

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Chief Counsel
February 23, 2026
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Public Record

DOCKET NO. FD 36873

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

**BNSF'S APPEAL OF ALJ'S ORDER
DENYING DISCOVERY UNTIL AN APPLICATION IS ACCEPTED
(BNSF-18)**

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February 23, 2026

This appeal seeks review of an ALJ order that all but blocks discovery in Class I merger proceedings before an application is *accepted*. The ruling is contrary to Board rules, Board practice, and Board precedent. The ALJ ruled on a ground that UP and NS did not press in their brief. The ruling is also contrary to the fact that the Board appointed an ALJ when it opened this docket in August 2025; the Board made the ALJ’s appointment effective immediately (not upon the filing or acceptance of an application). An order that essentially blocks discovery until Memorial Day 2026 cannot be the process that the Board wanted. Unless overturned, the ruling will impair the Board’s ability to develop a record and supervise a fair process.

* * * * *

The ALJ denied BNSF’s motion to compel ordinary course documents from UP and NS on the basis that the motion is premature until an application is *accepted*. Respectfully, the ALJ erred, and that error creates process issues for all stakeholders interested in developing a record about a merger that UP and NS say will “shape the next hundred years of American railroading.” *See* App. Vol. 1 at 13-14, 304, 309.

Given the multi-month delay that the ALJ’s ruling will cause—and given that UP and NS are pressing for an expedited procedural schedule—the error amounts to manifest injustice. Unless overturned, the ALJ’s order will delay discovery. That delay and compression of the schedule will fundamentally undermine the process. If not overturned, the ruling will make it impossible for the Board to develop a record on which it could judge the most significant proceeding in its history.

The Board should reverse the ALJ's order and rule that discovery is open and should continue. To keep the process moving forward in a timely way, the Board should remand for the ALJ to promptly rule on the merits of BNSF's motion to compel.

BACKGROUND

On July 30, 2025, UP and NS notified the Board of their intent to file a merger application. The Board opened a proceeding, assigned a docket number, and ordered Applicants to submit certain documents to facilitate the Board's review of the transaction. This included 100% of UP and NS traffic tapes from 2019 to 2024, along with timetables, station lists, track charts, GIS maps, joint facilities, and interchange commitments. *See* Decision No. 2; Decision No. 3.

On August 28, 2025, anticipating that discovery would commence before an application was filed, the Board assigned ALJ Soulikias "to entertain and rule upon discovery matters and to resolve initially all disputes concerning discovery in this proceeding." *See* Decision No. 3. The appointment was not conditional on a future event; it was effective immediately. *See id.*

To progress discovery, on October 1, 2025, BNSF served its first set of discovery requests. These requests called for the production of ordinary course documents that bear on the merger and test contentions that UP and NS made regarding the merger's benefits and harms. Among other things, BNSF sought (i) documents in UP's and NS's possession (including strategy plans or competitive assessments) that show or concern the impact of the proposed merger on synergies and competition, and

(ii) analyses and reports that UP relied upon in making the merger proposal to NS. UP and NS never objected that this discovery amounted to “improper” pre-application discovery. Rather, they responded on the merits (although in a completely deficient way, which prompted the BNSF motion to compel). Indeed, UP and NS used their participation in discovery to advocate for a shortened procedural schedule. *See* UP-7/NS-7 at 3 (“Consistent with its overall approach to addressing applications as efficiently as possible, the Board has already appointed an Administrative Law Judge, and Applicants have already begun responding to discovery requests[.]”).

On December 19, 2025, Applicants filed their Application. While the Application was pending, BNSF moved to compel UP and NS to satisfy basic discovery duties. Specifically, BNSF sought ordinary course documents (like board and banker materials) as well as merger-related documents on topics that are crucial to the Board’s review, such as alternatives to the merger and Applicants’ efforts to improve service and grow traffic through interline collaborations.

On January 16, 2026, the Board found the Application incomplete and said Applicants may file a “revised” application by June 22, 2026. *See* Decision No. 9.

On February 11, 2026, the ALJ denied BNSF’s motion to compel on timing grounds—without reaching scope. *See* Decision No. 10 (“Decision”). The Decision ruled that party-led discovery is “premature” until a revised merger application is accepted by the Board and that only Board-led data requests—such as traffic tapes and certain operational information—must be produced during a “pre-application” stage. *See id.* at 3 (citing *Major Rail Consol. Procs.*, 5 S.T.B. 539, 591 (2001)).

On February 17, 2026, Applicants filed a letter informing the Board that they anticipate filing a revised application on April 30, 2026. Assuming Applicants do so, the Board's next completion decision will likely come in May 2026. Under the Decision, discovery of ordinary course documents and the like cannot be compelled until that date—saying nothing of the time needed to tee up a motion to compel.

