

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 32760 (Sub-No. 52)

BNSF RAILWAY COMPANY—  
PETITION FOR REVIEW—UP/SP MERGER CONDITIONS

Digest:<sup>1</sup> In this decision, the Board declines to grant BNSF Railway Company’s request to set a procedural schedule but permits BNSF Railway Company to supplement the record with additional information and evidence.

Decided: May 26, 2026

On November 28, 2025, BNSF Railway Company (BNSF) filed a petition seeking “review, enforcement, and modification” of conditions imposed when the Board approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (UP) and the rail carriers controlled by Southern Pacific Rail Corporation (SP) in 1996 (the UP/SP merger).<sup>2</sup> (Pet. 1.) BNSF asks the Board to review UP’s compliance with the Restated and Amended Settlement Agreement (RASA),<sup>3</sup> and to enforce and/or reform the RASA as necessary to preserve competition and address UP’s alleged pattern of obstructive behavior. (Id. at 2-3.) The Board will not grant BNSF’s request to set a procedural schedule at this time. However, BNSF will be given an opportunity to supplement the record for the reasons discussed below.

BACKGROUND

The UP/SP Merger. In August 1996, the Board approved the common control and merger of the rail carriers controlled by UP and the rail carriers controlled by SP, subject to various conditions designed to preserve direct and indirect competition that would otherwise be lost as a result of the consolidation. Union Pac. Corp.—Control & Merger—S. Pac. Corp. (Decision No. 44), 1 S.T.B. 233, 367-75, 418-21 (1996). Along with certain other conditions, the Board imposed the terms of a settlement agreement between UP and BNSF. Id. at 242-43, 246-47, 419. The settlement agreement was intended to protect shippers that would lose access

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> See Union Pac. Corp.—Control & Merger—S. Pac. Corp. (Decision No. 44), 1 S.T.B. 233 (1996).

<sup>3</sup> See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (Oversight Decision No. 21), 5 S.T.B. 1173 (2001).

to a second rail carrier (2-to-1 shippers) by allowing BNSF to “replace, to a large extent, the competitive service that [would be] lost when SP [was] absorbed into UP.” *Id.* at 368, 372-73. The Board explained that, among other things, the “BNSF agreement permits BNSF to serve all shippers who would otherwise go from two directly serving carriers to one.” *Id.* at 368. As modified by the Board, the settlement agreement gave BNSF trackage rights over large segments of the UP/SP network and addressed, among other issues, access to new shipper facilities, access to jointly funded infrastructure, and dispatching protocols. *Id.* at 265, 368, 371, 373, 403-04, 420.

In 2001, UP and BNSF updated the settlement agreement to incorporate the additional conditions imposed by Decision No. 44 and the Board’s subsequent interpretations thereof. The updated settlement agreement, known as the RASA, was entered into on March 1, 2002. The Board approved the RASA at the conclusion of its oversight of the implementation of the UP/SP merger and reserved jurisdiction to enforce the UP/SP merger conditions and to address merger-related concerns. See Oversight Decision No. 21, 5 S.T.B. at 1173-74, 1177-78, 1185.<sup>4</sup>

*BNSF’s Petition.* BNSF alleges that in the years following the UP/SP merger, UP has engaged in a “pattern of conduct” that undermines the competition that the RASA was intended to preserve. (Pet. 12.) The petition describes several examples of alleged attempts to frustrate the merger conditions. According to BNSF, UP’s pattern of conduct includes, but is not limited to, seeking an unnecessary rate review, (*id.* at 8-9), abusing the customer election protocol, (*id.* at 13-17), failing to uphold trackage rights obligations, (*id.* at 17-22), manipulating the customer siting process, (*id.* at 22-23), and creating operational impediments for BNSF traffic, (*id.* at 23-26). BNSF asserts that UP’s practices harm rail customers and asks the Board to conduct a general review of UP’s compliance with the RASA in order to address UP’s practices. (*Id.* at 4, 13, 27.) According to BNSF, UP’s conduct has required more than a dozen petitions to enforce conditions set forth in the RASA, as well as multiple private arbitrations. (*Id.* at 9, 11.) BNSF contends that litigating these matters one at a time “has proven costly, inefficient, and detrimental to shippers,” and argues that a more comprehensive proceeding is warranted. (*Id.* at 12.)

