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April 27, 2026

BNSF-22

311205

Chief of Case Administration
Office of Chief Counsel
Surface Transportation Board
395 E Street N.W.
Washington, D.C. 20432-0001

ENTERED
Office of Chief Counsel
April 27, 2026
Part of
Public Record

*Re: STB Finance Docket No. 36873, Union Pacific Corporation, et al.—Control—
Norfolk Southern Corporation, et al.*

Dear Chief of Case Administration:

Enclosed for e-filing in the above-referenced proceeding is a public version of BNSF Railway Company's Motion to Enforce Decision No. 13, with appropriate redactions that the Board can place in its docket. We are concurrently filing a highly confidential version of the Motion to Enforce Decision No. 13, to be filed under seal.

Pursuant to 39 C.F.R. § 1002.2(f)(88), a filing fee of \$350 was paid using pay.gov. Please contact me with any questions.

Sincerely,

/s/ Daniel T. Donovan

Daniel T. Donovan, P.C.

FILED

April 27, 2026
SURFACE
TRANSPORTATION BOARD

FEE RECEIVED
April 27, 2026
SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36873

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

**BNSF RAILWAY COMPANY'S MOTION TO ENFORCE
DECISION NO. 13**

INTRODUCTION

On March 18, the Board ordered UP and NS to produce the executive-level documents related to their proposed merger that would be turned over in an HSR-reportable transaction across an 18-month period. In response, UP and NS only produced several handfuls of documents each. Specifically, for this entire 18-month period:

- UP only produced **36** documents, including five emails; NS only produced **38** documents (several of which were duplicates of UP-produced documents), including 11 emails.
- UP and NS produced no analyses regarding the \$750 million in concessions that they projected when they signed the merger agreement but then cut when UP/NS filed their application.
- UP and NS produced **none** of the modeling that supported their internal revenue and cost synergy assessments. Such models are included in HSR filings for large deals, especially ones based on synergies. This is a key issue, especially in light of the Board's prior skepticism about the timing

and fruition of the claimed efficiencies. *See* Decision No. 9 at 5 (Jan. 16, 2026)

- UP and NS did not produce a single document dated before March 13, 2025 (even though the Board’s order encompassed documents created back to July 30, 2024, UP’s and NS’s securities filings state that merger conversations started in late 2024, and internal assessments likely began much earlier).
- UP and NS did not produce a single document dated after October 20, 2025 (even though the Board’s order encompassed documents created through February 17, 2026, and UP and NS have surely been in regular communication about the transaction over the last six months).

In short, UP and NS collectively produced only 74 documents (even fewer unique documents) across an 18-month period—or less than one document per week. This production does not satisfy the Board’s order that UP and NS produce “*all* studies, surveys, analyses, and reports prepared *by or for any* officer(s), director(s), or supervisory deal team lead for the purpose of evaluating or analyzing the acquisition,” and “*all* studies, surveys, *analyses and reports* prepared by investment bankers, consultants, or other *third-party advisors*” for similar purposes. Decision No. 13 at 6-7 (Mar. 18, 2026) (emphases added).

Considering the scale of the proposed merger, and its tremendous consequences for UP and NS as organizations, BNSF respectfully asserts that there must be more documents responsive to the Board’s order. UP and NS are pursuing one of the world’s biggest mergers in recent times. When signed last summer, the proposed merger would have been the largest in the world, regardless of industry, in the then-prior three years. UP and NS claim the merger will be transformative and will “shape the next hundred years of American railroading.” App. Vol. 1 at 309. They

also promised their combination was “thoroughly planned and carefully executed.” App. Vol. 1 at 183. Before signing a merger agreement of that size and consequence, UP and NS dedicated teams of senior executives to investigate and analyze dozens of issues. They also engaged a significant number of consultants and bankers to create reports for their officers and boards on topics including [REDACTED]. Indeed, BNSF’s preliminary review identified certain documents that refer to other order-responsive analyses of these subjects but that were not produced.

These deficient productions prevent the Board and stakeholders from developing the record needed to analyze the proposed merger. Applicants are shielding their internal candid assessments—the very ones the Board ordered them to turn over. The selective documents that Applicants have turned over further emphasize just how important this real-world record will be for evaluating the claims made in the Application: they reflect that [REDACTED]

[REDACTED]. The analyses and other documents supporting these positions are crucial for the Board and other interested parties to evaluate whether the merger meets the Board’s standards.

The Board should therefore issue an order directing (1) UP and NS to produce the balance of the documents required by the Board’s order within seven days of entry

of its enforcement order; and (2) one UP officer and one NS officer (with knowledge of the efforts undertaken by the Applicant to comply with the order) to file an affidavit, signed under oath, that memorializes their respective company's efforts to comply with Decision No. 13 within seven days of the Board's enforcement order.

BACKGROUND

On March 18, 2026, the Board ordered UP and NS to produce documents that they would have been required to produce if the transaction were reportable under the HSR Act.¹ The time period for compliance was July 30, 2024 to February 17, 2026.

In its order, the Board stated that these "ordinary course" documents are of "critical importance" in evaluating the merger. Decision No. 13 at 6 (quoting Mar. 3, 2026 DOJ Letter ("DOJ Letter") at 2). They "may be more probative than 'party advocacy, expert analysis, and self-serving statements' provided to support a merger application." *Id.* (quoting DOJ Letter at 2). These documents "are likely to provide valuable insight into the proposed transaction's effects because they 'reflect real-time business decisions and forecasts concerning the merging parties operations, and views of past, present, and future market conditions.'" *Id.* at 5-6.

In response to that order, UP and NS produced 36 and 38 documents, respectively, and withheld four and 44 documents as privileged, respectively. Some of the produced documents were duplicates of documents in the other's production.

¹ The Board used terms as defined in the FTC's pre-merger notification forms: Competition Documents, Confidential Information Memoranda, Third-Party Studies, Surveys, Analyses, and Reports, and Synergies and Efficiencies. *See* Decision No. 13 at 6-7.