The compression in the schedule then compounds: under the Board's proposed schedule, the parties would then likely only have about 90 days to conduct both written discovery and depositions prior to filing their comments, requests for conditions, and responsive applications. *See* Decision No. 3 at 3. The F + 120 deadline is the primary opportunity by which stakeholders must submit their evidence. The ALJ's ruling—combined with the realities of the schedule in the biggest merger in the industry's history—would leave insufficient time for stakeholders to develop the record. It is why BNSF and others have been trying for months to advance the discovery process. And it is why BNSF files this appeal.

While UP and NS have said they intend to continue to participate in discovery notwithstanding the ALJ's ruling—*see* Ex. 1, Feb. 20, 2026 K. Kelly Email to M. Thompson—the discovery process is not moving forward. Applicants have produced no board materials, no strategic plans, no growth forecasts, and none of their employees' communications about actual integration plans (or any other subject). UP and NS continue to shield ordinary course documents, as well as their internal assessments and conversations about merger-specific issues—because, they say, the process should be “application-centric.” The sweeping, “trust us” approach that UP

and NS have adopted is unprecedented. *See* CPKC-12 (distinguishing Applicants’ authorities for an “application-centric” approach).

This appeal does not ask the Board to decide whether UP and NS’s “application-centric” approach to discovery is the right one (as the ALJ did not reach that question below). But, the stridency of Applicants’ approach underscores the need for the Board to reverse the ALJ’s timing-based order, so that the scope issue can be promptly decided. If permitted, Applicants’ approach will deprive the Board of a full record on which to consider the to-be re-filed application.

LEGAL STANDARD

This appeal is filed pursuant to 49 C.F.R. § 1115.1, seeking review of a decision issued by an ALJ acting under delegated authority as provided by 49 C.F.R. § 1011.6. As such, it is timely, filed within 10 days of the date of the ALJ’s action. *See id.* §§ 1115.1(c) (providing for 10 days to appeal), 1011.6(b) (providing for 10 days to appeal), and § 1104.7(a) (rolling forward to next business day where deadline falls on weekends). The Decision must be overturned if the Board finds that there are “exceptional circumstances to correct a clear error in judgment or to prevent manifest injustice.” *Id.* § 1115.1(c). Exceptional circumstances include a lack of authority to adjudicate an issue or misuse of legal precedent. *See, e.g., Delaware & Hudson Ry. Co. Unilateral Joint Rate Cancellation*, 2 I.C.C.2d 631 (I.C.C. Aug. 14, 1986) (granting appeal of the Commission’s acceptance of rate surcharges where the action disregarded the statute’s plain language).

ARGUMENT

Discovery begins when a proceeding is open—as was and remains the case here. Even if party-led discovery could not begin “pre-application” (which is not the law), this proceeding is long past that stage: an application has been filed, and a *revised* application will be filed. The Decision is also contrary to recent Board precedent, and it impairs the development of a record by allowing UP and NS to evade discovery until it will be too late.

A. The Decision Misapplies Board Precedent.

The Board should reverse the denial of BNSF’s motion to compel because it is premised on mistaken notions that (1) pre-application discovery is limited to Board-mandated discovery and regulatory requirements, and (2) this proceeding is currently in a “pre-application phase.” *See* Decision No. 10 at 3–4.

First, the Decision starts from the mistaken premise that pre-application, party-led discovery is inappropriate. But Board precedent does ***not*** categorically prohibit pre-application discovery. *See, e.g., Navajo Transitional Energy Co., LLC v. BNSF Ry. Co.*, NOR 42179, slip op. at 4 (STB served Aug. 7, 2023) (“[T]he Board’s regulations do not prevent parties from starting discovery before a procedural schedule is issued.”). The Board has “permitted discovery after the initiation of a proceeding under 49 U.S.C. § 11323 but before the filing of an application” in past cases. *Norfolk S. Corp. & Norfolk S. Railway Co.—Acquisition of Control—Norfolk & Portsmouth Belt Line R.R. Co.*, Decision No. 3, FD 36836, slip op. at 2 & n.2; *see also* 49 C.F.R. § 1114.21(a)).

For example, in *Canadian Pac. Ry.—Control—Kan. City S.*, CP filed on March 22, 2021 a notice of intent to file a merger application. FD 36500, slip op. at 4 (STB served Aug. 2, 2021). On May 27, 2021, CP filed a petition asking the Board, among other things, to confirm that Kansas City Southern was obligated to provide CP with information CP needed to complete its application. *See id.* at 3. In a decision served on August 2, 2021, the Board confirmed that CP could “seek materials from [Kansas City Southern] through the discovery process in this proceeding that [were] relevant to its preparation of an application for authority to acquire control of [Kansas City Southern] and [could] do so now without first filing an application in this docket or an inconsistent application in Docket No. FD 36514.” *Id.* at 4. Similarly in *CSX Corp. & CSX Transp., Inc.—Control & Merger—Pan Am Systems, Inc.*, discovery began before an initial application was filed. *See* FD 36472. And in *Norfolk S. Corp. et. al—Acquisition of Control—Norfolk & Portsmouth Belt Line R.R. Co.*, when the applicants sought to stay discovery because an application had not been filed, the Board denied the applicants’ request to block discovery; the Board stated that existing precedent showed discovery could properly begin as of the publication of a notice of intent. Decision No. 5, FD 36836 (STB served June 13, 2025).

