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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Docket No. FD 36873

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

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**APPLICANTS' REPLY  
TO BNSF RAILWAY COMPANY'S  
MOTION TO COMPEL**

RAYMOND A. ATKINS  
CARRIE C. MAHAN  
MATTHEW J. WARREN  
ALLISON C. DAVIS  
MARC A. KORMAN  
Sidley Austin LLP  
1501 K Street, NW  
Washington, DC 20005  
(202) 736-8000

JASON M. MORRIS  
JOSEPH H. CARPENTER IV  
THOMAS E. ZOELLER  
HANNA M. CHOUEST  
T. MATTHEW LOCKHART  
Norfolk Southern Railway Company  
650 W. Peachtree Street NW  
Atlanta, GA 30308

*Attorneys for Norfolk Southern  
Corporation and Norfolk Southern  
Railway Company*

January 29, 2026

MICHAEL L. ROSENTHAL  
DEREK LUDWIN  
JAMES J. O'CONNELL  
MATTHEW J. GLOVER  
PEGAH NABILI  
Covington & Burling LLP  
One CityCenter  
850 Tenth Street, NW  
Washington, DC 20001  
(202) 662-6000

CHRISTINA B. CONLIN  
JAMES B. BOLES  
TONYA W. CONLEY  
JENNIFER L. GALER  
Union Pacific Railroad Company  
1400 Douglas Street  
Omaha, NE 68179

*Attorneys for Union Pacific  
Corporation and Union Pacific  
Railroad Company*

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Applicants<sup>1</sup> oppose BNSF's January 9, 2026, Motion to Compel (the "Motion"). The Motion does not seek to compel Applicants to respond to any specific discovery request propounded by BNSF. Instead, BNSF seeks to delay this proceeding by requiring Applicants to undertake burdensome discovery efforts that have no basis in the Board's rules governing its review of railroad mergers. The Board should thus deny the Motion.

**BACKGROUND**

**A. The Board's Merger Review Process**

The Board, like the freight railroad industry itself, occupies a unique position in the American legal landscape. It has its own standards, procedures, and precedents designed to address railroad regulatory matters. In the merger context specifically, the Board oversees a process with no analog among other industries. Unlike the Hart-

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<sup>1</sup> "Applicants" are 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").

Scott-Rodino process applicable to other mergers, the Board’s merger review process is not a government-directed investigatory process. Instead, Board regulations require railroads seeking authority to merge to submit a detailed application, supported by extensive workpapers, that addresses the full range of issues relevant to the agency’s statutory criteria.<sup>2</sup> The Board’s process is designed to ensure that the Board and interested parties receive access to the information needed to evaluate the proposed transaction within the strict statutory deadlines for review of proposed mergers.<sup>3</sup>

Consistent with this application-centric process, the Board disfavors “broad pre-application discovery,” recognizing that such discovery would “impede the prospective applicants in the preparation of their application.”<sup>4</sup> And once the application is accepted, the Board permits expedited discovery as part of an evidentiary phase that must be completed within one year.<sup>5</sup> In lieu of broad, pre-application discovery, the Board generally requires applicants to produce their highly confidential 100% traffic tapes to interested parties that request the tapes.<sup>6</sup> Instead

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<sup>2</sup> See 49 U.S.C. § 11324(b); 49 C.F.R. Part 1180.

<sup>3</sup> See 49 U.S.C. § 11325; see also 49 C.F.R. § 1180.4(e).

<sup>4</sup> See *Major Rail Consol. Procs.*, 5 S.T.B. 539, 591 (2001) (explaining that the Board was “not proposing” that applicants be subject to “broad pre-application discovery,” which would “impede the prospective applicants in the preparation of their application”); Decision No. 5, *Norfolk S. Ry.—Control—Norfolk & Portsmouth Belt Line R.R.*, FD 36836, slip op. at 6 n.7 (STB served Jun. 13, 2025) (clarifying that broad, pre-application discovery “is not the default rule for transactions”).

<sup>5</sup> See 49 U.S.C. § 11325(b)(3) (requiring evidentiary proceeding to be completed within one year after application acceptance); see also 49 C.F.R. § 1180.4(e) (same).

<sup>6</sup> 49 C.F.R. § 1180.4(b)(4)(iii). In this proceeding, the Board went further and required Applicants to produce five years of highly confidential 100% traffic tapes; operating timetables, station lists, and track charts; geospatial information system maps for their entire systems; a list of all their joint facilities and joint use arrangements; and

of an extended post-application discovery period, the Board requires applicants to file detailed applications containing, among other things, a long list of supporting information, market analyses, operational data, financial information, and service assurance information.<sup>7</sup> When other parties seek supplementary discovery, the scope “must be limited to the applications before [the Board] and the relevant statutory criteria.”<sup>8</sup> Discovery must also be proportional to the needs of the proceeding and the expedited timeline. If other parties seek discovery that is “burdensome on its face,” the Board “will require a substantial showing of relevance and need to outweigh the burden of producing this evidence.”<sup>9</sup>

Applicants’ initial Application consisted of 6,700 pages of information, including verified statements from thirteen company witnesses addressing the various aspects of the proposal, including the merged company’s marketing, operating, and integration plans and quantifying the merger’s economic and environmental benefits, along with testimony from seven independent experts addressing the merger’s impacts on horizontal competition, vertical competition, and

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a list of all interchange commitments. *See* Decision No. 3 (served Aug. 28, 2025).

<sup>7</sup> *See* 49 C.F.R. § 1180.6 (supporting information); *id.* § 1180.7 (market analyses); *id.* § 1180.8 (operational data); *id.* § 1180.9 (financial information); *id.* § 1180.10 (service assurance plans); *id.* § 1180.11 (transnational informational requirement).

<sup>8</sup> *Canadian Pac. Ltd., et al.—Purchase & Trackage Rts.—Del. & Hudson Ry.*, Docket No. FD 31700, 1990 WL 288268, at \*2 (ICC decided June 20, 1990); *see id.* (“Abuse of discovery and delay of the process will not be countenanced, and we do not intend to extend filing dates.”).

<sup>9</sup> *FMC Wyo. Corp. v. Union Pac. R.R.*, NOR 42022, slip op. at 5 (STB served Feb. 5, 1998); *see also Atchison, Topeka & Santa Fe Ry.—Operating Rts.—S. Pac. Transp. Co.*, FD 22218, slip op. at 3 (STB served Feb. 7, 2025); *Norfolk S. Corp., et al.—Acquis. of Control—Norfolk & Portsmouth Belt Line R.R.*, FD 36836, slip op. at 3 (STB served July 25, 2025).

rail and truck diversions. The application was accompanied by more than 142 gigabytes of supporting workpapers. Applicants are in the process of preparing a revised application pursuant to the guidance provided by the Board in Decision No. 9.

**B. Applicants' Unprecedented Efforts to Respond to Unprecedented Pre-Application Discovery**

In this proceeding, BNSF and several other parties propounded sweeping discovery requests long before Applicants filed their initial Application on December 19, 2025. BNSF and other parties then propounded additional discovery requests before the Board decided whether to accept the Application. To date, Union Pacific's and Norfolk Southern's Class I railroad competitors have served Applicants with a combined seven sets of discovery requests, totaling 215 individual requests—400 counting the requests' 185 distinct subparts. BNSF alone has served Applicants with three sets of discovery requests, comprising 147 individual requests—276 counting the requests' 129 subparts. This kind of pre-application discovery is fundamentally inconsistent with the application-centric structure established for review of railroad mergers.<sup>10</sup>

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<sup>10</sup> The Board has, on occasion, permitted limited pre-application discovery, but those cases presented unique features not seen here, and the discovery requests at issue in those cases remained subject to prohibitions on irrelevant and unduly burdensome discovery. *See, e.g.,* Decision No. 7, *Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500, slip op. at 4 (STB served Aug. 2, 2021) (permitting Canadian Pacific, after the termination of its merger agreement with Kansas City Southern, to utilize the Board's discovery process to obtain information necessary for its completion of an inconsistent control application); Decision No. 5, *Norfolk S. Ry.—Control—Norfolk & Portsmouth Belt Line R.R.*, FD 36836, slip op. at 6 n.7 (STB served June 13, 2025) (permitting pre-application discovery where “[t]he proposed transaction occurred years ago, there has been significant litigation between Applicants and CSXT over

BNSF's requests in particular are not only excessive in number, they also fly in the face of the Board's admonition that "[d]iscovery requests must be narrowly drawn, directed toward a relevant issue, and not used for a general fishing expedition."<sup>11</sup> BNSF's first set of incredibly overbroad requests seeks detailed train event, car event, switching data, and traffic density data from 2019 through the present and train schedules from 1995 through the present,<sup>12</sup> even though the year used for merger impact analysis is 2023.<sup>13</sup> BNSF's first set of requests also seek information the Board's rules require applicants to include in the application and accompanying workpapers, such as analyses of the proposed merger's impacts on competition, employment levels, passenger service, traffic diversion, and operating costs.<sup>14</sup>

Despite the Board's stated disfavor for "broad pre-application discovery,"<sup>15</sup> Applicants responded to discovery requests even as they assembled their initial Application and are now preparing a revised Application. Applicants have also made eleven rolling productions of responsive material. As of the filing of this Reply, Applicants have already produced or otherwise made available to BNSF and other

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control of NPBL, and the record to date suggests that this proceeding may be contested").

<sup>11</sup> See *Duke Energy Corp. v. Norfolk S. Ry.*, NOR 42069, slip op. at 4 (STB served July 26, 2002)

<sup>12</sup> See Ex. 1 (BNSF's First Set of Disc. Req. to UP & NS (served Oct. 1, 2025), Requests 9, 10, 11, 12, & 25).

<sup>13</sup> See Decision No. 3 (served Aug. 28, 2025).

<sup>14</sup> See Ex. 1 (BNSF's First Set of Disc. Req. to UP & NS (served Oct. 1, 2025), Request 21); see also *id.* Request 18 (request to describe plans for cooperating with other carriers to resolve merger-related service disruptions); *id.* Request 19 (request to describe proposed merger conditions).

<sup>15</sup> Major Rail Consol. Procs., 5 S.T.B. at 591.

parties more than 56,000 pages and 924 gigabytes of data sets, agreements, workpapers, and other materials, including, but not limited to:

- 100% Traffic Tapes for the years 2019 through 2024
- System-Wide Car and Train Event Data for the years 2019 through 2024
- Reciprocal Switch Data for the years 2019 through 2024
- Interchange Volume Data for the years 2019-2024
- Intermodal Train Schedules
- Agreements containing Interchange Commitments
- Trackage Rights and Haulage Rights Agreements
- Terminal Agreements
- Operating Agreements
- Routing Protocol Agreements
- Density Charts/Maps
- Human Resource Policies
- Workpapers supporting the initial Application

And Applicants continue to respond to discovery requests and make rolling productions of responsive materials.

Contrary to BNSF's assertion, Applicants' discovery productions in this proceeding are both ahead of schedule—the Board has not even issued a procedural schedule for its review of the yet-to-be filed revised Application—and unprecedented at this stage in the Board's merger review process. For comparison, in the recent Canadian Pacific/Kansas City Southern merger proceeding (STB Docket No. FD 36500), applicants made their first production on December 7, 2021—roughly six weeks after filing their application on October 29, 2021, and two weeks after the Board accepted their application on November 23, 2021. That initial production consisted of fewer than 400 documents. By February 7, 2022—three weeks before responsive comments were due in that proceeding—applicants had produced fewer

than 3,300 documents responsive to discovery requests<sup>16</sup> and, to the best of Applicants' knowledge, never conducted wholesale custodial email collections like those demanded by BNSF.

### **C. The Discovery Requests at Issue**

The only discovery requests at issue in the Motion are BNSF's first set of 27 numbered discovery requests (three of which include a total of 26 sub-parts), which BNSF served on October 1, 2025—more than two-and-a-half months before Applicants filed their Application on December 19, 2025. Although BNSF's requests were both premature and went well beyond the scope of appropriate discovery, Applicants responded within 15 days on October 16, 2025, informing BNSF of their objections, directing BNSF to the forthcoming Application and workpapers for responsive materials where appropriate, and agreeing to produce key data and agreements sought by BNSF.<sup>17</sup> Applicants received no response from BNSF regarding their responses or objections until nearly four weeks later, on November 12, 2025.<sup>18</sup> Applicants—in the midst of finalizing their Application—responded to BNSF's correspondence on December 5, 2025.<sup>19</sup>

BNSF did not respond to Applicants' correspondence or otherwise follow up on its first set of requests until December 28, 2025. On December 28, nine days after Applicants submitted their Application, BNSF asked to meet and confer to address

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<sup>16</sup> Applicants' Reply to Union Pacific Railroad Company's Motion to Compel at 13, *Canadian Pac. Ry.—Control—Kansas City S.*, FD 36500 (served Feb. 7, 2022).

<sup>17</sup> See Ex. 2 (Applicants' Responses to BNSF's First Set of Disc. Req (Oct. 16, 2025)).

<sup>18</sup> See Ex. 3 (Letter M. Thompson to M. Rosenthal (Nov. 12, 2025)).

<sup>19</sup> See Ex. 4 (Letter K. Kelly to M. Thompson (Dec. 5, 2025)).

five broad topics related to the discovery process.<sup>20</sup> BNSF did not identify any specific pending discovery requests that it wished to address during the meeting, or even whether BNSF wished to discuss its first set or its second set of 65 numbered discovery requests (two of which include a total of 12 subparts), which it had served on December 22, 2025.<sup>21</sup>

Applicants conferred with BNSF on December 30, 2025. BNSF asserted that Applicants' productions were deficient because they did not include materials that BNSF contended would be disclosed in a Hart-Scott-Rodino ("HSR") merger review. BNSF further asserted that Applicants must immediately conduct wholesale email collections from any fact witness who submitted a verified statement in support of the initial Application and produce all board of director materials or information from bankers or financial advisors touching on a broad range of topics. These topics included not just the proposed transaction, but also "competition in the rail industry," "consolidation in the rail industry," each Applicant's "position in the rail industry," each Applicant's "growth," and "alternatives to the proposed transaction."<sup>22</sup> None of these topics are identified in the BNSF's first set of discovery requests. In response, Applicants requested that BNSF identify the specific discovery requests at issue and that the parties consider whether targeted collections would resolve disputes

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<sup>20</sup> See Ex. 5 at 10–11 (Email M. Thompson to K. Kelly (Dec. 28, 2025)).

<sup>21</sup> Applicants served responses to BNSF's second set of discovery requests on January 6, 2026. BNSF also served a third set of 55 numbered discovery requests (18 of which include a total of 91 subparts) on January 7, 2026, to which Applicants responded on January 22, 2026. The parties have not conferred regarding Applicants' responses to either of these sets of requests, but plan to confer in the future.

<sup>22</sup> See Ex. 5 at 10–11 (Email M. Thompson to K. Kelly (Dec. 28, 2025)).

regarding those requests. BNSF rejected Applicants' proposed approach, explaining that wholesale email collection and production of board and financial materials was common in HSR proceedings, and there was no need to address specific requests.

On January 6, 2026, Applicants emailed BNSF to reiterate their willingness to confer to reach workable solutions using targeted collections within the context of specific requests.<sup>23</sup> On January 9, 2026, BNSF sent an email response to Applicants confirming that it was unwilling to discuss specific requests and declaring impasse.<sup>24</sup> Within fifteen minutes of its email, BNSF filed its Motion with the Board.

In the Motion, BNSF argues the Board should pause a procedural schedule that has not yet been entered relating to an application that has not yet been accepted. BNSF insists that Applicants should be ordered to produce materials "that would be required in an initial HSR filing"<sup>25</sup> without regard to the critical differences between this proceeding and an HSR proceeding, including the requirement here that Applicants produce an application and workpapers addressing materials required by Board regulations and the fact that BNSF is not the government but is instead a direct competitor of Applicants.<sup>26</sup> BNSF insists that Applicants should be directed to process and search emails from all fact witnesses without regard to whether the materials would be relevant or responsive to any of the specific requests it has propounded or whether an email collection process is needed for a reasonable search or proportional to the needs of the case.

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<sup>23</sup> See Ex. 5 at 7–9 (Email K. Kelly to M. Thompson (Jan. 6, 2026)).

<sup>24</sup> See Ex. 5 at 5–7 (Email M. Thompson to K. Kelly (Jan. 9, 2026)).

<sup>25</sup> Mot. at 14.

<sup>26</sup> *Id.*

In short, BNSF's Motion is premature, overbroad, and untethered to the facts and posture of this matter.

## **ARGUMENT**

### **A. BNSF's Discovery Demands Are Incompatible with the Board's Merger Review Process.**

BNSF's Motion rests almost entirely on authorities drawn from the HSR merger review process and complex civil litigation because BNSF's approach to discovery does not align with the Board's merger procedures and practice.

The Board's merger review framework is distinctive and deliberately application-centric. Unlike the HSR process, which requires merger applicants to submit certain categories of management materials to the government (not their competitors), and unlike civil antitrust litigation, which relies on party-driven discovery and can extend over many years, the Board's merger rules require applicants to submit a comprehensive control application, supported by detailed workpapers, that addresses the issues the Board must consider under its governing statute within the review period established by Congress. The merger application—together with comments filed by interested parties—forms the evidentiary core of the proceeding.

BNSF's Motion seeks relief that is fundamentally at odds with the Board's merger review framework. Instead of requesting production of discrete information not addressed in the application and accompanying workpapers, BNSF is engaged in a fishing expedition, demanding that Applicants produce broad categories of materials that it claims might contain relevant information. But each of the areas in

which BNSF claims to need discovery is exhaustively addressed in the initial Application and supporting workpapers (and will also be addressed in the revised Application):

- ***Alternatives to Merger.*** BNSF argues that it needs materials regarding whether the merger’s benefit could be achieved through alternatives short of merger. However, those issues are extensively addressed in the verified statements of V. James Vena, Mark R. George, Kenny Rocker and Claude E. Elkins, Elizabeth M. Bailey, and Mark A. Israel that were submitted with the Applicants’ initial Application.
- ***Competition Analysis.*** BNSF argues it needs materials regarding “competition analysis.” However, Applicants have provided verified statements from three experts relating to competition issues—Elizabeth M. Bailey, who addresses horizontal competitive effects; Mark A. Israel, who addresses vertical competitive effects; and David T. Hunt & Matthew Schabas, who address traffic the merger will attract from rail and truck competitors.
- ***Conditions.*** BNSF argues it needs information on “conditions” Applicants will propose, but those conditions are set out in the verified statement of Kenny Rocker and Claude E. Elkins and in the verified statement of Katherine N. Novak.
- ***Effect on Customers.*** BNSF argues it needs information on the effect of the proposed transaction on customers, but the effects are addressed

in the verified statements of Kenny Rocker and Claude E. Elkins (addressing the market benefits of the proposed transaction); Eric Gehringer and John Orr (addressing the operating plan for the combined Union Pacific-Norfolk Southern network); John W. Turner (addressing the service assurance plan for the proposed transaction); Elizabeth M. Bailey; Mark A. Israel; and David T. Hunt and Matthew Schabas.

- ***Integration of Operations.*** BNSF argues it needs information on how the proposed transaction would affect service levels, but that information is contained in the verified statements of Eric Gehringer and John Orr (addressing the operating plan for the combined network) and John W. Turner (addressing improved service levels and merger integration plans, as required by Board regulations).

BNSF claims its approach is similar to the HSR merger review process, but even if true, the HSR process is not an appropriate model here. HSR review is a confidential, regulator-driven investigatory process in which a single governmental authority controls both the scope and use of information demanded. There is no public participation, no competing discovery demands, and no requirement that parties produce their materials to competitors or other interested stakeholders. The breadth of document collection sometimes associated with HSR review rests on those structural features—including strict confidentiality protections and criminal

penalties for improper disclosure<sup>27</sup>—that are wholly absent from Board proceedings. BNSF’s Motion asks for HSR materials without the HSR procedures and restrictions that are integral to their production.<sup>28</sup>

HSR review is also distinct because, with limited exceptions, it spans every industry in the United States. Each industry possesses its own characteristics and challenges and HSR regulators cannot realistically design a bespoke review process for each one, even if doing so would ultimately prove more effective. They instead seek higher-level information that exists in every industry. The HSR process relies on standardized, high-level information inputs.

