

SERVICE DATE – MARCH 18, 2026

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36873¹

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

Digest:² The Board denies an appeal from BNSF Railway Company seeking review of an Administrative Law Judge order. The Board also directs Applicants to submit additional information.

Decision No. 13

Decided: March 18, 2026

On July 30, 2025, Union Pacific Corporation (UPC) and Union Pacific Railroad Company (UP) (collectively, Union Pacific) and Norfolk Southern Corporation (NSC) and Norfolk Southern Railway Company (NS) (collectively, Norfolk Southern) (Union Pacific and Norfolk Southern collectively, Applicants) notified the Board of their intent to file an application seeking authority for the acquisition of control by UPC, through its wholly owned subsidiary Ruby Merger Sub 1 Corporation, of NSC and, through it, NS, for the resulting common control by UPC of UP and NS.

In an August 25, 2025 decision, the Board determined that agency access to Applicants' 100% traffic tapes prior to their filing an application would facilitate the Board's review. Union Pac. Corp.—Control—Norfolk S. Corp. (Decision No. 2), FD 36873, slip op. at 2 (STB served Aug. 25, 2025). Thus, the Board directed UP and NS to submit certain traffic tapes to the Board along with relevant contextual information by September 8, 2025. Id.

Shortly thereafter, the Board served and published notice of Applicants' prefiling notification in the Federal Register (90 Fed. Reg. 42,054). In its decision, the Board ordered

¹ This decision embraces the following dockets: Union Pacific Corp.—Control—Peoria & Pekin Union Railway, Docket No. FD 36873 (Sub-No. 1); and Union Pacific Corp.—Control—Terminal Railroad Ass'n of St. Louis, Docket No. FD 36873 (Sub-No. 2).

² The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

Applicants to file additional information in advance of their application. See Union Pac. Corp.—Control—Norfolk S. Corp. (Decision No. 3), FD 36873, slip op. at 3 (STB served Aug. 28, 2025) (requiring information about timetables, station lists, and track charts; geospatial information system maps; joint facilities; and interchange commitments). The Board also assigned and authorized Administrative Law Judge (ALJ) Jenifer Soulikias to entertain and rule on discovery matters in this proceeding, and to resolve initially all discovery disputes. Id. at 3.

Pursuant to Decision No. 2 and Decision No. 3, Applicants submitted traffic tapes and additional information to the Board. (See Union Pacific Reply, Sept. 29, 2025; Norfolk Southern Reply, Sept. 29, 2025; Union Pacific Reply, Sept. 8, 2025; Norfolk Southern Reply, Sept. 8, 2025.) Meanwhile, Applicants also began responding to discovery requests from other parties, including BNSF Railway Company (BNSF). (See Applicants Comments 3, Nov. 13, 2025; BNSF Appeal 3, Feb. 23, 2026.) On December 19, 2025, Applicants filed an application seeking authority for the proposed control transaction.

On January 9, 2026, BNSF filed a motion to compel Applicants to produce “basic discovery” pertaining to board of director materials, materials from bankers or financial advisers, email communications regarding the proposed transaction, and custodian information. (BNSF Mot. to Compel 4-5, 7, Jan. 9, 2026.) While BNSF’s motion was pending before the ALJ, the Board issued a decision rejecting the application as incomplete without prejudice to refile. See Union Pac. Corp.—Control—Norfolk S. Corp., FD 36873 et al., slip op. at 3 (STB served Jan. 16, 2026). The Board explained that its decision did not result in the dismissal of this proceeding and ordered Applicants to file a letter indicating whether and when they anticipate refile an application. Id. at 12-13.

Subsequently, Applicants replied in opposition to BNSF’s motion, arguing in part that the motion did not seek to compel Applicants to respond to specific discovery requests and instead sought to delay this proceeding. (Applicants Reply 2, Jan. 29, 2026.) Applicants also filed a letter informing the Board that they anticipate filing a revised application on April 30, 2026. (Applicants Letter, Feb. 17, 2026.)

On February 11, 2026, the ALJ denied BNSF’s motion to compel and a related request for a hearing on the motion. See Union Pac. Corp.—Control—Norfolk S. Corp. (Decision No. 10), FD 36873, slip op. at 3 (STB served Feb. 11, 2026); (see also BNSF Request for ALJ Hearing, Feb. 5, 2026). The ALJ reasoned that this proceeding is again in the pre-application phase—as no application is pending before the Board and Applicants are preparing a revised application—and that Board precedent does not require broad pre-application discovery. Decision No. 10, FD 36873, slip op. at 3 (citing Major Rail Consol. Procs. (Major Merger Rules), 5 S.T.B. 539 (2001)). The ALJ stated that Decision No. 2 and Decision No. 3 ordered Applicants to file certain information deemed necessary for the Board’s review of the application, but that BNSF had not asked to compel production of the information the Board ordered. Id. Instead, BNSF sought information it “may be entitled to . . . after a revised application is accepted by the Board.” Id. (stating that the issue was “about timing, not scope of discovery” and that BNSF’s motion may be renewed if appropriate after a revised application is accepted). However, the ALJ noted that the parties may voluntarily engage in pre-application discovery. Id. at 4.

