



U.S. Department of Justice

Antitrust Division

310931

*Liberty Square Building*

*450 5<sup>th</sup> Street, N.W.  
Washington, DC 20530*

March 3, 2026

ENTERED  
Office of Chief Counsel  
March 3, 2026  
Part of  
Public Record

By Electronic Filing

Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423-0001  
Attn: Chief of Case Administration, Office of Chief Counsel

Hon. Jenifer J. Soulikias  
Administrative Law Judge  
Surface Transportation Board  
395 E Street SW  
Washington, D.C. 20423-0001  
Email: [alj.soulikias.inbox@stb.gov](mailto:alj.soulikias.inbox@stb.gov)

Re: FD 36873, Union Pacific Corporation, et al. – Control – Norfolk  
Southern Corporation

Dear Chairman Fuchs, Vice Chairman Schultz, Member Hedlund, Chief of Case  
Administration, and Judge Soulikias:

This letter concerns the discovery disputes currently pending in the above-referenced matter between the Applicants and several third parties to the proceeding, including Canadian Pacific Railway Company (“CPKC”) and BNSF Railway Company (“BNSF”). The Antitrust Division of the United States Department of Justice (“Department”) is participating in this matter, pursuant to the Department’s statutory right to intervene as a party to the proceeding under 49 U.S.C. § 11325(b)(1). The Department has a strong public policy interest in ensuring that the Department and interested third parties are able to obtain reasonable and appropriate discovery from Union Pacific and Norfolk Southern (collectively, “the Applicants”), such that the Surface Transportation Board (“Board”) will have well-informed advocacy and a robust record from which to render its decision.

While the Department does not take a position on the question of whether compelling substantial discovery is appropriate while the Application is not currently pending, the Department urges the Board and Judge Soulikias to compel the Applicants to produce relevant ordinary course documents at the appropriate time. The Department writes now to highlight the importance of the ability to access, evaluate, and use as potential evidence documents and data created and/or considered by the Applicants in the ordinary

course of their respective businesses. In the Department’s experience evaluating the risk of anticompetitive effects from a proposed merger, it is imperative to have access to documents created in the ordinary course of business reflecting real-time business decisions and forecasts concerning the merging parties’ operations, and views of past, present, and future market conditions.

The Department routinely seeks and obtains ordinary course documents from merging parties when evaluating whether the effect of a proposed acquisition “may be substantially to lessen competition” in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. At the initial stage, the Department (as well as the Federal Trade Commission) receive information about any transaction that is reportable under the Hart-Scott-Rodino Antitrust Improvements Act (the HSR Act).<sup>1</sup> As part of this initial screening stage, the HSR Act rules require parties to submit 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.<sup>2</sup> In addition, the HSR rules require submission of certain plans and reports created in the ordinary course of a company’s business that cover similar topics, even if not transaction-specific.<sup>3</sup>

The Department relies on these kinds of documents—along with the HSR form and public information—at a screening stage of analysis to determine whether to open an investigation. If the Department cannot resolve any outstanding questions or competition concerns, the Department may request the production of additional information from the merging parties, commonly called a “Second Request.” The subjects of the documents, data and information the Department typically seeks at this stage are not limited to the transaction itself, but rather are primarily ordinary course documents about the relevant product and geographic markets, head-to-head competition, and evidence of effects of prior mergers in the industry, among other relevant considerations.

Because Section 7 requires an assessment of likely effects on competition in the future, the Merger Guidelines adopted by the Department and the Federal Trade Commission highlight the probative importance of such ordinary course business documents to evaluating the potential competitive effects of a given transaction.<sup>4</sup> In fact, the Guidelines emphasize the critical importance of ordinary course evidence compared to party advocacy, expert analysis, and self-serving statements:

The Agencies often obtain substantial information from the merging parties, including documents, testimony, and data. **Across all of these categories, evidence created in the normal course of business is more probative than**

---

<sup>1</sup> 15 U.S.C. § 18a.

<sup>2</sup> 16 C.F.R. Part 803 - Appendix B - Acquiring Person (“Business Documents”) (“Transaction-Related Documents”). The U.S. Court of Appeals for the Fifth Circuit has stayed a recent district court decision vacating the most recent revision of the HSR Act rules. *Chamber of Commerce of U.S. v. Fed. Trade Comm’n*, 2026 WL 402498 (E.D. Tex. Feb. 12, 2026), *stayed*, Case No. 26-40094 (5th Cir. Feb. 19, 2026). While the prior rules sought somewhat less extensive information at the initial screening stage, they did not limit the Department’s and Federal Trade Commission’s ability to seek additional ordinary-course documents as described below.

