

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 32760 (SUB-NO. 52)

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Office of Chief Counsel
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Part of
Public Record

BNSF RAILWAY COMPANY—PETITION FOR REVIEW—UP/SP MERGER
CONDITIONS

**UNION PACIFIC RAILROAD COMPANY’S REPLY TO BNSF RAILWAY
COMPANY’S PETITION FOR REVIEW, ENFORCEMENT, AND
MODIFICATION OF THE UP/SP MERGER CONDITIONS**

As part of a public relations campaign against the transformative potential of the UP/NS merger, BNSF chose this moment to ask the Board to reopen the three-decade-old settlement agreement the Board imposed as a condition on its approval of the UP/SP merger.¹ Whatever its merits as a PR stunt, BNSF’s Petition provides no basis for the Board to revisit the terms of the Restated and Amended Settlement Agreement (“RASA”).

The RASA is the product of a careful and intensive process to preserve two-carrier competition where it existed before the UP/SP merger. It reflects both arms-

¹ Petition for Review, Enforcement, and Modification of the UP/SP Merger Conditions, *BNSF Ry. Co.—Petition for Review—UP/SP Merger Conditions*, STB Fin. Docket No. 32760 (Sub-No. 52) (filed Nov. 28, 2025) (“Petition”). BNSF tellingly paired its Petition with a press release suggesting the Board complete a review of UP/SP merger conditions “[b]efore considering” the UP/NS merger application. See “BNSF files petition requesting STB to enforce, review Union Pacific/Southern Pacific merger conditions from three decades ago” <https://www.bnsf.com/news-media/news-releases/newsrelease.page?relId=bnsf-files-petition-requesting-stb-to-enforce-review-union-pacific-southern-pacific-merger-conditions-from-three-decades-ago> (Dec. 1, 2025).

length negotiations between BNSF and Union Pacific to reach the initial settlement agreement and certain revisions required by the Board. The RASA has achieved its competition-preserving purpose. BNSF enjoys unprecedented access to customers on Union Pacific lines and handles substantial amounts of traffic under merger-related access rights. BNSF provides no basis for the Board to reopen the conditions imposed on the UP/SP merger.

BNSF does not even try to meet the standard the Board previously established for petitions to modify UP/SP merger conditions. In response to BNSF's prior, unjustified attempts to improve its competitive position, the Board required future petitions to include "as much evidentiary detail as necessary" to justify a specific request for relief; to "set forth, at length the precise remedies" requested; and to "explain, with as much detail as circumstances require, why it is that the desired remedies are necessary."² This standard applies to BNSF's Petition, which asks the Board to "modify the conditions of the UP/SP merger approval decision as the Board deems necessary."³ But BNSF's Petition meets none of these requirements. In place of "evidentiary detail," BNSF provides vague anecdotes and unsupported and inaccurate assertions. This is consistent with BNSF's other PR efforts seeking to drum up opposition to the proposed UP/NS merger, which have

² *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (Oversight)*, Decision No. 13, 3 S.T.B. 987, 995 n.32 (1998) ("*UP/SP Oversight Decision No. 13*").

³ Petition at 4.

included made-up claims that Union Pacific would eliminate 300 intermodal lanes and false claims about integration problems in prior mergers.⁴

And BNSF does not propose any specific condition modifications at all—let alone meet the requirements to “set forth, at length the precise remedies” it wants to Board to impose and explain “why it is that the desired remedies are necessary.” *UP/SP Oversight Decision No. 13*, 3 S.T.B. at 995 n.32. Instead, BNSF asks the Board to open a generalized review proceeding on BNSF’s say-so, in which BNSF promises to decide eventually what “modification” it will propose.

