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November 24, 2026

Hon. Jenifer J. Soulikias
Administrative Law Judge
Surface Transportation Board

BNSF-78

Re: FD 36873 – BNSF's Opposition to UP's Motion for BNSF's Pricing Strategy

Dear Judge Soulikias:

Your Honor should deny UP's request for BNSF's pricing and growth strategy information. The requests are overbroad, unprecedented, and irrelevant. UP's lead argument for the discovery is that BNSF opposed the merger and called attention to UP's public statements that UP "maximizes price." That is not a valid basis to take discovery from a non-applicant. Nor is there any equivalence between UP and BNSF here. ***UP's*** pricing strategies and what ***UP*** will do with increased market power help determine whether ***UP's*** acquisition of NS is in the public interest. BNSF's historical pricing strategy is irrelevant to that question.

If UP wants historical pricing ***data***, UP already has seven years of BNSF's complete waybill data. That data contains detailed traffic information for tens of millions of individual shipments—including pricing, units, stations, and commodities. Next, if UP wants to know how BNSF will price in the ***future*** if the merger is approved, no such analysis currently exists at BNSF, so there is nothing to compel. Finally, UP has not produced its forward-looking pricing strategies, so a non-applicant competitor should not be the only party to do so in this proceeding.

* * * * *

UP's Requests are Overbroad. BNSF is not seeking a merger. BNSF has no evidentiary burden related to UP's request to acquire NS. Yet UP treats BNSF like an applicant and seeks a wide-ranging, intrusive expedition into a competitor's commercially sensitive pricing files that are untethered to UP's case. The requests at issue could not be broader. They seek "all documents" from BNSF related to "each" of thousands of lanes and commodities over several years. They seek "pricing models," "pricing systems," "internal pricing formulas," "detailed breakdown of costs" by every lane and so on. These requests are limitless. As Your Honor instructed in previous arguments, a party should not bring the ALJ overbroad requests and expect to narrow them later.

No.	UP Request
23	Produce Documents sufficient to show how You determine the rates that You establish for rail transportation ***for <u>each</u> route, commodity, and customer***, ***including*** but not limited to ***<u>any</u> pricing models, pricing systems, or internal pricing formulas You have utilized***.
24	Produce ***<u>all</u> Documents relating to Your calculations of movement-related costs for the rail transportation services You provide, <u>including detailed breakdowns</u>*** of cost (such as by route, commodity, car type, and customer) in documents and/or a computer-readable database or electronic spreadsheet.
25	Produce ***<u>all</u> Documents and Communications relating to Your policies or strategies for the pricing of Your rail transportation services***, including without limitation the level of returns that You require when pricing rail traffic.
26	Produce ***<u>all</u> Documents and Communications relating to Your strategies for growing Your rail traffic***.

Overbreadth concerns are heightened here, as UP seeks commercially sensitive information. *See Mannington Mills, Inc. v. Armstrong World Indus., Inc.*, 206 F.R.D. 525, 532 (D.D.C. 2002) (denying motion to compel a non-party's highly confidential documents because party did not show a "need" for materials and any "tangential need" was outweighed by breadth of the requests); *Taro Pharms. U.S.A., Inc. v. Perrigo Israel Pharms. Ltd.*, 2015 WL 7737310, at *3 (D. Del. Dec. 1, 2015) (similar). The overbroad requests should be denied.

UP's Requests Lack Any Legal Basis. Not only are the requests overbroad; UP asks Your Honor to break new ground. The Board has never required disclosure of a non-applicant's historic pricing strategies to evaluate whether a merger between two ***other*** railroads is in the public interest. If past pricing strategies from non-applicant railroads were relevant to the Board, it would be reflected in the Major Merger Rules or other Board precedent—and it is not. If the Board wanted to see competitors' pricing information in this case, it would have said so. The Board twice ordered UP to supplement its application (Decision Nos. 9 and 21) but never ordered disclosure of a competitor's pricing information. UP has had two chances to find any legal justification for its request, and UP has come up empty.[1]