The Board, by contrast, primarily regulates a single industry and has developed merger application requirements tailored specifically to freight railroads. Those requirements demand a level of detail far beyond what HSR requires and are expressly designed to provide the Board—and interested parties—with the information the Board deems necessary to evaluate a proposed transaction. The Board need not look to the HSR process for guidance on the type of information needed to evaluate a freight railroad merger because it has its own application requirements setting the scope of information that it considers necessary to evaluate a merger. Applicants thus produce an application and workpapers, which should

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<sup>27</sup> 18 U.S.C. § 1905.

<sup>28</sup> The HSR process requires the provision of highly sensitive, often market-moving information. Under the HSR Act, information submitted to the FTC or DOJ during this process is exempt from FOIA and, with few exceptions, cannot be shared by the FTC or DOJ with other federal or state agencies unless the parties waive confidentiality. *See* 18 U.S.C. § 18a(h).

normally be sufficient. BNSF's use of discovery should supplement the application process, not create a wholesale parallel review that follows a less-precise HSR roadmap.<sup>29</sup>

Rather than engage with this existing record, BNSF insists that Applicants perform sweeping document collections and custodial searches. But BNSF has still proffered no explanation, let alone the required “substantial showing,” of how such facially burdensome searches are relevant and proportional to the needs of this proceeding, particularly in light of the information already available through the Application.<sup>30</sup>

The civil litigation cases cited by BNSF are no more persuasive. Like the HSR process, civil litigation does not begin with a detailed application and workpapers. Further, the cases cited by BNSF proceeded on discovery schedules typical of complex federal litigation—schedules that are orders of magnitude longer than the timeline governing Board merger review.<sup>31</sup> BNSF, however, has served discovery as if the Application and workpapers and the statutory review period did not exist.

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<sup>29</sup> See *Duke Energy Corp. v. Norfolk S. Ry.*, NOR 42069, slip op. at 4 (STB served July 26, 2002) (“We caution that discovery must be limited to the applications before us and the relevant statutory criteria.”).

<sup>30</sup> *FMC Wyo. Corp. v. Union Pac. R.R.*, NOR 42022, slip op. at 5 (STB served Feb. 5, 1998) (observing that where “the requested discovery is burdensome on its face,” the Board “will require a substantial showing of relevance and need to outweigh the burden of producing”).

<sup>31</sup> The cases cited by BNSF in its Motion illustrate this point. For example, in *Brown v. Barnes & Noble, Inc.*, 474 F. Supp. 3d 637 (S.D.N.Y. 2019), nearly 4.5 years passed between the date of the complaint and the close of fact discovery. Over 2.5 years passed between the date of the complaint and the close of fact discovery in *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003). In *Oxbow Carbon & Minerals LLC v. Union Pacific Railroad Co.*, 322 F.R.D. 1 (D.D.C. 2017), over 9.5 years passed between the date of the complaint and the close of fact discovery. By contrast, the

That BNSF must invoke HSR practice and civil litigation cases only underscores that its discovery demands do not fit within the Board’s merger review process. If the discovery BNSF seeks were consistent with ordinary Board practice, BNSF would not need to import doctrines from unrelated procedural regimes to justify it. The Board has its own rules, its own precedent, and its own merger review process—one that already ensures robust access to information while avoiding the inefficiencies and strategic abuses associated with the type of discovery BNSF is seeking here.

**B. The Expansive Relief BNSF Seeks is Untethered from Specific Discovery Requests and is Inappropriate.**

BNSF justifies its claim for relief by pointing to broad categories of materials it did not receive, such as board materials, financial documents, and communications with stakeholders. This approach is backwards. Discovery compliance must be measured by the adequacy of specific responses to specific requests. It cannot, as BNSF posits, turn on a party’s dissatisfaction with the total volume or categories of materials received.

Applicants have repeatedly invited BNSF to identify the particular discovery requests it believes were inadequately answered and to explain how Applicants’ responses—including direction to the Application and accompanying workpapers—failed to comply with those requests. BNSF has declined to do so. Even in its Motion,

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Board’s proposed procedural schedule in this case contemplated interested parties would have just 120 days between the filing of the application and interested parties’ submission of their comments to conduct discovery. *See* Decision No. 5 at 3 (served Sept. 26, 2025).

BNSF does not anchor its claims of deficiency to specific requests, responses, or objections. That failure alone is fatal to the Motion, which asks the Board to order sweeping relief without identifying the discovery dispute the Board is supposedly being asked to resolve. BNSF must articulate its theories of relevance for specific requests, not broad categories of materials, and those theories must be targeted and reasonable.<sup>32</sup>

Applicants are not responsible for identifying and collecting every piece of information that BNSF may name as one of its relevant categories of material. Rather, Applicants need only produce the information that is responsive to specific requests, relevant to the pending proceeding, not unduly burdensome to collect and produce, and proportional to the needs of the proceeding. Several of BNSF's requests fail that standard on their face. For example, Request 11 seeks Union Pacific's and Norfolk Southern's intermodal train schedules from 1995 to the present.<sup>33</sup> BNSF has articulated no theory by which these time periods are relevant and proportional to the evaluation of the proposed transaction. And Request 5 asks Applicants to provide the names of every single customer or stakeholder with whom they have discussed potential support for the proposed transaction.<sup>34</sup> BNSF does not begin to explain why such a list would be necessary for BNSF to analyze the proposed transaction. And

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<sup>32</sup> *CSX Corp.—Control & Operating Leases Agreements—Conrail Inc.*, FD 33388, slip op. at 1 (STB served Aug. 1, 1997) (declining to enforce “extremely broad” discovery request “given the marginal relevance to this case of the material that ACE seeks”).

<sup>33</sup> See Ex. 1 (BNSF's First Set of Disc. Req. to UP & NS (served Oct. 1, 2025), Request 11).

<sup>34</sup> *Id.* Request 5.

BNSF's first set of requests is rife with other examples of overbroad and irrelevant requests.

Setting aside BNSF's backwards approach to discovery, Applicants have already produced or offered to produce sufficient materials within the categories identified by BNSF. Specifically, Applicants have agreed to produce board materials that address the proposed transaction, which include materials from bankers or financial advisors that the Applicants considered in approving the proposed transaction.<sup>35</sup> Regarding BNSF's request for communications to stakeholders, Applicants have already offered to produce the form letters it sent to solicit support for the Application, and the initial Application contains over 2,000 support letters from industry stakeholders.

To the extent BNSF believes it is entitled to additional specific materials in response to its requests, it should accept Applicants' offer to engage in scoping discussions. Instead, BNSF has stubbornly maintained its right to the wholesale collection of emails without reference to its own requests and Applicants' responses and objections. BNSF does not cite any precedent from Board merger cases supporting the relief it seeks. Catch-all email collections are burdensome, inefficient, and generally inconsistent with the scope and structure of the Board's merger review proceedings. Broad email collections of the type demanded by BNSF would inevitably sweep in large volumes of irrelevant and highly sensitive materials, far beyond what is necessary to supplement or clarify the Application. The witnesses who have

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<sup>35</sup> See Ex. 5 at 3–4 (Email K. Kelly to M. Thompson (Jan. 24, 2026)).

provided verified statements in the Application are knowledgeable about the substance of their respective sections of the Application, but that does not mean their email files are likely to contain responsive, non-privileged materials. Their statements are primarily forward-looking, focused on the proposed merger and its anticipated impacts, and they address specific issues required by the Board's merger rules. BNSF makes no effort to establish that these individuals are likely to possess responsive materials for specific requests at issue.

Applicants have offered to work with BNSF to identify reasonable, targeted alternatives, but BNSF has rejected those efforts. In doing so, BNSF has undermined the discovery process and circumvented the rules and procedures of the Board. The extraordinary relief requested by BNSF contains no basis in the detached and unsupported allegations levied against Applicants.

**C. BNSF's True Goal is Delay.**

Discovery should operate as a collaborative process. Parties serving discovery are expected to serve clear and reasonable requests; parties responding to discovery are expected to provide complete responses and objections; and then the two sides are expected to engage in good-faith discussions to narrow disputes and reach proportionate compromises. That process has not occurred here. The parties met and conferred once on BNSF's first set of requests. At that first meeting, BNSF declared impasse without engaging meaningfully with Applicants' well-founded concerns. The parties have not met and conferred at all on BNSF's second or third set of requests.

BNSF has only further muddied the waters with its Motion to Compel. BNSF's Motion does not identify which *set* of requests is at issue, let alone the specific

requests for which BNSF seeks relief. In short, the Motion reflects BNSF's broader scattershot discovery strategy. Had BNSF identified specific requests and responses at issue, the parties may well have resolved those matters without Board intervention. Applicants, for their part, remain willing to engage in focused, collaborative discussions to address any properly framed discovery concerns.

BNSF's conduct appears motivated by a desire to delay and complicate these proceedings rather than reach a realistic compromise on discovery. Even though no procedural schedule has been set, BNSF has expressly asked to indefinitely delay the proceedings. BNSF offers no support for this relief beyond conclusory assertions and flawed analogies to other merger contexts. Applicants' efforts to engage with BNSF have been rebuffed at every turn. BNSF's Motion is inappropriate at this stage of the discovery process, particularly in light of BNSF's failure to engage with Applicants or pursue targeted, request-specific compromises.

## **CONCLUSION**

For the foregoing reasons, Applicants respectfully request that the Board deny BNSF's Motion to Compel.

Respectfully submitted,

/s/ Raymond A. Atkins  
RAYMOND A. ATKINS  
CARRIE C. MAHAN  
MATTHEW J. WARREN  
ALLISON C. DAVIS  
MARC A. KORMAN  
Sidley Austin LLP  
1501 K Street, NW  
Washington, DC 20005  
(202) 736-8000

JASON M. MORRIS  
JOSEPH H. CARPENTER IV  
THOMAS E. ZOELLER  
HANNA M. CHOUEST  
T. MATTHEW LOCKHART  
Norfolk Southern Railway Company  
650 W. Peachtree Street NW  
Atlanta, GA 30308

*Attorneys for Norfolk Southern  
Corporation and Norfolk Southern  
Railway Company*

January 29, 2026

/s/ Michael L. Rosenthal  
MICHAEL L. ROSENTHAL  
DEREK LUDWIN  
JAMES J. O'CONNELL  
MATTHEW J. GLOVER  
PEGAH NABILI  
Covington & Burling LLP  
One CityCenter  
850 Tenth Street, NW  
Washington, DC 20001  
(202) 662-6000

CHRISTINA B. CONLIN  
JAMES B. BOLES  
TONYA W. CONLEY  
JENNIFER L. GALER  
Union Pacific Railroad Company  
1400 Douglas Street  
Omaha, NE 68179

*Attorneys for Union Pacific  
Corporation and Union Pacific  
Railroad Company*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 29th day of January, 2026, the foregoing document was served by first-class mail or email on all parties of record to this proceeding, the Secretary of Transportation, the Attorney General of the United States, and Administrative Law Judge Jenifer Soulikias.

/s/ Daniel Damitio

# **EXHIBIT 1**

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
  
DOCKET NO. FD 36873  
  
UNION PACIFIC CORPORATION, ET AL.  
—CONTROL—  
NORFOLK SOUTHERN CORPORATION, ET AL.

**BNSF RAILWAY COMPANY'S  
FIRST SET OF DISCOVERY REQUESTS TO  
UNION PACIFIC AND NORFOLK SOUTHERN**

Pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, BNSF Railway Company (“BNSF”) hereby requests that UP and NS (as defined below, and together, the “Applicants”) respond to and produce documents responsive to the following discovery requests to Steptoe LLP, 1330 Connecticut Avenue NW, Washington, DC 20036, no later than October 16, 2025.

**DEFINITIONS**

1. “Communication” means any transmission or receipt of information by one or more persons or between two or more persons by means including but not limited to telephone conversations, letters, telegrams, teletypes, telexes, telecopies, electronic mail, text messages, instant messages, other computer linkups, written memoranda, and in-person conversations.

2. “Concerning” means relating to, referring to, describing, reflecting, evidencing, constituting, or comprising.

3. “Document” has the broadest meaning permissible under 49 C.F.R. § 1114.30, including but not limited to electronically stored information and any writing, drawing, graph, chart, photograph, sound

recording, image, and other data or data compilation stored in any medium from which information can be obtained.

4. The term “Identify”:

- a. When used in reference to an individual, shall require a statement of the individual’s full name; present and/or last known position, employment, job title and/or business affiliation; and present and/or last known business address and telephone number.
- b. When used in reference to businesses or corporations, shall mean to state the business or corporation’s legal name, the names under which it does business, its form (proprietorship, corporation, partnership, association or business trust, etc.), its present and/or last known address, and its relationship, if any, to each of NS and UP.
- c. When used in reference to Documents, shall require a statement of the date thereof, the type of Document, the author or speaker (and if different, the signer or signers, and the addressee), the substance thereof, its present or last known location or custodian, and all other means of identifying it.
- d. When used in reference to any Communication, meeting, act, occurrence, statement, or conduct (hereinafter collectively “act”) requires you to:

- i. Describe the substance of the event or events constituting such an act;
- ii. Identify each and every person participating in such act;
- iii. Identify all other persons present when such act occurred;
- iv. State whether any minutes, notes, memoranda, accounts, statement, agreements, Documents, or any other record relating to the act was made;
- v. State whether such record now exists; and
- vi. Identify the person presently having possession, custody, or control of such record.

5. “NS” means Norfolk Southern Corporation and Norfolk Southern Railway Company and their predecessors and successors in interest, as well as their present and former directors, officers, employees, agents, managing agents, representatives, attorneys, parents, subsidiaries, affiliates, divisions, area offices, and regional offices, as well as all persons acting or purporting to act on their behalf.

6. “Proposed Transaction” means the proposed combination of NS and UP for which NS and UP are seeking STB approval in Finance Docket No. 36873.

7. “STB” or “Board” means the Surface Transportation Board.

8. “UP” means Union Pacific Corporation and Union Pacific Railroad Company and their predecessors and successors in interest, as well as their present and former directors, officers, employees, agents, managing agents, representatives, attorneys, parents, subsidiaries, affiliates, divisions, area offices, and regional offices, as well as all persons acting or purporting to act on their behalf.

### **INSTRUCTIONS**

1. Responsive Documents to all requests should be produced to the undersigned counsel, not later than fifteen days after the date of service of these Requests. Production of Documents may be accomplished through electronic means such as a data room or file transfer if NS and/or UP prefer.

2. If NS and/or UP objects to any portion of any Discovery Request, they should identify the portion to which they object, state the basis for the objection, and respond to the remainder. If NS and/or UP has objections, NS and/or UP’s counsel are requested to promptly confer with undersigned counsel for BNSF so that NS and/or UP’s objections can be promptly addressed and resolved.

3. If NS and/or UP asserts a claim of privilege as to Documents sought in these Requests, NS and/or UP should list, for each such Document, the Document’s date, signatory or signatories, author(s), addressee(s), each other person who received a copy, the subject matter of the Document, its location and custodian, and the basis for the claim of privilege. Such information should be supplied in sufficient detail to permit BNSF to assess the applicability of the privilege claimed.

4. If any of the requested Documents was but is no longer in NS and/or UP's possession or subject to their control, state what disposition was made of it and when, and explain the reasons for such disposition.

5. If a Document is provided in response to a Request, identify which Document(s) is (are) being provided to answer that Request, including any Bates numbers; if NS and/or UP is asked to identify Documents, provide a brief description of the Documents, including any Bates numbers. If NS and/or UP refers BNSF to workpapers to respond to a Request, please identify the Bates number(s) of the workpapers(s) responsive to the Request.

6. Each Discovery Request should be responded to upon NS and/or UP's entire knowledge from all sources and all information and Documents in NS and/or UP's possession or otherwise available to NS and/or UP, including information from agents, representatives, consultants, or attorneys, and information that is known to each of them.

7. Where a Discovery Request calls for information with respect to "each" one of a particular type of matter, event, Person, or entity, of which there is more than one, separately list, set forth or identify for each thereof all of the information called for in the Request.

8. These Requests are deemed continuing, and it is requested that supplemental responses and production be provided as additional information or Documents become available.

9. Unless otherwise provided, there is no time period limitation on these Discovery Requests.

## **FIRST SET OF DISCOVERY REQUESTS**

1. Produce copies of all Documents or Communications that NS and/or UP produce or have previously produced in response to discovery requests submitted by other participants in this proceeding.

2. Produce copies of all Documents or Communications that NS and/or UP produce or have previously produced to the Surface Transportation Board, the United States Department of Justice, or any other federal government agency, state attorneys general, or any other state government agency relating to the Proposed Transaction.

3. Produce Documents sufficient to show the conditions to STB approval to which NS and/or UP have agreed to accept, propose, or agree to if needed to secure regulatory approval for the Proposed Transaction.

4. Produce Documents sufficient to show all agreements between UP or NS and a counter-party that is designed to facilitate service between the existing UP or NS networks.

5. Identify all individuals and/or entities (customers, labor organizations, labor officials, government agencies or officials, other stakeholders, etc.) from whom either UP or NS has sought, solicited, or discussed a potential letter or statement of support relating to the Proposed Transaction. This request seeks the identity of responsive individuals and entities in the United States, Canada, and Mexico.

6. Identify all individuals and/or entities (customers, labor organizations, labor officials, government agencies or officials, other stakeholders, etc.) that have expressed or communicated concern about the

Proposed Transaction. This request seeks the identity of responsive individuals and entities in the United States, Canada, and Mexico.

7. Produce all Documents and Communications with the individuals and/or entities identified in response to Request Nos. 5 and 6 and that concern or relate to the Proposed Transaction.

8. Produce Documents sufficient to show any discounts, contract extensions, or any other economic value or concession offered in connection with or related to any discussion with a customer or stakeholder related to its support or non-opposition the Proposed Transaction.

9. Produce system-wide car and, where applicable, container, movement event data for all NS and UP traffic for each year or partial year from 2019 to the present. Car event data should be sufficient to identify the sequence of cars within a train for each applicable event, and container event data should be sufficient to identify the car conveying the container for each applicable event.

10. Produce system-wide train event data for all NS and UP trains for each year or partial year from 2019 to the present.

11. Produce UP and NS intermodal train schedules from 1995 to present.

12. Produce Documents sufficient to show the density information described below for the entire NS and UP systems for each year or partial year from 2019 to the present in a computer readable database or electronic spreadsheet, including all record layouts, all field descriptions, data definitions, and data dictionaries/decoders required to

utilize the data. The density database should include, at a minimum, the following data:

- a. Identification of the unique railroad divisions, subdivisions, and individual line segments for each unique density segment;
- b. Station name and SPLC at the beginning of a unique density segment and at the end of a unique density segment;
- c. Beginning and ending milepost for each unique density segment;
- d. Rail and track mileage for each unique density segment;
- e. (i) Total density (both directions including empty and loaded trains) by segment and by direction expressed in net ton-miles, or in the alternative, (ii) total density (both directions including empty and loaded trains) by segment and by direction expressed in gross ton-miles, including tare weight, locomotive weight, and non-revenue trains, plus appropriate factors that can be used to convert gross ton-miles to net ton-miles on each unique density segment; and
- f. Density information (i) for segments that NS or UP utilize via trackage rights (or other joint facility or joint use agreements) on another railroad, (ii) for segments where another railroad(s) operates by trackage rights (or other joint facility or joint use agreements) over NS or UP

segments, and (iii) an identification of such densities in (i) and (ii) that are included in the total densities provided in response to subpart e. above.

13. Produce Documents sufficient to show what constitutes a Materially Burdensome Regulatory Condition (as defined in the Merger Agreement). To the extent each Materially Burdensome Regulatory Condition is not memorialized in a Document, describe in detail what constitutes or could constitute a Materially Burdensome Regulatory Condition.

14. Produce Documents relating to any current or anticipated abandonments, leases, grants of trackage rights, or other transactions in which any current line segment of UP or NS would henceforth be operated by another railroad or non-carrier.

15. Produce all Communications between UP and NS since the merger announcement regarding (a) the quoting of interline UP-NS rates, (b) operational integration, and (c) the operation of jointly-owned companies.

16. Produce all Documents regarding changes in employee discipline standards or practices from January 1, 2024 to present.

17. Produce all Documents and Communications 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. The time period for this request is January 1, 2015 to present.

18. Describe in detail how Applicants would cooperate with other carriers in addressing or resolving service disruptions on their lines during the transitional period and afterwards.

