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**BEFORE THE**
**SURFACE TRANSPORTATION BOARD**

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**Finance Docket No. 36873**

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

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Canadian Pacific Railway Company d/b/a Canadian Pacific Kansas City and CPKC, on behalf of itself and its U.S. rail carrier subsidiaries (collectively, "CPKC"),[1] opposes Applicants' second, and particularly untimely, request that the Board break from precedent and authorize ex parte communications in this proceeding. Applicants demand that departure from precedent to allow Applicants, among other things, to explain "analysis" supporting their Application that is "unclear," to give direction on how to "navigate" Applicants' workpapers, to justify Applicants' "methodological choice[s]," and to provide the "assumptions" that "underlie" Applicants' economic models. *See* UP-114/NS-116 at 3-4, 7. Applicants also profess a need to allow their "process to continue," whereby they "revisit and expand their proposed voluntary conditions" following ex parte discussion with Board members and Staff. *Id.* at 5.

As the Board has repeatedly urged, however, Applicants should have done all that—publicly—months ago, as part of the process of submitting an Application aimed at carrying their

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[1] CPKC's U.S. rail carrier subsidiaries include Soo Line Railroad Company; Central Maine & Quebec Railway US Inc.; Dakota, Minnesota & Eastern Railroad Corporation; Delaware & Hudson Railway Company, Inc.; The Kansas City Southern Railway Company; Gateway Eastern Railway Company; and The Texas Mexican Railway Company. CPKC refers to "Union Pacific" as UP herein. Unless otherwise indicated, other capitalized terms used herein follow Applicants' abbreviations. *See* App. Vol. I at 9-11 (Table of Abbreviations).

"heav[y] burden" supporting approval of the proposed Transaction. Decision No. 21 at 18 (STB served May 28, 2026). Instead, Applicants chose to wait until just a few weeks before Comments are due to all but acknowledge the Amended Application's deficiencies and propose new processes under which they could belatedly attempt to address them through ex parte advocacy, whose content the public could only glimpse through sanitized summaries drafted by Applicants' lawyers.

Applicants do not explain why they refused the Board's invitations over many months to clarify and improve their Application under the Board's existing, public process. Instead, and incredibly, Applicants argue that "transparency"—a principle Applicants invoke eight times in their motion—requires that the public be barred from access to Applicants' new advocacy (other than through lawyer-generated summaries). UP-114/NS-116 at 2-6.[2] That secrecy would directly contradict both the tenet of transparency as well as the due process considerations that the Board has emphasized are critical to its evaluation of any merger (let alone major merger) proceedings. *See Petition of Fieldston Co., Inc. to Establish Procedures Regarding Ex Parte Communications in Railroad Merger Proceedings*, Ex Parte No. 619, 1996 WL 752555 (STB served Jan. 8, 1997) [hereafter, "*Fieldston*"]. Moreover, Applicants fail to even begin to contend seriously with the practical complications their proposal would create, including (1) the prospective, and entirely reasonable, desire of any of the other 700+ participants in this proceeding to receive equal access to Members of the Board through their own ex parte

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[2] CPKC filed a different motion raising issues of transparency a few hours before Applicants' revived request for ex parte communications. CPKC's motion involves Union Pacific's attempt to prevent public consideration of the UP Chief Executive Officer's remarks at the Southwest Association of Rail Shippers Conference. *See* CPKC-58 (filed Oct. 6, 2026). Union Pacific has refused to redesignate the video—taken at a conference with almost 900 attendees—to facilitate public consideration. *See* UP-116 (filed Oct. 13, 2026).

advocacy, and (2) the resulting undermining of the Board's normal deliberative process if Applicants and other parties provide one Board member evidence and advocacy that other Board members do not have. For all the reasons that follow (as well as the reasons set forth in CPKC's Reply to Applicants' Motion to Permit Stakeholder Communications (CPKC-4)), the Board should deny Applicants' request.

***1. Having had multiple opportunities to respond to the Board's prior admonitions to clarify and improve their Application, it is too late for Applicants to submit new evidence and argument now.*** Ten months ago, the Board rejected Applicants' original application for a variety of reasons, including Applicants' failure to provide appropriate analyses regarding their market-share and traffic projection figures. Decision No. 9 at 1-2; 4-7 (STB served Jan. 16, 2026). After walking through Applicants' failures in detail, the Board unusually and conspicuously invited Applicants to make improvements to their approach:

> "Although commenters have argued that the Application is incomplete for other reasons, the Board declines to reject the December 19 Application on these other grounds. However, the Board reiterates that—should Applicants choose to file a revised application—nothing prevents Applicants from making additional changes to improve their Application now that they have received comments from other stakeholders."

*Id.* at 11-12. The Board went on to note its expectation that Applicants would make "substantial" adjustments: "[r]evised impact analyses (as well as correction of the other omissions described in this decision and any other changes Applicants may choose to make) will likely result in substantial changes." *Id.* at 12.

