

53286
ALJ

SERVICE DATE – OCTOBER 8, 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

ORDER GRANTING IN PART AND DENYING IN PART
APPLICANTS’ MOTION TO COMPEL,
GRANTING NON-APPLICANTS’ MOTION FOR IN CAMERA REVIEW,
AND
DENYING NON-APPLICANTS’ MOTION
CHALLENGING NS’S WORK PRODUCT CLAIM

Decision No. 41

Decided: October 8, 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 October 2, 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. Applicants' Motion to Compel

On September 24, 2026, Applicants moved to compel CPKC and CSXT to disclose by October 5, 2026, six parameters about the discovery responses that CPKC and CSXT proposed to conduct in response to Applicants' First and Second Sets of Discovery Requests. (Apps. Letter Motion 1, Sept. 24, 2026.) Applicants want a substantially similar commitment to BNSF's response (id. at 1 n.1), or these six pieces of information:

- a. the requests for production (or other categories of documents or information) in connection with which each railroad proposes to conduct and not to conduct custodial searches;
- b. the search terms;
- c. the date cutoffs;
- d. for proposed custodians, confirm that it possesses ESI for each of the former employees on its list;
- e. identify any of the proposed custodians whose documents it refuses to search; and
- f. provide hit reports for the proposed search terms, dates, and custodians proposed.

(Id. at 2.) Applicants argued that they need this information to stay on track with the procedural schedule and depositions, and to raise timely any disputed issues in compliance with the Order Setting Discovery Procedures, Decision No. 24 (June 18, 2026). (See Apps. Letter Motion 1-2, Sept. 24, 2026.)

On September 29, 2026, CPKC opposed Applicants' motion to compel. (CPKC Opp. Letter, Sept. 29, 2026.) CPKC argued that a deadline three days after the discovery conference was unnecessary, it was working towards meeting its commitments, and it would provide the search term hit counts by October 16, 2026. (Id. at 1.) At the discovery conference, CPKC argued that it was reluctant to provide preliminary responses that counsel expected would be revised after hit counts were provided. Ultimately, CPKC agreed that it would provide preliminary (subject to revision after review and further discussion) responses by October 5, 2026, and then CPKC would provide the hit counts by October 16, 2026.

On September 29, 2026, CSXT opposed Applicants' motion to compel. (CSXT Opp. Letter, Sept. 29, 2026.) CSXT argued it did not meet and confer with Applicants until September 22, 2026 (Applicants disagreed with CSXT's argument). (Id.) CSXT requested until October 13, 2026, to respond to Applicants. (Id. at 1.)

Applicants explained that they want to raise disputed issues at the October 30, 2026 discovery conference. I discussed with Applicants and counsel for CSXT some options. CSXT agreed that it would provide preliminary (subject to revision after review and further discussion) responses by October 13, 2026, and then CSXT would provide the hit counts by October 16, 2026.

Therefore, Applicants' motion to compel is granted in part and denied in part. The information Applicants requested will be provided; however, Applicants requested that the information they be provided by October 5, 2026. Instead, the information will be provided as

CPKC agreed, with preliminary responses on October 5, 2026, and hit counts by October 16, 2026. CSXT will provide preliminary responses by October 13, 2026, and hit counts by October 16, 2026. These deadlines enable CPKC and CSXT to respond to Applicants' request for information and also give Applicants sufficient time to raise any disputed issues on the October 30, 2026, discovery calendar.

II. Non-Applicants' Challenge to NS's Work Product Assertion Over One Document and Request for In Camera Review

At issue is NS's claim of work product protection over a one-page email. Ultimately, the parties agree about the rules that apply but disagree about their application to the email. Moreover, NS argues that the entire email is protected; whereas, Non-Applicants argued that the entire email is not protected or, alternatively, redaction is appropriate.

I find that the email is protected by work product protection. The email is written in anticipation of litigation—the STB merger application—about an intermodal planning meeting for the application by an NS executive to a consultant. I considered whether the final paragraph was somehow different, not in anticipation of litigation or mere business, but in carefully reading the email and support, I find that it also is about the intermodal plan in support of the application.

