BEFORE THE
SURFACE TRANSPORTATION BOARD

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

RESPONSE OF CSX TRANSPORTATION, INC. TO APPLICANTS' SECOND MOTION TO PERMIT EX PARTE COMMUNICATIONS

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For the second time in these proceedings, Applicants ask the Board to create a special, collateral process for *ex parte* communications that would give Applicants unbalanced access to make their case to the Board. But the Board already has demonstrated its ability to ask questions about the record when it has them, negating Applicants' stated purpose. Their proposal also risks undermining the Board's procedural schedule and subverting the integrity of the record-making process. For the reasons that follow, the Board should again deny Applicants' request.

I. Applicants' renewed request for *ex parte* communications to address questions about the record is unnecessary.

Applicants ask the Board to create a special process for Board member-initiated *ex parte* communications and technical conferences, on the ground that they "believe the merger review process would be materially improved for all parties" if members could "address questions and issues directly through" such communications. *See Union Pac. R.R. Co.'s Motion to Permit Board-Initiated Ex Parte Communications and Technical Conferences* (UP-114/NS-116)*, Union Pac. Corp.–Control–Norfolk S. Corp. ("UP/NS")*, FD 36873 (Oct. 6, 2026), at 1. The Board, however, already has the authority and ability to ask questions that clarify the record without the need for Applicants' proposal, as it has already demonstrated in these proceedings.

First, the Board's merger review process already provides Applicants a full opportunity to make, explain, and defend their case for merger approval. When the Board accepted their Application, it directed Applicants to provide supplemental information to address the Board's specific questions and concerns about particular

deficiencies in their Application. *See UP/NS*, Decision No. 21, FD 36873 (S.T.B. served May 26, 2026), slip op. at 27-33. And the Board has now adopted a procedural schedule, which will naturally clarify issues as the process unfolds. After other parties have their opportunity to present evidence and respond to Applicants' case for their proposed merger, the schedule provides Applicants the opportunity to defend their Application and further explain that Application's evidence, in reply.

Second, the Board has already described the circumstances under which it would reevaluate the utility of *ex parte* communications in this proceeding. When the Board declined Applicants' prior request, it plainly stated that it would revisit the question "if the Board identifies specific issues for which *ex parte* communications would have particular value." Decision No. 21, slip op. at 36. The Board also made clear that it—not Applicants—would decide if and when to "issue a decision inviting such communications and providing for any necessary safeguards." *Id.* To date, no Board member has identified any such issue, and Applicants do not identify any legitimate need for an additional, collateral *ex parte* process. Congress permitted, but did not require, such communications (*see* 49 U.S.C. § 11324(f); Decision No. 21, slip op. at 34 n.35) and the Board has already exercised its discretion to decline a broad waiver. *Id.*, at 35-36.

Nor does Applicants' narrower proposal overcome the reasons the Board gave for denying their first request. The Board found that a waiver "could complicate and delay any future record building process," and that summaries of each communication and "potentially numerous responses to each summary" would add to a large record

and consume Board resources. Decision No. 21, slip op. at 35-36. Applicants' new proposal requires the same summaries and written responses. UP-114/NS-116, at 6-7. The Board also rejected Applicants' premise that the informal-rulemaking procedures of 49 C.F.R. § 1102.2(g) "remed[y]" the *Fieldston* concerns in a merger proceeding. Decision No. 21, slip op. at 36. Applicants nonetheless rely on those same procedures again. UP-114/NS-116, at 7-8. Applicants offer no reason for the Board to depart from its considered judgment that it, upon identifying specific issues, will invite any *ex parte* communications and set the necessary subject-matter and procedural limits. Decision No. 21, slip op. at 36.

II. Applicants' proposal risks introducing new evidence after the established schedule and procedure.

The Board's statutory process for building a record is not, as Applicants suggest, a free-flowing "iterative" one. UP-114/NS-116, at 5. That process is structured and staged to ensure that the Board is able to fully and fairly evaluate a merger application taking into account the positions and evidence of all participants. The Board's procedural schedule governs the submission of evidence, and Applicants presented their affirmative case, such as it is, in their Application. *See CSX Transportation, Inc.'s Motion for Summary Denial* (CSXT-19), *UP/NS*, FD 36873 (August 6, 2026), at 1-2, 6. CSXT is concerned that Applicants' *ex parte* proposal would serve as a means for Applicants to try to plug evidentiary holes in their case outside of that record-building process.

