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ENTERED
Office of Chief Counsel
September 25, 2026
Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 32760 (SUB-NO. 52)

BNSF RAILWAY COMPANY—PETITION FOR REVIEW—UP/SP MERGER CONDITIONS

UNION PACIFIC RAILROAD COMPANY'S REPLY TO BNSF RAILWAY COMPANY'S SUPPLEMENTAL FILING

BNSF has abandoned all but one claim, and the Restated and Amended Settlement Agreement ("RASA") requires arbitration of that remaining dispute. In response to the Board's instruction that BNSF specifically justify any request for "a modification of an existing merger condition,"[1] BNSF deserted that part of its Petition[2] entirely. And in the face of the Board's requirement that BNSF adequately support any claims that Union Pacific is not complying with UP/SP merger conditions,[3] BNSF dropped all its claims but one. What is left is BNSF asserting that Union Pacific has not been providing equal dispatching to BNSF trackage rights trains as required by RASA Section 9(d).[4] BNSF's claim that Union Pacific

[1] Decision, *BNSF Ry. Co.—Petition for Review—UP/SP Merger Conditions*, STB Fin. Docket No. 32760 (Sub-No. 52), at 6 (served May 26, 2026) ("*May 26 Decision*").

[2] Petition for Review, Enforcement, and Modification of the UP/SP Merger Conditions, *BNSF Ry. Co.—Petition for Review—UP/SP Merger Conditions*, STB Fin. Docket No. 32760 (Sub-No. 52) (filed Nov. 28, 2025) ("Petition").

[3] *May 26 Decision* at 6.

[4] Supplemental Petition at 3, *BNSF Ry. Co.—Petition for Review—UP/SP Merger Conditions*, STB Fin. Docket No. 32760 (Sub-No. 52) (filed Aug. 26, 2026) ("Supplement").

has not provided equal dispatching is incorrect and unsupported by the selective, stale, and largely anecdotal evidence that BNSF appends to its filing. Regardless, it is exactly the sort of claim that the parties agreed to arbitrate under the RASA's exclusive arbitration provision. The Board should not spend its valuable and limited resources on adjudicating a fact-intensive dispatching dispute that is perfectly suited for the arbitration forum that the RASA provided.

In short, there is little left of BNSF's Petition, and what is left is appropriate for arbitration, not a Board proceeding. The Board should deny the petition and close this docket.

I. BNSF's Vague and Expansive Petition Has Now Narrowed to a Single Factual Dispute.

In the *May 26 Decision*, the Board held that BNSF's Petition failed to provide "a clear and well-supported showing to justify the proposed proceeding." *May 26 Decision* at 5. The Board noted that its supplemental conditioning authority is used "sparingly and cautiously," especially for conditions that "BNSF and UP agreed to in an arms' length negotiation" decades ago. *Id.* at 4-5. And the Board reaffirmed its prior admonitions to BNSF that any attempt to modify *UP/SP* merger conditions must include "as much evidentiary detail as necessary" to justify a specific request for relief; must "set forth, at length, the precise remedies" requested; and must "explain, with as much detail as circumstances require, why it is that the desired remedies are necessary." *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (Oversight)*, Decision No. 13, 3 S.T.B. 987, 995 n.32 (1998) ("*UP/SP Oversight Decision No. 13*") (cited in *May 26 Decision* at 5, 6).

The Board found that BNSF's Petition did not meet those standards. *See May 26 Decision* at 5. To the contrary, the Petition was predicated on "vague and incomplete assertions" and failed to either "identify[] the full scope of issues that it wants the Board to resolve or commit[] to the type of relief it seeks." *Id.*

The Board gave BNSF 60 days to decide whether it "wish[ed] to continue pursuing this matter." *Id.* at 6. If it did, the Board instructed BNSF to "clearly identify the incidents or disputes that make up the alleged pattern of behavior," to clearly state for each claim "whether it seeks enforcement of an existing condition set forth in the RASA, a change to a condition, or both," and to provide factual support for the relief it was seeking. *Id.* The Board emphasized that any attempt to modify an existing merger condition would require BNSF to "show that it is unable to compete, or that its existing rights do not restore competitive options that existed before the merger and would have continued but for the merger." *May 26 Decision* at 6 (quoting *UP/SP Oversight Decision No. 13* at 995 n.32).