19. Describe in detail any conditions or provisions that Applicants are proposing to enhance competition in connection with the Proposed Transaction.

20. Produce all studies and analyses of the impact of the Proposed Transaction on potential future mergers involving any Class I carrier (including Applicants).

21. Produce all Documents in Applicants' possession, custody, or control (including any strategy plans or competitive assessments) that show or concern the impact of the Proposed Transaction on:

- a. Applicants' current and future debt and debt service obligations.
- b. Applicants' financial metrics including revenue, earnings, EBITDA, leverage, and operating ratio;
- c. Applicants' costs and potential opportunities to reduce costs (synergies);
- d. Railroad intramodal, intermodal, product, and geographic competition;
- e. Potential traffic diversions from truck transportation to rail transportation;
- f. Rail service, including rail service provided by other rail carriers;

- g. Rail safety, including the safety of rail service provided by other rail carriers;
- h. Rail labor and employment, including labor forces at railroads other than Applicants;
- i. Passenger or commuter service;
- j. Rates for rail transportation;
- k. Competition, including corridor competition, source competition, and intermodal competition; and
- l. Applicants' proposed gateway commitment on Applicants' existing traffic and the revenues and profitability of that traffic.

22. Produce all studies, analyses, and reports that UP relied upon in making a merger proposal to NS and in assessing whether to execute the Merger Agreement.

23. Produce all studies, analyses, and reports that NS relied upon in evaluating UP's merger proposal and in assessing whether to execute the Merger Agreement.

24. Produce all Documents that Applicants have provided to third parties, including but not limited to shippers, smaller railroads, public officials, ports, and rail industry suppliers, regarding the Proposed Transaction.

25. Produce data from 2019 through present for all reciprocal switches performed by or for UP or NS sufficient to identify:

- a. The date the reciprocal switch was requested;
- b. The date the reciprocal switch was completed;
- c. The switching and receiving carriers involved in the reciprocal switch;
- d. The price authority governing the reciprocal switch;
- e. Revenues paid for the reciprocal switch;
- f. The customer name and SPLC station location where switch was originated or terminated;
- g. The location, including latitude and longitude, where the shipment was physically transferred between switching and receiving carrier; and
- h. The car initial and car number of each rail car involved in the reciprocal switch.

26. Produce all Documents related to UP and NS's planned capital budgets and forecasts for the next five years (as prepared in the 2024 and 2025 period prior to the announcement of the Proposed Transaction).

27. Produce Documents sufficient to identify all issues or problems that UP and NS have had using rights or accessing services required by STB-ordered deal conditions.

Adam Weiskittel  
Courtney B. Estes  
Tyler R. White  
BNSF Railway Company  
2500 Lou Menk Drive  
Fort Worth, TX 76131  
(817) 352-2383

Respectfully submitted,

/s/ Peter W. Denton

Peter W. Denton  
Anthony J. LaRocca  
Timothy J. Strafford  
Steptoe LLP  
1330 Connecticut Ave., NW  
Washington, DC 20036  
(202) 429-3000

Matthew Reilly  
Richard Cunningham  
Daniel Donovan  
Jeffrey Ayer  
Kirkland & Ellis LLP  
1301 Pennsylvania Avenue, NW  
Washington, D.C. 20004  
(202) 389-5000

*Counsel for BNSF Railway Company*

Dated: October 1, 2025

## CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October, 2025, I have caused the foregoing *BNSF Railway Company's First Set of Discovery Requests to Union Pacific and Norfolk Southern* to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Onika K. Williams

Onika K. Williams

Attorney for *BNSF Railway Company*

# **EXHIBIT 2**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 36873

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

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**UNION PACIFIC'S RESPONSES AND OBJECTIONS  
TO BNSF RAILWAY COMPANY'S  
FIRST SET OF DISCOVERY REQUESTS**

MICHAEL L. ROSENTHAL  
DEREK LUDWIN  
JAMES J. O'CONNELL  
PEGAH NABILI  
Covington & Burling LLP  
One CityCenter  
850 Tenth Street, NW  
Washington, DC 20001  
(202) 662-6000

CHRISTINA B. CONLIN  
JAMES B. BOLES  
TONYA W. CONLEY  
JENNIFER L. GALER  
Union Pacific Railroad Company  
1400 Douglas Street  
Omaha, NE 68179

*Attorneys for Union Pacific  
Corporation and Union Pacific  
Railroad Company*

October 16, 2025

Union Pacific Railroad Company and Union Pacific Corporation (collectively, “Union Pacific”) respond to the first set of discovery requests of BNSF Railway Company (“BNSF”) served on October 1, 2025 (“BNSF’s Requests” or “Discovery Requests” or “Requests”), as follows.

### **GENERAL RESPONSES**

The following General Responses apply to each of BNSF’s Requests:

1. Union Pacific is conducting a reasonable search for information and documents responsive to BNSF’s Requests. Where Union Pacific states that it will produce documents, Union Pacific will conduct a reasonable search for responsive, non-privileged documents, subject to the specific and general objections stated below.

2. Production of information or documents does not necessarily imply that the information or documents are relevant to or admissible in this proceeding and is not to be construed as waiving any of the general or specific objections stated below.

3. Union Pacific’s responses and objections to these Requests are based on Union Pacific’s present knowledge, information, and belief. Union Pacific reserves the right to rely upon facts, documents, or other evidence that it may develop or that may subsequently come to its attention; to assert additional objections; and to supplement or amend these responses at any time as this proceeding continues.

### **GENERAL OBJECTIONS**

Union Pacific’s General Objections, as set forth herein, are to be considered objections to each of the specific Discovery Requests (including subparts) that follow. These general objections are not exhaustive and, where appropriate, Union Pacific

will also state specific objections. Union Pacific's objections shall not waive, limit, or prejudice any objections that it may later assert.

1. In providing these responses, Union Pacific reserves all objections as to competency, relevancy, materiality, authenticity, and admissibility of the use of any information requested in the BNSF's Requests and in any responses or productions Union Pacific may provide thereto, in any subsequent proceeding, or further proceedings in this matter. To the extent that Union Pacific provides responsive information or documents, Union Pacific does not concede that such information is relevant, material, or admissible into evidence, and any such production is not intended to waive any of Union Pacific's objections to any of BNSF's Requests.

2. Union Pacific objects to each and every Discovery Request as unduly burdensome and premature, to the extent it seeks discovery of information, documents, or communications prior to Union Pacific submitting its application and accompanying workpapers and seeks discovery of information documents, or communications that are or will be available or accessible to BNSF as an interested party through the application and accompanying workpapers to be submitted in this proceeding, once filed.

3. Union Pacific objects to each and every Discovery Request and to each Definition, Instruction, and Request contained therein to the extent they purport to impose upon Union Pacific burdens or duties that are greater than, or otherwise conflict with, the requirements or the permissible scope of discovery under 49 C.F.R. Part 1114, Subpart B, or under other Surface Transportation Board rules or

precedents or are not proportional to the needs of the above-captioned proceeding and impose an undue burden on Union Pacific.

4. Union Pacific objects to each and every Discovery Request requesting that Union Pacific produce “all” responsive documents, communications, or information as unduly burdensome to the extent it requests that Union Pacific engage in an unreasonably broad collection and review in order to identify each and every document that may possibly be responsive. For those Requests to which it is obliged to respond, Union Pacific will produce such responsive documents or information as it is able to locate or identify in a reasonable search and which are not otherwise subject to an applicable privilege or other protection.

5. Union Pacific objects to the Discovery Requests and to each Definition, Instruction, and Request contained therein to the extent they seek the production of documents prepared in connection with, or information relating to, possible settlement or mediation of this or any other proceeding, in whole or in part.

6. Union Pacific objects to each and every Discovery Request and to each Definition, Instruction, and Request contained therein that request information, documents, or communications that are: (a) already in the possession of BNSF; (b) publicly available or otherwise readily available or accessible to BNSF from other sources; (c) unreasonably cumulative or duplicative of documents already in BNSF’s possession, custody, or control; or (d) otherwise obtainable in a more convenient, less burdensome, or less expensive manner than from Union Pacific.

7. Union Pacific objects to each and every Discovery Request and to each

Definition, Instruction, and Request contained therein as unduly burdensome to the extent they seek production from the files of all current and former Union Pacific employees, including those who are not reasonably likely to possess non-duplicative relevant documents. Unless specifically stated otherwise, by stating that it will produce documents responsive to these Requests, Union Pacific represents that it will produce documents from files most likely to contain materials responsive to the Request without undue burden.

8. Union Pacific objects to each and every Discovery Request and to each Definition, Instruction, and Request contained therein as unduly burdensome to the extent they purport to require Union Pacific to conduct a special study or to undertake anything more than a reasonable search for responsive information. In responding to BNSF's Requests, Union Pacific will conduct a reasonable search of those accessible files in its possession in which information responsive to BNSF's Requests, as limited by Union Pacific's Objections, is likely to be located.

9. Union Pacific objects to each and every Discovery Request and to each Definition, Instruction, and Request contained therein to the extent they purport to prohibit Union Pacific from redacting information that might reveal Union Pacific's commercially sensitive or long-term corporate strategies and is not relevant to this proceeding. Union Pacific will redact any such information, and reserves the right to redact any non-responsive information, from otherwise responsive documents produced to BNSF.

10. Union Pacific objects to the production of, and is not producing,

documents or information subject to any attorney-client privilege, work-product doctrine, or other applicable privilege or protection. Union Pacific reserves the right to redact privileged information from materials that it produces in response to the Requests. Any production of privileged documents or information is inadvertent and should not be deemed as a waiver of any privilege. Union Pacific reserves all rights under applicable law, including the Protective Order to be entered in this case, to demand or require the return of all copies thereof and non-use by BNSF or by any other person or entity in this or any other proceeding.

11. Union Pacific objects to the production of documents that constitute or disclose confidential, proprietary, or commercially or competitively sensitive information. Union Pacific will produce such information, if not otherwise objectionable, designated “Confidential” or “Highly Confidential,” subject to the terms of the Protective Order entered in this case. Union Pacific reserves the right to seek additional protections as needed.

12. Union Pacific objects to each and every Discovery Request and to each Definition, Instruction, and Request contained therein to the extent they seek or may result in the use, disclosure, or dissemination of any confidential, proprietary, or commercially or competitively sensitive information produced in response to the Discovery Requests for the purpose of training, fine-tuning, evaluating, or otherwise interacting with artificial intelligence (AI) models or systems in a manner that violates the terms of the Protective Order entered in this case. This objection includes, but is not limited to, any use of such materials in connection with large

language models (LLMs), machine learning algorithms, or generative AI tools, regardless of whether such use is direct or indirect, manual or automated, or anonymized or de-identified. Union Pacific does not consent to the use of any of its discovery materials for purposes unrelated to this proceeding, including but not limited to AI training.

13. Union Pacific objects to Definition No. 1, “Communication” to the extent this Definition seeks to expand upon and conflicts with 49 C.F.R. Part 1114, Subpart B. Union Pacific objects to Definition No. 1 as unduly burdensome and as seeking information that is not proportional to the probative value the information sought may have in this proceeding to the extent that it seeks production of information on “telephone conversations” or “in-person conversations.” Union Pacific further objects to Definition No. 1 as unduly burdensome and as seeking information that is not proportional to the probative value the information sought may have in this proceeding to the extent that it would require production of text messages, instant or direct messages on any platform and electronic communications other than emails, and to the extent that it purports to require production of material that was not reduced to writing. Union Pacific is not searching for and will not produce these categories of “Communications.”

14. Union Pacific objects to Definition No. 3, “Document” to the extent this Definition seeks to expand upon and conflicts with 49 C.F.R. Part 1114, Subpart B. Union Pacific further objects to Definition No. 3 as unduly burdensome and as seeking information that is not proportional to the probative value the information

sought may have in this proceeding to the extent that it would require production of draft electronic communications, electronic meeting invites, meeting change or cancellation notices, text messages, communications by or with internet-connected applications (other than emails), electronic messages (other than emails), and Communications to the extent addressed in General Objection 13. Union Pacific is not searching for and will not produce these categories of “Documents.”

15. Union Pacific objects to Definition No. 4, “Identify,” to the extent that it seeks to expand upon and conflicts with 49 C.F.R. Part 1114, Subpart B. Union Pacific further objects to Definition No. 4 as overly broad, unduly burdensome, and as seeking information that is neither relevant nor proportional to the needs of this proceeding. Union Pacific further objects Definition No. 4 to the extent that it would require Union Pacific to provide information that is not reasonably accessible to Union Pacific, or is publicly available or otherwise readily available or accessible to BNSF from other sources, or to provide information in a form not kept in the regular course of business or to undertake anything more than a reasonable search for responsive information.

16. Union Pacific objects to Definition No. 5, “NS” as overly broad, unduly burdensome, disproportionate to the needs of this case, and not reasonably calculated to lead to the discovery of admissible evidence to the extent that it requires Union Pacific to respond to the Requests with respect to Norfolk Southern Corporation’s “predecessors and successors in interest, as well as their present and former directors, officers, employees, agents, managing agents, representatives, attorneys, parents,

subsidiaries, affiliates, divisions, area offices, and regional offices, as well as all persons acting or purporting to act on their behalf.” Union Pacific will respond to the Requests only with respect to Norfolk Southern Corporation and Norfolk Southern Railway Company.

17. Union Pacific objects to Definition No. 8, “UP,” as overly broad, unduly burdensome, disproportionate to the needs of this case, and not reasonably calculated to lead to the discovery of admissible evidence to the extent that it purports to require Union Pacific to respond to the Requests with respect to Union Pacific’s “Union Pacific Corporation and Union Pacific Railroad Company and their predecessors and successors in interest, as well as their present and former directors, officers, employees, agents, managing agents, representatives, attorneys, parents, subsidiaries, affiliates, divisions, area offices, and regional offices, as well as all persons acting or purporting to act on their behalf.” Union Pacific will respond to the Requests only with respect to Union Pacific Corporation and Union Pacific Railroad Company.

18. Union Pacific objects to each and every Instruction as unduly burdensome to the extent the Instruction seeks to impose obligations on Union Pacific that are greater than or otherwise inconsistent with those imposed under 49 C.F.R. Part 1114, Subpart B.

19. Union Pacific objects to Instruction No. 1 to the extent it purports to require Union Pacific to complete its production of documents, if any, within fifteen days after service of the Requests. Union Pacific will produce any documents

identified in response to the Requests on a reasonable timeframe and on a rolling basis, and consistent with the procedural schedule for this proceeding.

20. Union Pacific objects to Instruction No. 2 to the extent it purports to impose obligations on Union Pacific to respond to the Requests in a manner not required by 49 C.F.R. Part 1114, Subpart B. Union Pacific will respond to the Requests as provided in the regulations.

21. Union Pacific objects to Instruction No. 3 to the extent it purports to impose obligations on Union Pacific that are greater than or otherwise inconsistent with those imposed under 49 C.F.R. Part 1114, Subpart B.

22. Union Pacific objects to Instruction No. 4 to the extent it purports to impose obligations on Union Pacific that are greater than or otherwise inconsistent with those imposed under 49 C.F.R. Part 1114, Subpart B. Union Pacific further objects to this Instruction as overly broad, unduly burdensome, and as seeking information that is neither relevant nor proportional to the needs of this proceeding to the extent this Instruction, in conjunction with other Definitions and Instructions, purports to require Union Pacific to provide the history of Documents that “[were] but [are] no longer” in Union Pacific’s possession, custody, or control.

23. Union Pacific objects to Instruction No. 5 to the extent it would require Union Pacific to provide information not required by 49 C.F.R. Part 1114, Subpart B or information that would be unduly burdensome to provide.

24. Union Pacific objects to Instruction No. 6 as overly broad and unduly burdensome to the extent this Instruction purports to impose obligations on Union

Pacific that are greater than or otherwise inconsistent with those imposed under 49 C.F.R. Part 1114, Subpart B. For those Requests to which it is obliged to respond, Union Pacific will conduct a reasonable search for responsive, non-privileged documents or information subject to its specific and general objections to the Requests.

25. Union Pacific objects to Instruction No. 7 to the extent it purports to impose obligations on Union Pacific that are greater than or otherwise inconsistent with those imposed under 49 C.F.R. Part 1114, Subpart B, and to the extent it would require Union Pacific to provide information not required by 49 C.F.R. Part 1114, Subpart B or information that would be unduly burdensome to provide.

26. Union Pacific objects to Instruction No. 9 to the extent it purports to require Union Pacific to collect documents or information for an unduly burdensome period of time and “until present.” Except as more specifically objected to below, where Union Pacific agrees to produce responsive documents or information, Union Pacific will only search for and provide documents or information from January 1, 2019 up to July 29, 2025.

27. Union Pacific’s Responses and Objections are based upon information presently known to it. Union Pacific reserves the right to rely upon facts, documents, or other evidence that may develop or that may subsequently come to its attention; to assert additional objections; and to supplement or amend these responses at any time as this proceeding continues.

## **DISCOVERY REQUESTS AND RESPONSES**

### **REQUEST NO. 1**

Produce copies of all Documents or Communications that NS and/or UP produce or have previously produced in response to discovery requests submitted by other participants in this proceeding.

#### **Union Pacific Response**

Union Pacific objects to this Request's use of the terms "Documents" and "Communications" for the reasons set forth in its General Objection, and its use of the terms "produce" and "produced" as vague.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific will provide BNSF with a copy of or access to Union Pacific's responses to discovery requests in this proceeding that are served by other participants in this proceeding.

### **REQUEST NO. 2**

Produce copies of all Documents or Communications that NS and/or UP produce or have previously produced to the Surface Transportation Board, the United States Department of Justice, or any other federal government agency, state attorneys general, or any other state government agency relating to the Proposed Transaction.

#### **Union Pacific Response**

Union Pacific objects to this Request to the extent it seeks materials that are publicly available or otherwise readily available or accessible to BNSF from other sources or otherwise obtainable in a more convenient, less burdensome, or less expensive manner than from Union Pacific, including by accessing the materials that Union Pacific previously filed with the Surface Transportation Board and which are accessible to BNSF through the proceeding, subject to the

existing Protective Order. Union Pacific further objects to this Request to the extent it seeks materials protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities, including materials relating to the potential settlement of this proceeding. Union Pacific further objects to the terms “Documents” and “Communications” for the reasons set forth in its General Objection, and the terms “produce” and “produced” as vague.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific will produce nonprivileged materials in its possession that it made available to a federal government agency, state attorneys general, or any other state government agency, state attorneys general, or any other state government agency relating to the Proposed Transaction in response to the request of such entity or in response to Union Pacific’s legal obligations to provide such information, to the extent such information can be collected and produced without undue burden and can be located after a reasonable search. Union Pacific has not identified any such materials in its possession, other than the materials accessible to BNSF through this proceeding.

### **REQUEST NO. 3**

Produce Documents sufficient to show the conditions to STB approval to which NS and/or UP have agreed to accept, propose, or agree to if needed to secure regulatory approval for the Proposed Transaction.

#### **Union Pacific Response**

Union Pacific objects to this Request to as seeking materials protected

from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities, including materials relating to the potential settlement of this proceeding. Union Pacific further objects to this Request because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Union Pacific objects to this Request as unduly burdensome and premature, to the extent it purports to require Union Pacific to “Produce Documents sufficient to show” information “to secure regulatory approval” prior to Union Pacific submitting its application and accompanying workpapers.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific responds that its proposals regarding conditions it would accept, propose, or agree to if needed to secure regulatory approval for the Proposed Transaction will be addressed in its application and accompanying workpapers.

#### **REQUEST NO. 4**

Produce Documents sufficient to show all agreements between UP or NS and a counter-party that is designed to facilitate service between the existing UP or NS networks.

##### **Union Pacific Response**

Union Pacific objects to this Request to the extent it seeks materials protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities. Union Pacific objects to the undefined phrases “counter-party,” “designed to facilitate service,” and “between the existing UP ... networks” as vague and ambiguous

when read together. Union Pacific further objects to this Request as unduly burdensome to the extent it seeks production of “all” historical versions of the referenced agreements and for an unspecified period of time. Union Pacific further objects to this Request because it seeks information not in Union Pacific’s possession, custody or control. Union Pacific further objects to the term “Documents” for the reasons set forth in its General Objection, and the terms “produce” and “produced” as vague. Union Pacific understands this as a request for agreements between Union Pacific and a counter-party that are designed to facilitate freight rail service operations between the existing Union Pacific and existing Norfolk Southern networks.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific will produce current versions (in effect) of written terminal agreements, operating agreements, and routing protocol agreements between Union Pacific and a counter-party that are designed to facilitate freight rail service operations between the existing Union Pacific and existing Norfolk Southern networks, to the extent such agreements can be collected and produced without undue burden and can be located after a reasonable search.

