

July 22, 2026

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

BNSF-44 / CPKC-35 / CSXT-17 / CN-25

Re: STB Docket No. FD 36873 – Issues for Resolution at July 24 Conference

Dear Judge Soulikias:

Pursuant to Decision No. 24, BNSF, CN, CPKC, and CSXT (“Non-Applicant Railroads”) write regarding the upcoming July 24, 2026 discovery conference. The conference will be necessary to resolve certain disputes below between movants and UP/NS. Two matters are being adjourned. We also provide the positions of the Non-Applicant Railroads on Applicants’ scheduling proposal.

ADJOURNED MATTERS

I. UP’s Motion to Compel Data Productions (UP-75 / NS-73)

On July 16, UP moved to compel the Non-Applicant Railroads to produce car and train event, reciprocal switching, and interchange data. UP claimed that data discovery should be a reciprocal exchange. Certain Non-Applicant Railroads agreed to produce data in response to some of the data requests. BNSF responded that it would produce much of the requested data but raised relevance and undue burden concerns as to reciprocal switching data. *See* BNSF-42. CSXT replied that Applicants motion is premature because CSXT had already agreed to produce car and train event data and to investigate the availability and burden of producing the requested reciprocal switching or interchange data, and that Applicants have not shown the relevance or proportionality of such data from CSXT. CSXT-15. CN replied that Applicants’ motion is premature because CN agreed to produce most of the requested data and otherwise requested to meet and confer further on the relevance of event data and ways to limit the burden on CN in producing any such data. *See* CN-24. CPKC replied that UP’s motion is premature and that Applicants have not demonstrated that the data requests are relevant or proportional. *See* CPKC-34.

Based on UP-78/NS-76, we understand that Applicants are adjourning this motion to the next discovery conference in August. While Non-Applicant Railroads agree that this motion should not be heard now, Applicants’ adjournment confirms that the motion to compel was premature when it was filed, and as explained in Non-Applicants Railroads’ replies, should not have been filed while the meet and confer process was still ongoing.

II. BNSF’s Third Motion to Compel (BNSF-40)

On July 16, BNSF moved to compel UP and NS to produce board of director-level materials concerning competition, consolidation, growth, market shares, and alternatives to consolidation—whether related to the proposed merger or not. *See* BNSF-40. Applicants responded that BNSF’s request is unreasonable, and they ask that if production is ordered, the ALJ should set a second hearing to consider a reciprocal order that applies to the Non-Applicant

Railroads. *See* UP-76 / NS-74. While BNSF considers the proposals that UP/NS noted in their opposition, BNSF will adjourn (to the next conference in August) this motion. BNSF anticipates conferring further with Applicants on that motion ahead of that next conference.

MATTERS GOING FORWARD

I. UP and NS's Use of Technology Assisted Review (BNSF-36)

Before the July 10 conference, BNSF and Applicants submitted letters regarding Applicants' use of TAR. *See* BNSF-36; UP-70 / NS-68. "At the discovery conference, UP and NS agreed to provide additional information about TAR," and the parties were asked to confer further about Applicants' use of TAR. Decision No. 26 at 7. At 4 PM ET today (12 days after the conference), Applicants provided some information about their TAR process for the first time. Non-Applicant Railroads will review that information before the hearing.

II. CPKC's Motion to Compel (CPKC-24)

On May 28, 2026, CPKC moved to compel responses to 21 discovery requests from its first set concerning merger analysis, pricing strategies, growth strategies, interline initiatives, and service and operations information. UP and NS replied on June 9, 2026. UP-64 / NS-62. CPKC's motion was held in abeyance pending ongoing negotiations between CPKC, UP, and NS. *See* Decision No. 25.

With respect to UP's and NS's custodial searches, CPKC proposed search terms on June 17. On July 7, Applicants sent a hit report concerning CPKC's proposal stating they would not agree to CPKC's proposed search terms and declined to offer a counterproposal. On July 9, CPKC sent follow-up questions about the hit reports and requested a counterproposal. Following the July 10 discovery conference, CPKC again requested that Applicants provide a counterproposal. On July 17, Applicants sent a counterproposal, but Applicants did not answer the questions CPKC had asked in its July 9 email about the alleged burdens associated with CPKC's proposal. On July 20, CPKC again requested answers to its July 9 questions. After 3PM ET today, Applicants provided some of the requested information, and CPKC is considering it.