In May, the Board placed these proceedings in abeyance and directed Applicants to provide extensive supplements to aid the public's ability to provide comments. Decision No. 21 at 18-19. The Board identified "several aspects of the Revised Application that are unclear or underdeveloped and require supplementation at this stage of the proceeding so that the Board

may have the information necessary to thoroughly evaluate—and the public has an adequate opportunity to comment on—whether the transaction is in the public interest." *Id.* at 18. The Board then concluded that "information in the Revised Application lacks clarity and detail and does not yet afford parties a meaningful opportunity to comment on the merits of the Transaction." *Id.* The Board also noted that "the Revised Application does not contain the level of detail on certain issues that the Board would have preferred, particularly given the benefit of Board decisions and stakeholder comments after the original Application." *Id.* at 12. And the Board found that "the manner in which Applicants have managed the workpaper submission process has 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," requiring Applicants "to submit a new, complete set of workpapers." *Id.* at 33. Critically, the Board ordered these extensive changes so "the public has an adequate opportunity to comment." *Id.* at 18. The Board went on to explain that the public interest required Applicants to supplement their submissions well before comments were due:

> "Under the statute, parties offering views on the merits of a proposed merger, including by requesting conditions and proposing responsive applications, have a limited opportunity, early in a proceeding, to make their principal case to the Board. Based on the Board's initial assessment, the Board concludes that information in the Revised Application lacks clarity and detail and does not yet afford parties a meaningful opportunity to comment on the merits of the Transaction."

*Id.* at 18. And again, the Board invited Applicants to make other improvements to their submissions: "Given the scope of the Board's questions, it is important for Applicants to have the flexibility to improve or explain broad and interdependent aspects of the Revised Application." *Id.* at 19.

Other parties have repeatedly pointed out contradictions and missing evidence in Applicants' workpapers as well.[3] Those seriatim problems resulted in a September filing in which BNSF, CPKC, and CSXT requested Applicants certify that the diversion analysis underlying the entirety of their Application—a report hypothesizing business Applicants could win as a result of the merger, coming not from Applicants' marketing executives but from a third-party consultant—would not change again. *See* BNSF-54/CPKC-48/CSX-27. Applicants responded by representing that they "will not submit additional changes to the diversion study prior to the November 18 comment deadline." *See* UP-107/NS-107 at 1.

Applicants had multiple chances to respond to these encouragements by making improvements to their submissions on a timetable that allowed the public to consider that new evidence and address it in their comments, which are due in five weeks at this point. The Amended Application as Supplemented on July 7 and 27 was Applicants' only response. It is too late now and would present fundamental fairness concerns if new argument and evidence were advanced. Any evidence or analysis provided to support Applicants' submission (including

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[3] *See, e.g.*, BNSF-26 at 1-3 (explaining that "BNSF identified 181 missing workpapers, intermediate datasets, and other files needed to verify UP's and NS's calculations[,]" that even after Applicants' supplemental uploads "approximately 73 workpapers, intermediate data sets, and other files remain missing," including the database with the Applicants' full projected market shares); CPKC-21 at 1 (noting that "the continued deficiencies in their workpapers impede CPKC's ability to analyze the claims they advance in their Amended Application"); CPKC-23 at 1-2 & Ex. A (stating that "Applicants failed to provide with their Amended Application the workpapers that would allow recreation of their experts' analysis" and identifying 14 unresolved issues in the workpapers underlying Mr. Hunt's Appendix E, rail-to-rail, and truck-to-rail analyses, and explaining that "gaps in Mr. Hunt's workpapers prevent CPKC from reproducing his estimated rail-to-rail diversions or tracing how Mr. Hunt uses those diversions in constructing estimated post-merger UP volume and revenue," and "impair CPKC's ability to replicate Mr. Hunt's revenue projections or assess the sensitivity of Mr. Hunt's results to alternative modeling assumptions"); CPKC-25 at 2 (explaining that CPKC's consultants discovered only "through time-consuming analysis" that Mr. Hunt's Appendix E excluded a substantial share of his own forecasted diversions).

evidence exchanged between "Board staff and expert witnesses," UP-114/NS-116 at 7) should be provided under the existing rules and procedural schedule.

