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July 16, 2026

311790

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

ENTERED BNSF-40
Office of Chief Counsel
July 16, 2026
Part of
Public Record

Re: STB Docket No. FD 36873 – BNSF’s Third Motion to Compel

Dear Judge Soulikias:

The Board has already held that board of director-level materials are relevant and helpful for building a full record. *See* Decision No. 13 at 5-6. Since that ruling, UP and NS have agreed to produce some board of director materials but are withholding other director-level materials that are plainly relevant and discoverable. Standing on a relevance objection, UP and NS are limiting their board-level productions to materials directly discussing the proposed transaction. They are otherwise declining to produce materials that relate to relevant subject matters more generally, such as competition, consolidation, growth, market shares, and alternatives to consolidation. That is not appropriate. To state the obvious—UP and NS’s director-level statements and materials on such topics are relevant by themselves and additionally as a comparison to what was said to the Board in the Revised Application and supplements. UP and NS’s refusal to produce these materials is unfounded and, if not reversed, will block access to relevant and appropriate discovery. Accordingly, Your Honor should order UP and NS to produce board materials relating to subject matters relevant to evaluating the competitive impacts of the proposed transaction, even if not specifically about the proposed transaction itself, from 2019 to present.

* * * * *

To justify their proposed transaction, UP and NS have made specific claims about the state of the rail industry, competition, the ability of Class I railroads to grow, and the effectiveness of joint ventures. For example, they claim the proposed merger creates growth that UP and NS “could not achieve independently,” that the “U.S. railroad industry has stalled,” and that “[r]ailroads cannot contract their way to a seamless network through alliances” since “joint alliances have built-in limits.” Am. App. Vol. 1 at 221 ¶ 24; 254 ¶ 29; 266 ¶ 58; 338 ¶ 144.

The materials sought in this Motion will reveal Applicants’ unfiltered views of the railroad industry. As part of the record, this discovery will help the Board assess Applicants’ claims about the proposed merger’s effects in context and evaluate the necessity of a merger. But UP and NS

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refuse to produce this information by imposing a sweeping limitation: they will only produce board materials on these topics if they specifically contain UP's or NS's evaluation of the proposed transaction. *See* Ex. A, July 9, 2026 Email from K. Kelly to M. Thompson. That is wrong and inconsistent with the Board's rules on discovery. The Applicants' views about competition, consolidation, growth, market shares, and alternatives to consolidation are important to the merger analysis—whether they explicitly mention this merger or not. It matters how UP and NS viewed these issues before, during, and after they decided to pursue the proposed merger. For example, the views of Applicants' respective boards about their growth prospects as individual companies and their views on the benefits of interline relationships bear on the Board's public interest analysis. *See* 49 C.F.R. § 1180.1(c) (“[W]hen evaluating the public interest, the Board will consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation.”).

BNSF therefore requests an order compelling UP and NS to search for and produce board materials discussing competition, consolidation, growth, market shares, alternatives to consolidation—whether related to the proposed transaction or not—from 2019 to present.

I. The Requested Board of Directors Materials Are Relevant.

To test the contentions in the application, BNSF has sought board materials from UP and NS. Specifically, BNSF requested documents and communications “concerning UP and NS's Board of Directors Meetings ... concerning the Proposed Transaction, competition in the rail industry, consolidation in the rail industry, UP's position in the rail industry, NS's position in the rail industry, UP's growth, NS's growth, and/or alternatives to the Proposed Transaction.” BNSF's Second Disc. Reqs. at No. 2.

Parties may obtain 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). “Information is relevant when it might be able to affect the outcome of a proceeding.” *See Norfolk S. Corp. et al. – Control – Norfolk & Portsmouth Belt Line R.R. Co.*, FD 36836, slip op. at 3 (STB served July 25, 2025); *see also* Decision No. 23 at 2 (“There are a multitude of discoverable issues in this case, and the Board's Decision No. 21 highlights many of them. If the board stated that the matter is one for the merits . . . the issue is subject to discovery.”) (internal citation omitted). Accordingly, board materials discussing competition, consolidation, growth, market shares, and alternatives to consolidation are relevant—whether explicitly related to the proposed transaction or not—for several reasons.