III. UP's Motion to Compel Privilege Substantiation (UP-74 / NS-72)

On July 16, UP moved to compel BNSF to provide further "substantiation" for its privilege objections in response to UP and NS's discovery requests related to downstream effects. *See* UP-74 / NS-72. BNSF replied that, as it has told UP, BNSF's merger opposition work was done at the direction of counsel and is therefore privileged. *See* BNSF-43. UP does not identify what additional "substantiation" would be necessary or what specific, unanswered questions UP has about BNSF's privilege assertions.

IV. Interim Deadlines (Decision No. 26)

The parties were ordered to confer about interim discovery deadlines. *See* Decision No. 26 at 7. The parties have conferred on these issues. The chart below sets forth what Applicants' proposals (second column) and Non-Applicant Railroads' responses to it (third column):

Event	Applicants' Proposals	Non-Applicant Railroads' Position
Applicants' Search Framework	“Applicants’ production of all custodial files shall be subject to the discovery parameters and limitations identified in Applicants’ updated Exhibit A, covering specific search terms, date ranges, and custodian lists for both UP and NS custodians.” “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, and shall make reasonable efforts to respond to questions from other parties about their discovery methods.”	Applicants inappropriately include in their proposal a request for a <i>de facto</i> protective order on their search parameters. Applicants intend to use any such order to bar parties (including parties that are not yet before the Board) from seeking supplemental searches. Applicants’ search methodology should not be pre-approved in an order—particularly before Applicants file their supplements and the Board deems their supplements satisfactory for continuing to the merits of the case. Non-Applicant Railroads will need time to review the supplements and have an opportunity to serve discovery regarding new contentions or materials presented in the supplements. To the extent that Applicants want to proceed with a “reasonable, efficient, and defensible process” of their own choosing, other parties are entitled to reserve the right to question and challenge the sufficiency of the searches on the back end once the productions are made. During the meet-and-confer process, Non-Applicant Railroads asked Applicants how this language was meant to alter the Board’s otherwise applicable discovery protocols. They did not explain what difference, if any, was intended. For that reason alone, this language is superfluous and should not be accepted.
Applicants' Document Productions	“By August 17, 2026, Applicants shall substantially complete custodial productions for Applicants’ Initial Custodians and their production of non-custodial documents responsive to requests served before June 30, 2026. This provision does not supersede	If those dates are the best that Applicants can do for their own productions, which Applicants have had eight months to work on, Non-Applicant Railroads do not object. These dates should be memorialized in an order so the Board knows how discovery is progressing and the distant document production deadlines the Applicants are setting (particularly since most depositions will follow the substantial completion deadline and because depositions need to be complete before stakeholders’ comments are due).

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	Section C(6) of the Discovery Guidelines.” “By September 18, 2026, all parties 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. This provision does not supersede Section C(6) of the Discovery Guidelines.” Note: (C)(6) provides: “At 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 consistent with the party’s discovery responses and objections and any orders of the ALJ or Board.”	However, Non-Applicant Railroads object to Applicants’ proposal that Non-Applicant Railroads be held to the September 18, 2026 production deadline for discovery requests served on Non-Applicant railroads before August 3, 2026 for three reasons: First, Applicants ignore that the propriety of any discovery they may seek from the Non-Applicant Railroads is fundamentally determined by the scope of any responsive comments that may be filed. <i>See Union Pac. – Control & Merger – S. Pac.</i>, FD 32760 at 1-3 & n.6 (STB served Mar. 25, 1996) (affirming ALJ’s decision to deny or delay applicants’ discovery requests related to matters that would be raised in forthcoming comments/responsive applications). Without responsive filings, it is impossible to meaningfully balance the relevance of a request to the burden it imposes. Postponing the deadline for Non-Applicant Railroads’ final response is the most efficient approach, as it will allow discovery requests and responses to be tailored to the issues raised, potentially obviating the need for certain discovery entirely. Second, Applicants’ discovery requests to Non-Applicant Railroads were served much more recently than discovery on Applicants. The parties are still in the middle of negotiations regarding what, if any, documents Non-Applicant Railroads should produce in response to Applicants’ discovery requests. The outcome of those negotiations will significantly impact the amount of time needed to collect, review, and produce documents. Third, it makes little sense for Non-Applicant Railroads to be held to the same discovery deadlines as Applicants in this case. Applicants have already submitted their case-in-chief, and Non-Applicant Railroads are entitled to seek discovery from Applicants to test their assertions as they