[1] UP cites Decision No. 13 and *Norfolk S. Corp.—Acquis. of Control—Norfolk & Portsmouth Belt Line R.R.*, FD 36836 (STB served July 25, 2025) (Decision No. 8). Neither helps UP. Decision No. 13 ordered UP and NS to submit "the ordinary course documents that the DOJ and FTC request from [the merging] parties as a matter of course when reviewing proposed mergers under the HSR Act." Decision No. 13 at 5. The HSR Act does ***not*** require non-merging competing parties to submit such "ordinary course" documents. The logic of Decision No. 13 thus does not apply here. Similarly, in *NPBL*, the Board noted that if document requests are "burdensome on [their] face, a substantial showing of ***relevance and need*** is necessary to outweigh the burden of producing evidence." *See* Decision No. 8 at

A Non-Applicant's Pricing Strategy Is Not Relevant. Historical pricing strategies from BNSF have no bearing on the merits of this merger proposal. How BNSF determined price on a carload of grain moving from Kansas City to Chicago in 2025 says nothing about how a combined UP/NS would price rail services in a distorted, future market where it controls an unprecedented 50% of U.S.-originated rail shipments. Nor would any historical pricing strategy speak to the core questions of whether a combined UP/NS will deliver the benefits UP claims, or whether those benefits outweigh the harms.

Entirely absent from UP's brief is ***any*** argument that BNSF's pricing strategies go to the merger's benefits. They do not. UP/NS already conceded that BNSF pricing is irrelevant. Last May, the Board asked whether UP/NS's diversion analysis assumed "no competitive response, by any market participant, in any form, will occur during the first three years of consummation." *See* Decision No. 21 at 24 (PB-1). UP/NS's response was unequivocal: Their "truck-to-rail and rail-to-rail analyses . . . . ***do not require making specific assumptions about how competition carriers may adjust price***, reliability, transit times, or other service attributes when new single-line service is introduced." UP-80/NS-78 at 69 (emphasis added). That is because—according to UP/NS's diversion methodologies—all existing price information is already baked in, making it unnecessary, they say, to examine specific pricing strategies by parties like BNSF. Having disclaimed the need to model price-responsive behavior, UP cannot now reverse course after stakeholders have responded to the merger.

And even if UP wants to know how BNSF will price its rail services in the future if the merger is approved, no such analysis currently exists, so there is nothing to compel. Further, UP has not produced its forward-looking pricing strategies.

UP's New Relevance Arguments Are Unpersuasive. None of UP's new relevance arguments show that UP's overbroad, historical pricing strategy requests would help the Board:

- UP's Desire for New Market Analysis. There is no competitive baseline analysis to be done now. It is too late for UP to use any such information for a full market assessment, as UP was required to submit ***all*** of its evidence with its application. *See* Decision No. 9 at 6 ("The point of requiring robust and detailed market-impact analyses by applicants in major merger proceedings is to ensure that any debate of those analyses, and indeed the competitive impact of the transaction, is fully informed and supported by applicants ***at the beginning of the proceeding***") (emphasis added). We are now one year into the case. But, if UP were permitted to conduct an untimely market analysis, it has the waybill data to do so. In all events, BNSF's internal pricing and growth plans *pre*-merger are not relevant to

3. As shown above, UP's requests are facially overbroad. UP has not come close to making a showing that the documents it seeks are relevant and needed—let alone a substantial showing.

an analysis of the post-merger competitive landscape. And they do not establish the relevant baseline for assessing merger effects in the future.

- UP's Price Maximization Strategy. UP tells its investors that UP "maximizes price." UP seeks a fishing expedition into BNSF's internal documents, hoping to show "BNSF itself seeks to maximize the price it obtains for its services, allowing the Board to evaluate whether the conduct BNSF attributes to [UP] is anything other than ordinary competitive behavior." UP-135/NS-131 at 2. BNSF's pricing strategy is irrelevant to the contention that a combined UP/NS will have increased market power after the merger and will exploit that power. The Board asks whether the transaction would harm competition. That turns on the market power the merger creates, not on whether UP's practices are "ordinary." That is, the question is whether the merger widens UP's ability to maximize price by removing competitive constraints. ***Historical*** strategies from ***BNSF*** do not tell the Board anything about the merger's competitive effect.[2]