Other produced documents pointed to other responsive documents which were not produced. BNSF raised exemplar deficiencies with UP and NS via email on April 10. BNSF also asked questions about the Applicants' search and production process to help identify where the gaps might have been created. BNSF asked, for example:

- Who were the specific officer(s), director(s), and supervisory deal team lead(s) that UP and NS considered as relevant or responsive for the purposes of complying with the Board's order?
- From what custodians did UP and NS collect and review documents to comply with the Board's order?
- What non-custodial folders and drives did UP and NS search to comply with the Board's order?
- Did UP and NS exclude any non-privileged surveys, analyses, reports, etc. related to the transaction (including emails regarding the same) presented to the individuals identified in Appendix A to their respective productions, and if so, on what basis?

Ex. 1 (Apr. 10, 2026 Email from M. Thompson). While these questions should have been easy for UP and NS to answer, they declined to answer these questions or supplement their productions. Ex. 2 (Apr. 13, 2026 Email from K. Kelly).

ARGUMENT

Parties must comply with the Board's orders in their entirety. UP and NS's productions in response to Decision No. 13 are deficient. Accordingly, BNSF brings this motion pursuant to 49 C.F.R. 1117.1.

I. UP and NS Have Not Produced All Responsive Working Group Documents or Documents Sent or Received by Officers and Directors.

The order required UP and NS to produce all studies, surveys, and analyses regarding market shares, competition, competitors, markets, potential for sales

growth, market expansion, synergies, and efficiencies. The order also specified that UP and NS were to produce all such documents “*by or for any* officer(s), director(s), or supervisory deal team lead for the purpose of evaluating or analyzing the acquisition.” Decision No. 13 at 6-7 (emphasis added). This would necessarily include emails to and from officers, directors and supervisory deal team leads, as well as other electronic and hard copy files.²

To tackle the massive project of evaluating a potential merger, [REDACTED]

[REDACTED] [REDACTED] [REDACTED]. See Ex. 3 (UP-STB-D13-0000381) at -396; Ex. 4 (UP-STB-D13-0000430) at -432; Ex. 5 (NS_STB_00001303) at -307. [REDACTED]

[REDACTED] [REDACTED] [REDACTED]. Ex. 3 at -396. [REDACTED]

[REDACTED]. Ex. 5 at -307. [REDACTED]

² “Officers’ include any individual holding a position that is appointed by the board of directors or identified in the company’s articles of incorporation or bylaws. Where the bylaws provide that officers of the company will include additional officers as may be appointed by the president, board of directors, or chairman of the board, these additional officers are ‘officers’ for purposes of Item 4.” See FTC Informal Interpretation 1610002, see also FTC, *Item 4(c) Tip Sheet*, https://www.ftc.gov/system/files/ftc_gov/pdf/Tip-Sheet-Item-4c.pdf (describing which emails to or from officers must be submitted in an initial HSR filing).

[REDACTED]

[REDACTED].³

Taken at face value, UP's and NS's productions suggest that, in assessing this massive transaction, the officers on those deal teams collectively received, sent, or exchanged only 16 non-privileged, responsive emails—and that they never were included on any responsive emails with at least [REDACTED] and [REDACTED] members of their deal teams, respectively. In addition, there would be emails and other communications with officers and directors who were not in the working groups. The summary charts in Appendix A underscore how few emails were produced, even though the working groups and board members would have been demanding frequent and substantive updates.

The documents produced also reveal additional gaps:

- [REDACTED]
[REDACTED]. Ex. 3 at -396; Ex. 4 at -432. However, UP produced emails involving [REDACTED]
[REDACTED]. And UP produced just five emails in total.
- [REDACTED]
[REDACTED]. Ex. 5 at -307. However, NS produced emails [REDACTED]
[REDACTED]. And NS produced just 11 emails in total.
- [REDACTED]
[REDACTED]
[REDACTED]. Ex. 6 (NS_STB_00001217). This correspondence shows [REDACTED]

³ For each Applicant, the supervisory deal team lead is “[t]he individual who has primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer.” See HSR Rules, 89 Fed. Reg. at 89216, 89363, 89381.

[REDACTED]
[REDACTED]. Yet, NS produced [REDACTED]
[REDACTED]
[REDACTED].

- UP produced email correspondence where [REDACTED]
[REDACTED]
[REDACTED]. Ex. 7 (UP-STB_D13-0000657). [REDACTED]
[REDACTED]
[REDACTED].

These are merely examples that BNSF can see from the productions made to date.

Based on HSR guidance, at minimum, UP should have searched—and was ordered to search—the email and other electronic and hard copy files of the following individuals: **Michael McCarthy** (Chair of the board, an HSR director; S-4 identifies him as engaged in merger discussions); **Jim Vena** (CEO, an HSR officer; S-4 identifies him as engaged in merger discussions); **Beth Whited** (President until July 1, 2025, a position in bylaws and therefore an HSR officer until July 1, 2025; in UP’s merger working group); **Jennifer Hamann** (CFO, an HSR officer; in working group and S-4 identifies her as engaged in merger discussions); **Mike Miller** (Treasurer, an HSR officer; in working group); and the **Supervisory Deal Team Lead** (whether Todd Rynaski or otherwise). And, at minimum, NS should have searched—and was ordered to search—the email and other electronic and hard copy files of the following: **Richard Anderson** (Chair of the board, an HSR director; S-4 identifies him as engaged in merger discussions); **Mark George** (CEO, an HSR officer; S-4 identifies

him as engaged in merger discussions); **Michael Barr** (Treasurer, an HSR officer; in working group); and the **Supervisory Deal Team Lead** (whether Mike McClellan or otherwise). For each custodian, their email and other electronic and hard copy files should have been searched for the 18-month timeframe on the relevant subjects, including transaction-related impacts on competition, markets, market shares, synergies, and efficiencies.⁴

Again, this list does not include all the officers and directors who were *not* on the working groups—even though the Board ordered Applicants to produce documents for *any* officer or director. UP and NS should be ordered to provide all order-responsive documents and materials.