Respectfully, the Decision here cannot be squared with those rulings, which flow naturally from the language of the regulations governing discovery. Section 1114.21(a)—titled “[w]hen discovery is available”—provides that “[p]arties may obtain discovery . . . regarding any matter not privileged, which is relevant to the subject matter involved in a **proceeding**.” Here, that process was initiated in August

2025, when the Board acknowledged UP and NS’s pre-filing notification and assigned an ALJ to address discovery issues (effective immediately). *See* Decision No. 3. Pursuant to the Board’s rules, BNSF was entitled to use available “discovery procedures without filing a petition and obtaining prior Board approval,” *see* § 1114.21(b), and to do so “in any sequence,” *see id.* § 1114.21(d).

Nothing in the rulemakings that the ALJ cited supports an all-but-unqualified ban on pre-application, party-led discovery. Citing the Major Merger Rules, the ALJ contrasted “[e]arly access to critical traffic data” with “broad pre-application discovery” that has the potential to “impede . . . prospective applicants in the preparation of their application.” Decision No. 10 at 3 (quoting 5 S.T.B. at 591). But that is not a concern here. BNSF’s tailored requests would not qualify as “broad pre-application discovery requests.” Indeed, BNSF’s motion seeks (i) targeted, off-the-shelf materials that are directly relevant to the merger and (ii) assistance to force UP and NS to ***begin*** a process for email collections from relevant custodians directly involved in the merger process. BNSF’s requests are designed to avoid selective response—they prevent UP and NS from producing documents that fit their purposes but obscure the actual views of UP and NS executives regarding topics like the benefits and harms of the merger, as well as alternatives to it.

Second, BNSF’s requests do not constitute “pre-application” discovery. This proceeding is not in a *pre*-application phase. BNSF’s motion to compel was filed while the Application was pending, and the requested relief directly pertained to the Application. Today, the proceeding remains open, and a *revised* application will be

filed. Tellingly, UP and NS also understood that party-led discovery called for more than just traffic tapes, as they trumpeted their participation in that process to secure a shorter schedule. *See* UP-7/NS-7 (claiming that UP and NS were responding to discovery requests from interested parties, not just producing materials ordered by the Board).

Third, the materials that BNSF seeks—board materials, banker analyses, and targeted emails on topics central to the Board’s merger review—are key categories of relevant information that will test the contentions that UP and NS have made. The requests fall comfortably within the scope of permissible discovery, as “the Board’s regulations provide for broad discovery.” *Omaha Pub. Power Dist. v. Union Pac. R.R. Co.*, NOR 42173, slip op. at 3 (STB served Nov. 18, 2022) (affirming an ALJ’s decision to grant a motion to compel discovery); *see also Canadian Pac. Ry.*, FD 36500, slip op. at 4 (acknowledging authority to seek material relevant to subject matter of the proceeding under 49 C.F.R. § 1114.21 and interpreting the scope of relevance “[b]roadly”).

B. The Decision Rewards UP and NS’s Discovery Evasion and Unduly Prejudices the Process.

Although they have had months to get ahead of their discovery obligations, UP and NS have systematically stalled and obstructed discovery. They have produced little more than what is required by regulation; refused to collect emails (or even confirm whether they are collecting emails); and have yet to produce the limited board and banker materials they recently committed to producing. The ALJ’s decision

would allow Applicants to dictate the pace and scope of discovery while leaving BNSF and other stakeholders powerless to seek relief until it is too late.

Unless the Board corrects course, the Applicants' strategy—paired with the ALJ's ruling—will cause lasting damage to the schedule and process. The earliest date that BNSF could potentially renew its motion—let alone actually receive any documents—is likely June 2026. *See* Decision No. 10 at 3. If the Board accepts the application, requests for conditions and opposition comments would be due August 31, 2026 (F + 120). *See* Decision No. 3 at 3. That compresses the window to raise and resolve discovery disputes—and then receive the productions and complete depositions—to less than three months. And everyone will have more work to do, because if UP and NS adhere to the guidance in the Board's rejection decision, UP and NS will present expanded and more detailed analyses in their second attempt.