However, according to BNSF, identifying appropriate remedies to address UP’s behavior will require further development of the record. (*Id.* at 23, 26-28.) BNSF therefore asks the Board to issue a procedural schedule that allows BNSF to conduct discovery before submitting its requests for remedies, “including necessary modifications to the RASA,” to the Board.<sup>5</sup> (*Id.* at 27.) Under BNSF’s proposed schedule, once discovery is complete, BNSF would ask the Board to review UP’s conduct, with opening statements, evidence from shippers, replies, rebuttal, and a hearing. (*Id.* at 29.)

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<sup>4</sup> A copy of the RASA is attached to BNSF’s petition as Exhibit B.

<sup>5</sup> With its petition, BNSF filed a motion for a protective order, which the Board granted. BNSF Ry.—Pet. for Review—UP/SP Merger Conditions, FD 32760 (Sub-No. 52), slip op. at 1 (STB served Dec. 5, 2025).

*UP's Reply.* UP filed a reply opposing BNSF's petition on January 7, 2026.<sup>6</sup> UP characterizes BNSF's petition as an effort to oppose UP's proposed merger with Norfolk Southern Corporation (NSC) and Norfolk Southern Railway Company (NS).<sup>7</sup> (UP Reply 1-3.) UP argues that the RASA is a long-standing, carefully negotiated agreement that has fulfilled its intended purpose and should not be altered based on unsubstantiated complaints. (*Id.* at 4-6.) According to UP, BNSF's petition relies on unsupported assertions rather than evidence. (*Id.* at 2, 14-18.) UP disputes many of the facts and RASA interpretations outlined in BNSF's petition and further asserts that many of the allegations in BNSF's petition are too vague to identify. (*Id.* at 8-9, 14-17). UP also argues that BNSF's petition neither states how the merger conditions should be modified nor adequately explains why modifications are necessary. (*Id.* at 3, 15-18.) Finally, UP contends that BNSF has not shown that the available remedy of private arbitration (and Board adjudication where needed) is insufficient to resolve the disputes BNSF describes. (*Id.* at 2-3, 7, 11.)

*CPKC's Reply.* On January 7, 2026, Canadian Pacific Railway Company d/b/a Canadian Pacific Kansas City filed a reply to BNSF's petition on behalf of itself and its U.S. rail carrier subsidiaries (collectively, CPKC). CPKC encourages the Board to grant BNSF's petition and proposes expanding the scope of review to include all of the competition-preserving conditions imposed in the UP/SP merger. (CPKC Reply 6.) CPKC states that, like BNSF, it has witnessed a similar pattern, under analogous circumstances, where UP has resisted the level of competition that conditions like those in the UP/SP merger were designed to protect. (*Id.* at 2-3.) CPKC asserts that an expanded review of the UP/SP merger conditions presents a valuable opportunity to assess the effectiveness of merger conditions and identify ways to improve them. (*Id.* at 5.)

*Other Parties.* The Board also received replies in support of BNSF's petition from the American Chemistry Council (ACC) and the National Industrial Transportation League (NITL) on January 7, 2026. ACC, a trade association that represents chemistry businesses, states that it is the successor organization to the Chemical Manufacturers Association (CMA), whose settlement agreement with UP, SP, and BNSF was also imposed as a condition to the UP/SP merger. (ACC Reply 2.) ACC encourages the Board to thoroughly review the assertions in BNSF's petition because the alleged pattern of conduct, if proven, degrades competitive protections that the Board imposed to preserve two-carrier rail competition for shippers. (*Id.* at 3-4.)

NITL, an industry association that represents shippers on freight transportation policy issues, also filed a reply in support of BNSF's petition on January 7, 2026. (NITL Reply 1.) NITL states that it participated in the Board's review of the UP/SP merger and advocated for conditions to preserve competition for 2-to-1 shippers. (NITL Reply 1.) NITL encourages the Board to grant BNSF's petition because high costs and customers' fear of retaliation make the

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<sup>6</sup> Replies to BNSF's petition were originally due on December 18, 2025. However, the Board extended the reply deadline for all interested parties in response to UP's December 8, 2025 extension request. BNSF Ry.—Pet. for Review—UP/SP Merger Conditions, FD 32760 (Sub-No. 52), slip op. at 1 (STB served Dec. 10, 2025).

