

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB FINANCE DOCKET NO. 36873

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UNION PACIFIC CORPORATION AND  
UNION PACIFIC RAILROAD COMPANY

— CONTROL —

NORFOLK SOUTHERN CORPORATION AND  
NORFOLK SOUTHERN RAILWAY COMPANY

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**GRAND TRUNK CORPORATION'S MOTION TO COMPEL PRODUCTION OF  
SCHEDULE 5.8 TO THE MERGER AGREEMENT**  
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Pursuant to 49 C.F.R. § 1114.30, Grand Trunk Corporation and its U.S. rail operating subsidiaries<sup>1</sup> (collectively, “CN”) respectfully submit this motion seeking an order from the Surface Transportation Board (“Board”) to compel Union Pacific Corporation (“UPC”) and Union Pacific Railroad Company (“UP”) (collectively, “Union Pacific”) to produce the complete and unredacted Merger Agreement,<sup>2</sup> including specifically Schedule 5.8 (defined *infra*), in response to CN’s First Set of Discovery Requests served on September 23, 2025 (“First RFPs”) (Exhibit 1).

Union Pacific seeks to hide the contents of Schedule 5.8, a core part of their business deal, under the shroud of a legal privilege. But no such privilege or protection could possibly attach to Schedule 5.8: by Union Pacific’s own admission, that schedule reflects the negotiated business agreement between two adverse parties as to how they would respond to conditions imposed by the Board as prerequisite to closing their merger. Schedule 5.8 reflects two parties negotiating to allocate closing risks between them under the specter of a \$2.5 billion termination fee if the transaction does not close. Documents reflecting a business agreement between counterparties bargaining at arm’s length are not and cannot be privileged. A huge termination fee and a multi-page list of obligated conditions is a clear recognition that this combination has substantial competitive issues and anticipated competitive harms that bring with it a meaningful possibility of not closing. Union Pacific does not want to disclose those obligations and instead cries privilege because the obligations cut against the Applicants’ claims that this is a procompetitive combination

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<sup>1</sup> Bessemer and Lake Erie Railroad Company, Cedar River Railroad Company, Chicago, Central & Pacific Railroad Company, Grand Trunk Western Railroad Company, Illinois Central Railroad Company, Iowa Northern Railway Company, The Pittsburgh & Conneaut Dock Company, and Wisconsin Central Ltd.

<sup>2</sup> “Merger Agreement” means that certain Agreement and Plan of Merger, dated as of July 28, 2025, by and among Union Pacific, Ruby Merger Sub 1 Corporation, Ruby Merger Sub 2 LLC, and Norfolk Southern Corporation (“NSC”) and Norfolk Southern Railway Company (“NSRC”) (collectively, “Norfolk Southern”), and any amendments or supplements thereto.

of complementary railroad networks. This negotiated schedule that allocates risks of conditions between the parties is absolutely relevant to the analysis and proceedings.

Despite the fact that CN first requested the Merger Agreement months ago, Union Pacific has refused to produce it. Indeed, Union Pacific has gone so far as to now deny even the Board the ability to see the full Merger Agreement, despite Union Pacific’s regulatory obligation to provide it in full.<sup>3</sup> CN had hoped this matter would resolve prior to the filing of the Application, or at the very least that Applicants would resolve their deficiency with the Application itself. But Union Pacific has not provided the Board with *any* of the appendices, schedules, or disclosures to the Merger Agreement. CN has respectfully submitted to the Board that this deficiency renders the Application incomplete as a matter of law, and that Union Pacific’s failure to provide Schedule 5.8 is particularly egregious since it reflects an attempt by Applicants to improperly shield from the Board the document most likely to reflect Applicants’ views—views formed outside the context of litigation when Union Pacific and Norfolk Southern were negotiating against each other—as to the potential anticompetitive effects of the proposed merger.<sup>4</sup> But in their January 2, 2026 response to the submissions of CN and others arguing that the Application is incomplete, Applicants make clear that they will stand on their erroneous privilege objections. Without legal citation or further explanation, Applicants made a bald assertion that the “schedule at issue is shielded from discovery by recognized privileges.”<sup>5</sup> Since Applicants have claimed that the question of whether Schedule 5.8 is privileged is a “discovery dispute,”<sup>6</sup> CN respectfully files this

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<sup>3</sup> See 49 C.F.R. § 1180.6(a)(7)(ii) (requiring that an application for control contain within it the “contract or other written instrument entered into . . . pertaining to the proposed transaction”).

<sup>4</sup> See CN-6, FD 36873 (filed Dec. 29, 2025) (hereinafter the “CN Comment on Completeness”) at 27-31.

<sup>5</sup> See UP-17/NS-15, FD 36873 (filed Jan. 2, 2026) (hereinafter the “Reply”) at 25.

<sup>6</sup> *Id.* at 26.

motion to ensure the issue is resolved promptly.<sup>7</sup> CN submits this motion without waiving its argument that Applicants’ omission of Schedule 5.8 renders the Application incomplete as a matter of law, and in fact continues to encourage the Board to reject the Application and mandate full disclosure of all appendices, schedules, and disclosures to the Merger Agreement. In all events, CN respectfully seeks an order requiring Union Pacific to produce Schedule 5.8 expeditiously.

### **Procedural Facts**

CN served its First RFPs on Union Pacific on September 23, 2025. The First RFPs include eight requests (each a “Request”), each seeking information that is highly relevant and that could be produced without any significant burden.<sup>8</sup>

After several exchanges regarding Union Pacific’s Responses and Objections to the First RFPs, Union Pacific made its first production of documents on October 31, 2025, over a month after CN served the First RFPs. Within the materials responsive to Request 1, Union Pacific produced a redacted Section 5.8 of the Company Disclosure Schedules (“Schedule 5.8”) with no explanation or justification for the redaction (i.e., without stating the basis for the claim that it is privileged or otherwise not discoverable). Nor did Union Pacific identify the applicable privilege, the individuals who received Schedule 5.8, or the dates of any such disclosures.

When asked the basis for the redaction, Union Pacific responded only that Schedule 5.8 “reflects the legal advice of counsel and attorney work product regarding potential settlement

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<sup>7</sup> The parties are discussing proposed procedural guidelines for the discovery process, including expedited letter briefs for discovery disputes. CN favors letter briefs on discovery issues. Because the discovery guidelines are not yet agreed or approved, however, CN makes this initial request as a motion, consistent with the Board’s default rules.

<sup>8</sup> *See* Ex. 1. While CN reserves all rights with respect to all Requests, this motion concerns only Request 1, which seeks production of the “complete disclosure schedules, exhibits, and appendices to the Merger Agreement.”

strategy” and is “further protected from discovery by the settlement privilege.”<sup>9</sup> It provided no further case law or evidence in support of this sweeping statement of the several (and even contradictory) allegedly applicable privileges. On November 25, 2025, CN sent additional correspondence to Union Pacific noting that it disagreed with its assertions of privilege and that the parties had thus reached impasse on Request 1.<sup>10</sup>

On December 19, 2025, Applicants filed their Application.<sup>11</sup> The Application includes a request that the Board make a so-called “*Schwabacher*” fairness determination, which requires that the Board determine whether *all* of the terms of the proposed merger are fair to Applicants’ shareholders.<sup>12</sup> But the Application contains *none* of the associated schedules, disclosures, or appendices to the Merger Agreement. CN,<sup>13</sup> as well as several other interested parties,<sup>14</sup> have asserted that this deficiency renders the Application incomplete under 49 C.F.R. §1180.6(a)(7)(ii). CN’s Comment on Completeness further explained that Schedule 5.8 is not shielded from disclosure by any claim of privilege and must be provided to the Board in full.

Applicants responded in their Reply that they need not supply any of the schedules, appendices, or disclosures to the Merger Agreement.<sup>15</sup> Such omission is glaring. Just last week,

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<sup>9</sup> See Ex. 6 (Nov. 18, 2025 letter from K. Kelly to A. Ellis).

<sup>10</sup> See Ex. 7 (Nov. 25, 2025 letter from A. Ellis to M. Rosenthal).

<sup>11</sup> UP-13/NS-11, FD 36873 (filed Dec. 19, 2025) (hereinafter the “Application”).

<sup>12</sup> Appl. Vol. 1 at 23; see *Schwabacher v. United States*, 334 U.S. 182, 200 (1948) (“Federal law requires that merger terms be just and reasonable to all groups of stockholders, in contemplation of the continued use of their capital in the public calling to which it has been dedicated.”); *Zatz v. United States*, 149 F.3d 144 (2d Cir. 1998).

<sup>13</sup> See CN-6, FD 36873 (filed Dec. 29, 2025).

<sup>14</sup> See BNSF-8, FD 36873 (filed Dec. 29, 2025); CPKC-7, FD 36873 (filed Dec. 29, 2025); CSXT-4, FD 36873 (filed Dec. 29, 2025); NGFA-3, FD 36873 (filed Dec. 29, 2025).

<sup>15</sup> See Reply at 25-26.

the Board determined that a verified notice of exemption was not complete until it was supplemented with the “complete version” of the subject lease.<sup>16</sup> It would be nonsensical for the Board to require a complete version of an agreement for a notice of exemption proceeding filed by a shortline railroad—which does not even require an affirmative ruling on the merits—but not for a proceeding in which two Class I railroads propose to merge.

With regard to Schedule 5.8 specifically, Applicants explain that it “addresses the allocation of regulatory risk between UPC and NSC” and “the outer limits of conditions to the merger that UPC is obligated to NSC to accept.”<sup>17</sup> As a result, they claim that it is “shielded from discovery by recognized privileges.”<sup>18</sup> Applicants once again provide no support for such a bold assertion—they cite no cases or other legal authority, they provide no fact declarations or witness affidavits, and do not otherwise provide (nor have they ever provided) a privilege log or any other explanation for the basis of any privilege or a list of individuals who have received Schedule 5.8. Moreover, Applicants do not address any of the interested parties’ explanations for why any such privileges do not apply to Schedule 5.8.

### **Board Discovery Standards**

The Board permits discovery after the initiation of a proceeding under 49 U.S.C. § 11323 but before the filing of or the acceptance of an application.<sup>19</sup> The Board’s discovery rules “follow

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<sup>16</sup> See *N. Lines Ry.—Amended Lease & Operation Exemption Containing Interchange Commitment—BNSF Ry.*, FD 36891 (STB served Dec. 30, 2025); see also *Wash. & Idaho Ry.—Lease and Operation Exemption—BNSF Ry.*, FD 35370 (STB served Apr. 23, 2010).

<sup>17</sup> *Id.* at 26.

<sup>18</sup> *Id.*

<sup>19</sup> See, e.g., *Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500, slip op. at 4 (STB served Aug. 2, 2021); see also *Norfolk S. Corp.—Acquis. of Control—Norfolk & Portsmouth Belt Line R.R.*, FD 36836, slip op. at 4 (STB served Apr. 11, 2025) (declining to “propose a schedule that would limit the taking of discovery until the Board publishes a notice accepting the application”); *Norfolk S. Corp.—Acquis. of Control—Norfolk & Portsmouth Belt Line R.R.*, FD 36836, slip op.

generally those in the Federal Rules of Civil Procedure” and permit parties to “obtain discovery regarding any matter that is not privileged and that is relevant to the subject matter involved in a proceeding.”<sup>20</sup> Information is relevant when it “might be able to affect the outcome of a proceeding.”<sup>21</sup> The basic discovery that CN seeks but which Union Pacific has yet to provide is well supported by the Board’s discovery rules.

When a party claims a privilege as the basis for withholding documents, that party bears the burden of proving the existence of the privilege or other legal protection, and failure to present sufficient facts to allow the decision maker to “state *with reasonable certainty* that the privilege applies” is grounds to reject a claim of privilege.<sup>22</sup> Indeed, the proponent of a privilege must present more than “conclusory statements [and] generalized assertions” in support of said privilege.<sup>23</sup>

### Argument

There is no dispute that Schedule 5.8 is highly relevant to these proceedings. Union Pacific

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at 5 (STB served June 13, 2025) (denying petition for reconsideration of Board’s decision “allowing discovery to proceed” prior to the application).

<sup>20</sup> *Potomac Elec. Power Co. v. CSX Transp., Inc.*, 2 S.T.B. 290, 291 n.5 (1997); *see also* 49 C.F.R. § 1114.21(a)(1), *Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500, slip op. at 4 (STB served Aug. 2, 2021) (acknowledging authority to seek material relevant to subject matter of proceeding under 49 C.F.R. § 1114.21 and interpreting scope of relevance in discovery “[b]roadly”); *Finch Paper LLC—Pet. for Declaratory Ord.*, FD 35981, slip op. at 2 (STB served Jan. 18, 2017) (administrative law judge order referring to the Board’s discovery regulations as using “a very liberal standard” and describing “relevant” as “a broad standard”), *aff’d*, (STB served Mar. 24, 2017).

<sup>21</sup> *See Atchison, Topeka & Santa Fe Ry.—Operating Rts.—S. Pac. Transp. Co.*, FD 22218, slip op. at 2 (STB served Feb. 7, 2025).

<sup>22</sup> *FTC v. TRW, Inc.*, 628 F.2d 207, 213 (D.C. Cir. 1980) (emphasis in original); *see also English v. Wash. Metro. Area Transit Auth.*, 323 F.R.D. 1, 9 (D.D.C. 2017) (citing *Felder v. Wash. Metro. Area Transit Auth.*, 153 F. Supp. 3d 221, 224 (D.D.C. 2015)).