II. UP and NS Have Not Produced All Responsive Studies and Analyses of the Market and Competition.

UP and NS are also improperly withholding competition analyses that are responsive to the Board's order. UP and NS each produced [REDACTED]

■. However, the studies, surveys, analyses, and modeling that forms the basis of UP's and NS's conclusions, which would have been reviewed by at least some of UP's and NS's officers, were not produced. For instance:

- UP produced [REDACTED]. See Ex. 3; Ex. 8 (UP-STB-D13-0000623). But UP

⁴ Additional members of the merger working group could also be “officers” if they were appointed to their position (a) in the case of NS, by the NS board, or (b) in the case of UP, by the UP Board, Chair or CEO (as the UP bylaws allow the CEO and Chair to appoint officers). See FTC Informal Interpretation 1610002.

did not produce [REDACTED].

- UP produced [REDACTED].
- According to their security filings, UP CEO Jim Vena and NS CEO Mark George met on March 18, 2025 to discuss whether it was the right time to create a transcontinental railroad, which presumably would have included discussions and analysis of purported synergies and the impact of the merger on competition. *See* Union Pacific Corp., Registration Statement (Form S-4) (Sept. 16, 2025). UP produced no pre-meeting prep or post-meeting materials from this conversation, nor did NS.
- NS produced [REDACTED]. Ex. 5 (NS_STB_00001311). NS did not produce [REDACTED].
- NS produced [REDACTED]. Ex. 9 (NS_STB_00001339); *see* Form S-4. [REDACTED]. UP also produced no post-meeting materials from Rynaski.
- On December 18, 2024, Mark George contacted Jim Vena to discuss the potential benefits of creating a transcontinental railroad and the regulatory environment. *See* Form S-4. They also had discussions on at least April 1, 2025 and April 29, 2025. *See id.* Yet neither UP nor NS produced any pre-meeting prep or post-meeting materials from those meetings. Indeed, NS's first produced document is dated approximately May 20, 2025—five months after the December 2024 meeting.⁵

⁵ To the extent UP and NS argue there was “clean break” between the 2024 discussions and later engagement, that would be baseless. The FTC’s Premerger Notification Office has

Again, these are just examples. These examples underscore that UP and NS did not produce all order-responsive materials. The Board should order UP and NS to correct the deficiencies.

III. UP and NS Have Not Produced All Studies or Reports Analyzing Synergies or Efficiencies.

The Board ordered UP and NS to “[p]rovide *all* studies, surveys, analyses, and reports evaluating or analyzing synergies, and/or efficiencies prepared *by or for any* officer(s) or director(s) [of Applicants] for the purpose of evaluating or analyzing the acquisition.” Decision No. 13 at 7 (emphases added). Applicants have not done so.

Among other issues:

- UP and NS produced *no documents* regarding their removal of \$750 million in potential concessions for which they initially accounted for and disclosed to shareholders.
- UP produced [REDACTED]. Ex. 3 at -383. However, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED].
- On June 3, 2025, Jim Vena and members of UP senior management met with the board for a preliminary overview of synergies. See Form S-4. UP did not produce materials related to a June 3, 2025 board meeting.

stated that there is presumptively no clean break if the prior consideration took place within a year of the signing. See ABA, Premerger Notification Practice Manual 311 (5th ed. 2015). Even if there were a clean break, documents that are reviewed from an earlier look at a target can still be responsive if the acquirer relies on them in assessing the “transaction” that it ultimately signs. Regardless, the Board ordered productions back to July 30, 2024.

- On July 8, 2025, Jim Vena and Mark George discussed valuation and potential synergies. *See* Form S-4. UP and NS did not produce any prep materials or post-meeting reports related to this discussion.
- NS produced [REDACTED]. Ex. 10 (NS_STB_00000003) at 39-41. The underlying analysis, including any assumptions used, were not produced.

These examples underscore that UP and NS failed to produce executive-level analyses regarding synergies and efficiencies. These analyses are particularly important, as the limited documents that Applicants did produce reveal [REDACTED]. The Board should direct UP and NS to promptly produce the underlying modeling and analyses supporting their synergy calculations, not just the cherry-picked excerpts included [REDACTED].⁶

CONCLUSION

Surely the public company boards and experienced executives of UP and NS did not pursue this industry-changing merger—and recommend it to their shareholders—based on 74 documents. To ensure compliance with the Board’s order

⁶ It also appears that UP and NS inappropriately redacted or withheld documents as privileged. BNSF intends to attempt to confer further with counsel for the Applicants and thereafter raise with the ALJ if necessary. For example, NS withheld [REDACTED]. *See, e.g.*, NS_Priv_0020; NS_Priv_0024; NS_Priv_0034; NS_Priv_0026. These do not appear to be communications seeking or providing legal advice. UP and NS also asserted common interest privilege over a [REDACTED] when the two parties would have been negotiating at arms-length. *See* Ex 4; Ex. 11 (NS_STB_00001281). UP’s and NS’s failure to substantiate their privilege claims through even a cursory explanation also precludes an assessment of whether certain broad and sweeping privilege claims are valid. These are examples.

and facilitate the development of a full record, the Board should issue an order directing (1) UP and NS to produce *all* documents required by the Board's order within seven days of entry of its enforcement order; and (2) one UP officer and one NS officer (with knowledge of the efforts undertaken by the Applicant to comply with the order) to file an affidavit, signed under oath, that memorializes their respective company's efforts to comply with Decision No. 13 within seven days of the Board's enforcement order.

