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November 2, 2026

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Chief of Case Administration
Office of General Counsel
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

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November 2, 2026
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BNSF-69

Re: FD 36873 – BNSF's Opposition to UP's Appeal of Decision No. 43 (UP-123)

Dear Chief of Case Administration:

UP's appeal of Decision No. 43 should be denied immediately. To start, the appeal is untimely. UP did not comply with the firm deadline to file the appeal. On the merits, the ALJ properly rejected UP's attempt to shield from the public UP CEO Jim Vena's remarks to hundreds of shippers at the SWARS conference. There is no basis to claim a video of a speech to hundreds of shippers is confidential under the Protective Order.

So why did UP file an untimely appeal at 7:00 PM on a Friday night? To delay the public disclosure of Mr. Vena's threats before the November 18 deadline for comments. This appeal is a cynical ploy to delay and cover up the comments by an applicant that professes to be "transparent," but is anything but. UP's appeal should be denied immediately. Any further delay only rewards UP's strategy.

Why the video of the speech by UP's CEO matters. It is important that the speech not be shielded from the public. In this proceeding and to the public, UP states that customers support the proposed merger and that silence from any particular shipper (or group) should not be viewed as opposition. Mr. Vena's remarks at SWARS directly undermine both points. A CEO doesn't need to threaten customers if they support the proposed merger; he only needs to threaten them if he knows they oppose it. And, expressing threats to such a large group of customers undermines any argument that silence is indicative of non-opposition.

The merger review proceeding is a serious public process, not a private negotiation. It is a process in which the Board must decide whether the proposed merger is in the "public interest" and whether to affirmatively give UP a license to acquire NS and operate a transcontinental railroad with more than 50% of the rail share in the country. It is imperative that the review process be public, not negotiated behind closed doors with key pieces of evidence shielded from the public.

The appeal is untimely. In August, the Board clarified the deadline applicable to appeals of ALJ orders: Appeals "must be filed within five calendar days of the date of the ALJ's decision." Decision No. 30 at 11. The ALJ issued her decision on October 23, so UP's deadline to appeal was October 28. UP missed this deadline by two days, without even mentioning Decision No. 30 or trying to excuse its noncompliance. As UP said in response to a prior appeal in this case, "follow[ing] clearly defined deadlines is essential for ensuring that this proceeding continues in an efficient manner without unnecessary waste of Board resources." UP-29/NS-28 at 7. The deadlines in Decision No. 30 are not ambiguous or unclear. Given this, UP's late filing was a purposeful and intentional choice made for strategic reasons. (Because there is no valid appeal, there is no basis to stay an order pending an appeal.)

The appeal is meritless. The video that UP claims is "confidential" is a video of a speech UP's CEO gave to an audience of hundreds of people, including UP's customers and competitors. The ALJ's order directing the public release of a video of a public speech cannot cause irreparable harm or undue prejudice to UP. As the ALJ found—after considering the views of the Joint Shipper Associations—"the public's interest weighs in favor of the public designation." Decision No. 43 at 5.

To be sure, what Mr. Vena said at that conference should cause the Board concern and those comments should cause grave harm to UP's merger application. The comments corroborate UP's existing reputation for exploiting its current market power. They unequivocally show how UP intends to wield its unprecedented post-merger market power if the Board approves the merger. Mr. Vena's comments are emblematic of how UP's leadership thinks about price maximization and its power to set prices. (It is worth remembering that the Board penalized CN for deceptive and noncompliant behavior during the EJ&E oversight proceeding while Mr. Vena was CN's senior vice president for southern operations. *See* App. Vol. 1, p. 237.) While the video is shocking because it is such a stark admission, it also reflects UP's disdain for the regulatory process and comfort with abusing market leverage and power. All of that will be addressed in the merits phase. The video should be released immediately, so every stakeholder can consider it. Stakeholders may be outraged by Mr. Vena's comments or, unfortunately, further discouraged from commenting in this proceeding. Either way, the immediate public disclosure of the video is the only way stakeholders can make informed decisions as they consider whether to prepare their comments (which are due in less than three weeks).[1]

[1] In the merits phase, the Board should consider drawing an adverse inference regarding UP's misconduct. For example, the Board could draw an inference that even more shippers would have opposed the merger but for Mr. Vena's threats. At this stage, the only issues before the Board are whether the appeal is timely and whether it has merit.

UP's alternative relief is just another way UP seeks to game the system. UP knows the video is public. That is why UP offers a proposal where the video would be public—but only subject to heavy-handed control by UP. The Board should reject UP's request to permit UP to (i) post the video on UP's pro-merger website *and* (ii) restrict at UP's unilateral discretion how stakeholders and other regulators can use and download that video *while also* (iii) retaining the ability to track who watches the video. This is a *stunning*—and unprecedented—proposal. Setting aside that this proposal has been waived (as it was not raised with the ALJ), it would permit UP to observe who watches the video and to punish those viewers commercially. It is wildly problematic that a shipper or other stakeholder must engage with UP's technology (and then risk being tracked by UP) in order to learn about UP's behavior that UP has fought for months to keep them from seeing. There can be no version of this proposal that would not fatally undermine the very purpose of public disclosure.

The speech to the public—to hundreds of shippers and rail competitors—is not confidential. Accordingly, it cannot be shielded from the public pursuant to the Protective Order. The appeal is both untimely and meritless. It should be denied immediately.

Respectfully,

/s/ Daniel Donovan
Daniel T. Donovan, P.C.
Counsel for BNSF Railway Company

CERTIFICATE OF SERVICE

I certify that I caused the foregoing to be served electronically or by first-class mail, postage pre-paid, on the Secretary of Transportation, the Attorney General of the United States, Applicants' representatives, Administrative Law Judge Jenifer Soulikias, and all parties of record in this proceeding.

/s/ Onika Williams
Attorney for BNSF Railway Company
November 2, 2026