***2. The Board should not allow Applicants to circumvent due process by authorizing Applicants to attempt belatedly to rectify gaps in their Application through ex parte communications.*** As CPKC explained in its opposition to Applicants' similar motion last year—which the Board correctly denied—Board precedent establishes all the reasons Applicants' request is inappropriate. In *Fieldston* (a merger case), the Board correctly decided "not to entertain ex parte communications." *Id.* at 2. The Board concluded that this approach "promotes efficiency, fairness, and public confidence in the Board's decisional process." *Id.* *Fieldston* rests on a principle that has not changed: a rail merger proceeding is not an informal rulemaking but an evidentiary proceeding that is "adjudicati[ve] in fact." *Id.* Applicants bear the burden of proving, on record evidence, that their Proposed Transaction is in the public interest. *See, e.g.*, 49 C.F.R. § 1180.4(c)(8). Other stakeholders are entitled to submit evidence that the transaction should be denied, conditioned, or displaced by a responsive or inconsistent application. Decision No. 21 at 18. In this context, the Board acts as a decisionmaker, not a policymaker. *Fieldston* at 2. Congress's design reflects that adjudicative character in several ways. It imposed a one-year limit on the "evidentiary proceedings." *See* 49 U.S.C. § 11325(b)(3). Congress required that any discretionary ex parte communications be "preserved in the record." *See* H.R. Rep. No. 104-422, at 191 (1995) (Conf. Rep.). And the Board's own practice is to strike evidence submitted outside proper bounds. *See CP/KCS*, Finance Docket No. 36500, Decision No. 24 (STB served Sep. 13, 2022) (granting in part motions to strike).

Because merger proceedings "require the Board to adjudicate conflicting claims by competing parties" (*Fieldston* at 2), Board precedent properly recognizes that merger

proceedings trigger the "requirements for procedural due process." *Id.* As the Board explained, "requirements for fairness underlying all provisions of the [ICC Termination Act of 1995 ("ICCTA")] demand that the Board accord equal access to all members of the public and militate against a process under which the Board would decide issues based on any off-the-record considerations." *Id.* When the Board later permitted ex parte communications in informal rulemakings, it relied expressly on caselaw tolerating such contacts "so long as the proceedings were not quasi-adjudicative in nature." *Ex Parte Communications in Informal Rulemaking Proceedings*, Ex Parte No. 739 at 2-3 (STB served Feb. 28, 2018). The Board contrasted those proceedings with matters "involv[ing] competing claims for a valuable privilege." *Id.* at n.5.

Seeking approval to fundamentally reshape the nation's rail industry through this major merger proceeding is precisely such a privilege. The Board's merger determinations depend on the fairness and objectivity of its processes. Off-the-record advocacy would undermine both. Even a party's good-faith summary of a private session would not tell the public the precise questions asked or the precise information conveyed. The public would be left unable to respond to whatever evidence was presented outside the formal record. *Fieldston* identified exactly this danger: were the Board to permit ex parte communications, "parties, their attorneys and consultants, and all members of the public would be left to wonder whether the record in a proceeding truly includes all facts and arguments on which a decision is based." *Fieldston* at 2-3. As the Board put it, "[t]he process must be efficient and fair and in the public view. No one should have to be concerned about written or oral communications that are not fully reflected in the public record." *Id.* at 3. The Board further recognized that "judicial review of agency railroad merger decisions . . . would be greatly complicated" by ex parte communications. *Id.*

Nothing about these due process and fairness considerations has changed since *Fieldston* was decided.

The features of this transaction—and the proceedings thus far—make adherence to *Fieldston* more important than ever. This is the first proceeding in which the Board will apply its 2001 Major Merger Rules, which eliminated the presumption in favor of further consolidation and raised the burden of proof. *See* Decision No. 21 at 18. It is also likely the Board's one and only opportunity to decide whether a rail merger "End Game"—one that would set the industry on a path toward two transcontinental duopolies—serves the public interest.

Practical constraints reinforce the point, which *Fieldston* also recognized. The Board correctly observed that "engaging in, or entertaining, ex parte communications would impede, rather than promote, efficient processing of railroad merger proceedings" because "[t]he need to issue decisions promptly in these cases requires the Board to adhere to a strict timetable," and "[e]ntertaining comments at the initiative of anyone, and the consequent need to entertain the replies, rebuttals, and so on, would greatly complicate and delay the record building process and delay the Board's issuance of a prompt decision on the record." *Fieldston* at 2. The Board also foresaw that entertaining such communications from one party "would also likely lead to entertaining ex parte communications from all interested parties." *Id.*

That could not be more true here. Comments are due in five weeks. The public cannot reasonably participate in ex parte sessions and monitor summaries of others' sessions while also conducting discovery and preparing its own submissions, and the Board would be similarly burdened. And it would obviously be fundamentally unfair were Applicants permitted to present new advocacy after the deadline for the public to comment on Applicants' Amended Application.

## CONCLUSION

For the foregoing reasons, CPKC urges the Board to reject Applicants' Motion to Permit Board-Initiated Ex Parte Communications and Technical Conferences.

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 copy of the foregoing CPKC Reply to Applicants' Motion to Permit Board-Initiated Ex Parte Communications and Technical Conferences to be served by email or by first-class mail, postage prepaid 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/ *Kiera S. Judge*

Kiera S. Judge