<sup>23</sup> *United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121, 127 (D.D.C. 2012).

has admitted that Schedule 5.8 reflects the terms that Union Pacific and Norfolk Southern negotiated among themselves—i.e., it reflects contractual terms agreed to during a purportedly arm’s-length negotiation—regarding potential conditions Applicants would accept to ensure the Board’s approval of the proposed merger. Schedule 5.8 reflects Applicants’ own views as to where, how and why Applicants view the greatest risk of competitive harm and anticipated conditions STB may impose. Divestiture and remedial conditions in merger agreements typically offer a roadmap into the anticipated types and magnitude of competitive harms. That alone renders Schedule 5.8 relevant to these proceedings, as the Board is required to ensure that the proposed merger enhances competition.<sup>24</sup> Additionally, Schedule 5.8 reflects a key negotiated term that will assist the Board in determining whether the transaction is fair to Norfolk Southern and Union Pacific shareholders. That also renders Schedule 5.8 relevant. Nor did Applicants contend otherwise—they have not claimed that Schedule 5.8 is not relevant to the proceeding.

Thus, the only dispute is whether Schedule 5.8 is privileged. As discussed below, despite Union Pacific’s unsupported assertions to the contrary, no privilege or legal protection applies to Schedule 5.8. Union Pacific’s complete abdication of its burden to support its claims of privilege is not just a mere technicality: it is an implicit concession that Union Pacific does not have the facts to substantiate a claim of privilege.

#### **I. Union Pacific Should Produce Schedule 5.8 to the Merger Agreement**

Union Pacific sets forth the novel argument that Schedule 5.8 is protected from disclosure by attorney client privilege, work product doctrine, and/or settlement privilege. CN disagrees. No possible privilege or work product doctrine can attach to the Merger Agreement documents negotiated and executed between the parties to the merger. Union Pacific has never provided

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<sup>24</sup> See 49 C.F.R. § 1180.

evidentiary support for its claim, nor cited any legal authority for the proposition that a negotiated merger agreement can be subject to a privilege. To the extent Union Pacific had any legitimate claim of privilege over Schedule 5.8, the privilege was waived when the Merger Agreement Schedules were provided to independent banks for purposes of rendering their fairness determinations.

**A. No Privilege Attaches to Schedule 5.8.**

**1. Schedule 5.8 to the Merger Agreement Is Not Protected by Attorney Client Privilege.**

Courts will construe attorney client privilege narrowly, to only those situations in which the communication was made for the purpose of obtaining legal advice.<sup>25</sup> No such attorney client privilege attaches to Schedule 5.8. Final merger documents are business documents shared across and executed by adverse parties, not privileged communications seeking legal advice from attorneys. It is axiomatic that privilege does not attach to these types of materials.<sup>26</sup> Merger agreements and their exhibits, appendices, and schedules, by their nature, are intended to be shared with an adverse party such that they are inherently not privileged,<sup>27</sup> and that is precisely the case

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<sup>25</sup> See, e.g., *Fisher v. United States*, 425 U.S. 391, 403 (1976) (“[S]ince the privilege has the effect of withholding relevant information from the fact-finder, it applies only when necessary to achieve its purpose. Accordingly it protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege.”); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757 (D.C. Cir. 2014) (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 68-72 (2000)) (attorney client privilege applies only “to a confidential communication between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client.”).

<sup>26</sup> See *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982) (“[A]ny voluntary disclosure by the client to a third party breaches the confidentiality of the attorney-client relationship and therefore waives the privilege.”).

<sup>27</sup> See, e.g., *In re Grand Jury Subpoena*, 662 F.3d 65, 68-72 (1st Cir. 2011) (declining to find “closing statement, sales contract(s), and records of payment” to be privileged because they would have been “revealed at the closing and are, therefore, not confidential in nature”); *United States v. McDonald*, 313 F.2d 832, 833-35 (2d Cir. 1963) (finding “no basis” for claim that the attorney client privilege applies to closing statements and sales contracts because the “client necessarily

here.

## **2. Schedule 5.8 Is Not Protected by the Work Product Doctrine.**

Nor does the work product doctrine protect Schedule 5.8 from disclosure. At the outset, the work product doctrine covers only those materials created in anticipation of and for use in litigation.<sup>28</sup> But here, the schedules were shared across adverse parties, such that any work product protections were waived.<sup>29</sup> In *Courtalert.Com*, for example, the Southern District of New York rejected the defendants’ attempts at redacting portions of a merger agreement that discussed pending litigation under a theory of work product protection.<sup>30</sup> In rejecting the parties’ claim of work product, the Court noted that the redacted provision in the agreement was “merely another business term in a merger agreement negotiated between two entities at arm’s length” such that no possible privilege—or other legal protection—applied.<sup>31</sup> Here, too, Schedule 5.8 merely reflects business terms negotiated between Union Pacific and Norfolk Southern.<sup>32</sup> The Board should not permit Applicants to conceal the terms of the transaction that is the subject of this proceeding.

## **3. Schedule 5.8 Is Not Protected by Common Interest Privilege.**

No common interest privilege attaches either, for “even if parties to an agreement share an

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contemplated divulging the information requested to other parties at the closing”).

<sup>28</sup> See *In re Aftermarket Filters Antitrust Litig.*, 2010 U.S. Dist. LEXIS 117719, at \*20 (N.D. Ill. Nov. 4, 2010).

<sup>29</sup> See *Niagara Mohawk Power Corp. v. Stone & Webster Eng’g Corp.*, 125 F.R.D. 578, 587 (N.D.N.Y. 1989) (“[W]ork product protection is waived when documents are voluntarily shared with an adversary[.]”); *Bovis Lend Lease, Lmb v. Seasons Contracting Corp.*, 2002 U.S. Dist. LEXIS 23322, at \*38 (S.D.N.Y. Dec. 4, 2002) (same).

<sup>30</sup> *Courtalert.Com, Inc. v. Am. Legalnet, Inc.*, 2024 U.S. Dist. LEXIS 206259, at \*4 (S.D. N.Y. 2024).

<sup>31</sup> *Id.*

<sup>32</sup> See also *Medtronic Sofamore Danek, Inc. v. Michelson*, 2003 U.S. Dist. LEXIS 14054, at \*6 (W.D. Tenn. 2003) (requiring the production of unredacted schedules to a merger agreement that were not protected by work product).

interest between signing and closing,” if that common interest is primarily for business reasons, as opposed to legal reasons, no privilege attaches to their communications or shared documents.<sup>33</sup> Even if Schedule 5.8 was created to provide certainty for the parties about conditions the Board might impose in deciding whether to approve the merger, “[i]t is of no moment that the parties may have been developing a business deal that included as a component the desire to avoid litigation.”<sup>34</sup> Schedule 5.8 represents Applicants’ “shared commercial objective” in closing the transaction, which courts regularly find insufficient for invoking even common interest privileges.<sup>35</sup> This is also consistent with the Federal Trade Commission’s (“FTC”) guidance that *all* portions of a merger agreement should be submitted to the FTC’s Premerger Notification Office as part of its merger review process, as no part of the agreement is “protected by a common interest privilege.”<sup>36</sup> There is no basis for different treatment of a merger agreement in the Board’s review, especially where the regulations require that the Board “consider, but are not limited by, the policies embodied in the antitrust laws.”<sup>37</sup> Accordingly, Schedule 5.8—which was shared between Union Pacific and Norfolk Southern as adverse parties during the merger negotiations—is not

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<sup>33</sup> *Am. Bottling Co. v. Repole*, 2020 Del. Super. LEXIS 225, at \*10 (Super. Ct. May 12, 2020).

<sup>34</sup> *Titan Inv. Fund II, LP v. Freedom Mortg. Corp.*, 2011 Del. Super. LEXIS 63, at \*14 (Del. Super. Feb. 2, 2011).

<sup>35</sup> *See id.* at \*13 (declining to find privilege where communications related to merger negotiations); *Titan*, 2011 Del. Super. LEXIS 63, at \*16-17 (declining to find privilege where documents related to capital funding); *U.S. Bank Tr. Co., Nat’l Ass’n v. DISH DBS Corp.*, 2025 U.S. Dist. LEXIS 226515, at \*12 (S.D.N.Y. Nov. 18, 2025) (“The common interest doctrine does not cover communications regarding merger negotiations.”).

<sup>36</sup> *See* Bruce Hoffman, “All” means All: Submit side agreements with an HSR filing, Federal Trade Commission (Dec. 20, 2017), <https://www.ftc.gov/enforcement/competition-matters/2017/12/all-means-all-submit-side-agreements-hsr-filing> (explaining that “binding agreements or side letters negotiated between the merging parties that reflect the parties’ antitrust review obligations, risk-sharing commitments, and potential remedial measures” are not privileged).

<sup>37</sup> 49 C.F.R. § 1180.1(c)(2).

protected by a common interest privilege.<sup>38</sup>

#### 4. Schedule 5.8 Is Not Protected by Settlement Privilege.

In discovery letters, Union Pacific and Norfolk Southern have also claimed that Schedule 5.8 is protected by a settlement privilege.<sup>39</sup> But this doctrine attaches only where the parties are offering or accepting consideration to compromise (or attempting to compromise) a dispute.<sup>40</sup> There was no relevant claim pending against Union Pacific by Norfolk Southern or vice versa at the time Schedule 5.8 was created, and as such Applicants had no settlement to negotiate. Moreover, Applicants cannot simultaneously claim common interest (which requires an alliance of legal interests) and a settlement privilege (which would require adverse parties negotiating against each other resolve a legal claim between them).

Even if Schedule 5.8 were to represent settlement negotiations between Union Pacific and Norfolk Southern, which it does not, it would not be protected from disclosure. Schedule 5.8, in Applicants' own words, reflects the conditions that Union Pacific would be contractually obligated to accept. The omission intentionally obscures from the public and the Board one of the most

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<sup>38</sup> See *In re Côte d'Azur Est. Corp.*, 2022 WL 17574747, at \*12 (Del. Ch. Dec. 12, 2022) (“When parties are engaged in adversarial negotiation, they do not share a common interest sufficient to support privilege.”); *In re JP Morgan Chase & Co. Sec. Litig.*, 2007 WL 2363311, at \*5 (N.D. Ill. Aug. 13, 2007) (“Prior to the merger, these organizations stood on opposite sides of a business transaction. From a business standpoint and from a legal standpoint, the merger parties’ interests stood opposed to each other. They had no common interest, and indeed, their interests were in conflict—each company wanted to get the best deal from the other company, and to the extent that one succeeded in its goal, the other suffered.”).

<sup>39</sup> To the extent Applicants are invoking Federal Rule of Evidence 408, which they have not said explicitly, that rule would not bar discoverability but instead is limited to admissibility of evidence. See *Gramercy Grp., Inc v. D.A. Builders, LLC*, 2017 U.S. Dist. LEXIS 185543, at \*9 (D. Haw. Nov. 8, 2017) (granting motion to compel deposition testimony regarding a negotiated agreement because “FRE 408 . . . does not protect settlement negotiations from discovery”).

<sup>40</sup> See, e.g., *Canadian Nat’l Ry.—Control—Ill. Cent. Corp.*, FD 33556, slip op. at 7 (STB served Oct. 16, 1998).

material and relevant terms of the proposed transaction. Accordingly, Schedule 5.8 “must yield to the need for discovery.”<sup>41</sup>

**B. UP Has Failed to Support Its Claim of Privilege.**

At no point during any of the many opportunities available to it—in response to the RFPs served by CN, during the multiple conferrals on CN’s discovery requests, in the Application itself, or in its reply to the completeness comments—has Union Pacific provided even the most basic information necessary to substantiate its claim of privilege. This failure alone merits rejection of the claim.<sup>42</sup> Union Pacific’s failure to provide any of this information is not surprising: any such information (including who received Schedule 5.8) would almost certainly reveal that Schedule 5.8 was negotiated and exchanged extensively among a host of advisors outside Union Pacific and Norfolk Southern. The exchange of such information across a wide audience reflects a lack of any intention to treat Schedule 5.8 as privileged—indeed, courts routinely hold that materials exchanged with third parties, including third parties in merger negotiations, are not privileged because there is no expectation of confidentiality and that the discussions are not privileged because they are not soliciting or in furtherance of giving legal advice.<sup>43</sup>

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<sup>41</sup> See *id.*, slip op. at 8 (affirming production of a settlement agreement between applicants to a merger and an opponent to the merger because the transaction contemplated in the settlement agreement was at issue in the proceeding).

<sup>42</sup> *United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121, 127 (D.D.C. 2012).

<sup>43</sup> See, e.g., *United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121, 132 (D.D.C. 2012) (holding that party failed to demonstrate that a report was “prepared for the primary purpose of seeking legal advice, and therefore it is not entitled to the protection of the attorney-client privilege”); *SPS Techs., LLC v. Briles Aero., Inc.*, 2021 U.S. Dist. LEXIS 26049, at \*8 (C.D. Cal. Feb. 5, 2021) (declining to find work product protections where “there was no expectation of confidentiality in the underlying communications”); cf. *Barrett v. Vojtas*, 182 F.R.D. 177, 181 (W.D. Pa. 1998) (“[W]hen it is expected that the therapist will produce a report or an evaluation from the ordered sessions for review by third parties...there can be no expectation of confidentiality, and therefore no privilege.”).

Schedule 5.8 is not privileged. Union Pacific has provided no support—whether in case law, facts, or otherwise—to the contrary. Union Pacific has had “multiple opportunities to bolster its claimed privilege” but “failed to use its best efforts to cure the problems” created by its “failures until it was too late,” likely to provide its supposed justifications “only after a crash was imminent.”<sup>44</sup> The Board should require Applicants to produce the complete merger agreement, including unredacted Schedule 5.8.

