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ALJ

SERVICE DATE – JULY 16, 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 RESCHEDULING

AUGUST 7, 2026 DISCOVERY CONFERENCE TO AUGUST 11, 2026,
DENYING CPKC’S MOTION TO COMPEL NS’S DISCOVERY RESPONSES ABOUT UP’S
MERGER AGREEMENT COMPLIANCE,
ORDERING NS TO SUPPLEMENT RESPONSE TO CPKC’S REQUEST FOR
PRODUCTION OF DOCUMENTS ABOUT UP’S COMPLIANCE,
DENYING WITHOUT PREJUDICE BNSF’S MOTION FOR PRODUCTION DEADLINES
FOR UP AND NS, AND
ORDERING PARTIES TO CONFER AND PROPOSE INTERIM DISCOVERY DEADLINES

Decision No. 26

Decided: July 16, 2026

Discovery is before the undersigned pursuant to a ruling by the Surface Transportation Board. See Decision (Aug. 28, 2025). The undersigned scheduled and conducted a discovery conference on July 10, 2026. See Decision No. 22. This decision memorializes the rulings made at that conference.

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).

I. Rescheduling August 7, 2026 Discovery Conference to August 11, 2026

The undersigned developed a scheduling conflict with the discovery conference that is set for Friday, August 7, 2026. See Decision No. 22. Accordingly, the discovery conference is rescheduled to **Tuesday, August 11, 2026 at 9:00 a.m. Central Time/ 10:00 a.m. Eastern Time**. The corresponding deadlines for that discovery conference (e.g., Opening Letter Brief, Supporting Letter, Opposition Letter, Letters to the ALJ) will remain unchanged.

II. CPKC's Motion to Compel NS's Discovery Responses Regarding UP's Merger Agreement Compliance

On July 2, 2026, CPKC moved to compel NS's discovery responses to CPKC's discovery requests regarding UP's merger agreement compliance. (See CPKC Letter Brief 1, July 2, 2026.) CPKC served NS with one of each: a request for production of documents, interrogatory, and request for admission. (*Id.* at 2 & n.2.) CPKC sought "discovery concerning UP's compliance with Applicants' merger agreement: requests (1) to produce communications in which NS alleged or suggested that UP has failed to honor its contractual commitments to NS in the merger agreement and (2) to respond to an interrogatory and a request for admission about NS's opinion on whether UP has honored those contractual commitments." (*Id.* at 1.)

CPKC's Second Set of Discovery to NS requests:

Request for Production: Produce all Communications and Documents between Union Pacific and Norfolk Southern relating to any allegation or suggestion by Norfolk Southern that Union Pacific has failed to comply with Union Pacific's obligations under the Merger Agreement, including correspondence exchanged through counsel, notices under Section 8.7 of the Merger Agreement, correspondence relating to potential termination of the Merger Agreement, and correspondence relating to the Company Termination Fee as defined in Section 7.3(a) of the Merger Agreement.

Request for Admission: Admit that Union Pacific has complied with its obligations under the Merger Agreement.

Interrogatory: Has Union Pacific complied with its obligations under the Merger Agreement?

(*Id.* at 2 n.2; Ex. B.) CPKC argued that the requests were relevant, non-privileged, not burdensome or vague, and permissibly sought legal conclusions. (CPKC Letter Brief 4-5, July 2, 2026.) CPKC argued that the requests are relevant to assessing the adequacy of UP's proffered remedies, the likelihood of service disruptions and any efficiencies, whether any set of remedies could effectively regulate a combined UP-NS, and the timing of any lifting of the abeyance. (*Id.* at 3-4.)

CPKC argued its discovery requests are supported by United States v. Anthem, Case No. 1:16-cv-1493 (ABJ), 2016 WL 8461264, at *4-10 (D.D.C. Oct. 6, 2016), report and recommendation adopted, 2016 WL 11164028 (D.D.C. Oct. 14, 2016). (CPKC Letter Brief 3, 5,

Ex. A, July 2, 2026.) In the Anthem case, the United States sought to enjoin Anthem and Cigna from merging under section 7 of the Clayton Act. Anthem, 2016 WL 8461264, at *1. In a telephone conference with the Special Master, counsel for Cigna stated that the general counsel for each Anthem and Cigna had exchanged letters accusing the other's corporation of breaching the merger contract. Id. Then the United States served a request for production of documents that sought production of any documents about Cigna and Anthem's compliance, noncompliance, or breach of the merger agreement. Id. Cigna and Anthem objected to the document request based on joint defense privilege.¹ Id. The Special Master reviewed the responsive documents in camera. Id.