First, director-level materials are relevant because they “are likely to provide valuable insight into the proposed transaction's effects.” Decision No. 13 at 5. Here, board materials will provide valuable insight into what UP and NS executives were telling their boards about the competitive environment of the railroad industry leading up to the proposed transaction, as well as

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whether Applicants truly believe that the proposed merger is needed to secure the public benefits they claim. These insights are especially crucial since UP and NS have made specific claims about the state of the rail industry—including claims about competition, consolidation, growth, market shares, and alternatives to consolidation—to justify their transaction. *See, e.g.,* Am. Appl. Vol. 1 at 213 ¶ 7 (“We already operate in an intensely competitive industry.”); 254 ¶ 29 (“The U.S. railroad industry has stalled. Something has to change.”); 266 ¶ 59 (“Actual integration also fosters a level of strategic agility alliances alone cannot offer.”); 338 ¶ 144 (“But experience has shown that joint alliances have built-in limits.”).

Second, the Board has already held that similar documents are relevant to this proceeding. Merging parties’ day-to-day views of their “operations, and views of past, present, and future market conditions” may “provide valuable insight” into assessing the effects of a merger. *See* Decision No. 13 at 5-6 (quoting DOJ Comment at 2, Mar. 3, 2026). Indeed, this is why the DOJ seeks documents “not limited to the transaction itself, but rather . . . ordinary course documents about the relevant product and geographic markets, head-to-head competition, and evidence of effects of prior mergers in the industry” when it assesses mergers under the Hart-Scot-Rodino Antitrust Improvements Act.¹ *See* DOJ Comment at 2. And, as the DOJ noted “evidence created in the normal course of business is more probative than evidence created after the compan[ies] began anticipating a merger review.” *Id.* at 2-3. The board materials that BNSF moves to compel are such normal-course documents.

II. The Requested Board of Directors Materials are Proportional to the Need for Review of Applicant’s Proposed “Unprecedented” \$85 Billion Transaction.

Compelling the merging parties to produce these board materials is proportional to the needs of this proceeding. The Board’s rules balance the burden against the likely value of the information sought. 49 C.F.R. 1114.21(c); *see Omaha Public Power District v. Union Pac. R.R.*, NOR 42173 (STB served Oct. 3, 2022). Courts likewise weigh six factors to assess proportionality: “(1) the importance of the issues at stake in this action; (2) the amount in controversy; (3) the parties’ relative access to relevant information; (4) the parties’ resources; (5) the importance of the discovery in resolving the issues; and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit.” *See Oxbow Carbon & Mins. LLC v. Union Pac. R.R. Co.*, 322 F.R.D. 1, 6 (D.D.C. 2017). The requested materials are proportional to the needs of the proceeding:

Importance of the Issues. BNSF is seeking information that contextualizes Applicants’ claims about the transaction’s effects on consolidation, growth, market shares, and alternatives to

¹ For the avoidance of doubt, BNSF is not attempting to relitigate Decision No. 13 or Applicants’ compliance with it. This discovery motion concerns requests that are broader in both scope and time.

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consolidation. This information is key to the Board's assessment of the proposed transaction and whether it is in the public interest, considering available alternatives. *See* 49 C.F.R. § 1180.1(c).

Amount in Controversy. The amount in controversy is material. The proposed transaction is "unprecedented." Am. App. Vol. 1 at 15. The Board previously explained the transaction's "size and significance for the rail [] system" colors discovery. *See* Decision No. 13 at 5. The requested material from UP's and NS's respective boards is commensurate with the scope of this transaction.

Parties' Relevant Access. The information sought is internal to UP and NS; it is not contained in UP and NS's public filings or anywhere else accessible by BNSF. Only UP and NS can provide this information.

The Parties' Resources. UP and NS have the resources to search for the requested information. They have already made non-custodial productions of certain board materials and, as large public companies with corporate secretaries, they are likely to have such materials in a centralized location they have already identified.

The Importance of Discovery. This discovery is important to assess the proposed transaction's merits. Applicants cannot claim that ***only*** board materials that explicitly discuss the proposed transaction are relevant. Indeed, in granting a motion to compel 2025 traffic tapes, Your Honor explained that information from before the transaction "may challenge directly Applicants' supporting submissions." *See* Decision No. 20 at 4-5. Likewise, board materials regarding assessments of competition, consolidation, growth, market shares, and alternatives to consolidation will allow stakeholders to challenge Applicants' contentions in their Amended Application and supporting papers.

