ARU-5
BLET-4

BEFORE THE
UNITED STATES SURFACE TRANSPORTATION BOARD

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UNION PACIFIC CORPORATION AND
UNION PACIFIC RAILROAD COMPANY

—CONTROL—

NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY

REPLY OF THE
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION/IBT; BROTHERHOOD OF RAILROAD SIGNALMEN; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT #19, TRANSPORTATION COMMUNICATIONS UNION/IAM, TRANSPORT WORKERS UNION OF AMERICA; ANDTHE BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN TO APPLICANTS' MOTION TO PERMIT BOARD INITIATED EX PARTE COMMUNICAITONS

The unions participating in the above-captioned proceeding as the Allied Rail Unions ("ARU") [Brotherhood of Maintenance of Way Employes Division/IBT; Brotherhood of Railroad Signalmen; International Association of Machinists and Aerospace Workers District #19, Transportation Communications Union/IAM, and Transport Workers Union of America]; and the Brotherhood of Locomotive Engineers and Trainmen (referred to collectively herein as ARU/BLET) oppose the motion of the Applicants to permit Board member initiated ex parte communications in this proceeding.

ARU/BLET concur with parties who have argued that as proponents of the proposed transaction, it is Applicants' obligation to submit evidence and arguments that are designed to satisfy the statutory criteria for approval of a major transaction. Applicants have effectively had four opportunities to do that. If they think their own papers are unclear or insufficient to carry the statutory burden, that is a result of their own strategy in presenting their evidence and arguments. Additionally, Applicants will have the opportunity to respond to comments and responsive applications submitted by other parties, to submit briefs and to participate in hearings where they can engage with members of the Board on any aspects of the Application they choose to highlight, or that Board members ask them to explain or clarify. In all of those opportunities to advocate for the proposed transaction other participants will know first-hand what Applicants have said and have opportunities to respond. That is not so for ex parte communications. Yes, one-page summaries of ex parte meetings have typically been published (generally in rule-making proceedings), but such summaries cannot possibly capture the details of a full meeting. The Board has allowed Applicants to revise their Application several times and Applicants have chosen to only modestly modify the Application and mostly in grudging response to the Board's prodding them to provide additional information. Applicants also submitted an extensive errata filing with corrections and materials that ought to have been submitted in the first or amended application quite late in the process and well after discovery had begun. If after all that, Applicants believe that something is unclear or requires explanation, that is a consequence of the substantive decisions they made about what to include in the Application or how information in the Application was presented. After all of that, they should be required to live with the choices they made, and should not be allowed to provide additional information or corrections or

explanations when other parties will not know what additional details, corrections or explanations were provided to the Board.

Applicants' arguments in support of their motion also lack merit. They claim that granting their motion to allow communications between Applicants and Board members that will necessarily be shielded from the public, will promote transparency in this proceeding. In the name of supposed transparency, the Applicants seek to engage in non-public substantive discussions with the Board and its staff. The inherent contradiction between the desired outcome if the motion is granted, and the rationale offered for granting the motion, alone militates for denial of the motion.

Additionally, Applicants' arguments in support of their motion lack merit on their own terms. Applicants rely on their supposed transparency and forthcomingness to date as support for their motion. But Applicants have not been transparent and forthcoming. Applicants tout the many pages of documents filed, work papers produced, and discovery requests answered as evidence of their openness which they assert supports their request. But the formal application documents are not really larger in relative terms than the formal application documents in the major merger application documents in the 1990s. And great quantity of production does not equal great quality of production.

Applicants state that they have produced four million pages of documents and nearly 4,000 gigabytes of data in discovery. But much of what has been produced has been repetitive-largely the same voluminous application has been filed three times, twice with supplemental information that did not significantly increase the amount of information provided with each filing (many of the elements of the Application were unchanged in subsequent filings)—and then

there was the extensive errata filing which repeated prior filings but with corrections and missing backup documents. In essence, the same application was filed perhaps 3½ times.

Additionally, Applicants gloss over their efforts to keep much of the information they have produced from the public. Documents have just blithely slapped the classification of "highly confidential" on a wide swath of documents forcing other parties to seek reclassification of documents that should never have been marked with that classification. The Board has already ordered reclassification of the Employee Impact Exhibit – a document providing information necessary for consideration of a specifically enumerated factor in the Board's assessment of the merits of the transaction (49 U.S.C. §11324(b)(4)) (contrary to both the mandate of the statute and decades of practice), and large amounts of other very pertinent information has also been labeled highly confidential when the classification is dubious at best or plainly improper. And. in contrast to past proceedings, the category of "confidential" has barely been used; almost all of Applicants' filings and document production in this proceeding are either marked public or highly confidential. This means that even though counsel and consultants who signed the highly confidential undertaking can see all the materials, they cannot share that information with their clients and principals-- the actually interested participants in this proceeding-- so that the actual participants cannot effectively direct counsel with regard to positions they should take, or provide counsel with necessary information to respond to what counsel and the consultants have learned. In prior major transaction proceedings, documents were labeled confidential so that party representatives could see them and work with their counsel and consultants in developing positions and arguments. Furthermore, in responding to a relative handful of interrogatories propounded by ARU, rather than simply answer the interrogatories, many of the responses were to refer to work papers that were marked highly confidential so they could not be shared with

the Unions themselves (*see e.g.* responses at attachment A). The transcripts of several depositions attended by counsel for ARU were entirely covered by the highly confidential designation, requiring ARU to make multiple requests for reclassification of portions of the transcripts that never should have been marked highly confidential and the process has been quite slow (counsel for ARU has been negotiating with counsel for Applicants over reclassifications and some agreements have been reached while ARU is still waiting on a response regarding the transcript of the deposition of UP's Vice President Labor Relations almost a month after the deposition was taken). Accordingly, Applicants' excessive and unwarranted invocation of the highly confidential designation has negatively impacted the abilities of parties to respond to the Application. Additionally, absent significant reclassifications, when comments are filed, they will have to be filed with major redactions, so parties will not really know the content of filings on their own behalf or the comments of other parties; and the public will be in the dark as to significant issues in this proceeding. It is against this background that Applicants seek to engage with the Board in a manner that is not open to the public, and where the information they would provide in those meetings is not effectively subject to rebuttal. To the extent that Applicants' response to the rights of interested parties to meaningfully participate in these proceedings, and for the public to understand the issues and arguments are relevant to Applicants' motion, Applicants' conduct militates against granting the motion.

Another obvious problem with Applicants' motion is that there are over 700 participants in this proceeding and a sizable number of highly active participants. If Applicants have the ability to engage in ex parte communications with the Board, will the Board be able to provide such access to all participants who seek similar access? Will the Board even be able to provide

such access to all highly active participants? ARU/BLET submit that the Board will not be able to do so, which will result in Applicants having greater ability to advocate for approval of the proposed transaction than those who oppose the transaction and participants who will seek conditions.

CONCLUSION

For the reasons set forth herein, ARU/BLET respectfully submit that Applicants' motion to permit ex parte communications with the Board about the proposed transaction should be denied.

Respectfully submitted,

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August _26, 2026

CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the foregoing Comments Of the ARU and BLET to be served to representatives of all Parties of Record as of the date of this filing, and to Administrative Law Judge Jenifer Soulikias by email using the addresses on the service list for this proceeding.

/s/Richard S. Edelman
Date: October 26, 2026 Richard S. Edelman