The Special Master found the requested documents relevant under Rule 26, Federal Rules of Civil Procedure, because the breach letters demonstrated whether there was any barrier to integrating the corporations. Id. at *4. Moreover, in an affirmative defense, Anthem pled substantial efficiencies outweighed any alleged anticompetitive effect. Id. at *5 & n.2.

The Special Master found one document, Cigna document number 10 (email between Anthem's Chief Executive Officer and Anthem's in-house counsel), was not protected by the attorney-client privilege, because the communication was not for the purpose of obtaining legal advice. Id. at *6. Nor was the document subject to the work-product doctrine, because it was not prepared in anticipation of litigation. Id. The Special Master found Cigna must produce Cigna document number 10 but not the communications quoted beneath the email. Id. In reaching this conclusion, the Special Master noted that no contextual information was provided about the communication. Id.

Regarding the remaining documents, the Special Master found the attorney-client privilege did not apply, because there was not a sufficient factual basis to support the privilege—what the confidential information was or who conveyed it. Id. at *6 & n.4. To determine whether the work-product doctrine applied, the Special Master next broke the documents into two categories—strategies of obtaining approval of the merger and related to the alleged breaches. Id. at *8. Documents regarding the first category were protected by the work-product doctrine, because even if they criticized the other corporation, those efforts were to redirect the conduct of the other corporation to increase regulatory approval or success in litigation. Id. However, documents alleging breaches waived the work-product doctrine, because if there were litigation about a breach, the corporations would be adversaries. Id. at *9.

For the joint defense privilege, the Special Master reviewed the joint defense agreements between Cigna and Anthem, which were specifically limited to the Cigna/Anthem merger. Id. at *10. The Special Master found the joint defense privilege did not apply to documents, or portions of documents, alleging breach of the merger agreement. Id. at *10-11.

Here, NS opposed CPKC's discovery requests in its July 7, 2026 letter. (NS Opp. Letter, July 7, 2026.) NS called the request for production of documents a "communications request"

¹ The Anthem case sets forth that court's legal standards and framework for evaluating whether the responsive documents are subject to production. 2016 WL 8461264, at *2-4. As is explained below, there are no responsive documents for the undersigned to review.

and CPKC's interrogatory and request for admissions "legal position requests." (*Id.* at 1-2.) NS addressed these categories of requests, which are addressed here in turn.

A. Request for Production of Documents

NS argued that CPKC's communications request was not relevant; if such communications exist and were relevant, then they would be produced in response to other document requests; and finally, NS was not aware of any communications responsive to the communications request. (NS Opp. Letter at 2, July 7, 2026.)

CPKC agreed that it would accept NS's representation that NS was not aware of any documents responsive to CPKC's request for production of documents. As such, CPKC's motion to compel regarding CPKC's request for production of documents is DENIED AS MOOT.

At the discovery conference, CPKC argued that NS has an ongoing obligation to respond to CPKC's request for production of documents. Under STB regulations, there is a duty to supplement complete discovery responses only under certain circumstances. 49 C.F.R. § 1114.29(a)-(c). None of the requirements to supplement this document request applies.

However, an order imposes a duty to supplement. 49 C.F.R. § 1114.29(c). NS was not aware of any communications to date. Thus, the undersigned ORDERS NS to supplement its response to CPKC's request for production of documents regarding communications with UP about UP's compliance with the merger agreement. NS shall be required to supplement its response through the deadline for document production that might be later ordered, as applied to NS.² If responsive documents are found, NS may object to their disclosure under 49 C.F.R. § 1114.21(c) (reasons for protective conditions).³

B. Interrogatory and Request for Admission

Regarding the interrogatory and request for admission, CPKC argued that these are appropriate "contention" requests pursuant to Rules 36(a)(1)(A) and 33(a)(2), Federal Rules Civil Procedure. (CPKC Letter Brief 5, July 2, 2026.)

NS argued that these legal conclusion requests are not relevant and impermissibly seek

² For the avoidance of any doubt, if the undersigned (or the Board) does not enter an omnibus document production deadline that applies to NS, then NS shall supplement its response thirty (30) days before the discovery deadline.