Burden. Applicants did not object to this discovery based on a particular burden. Still, assuming *arguendo* that Applicants face a burden from incremental searching and review of these board materials, that burden would be outweighed by the benefit of the information sought. Without the requested materials, UP's and NS's internal views on competition, consolidation, growth, market shares, and alternatives to consolidation will not be part of the record. By consequence, the Board and stakeholders will be prejudiced and forced to evaluate Applicants' general claims about these subjects in a vacuum. UP's and NS's candid views on these subjects are necessary background information to fully explain the potential benefits (or costs) of the merger. *See also Major Rail Consol. Procedures*, 5 S.T.B. 539, 2001 WL 648944, at *5 (explaining the Major Merger Rules take a "more skeptical, 'show me' attitude towards claims of merger benefits").

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CONCLUSION AND REQUEST FOR RELIEF

Board materials regarding UP's and NS's views of the rail industry, growth prospects, and merger alternatives are relevant and proportional to this proceeding, regardless of whether they "relate to" UP's or NS's evaluation of the proposed merger. Therefore, BNSF respectfully requests an order compelling UP and NS to search for and produce board materials discussing competition, consolidation, growth, market shares, alternatives to consolidation—whether related to the proposed transaction or not—from 2019 to present.

/s/ Daniel T. Donovan

Daniel T. Donovan, P.C.

cc: Counsel of Record

EXHIBIT A

From: [Kelly, Kevin](#)
To: [Thompson, McClain](#); [Korman, Marc](#); [*AEllis@stblaw.com2](#); [Matellis, Joseph \(NON-SIDLEY @SULLCROM.COM \)](#); [Donovan, Daniel T.](#); [McCarrick, T.J.](#); [Razi, Sara Y.](#); [Bohl, Lindsey C.](#); [David Meyer](#); [*pdenton@steptoe.com](#); [*tstrafford@steptoe.com](#); [Cunningham, Rich](#); [Scheib, John M.](#); [Gardiner, Kent](#); [van Houwelingen, Luke](#); [Aluise, Dylan M.](#); [Hynes, Samantha F.](#); [Golden, Nathan H.](#); [Joseph, Neil](#); [Volbrecht, Tate D.](#); [Enson, Eric](#); [Fanchiang, Eric](#); [*Avia.Gridi@stblaw.com](#)
Cc: [*dludwin@cov.com](#); [*Ifahivewu@cov.com](#); [Rosenthal, Michael](#); [Magcale, Jamie Dominique U](#); [Brown, Molly](#); [Damitio, Daniel](#); [Harrison, Caroline](#); [Krovoza, Charlotte](#); [Warren, Matthew J.](#); [ratkins](#); [Laudone, Stephen S.](#); [William Mullins](#); [Spencer Naake](#); [OpalDisco](#)
Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests - Responsiveness
Date: Thursday, July 9, 2026 11:07:53 PM
Attachments: [image001.png](#)
[2026.07.09 Class Is Proposed Edits to UP Responsiveness Criteria \(UP Responses\) \(STB\).docx](#)

This message is from an EXTERNAL SENDER

Be cautious, particularly with links and attachments.

McClain,

We've reviewed the additional requests from Non-Applicant Railroads regarding responsiveness and provide responses below:

First, addressing your chart, we've added our responses in red.

Criteria	UP and NS Response(s)	Issue
FN 1: While the parties are committed to ensuring an efficient discovery process, the agreed responsiveness criteria listed in this document is not intended to be exhaustive or exclusive, and the parties serving discovery reserve the right to modify, alter, or expand the types of documents that may be considered responsive based on future additional discovery requests.	UP/NS do not agree, and reserve the right to object to any future modifications that other parties request.	The ALJ rejected a request from UP and NS that the ALJ set a deadline for new requests. We may have additional requests, including when we see the forthcoming supplements. If additional requests are served, modifications or additions to the criteria may be needed. The parties can negotiate in good faith if that is necessary, as they have with this criteria. But we're not forgoing the possibility of additions or modifications down the road. Both sides can reserve their rights. We agree that both sides can reserve their rights. We do not agree with your remaining arguments.
Please confirm this scope includes documents and communications received from bankers, economists, financial	NS: Confirmed, as they relate to NS's evaluation of whether to enter into the Merger Agreement. UP: Yes, if these documents or communications were considered	We do not agree that this should be limited to documents or communications related to NS's or UP's evaluation of the merger. If bankers or advisers provided UP or NS (or both) with information on

