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Office of Chief Counsel
August 18, 2026
Part of
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BNSF-47
CSXT-20
CPKC-41

August 18, 2026

By E-Filing

Hon. Jenifer J. Soulikias
Administrative Law Judge
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Docket No. FD 36873, *Union Pacific Corp., et al. – Control – Norfolk Southern Corp., et al.*

Dear Judge Soulikias:

CSXT, BNSF, and CPKC (the “Non-Applicant Class Is”) submit this letter in opposition to Applicants’ motion for entry of their [Proposed] Order Regarding Clawback Procedures. *See* UP-90/NS-88 (August 13, 2026). To be clear, Non-Applicant Class Is do not oppose the entry of an order governing clawback procedures for inadvertently produced, privileged materials. If that is all that Applicants’ proposal contemplated, there would be no dispute.

But Applicants demand that the order also protect privileged documents and information that Applicants *intentionally* produce. Seeking protection for documents that Applicants *willingly* produce is improper, inconsistent with the Federal Rules, and would unfairly advantage Applicants by allowing them to use privilege claims and clawback procedures as both sword and shield. The fix is simple: The clawback order should apply to inadvertently produced materials only.¹

While Applicants’ proposed order is supposed to be based on Federal Rule of Evidence (“FRE”) 502, it is actually inconsistent with the Rule. FRE 502 sets out specific and narrow rules governing when attorney-client privilege and work-product protections are not waived in federal proceedings based on an inadvertent production of such materials. *See* FRE 502(b)

¹ Applicants’ motion makes reference to “the return of non-responsive materials,” but their Proposed Order Regarding Clawback Procedures does not address clawing back non-responsive materials anywhere. Non-Applicant Class Is therefore do not understand Applicants to be requesting that their Proposed Order give them the ability to claw back documents solely based on responsiveness. For clarity, however, Non-Applicants would and do oppose any argument that a document can be clawed back solely based on responsiveness.

(stating that a production of privileged materials is not a waiver if the production was “inadvertent” and “the holder of the privilege or protection took reasonable steps to prevent disclosure.”). But under Applicants’ proposed order, any production of privileged material, “whether inadvertent or otherwise” is not a waiver. That means, under Applicants’ proposal, a producing party *never* waives attorney-client privilege or work product protections, even when they choose to deliberately produce protected information; the producing party can claw back materials as it sees fit, at any time. This could lead to situations where a producing party deliberately produces some materials when they are useful to its positions, then claw back those materials if it turns out those materials are no longer useful. A producing party can also claim that the intentional disclosure of some materials can be narrowly limited to disclosure of just those materials and not of other materials containing the exact same information, thereby allowing the producing party to use privilege as both “a sword and a shield.” See *XY, LLC v. Trans Ova Genetics, LC*, Civ. Action No. 17-cv-00944-WJM-NYW, 2018 WL 11000694, at *6 (D. Colo. May 14, 2018). Federal courts across the country have recognized the potential for abuse in this exact scenario. See, e.g., *id.* at *5-7 (refusing to allow “selective, intentional waivers” because it would allow the producing party to only disclose selected attorney-client privileged communications in hopes of gaining leverage or influencing the outcome of certain issues); *Thomas v. Marshall Public Schools*, 690 F. Supp. 3d 941, 962-63 (D. Minn. 2023) (stating that trying to expand FRE 502(d) to apply to both inadvertent and intentional disclosures of privileged documents was a “flagrant[]” overreading of the rule and that allowing that interpretation could lead to “the tactical, selective disclosure of some privileged materials for use in litigation while withholding others on the same subject”); *Lubrizol Corp. v. Int’l Business Machines Corp.*, Case No. 1:21-CV-00870-CAB, 2024 WL 941686, at *4 (court concluding that it did not have the authority to preemptively authorize a party to make intentional disclosures without waiving privilege and explaining that allowing such protected intentional disclosures could “enable a party to use the rule as a means to produce documents favorable to its position while holding back harmful materials.”).

Non-Applicant Class Is, therefore, request that the ALJ deny Applicants’ motion and instead enter Non-Applicant Class Is’ proposed order (attached here as Exhibit A), which is identical to Applicants’ Proposed Order Regarding Clawback Procedures except with minor modifications to clarify that intentionally produced materials are not protected from waiver.² Non-Applicant Class Is have included a redline (attached here as Exhibit B) showing the differences between Applicants’ proposed order and Non-Applicant Class Is’ proposed order for the ALJ’s convenience.

Sincerely,

/s/ Eric P. Enson

Eric P. Enson
CROWELL & MORING LLP
Counsel for CSX Transportation, Inc.

² Applicants would suffer no harm or prejudice should Non-Applicant Class Is’ proposed order be adopted, as Applicants could still negotiate for selective intentional waivers on a document-by-document basis in the future if they want to do so.

/s/ Daniel T. Donovan

Daniel T. Donovan, P.C.
KIRKLAND & ELLIS LLP
Counsel for BNSF Railway Company

/s/ Joseph J. Matelis

Joseph J. Matelis
SULLIVAN & CROMWELL LLP
Counsel for CPKC

cc: Counsel of Record

EXHIBIT A

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

[PROPOSED] ORDER REGARDING CLAWBACK PROCEDURES

IT IS ORDERED that, to facilitate the efficient and orderly exchange of any documents, electronically stored information (ESI) or other information in this proceeding, the following procedures shall govern the assertion and resolution of claims of privilege or protection of materials produced in discovery, including claims that material is protected by the attorney-client privilege, work product doctrine, or other applicable privilege or protection.