The STB does not have an applicable regulation on privileges. *See* 49 C.F.R. §§ 1114.1-1114.31 (STB's evidence and discovery regulations). Accordingly, the Federal Civil Rules may be used. Rule 26(b)(3)(A), Federal Rule of Civil Procedure provides, in relevant part, that:

(3) Trial Preparation: Materials

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).

Separately, Rule 26(b)(4), Federal Rule of Civil Procedure, provides that certain discovery may be had about an expert witness, including a deposition whose opinions may be presented at trial. Fed. R. Civ. P. 26(b)(4)(A). Moreover, three categories may be discovered regarding an expert: related to compensation for a study or testimony; identify facts or data that the expert considered in forming the expert's opinion; and identify assumptions that the party's attorney provided and the expert relied upon in forming the opinions expressed. *See* Fed. R. Civ. P. 26(b)(4)(C).

On September 21, 2026, Non-Applicant Class I Railroads ("Non-Applicants") (BNSF, CPKC, and CSXT) filed a motion challenging NS's privilege assertion and requesting in camera review of one document. (Non-Apps. Letter Motion, Sept. 21, 2026.¹) Specifically, Non-Applicants challenged NS's privilege claim over the email that NS clawed back. (*See id.* at 1.)

¹ Citations are to the public filings. While I have reviewed the in camera and highly confidential filings, I have discussed them through the public filings or in a very limited way to preserve the highly confidential nature, uphold the work product designation of the document, and preserve Non-Applicants' right to appeal this order.

Non-Applicants requested that I review in camera the one-page email written by NS executive Michael McClellan to confirm that the McClellan email is not privileged and that the work product doctrine does not apply. (See id.)

NS provided the challenged document (bates number NS_00330539, called “the McClellan email” or “the email” herein) for me to review in camera. (NS Opp. Letter, 1 n.1, Sept. 24, 2026.) I have reviewed the McClellan email in camera. Therefore, Non-Applicants’ request for in camera review is granted.

Non-Applicants argued that the email is not privileged, because the email does not reflect or request legal advice. (Non-Apps. Letter Motion, 1, Sept. 21, 2026.) Non-Applicants argued that no lawyer was included on the email. (Id.) Non-Applicants argued that rather than work product privilege, the McClellan email was a business communication between businesspeople—two NS executives (Michale McClellan and David Lehlbach) and two people at Oliver Wyman (a consulting firm). (Id.) Non-Applicants argued that this document was clawed back by NS compared with other documents that had not been clawed back, because it is not protected and is “significant” and “substantively damaging to the application[.]” (Id. at 1-2.)

In NS’s opposition letter, NS argued that the work product doctrine applied to shield it from production, because it was prepared in anticipation of litigation, prepared by NS personnel to “convey strategic direction and analytical framing to Oliver Wyman, an expert consultant retained by outside counsel to support Applicants’ application to the STB.” (NS Opp. Letter, 1, Sept. 24, 2026.) NS argued that the McClellan email is “ordinary work product” or factual work product pursuant to Rule 26(b)(3)(A), Federal Rules of Civil Procedure. (Id.)

NS concedes that “‘underlying facts’ are generally not protected by the work product doctrine”; however, arguing that “efforts to ‘uncover the theory of a case’ [are] unquestionably protected.” (See id. at 3 (footnote with citation omitted).) NS argued Non-Applicants failed to articulate any “substantial need,” and Non-Applicants would not suffer any “undue hardship” from NS’s clawback of the McClellan email. (Id. (citing Fed. R. Civ. P. 26(b)(3)(A)(ii)).)

NS disagreed with Non-Applicants’ characterization of the McClellan email as significant and argued that NS properly clawed back the McClellan email. (See NS Opp. Letter, 3-4, Sept. 24, 2026.) NS argued that it was irrelevant that it had not clawed back similar documents. (See id. at 4.) NS explained that it has now clawed back additional similar documents. (See id.)

On October 1, 2026, i.e., on the eve of the scheduled discovery conference, Non-Applicants submitted exhibits “that may be referred to during the argument.” (Non-Apps. Letter, Oct. 1, 2026.) Three exhibits submitted were designated as Highly Confidential (exhibits A, B, and C). (Id.) Exhibit D was the case Beigas v. Quickway Carriers, Inc., 573 F.3d 365 (6th Cir. 2009). (Id.) Exhibit E included statements from the Verified Statement of David T. Hunt, (id.) an employee of Oliver Wyman.