advisors, or other consultants regarding alternatives to the Proposed Transaction, competition, market shares, sales growth, or expansion into new markets.	by Union Pacific in evaluating whether to propose or enter into the Merger Agreement, they are within scope.	market shares, expansion into new markets, etc. during the search period, it is responsive, regardless of whether that information “related” to UP’s or NS’s evaluation of the merger. Please let us know if UP and NS will drop that limitation – or if we have a scope / relevant dispute that needs to get addressed by the ALJ. We agree to remove this limitation.
Please confirm this scope includes board materials regarding competition, consolidation, company growth, and alternatives to the Proposed Transaction.	<u>NS</u>: Confirmed, as they relate to NS’s evaluation of whether to enter into the Merger Agreement. <u>UP</u>: Yes, if these documents or communications were considered by Union Pacific in evaluating whether to propose or enter into the Merger Agreement, they are within scope.	Same as above. Board materials related to competition, consolidation, growth, and alternatives to the Proposed Transaction are responsive, regardless of whether they “relate” to UP’s or NS’s evaluation of the merger. Please let us know if UP and NS will drop that limitation – or if we have a scope / relevant dispute that needs to get addressed by the ALJ. We do not agree to this modification. Applicants have already agreed to conduct searches for board materials regarding the proposed transaction (and produced those materials). Applicants have also agreed to undertake searches for documents responsive to more tailored requests for documents related to competition, prior merger analyses, strategies for growth, etc. This request for anything related to broad topics (like growth) is unreasonable.
BNSF Set 4 at No. 7 – Seeking documents and communications concerning specific statements made in	NS said it does not agree to conduct custodial searches in response to these requests.	<u>First</u> , this discovery seeks information about contentions that NS has made and that we are entitled to test. Whether we agree these requests are appropriate for

the application. BNSF Set 5 at No. 1 and 2 – Seeking documents and communications concerning specific statements made by Mark George.	custodial searches (see below), NS should at least include these contentions in the responsiveness criteria. <u>Second</u>, what is NS’s basis to exclude these requests from its custodial searches? Mark George and other executives are custodians. <u>Third</u>, does NS intend to do (or also do) targeted pulls from custodians or from non-custodial sources for information responsive to those requests? Norfolk Southern will respond separately on this issue.
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Second, we have provided edits in response to CN’s additions in the attached. These are consistent with our responses to CN’s recent discovery requests. The additions we’ve accepted are in blue font. We’ve tracked our other edits.

Third, we have revised the responsiveness criteria regarding strategies related to CPKC’s requests in the attached to resolve that issue.

Best,

Kevin

Kevin Kelly

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From: Thompson, McClain <mcclain.thompson@kirkland.com>

Sent: Thursday, July 2, 2026 4:10 PM

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Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests

[EXTERNAL]

Marc, Kevin –

Thank you for the feedback to the responsiveness criteria. As I previewed this morning, we have made progress, and only a handful of issues remain.

First, please let us know your positions on the four rows in the chart below.

Second, in Track in the attached, the CN team added responsiveness criteria based on the set of requests that CN recently served. Please let us know if those additions are agreed.

