

KIRKLAND & ELLIS LLP

Daniel T. Donovan, P.C.
To Call Writer Directly:
+1 202 389 5174
daniel.donovan@kirkland.com

1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
United States

+1 202 389 5000

www.kirkland.com

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Facsimile:
+1 202 389 5200

BNSF-36

Hon. Jenifer J. Soulikias
Administrative Law Judge
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: STB Docket No. FD 36873 – Discovery Status

Dear Judge Soulikias:

We write for BNSF ahead of the July 10 conference. We appreciate Your Honor's efforts to move discovery forward. Requiring UP and NS to make bi-weekly rolling productions and provide bi-weekly status reports on their production efforts is an important first step in ensuring interested parties and the Board have the necessary information to evaluate the Revised Application and the forthcoming supplemental submissions on the merits. The next step is making sure UP and NS live up to these obligations now that they have been set.

We remain concerned, however, by the slow pace of discovery—particularly when contrasted against UP and NS's push for an expedited merits schedule. Despite the Board's admonition five weeks ago,¹ UP and NS have yet to produce many of the documents that are responsive to requests that BNSF and others served over six months ago. This is despite UP and NS's statements to the Board that they would be voluntarily producing such documents during the time that discovery was stayed. *See* UP-29 / NS-28 (March 2, 2026). That did *not* happen. Since the Board's admonition on May 26, NS has produced only 1,671 documents, including 78 emails. UP has made only one production since May 26. It totaled just 209 documents and included *zero* emails. This pace is untenable, particularly given how long these requests have been pending.

We respectfully request that some portion of the July 10 conference be set aside to discuss ways to increase the pace of productions, including omnibus production deadlines for long-pending requests. The longer discovery lags now, the more difficult it will be to evaluate the transaction's merits if the Board lifts this proceeding from abeyance. Simply put, delays of 180

¹ *See* Decision No. 21 at 19 (May 26, 2026) ("Continued discovery is essential to developing a record that allows for full consideration of this unprecedented proposed Transaction, and the Board is troubled by comments highlighting Applicants' purported unwillingness to engage in discovery . . . [T]he Board expects that Applicants and other parties will . . . expeditiously respond to discovery requests.").

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days or more cannot be squared with the Board's discovery guidance in Decision No. 21 or UP and NS's professed commitment to transparency in these proceedings.

How quickly UP and NS can catch up on their discovery obligations is informed by a threshold issue: UP and NS's search and review protocol. As UP and NS gather and search custodial and non-custodial sources, all agree that the collection and review must be appropriately scoped. UP and NS have now said they will use technology assisted review ("TAR"), a machine learning process to automate document review, to help scope their searches.

Regrettably, UP and NS have not been transparent about their use of TAR. It was only this afternoon—after weeks of pressing—that UP and NS provided a modest amount of information about their TAR plans. Many questions remain, and neither UP nor NS has shared draft TAR protocols (despite a direct request for them). We will engage with UP and NS on our outstanding questions, but we may need to raise these issues at the July 10 conference. "A long line of cases holds that TAR requires an 'unprecedented degree of transparency and cooperation among counsel,'" including "full disclosure about the technology used, the process, and the methodology.'" *In re Valsartan, Losartan, and Irbesartan Prods. Liab. Litig.*, 337 F.R.D. 610, 622 (D.N.J. 2020) (quoting *Progressive Cas. Ins. Co. v. Delaney*, 2014 WL 3563467, at * 10 (D. Nev. July 18, 2014)).

This has been a lingering issue, and we will be working to drive it to resolution in the coming days (including to raise disputes, as needed).

/s/ Daniel T. Donovan

Daniel T. Donovan, P.C.

cc: Counsel of Record

CERTIFICATE OF SERVICE

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

/s/ Onika K. Williams

Attorney for BNSF Railway Company

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