At the discovery conference, Non-Applicants argued that Oliver Wyman was a long-time

business consultant for NS.² Non-Applicants argued that NS did not carry its burden to show that it was prepared in anticipation of litigation, because it did not provide an affidavit or depositions to support a claim of work product, citing Beigas, 573 F.3d at 382.

NS argued that Non-Applicants' Exhibits were a prohibited Reply to a Reply under the Board's rules. The parties confirmed that Michael McClellan's deposition was moved to Friday, October 9, 2026, to allow time for this dispute to be resolved. (See also BNSF Letter, Sept. 25, 2026.)

At the discovery conference, I advised the parties of my initial impressions. In particular, I explained that I was concerned that there was a mixture of facts and strategy contained within the McClellan email and was inclined to provide a redacted version. I expressly questioned the last paragraph of the email. I permitted NS to file supplemental information by Monday, October 5, 2026. Non-Applicants could file their supplement by Tuesday, October 6, 2026.³

On October 5, 2026, NS filed its supplement, which included a Verified Statement of Michael McClellan. (NS Supp. Reply, Oct. 5, 2026.) NS's supplement argued that in the McClellan email, NS and Oliver Wyman were not communicating about business consulting. (See id. at 1.) Rather, NS argued that they were working on preparing a complex regulatory filing, and the McClellan email was an invitation to an application planning meeting on September 3-4, 2025 that was attended by counsel and for the purpose of developing the intermodal growth plan that would be a key element of the merger application. (See id. at 1-2.)

According to the Verified Statement of Michael R. McClellan, the development of the intermodal growth plan was a key element to the merger application. (See id.; Ex., V.S. McClellan ¶ 2.) In turn, the merger application required a coordinated effort among business personnel at both railroads, outside experts, and in-house and outside counsel. (See id.) Applicants retained Oliver Wyman to perform a traffic diversion analysis for the STB application, including rail-to-rail diversions and truck-to-rail diversions. (Id.; Ex., V.S. McClellan ¶ 3.) Mr. McClellan's statement explained that his email invited Oliver Wyman to a planning session for the development of Applicants' intermodal growth plan. (See id. at 1.)

NS argued the entire email is protected by the work product doctrine, because the email was prepared in anticipation of litigation (i.e., the merger application). (See id. at 2.)

² Oliver Wyman held multiple roles (business consultant, consultant for the application, and expert) with different varied work product protection from none, it mattered whether it was in anticipation of litigation, and specific expert rules applied.

³ At the discovery conference, I reminded the parties to comply with Section F.1, Resolution of Disputes and Discovery Calendar, in the Order Setting Discovery Guidelines. Decision No. 24 (June 18, 2026). The failure to comply can result in striking of filings or the undersigned's failure to consider filings. For the avoidance of any doubt, while the Order Setting Discovery Guidelines uses the terminology "Opposition Letter Briefs," these are "replies" just like "Opening Letter Briefs" are "motions." See Decision No. 24, Sec. F.1.a & F.1.c (June 18, 2026).

NS also argued that “nothing” suggests that the McClellan email was a business consulting communication, and “every sentence is oriented toward the presentation of a compelling application in the merger proceeding and how the September 3-4 meeting would facilitate that objective.” (Id. at 1.) NS also argues that when Oliver Wyman was not acting as a business consultant, then it was building the “diversion analysis” that NS would ultimately sponsor in the merger application. (Id. (citing Ex., T. Rynaski Depo Tr.).)

NS argued that Non-Applicants claimed the McClellan email is discoverable because it contains facts considered by the expert. (See id. at 2.) NS disagreed that there are any such facts. (Id.) Moreover, NS argued that Non-Applicants could ask Mr. Hunt, an Oliver Wyman expert, about these facts at his upcoming deposition. (Id.)

Non-Applicants filed their supplement on October 6, 2026. (Non-Apps. Supp. Oct. 6, 2026.) Non-Applicants argue that Mr. McClellan’s declaration fails to substantiate NS’s claim of work product protection for the McClellan email. (Id.) Non-Applicants argue that NS’s supplemental filing confirms that NS does not claim attorney-client privilege. (See id.)