* * * * *

UP and NS have had the luxury of time preparing their applications and marshaling their evidence, while commenting parties will have only weeks to conduct meaningful discovery and build their cases. That cannot be the process the Board envisioned for its consideration of a transaction that will change the industry for the next 100 years. Allowing Applicants to self-select modest productions *now* only further delays a final resolution *later*—benefiting no one.

UP and NS's approach undermines the fairness and efficiency of the process. That approach, paired with the practical realities of the Decision, compresses the

discovery schedule, prejudices BNSF's ability to prepare its case, and threatens the Board's ability to conduct a thorough review.

CONCLUSION

The Board should reverse the denial of BNSF's motion to compel; rule that discovery is open and should continue; and remand for the ALJ to promptly rule on the merits of BNSF's motion to compel.

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Respectfully submitted,

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Counsel for BNSF Railway Company

Dated: February 23, 2026

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Subject: RE: FD 36873 - Request for Meet and Confer on CSXT's Document Requests
Date: Friday, February 20, 2026 4:05:52 PM
Attachments: [image001.png](#)

This message is from an EXTERNAL SENDER

Be cautious, particularly with links and attachments.

McClain,

I was traveling outside the office this week, but will follow up separately with times when we are available to meet and confer next week.

While Applicants remain committed to voluntarily engaging with BNSF (and other parties) regarding the appropriate scope of discovery in this proceeding, we are concerned that you are not taking seriously the holding of the Board in Decision No. 10. Specifically, your unsupported assertion that the “vast majority of discovery has not been provided” assumes a level of pre-application discovery that the Board has clearly stated is not required under the Major Merger Rules. Contrary to your assertions, Applicants have already provided *all* of the pre-application discovery that they are required to provide, and have also produced enormous volumes of additional discovery on a voluntary basis.

Nonetheless, we are hopeful that by continuing to engage in the discovery process prior to submission of a revised application, Applicants and the other parties will be able to resolve many discovery issues well before the post-application discovery process actually commences.

Regarding the board and banker materials, I informed you on our last call that I could not provide a date of production because we were still engaged in the process of collecting and reviewing potentially responsive materials. I can confirm that we have *not* paused our review of these materials pending the filing of the revised application, and that review is ongoing.

Best,

Kevin

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Sent: Monday, February 16, 2026 11:16 AM

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Subject: RE: FD 36873 - Request for Meet and Confer on CSXT's Document Requests

[EXTERNAL]

Kevin, Matt –

When are UP and NS available to reschedule the meet and confer that UP/ NS took down last week?

While there is still time, we should continue discussions regarding our pending requests and see where compromises can be reached and where we're at impasse on others. We expect productions will continue in parallel with those discussions; the vast majority of discovery has not been provided.

When will UP and NS be producing the board and banker materials that they promised were forthcoming last week (NS) and shortly thereafter (UP)?

If Applicants' position is that discovery (not only productions, but also efforts to find compromises or run searches) is on pause until Applicants re-file their application, please just let us know.

Thanks,

McClain

McClain Thompson

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Subject: RE: FD 36873 - Request for Meet and Confer on CSXT's Document Requests

Kevin – We should keep the call. The ALJ's denial without prejudice changes nothing about the meet-and-confer process or the various follow ups on which we need answers from UP and NS. The decision was purely about timing, not scope. We need to keep the process moving, so there is not further delay. Thanks, McClain

McClain Thompson

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Subject: RE: FD 36873 - Request for Meet and Confer on CSXT's Document Requests

McClain,

We need to reschedule this afternoon's meet and confer. We are digesting the decision that the Board just issued denying BNSF's motion to compel and will need to confer with our clients before we reconvene.

Best,

Kevin

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Subject: RE: FD 36873 - Request for Meet and Confer on CSXT's Document Requests

[EXTERNAL]

Thanks. For BNSF Set 1 and Set 2, I'll send an invite for 2 ET on Wednesday.

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Subject: RE: FD 36873 - Request for Meet and Confer on CSXT's Document Requests

McClain, we could do:

- Wednesday – 2-3:30 ET
- Thursday – 2:30-3:30 ET

Eric, I'll circle back with you next week.

Kevin Kelly

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[EXTERNAL]

Matt, Kevin – What are some good windows for you next week, and then we can schedule around that? Thank you, McClain

McClain Thompson

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Subject: FD 36873 - Request for Meet and Confer on CSXT's Document Requests

Counsel,

As I mentioned on yesterday's call, we would like to meet and confer on Applicants' Responses and Objections to CSXT's document requests. It's probably most efficient to do so after we complete the meet and confers on BNSF's specific requests, but we would like to connect shortly thereafter. Once we get dates for the BNSF meet and confers, please let me know what works for you in terms of scheduling. Thanks.

Eric

Eric Enson

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing *Appeal of the ALJ's Order Denying Discovery Until an Application is Accepted* 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

February 23, 2026