to weigh CPKC's prior statements against its current position. What the designation *would* prevent is something else entirely: extracting a single clip and deploying it in advertising or media campaigns outside this proceeding to attack CPKC's credibility. The Protective Order draws exactly that line—permitting use "solely for purposes of this proceeding" while barring use for "any business, commercial, strategic, or competitive purpose." Decision No. 1 at 2 & App. ¶ 11. The same is true here. The Confidential designation places no limit on any party's ability to present Union Pacific's Recording to the Board. It restricts only the use of the video outside this proceeding, which is the exact use that redesignation would enable. A "confidential business nexus" requirement is therefore unnecessary to prevent a party from hiding harmful evidence, because the designation never keeps that evidence from the Board.

The consequences of the ALJ's interpretation would also work a manifest injustice. 49 C.F.R. § 1115.1(c). If ownership and non-disclosure are not enough to protect confidentiality, then any internal, proprietary business material that a party is compelled to produce in discovery could be redesignated as public and used by its competitors for purposes entirely unrelated to this proceeding, unless the producing party can also satisfy conditions that the Protective Order never imposed. That result would defeat the Protective Order's central purpose of ensuring that "confidential, *proprietary*, or commercially sensitive information" produced in discovery "will be

used solely for purposes of this proceeding and not for any other business or commercial purpose." Decision No. 1 at 2 (emphasis added).

The ALJ's interpretation would also turn compelled discovery into a means for competitors to obtain and publicize a party's proprietary materials, a burden that would fall not only on Union Pacific but on every party that produces documents in this proceeding. And because the harm from redesignation cannot be undone, Union Pacific will have no opportunity to obtain relief later. An outcome that strips a party of the protections it relied on in producing discovery, with no means of correction, is precisely the kind of manifest injustice that warrants the Board's intervention.

C. The ALJ's Alternative Holding That the Public Interest Outweighs the Confidential Designation Is Also Erroneous.

The ALJ held in the alternative that, even if the designation were appropriate, "the public's interest weighs in favor of redesignating the video recording as public." Decision No. 43 at 5. That holding also constitutes error. The discovery process exists to build a record for the Board's decision. The Board's rules permit discovery of matters "relevant to the subject matter involved in a proceeding," 49 C.F.R. § 1114.21(a), and the Protective Order ensures that "confidential, proprietary, or commercially sensitive information" produced in discovery "will be used solely for purposes of this proceeding." Decision No. 1 at 2. Discovery is not an avenue for obtaining a party's materials for use outside the proceeding; it is a means of providing the Board with a complete record. CPKC's request for redesignation does nothing to move this proceeding forward or to aid the Board's evaluation of the transaction; its only effect is to free the video for use outside the proceeding. The Confidential

designation does not impede discovery's legitimate purpose in any way: every party that has signed the appropriate undertaking to the Protective Order may view the video and use it in its filings, as the JSA concedes. JSA Letter at 2–3; UP-116 at 2. And it is the Board, not the parties, that will determine the materiality of the video to the merits. UP-116 at 2. Indeed, the parties' own conduct confirms that the designation has not hindered development of the record: when Mr. Vena was deposed in this proceeding, no party questioned him about the SWARS conference or his remarks there. No party has identified any use of the video in this proceeding that the designation prevents. A ruling whose only practical effect is to permit dissemination to individuals who would not otherwise be aware of the speech serves no interest that discovery is meant to advance.

Nor does the designation impair stakeholder participation. Stakeholders have had over a year to decide whether to participate as a party in this proceeding, and the deadline to file notices of intent to participate passed on September 30, 2026. Decision No. 35 at 2. Non-parties also remain free to file statements supporting, opposing, or commenting on the transaction, as the JSA concedes. JSA Letter at 3. The Board's statement in Decision No. 28 concerns stakeholders' freedom to participate without fear of retaliation, and the Confidential designation does nothing to restrict that freedom. UP-116 at 2–3.

Finally, the public interest does not require release of unrestricted copies of the video. Mr. Vena's SWARS remarks have already been the subject of extensive public discussion, including in Senator Baldwin's letter to the Board and the Board's

response in Decision No. 28. *See* Letter from Sen. Tammy Baldwin to the Board, FD 36873 (filed July 17, 2026); Decision No. 28 at 4. The public interest does not require granting CPKC and others the ability to obtain proprietary material through the discovery process and use it outside this proceeding. Such conduct is what the Protective Order is designed to prevent. The ALJ's alternative holding should therefore be reversed.

CONCLUSION

For the foregoing reasons, Union Pacific respectfully requests that the Board reverse Decision No. 43 insofar as it orders the redesignation of Union Pacific's Recording from Confidential to public. In the alternative, Union Pacific requests that the Board order Union Pacific to make Union Pacific's Recording available for public review on its website while preserving the Confidential designation and use restrictions established in the Protective Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2026, the foregoing document was served by first-class mail or email on all parties of record to this proceeding, the Secretary of Transportation, the Attorney General of the United States, and Administrative Law Judge Jenifer Soulikias.

/s/ Daniel Damitio