**C. Any Possible Privilege Claim Is Waived by Applicants’ Request for a Fairness Determination and Would Create an Obvious Inequity by Providing Schedule 5.8 to Third-Party Banks but Not the Board and Interested Parties.**

Even if attorney client privilege had attached (it did not), any such privilege would have been waived by the fact that Union Pacific has already shared Schedule 5.8 with third parties for purely business reasons: The banks that provided fairness opinions. Applicants have requested a *Schwabacher* fairness determination from the Board. A fairness determination from the Board, which would exempt Applicants from state securities regulations that would otherwise govern the transaction and protect them from litigation by dissenting shareholders.<sup>45</sup>

In support of their request for a fairness determination from the Board, Applicants submitted three independent opinions from investment banks: two on behalf of Union Pacific and one on behalf of Norfolk Southern. These three investment banks reviewed the Merger Agreement in

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<sup>44</sup> See *Dorf & Stanton Communs. v. Breweries*, 100 F.3d 919, 923 (Fed. Cir. 1996).

<sup>45</sup> See 49 U.S.C. §§ 11321(a) and 11324(c); *Schwabacher*, 334 U.S. at 201 (“We therefore hold that no rights alleged to have been granted to dissenting stockholders by state law provision concerning liquidation survive the merger agreement approved by the requisite number of stockholders and approved by the [Interstate Commerce] Commission as just and reasonable”); *Canadian Nat’l Ry.—Control—Ill. Cent. Corp.*, 4 S.T.B. 122, 172 (1999) (explaining that under the public interest standard, “we are required to determine whether terms are fair to the shareholders”).

formulating these fairness opinions.<sup>46</sup> None of these banks mention any allegedly privileged carve outs. Nor could they, as rendering a fairness opinion requires a fulsome review of the entirety of the agreement, lest Norfolk Southern’s or Union Pacific’s shareholders be subject to unfair treatment.<sup>47</sup> Indeed, the Board and interested parties and shareholders cannot understand the full scope and value of the transaction without reviewing the entirety of the Merger Agreement. Further still, it is a purely business task; it is totally “unrelated to the rendition of legal advice or protection of a legal interest.”<sup>48</sup> Had Union Pacific and Norfolk Southern identified who had received Schedule 5.8 in support of its claims of privilege (it did not), such information would almost certainly have shown that Schedule 5.8 was shared with a variety of non-attorney advisors for non-legal purposes. For Union Pacific and Norfolk Southern to have shared Schedule 5.8 with third parties but now deny CN—and the Board—the ability to review it shows the issue is not, and has never been, one of privilege but of gamesmanship. Accordingly, even if a privilege had applied (it never did), it could not now shield Schedule 5.8 from production.

### Conclusion

The Board’s rules expressly encourage public participation “[t]o ensure a fully developed

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<sup>46</sup> See Appl. Vol. 1 at 567 (Morgan Stanley), 572 (Wells Fargo), 579 (Bank of America).

<sup>47</sup> Indeed, Bank of America notes that its fairness opinion assumes “at the direction of Norfolk Southern, that the transaction will be consummated in accordance with the terms set forth in the Agreement, without waiver, modification or amendment of any material term, condition or other agreement contemplated therein or thereby and that, in the course of obtaining the necessary governmental, regulatory and **other approval, consents, releases and waivers for the Transaction, no delay, limitation, restriction or condition, including any divestiture requirements or amendments or modifications, will be imposed that would have an adverse effect on Norfolk Southern, Union Pacific, or the contemplated benefits of the Transaction,** in each case, in any respect material to our analyses or opinion.” Appl. Vol. 1 at 580 (emphasis added). This note suggests that the banks had visibility into Schedule 5.8 in order to comment on conditions, including divestitures.

<sup>48</sup> *Flagstar Bank, FSB v. Freestar Bank, N.A.*, 2009 U.S. Dist. LEXIS 76842, \*14 (N.D. Ill. 2009).

record on the effects of a proposed railroad consolidation.” 49 C.F.R. § 1180.1(m). CN’s Requests serve that policy, as they contribute to the development of a record for the Board to assess the impacts of the proposed transaction and perform their role in determining the fairness of the transaction to shareholders of Union Pacific and Norfolk Southern. Indeed, CN has taken steps to minimize the burden on Union Pacific and presently seeks to compel the production of materials responsive to only one discrete Request that CN expects is readily available and would require minimal burden to produce. Accordingly, CN respectfully requests that the Board grant this Motion to Compel the production of unredacted Schedule 5.8 and require Union Pacific to produce it expeditiously.

Respectfully submitted,

/s/ Sara Y. Razi

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*Attorneys for CN*

**CERTIFICATE OF SERVICE**

I hereby certify that, on this 8th day of January 2026, I caused a true and correct copy of the foregoing to be served by first-class mail or email on all parties of record in this proceeding, the Secretary of Transportation, the Attorney General, and Administrative Law Judge Jenifer Soulikias.

*/s/ Andrew Bernstein*

Andrew Bernstein

Sr. Paralegal Manager

Simpson Thacher & Bartlett LLP

**Exhibit 1**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB FINANCE DOCKET NO. 36873**

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**UNION PACIFIC CORPORATION, ET AL. – CONTROL –  
NORFOLK SOUTHERN CORPORATION, ET AL.**

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**GRAND TRUNK CORPORATION'S FIRST SET OF  
DISCOVERY REQUESTS TO APPLICANTS**

Pursuant to 49 C.F.R. Part 1114, Grand Trunk Corporation, on behalf of itself and its U.S. rail operating subsidiaries<sup>1</sup> (collectively "CN" as defined below) requests that NS (as defined below) and UP (as defined below) respond to the following discovery requests in accordance with the Surface Transportation Board's rules, and the Definitions and Instructions set forth below.

Responses from NS and UP should be served as soon as possible, and in no event later than fifteen days from the date of service hereof. NS and UP are requested to contact the undersigned promptly to discuss any objections or questions regarding these requests with a view to resolving any disputes or issues of interpretation informally and expeditiously.

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<sup>1</sup> Bessemer and Lake Erie Railroad Company, Cedar River Railroad Company, Chicago, Central & Pacific Railroad Company, Grand Trunk Western Railroad Company, Illinois Central Railroad Company, Iowa Northern Railway Company, The Pittsburgh & Conneaut Dock Company and Wisconsin Central Ltd.

## DEFINITIONS

1. “CN” means Grand Trunk Corporation; its parent companies; subsidiaries; controlled, affiliated, and predecessor firms; divisions; subdivisions; components; units; instrumentalities; partnerships; and joint ventures.
2. “Communication” or “Communications” shall mean any oral or written representation, promise, conversation, statement, message, or transmission of information, electronic or otherwise, and should be construed in the broadest sense possible. Requests to produce or identify Communications include, but are not limited to, text messages, emails, instant or direct messages on any platform, voicemails, electronic communications, agendas, notes, talking points, agreements, inquiries, memoranda, reports, face-to-face conversations and meetings, telephone conversations or conference calls, negotiations, and presentation slides, and include information that was displayed or shown to another party without being transmitted in writing to that party.
3. “Concerning” means relating to, referring to, describing, evidencing, constituting, or in any way pertaining to, in whole or in part, the subject matter or the Request.
4. “Document” or “Documents” is used in the broadest possible sense permissible and includes, without limitation, all originals, copies (if the originals are not available), nonidentical copies (whether different from the original because of underlining, editing marks, notes made on or attached to such copy, or otherwise) and drafts, whether printed or recorded (through a sound, video, or other electronic, magnetic, or digital recording system) or reproduced by hand, including, without limitation: letters, correspondence, telegrams, telexes, memoranda, records, text messages, communications via Internet-connected applications, Communications, summaries of personal conversations or interviews, minutes or records or notes of meetings or conferences, note pads, notebooks, postcards, “Post-It” or similar notes, stenographic notes, notes, opinions or reports of financial advisors or consultants, opinions or reports of experts, projections, financial or statistical statements or compilations, contracts, agreements, appraisals, analyses, purchase orders, confirmations, publications, articles, books, pamphlets, circulars, microfilm, microfiche, reports, studies, logs, surveys, diaries, calendars, appointment books, maps, charts, graphs, bulletins, photostats, speeches, data sheets, pictures, photographs, illustrations, blueprints, films, drawings, plans, tape recordings, videotapes, disks, diskettes, data tapes or readable computer-produced interpretations or transcriptions thereof, electronic messages, voice mail messages, interoffice communications, advertising, packaging and promotional materials, material of any sort and in any format maintained or available at any time on the World Wide Web

(whether formerly, currently, or both), and any other writings, papers and tangible things of whatever description whatsoever, including but not limited to any information contained in any computer, even if not yet printed out.

5. “Identify,”
  - a. when used in relation to an individual, means to state the name, address, and business telephone number of the individual, the job title or position and the employer of the individual at the time of the activity inquired of, and the last- known position and employer of the individual;
  - b. when used in relation to a corporation, partnership, or other entity, means to state the name of the entity and the address and telephone number of its principal place of business;
  - c. when referring to a Document, means to give, to the extent known, the (i) type of document (e.g., letter, e-mail, memorandum, report, chart); (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) or recipient(s). Documents may be produced in lieu of being Identified;
  - d. when referring to information, means to list or produce documents containing the specified information;
  - e. when used in relation to an oral Communication or statement means to: identify the person making the Communication or statement and the person, persons, or entity to whom the Communication or statement was made; state the date and place of the Communication or statement; describe in detail the contents of the Communication or statement; and identify all Documents that refer to, relate to or evidence the Communication or statement.
6. “Including” means “including, but not limited to.”
7. “Merger Agreement” means that certain Agreement and Plan of Merger, dated as of July 28, 2025, by and among Union Pacific, Ruby Merger Sub 1 Corporation, Ruby Merger Sub 2 LLC, and Norfolk Southern, and any amendments or supplements thereto.
8. “NS” means Norfolk Southern Corporation and Norfolk Southern Railway Company; their parent companies; subsidiaries; controlled, affiliated, and predecessor firms; departments; divisions; subdivisions; components; units; instrumentalities; partnerships; and joint ventures.

9. “Proposed Transaction” means the proposed combination of NS and UP for which NS and UP are seeking STB approval in Finance Docket No. 36873.
10. “UP” means Union Pacific Corporation and Union Pacific Railroad Company; their parent companies; subsidiaries; controlled, affiliated, and predecessor firms; departments; divisions; subdivisions; components; units; instrumentalities; partnerships; and joint ventures.
11. “You” and “Your” mean UP and/or NS, whichever is broader in the context in which it is used.
12. “RIA” or “Railroad Industry Agreement” means the Railroad Industry Agreement entered into by the American Short Line and Regional Railroad Association, on behalf Class II and III railroads, and the Association of American Railroads, on behalf of Class I railroads, on September 10, 1998, as amended on October 7, 2004.

### INSTRUCTIONS

1. Responsive Documents to all requests should be produced to the undersigned counsel, not later than fifteen days after the date of service of these Requests. Production of Documents may be accomplished through electronic means such as a data room or file transfer if You prefer. Rolling production of relevant Documents during that fifteen-day period is requested.
2. These requests extend to any Documents or Communications in the possession, custody, or control of UP, its present and former directors, officers, employees, attorneys, and any other agents or representatives, or NS, its present and former directors, officers, employees, attorneys, and any other agents or representatives.
3. Unless a different time period is specified, these requests cover the period from January 1, 2019 to the present.
4. If NS and/or UP withhold Documents or Communications on the basis of a claimed privilege or attorney work product, then for each such document, NS and/or UP should Identify the Document or Communication and state the basis for the claim that it is privileged or otherwise not discoverable.
5. NS and/or UP should immediately contact Lindsey Bohl at (202) 636-5908 to discuss any objections or questions with a view to resolving any dispute or issues of interpretation informally and expeditiously.
6. Following prior discovery practice in merger proceedings, these requests are presented in a single list of requests. Requests that ask NS and/or UP to produce documents shall be responded to in accordance with 49 C.F.R. §

1114.30. Requests that ask NS and/or UP to Identify or describe information or that otherwise pose questions shall be responded to in accordance with 49 C.F.R. § 1114.26.

7. If NS and/or UP believe that information responsive to a particular discovery request has been already presented in their workpapers, Identify the specific workpaper or workpapers that they believe provides the requested information, including the specific sheets and cells where applicable.
8. Pursuant to 49 CFR § 1114.29, NS and UP are under a duty to supplement their responses with respect to any Request.

### **DOCUMENT REQUESTS**

1. Produce complete disclosure schedules, exhibits, and appendices to the Merger Agreement.
2. Produce copies of all Documents or Communications that NS and/or UP produce or have previously produced to the Surface Transportation Board, the United States Department of Justice, or any other federal government agency, state attorneys general, or any other state government agency relating to the Proposed Transaction.
3. Produce copies of all Documents or Communications that NS and/or UP produce or have previously produced in response to discovery requests submitted by other participants in this proceeding.
4. Produce data and Documents concerning reciprocal switching for the period from January 1, 2019 through December 31, 2024, including but not limited to car-level movement records, switch lists, interchange logs, line-segment-level usage data, and any other records or communications reflecting reciprocal switching arrangements or traffic. To the extent not otherwise encompassed by this request, Your response should include: (1) waybill date, number, and identifiers associated with the switch operation; (2) the switching locations where the actual car switching between roads occur (FSAC, SPLC, Rule 260 junction code, station name, and state/province); (3) local customer information where the switched cars are picked-up or delivered in the switching terminal area (CIF, Parent Customer Name, FSAC, SPLC, station name, and state/province); (4) payment information for that switch; and (5) date of operation.
5. Produce Documents sufficient to show all interchange volumes with other carriers, broken down by line, location, and counterparty, together with any associated payments, settlements, or charges between carriers for haulage, switching, or other car handling (including waybill identifiers, car initials and numbers, dates and times, service type, payment types, and amounts),

for the period from January 1, 2019 through December 31, 2024, provided at the most disaggregated level maintained in the ordinary course of business.