<sup>3</sup> 16 C.F.R. Part 803 - Appendix B - Acquiring Person (“Business Documents”) (“Plans and Reports”).

<sup>4</sup> U.S. Dep’t of Justice and Fed. Trade Comm’n, Merger Guidelines (December 18, 2023) (“Merger Guidelines”), *available at* <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf>.

**evidence created after the company began anticipating a merger review.** Similarly, the Agencies give less weight to predictions by the parties or their employees, whether in the ordinary course of business or in anticipation of litigation, offered to allay competition concerns. **Where the testimony of outcome-interested merging party employees contradicts ordinary course business records, the Agencies typically give greater weight to the business records.**<sup>5</sup>

In short, the Department’s analysis of a proposed merger relies on obtaining, reviewing, and analyzing ordinary course documents from the parties. While the HSR Act rules and Merger Guidelines are not directly applicable to Board proceedings,<sup>6</sup> the Department recommends that the Board avail itself of the ability to obtain such ordinary course documents (and allow participating third parties access to such documents, pursuant to the Protective Order and any related orders<sup>7</sup>) in order to have a robust record, not limited to materials supporting the Applicants’ position, to make its decision.

Returning to the instant discovery dispute, while the Department has not yet sought discovery and is not privy to the negotiations between the Applicants and BNSF (among others participating in the matter), the Department is concerned about the implications of the Applicants’ position on discovery (as reflected in BNSF’s Motion, the Applicants’ Reply, BNSF’s Appeal, and CPKC’s letter).<sup>8</sup> For example, BNSF seeks the same type of “executive-level and board documents evaluating the merger’s effect on competition and proposed synergies or efficiencies”<sup>9</sup> that must be produced to the Department and Federal Trade Commission at the initial HSR Act screening stage. BNSF also seeks other ordinary course documents that the Department would typically request at the Second Request stage and find highly relevant to its evaluation of a proposed merger, such as “[d]ocuments and [c]ommunications relating to potential joint ventures, marketing alliances, or other forms of cooperative agreements between UP and NS other than a merger, whether or not such agreements were implemented.”<sup>10</sup> The Applicants’ refusal to produce these types of documents, and their rejection of other requests for ordinary course documents, limits the ability of the Board and interested third parties to test the assertions, projections, and analyses set forth in the Application (now withdrawn but soon to be refiled) and related hand-picked materials. In short, the Board and interested third parties should be able to obtain documents created in the Applicants’ ordinary course of

---

<sup>5</sup> *Id.* § 4.1 (emphasis added).

<sup>6</sup> Given the heightened “enhanced competition” standard applicable to this matter (*see* 49 C.F.R. § 1180.1), it may be even more imperative for the Board and interested third parties to obtain ordinary course documents than is the case under Section 7, which purpose is to prevent mergers whose effect may be substantially to lessen competition (and, accordingly, for which the Department would seek remedies that preserve the status quo in that Section 7 context).

<sup>7</sup> The Department filed a Motion for Supplemental Protective Order on the Board’s electronic docket on February 4, 2026. That motion is currently pending.

<sup>8</sup> *See* BNSF’s Motion to Compel (filed January 9, 2026 (BNSF-12)); Applicants’ Reply (filed January 29, 2026 (UP-24/NS-23)); BNSF’s Appeal (filed February 23, 2026 (BNSF-18)), and CPKC’s February 23 letter (CPKC-14).

<sup>9</sup> *See* BNSF Motion to Compel, at 8, 14 (BNSF-12) (Jan. 9, 2026).

<sup>10</sup> *Id.*, Exhibit 2 (“BNSF Railway Company’s First Set of Discovery Requests to Union Pacific and Norfolk Southern”), at 9.

business because they are often “more probative” than documents hand-picked after the Applicants “began anticipating a merger review.”<sup>11</sup>

Given the significant impact that the proposed transaction may have on the United States rail system, the Department urges the Board and Judge Soulikias to compel the Applicants to produce relevant ordinary course documents at the appropriate time, subject to the Protective Order and any related orders, to allow fully informed advocacy in these proceedings.

Thank you very much for considering these views of the Department of Justice.

Sincerely,

/s/ Don Amlin

Don Amlin  
Trial Attorney  
Transportation, Energy &  
Agriculture Section  
United States Department of Justice,  
Antitrust Division

cc: All Parties of Record

---

<sup>11</sup> Merger Guidelines § 4.1.

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing letter has been electronically filed with the Surface Transportation Board and served on all parties of record in this proceeding by electronic mail this 3rd day of March 2026.

/s/ Don Amlin  
Don Amlin  
U.S. Department of Justice  
Antitrust Division  
450 Fifth St. NW, Suite 8000  
Washington, D.C. 20530  
don.amlin@usdoj.gov