³ At this point, there are no responsive documents, and it is speculative whether any document might be appropriate to produce. Non-privileged documents about specific provisions at issue in the merger agreement—e.g., Section 5.8—are expected be produced in response to separate discovery requests. (See NS Opp. Letter 2, July 7, 2026.) Potentially, a privilege may apply to documents or portions of documents. In the Anthem case, the Special Master reviewed the documents in camera and found certain documents and portions of documents should be produced. 2016 WL 8461264, at *1, 11.

privileged legal advice, NS's legal position is irrelevant to this proceeding, and it would be unduly burdensome and prejudicial to require NS to disclose to its Class I rival railroads NS's legal opinions. (NS Opp. Letter 2-3, July 7, 2026.) NS argued that the STB is not governed by the Federal Rules of Civil Procedure, and the Board's discovery regulations do not contain the same language. (*Id.* at 2.) NS further argued that the Anthem case is not applicable, because the communications regarding a breach were directly at issue, and any privilege was waived when the communications were sent to the other party. (*See id.* at 2-3.)

The STB's regulations regarding interrogatories and requests for admission are "[s]ubject to the provisions of § 1114.21(a)[.]" 49 C.F.R. § 1114.26(a) (interrogatories); 49 C.F.R. § 1114.27(a) (request for admission). In turn, section 1114.21(a) provides that a party may obtain discovery that is non-privileged and "relevant to the subject matter involved in a proceeding[.]"

Here, Applicants are "seeking approval under 49 U.S.C. § 11323-25⁴ for (i) the acquisition of control by UPC of NSC, and through NSC of NS and NS's rail carrier subsidiaries, and (ii) the resulting common control by UPC of UP and NS and the consolidation of the rail operations of UP and NS." Decision No. 21 at 4 (citing Rev. Appl. 1-12) (Footnote 4 states that "[t]hese proceedings are governed by those provisions as well as the Board's regulations, including 49 CFR part 1180. *See Major Rail Consol. Procs. (Major Merger Rules)*, 5 S.T.B. 539 (2001)."). Under 49 C.F.R. § 1180.6(a)(7)(ii), Applicants were required to submit a complete copy of the Merger Agreement. *See* Decision No. 9, 7-9 (Jan. 16, 2026) (finding the Application was not complete, in part, because the schedules, exhibits, and other documents referenced in the merger agreement were not filed). Non-applicants contest whether the merger is in the public interest, although non-applicants have not filed a response to the Revised Application (and none is due).

This proceeding is not centered on whether UP breached the merger agreement. In such instances, the merger agreement is the subject matter involved in the proceeding. Here, the merger agreement informs the Board's inquiry whether the merger should be approved because it is consistent with the public interest. *See* 49 U.S.C. § 11324.

CPKC's discovery requests do not seek information about terms of the merger agreement (or other factual matters). Instead, they request NS's conclusions about whether UP complied with its obligations under the merger agreement (opinions). The interrogatory and request for admission do not differentiate between any condition or provision of the merger agreement. Instead, those discovery requests ask for NS's ultimate conclusion whether UP complied with its obligations under the merger agreement.

As requested by CPKC, the interrogatory and request for admission may cover both relevant and non-relevant information. The interrogatory and request for admission might be relevant regarding a condition about UP seeking approval of the merger. But that is not what they request—they ask for NS's ultimate conclusion about whether UP complied with its obligations under the entire merger agreement.

Assuming—without deciding—that the requests seek relevant information (i.e., about a condition that might reflect upon the public interest inquiry of the Board), the information sought

is protected by the work-product doctrine. CPKC speculates that such information exists. (CPKC Letter Brief 1, July 2, 2026.) In the Anthem case, counsel acknowledged on the record that the two merging parties exchanged letters accusing each other of breach of the merger agreement. See 2016 WL 8461264, at *1.

Here, CPKC argues that there is “reason to believe” there are allegations UP failed to comply with conditions of the merger agreement. (CPKC Letter Brief 2, July 2, 2026.) CPKC argues the merger agreement requires UP file “the application contemplated by 49 C.F.R. § 1180.4(c)” within six months of signing the agreement. (Id. (citing Rev. App. 4-74 to -75 (Section 5.8—Efforts)).) CPKC argues the Board did not accept the initial Application and then required Applicants submit additional information about the Revised Application, thus violating the merger agreement’s condition. (See id.)

