

September 1, 2026

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

BNSF-50/CPKC-43/CSXT-22

ENTERED

Office of Chief Counsel

September 1, 2026

Part of

Public Record

*Re: STB Docket No. FD 36873 – Opposition to Applicants’ Motion for “Common”
Discovery Deadlines (UP-96/NS-95)*

Dear Judge Soulikias:

The Board has now adopted a procedural schedule.

BNSF, CPKC, and CSXT (“Non-Applicant Railroads”) support discovery deadlines that facilitate an orderly process and align with the sequenced nature of the merits submissions in this proceeding. But Non-Applicant Railroads urge the Court not to consider deadlines that would artificially cap and constrain the scope of discovery; that do not fit the staggered nature of submissions the Board has ordered; and that disregard the Board-set deadlines (including the updated deadline for Notices of Intent to Participate). Because Applicants’ proposed deadlines are, for the most part, already-out-of-date, would impose inappropriate substantive limitations on discovery, and divorced from the realities of the Board’s schedule, Your Honor should reject them.

Instead, Non-Applicants Railroads support deposition-related milestones as outlined below. Additionally, Your Honor could impose a deadline for any non-applicant to serve its first (but not necessarily only) round of discovery within 20 days of (a) that non-applicant’s first appearance in the proceeding or (b) any new evidentiary filing by Applicants or any other party on which the discovery is served, whichever occurs later.

This is not a classic, plaintiff vs. defendant litigation schedule, where discovery of both sides occurs simultaneously. The Board has instead ordered a specific sequence of evidentiary submissions. Any discovery schedule should align with that sequence. Stakeholders have a September 30 deadline to notice their intent to participate. *See* Decision No. 35 at 2. Then, comments and responsive applications from non-applicants are due November 18, 2026. *See* Decision No. 30 at 13. Responses to those comments and responsive applications (which would include any rebuttals from Applicants) are due February 16, 2027. *Id.* Then, parties that file responsive applications will be entitled to file rebuttal in support of their applications by March 29, 2027. *Id.*

Applicants’ scheduling proposals are divorced from that sequence. They ignore that Applicants’ case continues to change, and even more change is coming. Just yesterday, UP’s Chief Accounting Officer testified there

Ex. A, Aug. 31, 2026
C. Powers (Rough) Dep. Tr. at 148:9-15.

. Other of Applicants’ proposals are flawed or obsolete, considering developments in the proceeding since Applicants initially proposed these deadlines in

July. Nonetheless, Non-Applicant Railroads recognize that some deadlines may help the process at this stage; as noted in Section IV below, we believe that some deposition-related milestones are the sensible next step.

I. Applicants' Deadlines for Document Requests Foreclose Discovery.

Applicants ask Your Honor to retroactively impose an August 3 deadline for discovery requests relating to the Amended Application. UP-77/NS-75 at 2. Applicants also ask Your Honor to impose a 20-day deadline to make requests related to filings. *Id.* These proposals would restrict discovery and impair the development of the record. And they would be inconsistent with Board rulings and the Board's schedule.

First, because notices of intent are not due until September 30, Applicants' proposal would mean that hundreds of parties who have recently noticed their participation cannot take discovery on the Amended Application. Applicants provide Your Honor with no authority—there is none—to strip the due process rights of others and foreclose their participation in this discovery process, especially in view of “the scope of the proposed transaction.” Decision No. 35 at 2.

Second, Applicants' proposals would constrain the ability to serve follow-up requests on new issues that will arise—and, in fact, are arising. For example, Applicants disclosed more market analyses last week, and a UP executive just testified that [REDACTED]. In depositions, new information is coming to light. This new information includes Applicants' internal projections, which is prompting additional discovery that could not have anticipated until those internal plans were uncovered. Applicants' proposed cutoffs for discovery requests would constrain (or at least create confusion about) the ability to serve follow-up requests on these issues. The bottom line is that the Board's regulations provide for broad discovery, yet Applicants' proposed discovery cutoffs would have the opposite effect.

Third, Applicants propose that “[l]imited secondary discovery must be justified by the party serving any such request, subject to a good cause standard, and conform with the discovery schedule.” Applicants' proposal has it backwards. If Applicants believe that a particular discovery request is improperly cumulative or duplicative or irrelevant, their recourse is to move for a protective order. That is how both the Board's discovery rules and the Discovery Guidelines are structured.

In the end, the Board's rules and the Discovery Guidelines issued by Your Honor set the correct framework for document discovery.