Non-Applicants argue that NS bears the burden of establishing the work product claim. (Id.) Non-Applicants argue that the “core facts” are undisputed: that the “discussions concerned synergy projections by the marketing and strategy teams (i.e., a business projection of how much revenue the merged entity could attract because of the merger).” (Id. at 1.) Business teams worked on the synergy projections and copied Oliver Wyman into an email about an upcoming meeting. (See id.) Oliver Wyman had been a business consultant for NS for years. (Id.)

Non-Applicants argue that the McClellan email does not discuss any Oliver Wyman work, so it does not discuss work product. (Id.) Non-Applicants argue that the McClellan email cannot summarize a future meeting, so it cannot convey or summarize work product. (Id.) Instead, Non-Applicants contend that the McClellan email discussed “a commercial analysis and offer[ed] a businessperson’s commentary about that factual information.” (Id.) Non-Applicants argue the McClellan email is ordinary course, commercial information and not protected work product. (Id.)

Rule 26(b)(3)(A), Federal Rules of Civil Procedure, protects from disclosure work product. The rule protects documents and things that are prepared by or for a party or representative in anticipation of litigation. Id. The parties do not argue that any opinion is protected but instead is factual or ordinary work product. Non-Applicants argued that the McClellan email contains business information, and to the extent that it references the application, that can be redacted, but otherwise, it is not protected. NS argues the entire McClellan email was prepared in anticipation of the merger application and about the intermodal strategy to support the application for a planning meeting with its consultants.

Non-Applicants argue that an upcoming meeting cannot be work product. (Non-Apps. Supp. 1, Oct. 6, 2026.) This is simply incorrect. Of course, an upcoming meeting can have factual work product attached to it. Work product does not simply need to summarize past events, as long as those fact are set forth (and not waived) in anticipation of litigation.

Again, I reviewed the email in camera. I also reviewed Mr. McClellan's declaration. I find that the email was written in anticipation of litigation—the STB merger application. The email specifically references inviting the consulting firm to an upcoming meeting scheduled to plan intermodal strategy for the merger application. It does not matter that an attorney was not included on this email. See Fed. R. Civ. P. 26(b)(3)(A).

I also considered the final paragraph separately,⁴ where Mr. McClellan writes, “[o]ne final note[.]” This phrase is used for emphasis and conclusion. It is not a change of subject, as I initially thought. Mr. McClellan explains that “prior to this meeting[.]” the planned intermodal meeting about the STB application strategy, Mr. McClellan would discuss with Todd Rynanski (another Oliver Wyman employee) (see NS Supp., Ex. T. Rynanski Depo Tr.) the intermodal growth targets. To the extent that the revenue synergy number is discussed, it is connected to the intermodal targets, and likewise cannot be separated from the work product.

I considered whether this was business advice rather than in anticipation of litigation. Considering Mr. McClellan's declaration, and the context of the email, I find it to be in anticipation of the merger application and the stated planned intermodal meeting. Therefore, this paragraph is protected by work product, too.⁵

Non-Applicants argued that separate briefing was needed to address any waiver arguments. (Non-Apps. Supp. 2, Oct. 6, 2026.) No. Any waiver argument should have been raised in Non-Applicants' original motion. Such piecemeal motion practice is time-consuming and impractical. Moreover, Non-Applicants have not demonstrated through the deposition excerpts provided that Applicants waived the work product protection over this particular document.

As NS conceded, Oliver Wyman's expert witnesses may be questioned at deposition about the facts and data relied upon in reaching its conclusions and to identify any assumptions provided that the expert relied on in forming opinions expressed. See Fed. R. Civ. P. 26(b)(4)(C).

It is ordered:

1. Applicants' motion to compel is granted in part and denied in part, as set forth above.
2. Non-Applicants' Request for In Camera Review is granted. Non-Applicants' Motion Challenging NS's Work Product Claim is denied.
3. This decision is effective on the date of service.

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

⁴ This paragraph is the crux of the dispute for Non-Applicants.

⁵ Non-Applicants have not argued they have a substantial need, and they cannot prepare their case without undue hardship by other means. See Fed. R. Civ. P. 26(b)(3)(A)(i)&(ii).