BNSF-64

BEFORE THE
SURFACE TRANSPORTATION BOARD

312687

ENTERED
Office of Chief Counsel
October 13, 2026
Part of
Public Record

FINANCE DOCKET NO. 36873

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

BNSF'S OPPOSITION TO MOTION TO PERMIT BOARD-INITIATED EX PARTE COMMUNICATIONS AND TECHNICAL CONFERENCES

UP/NS's ex parte proposal has already been rejected by the Board; is unnecessary because the Board knows how to ask questions when it has them; would be fundamentally unfair to impose this late in the process; and is simply an attempt for UP/NS to remedy deficiencies in their Application. Applicants have submitted their case, and the public is due to file its response within weeks. UP/NS's suggestion of creating an ex parte process now—which, under UP/NS's proposal, would begin only after stakeholders file their comments—is unnecessary, unproductive, and unfair.

At this point, UP's Application to acquire NS is submitted. After multiple bites at the apple, Applicants' case-in-chief is fixed and subject to public scrutiny. Within weeks, the public will file comments on that Application. So why are UP/NS now asking for an ex parte process, especially when the Board previously denied their ex parte request? UP/NS know their Application is on rocky ground: the purported

benefits calculated by Oliver Wyman consultant David Hunt, after numerous errata, are fatally flawed and unsupported; shippers, their associations, and other parties have identified substantial harms they will suffer if the merger proceeds; and discovery has confirmed that UP plans to raise prices, use its market power to limit competitive options, and bundle and leverage its over 50% market share to harm its competitors—resulting in higher prices for shippers and American consumers and even larger profits for UP.

Faced with these mounting concerns, UP/NS now seek off-the-record conversations with the Board to shore up their Application. That is not the process the Board has laid out, and it is not the process every other party has been following. The Board has been clear and consistent that it will make its decision based on the administrative record—that is, evidence—not on ex parte conversations. It has committed to "conducting a thorough and fair review based on evidence and argument in this proceeding," Decision No. 21, slip op. at 18 (STB served May 28, 2026), and to deciding the merits on "the entire record, including . . . all public and agency comments received," *id.* at 39, while "ensuring that its proceedings remain open to meaningful participation by all interested persons," Decision No. 28, slip op. at 4 (STB served July 22, 2026).

The Board denied Applicants' first request for ex parte access for good reason. *See* Decision No. 21 at 35-36. Since then, Applicants have twice submitted their Application and evidence to the Board, filed two supplements, and twice been ordered to refile workpapers that were missing critical data. *See* Decision No. 30, slip op. at 5

(STB served Aug. 18, 2026). The Board also asked Applicants questions on the record, to which Applicants responded on the record. Stakeholders across the rail industry and the nation—including shippers, unions, and competitors like BNSF—have spent months testing Applicants' evidence through discovery. Most of that discovery has been shielded from the public by Applicants' highly confidential designations, but Applicants know that it will be problematic when it is submitted to the Board. Now, just six weeks before opening comments are due, Applicants want private access to the Board in order to continue their "iterative" process of revisiting and supplementing their case and to try to explain the flaws and inconsistencies in their Application. UP-114/NS-116 at 5.

The Board should reject Applicants' request. This docket is not a private negotiation; it is a federal agency proceeding reviewing the largest rail merger proposed in American history, and it is subject to a "public interest" standard. Applicants' "iterative" process in which Applicants are "prompted" "to revisit and expand their proposed voluntary conditions," *id.*, is found nowhere in the Board's governing statute and rules nor in the Administrative Procedure Act. That "iterative" process is directly contrary to, and an attempt to avoid, Applicants' heavy burden to present a merger that satisfies the public interest. *See* Decision No. 21 at 18 ("[A]pplicants bear a heavier burden to show that a major rail combination is consistent with the public interest." (quoting *Major Rail Consol. Procs.*, 5 S.T.B. 539, 546 (2001))); Decision No. 9, slip op. at 6 (STB served Jan. 16, 2026) (Applicants' case must be "fully informed and supported by applicants at the beginning of the

proceeding."). The best test for whether this merger is in the public interest is to put it to the public—and keep it there.

Applicants have treated this proceeding as a negotiation from the start: they offer the minimum they think will get the merger approved, improve their offers only when pressed, and wait to see how stakeholders react before giving more. *See* Decision No. 37, slip op. at 5 (STB served Sep. 18, 2026) (Kloster, R., concurring) ("Applicants have approached this proceeding with an apparent strategy of 'letting the line out slowly.'"). This Motion is one more step in that strategy, when Applicants should instead have come with their best case from the start.

