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ALJ

SERVICE DATE – OCTOBER 1, 2026

SURFACE TRANSPORTATION BOARD

Docket No. FD 36873

UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY
—CONTROL—
NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN
RAILWAY COMPANY

OMNIBUS ORDER ON DISCOVERY MOTIONS

Decision No. 39

Decided: October 1, 2026

Discovery is before the undersigned pursuant to a ruling by the Surface Transportation Board. See Decision (Aug. 28, 2025). The undersigned conducted a discovery conference on September 18, 2026. This decision memorializes the rulings made at that conference and announces rulings on issues that were reserved for further review.

The Surface Transportation Board regulations provide for broad discovery. These regulations provide that “[p]arties may obtain discovery under this subpart regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” 49 C.F.R. § 1114.21(a)(1). The Board has recognized that this regulation allows for broad discovery. See Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 7), FD 36500, slip op. at 4 (Aug. 2, 2021) (acknowledging authority to seek material relevant to subject matter of proceeding under 49 C.F.R. § 1114.21 and interpreting scope of relevance in discovery “[b]roadly”). An order may be entered for good cause and which justice requires, to protect from “annoyance, embarrassment, oppression, or undue burden or expense, or to prevent the raising of the issues untimely or inappropriate to the proceeding.” 49 C.F.R. § 1114.21(c). Protective orders may include that discovery not be had or that discovery be had only on specified conditions. 49 C.F.R. § 1114.21(c)(1)-(2).

I. Non-Applicants’ Motion to Compel Depositions

On September 3, 2026, Non-Applicant Class I Railroads (“Non-Applicants”) (BNSF, CPKC, and CSXT) moved to compel the depositions of 5 witnesses. (Non-Apps. Letter Motion, Sept. 3, 2026.) Applicant, UP, largely opposed the depositions on various grounds. (See UP Opp. Letter, Sept. 15, 2026.)

A. Agreed Issues

By the discovery conference, the parties had resolved much of the motion. The parties agreed:

1. UP will make Jeff Pincock available for a deposition on October 8, 2026, in Omaha.
2. UP will make Rebecca Gregory available for up to five hours (on-the-record time) on a mutually-agreeable date in Omaha.
3. The parties are discussing accommodations for the deposition of David Hughes.
4. BNSF, CPKC, and CSXT withdraw their notice of intent to depose Carl Garrison, Andrew Brady, and Beth Whited.
5. BNSF will defer its request to depose Clint Pella until after the deposition of Jennifer Hamann; BNSF will evaluate its position as to Clint Pella after Jennifer Hamann's deposition.

Based on these agreements, Non-Applicants' motion to compel depositions is held in abeyance in part.

B. Lance Fritz

The parties disagreed about the deposition of Lance Fritz. UP argued that as a non-party, Mr. Fritz, should be served with a subpoena. (UP Opp. Letter, 1-2, Sept. 15, 2026.) I specifically requested additional briefing on the procedural issue with Non-Applicants providing their supplemental brief by Tuesday, September 21, 2026, and UP to provide its brief by Thursday, September 24, 2026.

There is no dispute that a non-party may be deposed under the STB's regulations. 49 C.F.R. § 1114.22 ("The testimony of **any person, including a party**, may be taken by deposition upon oral examination.") (emphasis added). The issue is the procedural device used when a non-party objects to being deposed.

Section 1114.23 provides that:

(a) *Where deposition should be taken.* Unless otherwise ordered or agreed to by stipulation, depositions should be taken in the city or municipality where the deponent is located.

(b) *Officer before whom taken.* Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions should be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held. Within a foreign country, depositions may be taken before an officer or person designated

by the Board or agreed upon by the parties by stipulation in writing to be filed with the Board.

(c) *Fees. . . .*

(d) ***Failure to attend or to serve subpoena; expenses.*** (1) If the party who filed a petition for discovery fails to attend and proceed with the taking of the deposition and another party attends in person or by representative pursuant to an order of the Board granting discovery the Board may order the party who filed the petition to pay to such other party the reasonable expenses incurred by him and his representative in so attending, including reasonable attorney's fees.

(2) **If the party who filed a petition for discovery fails to serve a subpoena upon the witness and the witness because of such failure does not attend**, and if another party attends in person or by representative because he expects the deposition of the witness to be taken, the Board may order the party who filed the petition to pay to such other party the reasonable expenses incurred by him and his representative in so attending, including reasonable attorney's fees.

(e) *Disqualification for interest. . . .*

49 C.F.R. § 1114.23 (emphasis added). This regulation does not state expressly that a subpoena is ***required***. However, the regulation squarely places the financial burden (with limits) upon the party who failed to serve a **subpoena** upon a witness and the witness's corresponding failure to attend the scheduled deposition. See 49 C.F.R. § 1114.23(d)(2). This provision applies to witnesses and does not distinguish between parties and non-parties. See id. The STB regulations also provide that:

Failure of party to attend or serve answers. If a party or a person or an officer, director, managing agent, or employee of a party or a person willfully fails to appear before the officer who is to take his deposition, **after being served with a proper a notice . . .** the Board on motion and notice may strike out all or any part of any pleading of that party or person, or dismiss the proceeding or any part thereof.