<sup>7</sup> See Union Pac. Corp.—Control—Norfolk S. Corp., Docket No. FD 36873 (Revised application filed April 30, 2026).

existing approach to resolving merger-related disputes ineffective. (*Id.* at 2.) NITL argues that if BNSF's allegations are true, merger conditions imposed to protect competition are not being fulfilled. (*Id.* at 2.)

Finally, CSX Transportation, Inc. (CSXT) filed a Notice of Intent to Participate on January 13, 2026.

## DISCUSSION AND CONCLUSIONS

Through its imposition of the merger conditions set forth in the BNSF/UP settlement agreement, as amended by the Board and memorialized in the RASA, the Board addressed (among other things) the problem of lost competition at 2-to-1 points by allowing BNSF to compete with UP for this traffic pursuant to the terms of their negotiated settlement agreements. See Decision No. 44, 1 S.T.B. at 284-85; Oversight Decision No. 21, 5 S.T.B. at 1175-78. BNSF now alleges that UP has engaged in a pattern of conduct intended to undermine this competition and asks the Board to conduct a comprehensive review. (Pet. 12.) The Board has examined a number of disputes related to the conditions memorialized in the RASA since the merger oversight period ended,<sup>8</sup> with a notable uptick in enforcement requests in recent years.<sup>9</sup> Although the recent increase in alleged violations may indicate that the guardrails put in place to preserve competition have been strained, BNSF must be more specific about the facts of the alleged violations, the RASA provisions implicated, and the details of the requested remedies for the Board to consider the review BNSF seeks.

Pursuant to 49 U.S.C. § 11327, the Board has continuing authority to enter supplemental orders to modify decisions entered in merger and control proceedings under 49 U.S.C. § 11323. Although it may be appropriate to use supplemental conditioning authority to ensure the public interest is served, the Board uses this authority sparingly and cautiously after a transaction has been consummated due to the reliance interests involved. Major Rail Consol. Procs., 5 S.T.B.

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<sup>8</sup> See, e.g., Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., 6 S.T.B. 428 (2002); Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., FD 32760 (STB served Dec. Jan. 22, 2009); Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., FD 32760 (STB served Dec. 20, 2013), reconsideration denied, Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., FD 32760 (STB served Dec. 30, 2014), aff'd sub nom. G3 Enters., Inc. v. STB, 678 Fed. Appx. 562 (9th Cir. 2017); Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., FD 32760 (STB served Jan. 31, 2018).

<sup>9</sup> See, e.g., TGS Cedar Port R.R.—Operation Exemption—in Chambers Cnty., Tex., Docket No. FD 36627 (BNSF Reply to UP Pet. to Revoke Exemption filed April 24, 2023); BNSF Ry. Co.—Pet. for Enforcement—Serv. to Granite Mountain Quarries, Docket No. FD 32760 (Sub-No. 48) (BNSF Pet. filed on Feb. 8, 2024); BNSF Ry. Co.—Pet. for Clarification—Serv. to Colo. Materials, FD 32760 (Sub-No. 49) (BNSF Pet. filed on Feb. 15, 2024); BNSF Ry. Co.—Pet. for Enforcement—Interchange with Savage Tooele R.R., Docket No. FD 32760 (Sub-No. 50) (BNSF Pet. filed on June 20, 2024); BNSF Ry. Co.—Emergency Pet. for Enforcement—Interchange with Salt Lake Garfield & W. Ry., Docket No. FD 32760 (Sub-No. 51) (BNSF Pet. filed on July 7, 2025).

539, 583 and n.53 (2001).<sup>10</sup> Furthermore, the RASA is the final iteration of a settlement that BNSF and UP agreed to in an arms' length negotiation, and the Board has rejected attempts to renegotiate it without a clear demonstration of merger-related harm. See, e.g., Union Pac. Corp.—Control & Merger—S. Pac. Corp. (Oversight Decision No. 13), 3 S.T.B. 987, 995 n.32 (1998). Given the amount of time that has passed since this condition was imposed and the nature of the requested relief, BNSF must make a clear and well-supported showing to justify the proposed proceeding.