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		prepare comments and responsive applications (for which the Board has not yet set a deadline). While Applicants have already served discovery on Non-Applicant Railroads, NS's counsel previewed on the July 10 conference that Applicants plan to seek <i>additional</i> discovery from Non-Applicant Railroads <i>after</i> the deadlines for any comments or responsive applications to test the assertions made therein. Any discovery deadline set for Non-Applicant Railroads should account for the cadence of the procedural schedule and occur only once. If the ALJ nonetheless desires to establish a set of omnibus discovery deadlines applicable to Non-Applicants at this point, Non-Applicant Railroads suggest that such a deadline be set by reference to the procedural schedule ultimately adopted by the Board.
Deadline for Document Requests	"With the exception of the Application, which is addressed separately in this scheduling proposal, discovery requests that are addressed toward the assertions in a party's filing (including the comments, responsive applications, supplements, or any other filing) are due 20 days after service of such filing." "By August 3, 2026, all discovery requests relating to the Applicants' Amended	Non-Applicant Railroads gave significant consideration to the ALJ's request. However, we continue to believe that any deadlines for document requests are inconsistent with the STB's regulations and not workable given the nature of STB proceedings. An omnibus deadline for serving 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. The Amended Application is still in abeyance, and the Board has not yet established a deadline for notices of intent to participate in this proceeding. (By August 3, not all parties will be before the Board, so that portion of Applicants' request is particularly problematic.) We would propose that Your Honor defer consideration of any deadlines for serving discovery requests until at least UP and NS commit that they are completed with their supplemental submissions and the Board orders a

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	Application, filed April 30, 2026, are due.”	schedule for this matter. A final deadline is not appropriate, especially before a Board schedule. To the extent the parties must adopt a discovery schedule prior to the Board’s imposition of a broader case schedule, Non-Applicant Railroads propose that deadlines be in relation to key deadlines in the Board’s forthcoming schedule, for example the submission Comments, Requests for Conditions, and Responsive Applications. For example, it might make sense to establish deadlines for core discovery (<i>i.e.</i>, not including appropriate follow-up/secondary discovery) some number of days (perhaps 45) prior to the due date established by the Board for the submissions in which responses to such discovery might be used. In all events, a 20-day deadline is far too limiting. As parties produce documents, requesting parties need to have the ability to issue supplemental requests related to filings. Applicants’ 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. A “good cause” filter as a precondition for serving proposed additional discovery will only invite up-front satellite fights – and Court time – to resolve whether discovery can be served.
Deadline for Fact Depositions	“Fact witness depositions may be held at any time subject to the terms of the Discovery Guidelines.”	All UP and NS witnesses should be presented at least 30 days before stakeholders’ comments are due (and Section (C)(6) of the Discovery Guidelines should apply).

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	“Expert witness depositions may be held at any time subject to the terms of the Discovery Guidelines.”	In this proceeding, it may make sense for some UP / NS expert witnesses to be deposed prior to the completion of fact depositions.
“Secondary” Discovery Deadline	“Limited secondary discovery must be justified by the party serving any such request, subject to a good cause standard, and conform with the discovery schedule. This provision does not limit any party’s ability to serve discovery requests directed toward the assertions in another party’s filing, so long as such discovery is served within 20 days after service of such filing.”	As discussed above, any such discussion should be tabled and re-assessed upon review of any procedural schedule the Board sets.

LIST OF ATTENDEES

A. BNSF

1. Daniel Donovan
2. McClain Thompson
3. Tim Strafford

B. CSX

1. Eric Enson
2. Eric Fanchiang
3. John Scheib

C. CPKC

1. Joseph J. Matelis
2. David L. Meyer
3. Noah Stern

D. CN

1. Abram Ellis
2. Laurel Fresquez

E. ARU

1. Richard S. Edelman

F. NJ TRANSIT

1. Ayelet Hirschhorn

Based on most recent hearing:

A. Union Pacific

1. Michael Rosenthal
2. Laura Flahive Wu
3. Kevin Kelly

B. Norfolk Southern

1. Matthew Warren
2. Carrie Mahan
3. Stephen Laudone
4. William Mullins
5. Spencer Naake

Respectfully,

/s/ Daniel T. Donovan

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Counsel for CN

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

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