## **REQUEST NO. 5**

Identify all individuals and/or entities (customers, labor organizations, labor officials, government agencies or officials, other stakeholders, etc.) from whom either UP or NS has sought, solicited, or discussed a potential letter or statement of support relating to the Proposed Transaction. This request seeks the identity of responsive individuals and entities in the United States, Canada, and Mexico.

### **Union Pacific Response**

Union Pacific objects to this Request to as seeking materials protected

from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities. Union Pacific further objects to this Request because it is overly broad, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, including to the extent it asks Union Pacific to identify “all individuals and/or entities ... from whom ... UP .. has sought, solicited, or discussed a potential letter or statement of support.” Union Pacific objects to this Request as unduly burdensome and premature, to the extent it purports to require Union Pacific to “Identify” information prior to Union Pacific submitting its application and accompanying workpapers. Union Pacific objects to this Request to the extent it seeks materials that are publicly available or otherwise readily available or accessible to BNSF from other sources or otherwise obtainable in a more convenient, less burdensome, or less expensive manner than from Union Pacific, including by accessing the materials filed with the Surface Transportation Board and which are accessible to BNSF through the proceeding.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific responds that it has engaged in widespread outreach to customers, labor unions, suppliers, community leaders, public officials, and other stakeholders about the benefits of the Proposed Transaction, including making information regarding the Proposed Transaction available to the public at <https://www.up-nstranscontinental.com>. When individuals or

entities have indicated support, Union Pacific has invited the submission of letters of support to the STB. Union Pacific will provide these letters of support with the application.

## **REQUEST NO. 6**

Identify all individuals and/or entities (customers, labor organizations, labor officials, government agencies or officials, other stakeholders, etc.) that have expressed or communicated concern about the Proposed Transaction. This request seeks the identity of responsive individuals and entities in the United States, Canada, and Mexico.

### **Union Pacific Response**

Union Pacific objects to this Request to as seeking materials protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities. Union Pacific further objects to this Request because it is overly broad, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Union Pacific objects to this Request as overly broad and unduly burdensome, to the extent it purports to request Union Pacific “Identify” *all* individuals or entities that “have expressed or communicated concern about the Proposed Transaction” to anyone in any form at any time. Union Pacific objects to this Request to the extent it seeks materials that are publicly available or otherwise readily available or accessible to BNSF from other sources or otherwise obtainable in a more convenient, less burdensome, or less expensive manner than from Union Pacific, including by accessing the materials filed with the Surface Transportation Board and which are accessible to BNSF through the

proceeding.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific responds that information regarding individuals or entities that submit comments, protests, requests for conditions, or any other evidence and argument in opposition to the Proposed Transaction will be accessible to BNSF through the proceeding.

## **REQUEST NO. 7**

Produce all Documents and Communications with the individuals and/or entities identified in response to Request Nos. 5 and 6 and that concern or relate to the Proposed Transaction.

### **Union Pacific Response**

Union Pacific objects to this Request to as seeking materials protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities. Union Pacific objects to this Request as overly broad, to the extent it purports to request *all* “Documents” or “Communications” that “concern or relate” for an undefined time period, undefined scope, and undefined subjects. Union Pacific further objects to this Request because it is overly broad, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Union Pacific objects to this Request to the extent it seeks materials that are publicly available or otherwise readily available or accessible to BNSF from other sources or otherwise obtainable in a more convenient, less burdensome, or less expensive manner than from Union Pacific, including by accessing the materials filed with the Surface

Transportation Board and which are accessible to BNSF through the proceeding.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific will produce nonprivileged information, to the extent such materials can be collected and produced without undue burden, and can be located after a reasonable search. Union Pacific directs BNSF to information available to the public at <https://www.up-nstranscontinental.com/>.

## **REQUEST NO. 8**

Produce Documents sufficient to show any discounts, contract extensions, or any other economic value or concession offered in connection with or related to any discussion with a customer or stakeholder related to its support or non-opposition the Proposed Transaction.

### **Union Pacific Response**

Union Pacific objects to this Request to as seeking materials protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities. Union Pacific further objects to this Request because it is overly broad, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Union Pacific objects to the phrase “other economic value or concession” as vague and overly broad. Union Pacific objects to the phrase “offered in connection with or related to” *any* discussion as vague, overly broad, and ambiguous. Union Pacific further objects to the term “stakeholder” as vague, overly broad, and ambiguous.

Subject to and without waiving the foregoing objections and its General

Objections, Union Pacific will produce nonprivileged information, to the extent such materials can be collected and produced without undue burden, can be located after a reasonable search, and are not otherwise provided with the application & workpapers. Union Pacific has not identified any such materials.

## **REQUEST NO. 9**

Produce system-wide car and, where applicable, container, movement event data for all NS and UP traffic for each year or partial year from 2019 to the present. Car event data should be sufficient to identify the sequence of cars within a train for each applicable event, and container event data should be sufficient to identify the car conveying the container for each applicable event.

### **Union Pacific Response**

Union Pacific objects to the undefined term “movement event data” as vague and ambiguous. Union Pacific objects to this request as overly broad and unduly burdensome, to the extent it purports to request *all* data “sufficient to identify the sequence of cars within a train for each applicable event” or “sufficient to identify the car conveying the container for each applicable event” for every shipment in which Union Pacific participated as a rail carrier for nearly seven years, which includes *billions* of data line items of commercially sensitive information. Union Pacific further objects to this Request as unduly burdensome and premature, to the extent it purports to require Union Pacific to provide a subset of information which could be ascertained by BNSF’s review of the data or documents that are or will be readily available or accessible to BNSF through Union Pacific’s submissions in this proceeding. Union Pacific further objects to this Request as unduly burdensome to the extent it purports to require Union Pacific to provide information in a form not kept in the regular

course of business or to conduct a special study or to undertake anything more than a reasonable search for responsive information. Union Pacific further objects to this request to the extent it asks Union Pacific to organize, manipulate, or modify data or documents in a manner that does not reflect how they are kept or were created in the ordinary course of business.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific will produce nonprivileged car-level event data from January 1, 2019 to December 31, 2024, in forms or formats kept in the normal course of business, to the extent such materials can be collected and produced without undue burden, can be located after a reasonable search, and are not otherwise provided with the application & workpapers.

## **REQUEST NO. 10**

Produce system-wide train event data for all NS and UP trains for each year or partial year from 2019 to the present.

### **Union Pacific Response**

Union Pacific objects to the undefined term “train event data” as vague and ambiguous. Union Pacific objects to this request as overly broad and unduly burdensome, to the extent it purports to request undefined data for *all* trains for nearly seven years. Union Pacific further objects to this Request as unduly burdensome and premature, to the extent it purports to require Union Pacific to provide a subset of information which could be ascertained by BNSF’s review of the data or documents that are or will be readily available or accessible to BNSF through Union Pacific’s submissions in this proceeding.

Union Pacific further objects to this Request as unduly burdensome to the extent it purports to require Union Pacific to provide information in a form not kept in the regular course of business or to conduct a special study or to undertake anything more than a reasonable search for responsive information. Union Pacific further objects to this request to the extent it asks Union Pacific to organize, manipulate, or modify data or documents in a manner that does not reflect how they are kept or were created in the ordinary course of business.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific will produce nonprivileged train cycle summary data from January 1, 2019 to December 31, 2024, in forms or formats kept in the normal course of business, to the extent such materials can be collected and produced without undue burden, can be located after a reasonable search, and are not otherwise provided with the application & workpapers.

#### **REQUEST NO. 11**

Produce UP and NS intermodal train schedules from 1995 to present.

##### **Union Pacific Response**

Union Pacific objects to this request as overly broad and unduly burdensome, to the extent it purports to request all “intermodal train schedules” over the course of thirty years. Union Pacific further objects to this Request as unduly burdensome and premature, to the extent it purports to require Union Pacific to provide a subset of information which could be ascertained by BNSF’s review of the data or documents that are or will be readily available or accessible to BNSF through Union Pacific’s submissions in

this proceeding. Union Pacific further objects to this Request as unduly burdensome to the extent it purports to require Union Pacific to provide information in a form not kept in the regular course of business or to conduct a special study or to undertake anything more than a reasonable search for responsive information. Union Pacific further objects to this request to the extent it asks Union Pacific to organize, manipulate, or modify data or documents in a manner that does not reflect how they are kept or were created in the ordinary course of business.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific will produce nonprivileged intermodal train schedules information from January 1, 2019 to July 29, 2025, to the extent such materials can be collected and produced without undue burden, and can be located after a reasonable search.

## **REQUEST NO. 12**

Produce Documents sufficient to show the density information described below for the entire NS and UP systems for each year or partial year from 2019 to the present in a computer readable database or electronic spreadsheet, including all record layouts, all field descriptions, data definitions, and data dictionaries/decoders required to utilize the data. The density database should include, at a minimum, the following data.

- a. Identification of the unique railroad divisions, subdivisions, and individual line segments for each unique density segment;
- b. Station name and SPLC at the beginning of a unique density segment and at the end of a unique density segment;
- c. Beginning and ending milepost for each unique density segment;
- d. Rail and track mileage for each unique density segment;
- e. (i) Total density (both directions including empty and loaded trains) by segment and by direction expressed in net ton- miles, or in the alternative, (ii) total density (both directions including empty and loaded trains) by

- segment and by direction expressed in gross ton-miles, including tare weight, locomotive weight, and non-revenue trains, plus appropriate factors that can be used to convert gross ton- miles to net ton-miles on each unique density segment; and
- f. Density information (i) for segments that NS or UP utilize via trackage rights (or other joint facility or joint use agreements) on another railroad, (ii) for segments where another railroad(s) operates by trackage rights (or other joint facility or joint use agreements) over NS or UP segments, and (iii) an identification of such densities in (i) and (ii) that are included in the total densities provided in response to subpart e. above.

### **Union Pacific Response**

Union Pacific objects to this request as overly broad and unduly burdensome, to the extent it purports to request “density information” in a form not kept in the regular course of business or to conduct a special study or to undertake anything more than a reasonable search for responsive information. Union Pacific further objects to this Request as unduly burdensome and premature, to the extent it purports to require Union Pacific to provide a subset of information which could be ascertained by BNSF’s review of the data or documents that are or will be readily available or accessible to BNSF through Union Pacific’s submissions in this proceeding. Union Pacific further objects to this request to the extent it asks Union Pacific to organize, manipulate, or modify data or documents in a manner that does not reflect how they are kept or were created in the ordinary course of business.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific will produce nonprivileged density information from January 1, 2019 to December 31, 2024, in forms or formats kept by Union Pacific in the normal course of business, to the extent such materials can be

collected and produced without undue burden, can be located after a reasonable search, and are not otherwise provided with the application & workpapers.

### **REQUEST NO. 13**

Produce Documents sufficient to show what constitutes a Materially Burdensome Regulatory Condition (as defined in the Merger Agreement). To the extent each Materially Burdensome Regulatory Condition is not memorialized in a Document, describe in detail what constitutes or could constitute a Materially Burdensome Regulatory Condition.

#### **Union Pacific Response**

Union Pacific objects to this Request to as seeking materials protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities, including materials relating to the potential settlement of this proceeding. Union Pacific further objects to this Request because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

### **REQUEST NO. 14**

Produce Documents relating to any current or anticipated abandonments, leases, grants of trackage rights, or other transactions in which any current line segment of UP or NS would henceforth be operated by another railroad or non-carrier.

#### **Union Pacific Response**

Union Pacific objects to this Request to as seeking materials protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities. Union Pacific objects to this Request as overly broad and unduly burdensome in that it requests production of Documents relating to “any current or anticipated”

transactions over an unlimited time period, undefined locations, and for undefined purposes. Union Pacific further objects to this Request because it is overly broad, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Union Pacific objects to this Request to the extent it seeks materials that are publicly available or otherwise readily available or accessible to BNSF from other sources or otherwise obtainable in a more convenient, less burdensome, or less expensive manner than from Union Pacific, including by accessing the materials filed by Union Pacific with the Surface Transportation Board.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific will provide responsive information about merger-related transactions with the application & workpapers, to the extent any such transactions exist.

## **REQUEST NO. 15**

Produce all Communications between UP and NS since the merger announcement regarding (a) the quoting of interline UP-NS rates, (b) operational integration, and (c) the operation of jointly-owned companies.

### **Union Pacific Response**

Union Pacific objects to this Request to as seeking materials protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities, including materials relating to the potential settlement of this proceeding. Union Pacific objects to this request as overly broad and unduly burdensome, to the extent it purports

to request *all* “Communications” between Union Pacific and Norfolk Southern since an undefined date. Union Pacific further objects to this Request because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Union Pacific objects to this request as overly broad and unduly burdensome, to the extent it purports to require Union Pacific to search for “all Communications” between interline carriers in the ordinary course of business. Union Pacific objects to the undefined term “merger announcement” as vague and ambiguous. For the purposes of responding to this Request, Union Pacific interprets “merger announcement” to refer to the July 29, 2025 announcement of the merger agreement.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific directs BNSF to its forthcoming application for information on operational integration and the future operation of jointly-owned companies.

## **REQUEST NO. 16**

Produce all Documents regarding changes in employee discipline standards or practices from January 1, 2024 to present.

### **Union Pacific Response**

Union Pacific objects to this request as overly broad, vague, and ambiguous, to the extent it purports to request *all* documents “regarding changes.” Union Pacific objects to the undefined phrase “employee discipline standards or practices” as vague and ambiguous. Union Pacific further objects to this Request because it seeks information that is neither relevant nor

reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific will produce nonprivileged documents responsive to this request to the extent such materials can be collected and produced without undue burden, and can be located after a reasonable search.

## **REQUEST NO. 17**

Produce all Documents and Communications 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. The time period for this request is January 1, 2015 to present.

### **Union Pacific Response**

Union Pacific objects to this Request to as seeking materials protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities, including materials relating to the potential settlement of this proceeding. Union Pacific further objects to this Request because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Union Pacific objects to this Request as unduly burdensome, to the extent it purports to require Union Pacific to produce *all* “Documents” and *all* “Communications” between the carriers for over ten years. Union Pacific objects to the undefined terms “joint ventures,” “marketing alliances,” and “other forms of cooperative agreements” as vague and ambiguous. Union Pacific objects to this Request as vague, ambiguous, and unduly burdensome, to the extent it purports to require Union Pacific to search for Documents and

Communications related to “potential” unspecified non-merger related business relationships “whether or not such agreements were implemented.”

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific will provide documents sufficient to show current interline business relationship service products between Union Pacific and Norfolk Southern, to the extent such materials can be collected and produced without undue burden, and can be located after a reasonable search.

### **REQUEST NO. 18**

Describe in detail how Applicants would cooperate with other carriers in addressing or resolving service disruptions on their lines during the transitional period and afterwards.

#### **Union Pacific Response**

Union Pacific objects to this Request as unduly burdensome and premature, to the extent it purports to require Union Pacific to “[d]escribe in detail” information prior to Union Pacific submitting its application and accompanying workpapers, or that are publicly available or otherwise readily available or accessible to BNSF from other sources or otherwise obtainable in a more convenient, less burdensome, or less expensive manner than from Union Pacific. Union Pacific further objects to the extent this Request seeks discovery of information documents, or communications that are or will be available or accessible to BNSF as an interested party through the application and accompanying workpapers to be submitted in this proceeding, once filed.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific directs BNSF to information available to the public

at <https://www.up-nstranscontinental.com> and to its forthcoming application.

## **REQUEST NO. 19**

Describe in detail any conditions or provisions that Applicants are proposing to enhance competition in connection with the Proposed Transaction.

### **Union Pacific Response**

Union Pacific objects to this Request as unduly burdensome and premature, to the extent it purports to require Union Pacific to “[d]escribe in detail” information prior to Union Pacific submitting its application and accompanying workpapers, or that are publicly available or otherwise readily available or accessible to BNSF from other sources or otherwise obtainable in a more convenient, less burdensome, or less expensive manner than from Union Pacific. Union Pacific further objects to the extent this Request seeks discovery of information documents, or communications that are or will be available or accessible to BNSF as an interested party through the application and accompanying workpapers to be submitted in this proceeding, once filed.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific directs BNSF to information available to the public at <https://www.up-nstranscontinental.com/>. Union Pacific further responds that provisions it would propose to enhance competition in connection with the Proposed Transaction will be addressed in its forthcoming application.

## **REQUEST NO. 20**

Produce all studies and analyses of the impact of the Proposed Transaction on potential future mergers involving any Class I carrier (including Applicants).

## **Union Pacific Response**

Union Pacific objects to this Request to as seeking materials protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities. Union Pacific further objects to this Request because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Union Pacific objects to this Request as unduly burdensome and premature, to the extent it purports to require Union Pacific to produce information prior to Union Pacific submitting its application and accompanying workpapers. Union Pacific objects to this Request to the extent it seeks discovery of information or documents that are or will be available or accessible to BNSF as an interested party through the application and accompanying workpapers to be submitted in this proceeding, once filed. Subject to and without waiving the foregoing objections and its General Objections, Union Pacific will produce nonprivileged documents responsive to this request to the extent such materials can be collected and produced without undue burden, can be located after a reasonable search, and are not otherwise provided with the application & workpapers.

### **REQUEST NO. 21**

Produce all Documents in Applicants' possession, custody, or control (including any strategy plans or competitive assessments) that show or concern the impact of the Proposed Transaction on:

- a. Applicants' current and future debt and debt service obligations.
- b. Applicants' financial metrics including revenue, earnings, EBITDA,

- leverage, and operating ratio;
- c. Applicants' costs and potential opportunities to reduce costs (synergies);
- d. Railroad intramodal, intermodal, product, and geographic competition;
- e. Potential traffic diversions from truck transportation to rail transportation;
- f. Rail service, including rail service provided by other rail carriers;
- g. Rail safety, including the safety of rail service provided by other rail carriers;
- h. Rail labor and employment, including labor forces at railroads other than Applicants;
- i. Passenger or commuter service;
- j. Rates for rail transportation;
- k. Competition, including corridor competition, source competition, and intermodal competition; and
- l. Applicants' proposed gateway commitment on Applicants' existing traffic and the revenues and profitability of that traffic.

### **Union Pacific Response**

Union Pacific objects to this Request to as seeking materials protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities, including materials relating to the potential settlement of this proceeding. Union Pacific further objects to this Request to the extent it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Union Pacific objects to this Request as unduly burdensome and premature, to the extent it purports to require Union Pacific to produce information prior to Union Pacific submitting its application and accompanying workpapers. Union Pacific objects to this Request to the extent it seeks discovery of information or documents that are or will be available or accessible to BNSF as an interested party through the application and accompanying workpapers to be submitted in this proceeding, once filed.

Subject to and without waiving the foregoing objections and its General

Objections, Union Pacific directs BNSF to its filings with the Securities and Exchange Commission, available at <https://www.sec.gov/Archives/edgar/data/100885/000119312525224307/d908896ds4a.htm> and <https://www.sec.gov/Archives/edgar/data/100885/000119312525226560/d908896d424b3.htm>, and information available to the public at <https://www.up-nstranscontinental.com/> and <https://investor.unionpacific.com/>. Union Pacific also directs BNSF to its forthcoming application and accompanying workpapers.

## **REQUEST NO. 22**

Produce all studies, analyses, and reports that UP relied upon in making a merger proposal to NS and in assessing whether to execute the Merger Agreement.

### **Union Pacific Response**

Union Pacific objects to this Request to as seeking materials protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities. Union Pacific objects to this Request as overly broad and unduly burdensome in that it requests production of *all* “studies, analyses, and reports” for undefined time periods. Union Pacific further objects to this Request because it is overly broad, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific directs BNSF to its filings with the Securities and Exchange Commission, available at <https://www.sec.gov/Archives/edgar/data/100885/000119312525224307/d908896ds4a.htm> and <https://www.sec.gov/Archives/edgar/data/100885/000119312525226560/d908896d424b3.htm>, and information available to the public at <https://www.up-nstranscontinental.com/> and <https://investor.unionpacific.com/>.

