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ENTERED
Office of Chief Counsel
July 21, 2026
Part of
Public Record

July 21, 2026

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

BNSF-42

Re: STB Docket No. FD 36873 – Response to UP’s Motion to Compel Data (UP-75)

Dear Judge Soulikias:

Before UP filed its motion, BNSF had already agreed to a reciprocal production of most of the operational data UP had requested. For example, BNSF has already agreed to produce car event data, container event data, train event data, and data sufficient to show interchange volumes from 2019 to 2025. This is in addition to the prior reciprocal traffic tape productions between BNSF and Applicants; that exchange included system wide waybill data from 2019 to 2024 and identifies interchange volumes by location and partner, broken down to the individual shipment level of detail. So, to the extent UP needs even more data from its competitors to meet UP’s burden of showing UP’s merger is in the public interest—a dubious proposition, given that UP’s third attempt at the application will be its case-in-chief and final word—UP either has the data or will receive it.

The only category of data that BNSF has declined to provide at this time is reciprocal switching data (Applicants’ Request No. 20). BNSF has relevance and undue burden objections to producing this data. **First**, it is unclear how non-Applicant reciprocal switching data is relevant to this case. When pressed to explain the relevance, UP had no answer, other than to say that BNSF asked for the same data from them. That does not establish relevance as to BNSF’s data. The parties are not similarly situated. Under the Major Merger Rules, UP bears the burden of showing its proposed merger is in the public interest and of supporting the contentions that UP has made. This means UP’s reciprocal switching data is relevant, among other reasons, because it indicates where existing UP reciprocal switching offers meaningful competitive options and identifies which shippers may benefit from obtaining similar switching rights as a competitive enhancement of the merger. **Second**, given the way BNSF maintains reciprocal switching data, it is particularly burdensome to collect and produce, as explained below. In light of the relevance and burden problems with this one portion of UP’s requests, this aspect of the motion should be denied.

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July 21, 2026

Page 2

I. BNSF Has Agreed to Produce Most of What Applicants Requested.

Before UP filed its motion, BNSF agreed to the following:

No.	Applicant Request	BNSF Response
18	Produce system-wide car and, where applicable, container, movement event data for all Your traffic. Car event data should be sufficient to identify all events and the sequence of cars within a train for each applicable event. Container event data should be sufficient to identify the car conveying the container for each applicable event and all events, including in-gate, out-gate, ramp, and deramp events.	BNSF will produce the requested data, to the extent it is available upon reasonable search, covering the same level of detail and time as contained in the data UP and NS have produced. BNSF is also willing to produce blocking information, which is available in BNSF event data, if UP and NS agree to produce the same.
19	Produce system-wide train event data for all Your trains.	BNSF will produce the requested data, to the extent it is available upon reasonable search, covering the same level of detail and time as contained in the data UP and NS have produced.
21	Produce data sufficient to show all interchange volumes with other rail carriers, broken down by line, location, and counterparty, together with any associated payments, settlements, or charges between carriers for haulage, switching, or other car handling (including waybill identifiers, car initials and numbers, dates and times, service type, payment types, and amounts), for the period from January 1, 2019, through December 31, 2025.	BNSF will produce the requested data, to the extent it is available upon reasonable search and not already included in other responsive materials, covering the same level of detail and time as contained in the data and materials UP and NS have produced.

KIRKLAND & ELLIS LLP

July 21, 2026

Page 3

II. BNSF Should Not Be Required to Produce Reciprocal Switching Data.

To prevail on a motion to compel, UP must show that the information sought is relevant and not unduly burdensome to produce. *CSX Transp., Inc. and Delaware and Hudson Rwy. Co. – Joint Use Agreement*, FD 35348, slip op. at 3 (S.T.B. served Aug. 16, 2010). Here, BNSF's reciprocal switching data is irrelevant to this proceeding, and regardless, is particularly burdensome to collect and produce.

Relevance. As a non-merging party, BNSF's reciprocal switching data is irrelevant to this case. For context, reciprocal switching occurs when one railroad serving a shipper changes (*i.e.*, switches) cars to another nearby railroad that does not have direct access to the shipper's facility. In this proceeding, UP's and NS's switching data is relevant to understand whether these types of switching arrangements should be expanded to maintain or enhance competition in accordance with their obligations under the Major Merger Rules. Details on how and where UP and NS currently offer reciprocal switching are relevant to determining where opportunities most readily exist, based on operations and infrastructure already in place, to expand these switching services as a competitive enhancement. Non-merging railroads do not have the same regulatory obligation, meaning their reciprocal switching data is not relevant to the Board's analysis. UP has never explained why it needs BNSF's reciprocal switching data. If UP provides a credible position, BNSF is open to considering it.

Undue Burden. Given the non-centralized way that BNSF maintains the data, the burden associated with collecting and producing the reciprocal switching data that UP has requested is heavy. Reciprocal switching occurs at over 100 stations across BNSF's system. UP has requested "switch lists" and "interchange logs," which are both daily records that report how reciprocal switches are planned and executed locally, for individual car movements. BNSF does not maintain the "switch lists" or "interchange logs" UP is asking for in a standardized format across all locations where reciprocal switching is performed. As a result, collecting such information would require: (1) researching the record-keeping practices across many different operating locations across BNSF's system where reciprocal switches are performed, (2) determining which types of data stores are responsive, and then (3) ensuring the full scope of available data is collected. That undertaking is unduly burdensome (particularly when weighed against the irrelevance of the data to this case).

UP has also requested "line-segment level usage data" relating to reciprocal switching data. To even identify the precise line segments where reciprocal switching has occurred over five years would require a special study, much less preparing usage statistics specific to these segments. UP has also requested "any other records or communications reflecting reciprocal switching arrangements or traffic." Each time a reciprocal switch is performed, which occurs hundreds of thousands of times each year across BNSF's system, there is communication both among BNSF's own local operating personnel and counterparts at other railroads operating in the area. This

KIRKLAND & ELLIS LLP

July 21, 2026

Page 4

request thus likely covers millions of individual conversations. UP has not produced similar level of detail for any of these components, nor has it explained why this information is relevant.

CONCLUSION

Your Honor should deny Applicants' motion as to the reciprocal switching data.

/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 Williams

Attorney for BNSF Railway Company

July 21, 2026