

SERVICE DATE – DECEMBER 10, 2025

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 32760 (Sub-No. 50)

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

ORDER GRANTING BNSF’S MOTION TO COMPEL DEPOSITIONS

Decided: December 10, 2025

This discovery matter is before the undersigned pursuant to a ruling by the Surface Transportation Board, see Decision (Nov. 26, 2025).

On June 20, 2024, BNSF Railway Company (BNSF) filed a petition requesting that the Board enforce certain conditions imposed in its 1996 decision authorizing the merger of the Union Pacific Railroad Company (UP) and the Southern Pacific Rail Corporation by requiring UP to allow BNSF to interchange with Savage Tooele Railroad Company (STR), a short line railroad serving the Lakeview Business Park in Tooele County, Utah. By decision served April 28, 2025, the Board denied UP’s request to dismiss BNSF’s petition and set a procedural schedule for this proceeding.

The Board’s decision denying UP’s request to dismiss BNSF’s petition in favor of arbitration explained:

Here, the Petition presents questions about whether the merger conditions are being implemented in a way that is consistent with the policies underlying them. For example, BNSF claims that “UP appears to have structured its transaction with STR in order to artificially monopolize access to shippers at the Park, thereby avoiding UP’s competition-preserving UP/SP merger obligations,” and that “UP’s efforts here are the latest attempt to erode and undercut the rights that BNSF was granted under the UP/SP merger conditions to provide fully effective replacement competition.” (Pet. 2-3.) And while arbitration may sometimes be preferable for the resolution of disputed factual matters, [Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (JDecision No. 86)], 4 S.T.B. [303,] at 309[(1999)], the presence of such disputed matters is not dispositive as to the appropriateness of arbitration as a forum.⁷ The more important consideration is the proceeding’s potential policy implications, which in this case concern appropriate implementation of BNSF’s right to interchange with short line railroads on newly constructed lines under Section 8(k) of the RASA. Accordingly, the Board will exercise its discretion to resolve this matter itself and will not refer this dispute to arbitration.

Decision at 6 (Apr. 28, 2025). Footnote seven states:

BNSF asserts that “the material facts in this case were largely developed in prior STB proceedings and are not in dispute” but that **“the facts pertaining to UP’s intent and purpose [in structuring the transaction] are still to be learned.”** (BNSF Reply 4; see also Pet. 12 n.4.) Without prejudging what weight, if any, the Board will give such information, **the Board believes that obtaining additional details about the structuring of the transaction may aid its decision-making later in this proceeding.** Cf. Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., FD 32760, slip op. at 6 (STB served Jan. 30, 2018) (noting that in an earlier related proceeding, the Board “investigate[d] the circumstances under which the [Track] was built” where the factual circumstances “raise[d] questions as to whether Board authority to construct the [Track] under § 10901 was required and whether the transaction between UP and [FRAC Resources] was structured purposefully to avoid seeking such authority”). **The Board, therefore, will grant BNSF’s request for a short period of discovery focused on the structuring of the transaction.**

Decision at 6 n.7 (Apr. 28, 2025) (emphasis added).

On August 15, 2025, BNSF filed a consent motion to modify the procedural schedule, which was granted on August 19, 2025. Under the modified procedural schedule, discovery was to close by September 25, 2025, and merits briefing was to be completed by December 24, 2025.

On September 25, 2025, BNSF filed a motion to compel the deposition testimony of three UP witnesses and to hold the procedural schedule in abeyance pending resolution of its motion. BNSF requested expedited consideration of its motion. On September 26, 2025, the Board’s Chief Counsel issued an order directing UP to file any reply to BNSF’s motion by September 30, 2025. The order also held the procedural schedule in abeyance pending further order of the Board. On September 30, 2025, UP filed a reply.¹ Discovery was referred to the undersigned ALJ. Decision (Nov. 26, 2025). The Board also held the procedural schedule in abeyance pending further order of the Board. Id. at 2.