### **REQUEST NO. 23**

Produce all studies, analyses, and reports that NS relied upon in evaluating UP's merger proposal and in assessing whether to execute the Merger Agreement.

#### **Union Pacific Response**

Union Pacific objects to this Request to as seeking materials protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities, including materials relating to the potential settlement of this proceeding. Union Pacific further objects to this Request because it seeks information not in Union Pacific's possession, custody or control.

### **REQUEST NO. 24**

Produce all Documents that Applicants have provided to third parties, including but not limited to shippers, smaller railroads, public officials, ports, and rail industry suppliers, regarding the Proposed Transaction.

#### **Union Pacific Response**

Union Pacific objects to this Request to the extent it seeks materials protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities, including materials relating to the potential settlement of this proceeding. Union Pacific objects to this request as overly broad, vague, and ambiguous, to the extent it purports to request *all* documents "provided to third parties... regarding the Proposed Transaction." Union Pacific objects to Union Pacific further objects to the term "Documents" for the reasons set forth in its General Objection, and

the terms “provided” as vague. Union Pacific objects to this Request to the extent it seeks materials that are publicly available or otherwise readily available or accessible to BNSF from other sources or otherwise obtainable in a more convenient, less burdensome, or less expensive manner than from Union Pacific, including by accessing the materials that Union Pacific previously filed with the Surface Transportation Board and which are accessible to BNSF through the proceeding, subject to the existing Protective Order.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific directs BNSF to information available to the public at <https://www.up-nstranscontinental.com/>.

## **REQUEST NO. 25**

Produce data from 2019 through present for all reciprocal switches performed by or for UP or NS sufficient to identify:

- a. The date the reciprocal switch was requested;
- b. The date the reciprocal switch was completed;
- c. The switching and receiving carriers involved in the reciprocal switch;
- d. The price authority governing the reciprocal switch;
- e. Revenues paid for the reciprocal switch;
- f. The customer name and SPLC station location where switch was originated or terminated;
- g. The location, including latitude and longitude, where the shipment was physically transferred between switching and receiving carrier; and
- h. The car initial and car number of each rail car involved in the reciprocal switch.

## **Union Pacific Response**

Union Pacific objects to this Request to the extent it seeks materials protected from disclosure by the attorney-client privilege, the attorney work-

product doctrine, or any other applicable privileges or immunities. Union Pacific further objections to the undefined terms “requested,” “completed,” and “reciprocal switches” as vague and ambiguous. Union Pacific further objects to this Request as unduly burdensome to the extent it purports to require Union Pacific to provide information in a form not kept in the regular course of business or to conduct a special study or to undertake anything more than a reasonable search for responsive information. Union Pacific further objects to this Request to the extent it seeks *all* data for *all* “reciprocal switching” from January 1, 2019 through December 31, 2024. Union Pacific further objects to this Request as unduly burdensome, to the extent it purports to require Union Pacific to provide a subset of information or data which could be ascertained by BNSF’s review of the data or documents that are or will be readily available or accessible to BNSF through Union Pacific’s submissions in this proceeding. Union Pacific further objects to this request to the extent it asks Union Pacific to organize, manipulate, or modify data or documents in a manner that does not reflect how they are kept or were created in the ordinary course of business.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific will produce nonprivileged data regarding reciprocal switch movements in its possession and responsive to this Request for the period January 1, 2019 to December 31, 2024, to the extent such materials can be collected and produced without undue burden, and can be located after a reasonable search.

## **REQUEST NO. 26**

Produce all Documents related to UP and NS's planned capital budgets and forecasts for the next five years (as prepared in the 2024 and 2025 period prior to the announcement of the Proposed Transaction).

### **Union Pacific Response**

Union Pacific objects to this Request to as seeking materials protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities. Union Pacific objects to this Request as overly broad and unduly burdensome in that it requests production of *all* "Documents related to ... capital budgets and forecasts." Union Pacific further objects to this Request because it is overly broad, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Union Pacific further objects to this Request because it seeks information regarding Norfolk Southern that is not in Union Pacific's possession, custody or control.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific directs BNSF to its Form 10-K filing with the Security Exchange Commission and information available to the public at <https://investor.unionpacific.com/>.

## **REQUEST NO. 27**

Produce Documents sufficient to identify all issues or problems that UP and NS have had using rights or accessing services required by STB- ordered deal conditions.

### **Union Pacific Response**

Union Pacific objects to this Request to as seeking materials protected

from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities. Union Pacific objects to this Request as overly broad and unduly burdensome in that it requests production of Documents “sufficient to identify all issues or problems” over an unlimited time period and for undefined purposes. Union Pacific further objects to this Request because it is overly broad, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Union Pacific objects to this Request to the extent it seeks materials that are publicly available or otherwise readily available or accessible to BNSF from other sources or otherwise obtainable in a more convenient, less burdensome, or less expensive manner than from Union Pacific, including by accessing the materials filed by Union Pacific with the Surface Transportation Board.

Subject to and without waiving the foregoing objections and its General Objections, Union Pacific will produce nonprivileged documents responsive to this request to the extent such materials can be collected and produced without undue burden, can be located after a reasonable search, and are not otherwise provided with the application & workpapers.

Respectfully submitted,

/s/ Michael L. Rosenthal  
MICHAEL L. ROSENTHAL  
DEREK LUDWIN  
JAMES J. O'CONNELL  
PEGAH NABILI  
Covington & Burling LLP  
One CityCenter  
850 Tenth Street, NW  
Washington, DC 20001  
(202) 662-6000

CHRISTINA B. CONLIN  
JAMES B. BOLES  
TONYA W. CONLEY  
JENNIFER L. GALER  
Union Pacific Railroad Company  
1400 Douglas Street  
Omaha, NE 68179

*Attorneys for Union Pacific  
Corporation and Union Pacific  
Railroad Company*

October 16, 2025

**CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of October, 2025, I have caused the foregoing Union Pacific's Responses and Objections to BNSF Railway Company's First Set of Discovery Requests to be served electronically on all parties of record in this proceeding.

/s/ Kevin Kelly

# **EXHIBIT 3**

# KIRKLAND & ELLIS LLP

1301 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
United States

+1 202 389 5000

www.kirkland.com

McClain Thompson  
To Call Writer Directly:  
+1 202 389 5292

mccclain.thompson@kirkland.com

Facsimile:  
+1 202 389 5200

November 12, 2025

## **Via E-Mail**

Michael L. Rosenthal  
Covington & Burling LLP  
One CityCenter  
850 Tenth Street, N.W.  
Washington, DC 20001-4956

Re: *STB Finance Docket No. 36873 – UP’s Initial Discovery Responses*

Dear Counsel:

We write for BNSF regarding UP’s responses to BNSF’s First Set of Discovery Requests, as well as the pace of discovery to date.

The UP-NS merger proposal is a pivotal moment for the railroad industry and, in turn, the American manufacturers, workers, and consumers who depend on competitive rail service. No railroad merger of this scale has ever been proposed. And UP has embraced its significance: UP contends the proposed UP-NS merger is “unprecedented” and will “transform the U.S. supply chain[.]”<sup>1</sup> Given the stakes, the Board and all stakeholders need discovery to study how this merger would shape the U.S. economy and American railroads for generations.

To date, UP has slow-walked discovery and blocked our ability to access that necessary information. More than 100 days after announcing the transaction, UP has produced just 331 documents (and the majority of that production was lease agreements and waiver conditions). UP has produced no emails, board materials, or internal analyses of the merger and its expected impacts on the rail industry and customers. And based on its initial written discovery responses, it appears that UP intends to not provide timely discovery into case-relevant information. UP declined to conduct any searches for 13 of BNSF’s initial requests,<sup>2</sup> and for others, UP is not providing responsive materials or otherwise declining to respond until UP files its Application.<sup>3</sup>

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<sup>1</sup> Applicants’ Notice of Intent, *Union Pac. Corp. and Union Pac. R.R. Co. – Control – Norfolk Southern Corp. and Norfolk Southern Ry. Co.* FD 36872 at 2 (Jul. 30, 2025).

<sup>2</sup> UP’s Responses and Objections to BNSF’s First Set of Discovery Requests, at Nos. 3, 5-6, 13-15, 18-19, 21-24, and 26.

<sup>3</sup> See *id.* at Nos. 3, 5, 8-10, 12, 14-15, 18-21, and 27.

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In light of UP's approach to discovery to date and limited productions, we were disappointed to see UP attempt to use its engagement in the discovery process as a basis to *shorten* the procedural schedule.<sup>4</sup> We will be sure to point out these short comings when we file our response to the procedural schedule.

Below, we write regarding some of our initial concerns about UP's participation in the discovery process to date.

### **UP's General Responses and Objections**

***Objections relating to UP's upcoming applications.*** UP objected to BNSF's requests to the extent that BNSF sought discovery that "will be available or accessible . . . through the application and accompanying workpapers to be submitted in this proceeding, once filed." UP Responses ¶ 2. Although there may be overlap between UP's Application and some of BNSF's discovery requests, UP cannot defer answering BNSF's requests until it files its Application—particularly when UP is telling the Board that it is actively responding to stakeholders' pre-Application discovery requests. Please confirm UP will withdraw this objection and address the discovery that we have served.

***Communications and documents other than emails.*** UP objects to searching any communications or documents other than emails as unduly burdensome and not proportional. *Id.* at ¶ 13-14. UP's refusal to search non-email communications—including texts, meeting invitations, instant messages, or chat logs from electronic platforms—is unsupported by 49 C.F.R. Part 1114 and denies BNSF and other stakeholders access to responsive information. Although BNSF is willing to meet and confer to negotiate parameters around searches for non-email communications, please confirm UP will withdraw its front-end objection to even searching from those sources.

Please also identify the custodians that UP proposes to search, so that we can consider further and begin those conversations.

***Relevant time period.*** UP generally objects to responding to BNSF's discovery requests to the extent they require UP "to collect documents or information for an unduly burdensome period of time and 'until the present.'" *Id.* at ¶ 26. UP asserts that it will "only search for and provide documents or information from January 1, 2019 up to July 29, 2025." *Id.* While BNSF appreciates there could be some valid undue burden concerns related to some pre-2019 materials,

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<sup>4</sup> See Applicants' Comments on the Proposed Procedural Schedule, *Union Pac. Corp. and Union Pac. R.R. Co. – Control – Norfolk Southern Corp. and Norfolk Southern Ry. Co.* FD 36872 (Oct. 20, 2025).

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a sharp cut-off is inappropriate. Pre-2019 materials—such as intermodal train schedules and joint ventures between the applicants—could be relevant and should be searched. Similarly, a July 29, 2025 cut-off would improperly exclude relevant materials—including communications with shippers and governmental agencies about the merger and its effects on the industry and customers; integration planning materials; and internal discussions within UP about the transaction and its implementation. Although BNSF is willing to negotiate parameters for those searches, please confirm UP will withdraw those front-end date objections.

### **UP's Specific Responses and Objections**

While BNSF intends to follow up with UP regarding other of BNSF's initial requests as discovery unfolds, we write in this first instance regarding aspects of 12 requests where it appears we may have near-term disputes. We reserve our rights to follow up about other aspects—and the other requests—at the appropriate time.

***BNSF Request No. 2:** Produce copies of all Documents or Communications that NS and/or UP produce or have previously produced to the Surface Transportation Board, the United States Department of Justice, or any other federal government agency, state attorneys general, or any other state government agency relating to the Proposed Transaction.*

UP responded that it would produce “nonprivileged materials” that it made available to government agencies “in response to the request of such entity or in response to UP’s legal obligations to provide such information, to the extent such information can be collected and produced without undue burden and can be located after a reasonable search.” *Id.* at 12-13.

We have several concerns with this response. **First**, please identify what privileges—if any—UP is using or might use to withhold responsive materials that were shared with federal or state government agencies. We are not aware of any such valid privilege assertions.

**Second**, UP improperly limits its search and production to materials “in response to the request of such entity or in response to [UP’s] legal obligations to provide such information[.]” *Id.* at 13. BNSF is entitled to relevant information provided by UP to federal and state government agencies whether or not UP had a *legal* obligation to disclose such. UP must produce all relevant documents and communications previously produced to the Board, DOJ, or any other federal or state government agency relating to the Proposed Transaction or BNSF’s requests. Please confirm that UP will withdraw this limitation.

**Third**, UP responds that it would produce materials “to the extent such information can be collected and produced without undue burden and can be located after a reasonable search.” *Id.*

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That limitation is unacceptable, since all of the materials requested by BNSF have already been—or will be—produced to third parties and should be identifiable with minimal burden to UP. Please confirm that UP will withdraw this limitation.

***BNSF Request No. 4: Produce Documents sufficient to show all agreements between UP or NS and a counter-party that is designed to facilitate service between the existing UP or NS networks.***

Although UP agreed to produce materials responsive to this request, UP improperly limited that production to agreements “between Union Pacific and a counter-party that are designed to facilitate freight rail service operations between the existing Union Pacific and existing Norfolk Southern networks[.]” *Id.* at 15 (emphasis added). UP’s response improperly re-writes our request and purports to limit UP’s response. We seek agreements between UP and counter-parties that “facilitate service between the existing UP or NS networks.” Please confirm that UP will search for agreements facilitating service between existing UP or NS networks. That information is relevant to understanding the operational efficiency of UP and NS’s rail networks and potential for service disruptions, among other things.

Please confirm that UP’s productions will include any agreements for “rubber wheel interchanges” where containers are interchanged between UP or NS via truck or drayage. Those short-haul trucking movements can add substantial time, cost, and congestion to intermodal operations, and are directly relevant to the operational efficiency, competitive effects, and environmental impact of the proposed merger, among other things.

***BNSF Request No. 5: Identify all individuals and/or entities (customers, labor organizations, labor officials, government agencies or officials, other stakeholders, etc.) from whom either UP or NS has sought, solicited, or discussed a potential letter or statement of support relating to the Proposed Transaction. This request seeks the identity of responsive individuals and entities in the United States, Canada, and Mexico.***

Although UP states that it “has engaged in widespread outreach” to various entities and that it “will provide these letters of support with the application,” that is not responsive to BNSF’s request. BNSF is seeking the identities of all individuals or entities for whom UP has sought, solicited, or discussed a potential letter or statement of support relating to the Proposed Transaction—not merely those providing letters of support to UP. Such information is relevant to this proceeding because, among other things, UP has cited customer support as a basis for Board

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approval of the Proposed Transaction.<sup>5</sup> Please confirm that UP will amend its response to identify all individuals or entities responsive to this request (which would include those who have chosen not to provide letters of support).

***BNSF Request No. 6:** Identify all individuals and/or entities (customers, labor organizations, labor officials, government agencies or officials, other stakeholders, etc.) that have expressed or communicated concern about the Proposed Transaction. This request seeks the identity of responsive individuals and entities in the United States, Canada, and Mexico.*

UP also fails to adequately respond to BNSF's Request No. 6, which seeks the identity of all individuals or entities that expressed or communicated concern about the Proposed Transaction. Although some of those individuals or entities may choose to file materials with the Board, others that expressed or communicated concerns to UP may not—particularly those who may have concerns about taking a public stance against what would be the only transcontinental railroad. Because UP is touting customer support as a basis for approval, the identities of individuals or entities who have expressed concern are relevant to these proceedings and should be identified by UP. Please confirm that UP will amend its response to identify all individuals or entities responsive to this request.

***BNSF Request No. 13:** Produce Documents sufficient to show what constitutes a Materially Burdensome Regulatory Condition (as defined in the Merger Agreement). To the extent each Materially Burdensome Regulatory Condition is not memorialized in a Document, describe in detail what constitutes or could constitute a Materially Burdensome Regulatory Condition.*

UP made two objections to this request: (1) that it seeks “materials protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privileges or immunities, including materials relating to the potential settlement of this proceeding;” and (2) “it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.” These objections are improper.

**First**, UP's privilege-based objections are meritless. There is nothing privileged about the terms of a contract signed by two parties negotiating at arms-length. Please confirm whether UP is withholding responsive documents based on privilege, and if so, please specifically identify the

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<sup>5</sup> See Statements of Support, <https://www.up-nstranscontinental.com/>.

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privilege on which UP is relying and how that privilege could shield the Materially Burdensome Regulatory Conditions from discovery.

**Second**, UP's relevance-related objections are similarly meritless. The UP-NS merger agreement includes multiple references to Materially Burdensome Regulatory Conditions, which would allow UP to walk away from the Proposed Transaction without paying NS a termination fee, among other things. Those conditions are relevant to the Proposed Transaction because they may show, among other things, the Applicants' internal assessment of competitive risk and Applicants' willingness to accept conditions necessary to protect shippers and enhance competition. Please confirm that UP will withdraw its relevance objection.

***BNSF Request No. 15: Produce all Communications between UP and NS since the merger announcement regarding (a) the quoting of interline UP-NS rates, (b) operational integration, and (c) the operation of jointly-owned companies.***

UP's response "directs BNSF to its forthcoming application for information on operational integration and the future operation of jointly-owned companies." Stakeholders like BNSF need not wait months for UP to produce data that it currently possesses, particularly when that information is directly relevant to this proceeding. Among other things, those communications bear directly on (a) the impact on the deal on interlining pricing, (b) the likelihood of the purported efficiencies claimed by the Applicants, (c) the probability of network breakdowns caused by the merger, and (d) how the Applicants are planning to change the operations of jointly-owned companies relied on by others in the industry. Please confirm whether UP will produce communications responsive to Request No. 15 prior to filing its Application, and when BNSF can anticipate that production being made.

***BNSF Request No. 17: Produce all Documents and Communications 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. The time period for this request is January 1, 2015 to present.***

UP responded that it "will provide documents *sufficient* to show current interline business relationship service products between [UP] and [NS]," but that response falls far short of BNSF's request for *all* documents and communications relating to potential joint ventures, marketing alliances, or other forms of cooperative agreements between UP and NS other than a merger. That information is relevant because, among other things, it demonstrates the ability of UP and NS to obtain operational efficiencies without a formal merger—which bears directly on a factor that the Board must evaluate as part of its assessments.

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Additionally, UP's proposal that it would "provide documents sufficient to show *current* interline business service products" is insufficient. Discussions about agreements that were not implemented may demonstrate the feasibility of UP/NS coordination without a merger, among other things. Please confirm if UP will respond to BNSF's request as BNSF made it.

***BNSF Request No. 18:*** Describe in detail how Applicants would cooperate with other carriers in addressing or resolving service disruptions on their lines during the transitional period and afterwards.

UP directs BNSF to its public website "and to its forthcoming application" concerning how UP would cooperate with other carriers to address or resolve service disruptions on UP-NS lines during the transitional period and afterwards. That response is insufficient. UP cannot withhold responsive information merely because it may overlap with UP's public statements or pending Application. UP surely contemplated how it would address service disruptions that are common with railroad mergers, and those plans are relevant to the Proposed Transaction and how it would affect the public interest, among other things. Please confirm that UP will amend its response to Request No. 18 before filing its Application, so stakeholders can serve and tailor other aspects of the discovery process.

***BNSF Request No. 19:*** Describe in detail any conditions or provisions that Applicants are proposing to enhance competition in connection with the Proposed Transaction.

Similar to its response to Request No. 18, UP directs BNSF to its public website "and to its forthcoming application" concerning how the Proposed Transaction would enhance competition. Again, UP cannot withhold responsive information merely because it may overlap with UP's public statements or forthcoming Application, particularly on a core issue like competition. Please confirm that UP will amend its response to Request No. 19 before filing its Application, so stakeholders can serve and tailor other aspects of the discovery process.

***BNSF Request No. 21:*** Produce all Documents in Applicants' possession, custody, or control (including any strategy plans or competitive assessments) that show or concern the impact of the Proposed Transaction on: [12 information subsets concerning the Applicants' businesses].

***BNSF Request No. 22:*** Produce all studies, analyses, and reports that UP relied upon in making a merger proposal to NS and in assessing whether to execute the Merger Agreement.