49 C.F.R. § 1114.31(d) (emphasis added). Section 1114.31(d) states that it applies to a "party or a person"; however, the subtitle of the section, "[f]ailure of party to attend," helps explain that it applies to a party. The text of the section further demonstrates this through its examples: "an officer, director, managing agent, or employee of a party." See id. Finally, this section states "after being served with a proper notice" but does not resolve the appropriate procedural device, particularly because it refers to different types of discovery, not just depositions. See id.

In this proceeding, the Order Setting Discovery Guidelines provides, in relevant part:

A person who has not submitted written testimony in this proceeding may be deposed on notice in accordance with 49 C.F.R. § 1114.22, which shall identify the cause or reason why such deposition will be taken. Any party opposing a deposition shall have the burden to secure a protective order in accordance with 49 C.F.R. § 1114.21(c). Any party seeking a ruling from the ALJ as to a deposition shall follow the procedures set forth below in Section F (Resolution of Disputes).

Decision No. 24, Sec. C.2(a) (June 18, 2026) (depositions). The Order Setting Discovery Guidelines also states: “The Board’s discovery rules set forth at 49 C.F.R. pt. 1114 will apply to this proceeding, except as modified by Board decision or by these discovery guidelines. . . . The default rules for non-party discovery shall apply, subject to further review and discussion as the case progresses.” Id. at Sec. A.2 (General).

Prior to the entry of the Order Setting Discovery Guidelines, I specifically asked the parties to consider whether any changes to the proposed order might be warranted for requested non-party discovery pursuant to 49 U.S.C. § 1321. See Decision No. 22, 2-3 (May 28, 2026.) At the conference discussing the proposed discovery guidelines, the parties argued that “49 C.F.R. § 1113.2” provides “the default rule” for requesting subpoenas and no alteration to the proposed discovery guidelines was needed. (See Apps. Opp. Letter 2, Sept. 15, 2026.) However, section 1113.2 explicitly applies to the Board’s oral hearings, not discovery (i.e., depositions): “[a] request for a subpoena to compel the appearance of a person **at a hearing** to give oral testimony, but not to produce documents, may be made either by letter (only the original need be filed with the Board) or orally upon the record at the hearing.” 49 C.F.R. § 1113.2(b)(1); see also 49 C.F.R. § 1113.2(b)(2) (a request for subpoena to compel a witness to produce documents should be made in writing, and the officer presiding at a hearing may grant a request for such a subpoena made orally upon the record).

Relevant to non-party witnesses, section 1321 states that:

(c) SUBPOENA WITNESSES.—(1) The Board **may subpoena witnesses and records related to a proceeding of the Board** from any place in the United States, to the designated place of the proceeding. . . .

(d) DEPOSITIONS.—(1) In a proceeding, the Board may take the testimony of a witness by deposition and may order the witness to produce records. A party to the proceeding pending before the Board may take the testimony of a witness by deposition and may require the witness to produce records at any time after a proceeding is at issue on petition and answer.

(2) If a witness fails to be deposed or to produce records under paragraph (1), **the Board may subpoena the witness to take a deposition, produce the records, or both.** . . .

49 U.S.C. § 1321 (emphasis added). This statutory authority applies to subpoenas for witnesses (i.e., non-parties), related to proceedings and not only oral hearings (i.e., discovery), and for depositions, production of documents, or depositions with the production of documents (i.e., a subpoena duces tecum).

CPKC argues that an STB regulation, 49 C.F.R. § 1114.22(a) authorizes the deposition of Mr. Fritz without issuance of a subpoena. (CPKC Supp. Letter, 1-2, Sept. 22, 2026.) Agreed. The Order Setting Discovery Guidelines comports with the STB’s regulation that a deposition of a witness who has not submitted written testimony may be taken by notice. Decision No. 24, Sec. C.2(a) (June 18, 2026). Any witness may voluntarily appear for deposition pursuant to a

notice of deposition. But Mr. Fritz will not voluntarily agree to be deposed. (See UP Opp. Letter 2, Sept. 15, 2026) (requiring Mr. Fritz’s deposition be compelled).

Mr. Fritz is an unwilling non-party witness, and a notice is not sufficient to secure his attendance. Simply put, there are no consequences for an unwilling non-party witness who fails to attend the deposition pursuant to a notice. Stated differently, a non-party witness can just ignore a deposition notice.

CPKC argues STB precedent supports its argument that a notice is sufficient. (CPKC Letter Brief 2, Sept. 22, 2026.) CPKC cites Application of the National Railroad Passenger Corp. Under 49 U.S.C. 24308(a), FD 33381 (STB served May 6, 1997). In that proceeding, in a footnote, the Board explained that the Northern New England Passenger Rail Authority (NNEPRA), as successor in interest to Maine Department of Transportation (MDOT) in implementing relevant Amtrak service filed a petition to intervene and agreed to comply with all obligations of parties in an STB proceeding, including discovery. Id. at n.4. The Board explained that one party, B&M, did not oppose NNEPRA’s intervention, provided that did not shield the State of Maine or MDOT from the obligations of a party. Id. The Board stated that: “[i]f B&M wishes to depose State or MDOT employees not under NNEPRA’s control, our rules provide the means for it to do so.” Id. (citing 49 C.F.R. § 1114.22). CPKC argues that the Board’s citation of section 1114.22 endorses its reading of that regulation. (CPKC Letter Brief 2, Sept. 22, 2026.)