Respectfully submitted,

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

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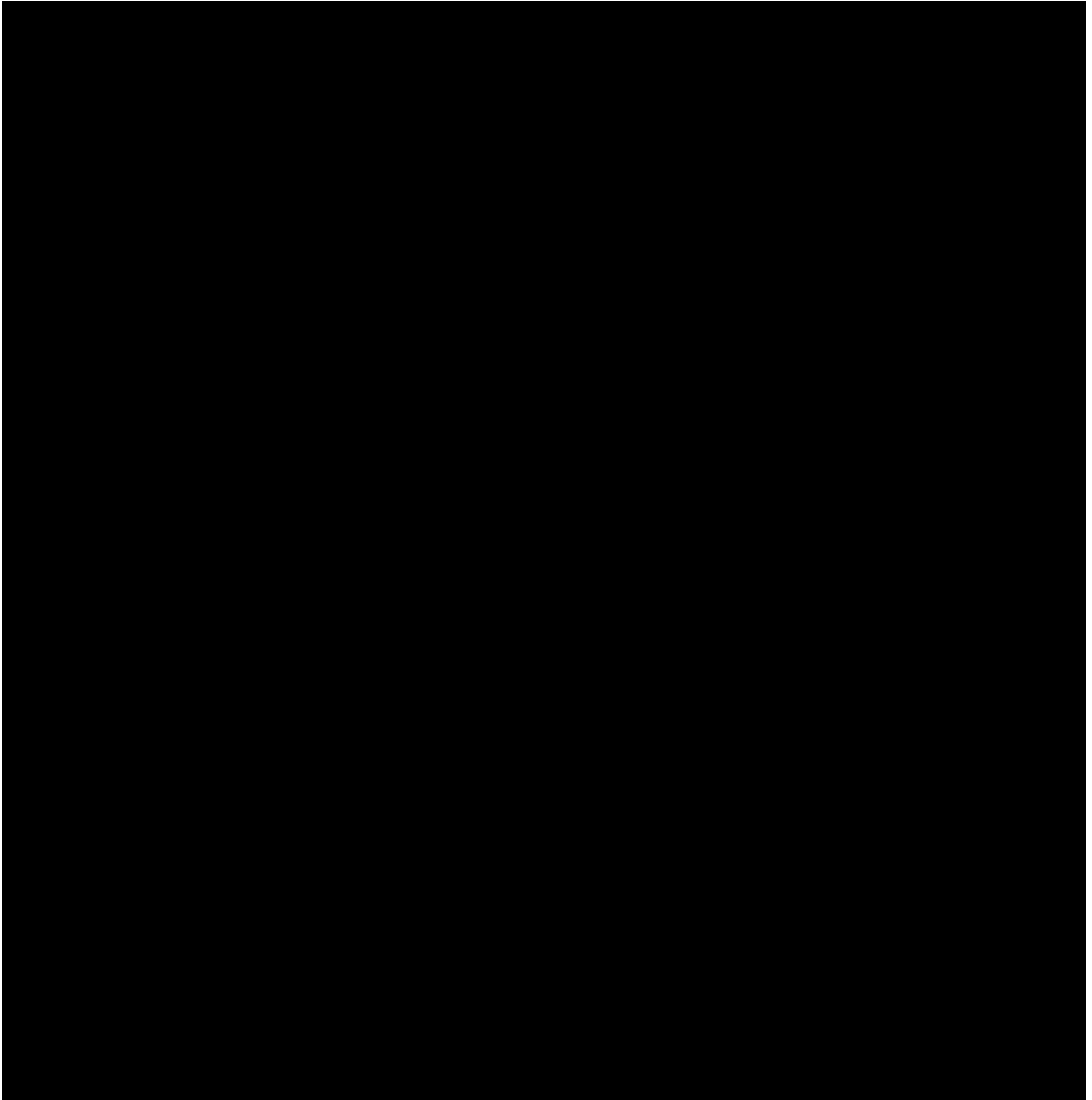