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UP directs BNSF to its public website and SEC filings in response Request Nos. 21-22, in addition to referring BNSF to UP's forthcoming Application. UP cannot withhold responsive information merely because it may overlap with UP's public statements or forthcoming Application. The materials sought by BNSF concern business and financial information that UP possessed and considered prior to initiating the Proposed Transaction, and while there may be some modest overlap with UP's SEC filings, those public filings do not excuse UP from conducting a reasonable search and producing the relevant materials requested by BNSF. Please confirm that UP will amend its response to Request Nos. 21 and 22 before filing its Application, including so that stakeholders can serve and tailor other aspects of the discovery process.

***BNSF Request No. 24: Produce all Documents that Applicants have provided to third parties, including but not limited to shippers, smaller railroads, public officials, ports, and rail industry suppliers, regarding the Proposed Transaction.***

UP again directs BNSF to its public website for information responsive to Request No. 24, which does not address BNSF's request. While UP objects that the request is overly broad because it requests "all" documents provided to third parties concerning the Proposed Transaction, that is no basis for producing **zero** documents that are responsive to this request. BNSF will meet-and-confer to negotiate search parameters for this request. Those materials are relevant because they may reveal how the Proposed Transaction may impact stakeholders, including effects on the public interest and competition, among other things. Please confirm whether UP will amend its response to Request No. 24.

\* \* \* \* \*

Please advise by November 17 whether UP intends to amend its Responses to address the issues and deficiencies identified above, and that UP will provide those amendments by November 24. We are available to discuss at your convenience.

Sincerely,

/s/ McClain Thompson

McClain Thompson

# **EXHIBIT 4**

# COVINGTON

BEIJING BOSTON BRUSSELS DUBAI FRANKFURT  
JOHANNESBURG LONDON LOS ANGELES NEW YORK  
PALO ALTO SAN FRANCISCO SEOUL SHANGHAI WASHINGTON

Covington & Burling LLP  
One CityCenter  
850 Tenth Street, NW  
Washington, DC 20001-4956  
T +1 202 662 6000

**By Email**

December 5, 2025

McClain Thompson  
Kirkland & Ellis LLP  
1301 Pennsylvania Avenue NW  
Washington, DC 20004  
Mcclain.thomspon@kirkland.com

**Re: Docket No. FD 36873, *Union Pacific Corp., et al. -  
Control - Norfolk Southern Corp., et al.***

Dear Counsel:

We write on behalf of Union Pacific Railroad Company and Union Pacific Corporation (collectively, “Union Pacific”) in response to BNSF’s November 12, 2025, letter regarding Union Pacific’s responses to BNSF’s Discovery Requests, which were served on October 16, 2025.

In your letter, you selectively—and at times misleadingly—quote from Applicants’ Notice of Intent to characterize the proposed Union Pacific/Norfolk Southern combination. As described in the full text of the Notice of Intent, the proposed combination “represents an unprecedented opportunity to create America’s first transcontinental railroad, which will transform the U.S. supply chain, unleash the industrial strength of American manufacturing, and create new sources of economic growth and workforce opportunity.”<sup>1</sup> It will “creat[e] a more accessible, sustainable, and lower-cost supply chain for manufacturers and consumers,” “drive additional employment opportunities in towns and cities across the combined rail network and generate economic growth in communities across the United States,” and “the combined company will compete more effectively with Canadian railroads to win back U.S. freight volume and American jobs.”<sup>2</sup> Union Pacific looks forward to providing additional information regarding the proposed combination in Applicants’ forthcoming application to the Board.

Your letter also mischaracterizes Union Pacific’s discovery efforts and the scope of information that has already been provided to BNSF in this proceeding. Union Pacific provided its 100% traffic tapes for the period January 1, 2019, through December 31, 2024, to BNSF on September 11, 2025, in exchange for BNSF’s agreement that it would produce its own traffic tapes

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<sup>1</sup> Applicants’ Notice of Intent (UP-1/NS-1) at 2.

<sup>2</sup> *Id.* at 2-3.

## COVINGTON

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for the same time period.<sup>3</sup> With the exception of a single year, BNSF did not produce its own traffic tapes to Union Pacific until two months later on November 12, 2025. In addition to providing its traffic tapes to BNSF, Union Pacific has undertaken diligent efforts to collect and produce a very large volume of data and information responsive to discovery requests. Union Pacific has produced more than 10 gigabytes of responsive documents and data, including expansive reciprocal switching and interchange volume data, agreements containing interchange commitments, and schedules to its merger agreement; and its collection efforts are ongoing. Union Pacific's efforts to respond to pre-application discovery requests in this proceeding are not only reasonable, but go above and beyond what is required by the merger rules.<sup>4</sup>

Although Union Pacific remains committed to diligently responding to discovery requests and working constructively with BNSF to narrow discovery disputes and reach reasonable resolutions, we have serious concerns with the incredibly broad and unduly burdensome scope of discovery that BNSF is seeking on topics that have little relationship to the needs of this proceeding. We address these concerns below in the context of the specific issues raised in your November 12, 2025, letter.

### **I. UNION PACIFIC'S GENERAL RESPONSES AND OBJECTIONS**

#### **A. Objections relating to Applicants' Forthcoming Application**

Union Pacific has responded to each of BNSF's discovery requests with appropriate objections and a response identifying the scope of material that it will collect and produce to address the request. In some cases, BNSF's pre-application discovery requests seek information that Union Pacific expects to provide as part of its forthcoming application. For these requests, Union Pacific has explained that the requested information overlaps with information that it is collecting and intends to provide with its application. BNSF's demand that Union Pacific engage in a duplicative collection of such information and that Union Pacific produce such information in advance of finalizing and submitting its application to the Board is not reasonable. If the Board accepted BNSF's argument on this point, it would mean that any party could force applicants to preview the content of their application prior to submission by issuing discovery requests that cover topics to be addressed in the application. To allow such an outcome would grossly impede the prospective applicants in the preparation of their application and create unnecessary inefficiencies in the application process. Union Pacific maintains its objection.

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<sup>3</sup> As explained in the preamble to the Board's merger rules, "[i]f 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." *Major Rail Consol. Procs.*, 5 S.T.B. 539, 591 (2001).

<sup>4</sup> See *Major Rail Consol. Procs.*, 5 S.T.B. 539, 591 (2001) (explaining that the Board was "not proposing" that applicants be subject to "broad pre-application discovery," which would "impede the prospective applicants in the preparation of their application").

**B. Communications and Documents other than Emails**

As stated in Union Pacific's objection, BNSF's definition of "Communication" as that term is used in its requests is unduly burdensome and seeks information that is not proportional to the probative value of the information sought. BNSF's definition includes a laundry list of mediums, from "telegrams" to "telecopies" to "electronic mail" to "other computer linkups." BNSF's insistence that Union Pacific collect individual's personal text messages and chat logs without demonstrating that the such collection is necessary or reasonable to address a specific discovery request demonstrates the overbroad and unduly burdensome nature of BNSF's position.

In responding to BNSF's specific discovery requests, Union Pacific has identified the scope of responsive material that it will collect through reasonable searches. Union Pacific has also clarified that where it has agreed to produce documents responsive to a request, it "will produce documents from files most likely to contain materials responsive to the request without undue burden."<sup>5</sup> Targeted collection of documents from the files most likely to contain the responsive material is the most appropriate way to address BNSF's discovery requests. To require widespread email, text message, and chat collection is not proportional to the needs of this proceeding and would be unduly burdensome. This proceeding is centered on the Board's evaluation of Applicants' forthcoming application. The application will contain extensive detail regarding the proposed transaction and analysis of its potential effect. Against this backdrop, BNSF is permitted to conduct reasonable discovery into the proposed transaction as an interested party, but it is not entitled to nearly limitless discovery of internal Union Pacific communications untethered from the contents of the application itself.

With respect to your November 18, 2025, email seeking a "list of executive and management team members who were involved in developing and negotiating the merger proposal, as well as those also involved in post-signing shipper outreach and integration planning" and "third-party consultants and bankers involved in those activities," Union Pacific disagrees that identification of the requested individuals is reasonable or necessary for Union Pacific to comply with its discovery obligations in the context of this proceeding.

**C. Relevant Time Period**

Union Pacific maintains that a default date period is necessary to ensure BNSF's discovery requests are not unduly burdensome and remain proportional to the needs of this case. To the extent BNSF can identify specific requests that it believes should have a different date range than the time period set forth in Union Pacific's objections, Union Pacific is willing to confer with BNSF on those requests.

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<sup>5</sup> Union Pacific's Responses at General Objection 7.

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### II. UNION PACIFIC'S SPECIFIC RESPONSES AND OBJECTIONS

#### A. BNSF Request 2

You have raised three concerns with regard to Union Pacific's response to BNSF Request No. 2, which we address below.

First, you ask Union Pacific to identify any privileges Union Pacific is using or *might* use to withhold responsive materials. Union Pacific's response to this request explains that for the scope of materials it has agreed to produce, Union Pacific "has not identified any such materials in its possession, other than the materials accessible to BNSF through this proceeding." To further clarify the response, Union Pacific is not withholding as privileged materials in its possession that it made available to a federal government agency, state attorneys general, or any other state government agency, state attorneys general, or any other state government agency relating to the Proposed Transaction in response to the request of such entity or in response to Union Pacific's legal obligations to provide such information.

Second, you assert that Union Pacific's response should not be limited to materials produced in response to Union Pacific's legal obligations to provide such information. This assertion rests on a misreading of Union Pacific's response. In response to your request for materials that were previously produced to the Board or other government entities regarding the proposed transaction, Union Pacific has agreed to produce materials that it made available to those entities "in response to the request of such entity *or* in response to Union Pacific's legal obligations to provide such information." It is not limiting its response solely to materials provided pursuant to a legal obligation.

Third, you take issue with Union Pacific's objection to the burden of producing the requested material. Consistent with Union Pacific's response to your first concern above, for the scope of materials it has agreed to produce, Union Pacific has not identified any responsive materials in its possession beyond the materials accessible to BNSF through this proceeding.

#### B. BNSF Request 4

Union Pacific objected to Request 4 as vague and ambiguous because it is incoherent as written. The request seeks "agreements ... that is [sic] designed to facilitate service *between* the existing UP *or* NS networks" (emphasis added). Although the request refers to agreements that facilitate service "between" two things, the only two things the request references are "the existing UP or NS networks." Union Pacific reasonably interpreted the request to be seeking agreements that facilitate service between the Union Pacific *and* Norfolk Southern networks, and agreed to produce certain materials responsive to that request.

You now claim that Union Pacific's attempt to resolve the flaws in BNSF's request "improperly re-writes [the] request and purports to limit UP's response," but your letter does nothing to clarify what the request is seeking beyond the agreements designed to facilitate service between the Union Pacific and Norfolk Southern networks that Union Pacific had already agreed to collect. To the extent BNSF has appropriately targeted requests for additional documents or

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information, that do not impose an undue burden on Union Pacific, we are willing to consider those requests and work constructively with BNSF to narrow the scope of this dispute.

### **C. BNSF Requests 5 and 6**

Requests 5 and 6 ask Union Pacific to identify all individuals and/or entities with whom Union Pacific sought, solicited, or discussed a potential letter of support or who expressed concern about the proposed transaction. Union Pacific has asserted valid objections to the requests, including that the requests are overly broad, unduly burdensome, and seek information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Individuals or entities that wish to express support or concern regarding the proposed transaction are permitted to contribute comments to the Board as part of the proceeding. Union Pacific has also confirmed in its response to Request 5 that it has engaged in widespread outreach to customers, labor unions, suppliers, community leaders, public officials, and other stakeholders about the benefits of the proposed transaction. These outreach efforts include making information widely available to any individual or entity who wishes to access it on a public website (<https://www.up-nstranscontinental.com>). Moreover, Union Pacific will make available to the Board and BNSF letters of support that it has obtained from individuals and/or entities as part of the forthcoming application.

Individuals or entities that wish to have their concerns considered by the Board can submit comments, protests, requests for conditions, or any other evidence and argument in the proceeding.

The marginal relevance of the identity of individuals and/or entities that received information regarding the proposed transaction (including from public websites) and have chosen not to participate in the proceeding is extremely low and does not justify the burden that would be placed on Union Pacific to identify every individual that directly or passively received a solicitation for support and to identify every instance in which any individual or entity anywhere in the world has expressed any concern to any Union Pacific employee regarding the proposed transaction. The unreasonable burden of these requests is further exacerbated by Request 7, which seeks any communication regarding the proposed transaction with any individual and/or entity identified in response to Requests 5 and 6. Union Pacific remains willing to confer with BNSF on this topic, but would appreciate an explanation of why the additional discovery (above and beyond what Union Pacific has provided) is necessary or proportional to the needs of this proceeding.

### **D. BNSF Request 13**

Request 13 seeks information regarding the meaning of term, Materially Burdensome Regulatory Condition, which is defined in the publicly available Merger Agreement. *See* Merger Agreement Section 5.8(b)-(c). Materially Burdensome Regulatory Conditions include Voting Trust Restrictions, Prior Transaction Restrictions, and Non-Required Restrictions. *Id.* Voting Trust Restrictions and Prior Transaction Restrictions are defined in the Merger Agreement. *Id.* Non-Required Restrictions are defined in Section 5.8(c) of the Company Disclosure Schedules. *Id.* Although Union Pacific has previously produced a copy of the Company Disclosure Schedules,

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Page 6

it has redacted portions of the schedule that contain descriptions of the terms and conditions that Union Pacific and Norfolk Southern would potentially be willing to accept to settle or otherwise resolve anticipated legal challenges to the proposed transaction. The redacted content reflects the legal advice of counsel and attorney work product regarding potential settlement strategy, which were shared between Union Pacific and Norfolk Southern pursuant to a common legal interest, and are further protected from discovery by the settlement privilege. Union Pacific has shared the non-privileged material that is responsive to Request 13 consistent with its stated objections.

### **E. BNSF Requests 15, 18, 19**

BNSF asserts that it is entitled to a preview of the portions of Applicants' forthcoming application that will contain information regarding operational integration and the future operation of jointly-owned companies (Request 15); potential cooperation with other carriers to address service disruptions on Union Pacific-Norfolk Southern lines during the transition period and afterwards (Request 18); and how the proposed transaction will enhance competition (Request 19). As addressed in Section I.A of this letter, such discovery is inefficient, unnecessary, and impedes Applicants' preparation of their forthcoming application. Discovery regarding these topics should proceed after the filing of Applicants' forthcoming application, and should be appropriately tailored to avoid undue burden and to target material that is proportional to the needs of the proceedings in the context of the filed application.

### **F. BNSF Request 17**

Request 17 seeks *all* documents and communications relating to potential joint ventures, marketing alliances, or other forms of cooperative agreements between UP and NS other than a merger. Union Pacific objected to significant defects in this request, including that the request is unduly burdensome, the terms used in the request are vague and ambiguous, and that the request is not appropriately targeted to information that is relevant or reasonably calculated to lead to the discovery of relevant information. Nonetheless, despite these defects, Union Pacific has agreed to conduct a reasonable search to identify document sufficient to show the current interline business relationship service products between Union Pacific and Norfolk Southern. To the extent BNSF has appropriately targeted requests for additional documents or information, that do not impose an undue burden on Union Pacific, we are willing to consider those requests and work constructively with BNSF to narrow the scope of this dispute.

### **G. BNSF Request 21**

Request 21 seeks documents regarding the impact of the proposed transaction in a dozen different contexts, which largely—if not entirely—track the supporting information that Applicants are required to submit as part of their forthcoming application or reference information that Union Pacific has provided in its public SEC filings. As discussed above, there is no basis to permit BNSF to obtain a preview of these sections of the application simply because it served broad pre-application discovery. Consistent with Union Pacific's position on other similar requests, discovery regarding these topics should proceed after the filing of Applicants' forthcoming application, and should be appropriately tailored to avoid undue burden and to target material that is proportional to the needs of the proceedings in the context of the filed application.

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### H. BNSF Request 22

Request 22 seeks studies, analyses, and reports that Union Pacific relied upon in making a merger proposal to Norfolk Southern and whether to execute the Merger Agreement. Union Pacific objected that the request was overly broad, unduly burdensome, and sought irrelevant information. Nonetheless, Union Pacific also explained that responsive information was already available to BNSF in its public SEC filings, which addresses Union Pacific's reasons for pursuing the proposed transaction. Union Pacific disagrees that the documents it considered in making the merger proposal are relevant to the Board's evaluation of Applicants' forthcoming application, let alone that broad discovery into those materials would be proportional to the needs of the proceeding.

### I. BNSF Request 24

Request 24 seeks *all* documents that have been provided to third parties, including but not limited to shippers, smaller railroads, public officials, ports, and rail industry suppliers regarding the proposed transaction. Union Pacific objected to this request as overly broad and vague and ambiguous, and directed BNSF to the publicly available materials regarding the proposed transaction that Union Pacific and Norfolk Southern have provided at <https://www.up-nstranscontinental.com>. BNSF's assertion that Union Pacific has provided zero documents in response to this request is misleading at best. The website provides significant information regarding the proposed transaction, including pages that are directed to various categories of third parties. Union Pacific is willing to confer with BNSF regarding the scope of its request, but Union Pacific has serious concerns regarding the breadth of the request as drafted.

\* \* \*

Please let me know if you have any questions. Union Pacific remains willing to meet and confer regarding any remaining disputes.

Sincerely,

/s/ Kevin M. Kelly

Kevin M. Kelly

# **EXHIBIT 5**

**From:** Kelly, Kevin  
**Sent:** Thursday, January 29, 2026 5:31 PM  
**To:** Warren, Matthew J.; Thompson, McClain; Rosenthal, Michael; Ludwin, Derek; Harrison, Caroline; Korman, Marc; Atkins, Raymond  
**Cc:** Donovan, Daniel T.; McCarrick, T.J.; Fanchiang, Eric; van Houwelingen, Luke; Enson, Eric; \*AEllis@stblaw.com2; Razi, Sara Y.; Bohl, Lindsey C.; David Meyer; Matelis, Joseph (NON-SIDLEY @SULLCROM.COM ); Dylan M. Aluisse; \*pdenton@steptoe.com; \*tstrafford@steptoe.com; Reilly, Matt; Cunningham, Rich; Damitio, Daniel  
**Subject:** RE: FD 36873 - Request for Discovery Meet and Confer

McClain,

We will provide availability to meet and confer next week, but your email makes clear that BNSF remains unwilling to meaningfully engage on the scope of its discovery requests or reach compromises that are necessary for the conferral to be productive. BNSF has an affirmative obligation to ensure its discovery requests are “narrowly drawn, directed toward a relevant issue, and not used for a general fishing expedition.” *Duke Energy Corp. v. Norfolk S. Ry.*, NOR 42069, slip op. at 4 (STB served July 26, 2002). In this proceeding, that means “discovery must be limited to the application[] before [the Board] and the relevant statutory criteria.” *Id.* And where BNSF’s requests are “burdensome on their face,” BNSF is also obligated to make a “substantial showing” that the relevance of those materials outweighs the burden of their production. See *FMC Wyo. Corp. v. Union Pac. R.R.*, NOR 42022, slip op. at 5 (STB served Feb. 5, 1998); *Atchison, Topeka & Santa Fe Ry.—Operating Rts.—S. Pac. Transp. Co.*, FD 22218, slip op. at 3 (STB served Feb. 7, 2025); *Norfolk S. Corp., et al.—Acquis. of Control—Norfolk & Portsmouth Belt Line R.R.*, FD 36836, slip op. at 3 (STB served July 25, 2025).

When we confer, we will expect BNSF to articulate a reasonably narrow set of materials it is seeking with each request, and why those materials are relevant and proportional to the needs of this proceeding, particularly in light of the information already available through the application and the substantial data sets that Applicants have already produced. We disagree that HSR disclosures or sweeping document collections and custodial searches are consistent with Board regulations, as we will articulate in our response to BNSF’s motion to compel, but we are willing to work with BNSF to identify compromises that allow the discovery process to move forward productively.

Regarding board of director and banker materials, we can discuss on our call, but we intend to search board presentations and minutes for materials addressing the proposed transaction as well as “final studies, surveys, analyses, and reports prepared by investment bankers, consultants, economists, or other third-party advisors in connection with Proposed Transaction,” which consist of banker decks that were presented to the board of directors.

