53329 SERVICE DATE – NOVEMBER 20, 2026
ALJ

SURFACE TRANSPORTATION BOARD

Docket No. FD 36873

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

ORDER HOLDING BRIAN SMITH'S MOTION TO COMPEL IN ABEYANCE, APPLICANTS' MULTIPLE MOTIONS TO COMPEL ARE GRANTED IN PART, DENIED IN PART, AND HELD IN ABEYANCE IN PART, AND ARU/BLET'S MOTION TO REDESIGNATE IS DENIED AS MOOT

Decision No. 48

Decided: November 20, 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 November 13, 2026. This decision memorializes the rulings made at that conference.

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 (STB 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. Brian Smith's Motion to Compel

On November 5, 2026, Brian Smith filed a motion to compel Norfolk Southern (NS) to produce documents and answer interrogatories in response to Mr. Smith's narrowed requests. (Smith Letter Motion, Nov. 5, 2026.) Mr. Smith sought four categories of information, which he argued should be compelled, because he met and conferred with NS's counsel then narrowed his

requests. (See id. at 1.) Mr. Smith requested, according to his four categories: (a) Request for Production Number 2, structural analysis of structures built before 2000; (b) Interrogatory Number 18 and Request for Production Number 14, recorded replacement costs; (c) Interrogatory Numbers 6 and 7 and Request for Product Number 4, integration plans and costs; and (d) Interrogatory Number 17 and Request for Production Number 13, compliance costs. (See id. at 2-4.) The motion to compel explained that Mr. Smith has not executed the Undertaking to the Protective Order, and his narrowed requests sought public information. (Id. at 4.)

NS opposed Mr. Smith's motion to compel by letter filed November 10, 2026. (NS Oppn. Letter, Nov. 10, 2026.) NS argued Mr. Smith's discovery requested information that is generally not relevant in this proceeding; the requests are unduly burdensome; and to the extent that they seek responsive information, Mr. Smith has not signed the Undertaking to the Protective Order, and as an individual without outside counsel, by definition, Mr. Smith cannot access any designated "Highly Confidential" information. (See id. at 2.)

NS argued Mr. Smith's third (or "(c)") was the most relevant category (i.e., integration plans and costs). (Id. at 4.) NS explained that as part of the Application, the parties prepared and submitted to the Federal Railroad Administration (FRA) a Safety Integration Plan, which was filed with the STB on April 30, 2026. According to NS, the FRA is the regulator (not the STB) that will oversee the Applicants' "deliberate approach to integrating Signal and Train Control[.]" (Id.)

At the discovery conference, Mr. Smith explained that he has professional experience in radio frequency engineering and FCC licensing. He reviewed the Application and did not find a discussion of the communication structure, including Positive Train Control (PTC) run on, so he requested discovery from NS.

Mr. Smith first argued in support of his integration (c) category requests. He argued that NS should be ordered to answer his two interrogatories whether any plan, analysis, or estimates for integrating the communication systems exist—yes or no. (See also Smith Letter Motion 3, Nov. 5, 2026.) Then, Mr. Smith wanted a privilege log for withheld documents. (Id.)

NS's counsel responded that the FRA is the safety regulator for the railroads. The Safety Integration Plan (which is filed in support of the Application) is submitted to the FRA, which reviews the plan and continues to comment on it, including discussion of communications and signals. NS argued that the STB would review the Safety Integration Plan submitted with the Application for completeness, if there were a challenge to the completeness of the Safety Integration Plan (but there was not). However, it is the FRA that works with the Applicants about their safety plans long-term, if the STB approves the merger. Therefore, NS argued that the later integration plans that Mr. Smith requested do not currently exist and are not part of the STB's review process in this proceeding.

Following this discussion, Mr. Smith requested to hold category (c) of his motion to compel in abeyance (i.e., deferred) while he reviewed the Safety Integration Plan and the jurisdiction of the FRA. Mr. Smith's category (c) interrogatories and request for production

(integration plans and cost) are held in abeyance.