The Board should not expend its resources revisiting a settled proceeding based on vague and inadequate allegations. As demonstrated below, the RASA has fulfilled its purpose by enabling BNSF to serve as a competitive replacement for Southern Pacific, as the Board intended. Despite fiercely competitive postures, the parties have had relatively few disputes over the RASA’s implementation, and the overwhelming majority of those disputes have been resolved swiftly and privately. When disputes arise, the parties can arbitrate them under the terms of the RASA or bring certain disputes to the Board. As the Board knows from experience, the cases

⁴ BNSF recently sent a communication to customers soliciting merger opposition that inaccurately claimed the CN/EJE merger caused congestion issues in Chicago. As the records in *CN/EJE* and other Board proceedings show, the congestion issues were caused by unusual weather events and wider problems the Board examined in Ex Parte 724, not merger integration. Indeed, the Board found that the poor service largely involved problems on BNSF’s network. See *United States Rail Service Issues*, Ex Parte 724, slip op. at 2-3 (served Apr. 1, 2014) (ordering executive-level officers from BNSF and CP to appear at a public hearing to discuss “the service problems that have been occurring across significant portions of the nation’s rail network, particularly on the Canadian Pacific Railway Company (CP) and BNSF Railway Company (BNSF) systems”).

BNSF has brought to the Board are not evidence Union Pacific is refusing to comply with the RASA. The cases reflect good-faith disputes between about how to apply the RASA. And the Board has quite often rejected BNSF's positions. If BNSF has other specific disputes, it can raise them with Union Pacific, or arbitrate them, or bring them to the Board. But BNSF has not provided cause for the Board to reopen a functional, long-settled merger condition merely because BNSF wishes to distract or delay the Board from considering whether the UP/NS merger is in the public interest.

I. Background

A. The RASA Was Carefully Negotiated and Board-Approved as a Condition of the UP/SP Merger.

As detailed in the application in Docket No. FD 36873, the proposed UP/NS merger is an end-to-end transaction with virtually no competitive overlaps. But when Union Pacific and Southern Pacific proposed to merge to create a needed competitor to the newly formed Burlington Northern Santa Fe, remedies were needed to address competitive overlaps between Union Pacific and Southern Pacific and preserve two-railroad competition at certain locations. Those conditions were embodied in a comprehensive 1995 agreement granting BNSF certain access rights (the "BNSF Agreement"). The BNSF Agreement was presented to the Board as part of the UP/SP application, and the Board found the agreement, as modified to incorporate an additional settlement agreement with the Chemical Manufacturers Association (the "CMA Agreement"), and as further modified by the Board, effectively addressed the competitive issues presented by the merger. *Union Pac.*

Corp.—Control & Merger—S. Pac. Rail Corp., Decision No. 44, 1 S.T.B. 233, 368 (1996).

When it approved the UP/SP merger, the Board set a five-year oversight period “to examine whether the various conditions . . . imposed have effectively addressed the competitive issues they were intended to address.” *Id.* at 248. That oversight period included regular consideration of whether the BNSF Agreement, as modified, was working as intended. The Board recognized disputes between Union Pacific and BNSF about the workings of the settlement agreement were healthy and to be expected as part of the vigorous competition the Board hoped to foster. *See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (Oversight)*, Decision No. 10, 2 S.T.B. 703, 712 (1997) (“It is understandable that there is a healthy tension between UP and BNSF about the exact parameters of our various conditions. These carriers are direct competitors, and as we predicted, our approval of the merger has led to continued rivalry rather than collusion.”) (“*UP/SP Oversight Decision No. 10*”). The Board made clear throughout the UP/SP oversight proceeding, however, that the purpose of the conditions was simply to preserve the pre-merger competitive landscape. The conditions were not meant to give BNSF a permanent leg up in its competition with Union Pacific. *See, e.g., UP/SP Oversight Decision No. 13*, 3 S.T.B. at 995 & n.32.