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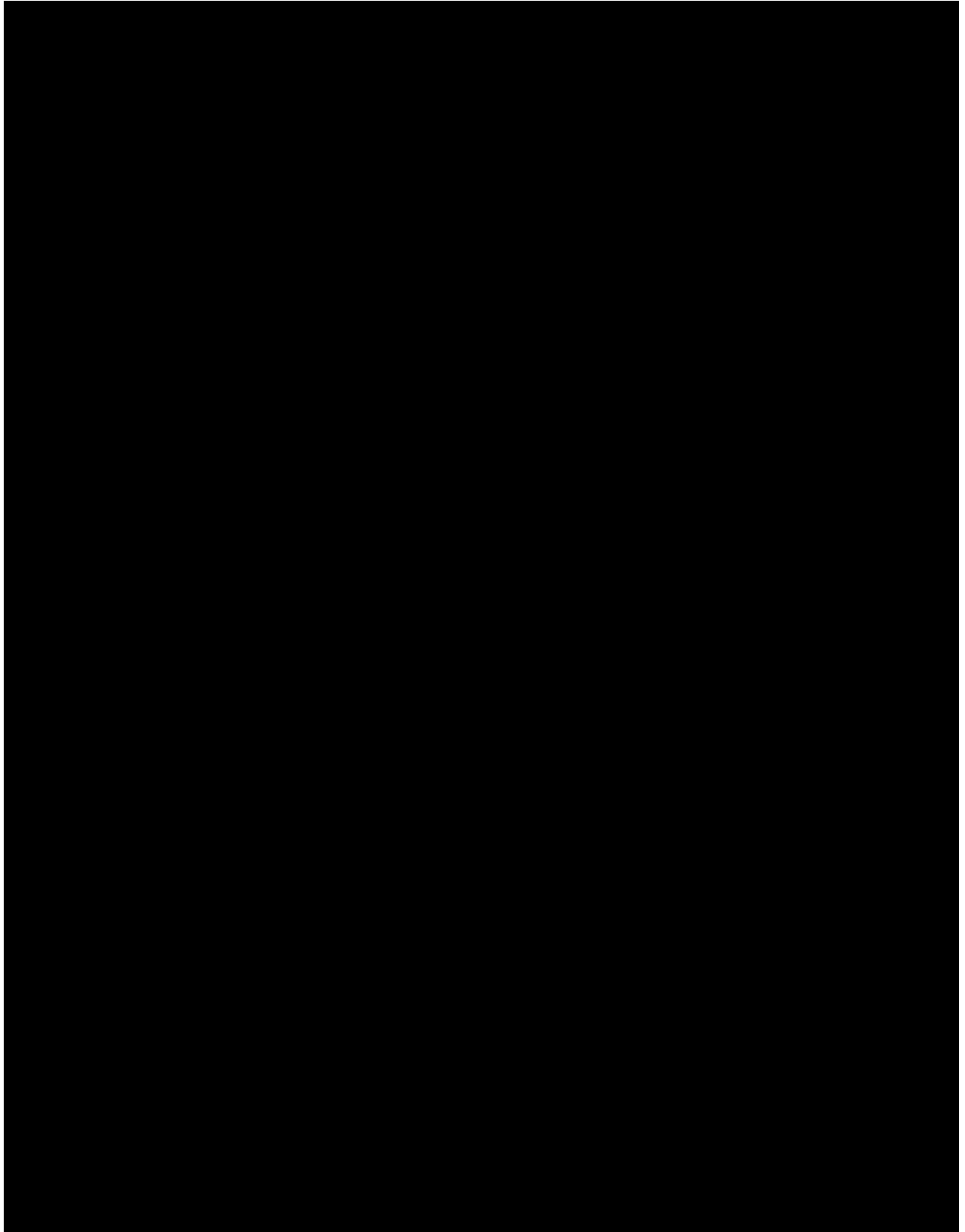
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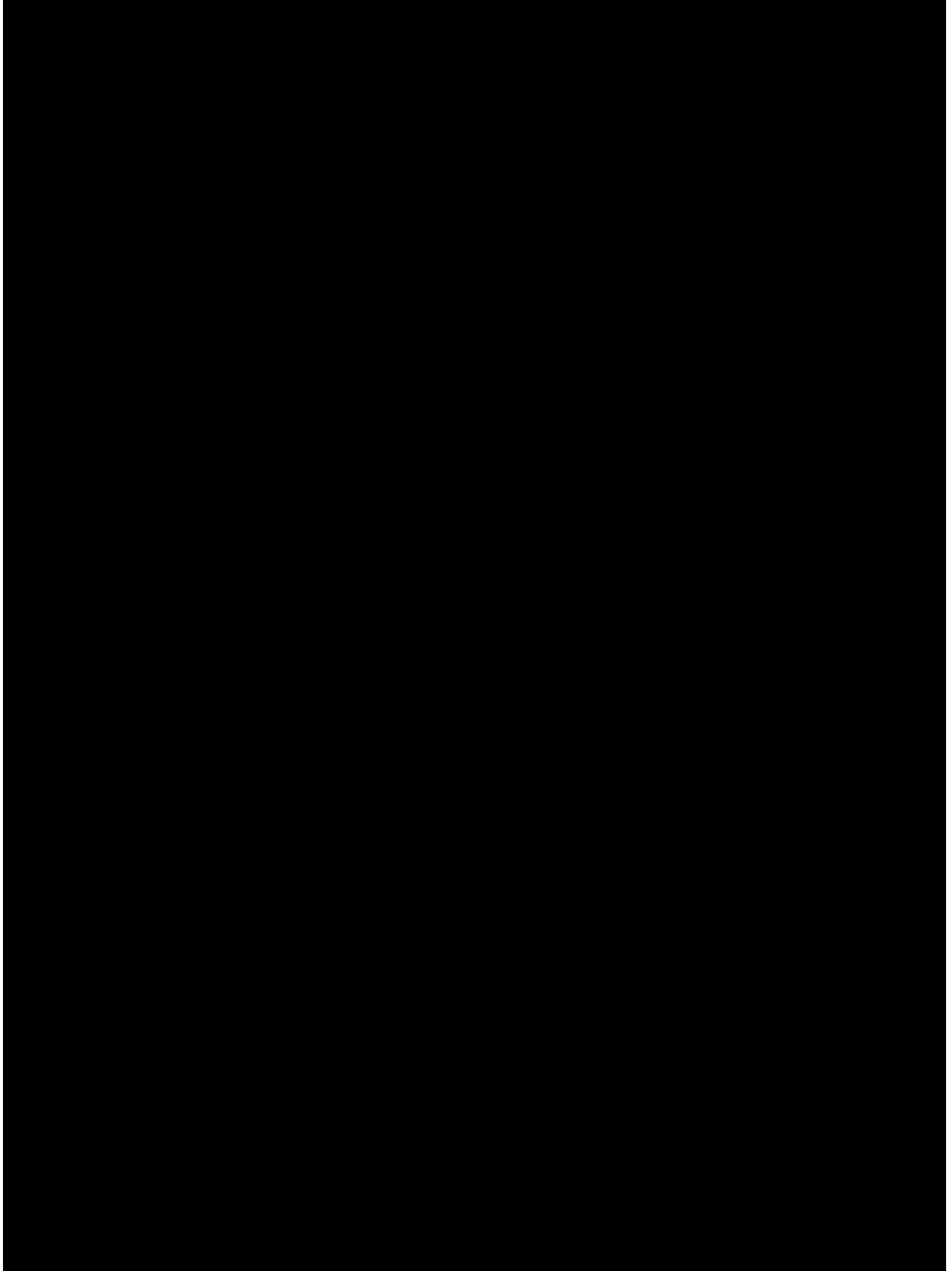
