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ENTERED
Office of Chief Counsel
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Part of
Public Record

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BNSF-20

Chief of Case Administration
Office of Chief Counsel
Surface Transportation Board
395 E Street S.W.
Washington, D.C. 20423-0001

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

Dear Chief of Case Administration:

BNSF files this letter to respond only to the procedural issue raised by UP/NS. BNSF appealed an ALJ order that interpreted, as a matter of first impression, the Major Merger Rules in a manner that blocks discovery of ordinary-course documents in Class I merger proceedings before an application is accepted. *See* Decision No. 10. BNSF timely filed its appeal of that decision pursuant to 49 C.F.R. § 1115.1, because BNSF sought review of a decision issued by an ALJ acting under delegated authority as provided by 49 C.F.R. § 1011.6. *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).

If the Board has any doubt about the application of the regulations to this situation, BNSF respectfully requests a protective waiver of any seven-day deadline. BNSF's appeal ensures that the Board would decide the first interpretation of the scope of pre-application discovery in a major merger under the new rules. Further, a waiver does not prejudice UP/NS. They did not identify any prejudice in their brief. UP/NS made no decision—discovery or otherwise—in reliance on a seven-day appeal deadline. Rather than create any prejudice, a waiver would ensure a Board ruling on the merits of BNSF's appeal and allow the Board to clarify the process it wants stakeholders to follow in this proceeding.

Regards,

/s/ Daniel T. Donovan

Daniel T. Donovan

CERTIFICATE OF SERVICE

I certify that I caused the foregoing to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding, the Secretary of Transportation, the Attorney General of the United States, and Administrative Law Judge Jenifer Soulikias.

/s/ Onika K. Williams

Attorney for BNSF Railway Company

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