Mr. Smith next argued about his category (a) requests: structural analyses of structures built before 2000. Mr. Smith requested information about 227 of NS's structures that were built before 2000. (See also Smith Letter Motion 2, Nov. 5, 2026.) Mr. Smith argued that Positive Train Control (PTC) is essential to the merger analysis, because of the safety and integration of the networks. Mr. Smith argued that because of the age of the structures, they would have to be replaced. I inquired whether the structures would have to be replaced because of their age regardless of the merger.

Mr. Smith stated that he understood that his request was likely to be an issue to be addressed by the FRA. NS explained that to the extent there were relevant documents, they would be designated "Highly Confidential," and Mr. Smith would not be able to review them.

After discussions, Mr. Smith requested that his motion to compel be deferred until he could review the Safety Integration Plan. I agreed, and Mr. Smith's motion to compel is held in abeyance.

At my request and for Mr. Smith's convenience, NS agreed to email Mr. Smith a link to the Safety Integration Plan. If Mr. Smith believes the STB is the appropriate authority to review his concerns, then he may renew his motion to compel by filing a letter by the deadline stated in Decision Number 24 (or Decision Number 44 for Wednesday, November 25, 2026) to bring his motion to compel to another discovery calendar.

II. Applicants' Motions to Compel Custodial Search Components

Applicants filed a separate motion to compel against each non-Applicant, CPKC, CSXT, and BNSF, about different categories of disputed issues about the non-Applicant's custodial searches to search additional custodians, expand the time frames for certain searches, and use additional search terms (or for BNSF, responsiveness). At the discovery conference, I heard the parties' arguments; made certain rulings; ordered the parties to meet and confer again in an attempt to reach agreement based on my guidance and rulings; and on the pricing and growth strategy issue in the BNSF motion, ordered supplemental briefing around the Comment deadline.

These three motions have substantial overlaps. However, each motion has different issues for the non-Applicants. Because the motions were heard at the discovery conference, the parties were able to hear my rulings and guidance for the motions as they were argued. I am setting forth general guidance here (to avoid repetition), followed by the more individualized portions of the motions.

Stated very generally, Applicants are entitled to discovery related to a party's filings about which that the Board will make a merits determination.[1] See 49 C.F.R.§ 1114.21(a)(1);

[1] On the day of the discovery conference, the November 18, 2026 deadline had not passed yet. For ease of reference, I will refer to non-Applicants' then-expected filings generally as "Comments."

see also, e.g., Decision No. 30, slip op. Appx. (STB Aug. 18, 2026) (procedural schedule). However, requested discovery must be reasonably calculated to lead to admissible evidence. 49 C.F.R. § 1114.21(a)(2). 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).

Time Frame

Regarding the time frame for requested discovery (other than the impacts of the proposed transaction), Applicants recognized: "Your Honor has held that information from 'a **few years** before the proposed transaction was announced is relevant[.]'" (Apps. CPKC Letter Mtn. 3, Nov. 5, 2026 (citing Decision No. 31 at 3) (emphasis added).) Then Applicants argued that "[a] January 1, 2019 start date should apply to all requests other than those seeking documents relating to the impacts of the Proposed Transaction." Id.

A "few years" is another general rule to give a ballpark that some time frame is appropriate. But too long is not. It depends on the discovery request and the party from whom discovery is sought.

Deferred Ruling/Holding in Abeyance

On several categories, I deferred ruling rather than denying Applicants' requests. As is discussed below, for example, non-Applicants offered to search one custodian's documents, but Applicants requested additional custodians. Where I deferred the searches of the additional custodians (set forth below), Applicants can renew their request to search the requested custodian's documents if the production demonstrates that non-Applicants' searches were insufficient (or as otherwise specified below). Non-Applicants must complete production so Applicants can review the documents and renew their request, if appropriate, and the search be conducted and documents produced and reviewed prior to any deposition of the corresponding additional custodian (if any) in compliance with Decision Number 24, Order Setting Discovery Procedures. The parties are always expected to meet and confer in an effort to resolve any disputes.