BNSF believes in the integrity of the robust procedures already available to the Board to investigate the Application. BNSF does not object to technical conferences, if necessary, that are on the record and open to all parties. And, of course, the Board has retained the discretion to invite ex parte communication with safeguards. *See* Decision No. 21 at 36. Applicants' one-sided invitation to expand those procedures threatens the integrity of the application process and is simply not necessary in light of the robust procedures the Board has already put in place. The Board should deny UP/NS's Motion.

ARGUMENT

I. THE BOARD SHOULD REJECT APPLICANTS' ONE-SIDED EX PARTE PROPOSAL.

A. Ex Parte Communications Do Not "Promote Transparency."

Private communications between Board members and Applicants at this stage would undermine the integrity of this public proceeding. In *Fieldston*, the Board

made clear that no party "should have to be concerned about written or oral communications that are not fully reflected in the public record." 1 S.T.B. 1083, 1086 (1996). That is exactly what Applicants propose. Private meetings would let Applicants advocate to the Board with information that no other party can see, test, or rebut. These private conversations would also allow Applicants to gain an unfair preview of the Board's concerns.

Applicants' track record shows why nothing they tell the Board should escape public review. At every stage, scrutiny by the Board and other parties has exposed the defects in Applicants' evidence. Within days after Applicants filed the Revised Application, BNSF identified 181 missing workpapers, intermediate datasets, and other files needed to verify Applicants' calculations. *See* BNSF-26 at 1-2. When pressed, Applicants conceded that some produced workpapers were outdated, that some files had been placed in the wrong folder and should not have been produced, and that others had no place in their calculations. *See id.*; *see also* CPKC-19 at 12-13, C3, C7. The Board found that Applicants' conduct raised "legitimate concerns that parties and the Board may not have a reliable and static set of workpapers to use in assessing and responding to the Revised Application." Decision No. 21 at 33. Yet the problems continued: even after the July supplements, the Board again had to order Applicants to refile certain workpapers because Applicants' filters had "removed substantial portions of the underlying analysis from the final presentation layer[,]" and what Applicants "provided was partial rather than exhaustive." Decision No. 30 at 5. Each time, the Board's remedy has been to put the complete

data before everyone and under the scrutiny of both "the Board and commenting parties." *Id.* Ex parte meetings would reverse that remedy and give Applicants a private channel to the Board where no one else can catch their next error.

A process that gives one side private access to the decisionmakers would erode public confidence in a proceeding of this magnitude, with hundreds of stakeholders. *Fieldston* recognized as much: parties should not "be left to wonder whether the record in a proceeding truly includes all facts and arguments on which a decision is based." 1 S.T.B. at 1086. The Board has honored that principle at every step of this proceeding, and it should hold Applicants to it now: the Board's review must rest on the "evidence and argument in this proceeding[,]" Decision No. 21 at 18—not on what Applicants say behind closed doors.

Off-the-record advocacy is especially dangerous here because Applicants' own witnesses could not stand behind their sworn testimony when it was tested in discovery. For example, Brian Barr, NS's Chief Operating Officer, initially swore that he had "carefully and independently reviewed the Operating Plan . . . in its entirety, together with the information and materials upon which it is based." UP-84/NS-82 ¶ 4. But at deposition, {{[redacted]}}, Ex. 1, B. Barr Dep. Tr. 125:11-22 (Sep. 3, 2026); {{[redacted]}}, *id.* at 107:20-108:24; and {{[redacted]}} *id.* at 358:14-360:1. Likewise, Katherine Novak, UP's General Director of Interline Operations, who sponsored the Committed Gateway Pricing ("CGP") program in her Verified Statement, {{[redacted]

[redacted]}} Ex. 2, K. Novak Dep. Tr. 163:21-22, 174:4-177:6, 202:18-203:2 (Sep. 24, 2026). Applicants say private meetings would fill a "gap" in the record. UP-114/NS-116 at 3. But the gaps here are in Applicants' own sworn evidence, and the place to fill them was when they filed (and refiled and supplemented) their Application on the record, which is now subject to cross-examination—not in private meetings with the Board.

Applicants' offer to draft summaries of their private conversations with Board members to "preserve transparency and the integrity of the public record" falls flat. *Id.* at 1-2. A meeting that excludes every other party to a contested proceeding is not "transparent." The public would see only a list of issues and a summary written by the party that attended. *Id.* at 6-7. That summary would be inherently self-serving, unsworn, and untestable by cross-examination.

