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ALJ

SERVICE DATE – FEBRUARY 11, 2026

SURFACE TRANSPORTATION BOARD

Docket No. FD 36873

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

ORDER DENYING BNSF MOTION TO COMPEL AND
REQUEST FOR HEARING AND
STRIKING CPKC’S REPLY TO REPLY

Decision No. 10

Decided: February 11, 2026

This discovery matter is before the undersigned pursuant to a ruling by the Surface Transportation Board. See Decision (Aug. 28, 2025).

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, under 49 U.S.C. §§ 11323-11325, for the acquisition of control by UPC, through its wholly owned subsidiary Ruby Merger Sub 1 Corporation, of NSC and, through it, NS. (Notice.) Applicants’ Notice identified 2023 as the impact analysis year. (Notice 3.) Applicants stated after the protective order was entered, they would make available 100% of their traffic tapes for the impact analysis year of 2023 available upon written request. (Notice 4.)

The Board explained that pursuant to the preamble of the merger rules, “[e]arly access to this critical traffic data w[ill] aid interested parties” but “[sh]ould not impede the prospective applicants in the preparation of their application.” Decision 1-2 (Aug. 25, 2025) (citing Major Rail Consol. Procs. (Major Merger Rules), 5 S.T.B. 539, 591 (2001)). The Board ordered the Applicants to submit to the Board 100% of their traffic tapes kept in the regular course of business for the period January 1, 2019, through December 31, 2024, by September 8, 2025. Decision (Aug. 25, 2025).¹ The Board also required Applicants to file the “contextual information,” i.e., the metadata, to aid in its review of the traffic tapes data. Id. at 2 & n.5. The

¹ These are not full and complete summaries of the Board’s decisions. Rather, the procedural history demonstrates the case’s current posture.

Board's decision explained that it sought traffic tapes kept in the ordinary course of business and this data would be treated as highly confidential.² Id.

By its Decision No. 3, served on August 28, 2025, the Board acknowledged Applicants' pre-filing notification and found it was a major transaction under 49 C.F.R. § 1180.2(a). Decision 1-2 (Aug. 28, 2025). This Decision assigned the undersigned the discovery issues in the case. Id. Further, the Board required Applicants to file, in advance of the application, pursuant to 49 C.F.R. 1180.4(c)(2)(v), the following additional information by September 29, 2025: Timetables, Station Lists, and Track Charts; Geospatial Information System Maps; Joint Facilities; and Interchange Commitments. Id. at 3-4. The Decision set forth the requirements for each category of additional information as well as technical information for submitting the information. Id.

On December 19, 2025, Applicants filed an application (the Application) seeking Board approval for (1) the acquisition of control by UPC of NSC, and through NSC of NS and NS's rail carrier subsidiaries, and (2) the resulting common control by UPC of UP and NS and the consolidation of the rail operations of UP and NS.

BNSF Railway Company (BNSF) filed a Motion to Compel Applicants to produce discovery documents on January 9, 2026. BNSF's motion to compel is supported by CSX Transportation, Inc., which filed a reply in support. The American Chemistry Council, Alliance for Chemical Distribution, American Fuel and Petrochemical Manufacturers, and The Fertilizer Institute submitted a Statement in Support of BNSF's motion to compel. BNSF also requests a hearing on its motion to compel.

On January 16, 2026, the Board found the Application incomplete, because it did not contain the required impact analyses, 49 C.F.R. § 1180.7(b)(2) & (b)(3), and the submission of contracts or written instruments (proposed or) entered into,³ 49 C.F.R. § 1180.6(a)(7). See Decision 3, 7 (Jan. 16, 2026). The Board declined to find the Application incomplete on other challenged grounds; however, the Board invited Applicants to "improve" any revised application based upon the stakeholders' comments. Id. at 12. In relevant part, the Board required Applicants to file a letter by February 17, 2026, to inform whether, and if so, when, Applicants anticipate filing a revised application. Id. Applicants can file a revised application no later than June 22, 2026. Id.

Following the Board's decision that the Application was incomplete, Applicants timely replied to BNSF's motion to compel on January 29, 2026. BNSF seeks to compel Applicants to produce discovery documents (i.e., board materials, banker presentations, and relevant internal emails). The motion to compel argues that Applicants are "far behind" in their discovery obligations. (Motion to Compel 2.) BNSF argues that if the Application is accepted, then

² The Protective Order was entered on August 5, 2025. Decision (Aug. 5, 2025).