That same Board decision addressed whether the Board should issue **subpoenas** for depositions and document production to third parties. Appl. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. 24308(a), FD 33381, slip op. at 2-4. The Board did not address its authority for issuing subpoenas. See id. The Board ultimately denied the request for subpoenas, because the information was available publicly, and the proponent did not justify their need for the information in the proceeding. See id. at 2-4; see also id. at 3 (“[I]t is not clear to us that the information sought would be relevant to any function we are required to perform under the statute.”).

A subpoena is required to secure the attendance of a non-party’s attendance at a deposition. The authority is found at 49 U.S.C. § 1321.¹

In its supplemental briefing, CPKC alternatively argued that I should issue CPKC’s proposed subpoena for Mr. Fritz’s deposition. (CPKC Letter Brief 3-4, Sept. 22, 2026.) CPKC argued Mr. Fritz’s deposition is relevant, because Mr. Fritz is UP’s former CEO who has relevant knowledge of UP’s past efforts to grow via interline partnership, as opposed to mergers. (Non-Apps. Letter Motion 1, Sept. 3, 2026.) Mr. Fritz was UP’s CEO from 2015 to 2023. Id. Importantly, 2023 is the base year at issue.

UP opposed Mr. Fritz’s deposition. (UP Opp. Br. 3, Sept. 24, 2026.) UP argued that Mr. Fritz is “not likely to have relevant and non-duplicative testimony.” (Id. (citing the

¹ This code section was previously found at 49 U.S.C. § 721 but renumbered in 2015. See Pub. L. 114-110.

balancing test of BNSF Railway Company Coal Dust Mitigation Tariff Provisions, FD 35557, slip op. at 4 (STB served June 25, 2012)).

UP argued the Non-Applicants questioned John Turner about UP's 2021 merger analysis. (UP Opp. Br. 3, Sept. Sept. 24, 2026.) I reviewed Mr. Turner's deposition testimony at Exhibit 1 of UP's Brief, which has been marked highly confidential and filed under seal. See id. Mr. Turner testified about UP's 2021 merger analysis. See id. However, it is very likely that Mr. Fritz will be able to provide additional details or might testify differently.² Thus, Mr. Fritz's testimony will not be duplicative.

UP also argued that Non-Applicants will have the opportunity to question Eric Gehringer, Jennifer Hamann, and Kenny Rocker, who are all UP executives and in their same positions and can answer questions about the 2021 merger analysis. Id. None of these employees is (or was) CEO, so they will not have the same perspective and answers. Moreover, former employees do not carry the shackles of current employment to ensure they answer questions fully and completely. In sum, Mr. Fritz's deposition testimony will not be duplicative of these current employees' testimonies.

While Mr. Fritz is *currently* a non-party, he is not a "stranger" to this proceeding—meaning that he has ties to UP as the former CEO, especially during the base year at issue, 2023. His documents are already being produced by UP. See Decision No. 31, 9 & n.9 (Aug. 19, 2026). As CPKC argued, (see Non-Apps. Letter Motion 5, Sept. 3, 2026 (quoting Decision No. 31, 9)), I previously decided that because he was CEO when UP was not interested in pursuing a merger, "Mr. Fritz's comments would be highly relevant to Non-Applicants' opposition to the proposed transaction."

Sitting for a deposition is different than asking a witness to produce documents. Again, Non-Applicants are not asking Mr. Fritz to produce documents—UP is already doing that for him.

The procedure is formal. If a witness has irrelevant information, the deposition is likely to be rather short (or unnecessary if only duplicative of others' testimony). It can be stressful at the extremes—if there is very little association with the proceeding or if there is an integral connection. For some witnesses, a deposition can be quite exciting. A deponent can interject his or her perspective about issues.

For his deposition, Mr. Fritz must only show up and answer questions—truthfully—to the best of his recollection. Admittedly, a deponent must reserve one day, i.e., seven hours (generally), which can be large time commitment for the deponent. But Mr. Fritz has information that is highly relevant to Non-Applicants' positions in this case. Mr. Fritz very likely would seek to give his thoughts on the UP/NS Proposed Transaction through the lens of his role as UP's former CEO.

² Because the transcript was filed under seal, I am not describing its details. This line of questioning is somewhat lengthy and fact based. It is evident that several witnesses would testify differently, especially years later.

Balancing all these considerations, Non-Applicants' motion for deposition regarding Mr. Fritz is granted. The ALJ will separately enter the subpoena for the deposition of Mr. Fritz when the parties have agreed upon the date and time for the deposition of Mr. Fritz. The date and time must be sufficiently in advance of the deadline for filing comments. See Decision No. 30 (Aug. 18, 2026). The parties may file a Notice of Filing Proposed Subpoena to bring the issue before me.

If the parties cannot jointly agree on a date and time, I will enter the subpoena on the date and time requested by Non-Applicants, because the comment deadline is approaching. I will discuss this issue with the parties at the next discovery conference (i.e., October 2, 2026), in hopes that a mutually agreeable deposition date can be found.