Over the course of the oversight period the Board considered and rejected multiple attempts by BNSF to alter or expand its rights “notwithstanding its arms length settlement reached with UP.” *UP/SP General Oversight Decision No. 13*, 3

S.T.B. at 995 n.32 (rejecting various “BNSF proposals to alter existing arrangements in ways that BNSF argues would improve its ability to offer a more competitive service”); *see, e.g., Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (Oversight)*, Decision No. 20, 5 S.T.B. 1159, 1164-65 (2001) (rejecting BNSF attempt to revise definition of 2-to-1 points as “an overreach that has no competitive justification in the context of the UP/SP merger, nor support in the BNSF Agreement itself”) (“*UP/SP Oversight Decision No. 20*”). After one such attempt in which the Board found BNSF had made unsubstantiated complaints and failed to show its existing rights were not sufficient to preserve pre-merger competition, the Board expressly stated that BNSF must support any future attempts at altering merger conditions with specific and detailed evidence:

If for some reason BNSF continues to have complaints, however, and wants us to intervene, it should submit pleadings: (1) that demonstrate, with as much evidentiary detail as necessary, the existence of the problems it alleges, and that further demonstrate that these problems were either created or exacerbated by the merger; (2) that set forth, at length, the precise remedies it would have us impose; and (3) that explain, with as much detail as circumstances require, why it is that the desired remedies are necessary.⁵

At the conclusion of the oversight period, the Board found that “the evidence submitted in th[e] fifth annual oversight round demonstrates that the conditions we imposed are working as intended,” and “have maintained and fostered rail competition in the Western United States.” *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (Oversight)*, Decision No. 21, 5 S.T.B. 1173, 1175 (2001). The Board therefore closed the formal oversight period.

⁵ *UP/SP General Oversight Decision No. 13*, 3 S.T.B. at 995 n.32.

Before the close of the oversight period, BNSF and Union Pacific submitted a draft of a restated and amended settlement agreement for the Board's review, including several provisions where BNSF and Union Pacific proposed alternative language based on disagreements about how the BNSF Agreement should be applied. On the same date as the final Decision No. 21 closing the formal oversight period, the Board resolved each of the remaining disagreements and instructed BNSF and Union Pacific to implement the Board's decisions on those issues in a final restated and amended version of the 1995 BNSF Agreement. *UP/SP Oversight Decision No. 20*, 5 S.T.B. at 1171-72.

The next year, Union Pacific and BNSF executed the RASA "to amend and restate the 1995 Agreement to incorporate the conditions imposed by the STB on the UP/SP merger (including the CMA Agreement, as modified by the STB) and the agreements they have reached relating to those conditions and other related matters." Revised and Amended Settlement Agreement at 2, attached as Exhibit A to Petition ("RASA"). Like the 1995 BNSF Agreement, the RASA specifies "unresolved disputes and controversies concerning any of the terms and provisions of this Agreement or the application of charges hereunder shall be submitted for binding arbitration under Commercial Arbitration Rules of the American Arbitration Association which shall be the exclusive remedy of the parties." RASA § 15.

B. The RASA Has Been an Effective Mechanism for Implementing UP/SP Merger Conditions.

The RASA and the BNSF Agreement before it have effectively preserved the pre-UP/SP-merger competitive environment. Over the three decades in which the BNSF Agreement and RASA have been in place, Union Pacific and BNSF handle most BNSF access requests smoothly and without incident. UP's records indicate that since 2009 over 80% of BNSF customer access requests pursuant to the RASA have been granted. This high percentage actually understates the degree of agreement between UP and BNSF, since it is only a reflection of Union Pacific's responses to new BNSF requests, and does not reflect the many shipper facilities that have long been settled as 2-to-1s covered by the RASA.⁶

BNSF admits that most of its access requests are granted, claiming only that "over a third" of its customer elections "[o]ver the past three decades" were "denied or delayed." Petition at 17. Even using BNSF's math and timeframe, two-thirds were *not* denied or delayed, and BNSF provides no evidence that Union Pacific is denying or delaying approval of well-founded BNSF requests without good cause. For example, in the calendar year 2025, BNSF presented six customer access requests, and Union Pacific approved all six. As Table 1 details, the average time was just 25 days.

⁶ Cf. BNSF Fifth Annual and Cumulative Progress Report, BNSF-PR-20, *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (Oversight)*, FD 32760, at 5 (filed July 20, 2001) (noting that as of 2001 "BNSF has identified more than 500 '2-to-1' shipper facilities").