6. Produce all rail line sale, lease, or interchange agreements to which You are a party that contain an interchange commitment, as defined in the Surface Transportation Board's August 28, 2025 order.
7. For each interchange commitment identified in Request 6, produce Documents concerning all instances in which You have granted a waiver, exception, or other form of consent permitting the tenant or purchasing railroad to interchange traffic with another carrier notwithstanding the interchange commitment. This includes waivers granted under the Railroad Industry Agreement or any other ad hoc or informal exceptions.
8. Identify the customers referenced in the following statements by UP's CEO Jim Vena at the Morgan Stanley 13th Annual Laguna Conference held on September 10, 2025 and the Norfolk Southern Corporation Earnings Call held on July 29, 2025:
  - a. "We don't see any customer that degrades its service or capability to compete. And the few, very few and we're talking about less than 10 that through this transaction, because it's a bolt-on, would go 2:1."
  - b. "A significant note, with this combination, fewer than 20 customers will go from having two rail providers to just one, and we intend to provide a competitive alternative."

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Dated: September 23, 2025

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 23<sup>rd</sup> day of September, 2025, I have caused the foregoing “Grand Trunk Corporation’s First Set of Discovery Requests to Applicants” to be served electronically or by first-class mail, postage pre-paid, on the service list for Finance Docket No. 36873.

/s/ Andrew Bernstein  
Andrew Bernstein

**Exhibit 2**

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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**UNION PACIFIC'S RESPONSES AND OBJECTIONS  
TO GRAND TRUNK CORPORATION'S FIRST SET OF DISCOVERY  
REQUESTS**

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*Attorneys for Union Pacific  
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October 8, 2025

Union Pacific Railroad Company and Union Pacific Corporation (collectively, “Union Pacific”) respond to the first set of discovery requests of Grand Trunk Corporation<sup>1</sup> served on September 23, 2025 (“CN’s Requests” or “Document Requests” or “Requests”), as follows.

### GENERAL RESPONSES

The following General Responses apply to each of CN’s Requests:

1. Union Pacific is conducting a reasonable search for information and documents responsive to CN’s Requests. Where Union Pacific states that it will produce documents, Union Pacific will conduct a reasonable search for responsive, non-privileged documents, subject to the specific and general objections stated below.

2. Production of information or documents does not necessarily imply that the information or documents are relevant to or admissible in this proceeding and is not to be construed as waiving any of the general or specific objections stated below.

3. Union Pacific’s responses and objections to these Requests are based on Union Pacific’s present knowledge, information, and belief. Union Pacific reserves the right to rely upon facts, documents, or other evidence that it may develop or that may subsequently come to its attention; to assert additional objections; and to supplement or amend these responses at any time as this proceeding continues.

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<sup>1</sup> Per Grand Trunk Corporation’s First Set of Discovery Requests to Applicants, Grand Trunk Corporation is seeking discovery on behalf of its itself and its U.S. rail operating subsidiaries, including Bessemer and Lake Erie Railroad Company, Cedar River Railroad Company, Chicago, Central & Pacific Railroad Company, Grand Trunk Western Railroad Company, Illinois Central Railroad Company, Iowa Northern Railway Company, The Pittsburgh & Conneaut Dock Company and Wisconsin Central Ltd. (collectively “CN”).

## GENERAL OBJECTIONS

Union Pacific's General Objections, as set forth herein, are to be considered objections to each of the specific Document Requests (including subparts) that follow. These general objections are not exhaustive and, where appropriate, Union Pacific will also state specific objections. Union Pacific's objections shall not waive, limit, or prejudice any objections that it may later assert.

1. In providing these responses, Union Pacific reserves all objections as to competency, relevancy, materiality, authenticity, and admissibility of the use of any information requested in the CN's Requests and in any responses or productions Union Pacific may provide thereto, in any subsequent proceeding, or further proceedings in this matter. To the extent that Union Pacific provides responsive information or documents, Union Pacific does not concede that such information is relevant, material, or admissible into evidence, and any such production is not intended to waive any of Union Pacific's objections to any of CN's Requests.

2. Union Pacific objects to each and every Document Request as unduly burdensome and premature, to the extent it seeks discovery of information, documents, or communications prior to Union Pacific submitting its application and accompanying work papers and seeks discovery of information documents, or communications that are or will be available or accessible to CN as an interested party through the application and accompanying workpapers to be submitted in this proceeding, once filed.

3. Union Pacific objects to each and every Document Request and to each

Definition, Instruction, and Request contained therein to the extent they purport to impose upon Union Pacific burdens or duties that are greater than, or otherwise conflict with, the requirements or the permissible scope of discovery under 49 C.F.R. Part 1114, Subpart B, or under other Surface Transportation Board rules or precedents or are not proportional to the needs of the above-captioned proceeding and impose an undue burden on Union Pacific.

4. Union Pacific objects to each and every Document Request requesting that Union Pacific produce “all” responsive documents, communications, or information as unduly burdensome to the extent it requests that Union Pacific engage in an unreasonably broad collection and review in order to identify each and every document that may possibly be responsive. For those Requests to which it is obliged to respond, Union Pacific will produce such responsive documents or information as it is able to locate or identify in a reasonable search and which are not otherwise subject to an applicable privilege or other protection.

5. Union Pacific objects to the Document Requests and to each Definition, Instruction, and Request contained therein to the extent they seek the production of documents prepared in connection with, or information relating to, possible settlement or mediation of this or any other proceeding, in whole or in part.

6. Union Pacific objects to each and every Document Request and to each Definition, Instruction, and Request contained therein that request information, documents, or communications that are: (a) already in the possession of CN; (b) publicly available or otherwise readily available or accessible to CN from other

sources; (c) unreasonably cumulative or duplicative of documents already in CN's possession, custody, or control; or (d) otherwise obtainable in a more convenient, less burdensome, or less expensive manner than from Union Pacific.

7. Union Pacific objects to each and every Document Request and to each Definition, Instruction, and Request contained therein as unduly burdensome to the extent they seek production from the files of all current and former Union Pacific employees, including those who are not reasonably likely to possess non-duplicative relevant documents. Unless specifically stated otherwise, by stating that it will produce documents responsive to these Requests, Union Pacific represents that it will produce documents from files most likely to contain materials responsive to the Request without undue burden.

8. Union Pacific objects to each and every Document Request and to each Definition, Instruction, and Request contained therein as unduly burdensome to the extent they purport to require Union Pacific to conduct a special study or to undertake anything more than a reasonable search for responsive information. In responding to CN's Requests, Union Pacific will conduct a reasonable search of those accessible files in its possession in which information responsive to CN's Requests, as limited by Union Pacific's Objections, is likely to be located.

9. Union Pacific objects to each and every Document Request and to each Definition, Instruction, and Request contained therein to the extent they purport to prohibit Union Pacific from redacting information that might reveal Union Pacific's commercially sensitive or long-term corporate strategies and is not relevant to this

proceeding. Union Pacific will redact any such information, and reserves the right to redact any non-responsive information, from otherwise responsive documents produced to CN.

10. Union Pacific objects to the production of, and is not producing, documents or information subject to any attorney-client privilege, work-product doctrine, or other applicable privilege or protection. Union Pacific reserves the right to redact privileged information from materials that it produces in response to the Requests. Any production of privileged documents or information is inadvertent and should not be deemed as a waiver of any privilege. Union Pacific reserves all rights under applicable law, including the Protective Order to be entered in this case, to demand or require the return of all copies thereof and non-use by CN or by any other person or entity in this or any other proceeding.

11. Union Pacific objects to the production of documents that constitute or disclose confidential, proprietary, or commercially or competitively sensitive information. Union Pacific will produce such information, if not otherwise objectionable, designated “Confidential” or “Highly Confidential,” subject to the terms of the Protective Order entered in this case. Union Pacific reserves the right to seek additional protections as needed.

12. Union Pacific objects to each and every Document Request and to each Definition, Instruction, and Request contained therein to the extent they seek or may result in the use, disclosure, or dissemination of any confidential, proprietary, or commercially or competitively sensitive information produced in response to the

Document Requests for the purpose of training, fine-tuning, evaluating, or otherwise interacting with artificial intelligence (AI) models or systems in a manner that violates the terms of the Protective Order entered in this case. This objection includes, but is not limited to, any use of such materials in connection with large language models (LLMs), machine learning algorithms, or generative AI tools, regardless of whether such use is direct or indirect, manual or automated, or anonymized or de-identified. Union Pacific does not consent to the use of any of its discovery materials for purposes unrelated to this proceeding, including but not limited to AI training.

13. Union Pacific objects to Definition No. 2, “Communication” or “Communication,” as unduly burdensome and as seeking information that is not proportional to the probative value the information sought may have in this proceeding to the extent that it would require production of text messages, instant or direct messages on any platform and electronic communications other than emails, and to the extent that it purports to require production of material that was not reduced to writing. Union Pacific is not searching for and will not produce these categories of “Communications.”

14. Union Pacific objects to Definition No. 4, “Document” or “Documents,” to the extent this Definition seeks to expand upon and conflicts with 49 C.F.R. Part 1114, Subpart B. Union Pacific further objects to Definition No. 4 as unduly burdensome and as seeking information that is not proportional to the probative value the information sought may have in this proceeding to the extent that it would

require production of draft electronic communications, electronic meeting invites, meeting change or cancellation notices, text messages, communications by or with internet-connected applications (other than emails), electronic messages (other than emails), and Communications to the extent addressed in General Objection {12}. Union Pacific is not searching for and will not produce these categories of “Documents.”

15. Union Pacific objects to Definition No. 5, “Identify,” to the extent that it seeks to expand upon and conflicts with 49 C.F.R. Part 1114, Subpart B. Union Pacific further objects to Definition No. 5 as unduly burdensome and as seeking information that is not proportional to the probative value the information sought may have in this proceeding to the extent that it would require Union Pacific to provide information that is not reasonably accessible.

16. Union Pacific objects to Definition No. 8, “NS” as overly broad, unduly burdensome, disproportionate to the needs of this case, and not reasonably calculated to lead to the discovery of admissible evidence to the extent that it requires Union Pacific to respond to the Requests with respect to Norfolk Southern Corporation’s “parent companies; subsidiaries; controlled, affiliated, and predecessor firms; departments; divisions; subdivisions; components; units; instrumentalities; partnerships; and joint ventures.” Union Pacific will respond to the Requests only with respect to Norfolk Southern Corporation and Norfolk Southern Railway Company.

17. Union Pacific objects to Definition No. 10, “UP,” as overly broad, unduly

burdensome, disproportionate to the needs of this case, and not reasonably calculated to lead to the discovery of admissible evidence to the extent that it purports to require Union Pacific to respond to the Requests with respect to Union Pacific's "parent companies; subsidiaries; controlled, affiliated, and predecessor firms; departments; divisions; subdivisions; components; units; instrumentalities; partnerships; and joint ventures." Union Pacific will respond to the Requests only with respect to Union Pacific Corporation and Union Pacific Railroad Company.

18. Union Pacific objects to Definition No. 11, "You" and "Your" as overly broad, unduly burdensome, and vague, to the extent it purports to require Union Pacific to respond on behalf of Norfolk Southern Corporation or Norfolk Southern Railway Company. Union Pacific will respond to these Requests only as to Union Pacific Corporation and Union Pacific Railroad Company.

19. Union Pacific objects to each of Instructions No. 1, 2, 3, 4, 5, and 7 as unduly burdensome to the extent the Instruction seeks to impose obligations on Union Pacific that are greater than or otherwise inconsistent with those imposed under 49 C.F.R. Part 1114, Subpart B.

20. Union Pacific objects to Instruction No. 1 to the extent it purports to require Union Pacific to complete its production of documents, if any, within fifteen days after service of the Requests. Union Pacific will produce any documents identified in response to the Requests on a reasonable timeframe and on a rolling basis, and consistent with the procedural schedule for this proceeding.

21. Union Pacific objects to Instruction No. 2 to the extent it purports to

require Union Pacific to collect and/or produce documents that are not in its possession, custody, or control, and are not reasonably accessible in its files.

22. Union Pacific objects to Instruction No. 3 to the extent it purports to require Union Pacific to collect documents or information for an unduly burdensome period of time and “until present.” Except as more specifically objected to below, where Union Pacific agrees to produce responsive documents, Union Pacific will only search for and provide information up to July 29, 2025.

23. Union Pacific objects to Instruction No. 4 to the extent it purports to impose obligations on Union Pacific that are greater than or otherwise inconsistent with those imposed under 49 C.F.R. Part 1114, Subpart B.

24. Union Pacific objects to Instruction No. 5 to the extent it purports to impose obligations on Union Pacific to respond to the Requests in a manner not required by 49 C.F.R. Part 1114, Subpart B. Union Pacific will respond to the Requests as provided in the regulations.

25. Union Pacific objects to Instruction No. 7 to the extent it would require Union Pacific to provide information not required by 49 C.F.R. Part 1114, Subpart B or information that would be unduly burdensome to provide.

26. Union Pacific objects to Instruction No. 8 to the extent it would require Union Pacific to provide information not required by 49 C.F.R. Part 1114, Subpart B or information that would be unduly burdensome to provide.