II. Applicants' Motion to Compel

Applicants filed a motion to compel on September 10, 2026. (Apps. Letter Motion, Sept. 10, 2026.) Applicants requested a deadline of no later than September 25, 2026, for responses to Applicants' discovery requests that the Non-Applicants agreed to produce.³ (See id. at 2.) Appellants argue that the agreed document production is for the discovery responses as follows: BNSF: Request Nos. 4, 6-8, 16, 22; CPKC: Request Nos. 2-4, 6-10, 12-14, and 16-17; and CSXT: Request Nos. 2-4. (See id. at 2.) Applicants argued that Non-Applicants served their responses on June 15 and 16 but have not made any firm commitments about a production schedule. (Id. at 1-2.)

Non-Applicants opposed Applicants' requested deadline. (BNSF Opp. Letter, Sept. 15, 2026; CPKC Opp. Letter, Sept. 15, 2026; CSXT Opp. Letter, Sept. 15, 2026.) At the discovery conference, Non-Applicants (BNSF, CPKC, and CSXT) explained that they are processing the discovery responses, and they agreed to make rolling productions. BNSF further agreed to make productions on October 2, 2026, October 16, 2026, and to substantially complete its production "well before" Applicants' next merits submission deadline on February 16, 2027. (BNSF Opp. Letter 1, Sept. 15, 2026.)

Regarding whether to order the Applicants' requested deadline, I considered the overall extent of Non-Applicants' discovery responses and document production. These discovery responses cannot be viewed in isolation. The scope and extent of discovery is very broad and voluminous in this matter (and at the same time the parties are engaged in taking depositions). Even if Non-Applicants have not yet produced documents, it is because the discovery sought is voluminous here. Non-Applicants have agreed to rolling productions. As Applicants are well acquainted in this proceeding, the initial stages of setting up the discovery protocols take the most time and effort. The initial productions start somewhat slowly (especially by the other party's standards), but then pick up speed substantially. I expect the same to apply to Non-Applicants as they set up their e-discovery protocols and make their rolling productions.

³ The document productions at issue in this motion are non-custodial documents. At the discovery conference, counsel for UP clarified that the parties' negotiation of custodial documents remains ongoing.

Although Applicants' motion did not address custodial productions, the Order Setting Discovery Guidelines includes a provision that a party must substantially complete the production of the witness's custodial documents ten (10) days prior to a deposition. See Decision No. 24, Sec. C.6 (June 18, 2026).

At the discovery conference, Non-Applicants agreed to make bi-weekly discovery update reports, starting on October 2, 2026.⁴ The bi-weekly updates will ensure that Non-Applicants' document production is on track. Accordingly, I am denying Applicants' motion without prejudice.

III. CSXT's Motion to Compel

CSXT filed a motion to compel Applicants' responses to CSXT's discovery requests. (CSXT Letter Motion, Sept. 10, 2026.) CSXT moved to compel three discovery requests: the documents NS produced in Canadian Pacific Ry.—Control—Kansas City Southern, Docket No. FD 36500; documents from various NPBL-related proceedings; and CSXT's Third Set of Discovery Requests, Requests Numbers 4 through 13 to Applicants. (Id. at 2-4.)

Applicants responded that the third category was resolved (i.e., CSXT's Third Set of Discovery Requests, Request Numbers 4 through 13 to Applicants), because Applicants agreed to respond to these requests after conducting reasonable searches. (See Apps. Letter, Sept. 15, 2026.)

NS opposed the first category of discovery requests (i.e., documents NS produced in FD 36500). (See NS Opp. Letter 1-2, Sept. 15, 2026.) However, at the discovery conference, CSXT explained that the parties resolved this dispute.

Therefore, CSXT's motion to compel is held in abeyance regarding the two categories of discovery requests that were resolved (i.e., the documents NS produced in FD 36500; and CSXT's Third Set of Discovery Requests, Request Numbers 4 through 13 to Applicants).

The second category remained at issue, which sought documents from various NPBL-related proceedings. The NPBL-related proceedings were:

A. Norfolk S. Co.—Control—Norfolk & Portsmouth Belt Line R.R., Docket No. FD 36836;

B. Norfolk S. Ry.—Pet. For Declaratory Ord., Docket No. FD 36522;

⁴ I required Applicants to file biweekly updates of their progress towards their non-custodial document production beginning July 10, 2026, and held in abeyance Non-Applicants' request for updates on the custodial production. See Decision No. 25, 4 (July 8, 2026). Since then, Applicants have been providing bi-weekly updates, because they voluntarily agreed to provide custodial production updates. (See, e.g., Apps. Letter, Sept. 19, 2026.)

C. Norfolk S. Ry.—Pet. to Set Trackage Rts. Comp.—Norfolk & Portsmouth Belt Line R.R., Docket No. FD 36223; and

D. CSX Transportation, Inc. v. NS Railway Company, Case No. 2:18-cv-00530-MSD-RJK (E.D. Va.).

(See CSXT Letter Motion 3, Sept. 10, 2026); see also Norfolk S. Co.—Control—Norfolk & Portsmouth Belt Line R.R., FD 36836, slip op. at 5, 7 (STB served Apr. 6, 2026).