Table 1
2025 BNSF Customer Access Requests

Customer	Date of BNSF Access Request	Date of UP Response	UP Response
{ }	4/23/2025	5/23/2025	Access Granted
{ }	5/30/2025	6/26/2025	Access Granted
{ }	6/10/2025	6/30/2025	Access Granted
{ }	6/10/2025	7/1/2025	Access Granted
{ }	8/1/2025	8/29/2025	Access Granted
{ }	8/1/2025	8/29/2025	Access Granted

To be sure, Union Pacific has denied BNSF's requests in a handful of situations where Union Pacific concluded in good faith the RASA did not apply. If BNSF disagrees with Union Pacific's conclusions, the parties can engage and discuss. And there are situations in which Union Pacific agrees to access, but certain operational or infrastructure issues need to be coordinated and discussed—just as in any scenario where a carrier has trackage or switching access to a customer. If Union Pacific and BNSF cannot successfully resolve a dispute, then BNSF has never been shy or hesitant about seeking a resolution.

II. The Board Should Not Reopen a Board-Approved Settlement Agreement With Built-In Dispute Resolution Mechanisms

BNSF's Petition seeks the extraordinary: Board reconsideration and revision of a settlement agreement that Union Pacific and BNSF privately negotiated a quarter-century ago, and that Board imposed as a condition on its approval of the

UP/SP merger, without evidence and against the background of Board oversight and decades of guidance. BNSF's handful of complaints about Union Pacific responses to BNSF access requests are exaggerations, incomplete anecdotes, and outright misstatements. Union Pacific corrects the record on these assertions below. But even if BNSF had legitimate, factually-grounded disputes about the RASA's implementation, BNSF has ample options for resolving those disputes under the existing framework.

“As a general matter, the Board encourages the resolution of disputes through privately negotiated agreements.”⁷ For this reason, the Board generally does not disturb agreements reached by parties, and routinely rejects attempts to alter agreed-upon merger conditions or reopen such voluntary agreements.⁸

The Board should particularly adhere to its policy against rewriting agreed-upon merger conditions in the case of the RASA, because the RASA and the BNSF Agreement before it were carefully scrutinized by the Board and the parties in the

⁷ *Application of The National Railroad Passenger Corporation Under 49 U.S.C. § 24308(a)—Canadian National Railway Company*, FD 35743, slip op. at 28 (served Aug. 9, 2019).

⁸ See *San Jacinto Rail Limited Construction Exemption and The Burlington Northern And Santa Fe Railway Company Operation Exemption—Build-Out To The Bayport Loop Near Houston, Harris County, Tx*, FD 34079, slip op. at 16 (served May 9, 2003) (recognizing “Board policy of encouraging privately negotiated agreements, rather than governmentally mandated solutions”); *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control And Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corporation* (Decision No. 89), 3 S.T.B. 196, 380 (1998) (“Government should not be in the business of fundamentally restructuring private-sector initiatives that are inherently sound.”).

UP/SP merger proceeding and the subsequent oversight proceeding. During the oversight proceeding, the Board repeatedly rejected BNSF attempts to alter the terms of its agreement and expand the agreement beyond what was necessary to maintain the pre-merger competitive landscape. And at the close of the oversight period, the Board reviewed a draft restated and amended version of the BNSF Agreement and resolved certain conflicting BNSF and Union Pacific proposals to revise that agreement. The RASA incorporates the Board's decisions on those issues. The RASA thus reflects not only the parties' agreement, but the Board's conditions on the UP/SP merger. The Board should not disturb those decades-old conditions.

While BNSF argues there are broad issues requiring a complete Board reexamination of the RASA, BNSF's description of those alleged issues is simply inaccurate. As discussed above, Union Pacific grants a substantial majority of BNSF access requests with no issue. And BNSF has no shortage of mechanisms to resolve any legitimate concerns. Section 15 of the RASA provides for arbitration of "disputes and controversies concerning any of the terms and provisions of this Agreement." The Board strongly prefers private resolution, and there is no basis for the Board to revisit a contract that provides the parties a private forum to resolve any disputes. Moreover, the Board itself has remained open as a forum to resolve individual disputes regarding general issues arising under the RASA. BNSF has produced no evidence that these mechanisms are not sufficient to resolve any concerns.