BNSF has not made such a showing on the current record. BNSF's petition instead relies on vague and incomplete assertions, and the only supporting material included with the petition is a copy of the RASA. The Board will not permit BNSF to conduct discovery before identifying the full scope of issues that it wants the Board to resolve or committing to the type of relief it seeks. Parties are generally entitled to discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 C.F.R. § 1114.21(a)(1). However, the proposed proceeding's subject matter is not sufficiently clear to justify discovery at this time, given the vagueness of BNSF's assertions and the petition's indication that the practices and incidents it describes are representative examples, not an exhaustive list. (See, e.g., Pet. 13, 16, 20, 27.) Likewise, BNSF does not clearly state what RASA provisions it believes UP is violating, or what, if any, changes to the merger conditions may be needed. The vague and incomplete nature of BNSF's current complaints would make it exceedingly difficult to determine what is "relevant" in the event of a discovery dispute.

However, the Board will not deny BNSF's request outright at this time because its allegations, if proven, could have serious ramifications for shippers and competition. And although, as UP notes, the RASA directs BNSF and UP to resolve disputes about its terms and provisions via arbitration, (BNSF Pet., Ex., RASA § 15), a Board proceeding may be appropriate when a petition raises issues that have broad implications for implementing the merger conditions. BNSF Ry.—Pet. for Clarification—Serv. to Colo. Materials, FD 32760 (Sub-No. 48), slip op. at 5 (STB served June 30, 2025); Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (Decision No. 96), 6 S.T.B. 210, 213 (2002). The Board has also stated that "[i]t is the Board's responsibility to determine whether the conditions it has imposed in merger proceedings are being properly implemented in a manner consistent with the public policy underlying those conditions." Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., FD 32760, slip op. at 3 (STB served May 5, 2017). BNSF's claims have broad implications for implementation of the RASA and raise policy questions related to the preservation of competition that the Board is best positioned to address. Private arbitration of individual disputes would appear to be a poor vehicle for considering whether the pattern of conduct alleged by BNSF exists. Moreover, arbitrators lack authority to modify conditions set forth in the RASA, which BNSF alleges may be necessary to ensure that the pre-merger competition between UP and SP is preserved going forward. (BNSF Pet. 27.)

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<sup>10</sup> The failure of a condition that the Board has previously imposed is one of the situations in which additions or changes to a merger condition may be appropriate. See Major Rail Consol. Procs., 5 S.T.B. 539, 583 (2001).

BNSF will be given an opportunity to clarify its claims and provide supporting evidence. Should BNSF wish to continue pursuing this matter, it must supplement its petition to clarify the scope of the proposed proceeding and the exact nature of the relief requested. In that supplement, BNSF should clearly identify the incidents or disputes that make up the alleged pattern of behavior. BNSF may group its claims into categories as appropriate, but the supplemental filing must list the events that BNSF wants the Board to consider. For each claim, BNSF must state whether it seeks enforcement of an existing condition set forth in the RASA, a change to a condition, or both. Where it requests enforcement of a merger condition, BNSF must state which RASA provision(s) it believes UP has violated and provide any available factual support (including documentation) for its claims. Where a modification of an existing merger condition is sought, BNSF must “show that it is unable to compete, or that its existing rights do not restore competitive options that existed before the merger and would have continued but for the merger.” Oversight Decision 13, 3 S.T.B. 995 n.32. BNSF must also provide any available factual support (including documentation) for these claims and state what changes BNSF believes are necessary to resolve them.

The Board will set a 60-day time limit for BNSF to submit a supplemental filing and a 30-day deadline for UP and other interested parties to respond.

Finally, CPKC’s request to expand the scope of the review to include all of the merger conditions that were imposed to safeguard competition in the UP/SP merger, (CPKC Reply 6), will be denied. First, requests for affirmative relief should be presented in pleadings to which an opposing party has a right to reply, not in the form of a reply to a petition.<sup>11</sup> Decision No. 86, 4 S.T.B. at 308. Furthermore, granting CPKC’s request would complicate the record by introducing a host of facts, legal issues, and potential parties unrelated to the BNSF/UP settlement agreement and the RASA. (See CPKC Reply 3-5.) Should CPKC wish to pursue the enforcement of UP/SP merger conditions other than those in the RASA, CPKC must separately petition the Board.

It is ordered:

1. BNSF’s supplemental filing is due on July 27, 2026.
2. Replies to BNSF’s supplemental filing are due on August 24, 2026.
3. CPKC’s request to expand the scope of the proceeding is denied.
4. This decision is effective on its date of service.

By the Board, Board Members Fuchs, Hedlund, and Schultz.

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<sup>11</sup> The Board’s regulations prohibit a reply to a reply. See 49 C.F.R. § 1104.13(c).