CSXT’s Discovery Request Numbers 18 and 19 requested that NS produce all documents that it produced in the NPBL-related proceedings, including sub-dockets and related proceedings. (See CSXT Letter Motion, Ex. A at 14, Request Nos. 18, 19, Sept. 10, 2026.) NPBL is a terminal and switching railroad with rail access to Norfolk International Terminals (NIT) in Norfolk, Virginia. (*Id.* at 1.) CSXT argues that:

NIT is among the most strategically significant deepwater intermodal terminals on the East Coast—a gateway through which transcontinental traffic moving on the networks of UP, BNSF, CPKC, and other carriers is interchanged with NS at inland points. NS dominates rail access to NIT. NS is the only Class I railroad with direct on-dock rail access to NIT, and its control of NPBL—approved by the Board in Decision No. 14 in Docket No. FD 36836—gives it exclusive control over the only line by which a competing carrier could otherwise access NIT by rail. As CSXT demonstrated in that proceeding, NS has used its control of NPBL to impose artificial operating barriers, leaving CSXT with a disproportionately low share of on-dock rail intermodal traffic at NIT and forcing it to continue to rely on a more difficult mode of transportation called drayage subsidized by Virginia International Terminals (“VIT”) to provide service to NIT. The proposed UP/NS merger, by which UP would acquire control of NPBL, would transform NS’s existing structural dominance at NIT into a foreclosure threat. A combined UP/NS would have both the ability and incentive to exploit NS’s exclusive on-dock rail access to NIT—and its control of the only line available to any competing carrier—to steer transcontinental traffic onto UP’s network and away from BNSF and CPKC.

(*Id.* at 3.)

CSXT argued that both it and the Virginia Port Authority (VPA) filed Descriptions of Anticipated Responsive Applications related to NPBL “to mitigate the additional harm to competition threatened by the proposed UP/NS merger.” (CSXT Letter Motion 4, Sept. 10, 2026.) CSXT argued that the requested discovery is relevant to CSXT’s and VPA’s anticipated responsive applications and is less burdensome than new discovery requests. (*Id.*)

CSXT argued that it seeks to challenge Applicants’ contention that they will keep existing gateways open for eligible traffic on commercially reasonable terms, because CSXT argued that “Applicants are *already* abusing their control over gateways and interchange points.” (*Id.*) CSXT argued that “documents produced in proceedings that are specifically about NS’s alleged abuse of its control over a shortline railroad and dock are relevant for testing Applicants’

contentions and for demonstrating the harm to competition posed by their proposed merger.” (Id.)

NS opposed CSXT’s discovery requests on five grounds. (NS Opp. Letter 2, Sept. 15, 2026.) NS argued that CSXT is using this proceeding to relitigate prior matters. (Id.) NS claimed that the requested documents are not relevant to this proceeding and CSXT’s foreclosure theory, and CSXT has access to other documents to prove its case. (Id. at 2-3.) NS argued that the requested documents are beyond the timeframes applicable to this proceeding. (Id.) Finally, NS argued that importing the discovery from the NPBL proceedings would create substantial duplication, inefficiency, and the risk of inconsistent adjudications. (Id. at 3.)

Following the discovery conference but before I issued this order, CSXT advised that in an effort to resolve this dispute, CSXT narrowed its discovery requests to NS’s materials reflected in briefings and other documents submitted to the STB in the three STB proceedings, “including any NS materials relied on or cited in those submissions—i.e.,[.] the actual STB evidentiary record in those proceedings[.]” (CSXT Letter 1, Sept 23, 2026.) CSXT withdrew its request for production of the federal litigation materials. See id. Also, CSXT agreed to maintain any confidentiality designation in the original STB proceeding in a manner consistent with the Protective Order entered in this proceeding. Id.

NS submitted a letter in opposition. (NS Opp. Letter, Sept. 23, 2026.⁵) NS argued CSXT violated the Order Setting Discovery Guidelines, Decision No. 24, which does not authorize supplemental advocacy. (Id. at 2.) NS argued that if the ALJ does not disregard CSXT’s email, then additional consideration should be given to NS’s reply on the merits. (Id.) Distilled to its essence, NS argued that the Board imposed conditions on NS’s control of NPBL, so therefore there cannot be competitive harm. (Id. at 2) (“Those binding conditions will continue to apply after the proposed transaction, defeating CSXT’s premise that a merged UP/NS could use control of NPBL to foreclose CSXT traffic.”)

Importantly, CSXT’s September 23, 2026 letter narrows its discovery requests from the original discovery request, Number 18, that sought NS to produce all documents that it produced in the NPBL-related proceedings, including sub-dockets and related proceedings. (See CSXT Letter Motion, Ex. A at 14, Request No. 18, Sept. 10, 2026.) CSXT’s September 23, 2026 letter explained that it requested instead the “the actual STB evidentiary record in those proceedings[.]” (CSXT Letter 1, Sept. 23, 2026.)

CSXT narrowed its requests to the three STB proceedings. Therefore, CSXT withdrew its motion for Request Number 19 regarding the federal litigation. Accordingly, CSXT’s motion to compel regarding Request Number 19 is denied without prejudice.

⁵ For the avoidance of any doubt, all correspondence directed to me must be filed on the STB’s **public docket** (unless there is confidential information and the Protective Order applies) **and** a copy sent to **alj.soulikias.inbox@stb.gov**.

CSXT’s counsel originally emailed this information to me and counsel for Applicants and Non-Applicants. I asked STB staff to have CSXT’s counsel submit the information in a letter to the STB’s public docket, which CSXT did. (See CSXT Letter, Sept 23, 2026.)