BNSF complains that it “has been forced to file more than a dozen petitions with the Board against UP,” but a dozen petitions over 30 years is not very many.⁹ And BNSF fails to mention that many of those petitions have been unsuccessful. For example, in *G3* the Board rejected BNSF’s petition, finding that BNSF was trying to “[e]xtend[] the competitive protections of the BNSF Agreement to a non-2-to-1 shipper at a non-2-to-1 location.”¹⁰ More recently, in *Colorado Materials* the Board concluded that BNSF’s petition “rest[ed] on a faulty interpretation of the RASA.”¹¹ Other disputes between the parties were settled shortly after filing.¹² The Board knows from experience the few BNSF petitions requiring agency resolution are the product of good faith disagreements, not instances where Union Pacific’s interpretations were found to be frivolous.

Disputes between intense competitors like BNSF and Union Pacific about the precise contours of the RASA were anticipated by the Board.¹³ The occasional good

⁹ Petition at 9. The Board noted in 1997 that it had been asked to resolve “only two disputes” about whether its conditions applied to a particular shipper during the first year after merger approval. *UP/SP Oversight Decision No. 10*, 2 S.T.B. at 711. A dozen petitions over almost 30 years is far less than two per year.

¹⁰ *See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp.* (Decision No. 106), FD 32760, at 7-8 (served Dec. 20, 2013).

¹¹ *BNSF Ry Co.—Pet. For Clarification—Service to Colorado Materials*, STB Docket No. FD 32760 (Sub-No. 49), at 4-5 (served June 30, 2025) (“*Colorado Materials*”). The Board allowed BNSF to file an amended petition, which is currently pending.

¹² *See, e.g., BNSF Ry. Co.—Emergency Pet. For Enforcement—Interchange with Salt Lake Garfield & W. Ry.*, STB Docket No. 32760 (Sub-No. 51).

¹³ *UP/SP Oversight Decision No. 10*, 2 S.T.B. 703 at 712 (anticipating a “healthy tension between UP and BNSF about the exact parameters of our various conditions”).

faith dispute is no reason to upset the balance that the Board struck by reopening the RASA so that BNSF can argue for more favorable conditions and otherwise pursue bargains it never made.

III. BNSF's Anecdotes and Misstatements Cannot Meet the Board Standard for Evidence Supporting Revisions to the UP/SP Merger Conditions.

Moreover, BNSF's Petition does not come close to meeting the specific requirements that the Board ordered BNSF to meet for any future requests to revise merger conditions. BNSF has not provided the "evidentiary detail" that the Board requires, and it has not even tried to explain what precise remedies it thinks are necessary. *UP/SP Oversight Decision No. 13*, 3 S.T.B. at 995 n.34. BNSF is apparently aware of the standard that was set for it,¹⁴ but ignores it in favor of a request to open a freewheeling "review" without providing evidentiary detail or even explaining what modifications to conditions it intends to propose. The Board should hold BNSF to the required standard.

As discussed above, during the UP/SP oversight proceeding BNSF made repeated efforts to improve its competitive position "notwithstanding its arms length settlement reached with UP."¹⁵ In response, the Board repeatedly denied BNSF's efforts to improve upon the bargain it struck in the BNSF Agreement, finding that BNSF had failed to show that its existing rights were not sufficient to

¹⁴ See Petition at 26 (citing the Decision No. 13 language without attempting to satisfy it).