The Board has already rejected this trade-off. In Decision No. 21, the Board held that *Fieldston*'s concerns "about transparency and fairness in merger proceedings were not necessarily 'remedied'" by the safeguards the Board adopted for ex parte communications in informal rulemaking proceedings and that those concerns are "heightened in the merger context." Decision No. 21 at 36. The Board also found that the additional filings Applicants proposed—"summaries of each ex parte communication and potentially numerous responses to each summary"—would

add to an already "large and complex record" and require Board members and staff "to expend resources on additional review." *Id.*

Applicants' Motion does not answer any of these findings; instead, Applicants propose ***the exact same procedure*** under a new label. *Compare* UP-4/NS-4 at 3-5, *with* UP-114/NS-116 at 6-7. Nor is the Motion a request for the Board to exercise its narrow, reserved discretion to invite communications on "specific issues," with safeguards. *See* Decision No. 21 at 36. The Board has not identified any specific issue, and Applicants' proposal is an open-ended invitation for private meetings, with only Applicants' self-drafted summaries as a safeguard. If the Board does identify a specific issue, the answer belongs on the record, where every party can respond.

B. Applicants' Untimely Request Would Prejudice Every Party But Applicants.

Before the Application was filed and when every party stood in the same position, BNSF supported an ex parte process that was "available and open to all participants—not just the Applicants." BNSF-3 at 3. That posture no longer exists. The Revised Application is Applicants' case-in-chief, Applicants have answered the Board's questions in two supplements, and the Board is now testing the merits of Applicants' claims. *See* Decision No. 30 at 3-4. Characterizing their approach, Applicants say they "recognized that the first application to be reviewed under the new merger rules would require open lines of communication," UP-114/NS-116 at 4, but that is not how the process works; the rules require Applicants to make their case, not the Board to tell them how to make it. Applicants' "iterative" process is over. *Id.* at 5.

Applicants' timing ensures that Applicants alone can benefit from their ex parte proposal. Applicants' assurance that "[n]othing in this proposal would alter the procedural schedule" misses the point. *Id.* at 6. Opposing evidence is due in just over a month; Applicants' rebuttal is due three months after that. *See* Decision No. 30 at 13-14 (Procedural Schedule). With ~783 notices of intent to participate and 23 descriptions of anticipated responsive applications, there is no practical way for the Board to meet with every interested stakeholder, so Board-initiated meetings would in practice exclude most participants and favor Applicants. Realistically, ***no*** meeting could occur before the opposing parties file their comments. Instead, any meetings would take place during the three-month period—after other parties have filed their evidence but before Applicants file their rebuttal. Applicants would thus learn Board members' concerns and tailor their rebuttal ***after*** commenters' evidence is locked in. *Fieldston* prevents exactly this kind of off-schedule advantage. *See* 1 S.T.B. at 1085 (the Board must keep a schedule "of which all parties are made aware ahead of time," and ex parte contacts "greatly complicate and delay the record building process").

II. ANY TECHNICAL CONFERENCES SHOULD TAKE PLACE ON THE RECORD AND BE OPEN TO ALL PARTIES.

BNSF recognizes the burden a record of this size imposes on the Board, and it is critically important to BNSF that the Board get answers to any questions the Board has. BNSF does not oppose technical conferences, provided that such conferences are held on the record—open to all parties. Written responses to staff technical questions should likewise be filed on the docket. These procedures are available to aid the

Board's review without undermining the integrity of these proceedings; however, that rationale holds only if the conferences are structured so they cannot ***become*** advocacy—for which the Motion proposes no such structure.

CONCLUSION

BNSF respectfully requests that the Board deny Applicants' request for ex parte communication and condition any technical conferences on the safeguards described above.

[Signature page follows.]

Respectfully submitted,

/s/ Daniel T. Donovan
Daniel T. Donovan
Matthew Reilly
Richard Cunningham
T.J. McCarrick
McClain Thompson
Kirkland & Ellis LLP
1301 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 389-5000

Jill K. Mulligan
Adam Weiskittel
Tyler R. White
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2383

Peter W. Denton
Anthony J. LaRocca
Timothy J. Strafford
Steptoe LLP
1330 Connecticut Ave., NW
Washington, DC 20036
(202) 429-3000

Counsel for BNSF Railway Company

Dated: October 13, 2026

EXHIBIT 1
(Redacted)

EXHIBIT 2
(Redacted)

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing BNSF's Opposition to Motion to Permit Board-Initiated Ex Parte Communications and Technical Conferences 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 K. Williams
Onika K. Williams
Attorney for BNSF Railway Company

October 13, 2026