- The "Attractiveness" of BNSF's Pricing. Straining for any hook, UP twists the words of a BNSF witness to claim he testified about the "attractiveness" of BNSF's pricing. UP-135/NS-131 at 2. That is incorrect. The witness testified about UP/NS's future ability to manipulate the ***NS portion*** of BNSF/NS interline rates to make the interline rate unattractive, ***regardless*** of BNSF's own pricing strategy. BNSF's internal pricing strategy cannot show whether ***UP/NS*** will be able to manipulate a rate that BNSF ***does not control***. The relevant evidence is ***UP's*** ability and incentive to set the rate after the merger, and that evidence is in UP's own files. In any event, UP already has full access to BNSF's historical pricing and traffic data, if UP wants to analyze how much foreclosure is likely to occur.

- BNSF's Conditions. UP fails to establish how BNSF's pricing and growth strategies "bear on" the necessity of BNSF's condition proposals. *Id.* at 3. The Board's inquiry is whether the transaction would lessen competition and whether the requested trackage rights and terminal-access remedies are warranted and appropriately tailored. *See* 49 C.F.R. § 1180.1(d). BNSF's historical internal strategies do not establish either. The conditions trigger only if the merger occurs and they concern UP's future practices, so BNSF's historical pricing practices are not relevant to them. Regardless, UP's requests are overbroad compared to the scope of BNSF's requested conditions. UP has not tailored its requests to the actual lines and terminals at issue in the condition requests.

[2] Similarly, whether bundling is common in the industry or whether BNSF bundles, UP-135/NS-131 at 3, is irrelevant to BNSF's theory of merger harm and does not affect whether the merger increases UP's leverage to bundle. The answer depends on the combined carrier's captive footprint, which is in UP's and NS's files.

- "Mutual Discipline." UP says that "[e]vidence that the railroads have constrained each other's pricing bears on whether rail-to-rail competition will continue to discipline rates after the transaction." UP-135/NS-131 at 5. First, this is exactly the type of analysis that UP disclaimed in response to Decision No. 21. Second, UP has its own records of how UP tracks and responds to BNSF's rates, and of the customers UP has won from or lost to BNSF. Those records—in UP's files—would be the best evidence of whether BNSF constrains UP, if that is analysis UP wants to do.

Finally, if UP wants to respond to any of BNSF's arguments against the merger, UP can use the millions of waybill data points that BNSF already produced. That waybill data contains actual historical pricing and traffic information in data form. UP makes no argument about how those data are insufficient.

The Requests Raise Burden and Retaliation Concerns. BNSF's pricing decisions are lane- and commodity-specific; BNSF prices movements in tens of thousands of lane and commodity combinations across its network. UP is asking how BNSF made thousands of individual, context-dependent decisions. That is unduly burdensome, particularly given UP's access to BNSF's ***actual*** pricing through waybill data and the lack of any probative value of historical strategies.

UP's requests also raise retaliation concerns. The Board has warned UP that it "will not tolerate retaliation." *See* Decision No. 45 at 2. UP's full-court press for BNSF's pricing information is an unmistakable message to others that UP will use discovery to chill opposition and punish merger opponents. It could not be more obvious here. UP has proposed CN as a remedy carrier for shippers that will lose competitive options in 3-to-2 and 2-to-1 scenarios. So, if any pricing strategies from Class I competitors were relevant, it would have been CN's—the carrier that UP says can provide service to customers who will lose a competitive option. When a party like UP does not seek pricing information from its proposed competitive solution carrier, but instead seeks it only from its opponents, the pretext and retaliatory motive are unmistakable.

CONCLUSION

BNSF's pricing and growth strategies have no bearing on whether UP's merger is in the public interest. The requested discovery is overbroad, irrelevant, and poses undue burden and retaliation concerns. It should be denied. And if Your Honor were inclined to consider any portion of this information relevant, Your Honor should direct UP to file a renewed motion for a more targeted set of information, so that BNSF could respond to that.

/s/ Dan Donovan
Daniel T. Donovan, P.C.

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
November 24, 2026