³ On January 8, 2026, CN filed a motion to compel UP and UPC to produce Schedule 5.8 to the merger agreement. Following the Board's January 16, 2026, Decision, CN filed a Notice of Withdrawal Without Prejudice, stating UP produced Schedule 5.8 of the merger agreement. However, CN reserved the right to contest the "Highly Confidential" designation. (Id. at 2.)

scheduling adjustments will be required for document discovery before depositions begin. (*Id.* at 7.)

In support of its arguments, BNSF cites Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1), slip op. at 69 (STB served Sept. 5, 2007), and Federal Trade Commission cases. (Motion to Compel 8-9.) However, this proceeding is governed by Major Merger Rules, 5 S.T.B. 539 (2001), and Board regulations. See Decision 3 n.4 (Jan. 16, 2026).

The Major Merger Rules explain that:

Traffic tapes. We are requiring that applicants contemplating a major transaction make their highly confidential 100% traffic tapes available to outside counsel or consultants for interested parties—subject to an appropriate protective order—as soon as practicable after the filing of the notice of intent. **Early access to this critical traffic data would aid interested parties in the preparation of their own submissions but (unlike broad pre-application discovery, which we are not proposing) would not impede the prospective applicants in the preparation of their application.** If the party seeking the applicants’ 100% traffic tapes is itself a railroad, it must provide applicants’ counsel or consultants with reciprocal access to its own 100% traffic tapes, subject to an appropriate protective order.

5 S.T.B. at 591 (emphasis added).

This is a question about timing, not scope of discovery. Here, the Board found the Application incomplete and gave Applicants leave to file a revised application. There is not an application pending for the Board to review. Applicants are preparing their revised application.

In this pre-application phase, the Board has ordered that Applicants file 100% of their traffic tapes for the period January 1, 2019, through December 31, 2024. Decision (Aug. 25, 2025). The Board’s August 28, 2025, Decision required applicants to file additional information: Timetables, Station Lists, and Track Charts; Geospatial Information System Maps; Joint Facilities; and Interchange Commitments, all pursuant to 49 C.F.R. 1180.4(c)(2)(v) (information that the Board may require). Decision 2-3 (Aug. 28, 2025). Therefore, the Board decided this additional information was necessary to review the Application.

However, BNSF has not asked to compel any of the specific things that the Board considered necessary and ordered. Instead, BNSF seeks what it calls “basic discovery” before depositions. (Motion to Compel 7.) BNSF requests to compel board materials, banker analyses, and email communications. (Motion to Compel 7-11.)

BNSF may be entitled to these things after a revised application is accepted by the Board; however, the Major Merger Rules do not support compelling them now during the pre-application phase. See 5 S.T.B. at 591. Accordingly, BNSF’s motion to compel is denied without prejudice and may be renewed, if appropriate, after Applicants’ revised application is

accepted. At that point, the appropriate scope of discovery would be reviewed. BNSF's request for a hearing on the motion to compel is denied.

To be clear, pre-application discovery may be voluntarily conducted.

Canadian Pacific Railway Company d/b/a Canadian Pacific Kansas City and CPKC, and its U.S. rail carrier subsidiaries (CPKC), submitted a letter in support of BNSF's motion to compel on February 2, 2026. On February 6, 2026, UP filed a letter requesting that CPKC's letter be stricken as an improper reply to a reply. On February 11, 2026, CPKC filed a letter in reply to UP's motion to strike. CPKC's February 11, 2026, reply letter argues it is not a reply to a reply, but instead seeks "affirmative relief on behalf of CPKC in light of UP's strident assertions regarding the appropriate scope of discovery in its January 29 reply to BNSF's motion (UP-24/NS-23)." (CPKC Reply 1, Feb. 11, 2026.)

UP's request to strike is granted. CPKC's letter was filed after UP's reply, and although not styled a "reply to a reply," CPKC's own reply letter admits exactly that purpose. (CPKC Reply 1, Feb. 11, 2026.) Therefore, CPKC's February 2, 2026, letter in support of BNSF's motion to compel is stricken as an improper reply to a reply.

It is ordered:

1. BNSF's motion to compel is denied without prejudice.
2. BNSF's request for hearing is denied.
3. UP's request to strike CPKC's February 2, 2026, letter as a reply to a reply is granted.
4. This decision is effective on the date of service.

By the Board, Jenifer J. Soulikias, Administrative Law Judge.