Best,

Kevin

**Kevin Kelly**

Covington & Burling LLP  
One CityCenter, 850 Tenth Street, NW  
Washington, DC 20001-4956  
T +1 202 662 5613 | [kkelly@cov.com](mailto:kkelly@cov.com)  
[www.cov.com](http://www.cov.com)

# COVINGTON

**From:** Warren, Matthew J. <mjwarren@sidley.com>

**Sent:** Tuesday, January 27, 2026 9:23 AM

**To:** Thompson, McClain <mcclain.thompson@kirkland.com>; Kelly, Kevin <Kkelly@cov.com>; Rosenthal, Michael <mrosenthal@cov.com>; Ludwin, Derek <dludwin@cov.com>; Harrison, Caroline <CHarrison@cov.com>; Korman, Marc <mkorman@sidley.com>; Atkins, Raymond <ratkins@sidley.com>

**Cc:** Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; Fanchiang, Eric <EFanchiang@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Enson, Eric <EEnson@crowell.com>; \*AEllis@stblaw.com2 <AEllis@stblaw.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; Matelis, Joseph (NON-SIDLEY @SULLCROM.COM) <Matelisj@sullcrom.com>; Dylan M. Aluise <aluised@sullcrom.com>; \*pdenton@steptoe.com <pdenton@steptoe.com>; \*tstrafford@steptoe.com <tstrafford@steptoe.com>; Reilly, Matt <matt.reilly@kirkland.com>; Cunningham, Rich <rich.cunningham@kirkland.com>

**Subject:** RE: FD 36873 - Request for Discovery Meet and Confer

**[EXTERNAL]**

NS will also be following the approach laid out in the third and fourth paragraphs of Kevin's email.

**MATTHEW J. WARREN**

**SIDLEY AUSTIN LLP**

+1 202 736 8996

[mjwarren@sidley.com](mailto:mjwarren@sidley.com)

\*\*\*\*\*  
This e-mail is sent by a law firm and may contain information that is privileged or confidential.  
If you are not the intended recipient, please delete the e-mail and any attachments and notify us  
immediately.  
\*\*\*\*\*

**From:** Thompson, McClain <[mcclain.thompson@kirkland.com](mailto:mcclain.thompson@kirkland.com)>

**Sent:** Monday, January 26, 2026 9:58 AM

**To:** Kelly, Kevin <[Kkelly@cov.com](mailto:Kkelly@cov.com)>; Rosenthal, Michael <[mrosenthal@cov.com](mailto:mrosenthal@cov.com)>; \*[dludwin@cov.com](mailto:dludwin@cov.com) <[dludwin@cov.com](mailto:dludwin@cov.com)>; Harrison, Caroline <[CHarrison@cov.com](mailto:CHarrison@cov.com)>; Korman, Marc <[mkorman@sidley.com](mailto:mkorman@sidley.com)>; Atkins, Raymond <[ratkins@sidley.com](mailto:ratkins@sidley.com)>; Warren, Matthew J. <[mjwarren@sidley.com](mailto:mjwarren@sidley.com)>

**Cc:** Donovan, Daniel T. <[ddonovan@kirkland.com](mailto:ddonovan@kirkland.com)>; McCarrick, T.J. <[tj.mccarrick@kirkland.com](mailto:tj.mccarrick@kirkland.com)>; Fanchiang, Eric <[EFanchiang@crowell.com](mailto:EFanchiang@crowell.com)>; van Houwelingen, Luke <[LVanHouwelingen@crowell.com](mailto:LVanHouwelingen@crowell.com)>; Enson, Eric <[EEnson@crowell.com](mailto:EEnson@crowell.com)>; \*[AEllis@stblaw.com2](mailto:AEllis@stblaw.com2) <[AEllis@stblaw.com](mailto:AEllis@stblaw.com)>; Razi, Sara Y. <[Sara.Razi@stblaw.com](mailto:Sara.Razi@stblaw.com)>; Bohl, Lindsey C. <[Lindsey.Bohl@stblaw.com](mailto:Lindsey.Bohl@stblaw.com)>; David Meyer <[david@meyerlawdc.com](mailto:david@meyerlawdc.com)>; Matelis, Joseph (NON-SIDLEY @SULLCROM.COM) <[Matelisj@sullcrom.com](mailto:Matelisj@sullcrom.com)>; Dylan M. Aluise <[aluised@sullcrom.com](mailto:aluised@sullcrom.com)>; \*[pdenton@steptoe.com](mailto:pdenton@steptoe.com) <[pdenton@steptoe.com](mailto:pdenton@steptoe.com)>; \*[tstrafford@steptoe.com](mailto:tstrafford@steptoe.com) <[tstrafford@steptoe.com](mailto:tstrafford@steptoe.com)>; Reilly, Matt <[matt.reilly@kirkland.com](mailto:matt.reilly@kirkland.com)>; Cunningham, Rich <[rich.cunningham@kirkland.com](mailto:rich.cunningham@kirkland.com)>

**Subject:** RE: FD 36873 - Request for Discovery Meet and Confer

Kevin –

Thank you for the email. (Matt – Below, I added a question for you to make sure we understand NS's positions.)

We would like to meet and confer this week. I'm generally free most of Wednesday as well as Thursday morning. We can go request-by-request for all three BNSF sets, and UP can tell us what they plan to produce, what they are withholding, and how UP is conducting its search and review for each. (This is independent of our motion to compel; we identified some of the types of requests for which email, board materials, and banker materials are responsive.) What's a good time for UP? We may need several hours – or we can break it into multiple, shorter calls – one for each set.

We also need to better understand what limitations UP intends to put on its search of board and banker materials. We did not limit the scope of those requests to the “proposed transaction.” We also asked, for example, for those materials as they relate to growth in the industry and alternatives to the proposed transaction, among other things. What limitations are UP placing on the collection of board materials? Also, we would expect there to be responsive banker materials that were shared with management that did not make it to the board. What limitations are UP placing on the collection of banker materials? Has UP collected materials from the bankers themselves?

We will standby for UP's disclosure of information on non-custodial and custodial sources later this week, and then we can separately confer about that.

**Matt** – Can you please let us know NS's positions on the third and fourth paragraphs in Kevin's email? Is NS planning to follow UP on those fronts?

Thanks,

McClain

#### McClain Thompson

**KIRKLAND & ELLIS LLP**  
1301 Pennsylvania Ave., N.W.  
Washington, D.C. 20004  
**T** +1 202 389 5292  
**M** +1 917 545 6401

[mcclain.thompson@kirkland.com](mailto:mcclain.thompson@kirkland.com)

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**From:** Kelly, Kevin <[Kkelly@cov.com](mailto:Kkelly@cov.com)>  
**Sent:** Saturday, January 24, 2026 6:15 PM  
**To:** Thompson, McClain <[mcclain.thompson@kirkland.com](mailto:mcclain.thompson@kirkland.com)>; Rosenthal, Michael <[mrosenthal@cov.com](mailto:mrosenthal@cov.com)>;  
\*dludwin@cov.com <[dludwin@cov.com](mailto:dludwin@cov.com)>; Harrison, Caroline <[CHarrison@cov.com](mailto:CHarrison@cov.com)>; Korman, Marc  
<[mkorman@sidley.com](mailto:mkorman@sidley.com)>; Atkins, Raymond <[ratkins@sidley.com](mailto:ratkins@sidley.com)>; Warren, Matthew J. <[mjwarren@sidley.com](mailto:mjwarren@sidley.com)>  
**Cc:** Donovan, Daniel T. <[ddonovan@kirkland.com](mailto:ddonovan@kirkland.com)>; McCarrick, T.J. <[tj.mccarrick@kirkland.com](mailto:tj.mccarrick@kirkland.com)>; Fanchiang, Eric  
<[EFanchiang@crowell.com](mailto:EFanchiang@crowell.com)>; van Houwelingen, Luke <[LVanHouwelingen@crowell.com](mailto:LVanHouwelingen@crowell.com)>; Enson, Eric  
<[EEnson@crowell.com](mailto:EEnson@crowell.com)>; \*AEllis@stblaw.com2 <[AEllis@stblaw.com](mailto:AEllis@stblaw.com)>; Razi, Sara Y. <[Sara.Razi@stblaw.com](mailto:Sara.Razi@stblaw.com)>;  
Bohl, Lindsey C. <[Lindsey.Bohl@stblaw.com](mailto:Lindsey.Bohl@stblaw.com)>; David Meyer <[david@meyerlawdc.com](mailto:david@meyerlawdc.com)>; Joseph J. Matelis  
<[Matelisj@sullcrom.com](mailto:Matelisj@sullcrom.com)>; Dylan M. Aluise <[aluised@sullcrom.com](mailto:aluised@sullcrom.com)>; \*pdenton@steptoe.com  
<[pdenton@steptoe.com](mailto:pdenton@steptoe.com)>; \*tstrafford@steptoe.com <[tstrafford@steptoe.com](mailto:tstrafford@steptoe.com)>; Reilly, Matt  
<[matt.reilly@kirkland.com](mailto:matt.reilly@kirkland.com)>; Cunningham, Rich <[rich.cunningham@kirkland.com](mailto:rich.cunningham@kirkland.com)>  
**Subject:** RE: FD 36873 - Request for Discovery Meet and Confer

McClain,

Applicants have made rolling productions of responsive materials consistent with our objections to BNSF's discovery requests. As we have previously noted, our productions are not limited to agreements or contracts (although those documents are responsive to the expansive requests that the parties have

propounded in this proceeding and the burden of collecting and producing them has been substantial), but encompass enormous data sets and other materials that are at the core of discovery in Board proceedings. Applicants have devoted significant effort to identifying and producing material responsive to the discovery requests that BNSF and other parties have propounded and will continue to do so.

We do have a dispute regarding BNSF's motion to compel what you refer to as "emails, board materials, or banker materials." We will respond to your motion consistent with the applicable deadlines. To the extent you are now interested in discussing specific requests for production, and how to appropriately narrow those requests to allow for a productive discovery process, we are available.

Regarding Requests 1 and 2 from BNSF's Second Set of Discovery Requests, Union Pacific previously objected to providing the board materials described in Request 2, and agreed to conduct a reasonable search for any separate "final studies, surveys, analyses, and reports prepared by investment bankers, consultants, economists, or other third-party advisors in connection with Proposed Transaction" responsive to Request 1. While the parties have not conferred on Union Pacific's responses and objections to these requests since they were served on January 6, 2026, Union Pacific has nonetheless considered potential compromises that would address BNSF's concerns, and we can now report that Union Pacific is willing to conduct a reasonable search for board materials that address the proposed transaction, including responsive banker materials, and produce the responsive, non-privileged materials it identifies. Our understanding is that the banker materials that Union Pacific agreed to search for in response to Request 1 would be present in the board materials to the extent they exist.

Regarding the information on non-custodial and custodial sources, we intend to provide that in the coming week.

Best,

Kevin

### **Kevin Kelly**

Covington & Burling LLP  
One CityCenter, 850 Tenth Street, NW  
Washington, DC 20001-4956  
T +1 202 662 5613 | [kkelly@cov.com](mailto:kkelly@cov.com)  
[www.cov.com](http://www.cov.com)

## **COVINGTON**

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**From:** Thompson, McClain <[mclain.thompson@kirkland.com](mailto:mclain.thompson@kirkland.com)>

**Sent:** Tuesday, January 20, 2026 4:07 PM

**To:** Kelly, Kevin <[Kkelly@cov.com](mailto:Kkelly@cov.com)>; Rosenthal, Michael <[mrosenthal@cov.com](mailto:mrosenthal@cov.com)>; Ludwin, Derek <[dludwin@cov.com](mailto:dludwin@cov.com)>; Harrison, Caroline <[CHarrison@cov.com](mailto:CHarrison@cov.com)>; Korman, Marc <[mkorman@sidley.com](mailto:mkorman@sidley.com)>; Atkins, Raymond <[ratkins@sidley.com](mailto:ratkins@sidley.com)>; Warren, Matthew J. <[mjwarren@sidley.com](mailto:mjwarren@sidley.com)>

**Cc:** Donovan, Daniel T. <[ddonovan@kirkland.com](mailto:ddonovan@kirkland.com)>; McCarrick, T.J. <[tj.mccarrick@kirkland.com](mailto:tj.mccarrick@kirkland.com)>; Fanchiang, Eric <[EFanchiang@crowell.com](mailto:EFanchiang@crowell.com)>; van Houwelingen, Luke <[LVanHouwelingen@crowell.com](mailto:LVanHouwelingen@crowell.com)>; Enson, Eric <[EEnson@crowell.com](mailto:EEnson@crowell.com)>; \*AEllis@stblaw.com2 <[AEllis@stblaw.com](mailto:AEllis@stblaw.com)>; Razi, Sara Y. <[Sara.Razi@stblaw.com](mailto:Sara.Razi@stblaw.com)>; Bohl, Lindsey C. <[Lindsey.Bohl@stblaw.com](mailto:Lindsey.Bohl@stblaw.com)>; David Meyer <[david@meyerlawdc.com](mailto:david@meyerlawdc.com)>; Joseph J. Matelis <[Matelisj@sullcrom.com](mailto:Matelisj@sullcrom.com)>; Dylan M. Aluise <[aluised@sullcrom.com](mailto:aluised@sullcrom.com)>; \*pdenton@steptoe.com <[pdenton@steptoe.com](mailto:pdenton@steptoe.com)>; \*tstrafford@steptoe.com <[tstrafford@steptoe.com](mailto:tstrafford@steptoe.com)>; Reilly, Matt <[matt.reilly@kirkland.com](mailto:matt.reilly@kirkland.com)>; Cunningham, Rich <[rich.cunningham@kirkland.com](mailto:rich.cunningham@kirkland.com)>

**Subject:** RE: FD 36873 - Request for Discovery Meet and Confer

[EXTERNAL]

Kevin, Matt –

We write regarding our efforts to move discovery forward.

Applicants announced the transaction six months ago. Applicants have received discovery requests from multiple parties. Yet, we still do not have any emails, board materials, or banker materials, among dozens of other categories of missing information. To date, we have only received modest productions from UP and NS, and those productions have mostly been lease agreements and contracts with regional or short line railroads. NS has not made a production in a month.

Additionally, on January 6, Applicants said they were willing to provide information on their custodial and non-custodial sources. We replied on January 9 and asked Applicants to describe the custodial and non-custodial sources used to respond to our requests. We have not received a response. Please confirm whether Applicants will provide additional information regarding the sources from which they collected materials and that they will do so this week.

Finally, we have not received any response to our January 9 email regarding Applicants' responses to Request No. 1 and Request No. 2 of BNSF's Second Set of Discovery Requests. Please confirm whether UP and NS intend to withhold any merger-related third-party analysis prepared for UP and NS's directors and officers, and please confirm whether UP and NS are representing that materials called for by Request No. 2 only appear in the public securities filings cited in UP and NS's responses.

Thanks,

McClain

**McClain Thompson**

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**KIRKLAND & ELLIS LLP**  
1301 Pennsylvania Ave., N.W.  
Washington, D.C. 20004  
T +1 202 389 5292  
M +1 917 545 6401

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[mcclain.thompson@kirkland.com](mailto:mcclain.thompson@kirkland.com)

---

**From:** Thompson, McClain

**Sent:** Friday, January 9, 2026 12:45 PM

**To:** 'Kelly, Kevin' <[Kkelly@cov.com](mailto:Kkelly@cov.com)>; Rosenthal, Michael <[mrosenthal@cov.com](mailto:mrosenthal@cov.com)>; \*[dludwin@cov.com](mailto:dludwin@cov.com)>  
<[dludwin@cov.com](mailto:dludwin@cov.com)>; Harrison, Caroline <[CHarrison@cov.com](mailto:CHarrison@cov.com)>; Korman, Marc <[mkorman@sidley.com](mailto:mkorman@sidley.com)>; Atkins,  
Raymond <[ratkins@sidley.com](mailto:ratkins@sidley.com)>; Warren, Matthew J. <[mjwarren@sidley.com](mailto:mjwarren@sidley.com)>

**Cc:** Donovan, Daniel T. <[ddonovan@kirkland.com](mailto:ddonovan@kirkland.com)>; McCarrick, T.J. <[tj.mccarrick@kirkland.com](mailto:tj.mccarrick@kirkland.com)>; Fanchiang, Eric  
<[EFanchiang@crowell.com](mailto:EFanchiang@crowell.com)>; van Houwelingen, Luke <[LVanHouwelingen@crowell.com](mailto:LVanHouwelingen@crowell.com)>; Enson, Eric  
<[EEnson@crowell.com](mailto:EEnson@crowell.com)>; \*[AEllis@stblaw.com2](mailto:AEllis@stblaw.com2)> <[AEllis@stblaw.com](mailto:AEllis@stblaw.com)>; Razi, Sara Y. <[Sara.Razi@stblaw.com](mailto:Sara.Razi@stblaw.com)>;  
Bohl, Lindsey C. <[Lindsey.Bohl@stblaw.com](mailto:Lindsey.Bohl@stblaw.com)>; David Meyer <[david@meyerlawdc.com](mailto:david@meyerlawdc.com)>; Joseph J. Matelis  
<[Matelisj@sullcrom.com](mailto:Matelisj@sullcrom.com)>; Dylan M. Aluise <[aluised@sullcrom.com](mailto:aluised@sullcrom.com)>; \*[pdenton@steptoe.com](mailto:pdenton@steptoe.com)>  
<[pdenton@steptoe.com](mailto:pdenton@steptoe.com)>; \*[tstrafford@steptoe.com](mailto:tstrafford@steptoe.com)> <[tstrafford@steptoe.com](mailto:tstrafford@steptoe.com)>; Reilly, Matt  
<[matt.reilly@kirkland.com](mailto:matt.reilly@kirkland.com)>; Cunningham, Rich <[rich.cunningham@kirkland.com](mailto:rich.cunningham@kirkland.com)>

**Subject:** RE: FD 36873 - Request for Discovery Meet and Confer

Counsel –

While we appreciate the response and additional information, Applicants' response confirms that UP and NS have not and do not intend to engage in the type and extent of discovery that is necessary for this proceeding, the transaction UP and NS have proposed, and what is at stake.

UP and NS have not agreed to provide basic materials relevant to any merger proceeding, including board and committee/subcommittee minutes, agendas, and presentations that concern the proposed transaction, its consequences, and alternatives to it. Nor have UP and NS committed to engaging in any custodial collections and email searches for a single request. There is a substantial amount of discovery that remains outstanding.

UP and NS's production of "hundreds of gigabytes" of data, such as traffic tapes, switching data, etc., misses the point. Virtually all of that data is required for production under the Board's rules in a case like this, and it is not tied to (or responsive to) many of BNSF's request for additional materials. Nor have UP and NS's discovery efforts been "exemplary," as the Board's orders and various clean-up efforts have made clear. For example, even though the Application was filed three weeks ago, UP and NS have still failed to produce 92 work papers and intermediate data sets. More to the point, preparing required data submissions does not in any way compensate for UP and NS's failure to move forward on other forms of discovery that are necessary for stakeholders to develop a full record and for the Board to make a fully informed decision about the proposed merger.

We respond to the specific points in your email below and intend to seek relief, including in light of the realities of the schedule Applicants have sought.

**Board of Director Materials and Banker/Financial/Advisor Documents.** Internal assessments of a merger, including relevant board materials, banker materials, and email communications, are regularly produced in merger proceedings. *See, e.g., FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1032 (D.C. Cir. 2008) (discussing emails regarding purpose of merger); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 25-26 (D.D.C. 2017) (noting internal assessments about competition were "ubiquitous" at trial). To help explain why, we noted that some of the requested materials are information that applicants are required to submit – as a baseline and without being asked – in a Hart-Scott-Rodino merger review to facilitate FTC and DOJ assessments. UP and NS's response—that "this proceeding is not governed by HSR review regulations"—misses the point. The reason board of director and third-party advisor materials must be disclosed in the HSR review process is because they are likely to show a merger's effect on competition, integration-related issues, and the achievability (or not) of proposed benefits. These are all issues that the Board must consider in this proceeding. The Board should not receive less than what other antitrust enforcers receive as part of their deal clearance review. Finally, UP and NS's suggestion that board and advisor materials are somehow not responsive to BNSF's First Set of Discovery Requests is meritless. Multiple requests plainly call for board and advisor materials. *See, e.g.,* BNSF First Set of Discovery Requests at Nos. 20-23. UP and NS's generic proposal of "considering appropriately narrowed requests" does not move the ball forward and fails to even offer a specific list of materials. We are at an impasse on this issue.

