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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 REPLY TO CPKC'S MOTION TO ENFORCE DECISION NO. 43

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Union Pacific opposes CPKC's Motion to Enforce Decision No. 43 (CPKC-66), which asks the Board to reject Union Pacific's appeal of Decision No. 43 (UP-124) as untimely, for the following reasons.

First, Union Pacific filed its appeal on October 30, consistent with the underlying decision by the ALJ. In Decision No. 43, the ALJ directed Union Pacific to provide the video without the Confidential designation "by October 30, 2026," and explained that the interim restriction on use of the video until that date "enables UP to appeal this order to the Board, if it chooses (without letting the cat out of the bag)." Decision No. 43 at 6, 9. Decision No. 43 did not reference the Board's Decision No. 30, which imposed a general five-day deadline on appeals, and Union Pacific reasonably understood the ALJ's specific order to contemplate that any appeal would be filed by October 30—the date Union Pacific filed the appeal—so that the Board could consider the appeal before the video's designation changed. Union Pacific thus did not intentionally disregard either the ALJ's order or the Board's Decision No. 30. Rather,

Union Pacific sought review on the schedule provided by the ALJ's order (and the Board's general regulations at 49 C.F.R. § 1115.9(b)).[1]

Second, if Union Pacific misinterpreted the ALJ's order, Union Pacific apologizes, but no party will be prejudiced. Every party that has signed the Undertaking—including CPKC—already has access to the video at issue and may use it in this proceeding. CPKC acknowledges that it has the video in its possession. CPKC-66 at 3 n.4. Further, CPKC has stated that it will respond to Union Pacific's appeal by November 4, CPKC-66 at 3, so the timing of Union Pacific's filing has not disrupted the briefing of the appeal. And the Board can resolve the appeal well in advance of the November 18 comment deadline that CPKC invokes. By contrast, if the appeal is not considered, the harm to Union Pacific—public release of its proprietary recording for use outside this proceeding—cannot be undone.

Third, even if the Board were to conclude that Union Pacific's appeal is untimely, the Board should exercise its authority on its own motion to review Decision No. 43 and reverse it to the extent it requires redesignation of Union Pacific's proprietary recording as public. The Board has already taken similar action in this proceeding. In Decision No. 13, the Board denied BNSF's appeal of an ALJ discovery order as untimely, but nonetheless acted *sua sponte* to address the subject

[1] Although Union Pacific understands the Board's reason for imposing a five-day appeal deadline in Decision No. 30 and will comply with that deadline in future appeals, the Board's authority to change its specific regulation without following notice-and-comment rulemaking requirements is unclear. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015); *Marseilles Land & Water Co. v. FERC*, 345 F.3d 916, 920 (D.C. Cir. 2003); *Am. Fed'n of Gov't Emps., AFL-CIO, Loc. 3090 v. FLRA*, 777 F.2d 751, 759 (D.C. Cir. 1985).

matter of the appeal, directing Applicants to submit "ordinary course" transaction documents of the type the parties had addressed in the briefing on that appeal. Decision No. 13 at 4–5 (served Mar. 18, 2026). The same approach is warranted here. The ALJ presides over discovery in this proceeding pursuant to the Board's delegation, and the Board retains authority to supervise and correct the ALJ's discovery rulings, including the application of the Board's own Protective Order. For the reasons set out in Union Pacific's appeal, Decision No. 43 applies requirements that the Protective Order does not contain and, if left uncorrected, would permit any party's proprietary discovery material to be redesignated as public and used outside this proceeding. That question affects every party producing material under the Protective Order and warrants the Board's review regardless of the timing of Union Pacific's appeal. The Board should therefore deny CPKC's motion and consider Union Pacific's appeal on the merits.

Respectfully submitted,

/s/ Michael L. Rosenthal
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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November, 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