Thanks,

McClain

Criteria	UP and NS Response(s)	Issue
FN 1: While the parties are committed to ensuring an efficient discovery process, the agreed responsiveness criteria listed in this document is not intended to be exhaustive or exclusive, and the parties serving discovery reserve the right to modify, alter, or expand the types of documents that may be considered responsive based on future additional discovery requests.	UP/NS do not agree, and reserve the right to object to any future modifications that other parties request.	The ALJ rejected a request from UP and NS that the ALJ set a deadline for new requests. We may have additional requests, including when we see the forthcoming supplements. If additional requests are served, modifications or additions to the criteria may be needed. The parties can negotiate in good faith if that is necessary, as they have with this criteria. But we're not forgoing the possibility of additions or modifications down the road. Both sides can reserve their rights.
Please confirm this scope includes	<u>NS</u> : Confirmed, as they relate to NS's evaluation of whether to enter into	We do not agree that this should be limited to documents or

documents and communications received from bankers, economists, financial advisors, or other consultants regarding alternatives to the Proposed Transaction, competition, market shares, sales growth, or expansion into new markets.	the Merger Agreement. <u>UP</u>: Yes, if these documents or communications were considered by Union Pacific in evaluating whether to propose or enter into the Merger Agreement, they are within scope.	communications related to NS's or UP's evaluation of the merger. If bankers or advisers provided UP or NS (or both) with information on market shares, expansion into new markets, etc. during the search period, it is responsive, regardless of whether that information "related" to UP's or NS's evaluation of the merger. Please let us know if UP and NS will drop that limitation – or if we have a scope / relevant dispute that needs to get addressed by the ALJ.
Please confirm this scope includes board materials regarding competition, consolidation, company growth, and alternatives to the Proposed Transaction.	<u>NS</u>: Confirmed, as they relate to NS's evaluation of whether to enter into the Merger Agreement. <u>UP</u>: Yes, if these documents or communications were considered by Union Pacific in evaluating whether to propose or enter into the Merger Agreement, they are within scope.	Same as above. Board materials related to competition, consolidation, growth, and alternatives to the Proposed Transaction are responsive, regardless of whether they "relate" to UP's or NS's evaluation of the merger. Please let us know if UP and NS will drop that limitation – or if we have a scope / relevant dispute that needs to get addressed by the ALJ.
BNSF Set 4 at No. 7 – Seeking documents and communications concerning specific statements made in the application. BNSF Set 5 at No. 1 and 2 – Seeking documents and communications concerning specific statements made by Mark George.	NS said it does not agree to conduct custodial searches in response to these requests.	<u>First</u>, this discovery seeks information about contentions that NS has made and that we are entitled to test. Whether we agree these requests are appropriate for custodial searches (see below), NS should at least include these contentions in the responsiveness criteria. <u>Second</u>, what is NS's basis to exclude these requests from its custodial searches? Mark George and other executives are custodians. <u>Third</u>, does NS intend to do (or also do) targeted pulls from custodians or from non-custodial sources for information responsive to those requests?

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From: Korman, Marc <mkorman@sidley.com>

Sent: Wednesday, July 1, 2026 2:34 PM

To: Kelly, Kevin <Kkelly@cov.com>; *AEllis@stblaw.com2 <AEllis@stblaw.com>; Matelis, Joseph (NON-SIDLEY @SULLCROM.COM) <Matelisj@sullcrom.com>; Thompson, McClain <mcclain.thompson@kirkland.com>; Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <aluised@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Fanchiang, Eric <EFanchiang@crowell.com>; *Avia.Gridi@stblaw.com <Avia.Gridi@stblaw.com>
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Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests

McClain,

I have included responses on behalf of Norfolk Southern to your responses in the attached document (they are in bold and highlighted). As for the green text additions, except for those on which we commented in the attached, we view them as generally consistent with our understanding of the requests and responsiveness so will accept the language as to how the various requests can be described. Of course, the non-Applicants do not get to draft or edit our specific review criteria, but we agree as to the scope of these requests with your language.

-Marc

MARC A. KORMAN
Counsel

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From: Kelly, Kevin <Kkelly@cov.com>

Sent: Wednesday, July 1, 2026 1:49 PM

To: Ellis, Abram J <AEllis@stblaw.com>; Matelis, Joseph (NON-SIDLEY @SULLCROM.COM) <Matelisj@sullcrom.com>; Thompson, McClain <mccclain.thompson@kirkland.com>; Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <aluised@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Fanchiang, Eric <EFanchiang@crowell.com>; Gridi, Avia <Avia.Gridi@stblaw.com>

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Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests

McClain,

We have provided Union Pacific's responses to the Non-Applicant Railroads' proposed edits to the responsiveness criteria in the attached. Our comments are in **red**. Unless modified in track or otherwise noted, the proposed edits are consistent with Union Pacific's understanding of the requests and the documents that are responsive. While the Non-Applicant Railroads do not get to draft, review, or edit Union Pacific's specific review protocol, Union Pacific agrees as to the scope of these requests consistent with your language.