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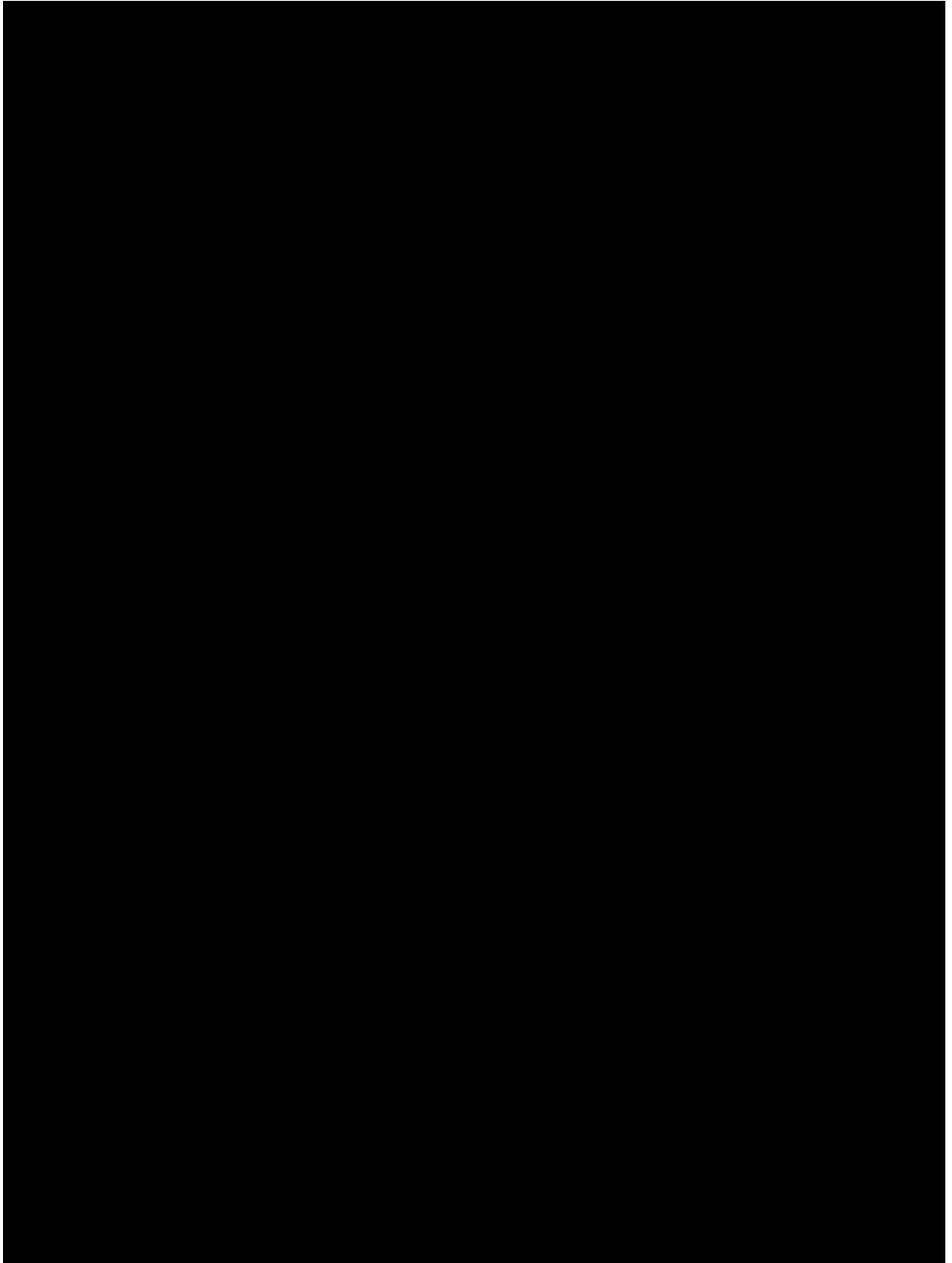
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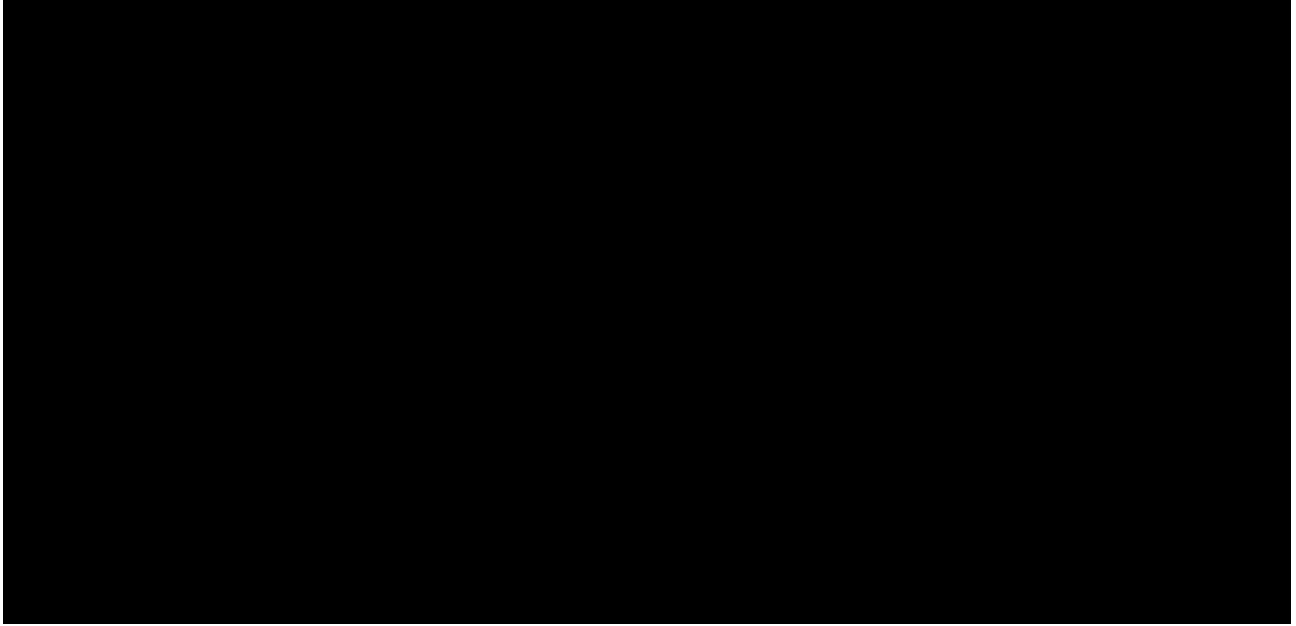
APPENDIX A

