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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 32760 (SUB-NO. 50)

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ENTERED  
Office of Chief Counsel  
September 30, 2025  
Part of  
Public Record

BNSF RAILWAY COMPANY  
—PETITION FOR ENFORCEMENT—  
INTERCHANGE WITH SAVAGE TOOEELE RAILROAD COMPANY

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**UNION PACIFIC'S REPLY TO BNSF'S MOTION TO COMPEL  
DEPOSITION TESTIMONY OF UNION PACIFIC WITNESSES**

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On the day before the discovery period closed, BNSF Railway Company (“BNSF”) moved to compel the deposition testimony of three employees of Union Pacific Railroad Company (“Union Pacific”).<sup>1</sup> Union Pacific previously agreed to extend the discovery period to allow BNSF more time to review documents produced by Union Pacific and Savage Tooele Railroad LLC and resolve any related discovery issues. BNSF had more than a month to review Union Pacific’s documents. In that time, BNSF never raised any issue regarding the production. To this day, BNSF has not explained why it needs depositions, much less why any such need outweighs the substantial burdens involved, why it did not request depositions until it was impossible to conduct them before the discovery period closed, or why its request justifies a further extension of the schedule in this case. As set forth below, the Board should deny BNSF’s motion and issue an order ruling that the depositions not be had. *See* 49 C.F.R. § 1114.21(c)(1).

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<sup>1</sup> Union Pacific is filing this response pursuant to the Board’s September 26, 2025 Order directing Union Pacific “to file any reply it may wish to submit to BNSF’s motion by Tuesday, September 30, 2025.”

## RELEVANT FACTS

On April 28, 2025, the Board established the procedural schedule for this proceeding, which set the close of discovery for August 26, 2025. BNSF waited for three weeks before serving discovery on Union Pacific. On May 19, 2025, BNSF served its first set of discovery requests and gave Union Pacific 30 days to respond. On June 18, 2025, Union Pacific served its responses and objections. Union Pacific's responses identified two of the three employees BNSF now seeks to depose.

On August 15, 2025, BNSF filed a Consent Motion to Modify Procedural Schedule, which the Board granted on August 19, 2025. The order extended the deadline for the close of discovery to September 25, 2025. BNSF represented to both Union Pacific and the Board that it was seeking an extension to ensure sufficient time to review Union Pacific's documents. *See Mot., Ex. 1, at 2.* At no time did BNSF indicate that it was considering noticing a deposition, let alone three. On August 21, 2025, Union Pacific produced over 9,000 documents responsive to BNSF's discovery requests. Savage Toole also produced documents responsive to BNSF's discovery requests. BNSF never suggested that Union Pacific's production is in any way insufficient or otherwise prejudices BNSF.

On September 17, 2025—one week before the discovery deadline—counsel for BNSF emailed counsel for Union Pacific notifying counsel of its intent to notice depositions for three Union Pacific witnesses. *See Mot., Ex. 1, at 2-3.* Union Pacific explained that the depositions were not proportional to the needs of the case and that arranging for three depositions—on such a compressed schedule and with the volume

of documents produced by the three parties in this proceeding—would be extremely burdensome. *Id.* at 2. On September 22, 2025—three days before the discovery deadline—BNSF formally served the deposition notices on the three Union Pacific witnesses.

On September 25, 2025—the final day of the discovery period—BNSF moved to compel the deposition testimony of the three Union Pacific witnesses.

### **ARGUMENT**

Pursuant to 49 C.F.R. § 1114.21(c), for good cause shown, the Board can impose protective conditions on discovery that protects a party from “annoyance, embarrassment, oppression, or undue burden or expense, or *to prevent the raising of issues untimely* or inappropriate to the proceeding.” (emphasis added). The relief granted can include “[t]hat the discovery not be had[.]” 49 C.F.R. § 1114.21(c)(1).