**Emails.** We do not agree that undefined "targeted collections" will result in complete or higher quality productions of information relevant to this proceeding. Consistent with other major merger matters, Applicants should have already collected and made a proposal, so the parties could negotiate a set of custodians and search terms—a conversation BNSF has been trying to start for months. UP and NS once again flip the burden to BNSF, stating "[t]o the extent BNSF contends that wholesale email collections are necessary to respond to a specific request for production," UP and NS "would like to understand BNSF's basis for that contention and discuss whether alternative collections would address BNSF's concerns." But UP and NS have not disclosed the details of their search or collection parameters to date or made any proposal. In any event, our requests clearly call for email correspondence. *See, e.g.,* BNSF First Set of Discovery Requests at Nos. 7, 8, 15, 17. More fundamentally, the parties' dispute on this issue is not about specific requests: UP and NS have refused to agree to search **any** custodial files for **any** request. In fact, UP and NS have not even begun email collection and

review (or if they have, they've refused to say so). Given UP and NS's failure to meaningfully engage, we are at an impasse on this issue.

**Custodial and Non-Custodial Sources.** If UP and NS are "willing to provide additional information regarding the sources from which they have collected materials," it is unclear why they waited months to do so. Please provide a description of the custodial and non-custodial sources used to respond to our requests, including BNSF's Second Set of Requests. Can you please get us that information on Monday?

Thanks,

McClain

### McClain Thompson

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#### KIRKLAND & ELLIS LLP

1301 Pennsylvania Ave., N.W.

Washington, D.C. 20004

T +1 202 389 5292

M +1 917 545 6401

---

[mcclain.thompson@kirkland.com](mailto:mcclain.thompson@kirkland.com)

---

**From:** Kelly, Kevin <[Kkelly@cov.com](mailto:Kkelly@cov.com)>

**Sent:** Tuesday, January 6, 2026 9:11 PM

**To:** Thompson, McClain <[mcclain.thompson@kirkland.com](mailto:mcclain.thompson@kirkland.com)>; Rosenthal, Michael <[mrosenthal@cov.com](mailto:mrosenthal@cov.com)>;  
\*dludwin@cov.com <[dludwin@cov.com](mailto:dludwin@cov.com)>; Harrison, Caroline <[CHarrison@cov.com](mailto:CHarrison@cov.com)>; Korman, Marc  
<[mkorman@sidley.com](mailto:mkorman@sidley.com)>; Atkins, Raymond <[ratkins@sidley.com](mailto:ratkins@sidley.com)>; Warren, Matthew J. <[mjwarren@sidley.com](mailto:mjwarren@sidley.com)>  
**Cc:** Donovan, Daniel T. <[ddonovan@kirkland.com](mailto:ddonovan@kirkland.com)>; McCarrick, T.J. <[tj.mccarrick@kirkland.com](mailto:tj.mccarrick@kirkland.com)>; Fanchiang, Eric  
<[EFanchiang@crowell.com](mailto:EFanchiang@crowell.com)>; van Houwelingen, Luke <[LVanHouwelingen@crowell.com](mailto:LVanHouwelingen@crowell.com)>; Enson, Eric  
<[EEenson@crowell.com](mailto:EEenson@crowell.com)>; \*AEllis@stblaw.com2 <[AEllis@stblaw.com](mailto:AEllis@stblaw.com)>; Razi, Sara Y. <[Sara.Razi@stblaw.com](mailto:Sara.Razi@stblaw.com)>;  
Bohl, Lindsey C. <[Lindsey.Bohl@stblaw.com](mailto:Lindsey.Bohl@stblaw.com)>; David Meyer <[david@meyerlawdc.com](mailto:david@meyerlawdc.com)>; Joseph J. Matelis  
<[Matelisj@sullcrom.com](mailto:Matelisj@sullcrom.com)>; Dylan M. Aluisse <[aluised@sullcrom.com](mailto:aluised@sullcrom.com)>; \*pdenton@steptoe.com  
<[pdenton@steptoe.com](mailto:pdenton@steptoe.com)>; \*tstrafford@steptoe.com <[tstrafford@steptoe.com](mailto:tstrafford@steptoe.com)>; Reilly, Matt  
<[matt.reilly@kirkland.com](mailto:matt.reilly@kirkland.com)>; Cunningham, Rich <[rich.cunningham@kirkland.com](mailto:rich.cunningham@kirkland.com)>

**Subject:** RE: FD 36873 - Request for Discovery Meet and Confer

McClain,

I write to memorialize Applicants' positions with respect to the items you raised in your December 28 email and that we discussed on our December 30 call. Please let me know if you have any questions or would like to discuss further.

Before addressing the specific issues raised in your email, I will reiterate two overarching points:

- First, contrary to BNSF's assertions, Applicants' discovery efforts at this early stage in the proceeding are both significant and unprecedented in STB merger proceedings. Although Applicants submitted their Application to the STB less than three weeks ago, they have already produced or otherwise made available **hundreds of gigabytes** of expansive data sets, agreements, workpapers, and other documents that are at the core of STB proceedings. These materials include, but are not limited to:
  - 100% Traffic Tapes
  - System-Wide Car and Train Event Data
  - Reciprocal Switch Data

- Interchange Volume Data
- Intermodal Train Schedules
- Agreements containing Interchange Commitments
- Trackage Rights and Haulage Rights Agreements
- Workpapers supporting the Application

On our call, you repeatedly asserted that Applicants' efforts were insufficient because they fell short of what you would expect an applicant to disclose in a Hart-Scott-Rodino ("HSR") merger review. But this proceeding is not governed by HSR review regulations. BNSF's role in this proceeding (as a competing railroad) is not analogous to the role that the FTC and DOJ play in HSR reviews. And any evaluation of Applicants' discovery efforts must be made in reference to STB regulations and based on an understanding of the discovery materials that are core to STB proceedings. Judged by this standard, Applicants' discovery efforts have been exemplary.

- Second, any discussion of the scope of discovery needs to be tied to BNSF's specific discovery requests and Applicants' responses and objections to those requests. Applicants' discovery obligations are born from specific requests and limited by Applicants' responses and valid objections to those requests. BNSF's effort to manufacture disputes regarding the overall scope of email collections unmoored from its actual requests is counterproductive, especially at this point in the proceedings, when most of BNSF's requests were served so recently that Applicants' responses were not due until a week after our December 30 call. Nonetheless, as we have previously offered, if there are specific requests and responses or objections that BNSF would like to discuss, including Applicants' forthcoming responses and objections, we remain willing to engage with you on the appropriateness of the requested discovery and the reasonable scope of materials that Applicants are required to produce in response.

As for the specific issues raised in your email and discussed on our call:

- **Emails.** Applicants timely responded and objected to BNSF's 1<sup>st</sup> Set of Discovery Requests. Consistent with their responses and objections, Applicants have been conducting reasonable searches to collect responsive materials and make rolling productions. It is Applicants' position that wholesale collections of custodial emails are not necessary to conduct a reasonable search for the responsive materials that Applicants have agreed to produce. Instead, targeted collections of responsive materials are both more efficient for Applicants to conduct and result in higher quality productions of materials that are relevant to this proceeding. To the extent that BNSF contends that wholesale email collections are necessary to respond to a specific request for production, Applicants would like to understand BNSF's basis for that contention and discuss whether alternative collections would address BNSF's concerns.
- **Custodial and Non-Custodial Sources.** Applicants are willing to provide additional information regarding the sources from which they have collected responsive materials. As we noted on our call, the source of some of the produced materials is self-evident. To the extent BNSF has questions about other materials, Applicants are willing to provide additional information on sourcing.
- **Board of Director Materials and Banker/Financial Documents.** I asked you to clarify which of BNSF's requests seek these materials (observing that the deadline for Applicants to respond to the requests that appeared to seek these materials had not yet passed) and to explain why these materials are relevant to the Board's evaluation of the Application. You did not identify which specific requests were seeking these materials and explained generally that BNSF believed the materials were relevant to evaluating whether the merger will be in the public interest, enhance competition, or is necessary to achieve benefits. Based on the limited explanation provided, Applicants remain skeptical that the requested board of director materials and banker/financial

documents are necessary for the Surface Transportation Board's evaluation of the Proposed Transaction, especially considering the information provided in the Application and publicly available in Applicants' SEC filings regarding the merger. Nonetheless, Applicants remain open to considering appropriately narrowed requests that are directly tied to the factors the Board must consider in evaluating the Proposed Transaction.

- **Substantial Completion.** As I explained on our call, Applicants are not in a position to forecast when they will be substantially complete with document productions in this proceeding because Applicants are still receiving and responding to discovery requests, including BNSF's 2<sup>nd</sup> Set of Discovery Requests, and no procedural schedule has been set by the Board. Nonetheless, Applicants have been working diligently to produce responsive materials including prioritizing the production of key data sets requested by the parties.

Best,

Kevin

### Kevin Kelly

Covington & Burling LLP  
One CityCenter, 850 Tenth Street, NW  
Washington, DC 20001-4956  
T +1 202 662 5613 | [kkelly@cov.com](mailto:kkelly@cov.com)  
[www.cov.com](http://www.cov.com)

## COVINGTON

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**From:** Thompson, McClain <[mcclain.thompson@kirkland.com](mailto:mcclain.thompson@kirkland.com)>

**Sent:** Tuesday, December 30, 2025 6:11 AM

**To:** Kelly, Kevin <[Kkelly@cov.com](mailto:Kkelly@cov.com)>; Rosenthal, Michael <[mrosenthal@cov.com](mailto:mrosenthal@cov.com)>; Ludwin, Derek <[dludwin@cov.com](mailto:dludwin@cov.com)>; Harrison, Caroline <[CHarrison@cov.com](mailto:CHarrison@cov.com)>; Korman, Marc <[mkorman@sidley.com](mailto:mkorman@sidley.com)>; Atkins, Raymond <[ratkins@sidley.com](mailto:ratkins@sidley.com)>; Warren, Matthew J. <[mjwarren@sidley.com](mailto:mjwarren@sidley.com)>

**Cc:** Donovan, Daniel T. <[ddonovan@kirkland.com](mailto:ddonovan@kirkland.com)>; McCarrick, T.J. <[tj.mccarrick@kirkland.com](mailto:tj.mccarrick@kirkland.com)>; Fanchiang, Eric <[EFanchiang@crowell.com](mailto:EFanchiang@crowell.com)>; van Houwelingen, Luke <[LVanHouwelingen@crowell.com](mailto:LVanHouwelingen@crowell.com)>; Enson, Eric <[EEnson@crowell.com](mailto:EEnson@crowell.com)>; \*AEllis@stblaw.com2 <[AEllis@stblaw.com](mailto:AEllis@stblaw.com)>; Razi, Sara Y. <[Sara.Razi@stblaw.com](mailto:Sara.Razi@stblaw.com)>; Bohl, Lindsey C. <[Lindsey.Bohl@stblaw.com](mailto:Lindsey.Bohl@stblaw.com)>; David Meyer <[david@meyerlawdc.com](mailto:david@meyerlawdc.com)>; Joseph J. Matelis <[Matelisj@sullcrom.com](mailto:Matelisj@sullcrom.com)>; Dylan M. Aluise <[aluised@sullcrom.com](mailto:aluised@sullcrom.com)>; \*pdenton@steptoe.com <[pdenton@steptoe.com](mailto:pdenton@steptoe.com)>; \*tstrafford@steptoe.com <[tstrafford@steptoe.com](mailto:tstrafford@steptoe.com)>; Reilly, Matt <[matt.reilly@kirkland.com](mailto:matt.reilly@kirkland.com)>; Cunningham, Rich <[rich.cunningham@kirkland.com](mailto:rich.cunningham@kirkland.com)>

**Subject:** RE: FD 36873 - Request for Discovery Meet and Confer

**[EXTERNAL]**

Thank you. I sent a Zoom for 3 PM ET to everyone on this thread, but defer on who plans to join.

### McClain Thompson

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**KIRKLAND & ELLIS LLP**  
1301 Pennsylvania Ave., N.W.  
Washington, D.C. 20004  
T +1 202 389 5292  
M +1 917 545 6401

---

[mcclain.thompson@kirkland.com](mailto:mcclain.thompson@kirkland.com)

---

**From:** Kelly, Kevin <[Kkelly@cov.com](mailto:Kkelly@cov.com)>  
**Sent:** Monday, December 29, 2025 10:13 PM  
**To:** Thompson, McClain <[mcclain.thompson@kirkland.com](mailto:mcclain.thompson@kirkland.com)>; Rosenthal, Michael <[mrosenthal@cov.com](mailto:mrosenthal@cov.com)>;  
<[dludwin@cov.com](mailto:dludwin@cov.com)> <[dludwin@cov.com](mailto:dludwin@cov.com)>; Harrison, Caroline <[CHarrison@cov.com](mailto:CHarrison@cov.com)>; Korman, Marc  
<[mkorman@sidley.com](mailto:mkorman@sidley.com)>; Atkins, Raymond <[ratkins@sidley.com](mailto:ratkins@sidley.com)>; Warren, Matthew J. <[mjwarren@sidley.com](mailto:mjwarren@sidley.com)>  
**Cc:** Donovan, Daniel T. <[ddonovan@kirkland.com](mailto:ddonovan@kirkland.com)>; McCarrick, T.J. <[tj.mccarrick@kirkland.com](mailto:tj.mccarrick@kirkland.com)>; Fanchiang, Eric  
<[EFanchiang@crowell.com](mailto:EFanchiang@crowell.com)>; van Houwelingen, Luke <[LVanHouwelingen@crowell.com](mailto:LVanHouwelingen@crowell.com)>; Enson, Eric  
<[EEnson@crowell.com](mailto:EEnson@crowell.com)>; \*[AEllis@stblaw.com2](mailto:AEllis@stblaw.com2) <[AEllis@stblaw.com](mailto:AEllis@stblaw.com)>; Razi, Sara Y. <[Sara.Razi@stblaw.com](mailto:Sara.Razi@stblaw.com)>;  
Bohl, Lindsey C. <[Lindsey.Bohl@stblaw.com](mailto:Lindsey.Bohl@stblaw.com)>; David Meyer <[david@meyerlawdc.com](mailto:david@meyerlawdc.com)>; Joseph J. Matelis  
<[Matelisj@sullcrom.com](mailto:Matelisj@sullcrom.com)>; Dylan M. Aluise <[aluised@sullcrom.com](mailto:aluised@sullcrom.com)>; \*[pdenton@steptoe.com](mailto:pdenton@steptoe.com)  
<[pdenton@steptoe.com](mailto:pdenton@steptoe.com)>; \*[tstrafford@steptoe.com](mailto:tstrafford@steptoe.com) <[tstrafford@steptoe.com](mailto:tstrafford@steptoe.com)>; Reilly, Matt  
<[matt.reilly@kirkland.com](mailto:matt.reilly@kirkland.com)>; Cunningham, Rich <[rich.cunningham@kirkland.com](mailto:rich.cunningham@kirkland.com)>  
**Subject:** RE: FD 36873 - Request for Discovery Meet and Confer

Hi McClain,

We're available to discuss at 3 PM ET tomorrow. Let me know if that time works for you.

Best,

Kevin

### Kevin Kelly

Covington & Burling LLP  
One CityCenter, 850 Tenth Street, NW  
Washington, DC 20001-4956  
T +1 202 662 5613 | [kkelly@cov.com](mailto:kkelly@cov.com)  
[www.cov.com](http://www.cov.com)

## COVINGTON

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**From:** Thompson, McClain <[mcclain.thompson@kirkland.com](mailto:mcclain.thompson@kirkland.com)>  
**Sent:** Sunday, December 28, 2025 4:22 PM  
**To:** Kelly, Kevin <[Kkelly@cov.com](mailto:Kkelly@cov.com)>; Rosenthal, Michael <[mrosenthal@cov.com](mailto:mrosenthal@cov.com)>; Ludwin, Derek  
<[dludwin@cov.com](mailto:dludwin@cov.com)>; Harrison, Caroline <[CHarrison@cov.com](mailto:CHarrison@cov.com)>; Korman, Marc <[mkorman@sidley.com](mailto:mkorman@sidley.com)>; Atkins,  
Raymond <[ratkins@sidley.com](mailto:ratkins@sidley.com)>; Warren, Matthew J. <[mjwarren@sidley.com](mailto:mjwarren@sidley.com)>  
**Cc:** Donovan, Daniel T. <[ddonovan@kirkland.com](mailto:ddonovan@kirkland.com)>; McCarrick, T.J. <[tj.mccarrick@kirkland.com](mailto:tj.mccarrick@kirkland.com)>; Fanchiang, Eric  
<[EFanchiang@crowell.com](mailto:EFanchiang@crowell.com)>; van Houwelingen, Luke <[LVanHouwelingen@crowell.com](mailto:LVanHouwelingen@crowell.com)>; Enson, Eric  
<[EEnson@crowell.com](mailto:EEnson@crowell.com)>; \*[AEllis@stblaw.com2](mailto:AEllis@stblaw.com2) <[AEllis@stblaw.com](mailto:AEllis@stblaw.com)>; Razi, Sara Y. <[Sara.Razi@stblaw.com](mailto:Sara.Razi@stblaw.com)>;  
Bohl, Lindsey C. <[Lindsey.Bohl@stblaw.com](mailto:Lindsey.Bohl@stblaw.com)>; David Meyer <[david@meyerlawdc.com](mailto:david@meyerlawdc.com)>; Joseph J. Matelis  
<[Matelisj@sullcrom.com](mailto:Matelisj@sullcrom.com)>; Dylan M. Aluise <[aluised@sullcrom.com](mailto:aluised@sullcrom.com)>; \*[pdenton@steptoe.com](mailto:pdenton@steptoe.com)  
<[pdenton@steptoe.com](mailto:pdenton@steptoe.com)>; \*[tstrafford@steptoe.com](mailto:tstrafford@steptoe.com) <[tstrafford@steptoe.com](mailto:tstrafford@steptoe.com)>; Reilly, Matt  
<[matt.reilly@kirkland.com](mailto:matt.reilly@kirkland.com)>; Cunningham, Rich <[rich.cunningham@kirkland.com](mailto:rich.cunningham@kirkland.com)>  
**Subject:** FD 36873 - Request for Discovery Meet and Confer

**[EXTERNAL]**

Covington and Sidley Teams –

Can you please let us know your availability tomorrow or Tuesday to meet-and-confer regarding the discovery issues identified below? While we will write separately about the status of productions in response to certain of our pending requests, we need near-term clarity on the following issues to help frame the discovery process.

1. **Emails.** Are UP and NS searching – and do UP and NS plan to produce – email in this proceeding? If yes, then we can negotiate parameters. If not, then we'll need to address with the ALJ.
2. **Custodial and Non-Custodial Sources.** Are UP and NS willing to identify and disclose the custodians, custodial sources, and non-custodial sources that UP and NS are searching to identify case-relevant information?
3. **Board Materials.** Are UP and NS willing to search and produce board materials (agendas, presentations, minutes) that relate to the Proposed Transaction, competition in the rail industry, consolidation in the rail industry, UP's position in the rail industry, NS's position in the rail industry, UP's growth, NS's growth, and/or alternatives to the Proposed Transaction?
4. **Banker / Financial Decks.** Are UP and NS willing to search and produce information and analyses from their bankers, economists, and financial advisors that relate to the Proposed Transaction, competition in the rail industry, consolidation in the rail industry, UP's position in the rail industry, NS's position in the rail industry, UP's growth, NS's growth, and/or alternatives to the Proposed Transaction? This would include the studies, analyses, and reports that UP and NS considered and/or relied upon in developing and evaluating the merger proposal and alternatives to it.
5. **Substantial Completion.** Although UP and NS announced the transaction more than 150 days ago, they have produced just 1,653 documents. Much of the productions to date concern lease agreements and contracts with regional or short line railroads – not the core materials that we will need to test the contentions in the Application. Substantial productions remain. We need those productions before depositions can begin, and we need to complete depositions before our comments are due. Let's please discuss what Applicants have in mind to complete their rolling productions. We are open to a phased approach where productions relevant to particular witnesses are complete before others (allowing for those witnesses' depositions to proceed before others).

Thanks,

McClain

### McClain Thompson

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#### KIRKLAND & ELLIS LLP

1301 Pennsylvania Ave., N.W.

Washington, D.C. 20004

**T** +1 202 389 5292

**M** +1 917 545 6401

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[mcclain.thompson@kirkland.com](mailto:mcclain.thompson@kirkland.com)

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