II. Applicants' Request for “Common” Production Deadlines Make No Sense.

Applicants propose that, for discovery requests served before August 3, 2026, all parties' document productions be substantially complete by September 18, 2026. UP-77/NS-75 at 2. In other words, Applicants want to force production deadlines on non-applicants *two months* before non-applicants' comments are even due and *six months* before Applicants make their next submission on the merits. This proposal does not make sense for at least four reasons.

First, the appropriateness of discovery that Applicants seek from non-applicants is fundamentally rooted in the contentions that non-applicants make on November 18. *See Union*

Pac. – Control & Merger – S. Pac., FD 32760, Decision No. 23 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 stakeholders’ responsive filings on the merger proposal, it is impossible to meaningfully balance the relevance and proportionality of a particular request. Indeed, Applicants have said they intend to serve discovery on non-applicants after they make their comments on November 18. It follows that non-applicants cannot have substantially completed their productions by September 18 when Applicants anticipate issuing requests after November 18.

Second, the deadline is entirely artificial. The next time Applicants will be heard in this proceeding is in mid-February—more than six months from now. There is no reason—and Applicants provide none—that they need non-applicants to complete their responses to Applicants’ discovery requests now. Absent any such legitimate reason, Applicants’ proposal suggests a tactic—attempting to unduly strain non-applicants’ resources during the short period in the Board’s procedural schedule when they must review Applicants’ own large document productions (now belatedly underway in earnest), take depositions of Applicants about the Application, and prepare their own comments. There is no need to create that constraint, because there is sufficient time for non-applicants to complete productions after they serve their comments and before Applicants make their rebuttal case.

Third, Applicants are proposing what amounts to a more accelerated (and thus expensive) process for non-applicants than themselves. Over 99% of Applicants’ email productions were made just over the last 24 days—months and months after the filing of Applicants’ April 2026 Amended Application, let alone their December 2025 Original Application. Applicants received discovery requests to which those email productions are responsive in 2025. There is no principled reason non-applicants should be held to a more accelerated production schedule than Applicants. Nor is there a principled reason why non-applicants should have been required to wait months after Applicants’ filings to receive substantive productions, but Applicants should receive substantive productions months before non-applicant comments are due.

Fourth, a deadline is not necessary to ensure meaningful, non-applicant discovery. Applicants and Non-Applicant Railroads have been engaging in productive meet and confers regarding many of Applicants’ pending requests; for many of their other requests, Applicants have not even raised the need to meet and confer, demonstrating the sufficiency of the current collaborative discovery efforts by non-applicants.

III. Applicants’ Proposals Regarding Search Framework Are Inappropriate.

Applicants’ proposed deadlines also contain proposals that are not deadlines at all. Specifically, Applicants propose to limit their production of documents to materials from certain custodians, during inconsistent time frames, and responsive to certain specific search terms. *See* UP-77/NS-75 at 2, Ex. A. These proposals are in fact shadow motions for a protective order that have no business in a schedule. Applicants’ document productions are ongoing, meaning that the need for supplemental searches might arise in the future. Applicants’ search methodology should not be pre-approved in an order. Applicants chose to proceed with a self-selected “reasonable, efficient, and defensible process for identifying and producing responsive custodial documents, including using search terms and TAR,” UP-77/NS-75 at 2, so other parties are entitled to reserve

the right to question and challenge the sufficiency of the searches later, once they see the implications of Applicants' methodologies as revealed in the productions ultimately made.

IV. Your Honor Should Instead Set Milestones for Depositions.

To efficiently advance discovery, the parties should focus on setting deposition milestones:

- Applicants should provide dates for their witnesses such that the depositions can be completed no later than November 4, 2026 (*i.e.*, 14 days before stakeholders' comments are due on November 18, 2026).
- Non-applicants should provide dates for their witnesses such that the depositions can be completed no later than February 2, 2027 (*i.e.*, 14 days before the February 16, 2027 submission deadline).
- Applicants and other parties making submissions on February 16, 2027, should provide dates for any testifying witnesses that are necessary to probe any additional contentions no later than February 2, 2027 (without limiting the potential need for other witnesses to address evidence presented in those submissions).

CONCLUSION

Board regulations provide for broad discovery and, in this matter, continued discovery is essential. The Amended Application continues to change. New developments continue to arise. Applicants' proposed deadlines would unnecessarily and unfairly impair the scope of discovery—and with it, the record that is available to the Board in the most consequential proceeding in its history. Your Honor should deny Applicants' motion and instead set milestones for depositions to ensure discovery proceeds in an orderly fashion.

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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
September 1, 2026

EXHIBIT A

(Redacted)