Turning to the narrowed requests. NS argued that CSXT seeks to relitigate claims that it lost on the merits and that the requests are not relevant, because CSXT cannot alter the STB's conclusions in the NPBL proceeding, and UP is bound by the STB's conditions. (NS Opp. Letter 2-3, Sept. 15, 2026.) NS also disagreed with CSXT's characterization that CSXT demonstrated NS has used its control of NPBL to impose artificial operating barriers and that CSXT is somehow at a competitive disadvantage due to that control. (*Id.*) (citing CSXT Letter Motion at 3.) NS disagreed with CSXT's theories of competitive harm and argued that CSXT conflates two distinct theories; however, NS concludes that "the alleged harm is either addressed by binding NPBL conditions or concerns a different issue governed by the gateway protections and competitive safeguards proposed in this proceeding." (NS Letter 3, Sept. 23, 2026.)

At the discovery conference, CSXT explained that it did not seek to relitigate its cases against NS but instead that the discovery materials are relevant to how NPBL works, NS control of NPBL, and how UP post-merger might use NPBL. CSXT explained that the Board included safeguards (or conditions) in NS's control of NPBL. See Norfolk S. Co.—Control—Norfolk & Portsmouth Beltline RR Co., FD No. 36836, slip op. 27-32 (STB served Apr. 6, 2026). CSXT explained that it will argue on the merits that the merged entity, UP/NS, through its control of NPBL, would harm CSXT (and others). (CSXT Letter Motion 1-2, Sept. 10, 2026.)

This is discovery, not the merits. The Board's regulation provides that "[i]t is not grounds for objection that the information sought will be inadmissible as evidence if the information sought as evidence *appears reasonably calculated to lead to the discovery of admissible evidence.*" 49 C.F.R. § 1114.21(a)(2) (emphasis added).

As CSXT explained, its narrowed discovery request is for the three STB evidentiary records, which CSXT requested to support its argument that the merged entity would cause competitive harm to CSXT. NS disagreed that this is possible with the conditions the STB imposed. NS's argument is not a reason to deny discovery. Rather, it supports that CSXT and NS (again) disagree on the merits question, but discovery is appropriate.

The evidentiary record and supporting filings from the control proceeding are relevant to CSXT's anticipated arguments in this case. See Norfolk S. Co.—Control—Norfolk & Portsmouth Belt Line R.R., Docket No. FD 36836. In that case, CSXT argued its competitive concerns. See Norfolk S. Co.—Control—Norfolk & Portsmouth Belt Line R.R., FD 36836, slip op. at 22 (STB served Apr. 6, 2026). How the Board ultimately evaluates those concerns in this matter is up to the Board during its evaluation of the merits. Building the record through discovery is a different question.

There is some overlap among the three STB proceedings. See Norfolk S. Co.—Control—Norfolk & Portsmouth Beltline R.R., FD No. 36836, slip op. 3-9 (STB served Apr. 6, 2026) (discussing NPBL's history, the control application, and the controversy between NS and CSXT). However, CSXT has not explained to me how the other two STB proceedings lead to the discovery of admissible evidence. (See CSXT Letter Motion 3, Sept. 10, 2026.) CSXT described "a request from NS for declaratory relief," Norfolk S. Ry.—Pet. For Declaratory Ord., Docket No. FD 36522, and "a request from NS to set certain rates for usage of NPBL," Norfolk

S. Ry.—Pet. to Set Trackage Rts. Comp.—Norfolk & Portsmouth Belt Line R.R., Docket No. FD 36223. Otherwise, CSXT referred to these collectively as NPBL-related proceedings or the three STB proceedings. (See CSXT Letter Motion, 3-4, Sept. 10, 2026; CSXT Letter, Sept. 23, 2026.) Without further specificity, I will deny CSXT’s motion to compel in part for two STB proceedings: Norfolk S. Ry.—Pet. For Declaratory Ord., Docket No. FD 36522, and Norfolk S. Ry.—Pet. to Set Trackage Rts. Comp.—Norfolk & Portsmouth Belt Line R.R., Docket No. FD 36223.

NS argued that the discovery records sought are outside the timeline of this case. (NS Opp. Letter 3, Sept. 15, 2025.) Of the narrowed requests, one of the three STB proceedings is outside of the discovery timeline in this case, i.e., generally 2019 here, because the base year is 2023. See Norfolk S. Ry.—Pet. to Set Trackage Rts. Comp.—Norfolk & Portsmouth Belt Line R.R., FD 36223, slip op. at 1-2 (STB served Sept. 25, 2025). Thus, I am also denying CSXT’s narrowed discovery request for Docket No. FD 36223 as being outside the discovery timeline.

NS also argued that permitting CSXT’s discovery request would create substantial duplication, inefficiency, and the risk of inconsistent adjudications. (NS Opp. Letter 3, Sept. 15, 2025.) CSXT narrowed its discovery request, which is efficient and would not cause substantial duplication of effort. Rather, the STB evidentiary record should just be produced, which is efficient. Further, NS’s argument regarding inconsistent adjudications directly conflicts with NS’s argument that UP is bound by the STB’s terms in Norfolk S. Co.—Control—Norfolk & Portsmouth Belt Line R.R., FD 36836 (STB served Apr. 6, 2026).

In sum, CSXT’s motion to compel, as narrowed, is granted in part. NS shall produce the evidentiary record from Norfolk S. Co.—Control—Norfolk & Portsmouth Belt Line R.R., Docket No. FD 36836.