If the parties cannot reach an agreement on search terms, they may file a letter to either bring the issue to another discovery conference or notify me that they would like me to rule based on the prior arguments and motions from this discovery conference.

a. Applicants' Motion to Compel CPKC

Time Frame

Applicants filed their motion to compel CPKC's custodial searches to search additional custodians, expand the time frames for certain searches, and use additional search terms. (Apps. CPKC Letter Mtn., Nov. 5, 2026.) CPKC opposed Applicants' motion. (CPKC Oppn. Letter, Nov. 10, 2026.)

Regarding the date range, Applicants requested that CPKC search from January 1, 2019, for Requests 11, 22-29, which are some of Applicants' "ordinary course" requests. (See Apps. CPKC Letter Mtn. 3, Nov. 5, 2026.)

At the discovery conference, Applicants argued that the disputed date range is for discovery requests regarding pricing and growth strategies. Applicants argued the pricing and growth strategy requests should match the date range for the others that CPKC agreed, which is to January 1, 2019. January 1, 2019, was the date that Applicants used for many searches, and to which CPKC agreed for other searches.

CPKC argued that there is a large public record why CP and KCS merged. As a non-Applicant, there is a disproportionate burden. (See CPKC Oppn. Letter, Appx. A., Nov. 10, 2026.)

Applicants argued that the requests were highly relevant, because they showed how the Class I railroads were competing without the merger. They argued that their pricing and growth strategy mattered to how the Class I railroads would compete with each other after the merger.

Thus, I considered Decision 31 where I wrote that information for a "few years" before the merger was announced is relevant. I also considered CPKC's situation where the STB approved the merger of CP and KCS, with conditions, effective April 14, 2023. Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 35), FD 36500, slip op. at 172-74 (STB Mar. 15, 2023.) Applicants seek information about how the Class I railroads were competing; however, that changed for CP and KCS when they merged. Applicants did not explain how the competitive information before the CPKC merger is relevant, except that it would match the time frames searched in other requests and used by Applicants. But that does not make these requests reasonably calculated to lead to discoverable evidence. Therefore, I granted in part Applicants' request for the time period beginning on the effective date of the approval of the CPKC merger, April 14, 2023, and denied in part Applicants' request for the time period before April 14, 2023.

Additional Custodians

Applicants requested that CPKC search four additional custodians. Applicants argued the additional custodians are in two categories: 1) government affairs—Larry Lloyd, and 2) ordinary course—Michael Upchurch, Jeffrey Songer, and Michael Naatz. Applicants argue that each of these custodians has unique, relevant information. (Apps. CPKC Letter Mtn. 2-3, Nov. 5, 2026.)

CPKC disagreed. CPKC argued that Mr. Lloyd's documents would be captured by James Clements, who CPKC agreed to search. (See CPKC Oppn. Letter 3, Nov. 10, 2026.) Moreover, CPKC agreed to conduct targeted searches to capture the impact of the proposed transaction, potential mergers and partnerships and communication with third parties regarding the proposed transaction. Id. CPKC argued that Applicants have not articulated why Mr. Lloyd's day-to-day communications with outside stakeholders were relevant. Id.

At the discovery conference, Applicants argued that they wanted to know what CPKC

was going to file in its Comments by the November 18, 2026 deadline. This argument does not make sense to me. Non-applicants filed anticipated Comments. Moreover, as a practical matter from the date of the discovery conference, the deadline for non-Applicants' Comments was only five days away.

Generally, what a party expects to file may be work product or privileged until it is filed or if the privilege is waived. If they are communications with a third party, they still must be reasonably calculated to lead to discoverable evidence—about the proposed transaction or comment—not just scheduling a meeting without any substance (e.g., do you want to have lunch Thursday? How about Friday? I have to cancel. And on, and on, and on . . . . Those documents are "responsive" to Applicants' day-to-day approach but not relevant, so those documents would not be produced.)