1. The inadvertent production of privileged or work-product protected documents or information is not a waiver of the privilege or protection from discovery in this case or in any other federal or state proceeding. In the event that a party discovers that it produced or disclosed material that is protected by the attorney-client privilege, work product doctrine, or any other privilege (“Protected Material”), the producing party may make a written request within a reasonable time after it discovers the disclosure that another party return the Protected Material (“Clawback Notice”).
2. Within ten (10) calendar days of the issuance of the Clawback Notice, the producing party shall provide (a) a privilege log with respect to the disclosed Protected Material that is sufficiently detailed to enable the receiving parties to evaluate a claim of privilege, including identification of attorneys involved in the relevant documents or communications, and (b) where appropriate, a redacted version of the disclosed Protected Material utilizing the same bates number(s) as the original. However, the producing party is not obligated to provide a privilege log for any clawed-back material where only a portion of the document contains Protected Material and where the attorneys involved in the relevant document or communications will be visible on the document when the producing party reproduces the document. In the event that the basis for a privilege assertion is not apparent from the face of a redacted document, the parties shall meet and confer following a written request from the challenging party. Upon receipt of the written notification, the receiving parties shall not further review the Protected Material, and shall immediately, and in no event more than five (5) calendar days after receiving the Clawback Notice, destroy, or return all copies, electronic or otherwise, and provide a certification of counsel that all such information has been returned, or destroyed, including by its vendors,

consultants, experts, and agents. The provisions of Federal Rule of Evidence 502(b) do not apply.

3. Within ten (10) calendar days of receipt of the privilege log (or notice that such a log will not be provided pursuant to the “However” clause in Section 2), a receiving party may challenge the producing party’s privilege claim, consistent with the procedure set forth in Section F of the Discovery Guidelines.
4. By returning, or destroying the Protected Material, the receiving party is not conceding that the material is privileged and is not waiving its right to later challenge the substantive privilege claim and seek an order from the Board or administrative law judge requesting an in camera review or compelling production of the Protected Material, provided that it may not challenge the privilege claim by arguing that the production of the Protected Material waived the privilege. Nothing herein shall be interpreted as alternating or shifting the burden associated with challenging a party’s privilege claim.
5. If a receiving party has disclosed Protected Material to any third parties, the receiving party, once it learns of the disclosure, must promptly: (a) notify, in writing, the producing party of the disclosure; (b) use its best efforts to retrieve all copies of the Protected Material; and (c) notify, in writing, the producing party as to whether all copies have been retrieved. This Order shall be interpreted to provide the maximum protection allowed to the producing party as articulated in Federal Rule of Evidence 502.

IT IS SO ORDERED.

DATED this _____ day of _____, 2026.

Jenifer J. Soulikias, Administrative Law Judge

EXHIBIT B

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

[PROPOSED] ORDER REGARDING CLAWBACK PROCEDURES

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6. The ~~inadvertent~~ production of privileged or work-product protected documents or information, ~~whether inadvertent or otherwise~~, is not a waiver of the privilege or protection from discovery in this case or in any other federal or state proceeding. In the event that a party discovers that it produced or disclosed material that is protected by the attorney-client privilege, work product doctrine, or any other privilege (“Protected Material”), the producing party may make a written request within a reasonable time after it discovers the disclosure that another party return the Protected Material (“Clawback Notice”).
7. Within ten (10) calendar days of the issuance of the Clawback Notice, the producing party shall provide (a) a privilege log with respect to the disclosed Protected Material that is sufficiently detailed to enable the receiving parties to evaluate a claim of privilege, including identification of attorneys involved in the relevant documents or communications, and (b) where appropriate, a redacted version of the disclosed Protected Material utilizing the same bates number(s) as the original. However, the producing party is not obligated to provide a privilege log for any clawed-back material where only a portion of the document contains Protected Material and where the attorneys involved in the relevant document or communications will be visible on the document when the producing party reproduces the document. In the event that the basis for a privilege assertion is not apparent from the face of a redacted document, the parties shall meet and confer following a written request from the challenging party. Upon receipt of the written notification, the receiving parties shall not further review the Protected Material, and shall immediately, and in no event more than five (5) calendar days after receiving the Clawback Notice, destroy, or return all copies, electronic or otherwise, and provide a certification of counsel that all such information has been returned, or destroyed, including by its vendors,

consultants, experts, and agents. The provisions of Federal Rule of Evidence 502(b) do not apply.

8. Within ten (10) calendar days of receipt of the privilege log (or notice that such a log will not be provided pursuant to the “However” clause in Section 2), a receiving party may challenge the producing party’s privilege claim, consistent with the procedure set forth in Section F of the Discovery Guidelines.
9. By returning, or destroying the Protected Material, the receiving party is not conceding that the material is privileged and is not waiving its right to later challenge the substantive privilege claim and seek an order from the Board or administrative law judge requesting an in camera review or compelling production of the Protected Material, provided that it may not challenge the privilege claim by arguing that the production of the Protected Material waived the privilege. Nothing herein shall be interpreted as alternating or shifting the burden associated with challenging a party’s privilege claim.
10. If a receiving party has disclosed Protected Material to any third parties, the receiving party, once it learns of the disclosure, must promptly: (a) notify, in writing, the producing party of the disclosure; (b) use its best efforts to retrieve all copies of the Protected Material; and (c) notify, in writing, the producing party as to whether all copies have been retrieved. This Order shall be interpreted to provide the maximum protection allowed to the producing party as articulated in Federal Rule of Evidence 502.

IT IS SO ORDERED.

DATED this ____ day of _____, 2026.

Jenifer J. Soulikias, Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that, on this 18th day of August, 2026, I caused the foregoing document 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/ Eric P. Enson

Eric P. Enson

Attorney for CSX Transportation, Inc.