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ALJ

SERVICE DATE – MAY 12, 2026

SURFACE TRANSPORTATION BOARD

Docket No. FD 36873

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

ORDER GRANTING CN'S MOTION TO COMPEL
APPLICANTS' 2025 RAIL TRAFFIC DATA AND DOCUMENTS

Decision No. 20

Decided: May 12, 2026

This discovery matter is before the undersigned pursuant to a ruling by the Surface Transportation Board. See Decision (Aug. 28, 2025).

On July 30, 2025, 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) (Union Pacific and Norfolk Southern collectively, Applicants) notified the Board of their intent to file an application seeking authority, under 49 U.S.C. §§ 11323-11325, for the acquisition of control by UPC, through its wholly owned subsidiary Ruby Merger Sub 1 Corporation, of NSC and, through it, NS. (Notice.) Applicants' Notice identified 2023 as the impact analysis year. (Notice 3.) Applicants stated after the protective order was entered, they would make available 100% of their traffic tapes for the impact analysis year of 2023 available upon written request. (Notice 4.) (See also Amended Appl. Vol. 1, 29-30.)

In its August 25, 2025 Decision, the Board ordered Applicants to submit to the Board 100% of their traffic tapes kept in the regular course of business for the period January 1, 2019, through December 31, 2024, by September 8, 2025. Decision (Aug. 25, 2025). On August 28, 2025, the Board required Applicants to file, in advance of the application, pursuant to 49 C.F.R. 1180.4(c)(2)(v), the following additional information: Timetables, Station Lists, and Track Charts; Geospatial Information System Maps; Joint Facilities; and Interchange Commitments. Decision 3-4 (Aug. 28, 2025).

On December 19, 2025, Applicants filed an application (the Application) seeking Board approval for (1) the acquisition of control by UPC of NSC, and through NSC of NS and NS's rail carrier subsidiaries, and (2) the resulting common control by UPC of UP and NS and the consolidation of the rail operations of UP and NS. On January 16, 2026, the Board found the

Application incomplete without prejudice to filing a revised application. See Decision (Jan. 16, 2026).

BNSF Railway Company (BNSF) filed a Motion to Compel Applicants to produce discovery documents (e.g., board materials, banker presentations, and internal emails) on January 9, 2026. Applicants timely replied to BNSF’s motion to compel on January 29, 2026.

Relying on the Major Merger Rules, the undersigned found that the discovery requested by BNSF was premature, because an application was not pending at that time. Decision No. 10 (“Decision No. 10”) (Feb. 11, 2026) (citing Major Rail Consol. Procs. (Major Merger Rules), 5 S.T.B. 539, 591 (2001) (rejecting broad pre-application discovery)). Decision No. 10 explained that BNSF did not seek to compel any specific thing that the Board had ordered but rather “basic discovery.” Decision No. 10 at 3.¹ Thus, because there was not a pending application then, the requested discovery was premature, and the motion was denied without prejudice. Id. BNSF did not timely appeal Decision No. 10 to the Board. See Decision 2 n.3 (Apr. 30, 2026).

On April 10, 2026, Grand Trunk Corporation and its subsidiaries (collectively “CN”) filed a motion to compel Applicants to produce traffic tape, reciprocal switching, and interchange data for 2025 (the “2025 data”). The 2025 data requested responds to Requests 12-14 from CN’s Third Set of Discovery Requests. (Motion 2.) CN argued its requests are timely. (Motion 3, 6-7.) CN claimed the 2025 data is relevant, because it is the most recent, current, and complete data. (Motion 3, 7-9.) Finally, CN argued that Applicants’ attempt to limit to the base year is contrary to its own use of other data. (Motion 3, 9-10.)

Applicants replied to CN’s motion on April 29, 2026. Applicants argued that according to Decision No. 10, because their revised application had not been filed and accepted by the Board, CN’s motion was untimely. (Reply 2-3.) Applicants argued that pursuant to Decision No. 10, the 2025 data was neither ordered by the Board nor required by the Major Merger Rules, and thus was not discoverable until the revised application was accepted by the Board. (Reply 3-4.) Applicants rely upon the language of Decision No. 10 that BNSF’s motion to compel “may be renewed, if appropriate, after Applicants’ revised application is accepted.” Decision at 3-4.²

The Board in its Decision, served on April 30, 2026, explained that:

After the Board rejected the Application, the ALJ declined to compel discovery in this proceeding because there was “not an application pending for the Board to review.” Union Pac. Corp.—Control—Norfolk S. Corp., FD 36873, slip op. at 3 (STB served Feb. 11, 2026). **As Applicants have filed the Revised Application** and allowing the ALJ to resolve discovery disputes will aid in efficient proceedings,

¹ Admittedly, Decision No. 10 did not explain the difference, distinction, and potential overlap of the information the Board ordered and discoverable issues, in the ALJ’s view. Very briefly, if the Board orders information and an applicant does not file all of it in the public record, then there may be discovery issues.

² This statement is dictum.

the Board will allow discovery to proceed before the ALJ so that interested parties may prepare their own submissions. Interested parties should file any discovery motions as soon as practicable to allow the ALJ to resolve discovery disputes expeditiously, and the ALJ may rule on any discovery motion upon the effective date of this decision.

Decision 2 (Apr. 30, 2026) (footnote omitted) (emphasis added).