¹⁵ *UP/SP General Oversight Decision No. 13*, 3 S.T.B. at 995 n.32.

preserve pre-merger competition.¹⁶ After one such effort, BNSF was instructed by the Board to set forth any future complaints in:

“pleadings: (1) that demonstrate, with as much evidentiary detail as necessary, the existence of the problems it alleges, and that further demonstrate that these problems were either created or exacerbated by the merger; (2) that set forth, at length, the precise remedies it would have us impose; and (3) that explain, with as much detail as circumstances require, why it is that the desired remedies are necessary.”¹⁷

None of these requirements have been met. BNSF fails to comply with even the simple requirement to substantiate its claims with the appropriate evidentiary detail. BNSF’s petition presents conclusory claims about a series of thinly-sketched anecdotes, few of which include any detail at all. Union Pacific will not respond to each of the allegations, some of which are too vaguely worded for Union Pacific to even identify the nature of BNSF’s complaint, and many of which appear to reflect years-old disputes that have long since been resolved. But the below examples will make clear how seriously BNSF misstates the facts and how it fails to present evidentiary detail showing legitimate problems.

RASA Joint Review of Charges. BNSF complains that Union Pacific is attempting “to drive up costs of access” by “trigger[ing] a 90-day review period” of the rates for RASA-related charges and not proffering a proposal. Petition at 8-9. But the RASA provides for periodic adjustment of charges and explicitly permits either party to request a joint review of the adjustment mechanism every five years. RASA at § 12. BNSF is thus complaining that Union Pacific invoked an undisputed

¹⁶ *Id.*

¹⁷ *Id.*

right under the RASA. Further, the RASA sets a standard that “rates and charges for trackage rights and services under this Agreement [should] reflect the same basic relationship to operating costs as upon execution of this agreement.” RASA § 12. A joint review to ensure the adjustment mechanism has kept pace with costs is not an effort to “drive up costs.”

Similarly, BNSF’s assertion that Union Pacific was required to “promptly propos[e] an adjustment for the parties to jointly review” is flatly wrong. Petition at 9. The RASA provides for a joint review but does not specify how the review should be conducted. Nor does the RASA require negotiations to be completed in 90 days. The RASA just requires a party give 90 days notice of its intent to request a joint review of the adjustment mechanism. BNSF’s complaint about Union Pacific’s request for a joint review of rates specifically contemplated by the RASA aptly illustrates the baseless nature of BNSF’s Petition.

BNSF Attempts to Change Trackage Rights Agreements. After complaining Union Pacific is seeking to review trackage rights rates as expressly authorized in the RASA, BNSF then complains Union Pacific is refusing to reopen and renegotiate trackage rights agreements that implement the rights granted in the RASA. Petition at 17-18. Yet BNSF does not point to any provision in the RASA or the implementing agreements requiring renegotiation. Nor does BNSF identify a particular reason to renegotiate them—they have governed the parties’ interactions for the past three decades. BNSF neither identifies any specific issue or problem

that requires revision nor explains what “necessary updates” BNSF thinks are required. *Id.* at 18. This also falls far short of the specific facts the Board requires.

Alleged delays in customer access. BNSF asserts that “UP increasingly denies BNSF’s access” or otherwise “employs delay tactics.” Petition at 15. But it should not be surprising if access requests BNSF makes nearly three decades after the original BNSF Agreement might take longer to resolve, especially when BNSF attempts to argue positions that are inconsistent with the RASA and prior Board decisions.¹⁸ Further, as noted above, each request BNSF made in 2025 was granted. And BNSF’s examples of alleged “delay tactics” fall apart upon examination. BNSF’s complaint that Union Pacific identified a need for an additional track for BNSF to access a customer in Dayton, Texas, omits to acknowledge that the customer was being served by Union Pacific as well, and that the additional track was needed to enable service by both Union Pacific and BNSF. BNSF’s claim that in 2022 Union Pacific asked a customer to sign lease agreements for a track used to serve other shippers is wrong—Union Pacific only asked the customer to lease the track that would be exclusively used for that customer. More generally, granting BNSF access to specific facilities can have other network and service impacts that sometimes requires additional coordination and agreements—access cannot be turned on like a light switch. Union Pacific is not engaged in improper delay when it seeks coordination from BNSF or the customer as needed to enable access. And, if

¹⁸ *Colorado Materials*, at 5-6 (finding that BNSF’s arguments “cannot be squared” with the RASA and that a prior Board decision “clearly undercuts BNSF’s current argument”).