Here, the Board should rule that BNSF’s request to depose three Union Pacific witnesses, and related motion to compel, are untimely and order that the depositions not be had. *Cf.* 49 C.F.R. § 1104.7(b) (“A request for an extension must be filed no less than 10 days before the due date[.]”). Union Pacific has produced over 9,000 pages of discovery. Not once has BNSF raised an issue with Union Pacific’s production or suggested that the production (or the discovery obtained from Savage Toole) was in any way insufficient to provide the information BNSF sought in its discovery requests or purports to now seek through deposition testimony. Nor has BNSF explained with any specificity what it might learn from the depositions that is not already provided in the documents. BNSF’s generic suggestions—that the witnesses may “provide relevant

information on what the Board has identified as the key issue in this proceeding,” Mot. at 6, and that it should be able to question the witnesses about “documents that are clearly relevant to the disputes in this proceeding,” *id.* at 6-7—could apply to many witnesses who appear in Union Pacific’s documents. These cursory claims that these witnesses may have relevant knowledge does not justify extending the discovery deadline nor BNSF’s last-minute attempt to hold three depositions.<sup>2</sup>

Further, BNSF’s sole endeavor to rationalize its delay is unavailing. BNSF merely points out that it identified the three witnesses after reviewing Union Pacific’s discovery responses and production. *See* Mot. at 6. But BNSF had Union Pacific’s discovery responses for over two months and document production for four weeks before the close of discovery. Moreover, given the contention that two of these witnesses “feature[] prominently in the responsive documents[,]” Mot. at 6, BNSF could have (and indeed should have) noticed the depositions sooner—if it had any genuine need to depose the witnesses.

As BNSF recognizes, *see* Ex. 1 at 2-3, it would have been impossible to conduct the depositions between the time it first requested the depositions and the end of the now-closed discovery period. By waiting until three days before the close of discovery to notice three depositions, BNSF asked Union Pacific, for all practical purposes, to consent to yet another extension of the discovery deadline. In so doing, BNSF suggested

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<sup>2</sup> BNSF’s suggestion (Mot. at 2) that it should be permitted to conduct these depositions because of Union Pacific’s proposed merger with Norfolk Southern is misplaced. The proposed merger has no relevance to this dispute and does not justify BNSF’s unreasonable delay in requesting deposition testimony.

that the untimeliness of its request need not be an issue because Union Pacific could simply agree to continue discovery past the deadline—the deadline which the Board set at BNSF’s request. But that is not how deadlines work. The Board already granted BNSF an extension to allow more time for BNSF to review the parties’ document productions. BNSF has now had that time and has not suggested Union Pacific’s production was in any way insufficient to provide the information BNSF needs, nor has BNSF identified any potential prejudice it would face if it is not allowed to conduct depositions.

That BNSF technically noticed the depositions within the discovery period (by three days) is of no moment. In analogous situations, federal courts routinely find motions to compel untimely. *See, e.g., Holmes v. Inmar Brand Solutions, Inc.*, 2024 WL 3627191, at \*3 (C.D. Ill. Aug. 1, 2024) (denying motion to compel where party submitted discovery requests three days before the close of discovery and thus “knew” that the responding party “would be unable to respond before the close of discovery”).

In nearly 30 years of access disputes in this docket, Union Pacific cannot recall, and BNSF does not identify, a single case in which a party conducted depositions. BNSF has not (and cannot) provided any explanation why it requires deposition testimony in this case, nor any valid justification for further extending the discovery period to accommodate its eleventh-hour request to depose three Union Pacific witnesses.

## CONCLUSION

For the reasons set forth above, Union Pacific respectfully requests that the Board deny BNSF's Motion to Compel Deposition Testimony of Union Pacific Witnesses.

Respectfully submitted,

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*Attorneys for Union Pacific Railroad Company*

September 30, 2025

**CERTIFICATE OF SERVICE**

I hereby certify that on this 30th day of September, 2025, I caused the foregoing document to be served by email on all parties of record in this proceeding.

/s/ Michael L. Rosenthal