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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

**APPLICANTS' REPLY TO BNSF RAILWAY COMPANY'S
INTERLOCUTORY APPEAL OF
ALJ'S ORDER DENYING MOTION TO COMPEL**

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Applicants¹ oppose BNSF’s February 23, 2026, Interlocutory Appeal (the “Appeal”) of Decision No. 10 (served February 11, 2026), which denied BNSF’s January 9, 2026, Motion to Compel Discovery (the “Motion”). The Board should deny BNSF’s Appeal because it is untimely under 49 C.F.R. § 1115.9(b); it fails to address, let alone satisfy, the Board’s threshold requirements for interlocutory appeal under 49 C.F.R. § 1115.9(a); and it fails to establish that Administrative Law Judge Soulikias’s narrow (and correct) decision regarding the proper timing of discovery under the Board’s rules was “a clear error of judgment” or creates a “manifest injustice” as required by 49 C.F.R. § 1115.1(c).

BACKGROUND

On February 11, 2026, Judge Soulikias issued Decision No. 10, which denied without prejudice BNSF’s motion to compel broad pre-application discovery of

¹ “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”).

Applicants. In issuing the ruling, Judge Soulikias explained that *Major Rail Consolidation Procedures (Major Merger Rules)*, 5 S.T.B. 539 (2001), and Board regulations do not provide for “broad pre-application discovery,”² but instead require that Applicants provide in the pre-application phase the “specific things that the Board considered necessary and *ordered*.”³ Those specific materials include “100% of [Applicants’] traffic tapes for the period January 1, 2019 through December 31, 2024”⁴ and “Timetables, Station Lists, and Track Charts; Geospatial Information System Maps; Joint Facilities; and Interchange Commitments.”⁵ Applicants have already produced all the required materials to BNSF and other parties seeking discovery.

Although Judge Soulikias held that “the *Major Merger Rules* do not support compelling [the discovery sought by BNSF] during the pre-application phase,” she further explained that her ruling was “a question about timing, not scope of discovery,” and that “BNSF’s motion . . . may be renewed, if appropriate, after Applicants’ revised application is accepted.”⁶

Judge Soulikias further noted that “pre-application discovery may be voluntarily conducted” by the parties.⁷ To date, Applicants have voluntarily produced

² Decision No. 10 at 3 (citing *Major Merger Rules*, 5 S.T.B. at 591) (explaining that requiring pre-application production of 100% traffic tapes “would aid interested parties in the preparation of their own submissions but (unlike broad pre-application discovery, which we are not proposing) would not impede the prospective applicants in the preparation of their application.”))

³ *Id.* (emphasis in original).

⁴ *Id.* (citing Decision No. 2).

⁵ *Id.* (citing Decision No. 3).

⁶ *Id.* at 3–4; *see also* UP-27/NS-26 (informing Board of intent to file revised application on April 30, 2026).

⁷ Decision No. 10 at 4.

more than 56,000 pages and hundreds of gigabytes of requested data sets, agreements, and other materials,⁸ and Applicants continue to voluntarily engage with BNSF and other parties in the hope of resolving many discovery issues well before the post-application discovery process actually commences.

On February 23, 2026, twelve days after Decision No. 10 was issued, BNSF filed its Appeal.⁹

STANDARD OF REVIEW

An “appeal prior to a final Board decision on the merits of a proceeding” is an “interlocutory appeal.”¹⁰ An interlocutory appeal of a discovery ruling is governed by the standards set forth in 49 C.F.R. §§ 1115.1 and 1115.9. “The Board . . . read[s] these two regulations in conjunction as a two-part standard for interlocutory appeals.”¹¹

First, before considering the merits of the appeal, the Board must make a “threshold determination concerning whether the decision is of a type that is subject to an interlocutory appeal.”¹² “Under § 1115.9(a), a Board employee’s ruling on

⁸ See UP-24/NS-23 at 6–7.

⁹ CPKC submitted a letter of support for BNSF’s Appeal on February 23, 2026. Applicants address issues specific to CPKC’s submission in a separate reply.

¹⁰ *Finch Paper LLC—Pet. for Declaratory Order*, FD 35981, slip op. at 5 (STB served Jan. 11, 2017).