The Surface Transportation Board regulations provide for broad discovery. These regulations provide that “[p]arties may obtain discovery under this subpart regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” 49 C.F.R. § 1114.21(a)(1). The Board has recognized that this regulation allows for broad discovery. See Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 7), FD 36500, slip op. at 4 (Aug. 2, 2021) (acknowledging authority to seek material relevant to subject matter of proceeding under 49 C.F.R. § 1114.21 and interpreting scope of relevance in discovery “[b]roadly”); CSX Transp. & Del. & Hudson Ry.—Joint Use Agreement, FD 35348, slip op. at 3 (STB served Aug. 16,

¹ By decision dated October 1, 2025, all filings and deadlines were tolled during the period of the Federal government shutdown (October 1, 2025, through November 12, 2025). See Materials Due to Be Submitted During the Fed. Gov’t Shutdown, EP 751 (STB served Oct. 1, 2025).

2010) (parties are entitled to discovery regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding and relevance means that information might be able to affect the outcome of a proceeding) (citing 49 C.F.R. § 1114.21).

Despite this broad language, the Board has slightly restricted discovery where it seeks extraordinarily sensitive commercial, competitive, or confidential materials. The Board has held that the “[d]isclosure of extraordinarily sensitive information should not be required without a careful balancing of the seeking party’s need for the information, and its ability to generate comparable information from other sources, against the likelihood of harm to the disclosing party.” CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc., FD 33388, slip op. at 3 (STB served Nov. 10, 1997).

The Board’s regulations provide that the “testimony of any person, including a party, may be taken by deposition upon oral examination.” 49 C.F.R. § 1114.22(a). Under 49 C.F.R. § 1114.21(c), however, discovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought.

BNSF seeks to depose three UP witnesses, Richard Harris, Melissa Meier, and Michelle Zemeckis, about “the structuring of the transaction” between UP and STR, and particularly UP’s intent and purpose. (BNSF Motion 1, 6.) BNSF has agreed to schedule the depositions remotely, at UP’s office, and at a mutually-agreeable date and time. (Id. at 5.)

UP’s reply argued BNSF raised the issue of depositions at the expiration of the discovery period, which was untimely. (UP Reply 1-3.) UP argued that its 9,000 page document production, along with production from STR, provided the information sought by BNSF. (Id. at 3.) UP argued that BNSF had UP’s 9,000 document production for “four weeks” and should have noticed the depositions sooner, if it had any need for the depositions. (Id. at 4.)

Taking UP’s arguments in reverse order, the Board has held the procedural schedule in abeyance. Decision at 2 (Nov. 26, 2025). Therefore, UP’s argument about when BNSF raised the issue of depositions is moot. Discovery is not closed, and there is not a discovery deadline until the Board sets one by further order.

On one hand, UP argued that the document production already provided the discovery that BNSF requested. (UP Reply 3.) However, the four corners of the agreements and documents do not limit the scope of discovery. See 49 C.F.R. § 1114.21(a)(1). On the other hand, UP’s Reply complains that BNSF has not stated its request with specificity, and “many witnesses” have this knowledge. (UP Reply 4-5.) While “many witnesses” may have this knowledge, BNSF only sought to depose three of UP’s witnesses.

BNSF identified three witnesses that BNSF claims are “best positioned” to provide information about UP’s intent and purpose in structuring the transaction. (BNSF Motion 6.) The Board allowed discovery on “UP’s intent and purpose [in structuring the transaction].” See Decision at 6 n.7 (Apr. 28, 2025). It is unlikely that UP’s 9,000 documents contain all the non-privileged discoverable evidence about this transaction, especially when “intent and purpose” are

at the core of the inquiry. Thus, deposing only three witnesses about UP's intent and purpose is reasonable.

Finally, because of the lapse in time since BNSF's motion was filed, BNSF should be prepared for these depositions. Thus, the depositions should be scheduled within the next two weeks. Before the procedural schedule was held in abeyance, December 24, 2025, was scheduled to be the close of merits briefing; therefore, the parties were planning on working on this case during this time period.

BNSF is entitled to depose the three individuals, Richard Harris, Melissa Meier, and Michelle Zemeckis, about "UP's intent and purpose [in structuring the transaction]" See Decision at 6 n.7 (Apr. 28, 2025).

The Board will ultimately determine whether the testimony by the deponents is relevant and admissible before the Board, but that is a far different issue than the scope of what is discoverable through their depositions.

For these reasons, the undersigned **GRANTS** BNSF's Motion to Compel. The three depositions shall occur **no later than Wednesday, December 24, 2025.**

It is ordered:

1. BNSF's Motion to Compel is granted as discussed in this decision.
2. This decision is effective on the date of service.

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