Best,

Kevin

Kevin Kelly

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From: Kelly, Kevin

Sent: Monday, June 29, 2026 10:49 AM

To: Ellis, Abram J <AEllis@stblaw.com>; Matelis, Joseph J. <Matelisj@sullcrom.com>; Thompson, McClain <mcclain.thompson@kirkland.com>; Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <aluised@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Fanchiang, Eric <EFanchiang@crowell.com>; Gridi, Avia <Avia.Gridi@stblaw.com>

Cc: Ludwin, Derek <dludwin@cov.com>; Flahive Wu, Laura <lflahivewu@cov.com>; Rosenthal, Michael <mrosenthal@cov.com>; Magcale, Jamie Dominique U <JMagcale@cov.com>; Brown, Molly <MBrown@cov.com>; Damitio, Daniel <DDamitio@cov.com>; Harrison, Caroline <CHarrison@cov.com>; Krovoza, Charlotte <CKrovoza@cov.com>; Warren, Matthew J. <mjwarren@sidley.com>; ratkins <ratkins@sidley.com>; Korman, Marc <mkorman@sidley.com>; Laudone, Stephen S. <slaudone@sidley.com>; William Mullins <wmullins@mullinslawgroup.net>; Spencer Naake <snaake@mullinslawgroup.net>; OpalDisco <OpalDisco@cov.com>

Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests

It seems we have a critical mass for tomorrow afternoon to discuss Applicants' discovery requests. We'll update the invite for 1:30-3 PM ET tomorrow. CN, if you're not available until 2:30 PM ET, you can join then.

McClain, we expect to respond to your proposed edits to Applicants' responsiveness criteria by tomorrow morning, and we think it's likely our responses will resolve any remaining issues. On BNSF's request for due diligence materials exchanged between UP and NS, we previously confirmed that UP and NS were collecting responsive documents for review and production in my May 29 email. I understand that NS has already made a production of those materials, and UP intends to do so in the future. On TAR, we've previously provided our position, which is that we will be able to provide additional information on Applicants' use of TAR once the remaining issues regarding the scope of custodial searches are resolved and we know the total universe of documents for review.

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From: Ellis, Abram J <AEllis@stblaw.com>

Sent: Monday, June 29, 2026 8:16 AM

To: Matelis, Joseph J. <Matelisj@sullcrom.com>; Thompson, McClain

<mcclain.thompson@kirkland.com>; Kelly, Kevin <Kkelly@cov.com>; Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <aluised@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Enson, Eric <EEenson@crowell.com>; Fanchiang, Eric <EFanchiang@crowell.com>; Gridi, Avia <Avia.Gridi@stblaw.com>
Cc: Ludwin, Derek <dludwin@cov.com>; Flahive Wu, Laura <lflahivewu@cov.com>; Rosenthal, Michael <mrosenthal@cov.com>; Magcale, Jamie Dominique U <JMagcale@cov.com>; Brown, Molly <MBrown@cov.com>; Damitio, Daniel <DDamitio@cov.com>; Harrison, Caroline <CHarrison@cov.com>; Krovoza, Charlotte <CKrovoza@cov.com>; Warren, Matthew J. <mjwarren@sidley.com>; ratkins <ratkins@sidley.com>; Korman, Marc <mkorman@sidley.com>; Laudone, Stephen S. <slaudone@sidley.com>; William Mullins <wmullins@mullinslawgroup.net>; Spencer Naake <snaake@mullinslawgroup.net>; OpalDisco <OpalDisco@cov.com>
Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests

[EXTERNAL]

We cannot do the 1-2:30 ET slot on Tuesday (as we communicated to the UP team separately). As we also told the UP team, we're not sure it's necessary for all Class 1s to be on to discuss each Class 1s R&Os. We can address CN's R&Os at the end of the 11 am call if that's applicants' preference, or do the window we communicated tomorrow (after 2:30 pm ET).

