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Office of Chief Counsel
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Part of
Public Record

Hon. Jenifer J. Soulikias
Administrative Law Judge
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: Docket No. FD 36873, *Union Pacific Corp., et al. - Control - Norfolk Southern Corp., et al.*

Dear Judge Soulikias:

Union Pacific respectfully opposes Movants' motion to recall Katie Novak for additional deposition testimony.[1] The Discovery Guidelines are clear: fact witness depositions are limited to seven hours. Decision No. 24 at 3. The parties have completed 21 depositions under the Discovery Guidelines framework, which has allowed discovery to proceed efficiently while reasonably protecting witnesses. The same rules should apply to Ms. Novak's deposition, and the examining parties' failure to allocate their examination time provides no basis for an exception.

First, the noticing parties are responsible for managing how the seven-hour period is allocated, and the fact that certain examining parties received less or no questioning time reflects the examining parties' own allocation decisions, not any action by Union Pacific or Ms. Novak. Indeed, in other depositions in this proceeding, counsel have recognized the seven-hour limit and not attempted to question the witness when the prior examiners used all of the time.[2] Here, by contrast, Movants did not ask for additional time until after Ms. Novak had been excused.[3]

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[1] The Movants are Iowa Interstate Railroad, LLC ("IAIS"), Foresight Energy, LLC ("Foresight"), and Metra (the Northern Illinois Commuter Rail Division of the Regional Transportation Authority) ("Metra").

[2] *See, e.g.*, Rynaski Dep. Tr. at 412:21-413:12 [redacted]

[3] Novak Dep. Tr. at 398:10-15 [redacted]

During the deposition, a remotely-participating party that apparently had not been allocated examination time nevertheless conducted approximately thirty minutes of questioning,[4] and certain other examining attorneys apparently exceeded their agreed-upon time.[5] Counsel for the moving parties complained off the record about the time spent on these lines of questioning. Once the discussion resumed on the record, however, counsel briefly recognized the examination time consumed by parties other than Union Pacific before withdrawing that point and changing course to raise complaints regarding Union Pacific's objections. [6] Counsel for the noticing party likewise acknowledged that he might have been at least partially responsible for the misallocation of examination time.[7]

Second, counsel for Movants—the final examining attorney—made his own choice to ask questions on behalf of only one of his clients, notwithstanding that he started his examination with only 28 minutes remaining in the deposition, a fact that was readily available to all counsel.[8]

Third, there is no basis to exclude objection time from the seven-hour limit. The governing rules and established deposition practice recognize that the deposition clock continues to run during objections made on the record. *See* Fed. R. Civ. P. 30(c)(2) (objections "must be noted on the record," and the examination otherwise "proceeds" subject to them). Moreover, the objections asserted during Ms. Novak's deposition were appropriate and necessitated by the questions. Many of them concerned foundation, with the witness's answers confirming the basis for those objections.[9] Objections to errors that could be corrected at the deposition must be

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[4] *Id.* at 402:7-10 [redacted]

[5] *Id.* at 401:2-3 [redacted]

[6] *Id.* at 400:3-4 [redacted]

[7] *Id.* at 405:11-14 [redacted]

[8] Counsel for Foresight/Metra, the final examining attorney, asked questions only on behalf of Foresight, continued until the limit was reached, and never began any questioning on behalf of Metra. At no point before the witness was excused did he ask for additional time, reserve time for Metra, or indicate that he could not complete both examinations in the time remaining. Nor did any other examining counsel. And as to Movants' complaint about the breaks provided to the witness, including a 40-minute lunch break, the examining parties could have used that time to coordinate their remaining examination time or request the amount of time left on the record from the videographer as examining parties have done in other depositions.

[9] *See, e.g.*, Novak Dep. Tr. at 98:18-23 [redacted]

(continued...)

timely raised during the deposition or they are waived. *See* Fed. R. Civ. P. 32(d)(3)(B). In addition, questions posed by examining counsel also implicated privileged communications and warranted appropriate instructions. The topics of Ms. Novak's deposition included Committed Gateway Pricing ("CGP") and the identification of, and proposed remedies for, two-to-one shippers, both of which involved the participation of counsel.[10] There is no basis for treating objection time any differently in this proceeding, and doing so would encourage precisely the sort of post hoc disputes the Discovery Guidelines are designed to avoid.

Fourth, Movants' complaint about examination time is also undercut by how the examining attorneys used it. As reflected in the transcript, certain examining parties chose to question Ms. Novak extensively about materials and subjects outside her personal knowledge rather than preserving time for other counsel. After Ms. Novak testified that [redacted] counsel then proceeded to read passages [redacted] interspersed with questions about whether she [redacted] Counsel also devoted significant time to whether Ms. Novak's job responsibilities included identifying [redacted] ultimately eliciting the straightforward answer that

[redacted]

[10] *See, e.g., id.* at 83:21-84:9 [redacted]

[11] *Id.* at 45:8-15 [redacted]

[12] *See generally id.* at 45:7-62:20.

[13] *Id.* at 46:2-15.

they did not.[14] Counsel sought testimony from Ms. Novak regarding her personal understanding of a term with potential legal significance, *i.e.*, the meaning of [redacted]

Most notably, one counsel represented on the record that Appendix A of Ms. Novak's verified statement did not in fact contain certain language surrounding gateways that Ms. Novak had testified was contained in the statement, prompted Ms. Novak to review the Appendix on the record, and pursued additional questioning based on his representation.[16] After counsel for Union Pacific identified the precise provision in the verified statement that confirmed Ms. Novak's testimony, examining counsel agreed to strike his inaccurate representation, read that provision into the record, and explained that he had been working from an excerpt rather than the full application.[17] These are just examples of why any inability to complete the examination resulted from the examining parties' own choices about how to use the seven hours.

For the foregoing reasons, Union Pacific respectfully requests that the motion be denied.

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[14] *Id*. at 13:5-22:1.

[15] *Id.* at 35:15-37:5.

[16] *Id.* at 336:11-340:18.

[17] *Id.* at 347:2-348:22.

Respectfully submitted,

/s/ Laura Flahive Wu

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cc: All Parties of Record

Enclosures

CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of October, 2026, the foregoing document was served by first-class mail or email 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/ Travis F. Cabbell