CSXT’s motion to compel is denied in part, for the other two STB proceedings: Norfolk S. Ry.—Pet. For Declaratory Ord., Docket No. FD 36522, and Norfolk S. Ry.—Pet. to Set Trackage Rts. Comp.—Norfolk & Portsmouth Belt Line R.R., Docket No. FD 36223.

CSXT’s motion to compel regarding the federal litigation (Request Number 19) is denied without prejudice.

IV. CPKC’s Motion to Compel

On September 10, 2026, CPKC filed its motion to compel Applicants’ discovery responses regarding CPKC’s Second Set of Discovery Requests to UP and Third Set of Discovery Requests to NS. (CPKC Letter Motion, Sept. 10, 2026.) There were five categories in the motion, which are addressed in turn.

A. *Vena Statement*

CPKC’s motion argued that UP should produce the discovery requested of its CEO’s remarks made at the Southwest Association of Rail Shippers Annual Meeting held from March 16-17 in Houston, Texas. At the discovery conference, CPKC explained that UP agreed to

produce the requested video, (see Apps. Letter Opp. 1-2, Sept. 15, 2026), and requested that this portion of CPKC’s motion be held in abeyance.

B. *Rocker Statement*

CPKC propounded Interrogatory Number 8 to describe the basis for Kenny Rocker’s July 9, 2026 statement. (See CPKC Letter Motion, Ex. A at 7, Sept. 10, 2026.) In response, UP argues that it responded sufficiently. (UP Opp. Letter 1, Sept. 15, 2026.) UP argued that if ordered to supplement, heightened confidentiality protections should be ordered beyond the Protective Order currently in place. (Id. at 1, 2-3.)

CPKC’s Interrogatory No. 8, and UP’s response to the Interrogatory states, in relevant part, that:

INTERROGATORY NO. 8

Describe the bases for the statement made by Kenny Rocker in the July 9, 2026 announcement titled “Let’s Talk Facts: It Doesn’t Surprise Me the Opposition is Nervous” (UP Announcement Number CN2026-18) that “[s]everal [customers] have told me directly that after voicing early support [for the Proposed Transaction], they faced real backlash from BNSF and CPKC railroads,” including by identifying each customer who has allegedly faced “backlash,” the form that “backlash” allegedly took, and the approximate date on which that “backlash” allegedly occurred.

Union Pacific Response

. . . . Union Pacific responds that customers that have facilities on multiple Class I railroads have reported to Union Pacific that they are remaining silent on the merger due to concerns about retaliation elsewhere, including from BNSF and CPKC. Several customers who have supported the Proposed Transaction have reported facing backlash from BNSF or CPKC in the form of BNSF or CPKC employees pressuring those customers to not support the Proposed Transaction, including by indicating that BNSF or CPKC might provide less favorable treatment to those customers or might take adverse action with respect to future business arrangements with those customers. The referenced backlash occurred after the customers revealed their support for the Proposed Transaction and before Mr. Rocker’s July 9, 2026, statement referenced in this Interrogatory. . . .

(CPKC Letter Motion, Ex. D, 15-16, Sept. 10, 2026.)

At the discovery conference, CPKC’s counsel argued that the interrogatory seeks the factual basis for Mr. Rocker’s statement in a public letter, including whether the customer “feared backlash” or “faced backlash.” CPKC’s counsel argued the factual basis is relevant to assessing Mr. Rocker’s credibility, because he provided a verified statement in support of the proposed transaction. CPKC also argued that the current Protective Order is sufficient, and alternative protections proposed by UP are not required.

UP responded that Mr. Rocker's deposition has been noticed (however the date has not been identified). UP argued that the information of "customers who feared backlash" is extremely sensitive information. (UP Opp. Letter 2, Sept. 15, 2026.) UP questioned the relevance of the requested information. Id.

As I explained at the discovery conference, I am concerned about the identity of customers who might be identified from a full, factual answer of this interrogatory.⁶ I reviewed UP's response to the interrogatory, (CPKC Letter Motion, Ex. D, 15-16, Sept. 10, 2026) (quoted above), and it provides many details in response to the interrogatory: customers that have facilities on multiple Class I railroads, remaining silent, previously supported the proposed transaction, pressure by employees of Non-Applicants to oppose, indicated BNSF or CPKC might provide less favorable treatment or might take adverse action with respect to future business arrangement with those customers, after customers revealed support for proposed transaction but before the July 9, 2026 statement. See id. This includes quite a few facts that CPKC can ask Mr. Rocker about at deposition. Moreover, this collection of facts can narrow down the potential customer base.

The answer does not include the number of customers that are the answer to this interrogatory. As I explained at the discovery conference, it does not state whether it is two customers or one hundred customers (or anything in between).

Therefore, I ordered UP to supplement its answer to this interrogatory to state the number of customers and to identify the number for CPKC and to BNSF, on or before Friday, September 25, 2026. This deadline expired before this order was issued, and therefore, I am extending this deadline to Monday, October 5, 2026. The remainder of the motion to compel regarding the interrogatory is held in abeyance pending Mr. Rocker's deposition.