I found CPKC's approach to be reasonably calculated to lead to discoverable evidence. Applicants' request to add Mr. Lloyd as an additional custodian is held in abeyance. Likewise, Applicants' request is held in abeyance to search the three additional ordinary course custodians: Michael Upchurch, Jeffrey Songer, and Michael Naatz. CPKC is searching the documents of KCS's former President and CEO, Patrick Ottensmeyer. (CPKC Oppn. Letter 3, Nov. 10, 2026.) It is not clear to me that the additional custodians would have non-duplicative, responsive discovery. Rather than denying Applicants' request for the three additional ordinary course custodians, I am deferring; CPKC's Comments and the production of Mr. Ottensmeyer's documents may inform Applicants' request for whether any of these additional custodians should be searched.

Search Terms

Applicants disagree with CPKC's search terms for Applicants' discovery relating to the potential impacts of the proposed transaction. (Apps. CPKC Letter Mtn. 4, Nov. 5, 2026.) CPKC proposed one string. (Id.) Applicants proposed twenty-six separate strings to try and capture the discovery it sought. (Id. at 4, Appx. A.) Both Applicants and CPKC argued they were following my earlier order regarding search terms. (See id. at 4; CPKC Oppn. Letter, Appx. A., Nov. 10, 2026 (citing Decision No. 31, slip op. at 6-8 (STB Aug. 19, 2026)).)

At the discovery conference, Applicants explained why they thought additional strings were necessary. I expect the parties can reach an agreement on the search terms. Accordingly, Applicants' request for twenty-six additional search strings is held in abeyance to allow the parties to meet and confer in an effort to reach an agreement.

b. Applicants' Motion to Compel CSXT

Applicants filed their motion to compel CSXT's custodial searches to search additional custodians, expand the time frames for certain searches, and use additional search terms. (Apps.

CSXT Letter Mtn., Nov. 6, 2026.[2]) CSXT opposed Applicants' motion. (CSXT Oppn. Letter, Nov. 10, 2026.)

Time Frame

Regarding the date range, Applicants requested that CSXT search from January 1, 2019, for Requests 2, 10-11, 16, and 22-29, which are some of Applicants' "ordinary course" requests. (See Apps. CSXT Letter Mtn. 3, Nov. 6, 2026.)

At the discovery conference, Applicants argued that CSXT offered to search back to 2023 on some issues but did not give a firm commitment. Applicants requested that all searches start at January 1, 2019. CSXT argued that they were negotiating the dates and should be able to reach agreement.

I previously found that documents were relevant for a few years before the proposed transaction was announced. Applicants and CSXT are to meet and confer in an attempt to resolve the time frame for Applicants' requests. Applicants' motion to compel is held in abeyance regarding the time frame.

Additional Custodians

Applicants requested to add nine additional custodians. Applicants wanted to add as custodians: Michael Cory, Tom Livingston, Stephen Flippin, Farrukh Bezar, James Foote, Sean Pelkey, Edmond Harris, Jamie Boychuk, and Mark Wallace. (Apps. CSXT Letter Mtn. 2-3, Nov. 6, 2026.) At the discovery conference, Applicants focused on Mr. Cory and Mr. Pelkey.

Mr. Cory was CSX's COO until last month. (Id. at 2-3.) Applicants argued that Mr. Cory made public statements about the merger. There is no dispute that Mr. Cory has relevant information. Instead, CSXT offered as an alternative custodian, Casey Albright, who reported to Mr. Cory, and would provide documents that would be duplicative of Mr. Cory's on operational issues.

