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ENTERED
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Part of
Public Record

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July 10, 2026

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

BNSF-39

Re: STB Docket No. FD 36873 – Response to UP Letter

Dear Judge Soulikias:

We write for BNSF in response to UP's letter sent at 11 PM last night, so that Your Honor has our positions in writing before this morning's hearing. These are important issues. They will shape the record available to the Board in the biggest proceeding in its history.

Before addressing each issue, we note several items that are important to consider in setting production deadlines. *First*, Applicants have failed to produce discovery in a timely manner and that has been recognized by the Board. Applicants need to get going. *Second*, all parties (even Applicants now) recognize that there needs to be mileposts and deadlines for Applicants to produce documents and data in response to discovery requests that have been pending for months and months. *Third*, there is no basis in the rules, equity, or good process to set a deadline for when discovery can be served upon Applicants at this time – before Applicants have finished their supplemental information productions per Decision No. 21, before Notices of Intent are due, and before the Board has issued a schedule in this matter. Against that background, we address the issues in Applicants' letter from last night below. We put UP's position and BNSF's response in a chart format for Your Honor's convenience.

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Production Deadlines	“By August 17, 2026, Applicants shall substantially complete custodial productions for the Applicants’ Initial Custodians and their production of non-custodial documents responsive to requests served before June 30, 2026.” “By September 18, 2026, Applicants shall substantially complete production of documents responsive to all discovery requests served by August 3, 2026, including custodial productions for the remaining custodians named in Decision No. 25.”	If those dates are the best that Applicants can do, BNSF does not object. However, these dates should be memorialized in an order so the Board knows how slow discovery is proceeding and the distant document production deadlines the Applicants are setting. <i>The following notes are important as to the remainder of UP’s proposal:</i> (1) the search methodology for those custodians is not agreed, (2) open issues remain on the responsiveness criteria, and (3) the rolling productions should otherwise remain consistent with Section C(6) of the Discovery Guidelines that “[a]t least 10 business days before the date for a witness’s deposition, the party with whom the witness is affiliated shall substantially complete production of the witness’s custodial documents.”
Discovery Parameters	“Applicants’ production of all custodial files shall be subject to the discovery parameters and limitations identified in Exhibit A, attached hereto.”	<i>This is <u>not</u> agreed.</i> UP and NS are asking for a de facto motion for a protective order—on 10 hours’ notice and without filing a motion (or even serving their letter on all participants, who would not be able to be heard on this issue). UP and NS are asking Your Honor to bless a version of search terms that are still being negotiated between certain parties. UP and NS have not provided hit counts for the full body of ordered custodians. Accordingly, this must be rejected. If Applicants want to seek a protective order that would limit the extent of their search for responsive material, we will respond following the process and schedule Your Honor established.

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	“The parties, including Applicants and non-Applicant Participants, are entitled to determine a reasonable, efficient, and defensible process for identifying and producing responsive custodial documents, including using search terms and TAR. The parties shall make reasonable efforts to respond to questions from other parties about their discovery methods.”	This is a concerning dodge—and another promise of “transparency” that is not being provided. We have asked specific questions, and UP and NS have not answered them.¹ The pending issues are as follows: • UP and NS should not limit the universe of materials going into the TAR model by filtering for search terms that were being negotiated for linear, human review (i.e., double culling). If any search terms are to be used for pre-TAR culling, the parties should be ordered to negotiate a broader set of search terms for purposes of pre-TAR culling (i.e., terms targeted to filter out noise, like personal matters). • UP and NS should provide the written protocols they are considering using to govern their TAR processes. • UP and NS should answer the specific questions raised in BNSF’s July 6 email, as follows: • <u>Training</u>. How will the models be trained? Are UP and NS feeding any of their existing productions (i.e., documents that UP and NS have determined are responsive)

¹ “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)).

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		into the model to train it? Has the training started? • <u>Validation</u>. UP and NS should describe their validation protocols in detail, including specific cut-off, recall, and precision rates that they are proposing and why they believe those are appropriate and reasonable. In addition, UP and NS should identify who will conduct the validation. • <u>Rank Value</u>. Please describe how UP/NS will discern the appropriate rank value for separating responsive documents from non-responsive documents. • <u>Target Score</u>. Once the target recall score is reached, do UP and NS plan to conduct additional review for (or changes in) responsiveness calls beyond that point? • <u>Purpose</u>. Are UP and NS using TAR for culling only? • <u>Chat/Ephemeral Messages</u>. For chat, ephemeral, and text messages, do UP and NS intend to review these types of documents via TAR? In what time increments will these messages be formatted for training and production (e.g., single message, 24-hr, weekly, monthly) and why? Are search terms being applied after the messages are broken up into the pre-set temporal chunks? Finally, all parties' rights should be reserved to comment on the protocols and

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		metrics (e.g., validation, precision, recall). UP's and NS's rights to oppose those comments should be reserved.
Deadline for Serving Discovery Requests	"Service of discovery requests concerning the Amended Application and Applicants' submissions in response to Decision 21 shall be served by August 3, 2026."	A deadline for discovery requests is not appropriate at this time. Applicants have not even completed their Board-ordered production of information and answers to Board-ordered questions. That supplement deadline is not until July 27, 2026. The application is still in abeyance. In addition, other parties have recently started serving discovery requests, and the deadline to file notices of intent to participate has not run. The parties should defer any discussion of deadlines for serving discovery requests until at least UP and NS commit that they are complete with their submissions and the Board speaks to a schedule for this matter. UP's proposal is also problematic as it appears to be asking Your Honor to set a deadline for follow-up requests that would run before stakeholders see the vast majority of Applicants' productions—and that would prohibit stakeholders from asking reasonable follow up discovery.

We look forward to discussing these important issues this morning.

/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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