CPKC’s argument requires a legal opinion about whether UP breached a condition when it filed an application that the Board did not accept or required additional detail. In essence, CPKC reads the merger agreement’s condition as UP must have filed “an accepted application.” That is an issue of contract construction. Whether UP breached any such requirement is a legal opinion. CPKC has its opinion, and CPKC argues NS should have one, too.

If NS formulated any such opinion, it would be protected by the work-product doctrine.⁴ As the court in Anthem explained, “[o]pinion work product is virtually undiscoverable[.]” 2016 WL 8461264, at *8 (quotation omitted). CPKC argues that it is entitled to this discovery: “CPKC is seeking NS’s view about UP’s compliance with the merger agreement. That is a topic on which NS certainly has a view, regardless of how a court might ultimately rule.” (CPKC Letter Brief 5, July 2, 2026.) CPKC requests NS’s “view” or “opinion” about UP’s compliance. (E.g., id. at 1, 3.) NS would be responding with legal opinions formulated by NS’s attorney(s). Those attorney opinions are protected from disclosure by the work-product doctrine.

These requests do not seek communications between NS and UP but request the ultimate conclusion by NS, and necessarily, NS’s attorneys. Thus, there is no argument that any such privilege was waived through disclosure. (See CPKC Letter Brief 4, July 2, 2026.) In Anthem, the merging parties disclosed their communications to each other and waived the work-product protection. 2016 WL 8461264, *8. There is no argument of any waiver here.

CPKC’s request for admission and interrogatory seek the legal opinion of NS’s attorneys. The work-product doctrine protects such legal opinions from disclosure in discovery. CPKC’s motion to compel is DENIED as to the interrogatory and request for admission.

III. Denying Without Prejudice BNSF’s Motion for Production Deadlines for UP and NS

Prior to the discovery conference, BNSF moved for Production Deadlines for UP and NS in a letter motion dated July 2, 2026. As discussed at the discovery conference, UP and NS’s

⁴ Assuming NS made such assessment, it would have been made in anticipation of litigation about a breach of the merger agreement, so the first step of the work-product doctrine would be satisfied.

production depends upon either the parties agreeing to a discovery framework or the undersigned ruling on individual disputes, such as BNSF's complaints about Technology Assisted Review (TAR). Neither of those things happened. BNSF's motion is premature and is DENIED WITHOUT PREJUDICE.

IV. Order to Confer and Propose Interim Discovery Deadlines

BNSF requested the ALJ's intervention regarding UP and NS's use of TAR in a letter motion dated July 2, 2026. At the discovery conference, UP and NS agreed to provide additional information about TAR. BNSF's Motion regarding UP and NS's Technology-Assisted Review is HELD IN ABEYANCE.

In light of the ongoing discovery disputes and to continue to streamline discovery, the undersigned discussed that the parties should confer about pending issues (e.g., remaining production framework issues including TAR) and return to the next discovery conference on Friday, July 24, 2026, with proposed interim (or benchmark) deadlines.⁵ The proposed schedule should consider the following deadlines:

1. Preliminary document discovery
 - a. Deadline for production framework
 - b. Document request deadlines—all parties
 - c. Then document production deadline—all parties
2. Fact witness depositions
3. Expert witness depositions
4. Limited secondary discovery

The parties should include other interim discovery deadlines as appropriate in this matter.

It is ordered:

1. The discovery conference for Friday, August 7, 2026, is rescheduled until Tuesday, August 11, 2026, at 9:00 a.m. Central Time/10:00 a.m. Eastern Time. The pre-conference deadlines remain unchanged.
2. CPKC's Motion to Compel NS regarding UP's Compliance with the Merger Agreement is denied as moot regarding the request for production of documents and denied regarding the interrogatory and request for admission.
3. NS shall supplement its response to CPKC's request for production of documents regarding UP's Compliance with the Merger Agreement as set forth herein.
4. BNSF's Motion to Set Production Deadlines for UP and NS is denied without

⁵ The Board has not issued a procedural schedule, which would include a discovery deadline. Accordingly, any such deadlines are "interim" or "benchmarks," and could be adjusted according to the Board entering a procedural schedule or discovery deadline.

prejudice.

5. BNSF's Motion Regarding Technology-Assisted Review is held in abeyance.
6. The parties shall confer about pending discovery issues and submit to the undersigned (jointly if possible) in advance of the July 24, 2026 discovery conference proposed interim (or benchmark) discovery deadlines.
7. This decision is effective on the date of service.

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