UP's former CEO, Lance Fritz, was the subject of two motions I resolved previously. In Decision 31, I ordered UP to search an expanded timeframe for the search of Mr. Fritz's custodial documents, even though the documents were on a legacy system and burdensome to retrieve. See Decision No. 31, slip op. at 9 (STB served Aug. 19, 2026). I also ordered that even as a non-party, Mr. Fritz's deposition must be taken, because his testimony would not be duplicative of the deponents UP offered. See Decision No. 39, slip op. at 2-7 (Oct. 1, 2026.)

While neither previous order directly addresses the custodian issue, Applicants' requested additional custodian, Mr. Cory, has relevant discoverable documents. CSXT has offered its

[2] Applicants filed their motion to compel on November 5 and a corrected motion on November 6, which added exhibits that were inadvertently omitted from the original motion. References are to Applicants' "corrected" letter motion, which was filed on November 6, 2026.

preferred custodian. But that is not a reason to deny Applicants their choice of Mr. Cory as an additional custodian.

Applicants' next requested additional custodian was Sean Pelkey, the CFO until October 2025. (Apps. CSXT Letter Mtn., Nov. 6, 2026.) CSXT offered the alternative custodian, Mr. Boone. (CSXT Oppn. Letter 3, Nov. 10, 2026.) For the same reasons, I will grant Applicants' request for additional custodian Mr. Pelkey.

Thus, Applicants' request for CSXT to search additional custodians, Mr. Corey and Mr. Pelkey, is granted in part.

For the remainder of the proposed custodians, CSXT opposed the additional custodians. Some were dead and others left CSXT prior to the proposed merger announcement. (See CSXT Oppn. Letter 2-3 n.2, Nov. 10, 2026.) With the other rulings and guidance, Applicants and CSXT shall meet and confer in an effort to resolve whether any additional custodians should be searched. Applicants' motion for additional custodians (other than Mr. Cory and Mr. Pelkey) is held in abeyance.

Search Terms

Applicants disagree with CSXT's search terms for Applicants' discovery relating to the potential impacts of the proposed transaction. (Apps. CSXT Letter Mtn. 3-4, Nov. 6, 2026.) CSXT proposed a series of strings, but Applicants thought they were not broad enough. (See id.) Applicants proposed twenty-six separate strings to try and capture the discovery it sought. (Id. at 4, Appx. A.)

At the discovery conference, Applicants explained why they thought additional strings were necessary. The parties agreed to continue negotiations on the search terms. Accordingly, Applicants' request for twenty-six additional search strings is held in abeyance to allow the parties to meet and confer in an effort to reach an agreement.

c. Applicants' Motion to Compel BNSF

Applicants filed their motion to compel BNSF's custodial searches to search additional custodians, expand the time frames for certain searches, and whether Applicants' discovery was relevant on pricing and growth strategies. (Apps. BNSF Letter Mtn., Nov. 5, 2026.) BNSF opposed Applicants' motion. (BNSF Oppn. Letter, Nov. 10, 2026.)

Time Frame/Relevance

Regarding the date range, Applicants requested that BNSF search from January 1, 2019, for Requests 2, 10-11, 16, and 22-29, which are some of Applicants' "ordinary course" requests. (See Apps. BNSF Letter Mtn. 3, Nov. 6, 2026.)

BNSF objected to the relevance of pricing and growth strategy discovery. After hearing argument, I requested the Applicants and BNSF file supplemental briefing on that issue.

Applicants will file a supplemental letter on the relevance of their requested pricing and growth strategy discovery by Monday, November 23, 2026 at 6:00 p.m. ET.[3] BNSF will file its supplemental letter by Tuesday, November 24, 2026 at 6:00 p.m. ET.

Applicants' motion to compel is held in abeyance regarding the time frame and relevance (i.e., pricing and growth strategies).

Additional Custodians

Applicants requested to add ten additional custodians. Applicants wanted to add as custodians: Katie Hower, Angela Caddell, Zak Andersen, Mike Smythers, Carl Ice, Julie Piggot, Stevan Bobb, Matt Igoe, Matt Garland, and Colby Taner. (Apps. BNSF Letter Mtn. 2-3, Nov. 5, 2026.) At the discovery conference, Applicants focused on Katie Hower, Angela Caddell, Matt Igoe, Matt Garland, and Zak Andersen.