On February 23, 2026, BNSF appealed the ALJ's order to the Board, citing 49 C.F.R. § 1115.1. (BNSF Appeal 5.) BNSF argues, inter alia, that Decision No. 10 is contrary to Board precedent and impedes record development. (See id. at 6-10.) Canadian Pacific Railway Company d/b/a Canadian Pacific Kansas City and CPKC (CPKC) filed a letter in support of BNSF's appeal. (CPKC Letter, Feb. 23, 2026.)

One week later, Applicants filed a reply requesting that the Board deny BNSF's appeal as untimely, arguing "that the deadline for filing an interlocutory appeal of an ALJ's discovery ruling is seven days after the ruling, as provided by 49 C.F.R. § 1115.9(b)." (Applicants Reply 6, Mar. 2, 2026.) Alternatively, Applicants urge the Board to deny the appeal because it does not satisfy threshold regulatory requirements and fails to establish that exceptional circumstances warrant granting the motion to correct a clear error of judgment or to prevent manifest injustice. (Id. at 8-12.) In a contemporaneously filed letter, Applicants also request that the Board strike CPKC's February 23, 2026 letter because it does not remedy defects in BNSF's appeal and amounts to an impermissible reply to a reply. (Applicants Letter, Mar. 2, 2026); see 49 C.F.R. § 1104.13(c).

On March 3, 2026, CPKC filed a letter arguing that it is entitled to reply to BNSF's motion and urging the Board to consider its February 23 letter. (CPKC Letter, Mar. 3, 2026.) That same day, BNSF filed a letter "respond[ing] only to the procedural issue raised" in Applicants' reply. (BNSF Letter, Mar. 3, 2026.) In it, BNSF states that the ALJ order interpreted, as a matter of first impression, the Major Merger Rules, and that BNSF timely appealed the order under 49 C.F.R. § 1115.1. (Id.) Alternatively, BNSF asserts that the Board should waive any seven-day deadline, arguing that a waiver would not result in prejudice to Applicants and would permit the Board to clarify the discovery process. (Id.)

Also on March 3, 2026, the Antitrust Division of the U.S. Department of Justice (DOJ) filed a letter discussing discovery issues in this proceeding. While declining to take a position on whether compelling discovery is appropriate at this time, DOJ urges the Board to compel the production of "relevant ordinary course documents" when appropriate. (DOJ Letter 1, Mar. 3, 2026.) DOJ argues that it, along with the Federal Trade Commission (FTC), routinely receives such documents from applicants when reviewing proposed mergers pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), 15 U.S.C. § 18a. (Id.) DOJ explains that ordinary course documents include "transaction documents analyzing markets, market shares, competition, competitors, entry into new markets, and synergies, among other similar categories, as well as certain specified deal documents," and "certain plans and reports created in the ordinary course of a company's business that cover similar topics." (Id. at 2.) According to DOJ, access to such documents is imperative in evaluating the potential anticompetitive effects of a proposed merger. (Id.) Thus, although the HSR Act does not itself apply to Board proceedings, DOJ "recommends that the Board avail itself of the ability to obtain such ordinary course documents" to ensure a robust record for the Board's decision making. (Id. at 3.) Finally, DOJ notes concerns that Applicants' position regarding production of such documents would limit the Board and others from fully evaluating the merits of the application. (Id.)

In a March 4, 2026 letter responding to DOJ, Applicants state that they "are not refusing to produce such [ordinary course] documents." (Applicants Letter 1-2, Mar. 4, 2026 (stating that

they have agreed to conduct reasonable searches for certain documents, expressed willingness to confer with parties, and produced numerous documents and data).) Applicants also argue that DOJ's process is statutorily and procedurally different from the Board's process, which is industry-specific and requires the submission of a comprehensive control application. (*Id.* at 2.) More specifically, Applicants state that DOJ's process requires production of "broad categories of highly sensitive internal company documents and subjects DOJ employees to criminal penalties for improper disclosure of those documents" including to the parties' competitors, whereas the Board's process requires parties to submit a control application and "to produce to their competitors a substantial amount of highly sensitive internal data so those competitors can perform their own analyses of the proposed transaction." (*Id.*)

On March 6, 2026, Applicants filed a letter requesting that the Board strike BNSF's March 3, 2026 letter as an improper reply to a reply.