27. Union Pacific’s Responses and Objections are based upon information presently known to it. Union Pacific reserves the right to rely upon facts, documents,

or other evidence that may develop or that may subsequently come to its attention; to assert additional objections; and to supplement or amend these responses at any time as this proceeding continues.

## **DOCUMENT REQUESTS AND REPONSES**

### **REQUEST NO. 1**

Produce complete disclosure schedules, exhibits, and appendices to the Merger Agreement.

#### **Union Pacific Response**

Union Pacific objects to this Request to the extent it seeks materials protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities, including materials relating to the potential settlement of this proceeding. Union Pacific further objects to this Request because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific will produce nonprivileged materials in its possession responsive to this Request, subject to the confidentiality designations of the Protective Order.

### **REQUEST NO. 2**

Produce copies of all Documents or Communications that NS and/or UP produce or have previously produced to the Surface Transportation Board, the United States Department of Justice, or any other federal government agency, state attorneys general, or any other state government agency relating to the Proposed Transaction.

**Union Pacific Response**

Union Pacific objects to this Request to the extent it seeks materials that are publicly available or otherwise readily available or accessible to CN from other sources or otherwise obtainable in a more convenient, less burdensome, or less expensive manner than from Union Pacific, including by accessing the materials that Union Pacific previously filed with the Surface Transportation Board and which are accessible to CN through the proceeding, subject to the existing Protective Order. Union Pacific further objects to this Request to the extent it seeks materials protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities, including materials relating to the potential settlement of this proceeding. Union Pacific further objects to the terms “Documents” and “Communications” for the reasons set forth in its General Objection, and the terms “produce” and “produced” as vague.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific will produce nonprivileged materials in its possession that it made available to a federal government agency, state attorneys general, or any other state government agency, state attorneys general, or any other state government agency relating to the Proposed Transaction in response to the request of such entity or in response to Union Pacific’s legal obligations to provide such information, to the extent such information can be collected and produced without undue burden and can be

located after a reasonable search. Union Pacific has not identified any such materials in its possession, other than the materials accessible to CN through this proceeding.

### **REQUEST NO. 3**

Produce copies of all Documents or Communications that NS and/or UP produce or have previously produced in response to discovery requests submitted by other participants in this proceeding.

#### **Union Pacific Response**

Union Pacific objects to this Request's use of the terms "Documents" and "Communications" for the reasons set forth in its General Objection, and its use of the terms "produce" and "produced" as vague. Subject to and without waiving the foregoing objections and its General Objections, Union Pacific will provide CN with a copy of or access to Union Pacific's future responses to discovery requests in this proceeding that are served by other participants in this proceeding.

### **REQUEST NO. 4**

Produce data and Documents concerning reciprocal switching for the period from January 1, 2019 through December 31, 2024, including but not limited to car-level movement records, switch lists, interchange logs, line-segment-level usage data, and any other records or communications reflecting reciprocal switching arrangements or traffic. To the extent not otherwise encompassed by this request, Your response should include: (1) waybill date, number, and identifiers associated with the switch operation; (2) the switching locations where the actual car switching between roads occur (FSAC, SPLC, Rule 260 junction code, station name, and state/province); (3) local customer information where the switched cars are picked-up or delivered in the switching terminal area (CIF, Parent Customer Name, FSAC, SPLC, station name, and state/province); (4) payment information for that switch; and (5) date of operation.

### Union Pacific Response

Union Pacific objects to this Request to the extent it seeks materials protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities. Union Pacific further objects to the undefined terms “switch lists,” “interchange logs” and “line-segment-level usage data,” as vague and ambiguous. Union Pacific further objects to this Request as unduly burdensome to the extent it purports to require Union Pacific to provide information in a form not kept in the regular course of business or to conduct a special study or to undertake anything more than a reasonable search for responsive information. Union Pacific further objects to this Request to the extent it seeks *all* data and documents and communications “reflecting reciprocal switching arrangements” from January 1, 2019 through December 31, 2024. Union Pacific further objects to this Request as unduly burdensome, to the extent it purports to require Union Pacific to provide a subset of information or data which could be ascertained by CN’s review of the data or documents that are or will be readily available or accessible to CN through Union Pacific’s submissions in this proceeding. Union Pacific further objects to this Request as vague, to the extent it requests data and documents “concerning reciprocal switching.” Union Pacific interprets this Request as a request for reciprocal switching data.

Subject to and without waiving the foregoing objections and its General

Objections, Union Pacific will produce nonprivileged data regarding reciprocal switch movements in its possession and responsive to this Request for the period January 1, 2019 to December 31, 2024, to the extent such materials can be collected and produced without undue burden, and can be located after a reasonable search.

#### **REQUEST NO. 5**

Produce Documents sufficient to show all interchange volumes with other carriers, broken down by line, location, and counterparty, together with any associated payments, settlements, or charges between carriers for haulage, switching, or other car handling (including waybill identifiers, car initials and numbers, dates and times, service type, payment types, and amounts), for the period from January 1, 2019 through December 31, 2024, provided at the most disaggregated level maintained in the ordinary course of business.

#### **Union Pacific Response**

Union Pacific objects to this Request as unduly burdensome to the extent it purports to require Union Pacific to provide information in a form not kept in the regular course of business or to conduct a special study or to undertake anything more than a reasonable search for responsive information. Union Pacific further objects to this Request as unduly burdensome and untimely, to the extent it purports to require Union Pacific to provide a subset of information or data which could be ascertained by CN's review of the data or documents that are or will be readily available or accessible to CN through Union Pacific's submissions in this proceeding, including Union Pacific's 100% traffic tapes. Union Pacific objects to this Request as vague, to the extent it is unclear whether "for haulage, switching, or other car handling" modifies

“charges between carriers” or “interchange volumes with other carriers,” to the extent it requests “any associated payments, settlements, or charges between carriers for... other car handling” without identifying the nature of the definition of requested services performed, and to the extent it uses the undefined term “car handling.” Union Pacific interprets this Request as a request for data related to interchange volumes with other carriers.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific will produce nonprivileged data regarding interchange volumes with other carriers in its possession and responsive to this Request, to the extent such materials can be collected and produced without undue burden, and can be located after a reasonable search.

#### **REQUEST NO. 6**

Produce all rail line sale, lease, or interchange agreements to which You are a party that contain an interchange commitment, as defined in the Surface Transportation Board’s August 28, 2025 order.

#### **Union Pacific Response**

Union Pacific objects to this Request to the extent it seeks materials protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities. Union Pacific further objects to this Request as unduly burdensome to the extent it seeks production of any and all historical versions of the referenced agreements.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific will produce the line sale, lease, or interchange agreements in its possession that contain the interchange commitment in effect as of August 28, 2025, for the agreements identified in Union Pacific's List of Interchange Commitments filed with the Surface Transportation Board in response to its August 28, 2025 order, to the extent such materials can be collected and produced without undue burden and can be located after a reasonable search, subject to any applicable confidentiality requirements set forth in those agreements.

#### **REQUEST NO. 7**

For each interchange commitment identified in Request 6, produce Documents concerning all instances in which You have granted a waiver, exception, or other form of consent permitting the tenant or purchasing railroad to interchange traffic with another carrier notwithstanding the interchange commitment. This includes waivers granted under the Railroad Industry Agreement or any other ad hoc or informal exceptions.

#### **Union Pacific Response**

Union Pacific objects to this Request to the extent it seeks materials protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities. Union Pacific objects to this Request as vague to the extent it seeks Documents concerning "other form[s] of consent permitting the tenant or purchasing railroad to interchange traffic with another carrier notwithstanding the interchange commitment ... or any other ad hoc or informal exceptions." Union Pacific understands this Request as a request for documents granting a waiver

or exception to the interchange commitment for a tenant or purchasing railroad as contemplated by the Railroad Industry Agreement, whether or not such waiver or exception was submitted as a formal request under the Railroad Industry Agreement.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific will produce documents sufficient to show waivers, exceptions, or other forms of consent responsive to this Request that are in its possession, to the extent such materials can be collected and produced without undue burden and can be located after a reasonable search.

#### **REQUEST NO. 8**

Identify the customers referenced in the following statements by UP's CEO Jim Vena at the Morgan Stanley 13<sup>th</sup> Annual Laguna Conference held on September 10, 2025 and the Norfolk Southern Corporation Earnings Call held on July 29, 2025:

- a) "We don't see any customer that degrades its service or capability to compete. And the few, very few and we're talking about less than 10 that through this transaction, because it's a bolt-on, would go 2:1."
- b) "A significant note, with this combination, fewer than 20 customers will go from having two rail providers to just one, and we intend to provide a competitive alternative."

#### **Union Pacific Response**

Subject to and without waiving its General Objections, Union Pacific will produce information in its possession responsive to this Request.

Respectfully submitted,

/s/ Michael L. Rosenthal  
MICHAEL L. ROSENTHAL  
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*Attorneys for Union Pacific  
Corporation and Union Pacific  
Railroad Company*

October 8, 2025

**CERTIFICATE OF SERVICE**

I hereby certify that on this 8th day of October, 2025, I have caused the foregoing Union Pacific's Responses and Objections to Grand Trunk Corporation's First Set of Discovery Requests to be served electronically on all parties of record in this proceeding.

/s/ Matthew Nicholls

# Exhibit 3

## Simpson Thacher &amp; Bartlett LLP

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October 20, 2025

**VIA ELECTRONIC MAIL**

Michael L. Rosenthal  
Matthew Nicholls  
Covington & Burling LLP  
One CityCenter  
850 Tenth Street, N.W.  
Washington, DC 20001-4956

Re: **Docket No. FD 36873**  
**Union Pacific Corporation and Union Pacific**  
**Railroad Company – Control – Norfolk Southern**  
**Corporation and Norfolk Southern Railway Company**

Dear Counsel:

We write on behalf of Grand Trunk Corporation and its U.S. rail operating subsidiaries (collectively, “CN”), in response to Union Pacific’s (“UP”) Responses and Objections (“Responses”) to Grand Trunk Corporation’s First Set of Discovery Requests served on September 23, 2025 (“RFPs”) and to memorialize our October 10, 2025 meet and confer. CN expressly reserves all rights and arguments.

**I. Discovery Protocol**

As we explained, CN believes a discovery protocol detailing the timing and processes for discovery in this proceeding is necessary, in light of the expedited timeframe for review of the proposed transaction. Such a protocol would be helpful, for instance, if the parties reach impasse on discovery issues following good faith conferrals and need to raise those issues to the Administrative Law Judge (“ALJ”) for timely resolution. Such a discovery protocol is consistent with longstanding STB precedent.<sup>1</sup> You also confirmed that UP is willing to discuss such a protocol and that you would look into whether the Applicants are preparing one. Please confirm that UP is preparing a discovery protocol. Alternatively, CN will prepare and circulate its proposed discovery protocol.

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<sup>1</sup> See Decision No. 10, FD 33388 (STB served June 27, 1997); Decision No. 4, FD 33556 (STB served Nov. 4, 1998).

## II. UP's General Responses and Objections

**Relevant Time Period:** UP's Responses state that UP will search for and provide information up to July 29, 2025. During our meet and confer, you stated that July 29, 2025 was likely selected as the end of the relevant time period because that is the date on which UP's Notice of Intent was filed. However, CN's position is that materials created after the Applicants filed their Notice of Intent would be highly relevant. You raised that searching for and producing materials from after July 29, 2025 would be burdensome given that there may be an increase in privilege issues that arise after that date. UP would not confirm, however, whether its position is that all materials prepared after that date are considered privileged, but indicated that in all events the burden of parsing through material to properly withhold privileged material is too burdensome to justify any discovery after that date.

CN disagrees that all materials after July 29, 2025 are privileged and disagrees that the burden of reviewing materials after July 29, 2025 justifies cutting off all discovery after that date. Many categories of documents from after July 29, 2025 can be produced with little to no burden and are highly unlikely to be privileged, including data, ordinary course documents that were created before, but recirculated after, July 29, 2025, letters or written communications with third parties about the proposed transaction, communications or presentations made to governmental agencies or the Board, etc. Further, UP's concerns about the burden of reviewing materials after July 29, 2025 for privilege does not outweigh CN's interest in receiving responsive materials that directly reflect discussions UP has had with others—including shippers, members of the Board or other government agencies, or other stakeholders in the industry—about the proposed transaction or other highly relevant topics.

Notwithstanding the foregoing, CN is willing to negotiate a reasonable cutoff date for certain categories of materials that are more burdensome to search for and produce on a request-by-request basis. CN proposes that the RFPs can be organized into the below categories:

Requests for which the relevant time period is already detailed in the request or for which a cutoff period is not necessary, as these requests are "go-gets":

- RFP 1
- RFP 4
- RFP 5
- RFP 6
- RFP 7
- RFP 8

Requests that do not have a cutoff date and are ongoing in nature:

- RFP 2
- RFP 3

CN reserves the right to revise this proposal as necessary and does not agree that this proposal applies to any future discovery requests. Further, this proposal does not limit UP's

obligation, pursuant to 49 CFR § 1114.29, to supplement its responses with respect to any RFP.

**Timeliness of the Requests:** UP's Responses state that UP objects to the RFPs "as unduly burdensome and premature, to the extent [they] seek[] discovery of information, documents, or communications prior to UP submitting its application[.]" UP confirmed that it is not refusing to collect and produce materials responsive to the RFPs prior to the filing of its application on the basis of that objection and that it is currently reviewing and collecting materials responsive to the RFPs.