After obtaining an extension of time for the stated purpose of incorporating a waybill analysis into its filing, BNSF filed its Supplement on August 26, 2026. In that Supplement, BNSF did not identify a single merger condition that it was seeking to modify. BNSF therefore waived that portion of the Petition. And BNSF narrowed its previous requests for a sweeping "enforcement" proceeding down to a single "request that the Board open a proceeding to enforce the merger conditions requiring equal dispatching." Supplement at 3 (citing RASA § 9(d)).[5] BNSF has abandoned the Petition's remaining broad claims. *Id.*[6]

Perhaps to disguise the dramatic diminishment of the Petition it announced with such fanfare last November, BNSF submitted a mass of documents and verified statements in conjunction with the Supplement. But much of what BNSF submitted has nothing at all to do with the dispatching claim. For example, the verified statement of Nicholas Hill, which contains the waybill analysis that BNSF used as an excuse to obtain an extension for its filing, does not relate to its dispatching claim in any way.[7] Similarly, more than half of the verified statement of Olivia Power (and over 30 of her exhibits) address non-dispatching claims that BNSF is no longer pursuing.[8]

The BNSF exhibits that do relate to dispatching consist in large part of years-old BNSF complaints about individual historical operating situations, typically without providing the contemporaneous Union Pacific communications, or explaining how the complaint was addressed at the time, or including information

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[5] Section 9(d) of the RASA requires that trains operated using trackage rights on the Joint Trackage as defined by § 9(d) "shall be given equal dispatch without any discrimination in promptness, quality of service, or efficiency in favor of comparable traffic of the owning carrier."

[6] BNSF asserts that it will have "bilateral" discussions with Union Pacific about certain other issues, but no longer seeks a Board proceeding on those issues. *Id.*

[7] Supplement, V.S. Hill (purporting to analyze service election process and impact on freight rates, but not addressing dispatching claims). It is worth noting that Dr. Hill's waybill analysis exclusively addresses alleged impacts on freight rates before 2006, and has no analysis pertaining to the last twenty years.

[8] *See id.* V.S. Power at 6-15 (addressing non-dispatching allegations and including over 30 exhibits to support non-dispatching allegations).

on the full operational context at the time.[9] Union Pacific strongly contests BNSF's assertion that any of these historical incidents reflect a violation of the equal dispatching provisions of the RASA. But it is clear that reconstructing the circumstances around these incidents would require substantial factual investigation and discovery into historical data and operational circumstances relating to incidents from many years ago. Any adjudication of BNSF's claim would be fact-intensive and time-consuming for the adjudicator.

BNSF cannot cure those deficiencies through additional discovery. The Board expressly rejected an open-ended proceeding in which BNSF could use discovery to determine the scope of its own claims. It held that BNSF had not made "a clear and well-supported showing to justify the proposed proceeding," characterized the Petition as "vague and incomplete," and stated that it would "not permit BNSF to conduct discovery before identifying the full scope of issues that it wants the Board to resolve." *May 26 Decision* at 5-6. The Board specifically criticized "the petition's indication that the practices and incidents it describes are representative examples, not an exhaustive list." *Id.* It therefore directed BNSF to "clearly identify the incidents or disputes that make up the alleged pattern of behavior" and made clear that the "supplemental filing must list the events that BNSF wants the Board to consider." *Id.* BNSF's renewed request for additional discovery disregards those

[9] *See, e.g.*¸ Supplement V.S. Power (including complaints from as early as 2017, 2019, 2020, and 2021); Supplement V.S. Brewer (including complaints from as early as 2018, 2019, and 2020). BNSF also provides one expert statement purporting to show differentials at select locations that BNSF infers show unequal dispatching.

instructions. Rather than identify an exhaustive set of incidents and support each one with evidence, BNSF again asks the Board to open a proceeding first and allow BNSF to develop its case later. Because the Supplement still does not define the full scope of the alleged violations or make the required clear and well-supported showing, the Board should reject BNSF's request for discovery and deny the Petition.