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From: Matelis, Joseph J. <Matelisj@sullcrom.com>

Sent: Monday, June 29, 2026 7:19 AM

To: Thompson, McClain <mcclain.thompson@kirkland.com>; Kelly, Kevin <Kkelly@cov.com>; Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; Ellis, Abram J <AEllis@stblaw.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <aluised@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D.

<tate.volbrecht@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Fanchiang, Eric <EFanchiang@crowell.com>; Gridi, Avia <Avia.Gridi@stblaw.com>
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Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests

*** External Email ***

We can join a call today at 11, and as I said last night we'll be prepared to address the discovery directed to CPKC during the window tomorrow.

From: Thompson, McClain <mcclain.thompson@kirkland.com>
Sent: Monday, June 29, 2026 5:56 AM
To: Kelly, Kevin <Kkelly@cov.com>; Matelis, Joseph J. <Matelisj@sullcrom.com>; Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; zzExt-aellis <aellis@stblaw.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <aluised@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Fanchiang, Eric <EFanchiang@crowell.com>; *Avia.Gridi@stblaw.com <Avia.Gridi@stblaw.com>
Cc: zzExt-dludwin <dludwin@cov.com>; *lflahivewu@cov.com <lflahivewu@cov.com>; Rosenthal, Michael <mrosenthal@cov.com>; Magcale, Jamie Dominique U <JMagcale@cov.com>; Brown, Molly <MBrown@cov.com>; Damitio, Daniel <DDamitio@cov.com>; Harrison, Caroline <CHarrison@cov.com>; Krovoza, Charlotte <CKrovoza@cov.com>; Warren, Matthew J. <mjwarren@sidley.com>; ratkins <ratkins@sidley.com>; Korman, Marc <mkorman@sidley.com>; Laudone, Stephen S. <slaudone@sidley.com>; William Mullins <wmullins@mullinslawgroup.net>; Spencer Naake <snaake@mullinslawgroup.net>; OpalDisco <OpalDisco@cov.com>
Subject: [EXTERNAL] RE: FD 36873 - Applicants' 1st Set of Discovery Requests

Either works for BNSF. But we should keep today's call. We need to hear what UP and NS are planning as to TAR and receive your proposed protocol. We also need to discuss the responsiveness criteria – UP has had our edits for 10 days. And we need to know if UP and NS agree or not to produce the contents of data rooms and diligence trackers shared between UP and NS in connection with the Proposed Transaction.

McClain Thompson

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From: Kelly, Kevin <Kkelly@cov.com>

Sent: Sunday, June 28, 2026 9:43 PM

To: Matelis, Joseph J. <Matelisj@sullcrom.com>; Thompson, McClain <mcclain.thompson@kirkland.com>; Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; *AEllis@stblaw.com2 <AEllis@stblaw.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <alused@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Fanchiang, Eric <EFanchiang@crowell.com>; *Avia.Gridi@stblaw.com <Avia.Gridi@stblaw.com>

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Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests

If 1-2:30 ET on Tuesday works for all of the Class Is, we're willing to switch times. If not, we'll proceed at 11 ET tomorrow.

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From: Matelis, Joseph J. <Matelisj@sullcrom.com>

Sent: Sunday, June 28, 2026 6:45 PM

To: Kelly, Kevin <Kkelly@cov.com>; Thompson, McClain <mcclain.thompson@kirkland.com>; Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; zzExt-aellis <aellis@stblaw.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent

<KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <aluised@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Fanchiang, Eric <EFanchiang@crowell.com>; *Avia.Gridi@stblaw.com <Avia.Gridi@stblaw.com>
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Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests

[EXTERNAL]

Kevin – CPKC can meet Tuesday 1 to 2:30. I continue to think it would be helpful if you could point us to precedent from the Board or the federal courts relating to the relative discovery obligations of applicants and non-applicants during the Board’s merger reviews. A view about that issue seems to underlie your correspondence, and it would be useful if we could have the chance to consider it.

Matt – I didn’t hear back about our offer to discuss NS’s objections to CPKC’s June 8 requests. We’ll be ready to address those Tuesday as well.