With respect to timing of productions, UP confirmed that it would prioritize certain RFPs that CN believes can be produced easily and without burden. Specifically, UP agreed to prioritize materials responsive to RFPs 1 & 8 and to make the productions of these materials on a rolling basis. We address those specific RFPs below, but we continue to see no reason why those documents have yet to be produced. *We ask that UP produce such documents no later than October 23, which is a month after CN served its initial set of Discovery Requests on September 23, 2025.*

**Settlement Communications:** UP's Responses include an objection to producing "documents prepared in connection with, or information relating to, possible settlement or mediation of this or any other proceeding." During our meet and confer, we asked you to confirm whether UP intends to withhold ordinary course documents solely on the basis of this objection. Indeed, documents created outside the context of settlement negotiations in the ordinary course of business and shared with the Board, or agreements or communications with a third-party, do not become privileged simply because they were appended to a settlement communication or were mentioned during a settlement discussion. You declined to confirm UP's position on this point. You instead stated that should a dispute arise with respect to a specific document, UP would give its position on the document at that time. *We ask that you confirm your position because it seems we are at impasse on this issue.*

Similarly, UP objected to producing documents or information "relating to" settlement. It is not appropriate to withhold documents solely because they may conceivably relate to UP's settlement communications. For example, communications or documents discussing or referencing potential agreements with third parties should not be subject to UP's objection to producing settlement communications simply because those third-party agreements might somehow relate to a settlement proposal or settlement communication between UP and the Board. You declined to confirm UP's position on this point. *We ask that you confirm your position because it seems we are at impasse on this issue.*

**Relevant Files:** You confirmed that UP's objection that it "will produce documents from files most likely to contain materials responsive to the Request without undue burden" refers only to its intention to consider the most relevant custodians and file locations.

**Redacting Non-Responsive Information:** You confirmed that UP's objection to the production of "commercially sensitive or long-term corporate strategies" is a reservation of rights to redact such information, but that you are not yet aware of any information that UP is planning to redact on this basis. CN disagrees that the redaction of information or material for this purpose is appropriate. There is a comprehensive protective order in place to protect

confidential information produced in this proceeding.<sup>2</sup> CN expressly reserves the right to argue that any such redactions made are inappropriate. Given that UP is not presently aware of any intention to make such redactions, however, we agree to defer further discussions until such time that these types of redactions are made.

To the extent UP makes such redactions, we intend to dispute the appropriateness of such redactions on an expedited basis as necessary to ensure that CN has ample time to review such redactions and move to compel.

**Communications:** UP's Responses object to the definition of "Communications" "to the extent that it purports to require production of material that was not reduced to writing." You confirmed that this language relates solely to the form of such communications and that UP would produce oral communications if they were reduced to writing. You agreed to confirm whether e-mail serves as the main method of communication at UP (as opposed to an electronic messaging system for example). Understanding whether e-mail serves as the main method of communication is highly relevant to evaluating UP's objections to searching for and producing other forms of electronic messaging at UP.

**UP and Norfolk Southern Definitions:** UP's Responses include objections to the definitions of both UP and Norfolk Southern. You confirmed that UP does not intend to withhold documents on the basis that they relate to some other affiliated entity that is being carved out of these definitions. We understand that this objection refers to UP's intention that it will respond only on behalf of those entities listed in its Responses.

### III. UP's Specific Responses and Objections

**RFP 1:** With respect to RFP 1, you represented that UP intends to withhold or redact a schedule of the Merger Agreement on the basis of privilege that you assert includes discussions of potential settlement. You did not confirm what the basis of UP's privilege claim was or that UP would disclose the basis of its privilege claim when it produces the remaining exhibits, annexes, and schedules responsive to RFP 1. To the extent UP is withholding this document on the basis of its objection to producing documents relating to settlement communications, CN disagrees that is a legitimate basis as discussed above. *We ask that you confirm the privilege basis on which this document would be withheld.*

You also did not confirm the timing of UP's response to RFP 1. Such materials should have been produced already given the minimal burden involved, but as a sign of good faith we have been patient with respect to the production of these documents. *Please confirm that UP intends to produce the documents responsive to RFP 1 by no later than October 23.*

**RFP 2:** UP's Response to RFP 2 suggests that UP plans to withhold documents responsive to RFP 2 if they were voluntarily produced, as opposed to produced "in response to the request of [an] entity or in response to UP's legal obligations to provide such information." CN's position is that it is not appropriate to withhold such documents and that they are responsive to the request. RFP 2 seeks only a narrow category of documents, documents produced to the Board, Department of Justice or other regulatory agencies regarding this transaction, whether those materials were voluntary or required in response to

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<sup>2</sup> See Decision No. 1, FD 36873 (STB served Aug. 5, 2025).

a request. Such materials are clearly responsive and given the limited universe of documents the burden involved is minimal. You confirmed that you would check and confirm whether such documents are being excluded.

It is also CN's position that RFP 2 is an ongoing request and that to the extent any documents are produced to the entities detailed in RFP 2 during this proceeding that are responsive to RFP 2 they should be produced to CN.

**RFP 3:** There do not appear to be any current issues with respect to RFP 3. We understand that UP will produce documents responsive to RFP 3 and will do so on an ongoing basis throughout this proceeding.

**RFP 4 & RFP 5:** You confirmed that UP does not intend to withhold documents based on its objections to RFPs 4 & 5 and it intends to produce documents responsive to these requests.

**RFP 6:** UP's Responses state that UP will produce agreements responsive to RFP 6 that are "in effect as of August 28, 2025." As discussed, it is not appropriate for UP to limit its search and production to only those agreements in effect as of August 28, 2025. UP should search for and produce all agreements that were in effect during the relevant time period. During our conferral you asked why historical agreements were needed. As an initial matter, the basis for this discovery request is patently obvious. UP's interchange commitments are clearly relevant to assessing the data produced and understanding the corresponding historical traffic movements. UP's objections to producing these agreements are without merit.

Further, UP's response should not be limited to only those interchange commitments identified in UP's List of Interchange Commitments filed with the Surface Transportation Board in response to its August 28, 2025 order. As you're aware CN has already identified a number of deficiencies with that initial list, and UP has already supplemented the list accordingly. UP should produce any interchange commitments responsive to RFP 6 regardless of whether it included them in its submission.

**RFP 7:** With respect to UP's objections to RFP 7, you confirmed that UP is not distinguishing between formal and informal waivers, exceptions, or other forms of consent and that UP plans to produce responsive documents with respect to both.

**RFP 8:** You could not yet confirm the timing for when UP would produce materials responsive to RFP 8, but did agree to prioritize the production of these materials. CN's position is that documents responsive to RFP 8 could have already been produced and that they should be produced without delay. ***Please confirm that UP intends to produce documents responsive to RFP 8 by no later than October 23.***

\* \* \*

We appreciate UP's agreement to continue to meet and confer on these issues, but absent a commitment to begin imminently producing documents that are readily available and can be

produced with no incremental burden—e.g., the merger agreement—CN will feel compelled to seek adjudicative relief.

Very truly yours,

/s/ Abram J. Ellis

Abram J. Ellis

**Exhibit 4**

**COVINGTON**

BEIJING BOSTON BRUSSELS DUBAI FRANKFURT  
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**By Email**

October 24, 2025

Abram J. Ellis  
Simpson Thacher & Bartlett LLP  
900 G Street, NW  
Washington, DC 20001  
abram.ellis@stblaw.com

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

Dear Counsel:

We write on behalf of Union Pacific Railroad Company and Union Pacific Corporation (collectively, “Union Pacific”) in response to the October 20, 2025 letter from Grand Trunk Corporation and its U.S. rail operating subsidiaries (collectively, “CN”) regarding CN’s First Set of Discovery Requests and our October 10, 2025 meet and confer. We address the matters raised in your letter below.

**I. Discovery Protocol**

We confirm that Union Pacific is preparing a discovery protocol that will address the processes for discovery in this proceeding.

**II. Union Pacific’s General Responses and Objections****A. Relevant Time Period**

Your letter misstates Union Pacific’s general objection on the relevant time period and our explanation of that objection during our meet and confer. Union Pacific objected to CN’s instruction that it produce documents “until present” and instead agreed that “[e]xcept as more specifically objected to [in its responses]” Union Pacific would “search for and provide information up to July 29, 2025.” We further clarified during our meet and confer that there were multiple Requests for which Union Pacific has already agreed to search for materials that would post-date July 29, 2025, including materials responsive for Requests 3 and 8. We also explained that Union Pacific was willing to consider CN’s proposals for different date cutoffs for specific Requests.

Instead of proposing any new date cutoffs for specific requests, you have asserted that no date cutoff should apply to certain requests that you have characterized as “go gets” or “ongoing in nature.” While we disagree with your characterization of those requests and your conclusion

**COVINGTON**

Abram J. Ellis  
October 24, 2025  
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that no date cutoff should apply to them, there are numerous requests for which it appears there is no dispute between the parties regarding the relevant time period.

For Requests 1, 4, and 5, the responsive materials pre-date July 29, 2025.

For Requests 3 and 8, Union Pacific has agreed to produce certain responsive materials that post-date July 29, 2025, subject to its remaining objections.

For Request 2, we are investigating the issue raised in your October 20 letter as addressed below, but have otherwise already directed you to the responsive material that Union Pacific has identified.

For Requests 6 and 7, Union Pacific is conducting a reasonable search for the responsive materials that it has agreed to produce without limiting its collection to documents created on or before July 29, 2025. Union Pacific does not concede that it is obligated to perform additional searches for these same materials at regular intervals in the future, which would be unduly burdensome and not proportional to the needs of this proceeding.

Finally, Union Pacific disagrees with CN's broad arguments regarding undue burden and relevance, which are not tied to the specific requests at issue.

**B. Timeliness of the Requests**

As we stated during our meet and confer, Union Pacific is moving forward with responding to CN's discovery requests and collecting responsive materials for production, consistent with its responses and objections.

With regard to Requests 1 and 8, we informed CN that we would look into prioritizing the collection and productions of materials in response to these requests, but did not commit to a specific production date or order. We are currently working to collect, review, and process materials responsive to these requests and other requests, and expect to make an initial production of responsive materials next week.

**C. Settlement Communications**

It appears that CN is attempting to manufacture an impasse where none exists. On our call, you asked Union Pacific to take a position regarding whether privilege that would apply to a hypothetical situation involving settlement communications. Our response was that it is unproductive to engage in speculative analysis of a hypothetical situation, but that we would of course comply with our obligations to evaluate responsive materials for privilege. There is no dispute with respect to any specific request or document, let alone an impasse that needs to be resolved at this juncture.

To the extent Union Pacific withholds responsive materials that it has agreed to produce in response to CN's requests pursuant to a claim of privilege, it will provide a privilege log providing the basis for that claim.

**COVINGTON**

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October 24, 2025  
Page 3

**D. Relevant Files**

To the extent Union Pacific has agreed to produce documents responsive to a request, it will conduct a reasonable search to identify responsive materials from the locations most likely to contain materials responsive to the request.

**E. Redacting Non-Responsive Information**

Union Pacific agrees to defer further discussions of this issue until such time as there is a dispute regarding redactions to specific documents.

**F. Communications**

Subject to its remaining objections and the scope of materials Union Pacific has agreed to produce in response to each request, we confirm that Union Pacific will not withhold oral communications if they are reduced to writing solely on the basis of its objection to the definition of "Communications." We also confirm that email is the main method of written communication at Union Pacific.

**G. Union Pacific and Norfolk Southern Definitions**

We confirm that Union Pacific's objection to the definition of "UP," "You," and "Your" refers to Union Pacific's intention to respond only on behalf of Union Pacific Corporation and Union Pacific Railroad Company. These objections as well as the objection to the definition of "NS" are not intended to carve out any entities that we know are key to the subject matter of the proceeding.

**III. Union Pacific's Specific Responses and Objections****A. Request 1**

We are preparing the materials responsive to Request 1 for production, and currently expect to produce those materials next week. CN's demand in its October 20 letter that CN produce all responsive material within three days is not reasonable or productive. Union Pacific is working diligently to respond to CN's discovery requests. As we have previously informed you, it takes time to collect, review, and process materials for production, and we are proceeding with those efforts on a reasonable schedule.

We will produce a privilege log for material withheld from production after the production is made.

**B. Request 2**

As we discussed during our meet and confer, Union Pacific objects to an interpretation of this request that would make any communication with the Board, Department of Justice, or other regulatory agencies responsive as overly broad and unduly burdensome. We clarified that the responsive materials for which we agreed to search were not limited to productions made in

**COVINGTON**

Abram J. Ellis  
October 24, 2025  
Page 4

response to formal subpoenas, but also included productions made pursuant to Union Pacific's legal obligations. CN clarified that it was interested in "documents at the heart of the matter."

Relying on CN's clarification, we are currently evaluating whether there are any additional documents regarding the proposed transaction that Union Pacific produced to the Board, Department of Justice, or other regulatory agencies in response to requests (whether formal or informal) that can be located through a reasonable search. Union Pacific is not limiting its search to documents created on or before July 29, 2025, but does not concede that it is obligated to perform additional searches for these same materials at regular intervals in the future.

C. Request 3

We confirm that Union Pacific will provide CN with a copy of or access to the productions Union Pacific makes in response to discovery requests in this proceeding.

D. Requests 4 & 5

We confirm that Union Pacific will produce data responsive to Requests 4 and 5 consistent with its responses and objections.

E. Request 6

Union Pacific disagrees with CN's unsupported assertion that its need for historical agreements, as opposed to agreements currently in effect, is "*patently* obvious" and that the historical agreements are "*clearly* relevant." Nonetheless, Union Pacific is currently conducting a reasonable search to locate agreements in effect after January 1, 2019 that contain an interchange commitment, as defined in the Surface Transportation Board's August 28, 2025 order.