Based on my earlier ruling, BNSF agreed to search Matt Garland's documents. Therefore, the motion is denied as moot regarding Mr. Garland.

I granted Applicants' request to add Mr. Igoe as an additional custodian. Based on my earlier rationale, Mr. Igoe left in December 2025 and was EVP of Operations.

I deferred on Applicants' request to search Mr. Andersen's documents. Applicants noticed Zak Andersen for deposition. BNSF will file a motion for protective order about that deposition. Applicants can renew their request when BNSF's motion for protective order is heard on the discovery calendar.

Regarding Katie Hower and Angela Caddell, I deferred, because BNSF agreed to search the documents of custodians Gabriel and Williams. BNSF argued the documents of Gabriel and Williams would produce the discovery requested. The remainder of the additional custodians requested is also held in abeyance. Thus, Applicants' request for BNSF to search additional custodians, not specifically addressed here, is held in abeyance in part.

Non-Privileged Documents

Applicants argued that BNSF must conduct an adequate search for non-privileged documents responsive to Applicants' First Set of Discovery Requests. (Apps. BNSF Letter Mtn. 4-5, Nov. 5, 2026.) Applicants argued that because BNSF did not return non-privileged documents, it did not conduct an "adequate search." (See id.) At the discovery conference, BNSF disagreed and argued that they will meet and confer on a date to produce a privilege log. (BNSF Oppn. Letter 5 n.1, Nov. 10, 2026.)

Applicants' motion is denied regarding their request for BNSF to conduct an adequate search for non-privilege documents. As I explained at the discovery conference, BNSF will

[3] I am extending these deadlines slightly beyond what I announced at the discovery conference, based on the service date of this order.

produce a privilege log. If Applicants wish to contest any of the contents of the log, they may do so then.

III. ARU/BLET's Motion to Redesignate

Allied Rail Unions: Brotherhood of Maintenance of Way Employes Division/IBT; Brotherhood of Railroad Signalmen; International Association of Machinists and Aerospace Workers District #19, Transportation Communications Union/IAM and Transport Workers Union of America; and the Brotherhood of Locomotive Engineers and Trainmen (collectively "ARU/BLET") filed a motion to redesignate portions of the deposition transcript of Maqui Parkerson. (ARU/BLET Letter Motion, Nov. 9, 2026.) ARU/BLET filed a notice that they withdrew their motion to redesignate. (ARU/BLET Notice, Nov. 11, 2026.) Therefore, the motion to redesignate is denied as moot.

It is ordered:

1. Brian Smith's motion to compel is held in abeyance.

2. Applicants' motion to compel CPKC is granted in part and denied in part for the start date of April 14, 2023, for Request Numbers 11, 22-29, and held in abeyance regarding the remainder of the motion (i.e., additional custodians, search terms), as set forth herein.

3. Applicants' motion to compel CSXT is granted in part for additional custodians (Michael Cory and Sean Pelkey), and held in abeyance regarding the remainder of the motion (i.e., time frame, additional custodians, and search terms), as set forth herein.

4. Applicants' motion to compel BNSF is granted in part for additional custodian (Matt Igoe), denied as moot in part for additional custodian (Matt Garland), denied in part for an adequate non-privilege search, and held in abeyance regarding the remainder of the motion (i.e., time frame, remaining additional custodians, and relevance), as set forth herein.

    a. Applicants will file a supplemental letter on the relevance of their requested pricing and growth strategy discovery by **Monday, November 23, 2026,** at 6:00 p.m. ET.

    b. BNSF will file its supplemental letter by **Tuesday, November 24, 2026,** at 6:00 p.m. ET.

5. ARU/BLET's Motion to Redesignate the Deposition Transcript as Public is denied as moot.

6. This decision is effective on the date of service.

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