II. BNSF's Single Remaining Dispatching Claim Should be Arbitrated as the RASA Intended.

There is no dispute that Section 9(d) of the RASA requires "equal dispatch" for trackage rights trains governed by that section. Union Pacific complies with that provision and dispatches BNSF trackage rights trains evenhandedly as it responds to the many complex operational situations that arise every day. BNSF alleges that Union Pacific is somehow not complying with § 9(d). The RASA requires the parties to arbitrate this factual dispute.[10]

The Board "favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, whenever possible." *Joint Pet. for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Ex Parte 765, at 8 (STB served Nov. 15, 2021) (cleaned up). That general rule is particularly applicable when sophisticated parties have specifically

[10] RASA § 15 ("Except as otherwise provided by any decision of the STB or by separate agreement, unresolved disputes and controversies concerning any of the terms and provisions of this Agreement or the application of charges hereunder shall be submitted for binding arbitration under Commercial Arbitration Rules of the American Arbitration Association which shall be the exclusive remedy of the parties.").

agreed to an arbitration remedy, as BNSF and Union Pacific did in the RASA. Indeed, the Board recently emphasized that RASA disputes about contested factual matters should ordinarily be arbitrated.[11]

The Board previously declined to require arbitration in part because an arbitrator lacks authority to modify conditions set forth in the RASA. *May 26 Decision* at 5. That concern does not apply to BNSF's current request, which seeks enforcement of the existing equal-dispatch condition and damages—not modification of the RASA. Those fact-specific claims fall squarely within the RASA's arbitration provision. To the extent BNSF nevertheless seeks to modify the RASA, it has not satisfied the Board's threshold requirement to show that it is "unable to compete, or that its existing rights do not restore competitive options that existed before the merger and would have continued but for the merger." *May 26 Decision* at 6 (quoting *UP/SP Oversight Decision No. 13* at 995 n.32). Nor does BNSF's remaining claim raise issues with "broad implications for implementing the merger conditions."[12] The only question presented is whether Union Pacific is complying with an existing condition, and, if not, what damages are available—precisely the

[11] *See BNSF Ry Co.—Pet. For Clarification—Service to Colorado Materials*, STB Docket No. FD 32760 (Sub-No. 49) (served June 30, 2025) ("*Colorado Materials*"), at 4 ("As a general matter, the Board encourages BNSF and UP to arbitrate, in the first instance, future disputes over contested factual matters which otherwise do not have broad implications or raise policy questions regarding implementation of the Board's conditions.").

[12] Similarly, the Board's observation that arbitration might be insufficient to determine whether a "pattern of conduct" existed that required a reexamination of UP/SP merger conditions has been mooted by BNSF's narrowing of its petition to a single claim and abandonment of its request to modify merger conditions. *May 26 Decision* at 5.

type of dispute the parties agreed to arbitrate under the RASA. *See Colorado Materials* at 4.

Moreover, dispatching-related claims are inherently fact-intensive, because they require close examination of the operational circumstances surrounding any claimed failure to dispatch equally. This is particularly true if BNSF intends to relitigate incidents from many years ago, as indicated by the claims in its Supplement. Responding to that evidence will require extensive discovery into historical records and operational data from both railroads, and the adjudicator will have to sort through that evidence in the context of the specific operating environments of complex locations like Houston and Eagle Pass. Arbitration is the best forum to adjudicate these fact-specific disputes, particularly at a time when the Board has multiple complex matters requiring its attention.

If the Board nonetheless chooses to open a proceeding to decide this claim itself, it should allow the parties to meet and confer on a procedural schedule, which will need to accommodate substantial discovery into data and records and must allow for sufficient time to develop evidence on the fact-specific dispatching issues that are all that is left of BNSF's Petition.[13]

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[13] *See* Supplement at 38 (agreeing that if proceeding is opened, next step should be for parties to meet and confer on a procedural schedule).

III. Conclusion

BNSF's single remaining claim for "enforcement" of the UP/SP merger conditions is a claim that should be arbitrated under the RASA. For this reason, the Board should deny the Petition and close this proceeding.

Respectfully submitted,

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Date: September 25, 2026

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2026, a copy of the foregoing Reply to BNSF Railway Company's Supplemental Filing was served by email or first-class mail on the service list for Finance Docket No. 32760 (Sub-No. 52).

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