C. *Orr Resignation Documents*

CPKC moved to compel executive level materials related to the departure of NS's former COO, John Orr, a declarant in this proceeding. (See CPKC Letter Motion, Exs. A, B, Sept. 10, 2026.) Mr. Orr was one of two co-authors of the Operating Plan with Brian Barr. Orr resigned on May 31, 2026, and had been NS's COO since 2024. (Id. at 3.) CPKC argues the circumstances regarding his resignation are relevant to the sufficiency of the Operating Plan.

CPKC argued that Mr. Orr resigned because he had a diminution in his responsibilities, according to an SEC statement, which meant he was being demoted. According to CPKC, Mr. Orr sponsored the original Operating Plan and was a signatory on one of the multiple versions of the Operating Plan. Thus, CPKC argued it matters if Mr. Orr was being demoted. CPKC argued

⁶ To be clear, this is not an assessment of the merits. It is an assumption. If CPKC's discovery allegation is true, and the factual allegations are made known, is there a concern? Can that concern be alleviated if the information can be learned a different way (i.e., through deposition)?

it also mattered if UP knew about Mr. Orr's job performance, signature on the Operating Plan(s), and then resignation.

I find that the resignation documents are reasonably calculated to lead to discoverable evidence. See 49 C.F.R. § 1114.21(a)(2). CPKC seeks documents regarding Mr. Orr's resignation, which are relevant to his performance given the SEC statement, which in turn, relates to the operating plan(s). The Operating Plan is one of the integral documents to the Revised Application. See Revised Application, Ex. Volume 2, Operating Plan, 2-601-2-844. Mr. Orr co-signed the Operating Plan. Accordingly, I granted CPKC's motion to compel for executive level resignation documents for Mr. Orr.

NS has already collected, if not produced, Mr. Orr's custodial documents. Thus, Applicants and CPKC will confer about the scope of documents CPKC seeks NS to produce. Mr. Orr will be deposed. Applicants will attempt to substantially produce these documents 10 days prior to Mr. Orr's deposition.

D. *Merger Agreement Drafts*

In its requests narrowed through the meet-and-confer process, CPKC seeks drafts of "regulatory effort" provisions of the Merger Agreement exchanged between Applicants. (CPKC Letter Motion 3, Sept. 10, 2026.) CPKC cites the importance of these provisions was recognized by the Board in rejecting the original application, in part, because Applicants withheld Section 5.8. (See id. at 3-4 (citing Decision No. 9 (Jan. 16, 2026).) CPKC argued that the drafts are more probative than the final schedule, because the drafts reflect commercial compromises that led to the merger agreement. (CPKC Letter Motion 4, Sept. 10, 2026.)

UP argued that the negotiation of the merger agreement is not relevant to the proposed merger. (UP Opp. Letter 4, Sept. 15, 2026.) UP also argued that the Board's Decision Number 9 only reflected commenter's comments. (See id.) UP argued that the Board relied upon 49 C.F.R. § 1180.6(a)(7)(ii) and required the submission of all final agreements pertaining to the proposed transaction. (See id. (citing Decision No. 9 at 8).) UP argued that if Schedule 5.8 is relevant because it "reflects[s] UP's bottom line on regulatory conditions," then the draft versions are irrelevant. (See id.)

UP focused on CPKC's citation to Decision Number 9. However, CPKC explained that it wanted to know about NS's (not UP's) bottom line. (See CPKC Letter Motion 4, Sept. 10, 2026.) CPKC's citation to Decision Number 9 was an analogy. The drafts demonstrate NS's positions through negotiations (likely its bottom line). They are relevant and likely to lead to discoverable evidence. Moreover, because the request seeks the drafts exchanged, they are not privileged. CPKC's narrowed motion to compel the merger agreement drafts is granted. The documents must be produced within two weeks.

It is ordered:

1. Non-Applicants' motion to compel depositions is granted in part as to Mr. Fritz and held in abeyance in part, all as set forth above.

2. Applicants' motion to compel a deadline for production of agreed documents is denied without prejudice.
3. CSXT's motion to compel:
 - A. As narrowed, is granted in part. NS shall produce the evidentiary record from Norfolk S. Co.—Control—Norfolk & Portsmouth Beltline R.R., Docket No. FD No. 36836.
 - B. As narrowed, is denied in part, for the other two STB proceedings: Norfolk S. Ry.—Pet. For Declaratory Ord., Docket No. FD 36522, and Norfolk S. Ry.—Pet. to Set Trackage Rts. Comp.—Norfolk & Portsmouth Belt Line R.R., Docket No. FD 36223.
 - C. Regarding the federal litigation (Request Number 19), is denied without prejudice.
 - D. Is held in abeyance, in part, regarding the agreed requests.
4. CPKC's motion to compel Applicants' discovery responses regarding CPKC's Second Set of Discovery Requests to UP and Third Set of Discovery Requests to NS:
 - A. Is held in abeyance regarding the Jim Vena Statement.
 - B. Is held in abeyance regarding the Kenny Rocker Interrogatory. However, UP shall supplement its Interrogatory response to state the number of customers each about CPKC and BNSF on or before Friday, May 28, 2026.
 - C. Is granted in part regarding Mr. Orr's executive-level resignation documents.
 - D. Is granted in part regarding the narrowed "regulatory effort" draft provisions of the Merger Agreement exchanged between UP and NS, which must be produced within two weeks.
5. This decision is effective on the date of service.

By the Board, Jenifer J. Soulikias, Administrative Law Judge.