¹¹ *Id.*

¹² *Id.* at 5; see also *Omaha Pub. Power Dist. v. Union Pac. R.R.*, NOR 42173, slip op. at 3 (STB served Nov. 18, 2022) (citing *Finch Paper*, slip op. at 2) (“Appeals must satisfy a threshold determination under 49 C.F.R. § 1115.9(a) before the Board will analyze the merits of the appeal under the standard outlined in 49 C.F.R. § 1115.1(c).”).

discovery (including an ALJ's ruling) may be appealed on an interlocutory basis only if it meets one of the four enumerated circumstances,"¹³ namely:

- (1) The ruling denies or terminates any person's participation;
- (2) The ruling grants a request for the inspection of documents not ordinarily available for public inspection;
- (3) The ruling overrules an objection based on privilege, the result of which ruling is to require the presentation of testimony or documents; or
- (4) The ruling may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party.

49 C.F.R. § 1115.9(a). Where a party "fail[s] to allege any of these four bases for appeal . . . , much less explain how [the appealed ruling] meets this highly deferential standard," the appeal should be denied.¹⁴

Second, "[i]f the § 1115.9(a) threshold is satisfied and the ruling can be appealed prior to a final Board decision, the merits of the appeal are analyzed under the standard outlined in §1115.1(c)."¹⁵ Section 1115.1(c) provides that "appeals are not favored" and "will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice."¹⁶ To meet this high standard, a party must "do more than show that the ALJ could have reached a different outcome regarding the motion."¹⁷

¹³ *Finch Paper*, slip op. at 5.

¹⁴ *M&G Polymers USA, LLC v. CSX Transp., Inc.*, NOR 42123, slip op. at 3 (STB served Dec. 23, 2010).

¹⁵ *Finch Paper*, slip op. at 5.

¹⁶ 49 C.F.R. § 1115.1(c).

¹⁷ *See Consol. Rail Corp.—Abandonment Exemption—In Hudson Cnty., NJ*, AB 167

At all stages of reviewing an interlocutory appeal, the Board “appl[ies] a highly deferential standard” to the ruling below.¹⁸

ARGUMENT

A. BNSF’s Appeal is Untimely.

BNSF filed its Appeal *five days* after the applicable deadline. The Board clarified nearly a decade ago that the deadline for filing an interlocutory appeal of an ALJ’s discovery ruling is seven days after the ruling, as provided by 49 C.F.R. § 1115.9(b).¹⁹ Decision No. 10 was issued on February 11, 2026, and thus the deadline for an appeal of that decision was February 18, 2026. Yet, BNSF did not file its appeal until February 23, 2026. The Board should therefore deny BNSF’s appeal as untimely.

BNSF’s argument that its Appeal is “timely” because it was “filed within 10 days of the date of the ALJ’s action,”²⁰ is wrong. In *Finch Paper*, the Board “clarifie[d] the Board’s regulations and procedures for interlocutory appeals of decisions by ALJs . . . on discovery.”²¹ *Finch Paper* not only set forth the two-part standard for reviewing interlocutory appeals, but also made clear that the deadline for filing such appeals is

(Sub-No. 1189X), slip op. at 5 (STB served Apr. 28, 2017).

¹⁸ *Wisc. Power & Light Co. v. Union Pac. R.R.*, NOR 42051, slip op. at 2 (STB served June 21, 2000) (“Interlocutory appeals of an ALJ’s decision are governed by 49 CFR 1115.9. We apply a highly deferential standard of review to such appeals.”); *see also Consol. Rail Corp.*, slip op. at 5 (STB served Apr. 28, 2017) (explaining that under § 1115.1(c), “the Board has accorded the ALJ broad discretion to act within the scope of his or her authority”).

¹⁹ *See Finch Paper*, slip op. at 6 (holding that appeal of ALJ’s discovery ruling was untimely because it did not comply with § 1115.9(b)).

²⁰ Appeal at 5.

²¹ *Finch Paper*, slip op. at 4.

governed by 49 C.F.R. § 1115.9(b), which provides “interlocutory appeals shall be filed with the Board within seven (7) calendar days” of the ruling.²² The Board has subsequently confirmed that § 1115.9(b)’s 7-day deadline is the applicable deadline for filing interlocutory appeals of discovery rulings by ALJs.²³

BNSF has no excuse for failing to meet its deadline. The Board’s decision in *Finch Paper* eliminated any potential ambiguity regarding the proper deadline for an interlocutory appeal of an ALJ’s discovery ruling.²⁴ BNSF is a sophisticated party that should be expected to be familiar with Board rules and precedent.