DISCUSSION AND CONCLUSIONS

BNSF Appeal. An appeal prior to a final Board decision on the merits of a proceeding is an interlocutory appeal. Finch Paper LLC—Pet. for Declaratory Ord. (Finch Paper), FD 35981, slip op. at 5 (STB served Jan. 11, 2017). Interlocutory appeals are permitted only if a party establishes one of four circumstances enumerated in 49 C.F.R. § 1115.9(a). *Id.* Section 1115.9 also governs the deadline for an appeal of an interlocutory decision, providing that "interlocutory appeals shall be filed with the Board within seven (7) calendar days of the ruling." 49 C.F.R. § 1115.9(b); *see Finch Paper*, FD 35981, slip op. at 6 & n.10 (finding that an appeal of an interlocutory decision was untimely under 49 C.F.R. § 1115.9(b)). If an interlocutory appeal meets the 49 C.F.R. § 1115.9 requirements, the Board then analyzes the merits of the appeal under the standard outlined in 49 C.F.R. § 1115.1(c). Finch Paper, FD 35981, slip op. at 5.

The Board has made clear that an ALJ ruling on discovery is not a decision on the merits and thus is subject to the threshold requirements of 49 C.F.R. § 1115.9, including the seven-day appeal deadline. *See Finch Paper*, FD 35981, slip op. at 6. BNSF filed its appeal five days late, incorrectly asserting that its appeal was timely under 49 C.F.R. § 1115.1(c). (BNSF Appeal 5.) As BNSF failed to file an appeal within the applicable seven-day deadline for interlocutory rulings by an ALJ, BNSF's appeal of the ALJ discovery order is untimely.

In its March 3, 2026 letter responding to Applicants' reply, BNSF asserts its appeal was timely under 49 C.F.R. § 1115.1(c) and asks that, "if the Board has any doubt" it should "waive any seven-day deadline" that might apply. (BNSF Letter, Mar. 3, 2026.) To the extent BNSF makes arguments that its appeal was timely, this letter is an impermissible reply to a reply. *See* 49 C.F.R. § 1104.13(c). To the extent BNSF seeks a waiver, the Board declines to waive the seven-day appeal deadline. *See* 49 C.F.R. § 1110.9 (allowing the Board to waive any rule). BNSF does not address its failure to follow the Board's regulations and precedent, and the record

does not otherwise establish good cause for a waiver. Accordingly, the Board will deny BNSF's late appeal of Decision No. 10 as untimely.³

Supplemental Information. Although the Board is denying BNSF's discovery appeal as untimely and thus will not disturb the ALJ's order, the Board sua sponte will direct that Applicants file with the Board certain transaction-related documents. As described in more detail below, the Board will direct that Applicants submit the "ordinary course" documents that DOJ and FTC request from parties as a matter of course when reviewing proposed mergers under the HSR Act. See 15 U.S.C. § 18a; 16 C.F.R. § 803.1(a); Premerger Notification; Reporting & Waiting Period Requirements (HSR Rules), 89 Fed. Reg. 89216, 89301-03, 89370, 89386 (Nov. 12, 2024).

The Board has discretion to direct the filing of supplemental information as necessary to facilitate its review. 49 U.S.C. § 1321(b)(3); see, e.g., Canadian Pac. Ry.—Control—Kan. City S., FD 36500, slip op. at 10 (STB served Nov. 23, 2021); Canadian Nat'l Ry. & Grand Trunk Corp.—Control—Iowa N. Ry., FD 36744, slip op. at 9 (STB served Mar. 29, 2024); Burlington N. Inc.—Control—Santa Fe Pac. Corp., FD 32549, slip op. at 12 (ICC served Nov. 10, 1994). The Board has exercised this authority already in this proceeding, directing the submission of information during the pre-application phase. See Decision No. 2, FD 36873, slip op. at 2; Decision No. 3, FD 36873, slip op. at 3; see also Decision No. 10, FD 36873, slip op. at 3. It will do so again here. Further, although Applicants argue that the Board should not import DOJ's discovery practices into this proceeding, Applicants have not identified any "fundamental statutory [or] procedural differences" that would render the "ordinary course" documents identified below irrelevant to the Board's review or place them outside the scope of 49 U.S.C. § 1321(b)(3). (Applicants Letter 2, Mar. 4, 2026.) While some of the targeted documents may be "highly sensitive," (*id.*), Applicants may designate them Confidential or Highly Confidential, as appropriate, in accordance with the Protective Order of August 5, 2025, as noted below. These procedures are sufficient and routinely used to protect confidentiality in Board proceedings, which Applicants agree already "require merging parties to produce to their competitors a substantial amount of highly sensitive internal data." (*Id.*)