Thanks – Joe

From: Kelly, Kevin <Kkelly@cov.com>

Sent: Friday, June 26, 2026 4:46 PM

To: Thompson, McClain <mccclain.thompson@kirkland.com>; Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; zzExt-aellis <aellis@stblaw.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <aluised@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Matelis, Joseph J. <Matelisj@sullcrom.com>; Fanchiang, Eric <EFanchiang@crowell.com>; *Avia.Gridi@stblaw.com <Avia.Gridi@stblaw.com>

Cc: zzExt-dludwin <dludwin@cov.com>; Flahive Wu, Laura <lflahivewu@cov.com>; Rosenthal, Michael <mrosenthal@cov.com>; Magcale, Jamie Dominique U <JMagcale@cov.com>; Brown, Molly <MBrown@cov.com>; Damitio, Daniel <DDamitio@cov.com>; Harrison, Caroline <CHarrison@cov.com>; Krovoza, Charlotte <CKrovoza@cov.com>; Warren, Matthew J. <mjwarren@sidley.com>; ratkins <ratkins@sidley.com>; Korman, Marc <mkorman@sidley.com>; Laudone, Stephen S. <slaudone@sidley.com>; William Mullins <wmullins@mullinslawgroup.net>; Spencer Naake <snaake@mullinslawgroup.net>; OpalDisco <OpalDisco@cov.com>

Subject: [EXTERNAL] RE: FD 36873 - Applicants' 1st Set of Discovery Requests

McClain,

You have not provided the information we requested regarding the scope of the searches BNSF is undertaking in response to these requests. We have concerns that those searches are inadequate. We also have questions regarding the broad privilege assertions BNSF has made with respect to responsive documents and information. As we learn more about BNSF's positions, we will likely have additional questions that we can address on the call. We look forward to discussing with you on Monday.

Best,

Kevin

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From: Thompson, McClain <mcclain.thompson@kirkland.com>

Sent: Friday, June 26, 2026 3:18 PM

To: Kelly, Kevin <kkelly@cov.com>; Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; *AEllis@stblaw.com2 <AEllis@stblaw.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <alused@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Matelis, Joseph (NON-SIDLEY @SULLCROM.COM) <Matelisj@sullcrom.com>; Fanchiang, Eric <EFanchiang@crowell.com>; *Avia.Gridi@stblaw.com <Avia.Gridi@stblaw.com>

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Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests

[EXTERNAL]

As for BNSF, I directly answered all your questions / issues in writing yesterday. Happy to join at 11 AM ET, but what is it that you specifically want to discuss as to BNSF's responses?

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Sent: Friday, June 26, 2026 3:15 PM

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*AEllis@stblaw.com2 <AEllis@stblaw.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C.
<Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com
<pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich
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Eric <EEEnson@crowell.com>; Matelis, Joseph (NON-SIDLEY @SULLCROM.COM)
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Laudone, Stephen S. <slaudone@sidley.com>; William Mullins <wmullins@mullinslawgroup.net>;
Spencer Naake <snaake@mullinslawgroup.net>; OpalDisco <OpalDisco@cov.com>

Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests

Counsel,

In response to Applicants' June 22 request for your availability to meet and confer regarding your responses to Applicants' 1st Set of Discovery Requests, only CN has provided availability (indicating Monday and Tuesday of next week would work). We will circulate an invite for the parties to meet and confer at 11 AM ET on Monday. If you cannot be available then, please provide alternative times on Monday or Tuesday when you are all available.

Best,

Kevin

Kevin Kelly

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From: Kelly, Kevin

Sent: Wednesday, June 24, 2026 4:54 PM

To: Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; Ellis, Abram J <AEllis@stblaw.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <aluised@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Thompson, McClain <mcclain.thompson@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Matelis, Joseph (NON-SIDLEY @SULLCROM.COM) <Matelisj@sullcrom.com>; Fanchiang, Eric <EFanchiang@crowell.com>; 'Gridi, Avia' <Avia.Gridi@stblaw.com>

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Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests

Counsel,

Following up on the attached correspondence, please provide your availability to meet and confer this week.

Best,

Kevin

Kevin Kelly

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Subject: FD 36873 - Applicants' 1st Set of Discovery Requests

Counsel,

Please see the attached correspondence.

Best,

Kevin

Kevin Kelly

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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 Williams

Attorney for BNSF Railway Company

July 16, 2026