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SERVICE DATE – JULY 28, 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 APPLICANTS’
MOTION TO COMPEL PRIVILEGE SUBSTANTIATION BY BNSF
AND REQUIRING CPKC TO FILE A SUPPLEMENT TO ITS
MOTION TO COMPEL REGARDING CPKC’S
REQUEST FOR QUANTITY OF DOCUMENTS SEARCHED

Decision No. 29

Decided: July 28, 2026

Discovery is before the undersigned pursuant to a ruling by the Surface Transportation Board. See Decision (Aug. 28, 2025). The undersigned scheduled and conducted a discovery conference on July 24, 2026. See Decision No. 22. 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 (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).

A party claiming privilege bears the burden of proving that the communications are protected. See, e.g., In re Lindsey, 158 F.3d 1263, 1270 (D.C. Cir. 1998). “A blanket assertion of the privilege will not suffice.” Id. Rather, the party “must present the underlying facts

demonstrating the existence of the privilege in order to carry its burden.” Id. (internal quotation omitted; citation omitted).

I. Applicants’ Motion to Compel Privilege Substantiation

Applicants moved to compel privilege substantiation for BNSF’s responses to Applicants’ discovery requests. (Apps. Letter Brief, July 16, 2026.) Applicants argue that for Request Numbers 1-4, BNSF asserted broad claims of privilege and requested that BNSF supply information sufficient to identify documents or categories of documents or communications withheld based on privilege. (Id. at 5.) Further, Appellants requested that BNSF specifically identify the type of privilege claimed (i.e., attorney-client privilege, common interest privilege, work product protection, or other grounds). (See id.)

In relevant part, BNSF argued that its analyses “were conducted at the direction of counsel” and therefore responses that such analyses are “privileged” are sufficient. (BNSF Letter 1, 2-3 & Exh. B, July 21, 2026.)

BNSF’s broad privilege assertions are not sufficient to assess the privilege it asserts. “Privileged” does not explain on which privilege BNSF relies, whether attorney-client communication, the work product doctrine, common interest privilege, or some combination of these privileges. BNSF’s responses, objections, and assertions of privilege do not make clear what categories of information BNSF is withholding. Specifically, the requests may seek non-privileged business information. BNSF’s responses and objections must explain how the information is protected by a privilege rather than non-privileged business information (if any exists) sought by the requests.

At the discovery conference, BNSF agreed to supplement its responses and objections.

A review of Applicants’ Request Numbers 1 and 2 demonstrates that the requests seek more information than only related to the UP/NS proposed merger transaction. It is not clear from BNSF’s response and objections whether BNSF is claiming a privilege, other objection (e.g., relevance), or both to the additional information sought. Additional specificity is required.

Request Numbers 1 and 2 request information from “within the last 12 months.” (BNSF Letter, Exh. A, 4, July 21, 2026.) Applicants’ discovery requests were served on May 29, 2026. (Id. at Exh. A.) Applicants filed their Notice of Intent on July 30, 2026. Thus, Request Numbers 1 and 2 seek information including from before the proposed transaction. The information requested may include business information (if there is any) rather than legal advice. A more detailed response or objection is required.

Request Numbers 1 and 2 seek information “whether in response to the Proposed transaction or otherwise.” (BNSF Letter, Exh. A, 4, July 21, 2026.) BNSF responded to both requests that it “did not take steps to acquire another Class I railroad,” along with its claim of privilege. (Id. at Exh. B, 2-3.) BNSF’s responses and objections require more detail to understand what information BNSF claims is privileged, whether BNSF objects to the additional information sought, or both.

For Request Numbers 3 and 4, BNSF responded it has not identified any non-privileged documents and that it would produce “final, non-privileged analyses[,]” respectively. (*Id.* at Exh. B, 4-5.) BNSF did not provide sufficient details about which privilege it claims for the information to justify withholding the information (if any information exists).

Applicants’ Motion to Compel Privilege Substantiation is GRANTED IN PART. BNSF shall supplement its responses and objections to Request Numbers 1 – 4 to demonstrate (1) which privilege is claimed and (2) that the elements of the corresponding privilege, with the supporting underlying factual information, are met. *See In re Lindsey*, 158 F.3d at 1270. BNSF’s responses and objections should make clear whether it is withholding information based upon privilege, an objection, or both.

Applicants’ motion also requests an order compelling BNSF to supplement its response to Request Number 1 with all non-privileged factual information, produce all non-privileged documents and communications responsive to Request Numbers 2 and 3, and identify the custodial and non-custodial sources searched or consulted in responding to each request. Applicants’ motion is DENIED IN PART without prejudice for these requests for relief. Applicants may renew their requests for this relief, if necessary, after BNSF supplements its responses and objections.

II. CPKC’s Motion to Compel

On May 28, 2026, CPKC moved to compel Applicants’ discovery responses. (CPKC Letter Brief, May 28, 2026.) At the discovery conference, CPKC explained that it is still conferring with Applicants regarding the substance of its motion (i.e., search terms), and thus, its motion is not ready to be heard. CPKC argued that regarding Applicants’ claim that the additional search terms would cause an undue burden, CPKC seeks the total quantity of custodial documents searched (i.e., the universe), so it can calculate the difference between the agreed search terms and CPKC’s requested search terms.

After discussion, the undersigned requested that CPKC supplement its motion to compel regarding this issue for the next discovery conference, so it could be briefed by the respective parties. Applicants have disclosed the hit counts for the agreed search terms and CPKC’s proposed search terms. The undersigned is not clear whether requiring Applicants to disclose that actual number of documents in the universe would yield meaningful calculations to demonstrate Applicants’ argument that using CPKC’s additional search terms is unduly burdensome. From the (very large) universe of documents, the calculation would give a percentage of the hit counts that can be compared—the agreed search terms versus CPKC’s additional search terms. But how do those percentages demonstrate whether CPKC’s proposed search terms yield responsive documents that are not captured by the agreed search terms? Therefore, the undersigned requires additional information about CPKC’s request, including its argued significance.

CPKC is required to supplement its motion to compel to brief this issue for the next discovery conference by the deadline for Opening Letter Briefs, if this issue is not resolved by

CPKC and Applicants before then. See Decision No. 24, 5. The supplemented issue shall be briefed according to the deadlines in the Order Setting Discovery Guidelines, Decision No. 24, 5-6.

III. Matters Held in Abeyance

The following matters are held in ABEYANCE until further notice:

- A. Applicants' Motion to Compel Data Productions, filed on July 16, 2026;
- B. BNSF's Third Motion to Compel, filed on July 16, 2026; and
- C. The undersigned's request for proposals for interim discovery deadlines, see Decision No. 26, 7.

It is ordered:

1. Applicants' Motion to Compel Privilege Substantiation is Granted in part and denied in part. BNSF shall supplement its responses and objections to Applicants' Request Numbers 1-4.
2. CPKC shall file a supplement to its motion to compel regarding the universe quantity by the deadline for Opening Letter Briefs before the next discovery conference. Briefing of the supplemental issue shall be in accordance with the abbreviated briefing schedule for discovery conferences. See Decision No. 24, 5-6.
3. This decision is effective on the date of service.

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