The timing of Applicants' proposal compounds CSXT's concern. Under the procedural schedule, comments and requests for conditions are due just five weeks

from now, on November 18, 2026, and Applicants' response to those comments is due February 16, 2027. *See UP/NS*, Decision No. 30, FD 36873 (S.T.B. served Aug. 18, 2026), slip op. at 13. Applicants seek meetings "before the reply record closes." UP-114/NS-116, at 5. At this point, in practice, the *ex parte* communications Applicants contemplate would likely occur after other parties have filed their evidence but before Applicants file their reply, allowing Applicants to tailor that reply to the Board's concerns while other parties are limited to written responses and briefs. Applicants are candid about the purpose: *ex parte* meetings "would allow that process to continue"—that is, the process in which Applicants "revisit and expand their proposed voluntary conditions." *Id.* The Board's procedures should not become a forum for Applicants to learn, in secret outside the record, what conditions will secure approval.

Applicants appear to suggest that they may have failed to recognize what information the Board would consider important, but should not be faulted because their Application is large and the first to be evaluated under the 2001 Merger Rules. UP-114/NS-116, at 2-5. But multiple parties to this proceeding, including CSXT, have pointed to important evidentiary deficiencies in the Application from the start. *See, e.g.*, *CSXT's Comments on Completeness of Application* (CSXT-4), *UP/NS*, FD 36873 (Dec. 29, 2025), at 1-3. And the Board has afforded Applicants several opportunities to supplement their Application and make their case. *UP/NS*, Decision No. 9, FD 36873 (S.T.B. served Jan. 16, 2026), slip op. at 2, 11-12 ("Nothing in this decision prevents Applicants from revising other parts of their Application on their

own accord or in light of the comments filed by other stakeholders."); Decision No. 21, slip op. at 18-19. There should be no doubt that Applicants have made considered choices about how to approach their evidentiary presentation. *See* CSXT-19, at 10-30, 41-43 (highlighting, among other deficiencies, Applicants' failure to address the risk of harm to competition from vertical foreclosure despite clear Board precedent). Any regrets Applicants may now have about the depth of their presentation are not cause to permit *ex parte* advocacy at this stage of the proceeding, especially without appropriate safeguards.

III. Applicants' proposal does not satisfy principles of fairness, equal access, and due process.

Even if the Board were inclined to allow *ex parte* communications at this stage, Applicants' proposal fails to satisfy the fairness, equal access, and due process principles the Board identified in *Fieldston*. *See Pet. of Fieldston Co. to Establish Procs. Regarding Ex Parte Commc'ns*, 1 S.T.B. 1083, 1084-85 (1996). Applicants' proposal is structurally imbalanced. Under their proposal, in-person communications with a Board member would give rise only to an opportunity for other parties to submit written responses to a written summary—not to engage in their own in-person communications with that Board member on the same issues. *See* UP-114/NS-116, at 6-7. *Fieldston* cautioned against just this kind of unequal access. *See Fieldston*, 1 S.T.B. at 1085. Applicants' proposal for technical conferences is similarly one-sided. The conferences would be built around Applicants' models and workpapers, and other

parties would be offered only "their own" separate sessions—not an opportunity to hear and respond to what Applicants' experts tell Board staff. UP-114/NS-116, at 8.

Nor does the proposal provide any disclosure mechanism for those conferences comparable to the one it proposes for member meetings. *See id.*, at 6-8. Applicants propose to use such conferences to provide oral expert explanations to staff—including on critical issues like an expert's justifications for his or her "methodological choices." *Id.*, at 3. That kind of off-the-record input, untested by cross-examination and undisclosed to other parties, is precisely what *Fieldston* warned against. *See Fieldston*, 1 S.T.B. at 1085. In a proceeding that "require[s] the Board to adjudicate conflicting claims by competing parties[,]" this asymmetry would undermine the "principles of fairness" and "public confidence" that are "critical to the Board's rail merger procedures[.]" *Id.*, at 1084-85. If the Board is nonetheless inclined to permit some form of *ex parte* communication, it would need to impose safeguards to address such imbalance and ensure equal access, protect due process, and preserve the integrity of the evidentiary record, consistent with CSXT's comments on Applicants' first motion. *Response of CSX Transportation, Inc. to Applicants' Motion to Permit Ex Parte Communications*, *UP/NS*, FD 36873 (Sept. 22, 2025), at 1-2, 4-8.[1]

[1] For example, any *ex parte* communications must not serve as a vehicle to submit new evidence when other parties' opportunity to submit responsive evidence has passed, and must come with a corresponding opportunity for other parties to engage in their own *ex parte* communication with the same Board member on the same issues. CSXT specifically cautioned against timing that would let Applicants learn what to emphasize in their rebuttal without a comparable opportunity for other parties. *Id.*, at 6.

For these reasons, CSXT requests that the Board deny Applicants' Motion.

Respectfully submitted,



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Dated: October 13, 2026

CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of October, 2026, I caused a true and correct copy of the foregoing Response of CSX Transportation, Inc. to Applicants' Second Motion to Permit *Ex Parte* Communications to be 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.



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