The Surface Transportation Board regulations provide for broad discovery. These regulations provide that “[p]arties may obtain discovery under this subpart regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” 49 C.F.R. § 1114.21(a)(1). The Board has recognized that this regulation allows for broad discovery. See Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 7), FD 36500, slip op. at 4 (Aug. 2, 2021) (acknowledging authority to seek material relevant to subject matter of proceeding under 49 C.F.R. § 1114.21 and interpreting scope of relevance in discovery “[b]roadly”). An order may be entered for good cause and which justice requires, to protect from “annoyance, embarrassment, oppression, or undue burden or expense, or to prevent the raising of the issues untimely or inappropriate to the proceeding.” 49 C.F.R. § 1114.21(c). Protective orders may include that discovery not be had or that discovery be had only on specified conditions. 49 C.F.R. § 1114.21(c)(1)-(2).

The Board decided discovery should proceed now. Decision 2 (Apr. 30, 2026). Applicants’ Reply focused on the timing of the requests. (Reply.) The Board’s Decision mooted that argument. Decision 2 (Apr. 30, 2026). The Board’s Decision also stated that “the ALJ may rule upon any discovery motion upon the effective date of this decision.” Id. CN’s motion to compel was ripe on the effective date of the Board’s April 30, 2026 Decision.

Thus, the question is whether CN’s 2025 data requests are properly discoverable. Applicants offered no other counterargument in its reply. (See Reply.) Applicants’ essential³ objections to the 2025 data requests were that they are overly broad and unduly burdensome, and neither relevant nor reasonably calculated to lead to discoverable evidence because they seek evidence outside the application submitted on December 19, 2025. (Motion, Ex. B, 12-15.) Applicants’ Amended Application⁴ has since been filed.

For discovery, the standard of “reasonably calculated to lead to the discoverable evidence” does not look only at Applicants’ filing. The Major Merger Rules state that “[t]o ensure **a fully developed record on the effects of a proposed railroad consolidation**, the

³ Applicants also raised general objections, including to definitions and instructions. (See Motion, Ex. B, 3-11.) CN’s motion to compel did not take issue with these objections but rather Applicants’ complete refusal to respond to the requests.

⁴ The Board stated that Applicants shall be permitted to file a “revised” application. Decision 12 (Jan. 16, 2026.) Applicants named their filing “Amended Railroad Merger Application.” Accordingly, references are to the proposed revised application as permitted by the Board until the “Amended Application” was made by Applicants’ filing (and its supporting documents) made with the Board.

Board encourages public participation from . . . interested parties.” 49 C.F.R. § 1180.1(m) (emphasis added). Moreover, the Major Merger Rules state that the Board reviews not only the potential benefits of the proposed merger but the potential harm: reduction of competition, harm to essential services, and transitional service problems. 49 C.F.R. § 1180.1(c)(2). Here, the Board recognized the need for discovery now so “interested parties may prepare their own submissions.” Decision 2 (Apr. 30, 2026.)

Thus, the scope of discoverable evidence in a major merger includes the potential benefits and harms of the proposed transaction. The starting point is reviewing Applicants’ Amended Application regarding potential benefits and harms of the proposed transaction, particularly if the claimed benefits and harms might relate to the requested 2025 data, i.e., traffic tapes, reciprocal switching, and interchange data. Moreover, interested parties (like CN) might challenge Applicants’ claims directly or offer relevant, opposing claims.⁵

Applicants’ Amended Application stated that “the proposed transaction does not risk harm to the public interest.” (Amended Appl. Vol. 1, 21.) Applicants provided the Verified Statements of Drs. Bailey and Israel, among others, in support of their claims. (See, e.g., Amended Appl. Vol. 1, 21-22.)

The Amended Application stated the balance of benefits and harms “decisively favors” approval of the proposed transaction; however, “[t]o remove any doubt” Applicants voluntarily committed to “standard competition-preserving conditions[.]” (Amended Appl. Vol. 1, 22.) Applicants proposed the Board impose a program called Committed Gateway Pricing for the period of merger oversight (unless extended). (Amended Appl. Vol. 1, 23, 53, 92-93.) Applicants offered their Service Assurance Plan to offset “temporary service disruptions[.]” (Id.) Applicants’ Amended Application cited the Verified Statement of Dr. Bailey to support their claim that the proposed transaction will have no meaningful impact on geographic competition. (Amended Appl. Vol. 1, 23, 51-52.)

Applicants’ Amended Application used 2023 as the base year; however, the verified statements were not confined to 2023. For example, the verified statement of Elizabeth M. Bailey, Ph.D., reviewed the traffic tapes from 2019 – 2024 for all six Class I shippers. (Amended Appl. Vol. 2, 50.) V. James Vena’s verified statement includes UP’s Performance Improvement from Q3 2023 through Q1 2026, at Table 2. (Amended Appl. Vol. 1, 220.) The verified statement of Mark A. Israel has Table D-1, which contained certain interchange information as he defined, including annual average through traffic volumes pre- and post-merger through indicated interchanges. (See Amended Appl. Vol. 2, 340-341.)

The requests for 2025 data are not overly broad and unduly burdensome. As CN argued, the information requested is for the year 2025, which is the most recent, full year prior to the Amended Application. It is only one year requested. Therefore, the 2025 data is not overly broad or unduly burdensome in this proceeding.

⁵ For the purposes of the instant motion to compel, only certain points of the of the Amended Application and supporting documents are highlighted to help frame the scope of discoverable evidence for the instant motion.

The 2025 data is discoverable. The traffic tapes, reciprocal switching, and interchange data may all lead to admissible evidence challenging Applicants' Amended Application, particularly regarding the traffic tapes and interchange data. The 2025 data may challenge directly Applicants' supporting submissions or oppose them with another counterargument on the effects of the proposed transaction. Again, the Major Merger Rules require a fully developed record for the Board's consideration.

It is ordered:

1. CN's motion to compel is granted. Applicants shall provide the required information within fourteen (14) days of the service date of this order.
2. This decision is effective on the date of service.

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