The Board has especially good cause to enforce its procedural rules in this proceeding. This is a complex proceeding involving numerous parties, hundreds of filings, and significant demands on the Board and its staff. Requiring the parties to follow clearly defined deadlines is essential for ensuring that this proceeding continues in an efficient manner without unnecessary waste of Board resources.

²² See *id.* at 6 (citing the filing deadline in § 1115.9(b)).

²³ See *Consol. Rail Corp.—Abandonment Exemption—In Hudson Cnty., NJ*, AB 167 (Sub-No. 1189X), slip op. at 4 (STB served Jan. 26, 2017) (“Consistent with § 1115.9(b), the deadline for Riffin to file a new interlocutory appeal of the October 2016 Decision under the applicable standards of §§ 1115.9 and 1115.1 will be seven days from the service date of this decision.”).

²⁴ Although the Board waived the filing deadline in *Finch Paper*, it did so because the Board had not yet clarified the applicable deadline when the appeal in that case was filed. See *Finch Paper*, slip op. at 6 (“Here, [the] appeal, which was filed under the incorrect regulation, was technically untimely. However, in light of our clarification of the rules that apply to appeals, we will waive our filing deadline and accept the appeal for filing.”).

B. BNSF’s Appeal Fails the Threshold Inquiry Under 49 C.F.R. § 1115.9(a).

If the Board waives the filing deadline and considers BNSF’s Appeal under the two-step framework described in *Finch Paper*, the Appeal still fails because BNSF did not address—much less satisfy—the threshold inquiry under 49 C.F.R. § 1115.9(a).

As the Board explained in *Finch Paper*, a discovery ruling “may be appealed on an interlocutory basis only if it meets one of the four enumerated circumstances (regarding party participation; document inspection; privilege; or irreparable harm, prejudice, or detriment to the public interest)” set forth in § 1115.9(a).²⁵ “Appeals must satisfy a threshold determination under 49 C.F.R. § 1115.9(a) before the Board will analyze the merits of the appeal.”²⁶

BNSF did not even bother to cite § 1115.9(a) in the Appeal, and it provides no basis to conclude that any of those circumstances apply.²⁷ Even if the Board were to infer arguments on BNSF’s behalf—contrary to the deferential standard of review required by the regulations²⁸—the ruling does not meet any of the four circumstances enumerated in § 1115.9(a).

²⁵ *Finch Paper*, slip op. at 5.

²⁶ *Omaha Pub. Power Dist.*, slip op. at 3.

²⁷ CPKC’s February 23, 2026, Letter includes a cursory reference to § 1115.9(a), but as explained in Applicants’ separate response to CPKC (UP-30/NS-29), CPKC fails to support its claim that the ruling meets the threshold test.

²⁸ *Wisc. Power & Light*, slip op. at 2 (“Interlocutory appeals of an ALJ’s decision are governed by 49 CFR 1115.9. We apply a highly deferential standard of review to such appeals.”).

Decision No. 10 clearly does not meet the first three circumstances described in § 1115.9(a). Decision No. 10 does not “den[y] or terminate[] any person's participation” (§ 1115.9(a)(1)); “grant[] a request for the inspection of documents not ordinarily available for public inspection” (§ 1115.9(a)(2)); or “overrule[] an objection based on privilege, the result of which ruling is to require the presentation of testimony or documents” (§ 1115.9(a)(3)).

Nor is Judge Soulikias's ruling one that “may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party.”²⁹ Decision No. 10 does not threaten any harm to a party or the public. BNSF's Appeal focused on the permissible scope of discovery under the *Major Merger Rules* and Board regulations. Decision No. 10 addresses only the proper *timing* of discovery.³⁰ Nothing in Decision No. 10 precludes BNSF from pursuing discovery to the extent permitted under *Major Merger Rules* and the Board's regulations. BNSF's Appeal provides no basis for concluding that BNSF or other parties will be unable to conduct permissible discovery in the time that will be available under the procedural schedule the Board will establish for this proceeding—especially because the Board has not yet established a procedural schedule.³¹

The Board should therefore reject the Appeal for failure to satisfy the threshold requirements of 49 C.F.R. § 1115.9(a).

²⁹ 49 C.F.R. § 1115.9(a)(4).

³⁰ See Decision No. 10 at 3 (“This is a question about timing, not scope of discovery.”).