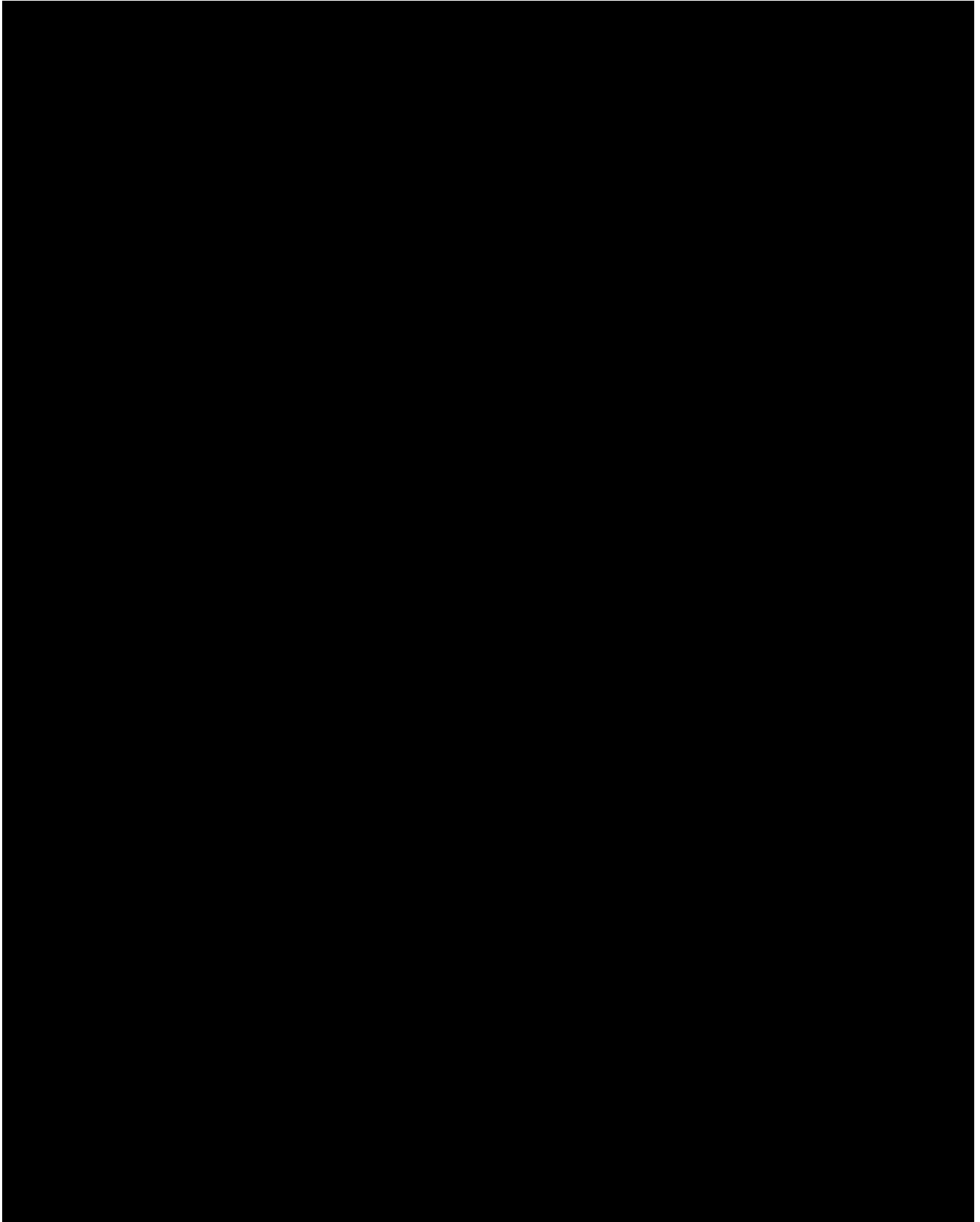


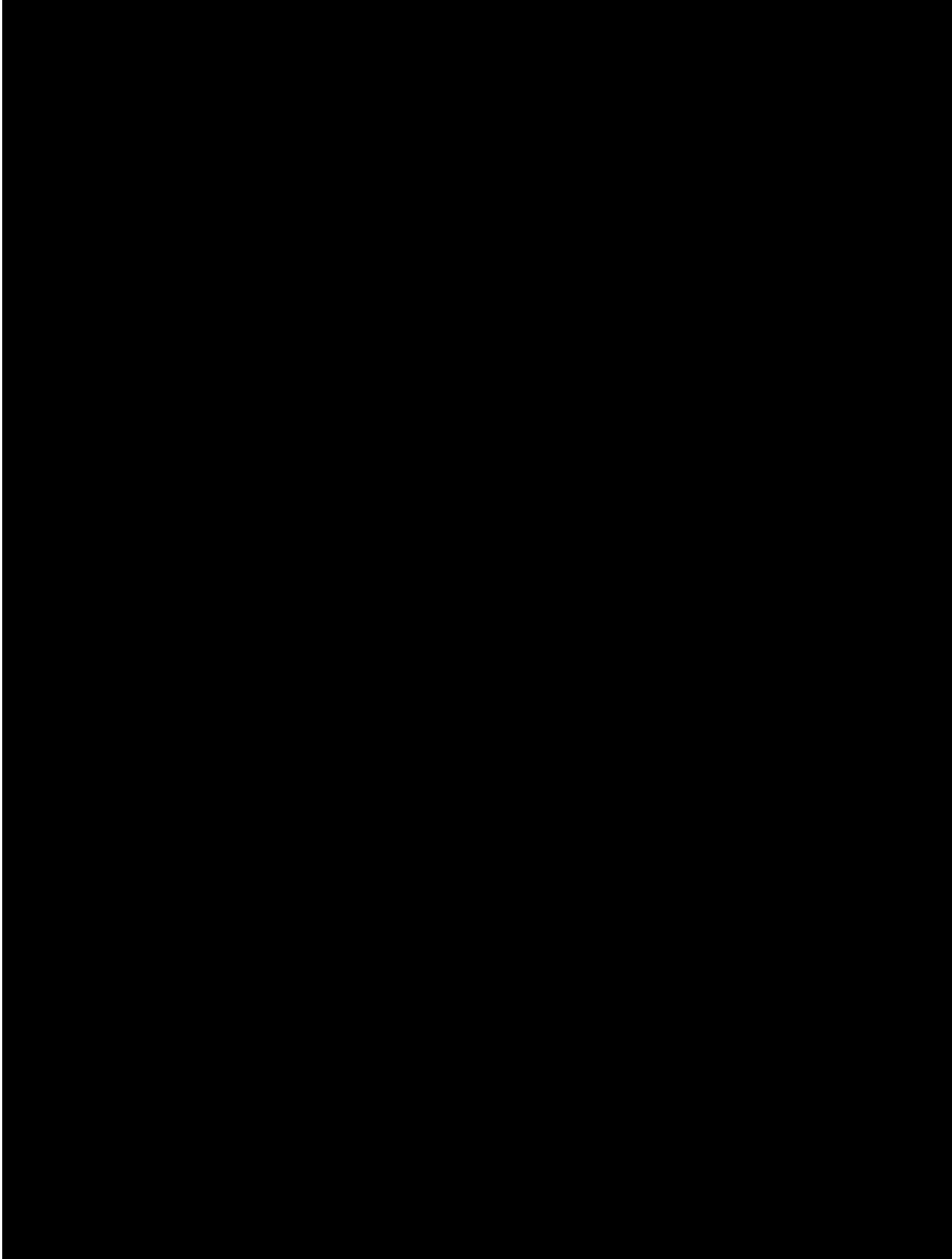












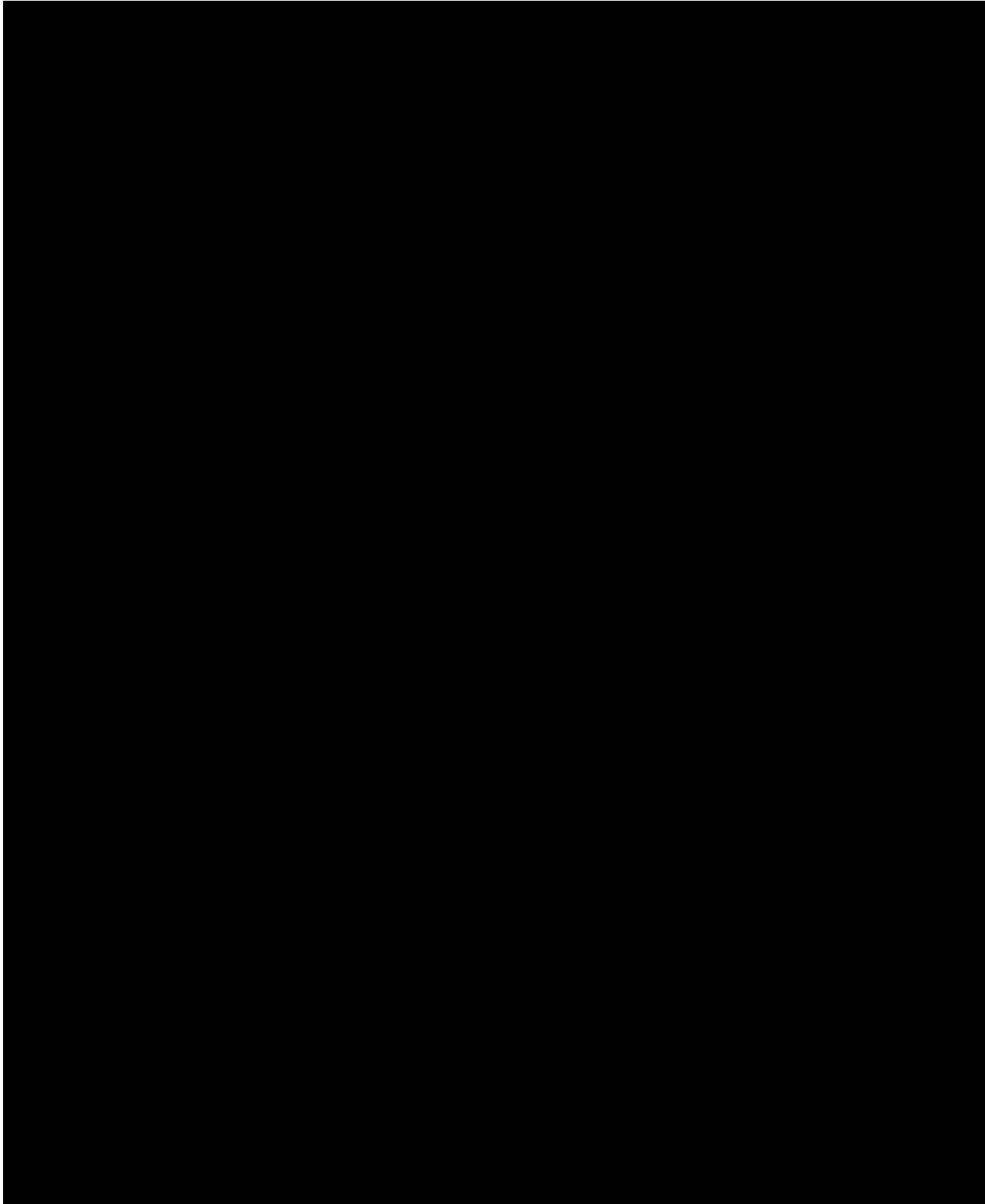


EXHIBIT 1

(Redacted)

EXHIBIT 2

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EXHIBIT 3

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EXHIBIT 9

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EXHIBIT 10

(Redacted)

EXHIBIT 11

(Redacted)

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing *BNSF Railway's Motion to Enforce Decision No. 13* 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 K. Williams

Onika K. Williams

Attorney for BNSF Railway Company

April 27, 2026