

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**UNION PACIFIC RAILROAD
COMPANY**

v.

**BNSF RAILWAY
COMPANY**

Docket No. NOR 42188

**UNION PACIFIC’S REPLY TO BNSF’S MOTION TO HOLD PROCEEDING
IN ABEYANCE**

BNSF’s request for an indefinite abeyance pending resolution of its Motion to Dismiss should be denied. Union Pacific has shown that BNSF’s Motion to Dismiss lacks merit,¹ and an indefinite abeyance would serve only to delay resolution of this proceeding. Moreover, any undue burden claimed by BNSF is outweighed by the concrete and ongoing prejudice to Union Pacific, and affected shippers—including those who have already identified “a pressing need for a prompt resolution of the competing claims in this proceeding.”²

BNSF’s request rests on a single premise: because it has filed a motion to dismiss, the Board should halt this proceeding until that motion is decided. But a

¹ Union Pacific Railroad Company’s Response to BNSF Railway Company’s Motion to Dismiss, Docket No. NOR 42188 (filed July 27, 2026).

² Letter from Farmers Cooperative at 2, Docket No. NOR 42188 (filed July 24, 2026); *see also* Letter from Cooperative Producers, Inc. at 2, Docket No. NOR 42188 (filed July 24, 2026) (“the need for a prompt resolution and certainty with respect to the competing claims in this proceeding is critical”).

pending dispositive motion by itself does not justify suspending discovery or delaying establishment of a procedural schedule. If the mere filing of a motion to dismiss justified an abeyance, proceedings would routinely stop whenever such a motion was filed. The Board's rules do not adopt such a regime.³ While the agency at times has held cases in abeyance pending the resolution of a motion to dismiss where the specific facts so required, it has also refused to do so in other cases—permitting discovery to go forward while it considered the motion to dismiss.⁴ Abeyances are only granted if they both promote the efficient resolution of the dispute and are not fundamentally unfair to any party, including third party stakeholders.⁵

BNSF has failed to demonstrate that an indefinite abeyance would advance either of the efficiency and fundamental fairness considerations that govern the Board's exercise of its discretion, and third-parties have already indicated harm from holding this proceeding in abeyance.⁶

³ See 49 CFR Parts 1111 and 1114 (including no provisions for abeyance of proceedings or discovery when motions to dismiss are filed).

⁴ See, e.g., *W. Texas Utils. Co. v. Burlington N. R.R. Co.*, Docket No. 41191, 1994 WL 144009, at *1 (ICC served Apr. 22, 1994); see also *E.I. DuPont de Nemours & Co. v. Norfolk S. Ry. Co.*, Docket No. NOR 42125, at 4 (STB served Nov. 29, 2012) (abeyance decision “in any particular situation is highly dependent on the facts and circumstances of the case”).

⁵ *Norfolk S. Ry. Co.—Pet. to Set Trackage Rts. Comp.—Norfolk & Portsmouth Belt Line R.R. Co.*, Docket No. FD 36223 (STB served Dec. 19, 2019); *Pet. of the Nat'l R.R. Passenger Corp. for Relief Pursuant to 49 U.S.C. § 24905*, Docket No. FD 36048, at 4 (STB served Oct. 3, 2016) (considering whether “any other entity would be materially harmed by holding this proceeding in abeyance”).

⁶ Like the Board, federal courts assess motions to stay discovery pending resolution of a motion to dismiss on a case-by-case basis, considering factors like: (1) the

First, abeyance here would not promote the efficient resolution of disputes because BNSF's Motion to Dismiss lacks merit. As Union Pacific explained in its Reply to the Motion to Dismiss, the facts pled in the Complaint plainly make out the elements of each of the three Counts of the Complaint. BNSF's Motion to Dismiss does not establish any clear jurisdictional or procedural bar to those Counts, and many of its arguments are merely factual disputes appropriate for determination only after the submission of evidence and argument. In short, BNSF has not shown that Union Pacific failed to state reasonable grounds for investigation, and therefore it is clear that the case should move forward into discovery and evidence. Staying this proceeding until the motion to dismiss is denied would thus serve no purpose but delay.

Moreover, BNSF has not demonstrated that any undue burden of discovery supports abeyance. BNSF's assertion that resolution of its motion "may" change the scope of discovery is entirely speculative and is insufficient to justify delaying the entire proceeding. BNSF has not demonstrated that its Motion to Dismiss is likely to terminate or materially narrow this proceeding, nor has BNSF made any attempt at explaining how or why ordinary discovery would pose an unusual burden. Union Pacific expects to tailor its discovery requests to the issues in dispute, and the Board's discovery rules already provide a mechanism for resolving any specific discovery objections that may arise. If BNSF believes—after seeing Union Pacific's

strength of the motion to dismiss; (2) the burden of responding to discovery; and (3) prejudice to the party opposing the stay. *See, e.g., Cabrera v. Progressive Behav. Sci., Inc.*, 331 F.R.D. 185, 186 (S.D. Fla. 2019).

actual discovery—that a request is unduly burdensome, it may file a motion under 49 C.F.R. § 1114.21(c) to address the objectionable discovery. Simply presupposing that hypothetical discovery requests will be burdensome does not warrant the complete pause of discovery BNSF seeks. BNSF’s request for an abeyance is not appropriate under the circumstances of this case and would certainly not promote efficiency.⁷

Second, an abeyance would be fundamentally unfair. Not only will Union Pacific continue to be harmed by BNSF’s retaliatory and anticompetitive tariffs, but shippers who depend on competitive rail service during the harvest window will also be left without recourse while BNSF’s tariffs and practices remain in effect. The Board has directly heard from impacted customers like Farmers Cooperative, which opposes BNSF’s requested abeyance and explains that there is “a pressing need for a prompt resolution of the competing claims in this proceeding.”⁸ Cooperative Producers, Inc. similarly opposes abeyance, arguing that “the need for a prompt resolution and certainty with respect to the competing claims in this proceeding is critical.”⁹ Union Pacific’s proposed schedule is specifically designed to resolve this

⁷ *Omaha Pub. Power Dist. v. Union Pac. R.R. Co.*, Docket No. NOR 42173, at 2–3 (STB served Dec. 23, 2022), does not support BNSF’s position. In *OPPD*, the Board suspended a procedural schedule after extensive discovery had already been conducted and where there were indications that continued discovery while the motion to dismiss was considered would significantly burden both parties. Here, no discovery has been conducted and there is no indication of undue burden.

⁸ Letter from Farmers Cooperative at 2, Docket No. NOR 42188 (filed July 24, 2026).

⁹ Letter from Cooperative Producers, Inc. at 2, Docket No. NOR 42188 (filed July 24, 2026).

matter before the next grain harvest season. BNSF's requested abeyance would extend the harm it has caused to these and other customers who have been impacted by BNSF's retaliatory and anticompetitive tariff changes, and it could have the effect of delaying a Board resolution of the underlying claims until after the 2027 harvest season or later. There is nothing fundamentally fair about permitting BNSF to freeze this proceeding while the harm it causes the market as a whole continues.

* * *

BNSF has not shown that an indefinite abeyance would promote the efficient resolution of this proceeding. Nor has it addressed the concrete prejudice that continued delay would inflict on Union Pacific and those affected by the challenged tariffs. For these reasons, BNSF's Motion to Hold Proceeding in Abeyance should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 3rd day of August, 2026, the foregoing document was served by first-class mail or email on all parties of record in this proceeding.

/s/ Sydney A. Volanski

Sydney A. Volanski