BNSF believes it has legitimate claims, it can pursue them through arbitration; BNSF never explains why its contractually negotiated dispute resolution mechanism is insufficient.

Customer siting. BNSF asserts that Union Pacific marketing personnel who are selling Union Pacific's rail services as an option for potential rail customers somehow be required to advocate that prospective customers locate new facilities at locations that could be served by BNSF as well. Petition at 22-23. BNSF does not point to anything in the RASA that would support the extraordinary proposition that Union Pacific's marketing department should be conscripted to market services for their primary competitor. Nor does it explain why BNSF's own marketing department is not fully equipped to engage with potential customers and advocate for BNSF as an option. Indeed, during the oversight period BNSF touted the efforts of its "marketing and sales campaigns" to identify potential customers that BNSF could serve pursuant to UP/SP merger conditions.¹⁹ There is no basis for the Board to consider reopening UP/SP merger conditions because BNSF wants UP to do marketing for it.²⁰

¹⁹ BNSF Fifth Annual and Cumulative Progress Report, BNSF-PR-20, UP/SP Oversight Proceeding, FD 32760, at 4-5 (filed July 20, 2001).

²⁰ BNSF makes a series of complaints about dispatching practices, siding usage, and other operational issues. Such fact-specific disputes are best suited for private discussion between Union Pacific and BNSF or arbitration if necessary, and are precisely the sort of disputes that the Board encouraged the parties to resolve without seeking Board intervention. *See Colorado Materials*, at 4 ("As a general matter, the Board encourages BNSF and UP to arbitrate, in the first instance, future disputes over contested factual matters which otherwise do not have broad implications or raise policy questions regarding implementation of the Board's conditions.").

BNSF's Petition also fails to identify the remedies BNSF wants Board to consider, let alone explain why such remedies are necessary. In its Petition for "Review, Enforcement, and Modification," BNSF does not bother to specify which conditions it wants "enforced," which it wants "modified," or what "enforcement" or "modification" it seeks, much less explain why it cannot obtain relief through the RASA's existing arbitration mechanism. BNSF thus has not met even the most basic prerequisite for reopening the Board's UP/SP merger conditions.

BNSF attempts to address the shortcomings in its Petition with the assertion that it needs discovery to determine what modifications it might want to propose. BNSF has operated under the RASA for three decades. If BNSF had legitimate proposals, it would have made them. The Board should hold BNSF to the standard that the Board set for BNSF in the Oversight Proceeding—if BNSF wants to reopen merger conditions that have worked for a generation, then BNSF has to produce specific evidence that reopening is warranted, specific proposed changes to the RASA, and detailed reasons why those requested changes are necessary.

IV. Conclusion

BNSF pronounces that it is the guardian of the rights that the Board entrusted to it, and that the Board therefore should open a proceeding to allow BNSF to present its case as this "guardian." Pet. at 2, 27 (quoting *UP/SP Oversight Decision No. 20*, 5 S.T.B. at 1171). But BNSF ignores that the very decision it quotes also prescribed the current RASA as the framework for BNSF's rights, and rejected BNSF efforts to expand upon the rights embodied in the RASA as "an overreach that has no competitive justification." *UP/SP Oversight Decision No. 20*,

5 S.T.B. at 1164-65. BNSF today has the ability and the incentive to “guard” the rights that are embodied in the RASA, and to bring specific claims through arbitration or Board petition if it believes those rights are not being respected. The extraordinary remedy BNSF now seeks—to reopen merger conditions and revise a Board-approved settlement agreement nearly 30 years old—is neither justifiable nor supported with requisite evidence. The petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 2026, a copy of the foregoing Reply to BNSF Railway Company's Petition for Review, Enforcement, and Modification of the UP/SP Merger Conditions was served by email or first class mail on the service list for Finance Docket No. 32760 (Sub-No. 52).

/s/ Matthew J. Warren
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