The Board finds that it is appropriate to order the submission of the "ordinary course" documents here given the proposed transaction's size and significance for the rail transportation system, and because the transaction is the first to be assessed under the 2001 merger rules. Moreover, the Board finds that these documents will assist it in determining whether the proposed transaction is likely to have the effects attributed to it by Applicants and whether the transaction is consistent with the public interest, which requires consideration of the proposal's competitive effects. See 49 U.S.C. § 10101(1), (4), (5), (9), (12); 49 U.S.C. § 11324(b), (c); see also HSR Rules, 89 Fed. Reg. at 89301 (highlighting the value of such documents to assessing competitive effects of a transaction). As set forth in DOJ's letter, these "ordinary course" documents are likely to provide valuable insight into the proposed transaction's effects because they "reflect[] real-time business decisions and forecasts concerning the merging parties"

³ Because the Board will deny BNSF's appeal as untimely, the Board declines to consider CPKC's February 23, 2026 letter supporting BNSF's appeal and finds that Applicants' request to strike CPKC's letter is moot.

operations, and views of past, present, and future market conditions.” (DOJ Letter 2, Mar. 3, 2026.) Thus, as DOJ explains, “ordinary course” documents are of “critical importance” in evaluating a merger, and may be more probative than “party advocacy, expert analysis, and self-serving statements” provided to support a merger application. (*Id.* at 2-3.) In this proceeding where Applicants seek approval to “create America’s first transcontinental railroad,” the highly probative nature of these documents is clear. And, as discussed below, the Board requires a targeted search for documents that Applicants may have already initiated. (Applicants Letter 1-2, Mar. 4, 2026.)

Specifically, the Board will direct Applicants to provide the documents described in the below-quoted language from the FTC’s instructions for its pre-merger notification forms under the HSR Act:

- **Competition Documents.** Provide all studies, surveys, analyses, and reports prepared by or for any officer(s), director(s), or supervisory deal team lead⁴ for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets;
- **Confidential Information Memoranda.** Provide all confidential information memoranda prepared by or for any officer(s) or director(s) [of Union Pacific Corporation or Norfolk Southern Corporation (i.e., the ultimate parent entities)] that specifically relate to the sale of the target. If no such confidential information memorandum exists, submit any document(s) given to any officer(s) or director(s) of [Union Pacific Corporation or Norfolk Southern Corporation] meant to serve the function of a confidential information memorandum. This does not include ordinary course documents and/or financial data shared in the course of due diligence, except to the extent that such materials served the purpose of a confidential information memorandum when no such confidential information memorandum exists;
- **Third-Party Studies, Surveys, Analyses, and Reports.** Provide all studies, surveys, analyses and reports prepared by investment bankers, consultants, or other third-party advisors (“third party advisors”) for any officer(s) or director(s) [of Union Pacific Corporation or Norfolk Southern Corporation] for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the target.

⁴ For each Applicant, the supervisory deal team lead is “[t]he individual who has primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer.” HSR Rules, 89 Fed. Reg. at 89363, 89381.

This item requires only materials developed by third party advisors during an engagement or for the purpose of seeking an engagement;

- **Synergies and Efficiencies.** Provide all studies, surveys, analyses, and reports evaluating or analyzing synergies, and/or efficiencies prepared by or for any officer(s) or director(s) [of Applicants] for the purpose of evaluating or analyzing the acquisition. Financial models without stated assumptions need not be provided.

HSR Rules, 89 FR at 89,370-71 (acquiring person instructions); id. at 89,386 (acquired person instructions). Documents responsive to this directive are limited to those created between July 30, 2024, and February 17, 2026, inclusive. Documents should be produced as a searchable PDF from which text can be copied or an Excel file. Id. at 89,364, 89,381. Submit only one copy of identical responsive documents. Applicants shall also provide a list that gives, for each document produced, the title, estimated date, authors (including job titles), and recipients (including job titles). Id. For any responsive documents that Applicants contend are privileged, Applicants shall further provide a privilege log indicating whether the document has been redacted or withheld, the privilege claim, the addressees and recipients, subject matter, document's present location, and who has control over it. Id. If the privilege claim is based on advice from counsel, the name of the counsel providing the advice (and the law firm, if applicable) must be provided. Id. Applicants may designate their submission Confidential or Highly Confidential, as appropriate, in accordance with the August 5, 2025 Protective Order entered in this proceeding. Nothing in this decision limits the scope of additional information and/or documents that may be appropriately requested or ordered produced in discovery if and when the Board accepts a revised application.

Applicants shall file the documents responsive to this directive on or before April 7, 2026.

It is ordered:

1. BNSF's appeal of Decision No. 10 is denied as untimely.
2. Applicants' request to strike CPKC's February 23, 2026 letter is denied as moot, and Applicants' request to strike BNSF's March 3, 2026 letter is granted in part and denied in part.
3. UP and NS are directed to submit additional information, as described above, by April 7, 2026.
4. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, and Schultz.