As we discussed during our meet and confer, Union Pacific will include in its production any additional interchange agreements that it identifies in response to the Board's August 28, 2025 order.

F. Request 7

As we explained during our meet and confer, Union Pacific is not limiting its production in response to Request 7 to formal waivers. Subject to its objections, Union Pacific will conduct a reasonable search for documents sufficient to show waivers or exceptions to the interchange commitment for a tenant or purchasing railroad as contemplated by the RIA, whether or not the waiver or exception was submitted as a formal request.

G. Request 8

We reiterate our objections to CN's production demands as addressed above. Union Pacific is working diligently to respond to CN's discovery requests. We are preparing to produce information responsive to Request 8, and currently expect to make an initial production of that information next week.

**COVINGTON**

Abram J. Ellis  
October 24, 2025  
Page 5

**IV. Service of Productions**

Prior to Union Pacific's initial production, please provide the email addresses of the individuals to whom the production should be made available. Please also confirm that the identified recipients may receive Confidential and Highly Confidential material and have executed Exhibits A and B to the Protective Order in this proceeding.

Sincerely,

/s/ Kevin M. Kelly

Kevin M. Kelly

# Exhibit 5

## Simpson Thacher &amp; Bartlett LLP

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November 5, 2025

**VIA ELECTRONIC MAIL**

Michael L. Rosenthal  
Covington & Burling LLP  
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850 Tenth Street, N.W.  
Washington, DC 20001-4956

Re: **Docket No. FD 36873**  
**Union Pacific Corporation and Union Pacific**  
**Railroad Company – Control – Norfolk Southern**  
**Corporation and Norfolk Southern Railway Company**

Dear Counsel:

We write on behalf of Grand Trunk Corporation and its U.S. rail operating subsidiaries (collectively, “CN”), regarding Union Pacific’s (“UP”) documentary and data production on October 31, 2025 (“UP’s First Production”) in response to Grand Trunk Corporation’s First Set of Discovery Requests served on September 23, 2025 (“First RFPs”). While CN expressly reserves all rights and arguments to challenge the sufficiency of UP’s production in response to the First RFPs, we write to confirm that we appear to be at impasse on two specific issues related to Document Request 1 (“RFP 1”) and Document Request 8 (“RFP 8”).

CN has taken every effort to cooperate with UP, meeting and conferring several times, agreeing to prioritize certain requests to lessen the burden on UP, and providing several opportunities for UP to comply with its discovery obligations. Indeed, CN agreed to prioritize RFP 1 and 8, in part to ease UP’s burden.<sup>1</sup> Moreover, UP agreed not to object to producing documents responsive to the RFPs on the basis that the requests are premature to the filing of the Application.<sup>2</sup>

On October 31, 2025, over a month after CN served its RFPs, UP made its First Production, containing only 331 documents. UP’s First Production falls short of what was promised. UP’s reticence to produce materials that are limited in scope and easily attainable,

<sup>1</sup> See October 20, 2025 letter from CN to UP.

<sup>2</sup> *Id.*

Michael L. Rosenthal

-2-

November 5, 2025

and now flat-out refusal to produce certain of these documents, serves only to frustrate CN's ability to meaningfully participate in the matter and appears intended only to delay proceedings.

*Request for Production 1*

With regard to **RFP 1**, which seeks production of complete disclosure schedules, exhibits, and appendices to the Merger Agreement between UP and Norfolk Southern ("Merger Agreement"), UP agreed in its October 8, 2025 Responses and Objections to produce all disclosure schedules, exhibits, and appendices to the Merger Agreement subject to any claims of attorney-client privilege, the attorney work product doctrine, or any other applicable privileges or immunities including related to the potential settlement of this proceeding. During our meet and confers on October 10, 2025 and October 23, 2025, CN objected to any claim of privilege over these materials, noting that there was no legitimate basis to withhold any portion of the Merger Agreement.<sup>3</sup> We also asked that UP explain the basis for its assertions of privilege over these materials. UP has declined to do so and instead indicated that it would do so only at a later date, despite the fact that UP clearly understood that it would be asserting a claim of privilege and had all information available to it to explain any such claim of privilege.

UP's First Production contains the Merger Agreement and portions of the disclosures, appendices, and exhibits. However, Section 5.8 of the Company Disclosure Schedules is redacted in full.<sup>4</sup> UP has still refused to explain the basis of its privilege claim or when it will disclose the basis of its privilege claim for these redactions, or otherwise provide any accompanying privilege log. We reiterate our position that there is no legitimate basis to withhold any part of the Merger Agreement or its disclosure schedules, exhibits, or appendices. It is clear that UP knows what its claim of privilege is and has the information necessary for explaining that basis at no incremental burden, so any refusal to disclose it now can only be intended to cause further delay.

*Request for Production 8*

With regard to **RFP 8**, which seeks the identification of the "2-to-1" customers referred to by UP CEO Jim Vena in public statements on September 10, 2025 and July 29, 2025, UP agreed in its Responses and Objection to produce documents responsive to RFP 8. UP further reiterated its agreement to produce these responsive materials during meet and confers. But On October 31, 2025, UP served Supplemental Responses and Objections that now indicate, for the first time, that the information requested in RFP 8 "referred to an ongoing analysis Union Pacific and Norfolk Southern are conducting to identify [2-to-1 shipper facilities]" and that because the aforementioned analysis remains ongoing, RFP 8 will be addressed in UP's and NS's forthcoming application.

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<sup>3</sup> See October 20, 2025 letter from CN to UP at 5 (noting that there is no legitimate basis for withholding the Merger Agreement).

<sup>4</sup> See UP\_0000067, UP\_0000068.

Michael L. Rosenthal

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November 5, 2025

UP's position mischaracterizes RFP 8 and offers no basis to refuse the production of documents or information responsive to RFP 8. RFP 8 seeks the identity of those customers *already* referenced by Mr. Vena in *previously* made public statements. The fact that UP may also be undertaking an "ongoing analysis" of a similar issue does not in any way relate to the information sought or requested by RFP 8. Indeed, UP may supplement or revise its productions in response to RFP 8 as its analyses continue, but a related but ongoing analysis is not a basis to refuse producing what information it currently has on hand now. That this list may be different from what the application ultimately contains is not at issue here.

Furthermore, the burden of producing these responsive materials, if any, is minimal—the parties have been reviewing the impacted customers since the merger was announced clearly have some frame of reference for these customers such that Mr. Vena felt comfortable enough to publicly disclose the numbers including in statements to investors.<sup>5</sup> All told, we see no burden in simply identifying those entities that Mr. Vena was referring to.

\* \* \*

As an unfortunate result of UP's refusal to cooperate, we are now at impasse on RFPs 1 and 8. Absent a commitment to imminently produce documents that are responsive to RFPs 1 and 8—i.e., the specific 2-to-1 customers publicly referenced by UP's CEO and all unredacted disclosure schedules, appendices, and exhibits to the Merger Agreement—CN will seek the appropriate relief from the Surface Transportation Board.

CN's review of UP's production remains ongoing and CN expressly reserves all rights and arguments, including the right to later supplement this letter or further identify deficiencies in UP's First Production.

Very truly yours,

/s/ Abram J. Ellis

Abram J. Ellis

Cc:

Sara Razi – sara.razi@stblaw.com

Lindsey Bohl – lindsey.bohl@stblaw.com

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<sup>5</sup> We are confident Mr. Vena does not make a habit of making statements to investors without specific and detailed evidence to substantiate those statements.

# Exhibit 6

**COVINGTON**

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**By Email**

November 18, 2025

Abram J. Ellis  
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abram.ellis@stblaw.com

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

Dear Counsel:

We write on behalf of Union Pacific Railroad Company and Union Pacific Corporation (collectively, “Union Pacific”) in response to the November 5, 2025 letter from Grand Trunk Corporation and its U.S. rail operating subsidiaries (collectively, “CN”) regarding Union Pacific’s responses to CN’s Document Requests 1 and 8.

As an initial matter, your description of the parties’ past interactions regarding CN’s discovery requests is incomplete and mischaracterizes Union Pacific’s responses. Union Pacific has undertaken diligent efforts to collect and produce an expansive array of data and information in response to CN’s exceedingly broad discovery requests. As a result of those efforts, Union Pacific made an initial production on October 31, 2025 of more than **10 gigabytes** of responsive documents and data. Of course, Union Pacific has also raised legitimate objections to portions of CN’s discovery requests. To narrow the scope of any disputes regarding these objections, Union Pacific has engaged constructively with CN, and remains committed to further conferring to resolve any remaining disputes, including with respect to CN Requests 1 and 8.

With respect to CN Requests 1 and 8, CN’s claims that its ability to meaningfully participate in the matter has been frustrated by Union Pacific’s responses to the requests and that it has been deprived of “what was promised” by Union Pacific are not supported by the record.

**I. CN Request 1**

In response to CN Request 1, which sought disclosure schedules, exhibits, and appendices to the Merger Agreement between Union Pacific and Norfolk Southern, Union Pacific made a production of responsive documents on October 31, 2025. The production included approximately 80 pages of disclosure schedules. Consistent with its objections to CN Request 1, Union Pacific redacted 2 pages of the disclosure schedules that contain privileged material.

**COVINGTON**

Abram J. Ellis  
November 18, 2025  
Page 2

As Sections 5.8(b) and 5.8(c) of the Merger Agreement describe, the redacted portions of the disclosure schedules contain descriptions of the terms and conditions that Union Pacific and Norfolk Southern would potentially be willing to accept to settle or otherwise resolve anticipated legal challenges to the proposed transaction. The redacted content reflects the legal advice of counsel and attorney work product regarding potential settlement strategy, which were shared between Union Pacific and Norfolk Southern pursuant to a common legal interest, and are further protected from discovery by the settlement privilege.

**II. CN Request 8**

CN Request 8 sought information regarding the customers referenced in the following statements by Union Pacific CEO Jim Vena:

1. “We don’t see any customer that degrades its service or capability to compete. And the few, very few and we’re talking about less than 10 that through this transaction, because it’s a bolt-on, would go 2:1.”
2. “A significant note, with this combination, fewer than 20 customers will go from having two rail providers to just one, and we intend to provide a competitive alternative.”

In its October 8, 2025 response to CN Request 8, Union Pacific stated that it would produce information responsive to the request. In its October 31, 2025 supplemental response to CN Request 8, Union Pacific explained that the statements by Mr. Vena that are referenced in the request referred to an ongoing analysis to identify 2-to-1 shipper facilities. The continuing nature of the analysis is apparent from Mr. Vena’s reliance in his statements on ranges of potential customers implicated, *i.e.*, “about less than 10” or “fewer than 20.” Although CN interprets Mr. Vena’s statements differently, and concludes that he must have been describing specific customers that he had in mind—as opposed to describing his understanding of the range of customers implicated by Union Pacific’s ongoing analysis—that opinion is unsupported by the record and does not provide a basis for challenging the sufficiency of Union Pacific’s response.

Nonetheless, to the extent CN would like to revise its Request to seek information regarding the customers that Union Pacific identifies as a result of the ongoing analysis that Mr. Vena referenced, Union Pacific has already stated that the identities of those customers will be addressed in applicants’ forthcoming application.

\* \* \*

Please let me know if you have any questions. Union Pacific remains willing to meet and confer regarding any remaining disputes.

Sincerely,

/s/ Kevin M. Kelly

Kevin M. Kelly

**Exhibit 7**

## Simpson Thacher &amp; Bartlett LLP

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November 25, 2025

**VIA ELECTRONIC MAIL**

Michael L. Rosenthal  
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Washington, DC 20001-4956

Re: **Docket No. FD 36873**  
**Union Pacific Corporation and Union Pacific**  
**Railroad Company – Control – Norfolk Southern**  
**Corporation and Norfolk Southern Railway Company**

Dear Counsel:

We write on behalf of Grand Trunk Corporation and its U.S. rail operating subsidiaries (collectively, “CN”), regarding Union Pacific’s (“UP”) documentary productions on October 31, 2025 (“UP’s First Production”) in response to Grand Trunk Corporation’s First Set of Discovery Requests served on September 23, 2025 (“First RFPs”) and Grand Trunk Corporation’s Second Set of Discovery Requests served on October 23, 2025 (“Second RFPs,” together with the First RFPs, the “RFPs”). We write (1) regarding specific deficiencies related to Document Request 1 (“RFP 1”) and Document Request 6 (“RFP 6”), (2) confirmation regarding UP’s position on Document Request 8 (“RFP 8”), (3) to request an update on the status of future productions responsive to the RFPs, and (4) to request a meet and confer regarding the Second RFPs. CN expressly reserves all rights and arguments to challenge the sufficiency of UP’s productions in response to the RFPs.

**I. RFP 1**

As explained in our previous correspondence, upon review of UP’s First Production, CN found the enclosed documents to be deficient in response to RFP 1 due to redactions to Section 5.8 of the Company Disclosure Schedules.<sup>1</sup> We appreciate that UP has identified the

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<sup>1</sup> See Letter from A. Ellis to M. Rosenthal (November 5, 2025).