³¹ BNSF's professed concerns about the need for pre-application discovery are particularly misplaced in the context of this proceeding, where Applicants have voluntarily engaged in pre-application discovery, producing thousands of pages of documents and hundreds of gigabytes of data.

C. BNSF’s Appeal Fails the Merits Analysis Under 49 C.F.R. § 1115.1(c).

If the Board proceeds to the second step of its framework for evaluating interlocutory appeals, despite the flaws addressed above, and considers the merits of BNSF’s Appeal under 49 C.F.R. § 1115.1(c), the Appeal still fails. BNSF has not established that Judge Soulikias’s narrow (and correct) ruling regarding the proper timing of discovery under *Major Merger Rules* and the Board’s regulations presents “exceptional circumstances” in which grant of the Appeal is necessary “to correct a clear error of judgment or to prevent manifest injustice” as required by § 1115.1(c)(3).

1. No Clear Error of Judgment

Instead of identifying any clear error of judgment by Judge Soulikias, BNSF simply reargues its Motion in its Appeal. BNSF again cites to non-major merger cases to support its position on pre-application discovery instead of specifically addressing Judge Soulikias’s application of *Major Merger Rules* and the Board’s regulations.³² Judge Soulikias reasonably interpreted *Major Merger Rules*, including the Board’s express statement that it was not proposing to permit broad pre-application discovery, to preclude pre-application discovery of materials other than those the Board considered necessary and ordered.³³ Even assuming that one could have a different interpretation of *Major Merger Rules*—a notion Applicants reject—that would not establish a clear error of judgment. Under the highly deferential standard the Board employs in reviewing interlocutory appeals of ALJ decisions, BNSF must

³² See Appeal at 6–9.

³³ See Decision No. 10 at 3 (citing *Major Merger Rules*, 5 S.T.B. at 591).

“do more than show that the ALJ could have reached a different outcome regarding the motion” below.³⁴ Judge Soulikias’s ruling is supported by Board precedent and procedure and was in no way a “clear error of judgment.”

2. No Manifest Injustice

BNSF’s Appeal likewise fails to establish manifest injustice would result from Judge Soulikias’s ruling. Contrary to BNSF’s overwrought claims, Decision No. 10 will not “fundamentally undermine the process.”³⁵ Far from it. Discovery will proceed more efficiently when guided and informed by a completed and accepted merger application. Further, the more detailed informational requirements imposed by *Major Merger Rules* significantly reduce the need for discovery. This was BNSF’s own position when it commented on the *Major Merger Rules* and argued that they should allow mergers to be processed more quickly and “without the need to supplement the initial filings of the parties with third-party discovery, depositions, or other evidentiary proceedings,” as demonstrated by the experience of Federal Energy Regulatory Commission (“FERC”):

There is no reason for merger review to take as long as the NPR proposes. . . . FERC was able to improve its merger processing time significantly when it narrowed the scope of its merger review and defined more precisely for applicants what issues must be addressed in any application. FERC also has been able to process most mergers without the need to supplement the initial filings of the parties with third-party discovery, depositions, or other evidentiary proceedings. The Board should do the same.³⁶

³⁴ See *Consol. Rail Corp.*, slip op. at 5 (STB served Apr. 28, 2017).

³⁵ Appeal at 1.

³⁶ Comments of the Burlington Northern and Santa Fe Railway Company, *Major Rail Consolidation Proceedings*, EP No. 582 (Sub.-No.1) at 19 (filed Nov. 17, 2000).

BNSF's original comment remains persuasive. The Board's more detailed application process under *Major Merger Rules* should require parties to engage in less discovery, not more.

It is not a "manifest injustice" that BNSF is permitted to conduct general discovery only during the post-application time period. The Board will establish an appropriate period for post-application discovery in its procedural schedule.

Finally, nothing in Judge Soulikias's ruling precludes BNSF from seeking relief regarding the scope of discovery at the appropriate time in this proceeding. Applicants hope to reach resolutions on outstanding discovery disputes through its voluntary pre-application participation. But if disputes persist, BNSF may subsequently seek the Board's guidance regarding the proper scope of post-application discovery following the submission and acceptance of the Application.

CONCLUSION

For the foregoing reasons, Applicants respectfully request that the Board deny BNSF's Appeal.

Respectfully submitted,

/s/ Raymond A. Atkins

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 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