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basis of its redactions.<sup>2</sup> However, we disagree with UP's assertion of privilege and work product protections and reiterate our position that there is no legitimate basis to withhold any part of the Merger Agreement or its disclosure schedules, exhibits, or appendices. **We write to confirm that we appear to be at impasse on this issue related to RFP 1.**

## II. RFP 6

Upon review of UP's Productions, CN has found the enclosed documents to be deficient in response to RFP 6. RFP 6 seeks **all** rail line sale, lease, or interchange agreements to which UP is a party that contain an interchange commitment. Although UP has now produced many of the agreements identified in UP's response to the Board's August 28, 2025 order, UP has failed to provide **all** agreements that contain interchange commitments as required by RFP 6.<sup>3</sup> Specifically, UP has failed to provide the following agreements, which it has acknowledged, *see id.*, contain interchange commitments:

- Lease Agreement between Union Pacific and Arkansas-Oklahoma RR, interchanging at Howe, OK; Oklahoma City, OK; and Shawnee, OK.
- Lease Agreement between Union Pacific and Colorado Pacific Rio Grande RR.
- Lease Agreement between Union Pacific and Missouri Eastern RR.
- Lease Agreement between Union Pacific and Portland & Western RR.

Additionally, we received the Lease Agreement between Union Pacific and Dallas, Garland & Northeastern but, upon review, it did not contain the relevant interchange commitment. Under the terms of RFP 6, UP must produce **all** agreements that contain interchange commitments. The burden to produce these remaining agreements is minimal, if any, and there is therefore no basis for UP to refuse to produce them. **Please confirm that UP will produce these additional agreements and provide a date certain for their production.**

## III. RFP 8

RFP 8 seeks the identification of the "2-to-1" customers referred to by UP CEO Jim Vena in public statements on September 10, 2025 and July 29, 2025. On October 31, 2025, UP served Supplemental Responses and Objections indicating that the information requested in RFP 8 "referred to an ongoing analysis Union Pacific and Norfolk Southern are conducting to identify [2-to-1 shipper facilities]" and that because the aforementioned analysis remains ongoing, RFP 8 will be addressed in UP's and NS's forthcoming application. On November 18, 2025, UP claimed that UP CEO Jim Vena's public statements on September 10, 2025 and July 29, 2025 were not based on any specific list of customers or otherwise verifiable information.<sup>4</sup> **Please confirm that UP is asserting that UP CEO Jim Vena made public statements to investors regarding the existence of 2-to-1 customers without any specific**

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<sup>2</sup> See Letter from K. Kelly to A. Ellis (November 18, 2025).

<sup>3</sup> See Letter from T.J. Litwiler to M. Rosenthal and R. Atkins (October 6, 2025).

<sup>4</sup> See Letter from K. Kelly to A. Ellis (November 18, 2025).

Michael L. Rosenthal

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November 25, 2025

**facts to support those statements. To the extent UP is asserting that CEO Jim Vena had no specific 2-to-1 customers in mind, please confirm that also.**

#### **IV. Outstanding Items**

CN has taken several steps to cooperate with UP, including meeting and conferring several times. On October 31, 2025, over a month after CN served its RFPs, UP made its First Production, containing only 331 documents responsive only to RFPs 1 and 6. UP has failed to produce documents responsive to all RFPs. Specifically, UP has failed to produce any documents responsive to RFPs 2, 3, 4, 5, and 7. **Please confirm that UP is gathering additional documents responsive to the RFPs and provide a date certain for their production.**

CN also requests a meet and confer regarding the Second RFPs to discuss UP's responses and objections.

CN's review of UP's First Production remains ongoing and CN expressly reserves all rights and arguments, including the right to later supplement this letter or identify further deficiencies in UP's First Production.

Very truly yours,

/s/ Abram J. Ellis  
Abram J. Ellis

Cc:

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Lindsey Bohl – lindsey.bohl@stblaw.com

**Exhibit 8**

**COVINGTON**

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**By Email**

December 12, 2025

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

Dear Counsel:

We write on behalf of Union Pacific Railroad Company and Union Pacific Corporation (collectively, “Union Pacific” or “UP”) in response to the November 25, 2025 letter from Grand Trunk Corporation and its U.S. rail operating subsidiaries (collectively, “Canadian National” or “CN”) regarding Union Pacific’s responses to Canadian National’s discovery requests.

**I. CN Request 1**

The sole issue you raise with respect to Request 1 is Union Pacific’s redactions to Section 5.8 of the Company Disclosure Schedules, which were produced in response to the request. As you acknowledge in your letter, Union Pacific has previously identified the basis for its redactions. We explained that the redacted sections contain descriptions of the terms and conditions that Union Pacific and Norfolk Southern would potentially be willing to accept to settle or otherwise resolve anticipated legal challenges to the proposed transaction.<sup>1</sup> This content reflects the legal advice of counsel and attorney work product regarding potential settlement strategy, which were shared between Union Pacific and Norfolk Southern pursuant to a common legal interest, and are further protected from discovery by the settlement privilege.<sup>2</sup>

CN has stated that it disagrees with Union Pacific’s position, but has offered no explanation for why it believes Union Pacific’s privilege claims are not valid beyond conclusory arguments that there can be no legitimate basis for withholding the requested material. If Canadian National has authority to support its position or an explanation of its basis for contesting Union Pacific’s privilege claims, please provide it so we may consider Canadian National’s arguments.

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<sup>1</sup> Letter from K. Kelly to A. Ellis (November 18, 2025) at 2.

<sup>2</sup> *Id.*

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**II. CN Request 6**

With respect to Request 6, Canadian National acknowledges that Union Pacific has already produced many of the agreements containing interchange commitments that it requested, but has identified a small subset that it believes were not previously produced. Canadian National specifically identified four agreements that you believe should have been produced. We address each below.

- A. Lease Agreement between Union Pacific and Arkansas-Oklahoma RR, interchanging at Howe, OK; Oklahoma City, OK; and Shawnee, OK

Union Pacific has collected responsive documents and will produce them.

- B. Lease Agreement between Union Pacific and Colorado Pacific Rio Grande RR

Contrary to CN's assertions, Union Pacific does not acknowledge that a lease agreement between Union Pacific and Colorado Pacific Rio Grande RR ("CXRG") with an interchange commitment exists. Although CXRG has argued that an interchange commitment exists in Walsenburg, Colorado,<sup>3</sup> it is mistaken. Union Pacific has further addressed this claim in its reply to CXRG's petition.<sup>4</sup>

- C. Lease Agreement between Union Pacific and Missouri Eastern RR

Union Pacific previously produced a document responsive to this request at UP\_0002796. Union Pacific has also performed a supplemental search and identified one additional document for production.

- D. Lease Agreement between Union Pacific and Portland & Western RR

Based on your description, it is unclear which specific documents you are referencing, but Union Pacific has identified the following produced documents that might be responsive: UP\_0001505, UP\_0002938, UP\_0002941, UP\_0002946, UP\_0002953, UP\_0002959, UP\_0002962, UP\_2978, UP\_0002978, UP\_0002981, UP\_0002989, UP\_0002991, UP\_0002995.

Union Pacific further notes that some of the filenames (as kept in the normal course of business) for these produced documents do not align with the document content. If Canadian

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<sup>3</sup> Petition for Order Directing Union Pacific to Supplement Its Response to Decision No. 3 (CXRG-2).

<sup>4</sup> Union Pacific's Reply to CXRG's Petition for Order Directing Union Pacific Union to Supplement Its Response to Decision No. 3 (UP-12).

**COVINGTON**

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National only reviewed the filenames and did not review each document's content, it would have failed to locate the responsive material.

E. Lease Agreement between Union Pacific and Dallas, Garland & Northeastern

Union Pacific has undertaken a supplemental search and identified one additional document for production.

**III. CN Request 8**

Your letter mischaracterizes Union Pacific's prior responses, including its November 18, 2025, letter. As we have previously stated, Mr. Vena's statements referred to an ongoing analysis to identify 2-to-1 shipper facilities, and is consistent with describing his understanding of the range of customers implicated by Union Pacific's ongoing analysis. Nonetheless, Union Pacific has confirmed that the identities of the 2-to-1 customers that it identifies as a result of that analysis will be addressed in applicants' forthcoming application, which Applicants' anticipate filing in less than two weeks.<sup>5</sup>

**IV. Other Items**

Setting aside your general mischaracterization of Union Pacific's discovery efforts, your specific claim that Union Pacific has failed to produce documents responsive to CN Requests 3, 4, 5, and 7 is false, and misleading with respect to CN Request 2. Union Pacific has produced more than 10 gigabytes of responsive documents and data, including expansive reciprocal switching and interchange volume data, agreements containing interchange commitments, and schedules to its merger agreement; and its collection efforts are ongoing. Union Pacific's efforts to respond to pre-application discovery requests in this proceeding are not only reasonable, but go above and beyond what is required by the merger rules.<sup>6</sup>

For Request 3, Union Pacific previously responded that it would "provide CN with a copy of or access to Union Pacific's future responses to discovery requests in this proceeding that are served by other participants in this proceeding."<sup>7</sup> The only such materials to date are Union Pacific's responses to BNSF's Discovery Requests, which Union Pacific provided to Canadian National when it served them.<sup>8</sup> Consistent with its prior response, Union Pacific will continue to

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<sup>5</sup> See Amendment to Notice of Intent to File Application (UP-10/NS-9).

<sup>6</sup> See *Major Rail Consol. Procs.*, 5 S.T.B. 539, 591 (2001) (explaining that the Board was "not proposing" that applicants be subject to "broad pre-application discovery," which would "impede the prospective applicants in the preparation of their application").

<sup>7</sup> Union Pacific's Responses to CN's First Set of Discovery Requests.

<sup>8</sup> See K. Kelly email to S. Razi, et al. (October 16, 2025).

**COVINGTON**

Abram J. Ellis  
December 12, 2025  
Page 4

provide Canadian National with access to Union Pacific's future discovery responses and productions.

For Request 4, Union Pacific responded that it would "produce nonprivileged data regarding reciprocal switch movements in its possession and responsive to this Request for the period January 1, 2019 to December 31, 2024."<sup>9</sup> Union Pacific has produced the following documents containing or defining data responsive to this request: UP\_0003598, UP\_0003599, UP\_0003600, UP\_0003601, UP\_0003602, UP\_0003603, UP\_0003604, UP\_0003605, UP\_0003606, UP\_0003607, UP\_0003608, UP\_0003609, UP\_0003610, UP\_0003611, UP\_0003612, UP\_0003613, UP\_0003614, UP\_0003615, UP\_0003616, UP\_0003617, UP\_0003618, UP\_0003619, UP\_0003620, UP\_0003621, UP\_0003622, UP\_0003623.

For Request 5, Union Pacific responded that it would "produce nonprivileged data regarding interchange volumes with other carriers in its possession and responsive to this Request."<sup>10</sup> Union Pacific has produced the following documents containing or defining data responsive to this request: UP\_0003624, UP\_0003625, UP\_0003626, UP\_0003627, UP\_0003628, UP\_0003629, UP\_0003630, UP\_0003631, UP\_0003632, UP\_0003633, UP\_0003634, UP\_0003635, UP\_0003636, UP\_0003637, UP\_0003638.

For Request 7, Union Pacific responded that it would "produce documents sufficient to show waivers, exceptions, or other forms of consent responsive to this Request."<sup>11</sup> Union Pacific has produced the following documents responsive to this request: UP\_0000079, UP\_0000080, UP\_0000081, UP\_0000082, UP\_0000083, UP\_0000084, UP\_0000085, UP\_0000086, UP\_0000087, UP\_0000088, UP\_0000089, UP\_0000090, UP\_0000092, UP\_0000093, UP\_0000094, UP\_0000095, UP\_0000096, UP\_0000097, UP\_0000098, UP\_0000099, UP\_0000100, UP\_0000101, UP\_0000102, UP\_0000103, UP\_0000104, UP\_0000105, UP\_0000106, UP\_0000107, UP\_0000108, UP\_0000109, UP\_0000110, UP\_0000111, UP\_0000112, UP\_0000113, UP\_0000114, UP\_0000115, UP\_0000116, UP\_0000117, UP\_0000118, UP\_0000119, UP\_0000120, UP\_0000121, UP\_0000122, UP\_0000123, UP\_0000124, UP\_0000125, UP\_0000126, UP\_0000127, UP\_0000128, UP\_0000129, UP\_0000130, UP\_0000131, UP\_0000132, UP\_0000133, UP\_0000134, UP\_0000135, UP\_0000136, UP\_0000137, UP\_0000138, UP\_0000139, UP\_0000143, UP\_0000147, UP\_0000151, UP\_0000152, UP\_0000153, UP\_0000154, UP\_0000155.

For Request 2, Union Pacific previously responded that it would "produce nonprivileged materials in its possession that it made available to a federal government agency, state attorneys general, or any other state government agency, state attorneys general, or any other state government agency relating to the Proposed Transaction in response to the request of such entity or in response to Union Pacific's legal obligations to provide such information," but further explained that it had "not identified any such materials in its possession, other than the materials

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<sup>9</sup> UP's Responses to CN's First Set of Discovery Requests.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

**COVINGTON**

Abram J. Ellis  
December 12, 2025  
Page 5

accessible to CN through this proceeding.”<sup>12</sup> Union Pacific subsequently informed Canadian National that it was “evaluating whether there are any additional documents regarding the proposed transaction that Union Pacific produced to the Board, Department of Justice, or other regulatory agencies in response to requests (whether formal or informal) that can be located through a reasonable search.”<sup>13</sup> Union Pacific has not identified any additional responsive material to date, other than material that has been made available to Canadian National through this proceeding.<sup>14</sup>

\* \* \*

Please let me know if you have any questions. Union Pacific remains willing to meet and confer regarding any remaining disputes.

Sincerely,

/s/ Kevin M. Kelly

Kevin M. Kelly

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<sup>12</sup> *Id.*

<sup>13</sup> Letter from K. Kelly to A. Ellis (October 24, 2025).

<sup>14</sup> For example, Union Pacific has provided to Canadian National copies of materials produced to the Board in response to supplemental data requests. *See, e.g.*, Response to Supplemental Request from Board Staff (UP-11).