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SERVICE DATE – AUGUST 27, 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 FOR THE ENTRY OF AN ORDER REGARDING
CLAWBACK PROCEDURES

Decision No. 33

Decided: August 27, 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 August 21, 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).

At issue is whether the proposed clawback order should include that privilege or protection is not waived whether the disclosure is “inadvertent or otherwise” as Applicants argued or only when inadvertent as Non-Applicant Class Is claimed. Applicants moved for the entry of their proposed order regarding clawback procedures. (Apps. Letter Brief, Aug. 13, 2026.) Applicants included their proposed order as Exhibit A to their Letter Brief. (Id., Exh. A.) The disputed sentence is found in the first numbered paragraph of Applicants’ proposed order:

The 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. . . .

(Id., Exh. A ¶ 1) (emphasis added).

CSXT, BNSF, and CPKC (“Non-Applicant Class Is”) opposed the “inadvertent or otherwise” clause of that sentence. (Opp. Letter 1, Aug. 18, 2026.) Non-Applicant Class Is instead proposed that the order read: “[t]he **inadvertent production** of privileged or work product 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.” (Id., Exh. B ¶ 6, redline) (emphasis added).

Applicants argued that the Proposed Order was consistent with prior STB clawback orders in other proceedings. (Apps. Letter Brief Letter Brief 1, Aug. 13, 2026) (citing STB proceedings). At the discovery conference, Applicants clarified that the STB has not entered a clawback order with the “inadvertent or otherwise” language. Applicants argued that federal courts routinely enter clawback orders with their proposed “inadvertent or otherwise” provision, because it comports with Federal Rule of Evidence 502(d). Applicants argued they requested the “inadvertent or otherwise” language, because they did not want to litigate whether disclosure during discovery was inadvertent.

Non-Applicant Class Is argued that the “inadvertent or otherwise” language would welcome abuse and permit it to be used as a sword and a shield. (Opp. Letter 2, Aug. 18, 2026) (citing cases).

The STB does not have an applicable regulation that governs waiver of attorney-client privilege or work product doctrine of documents or information. See 49 C.F.R. §§ 1114.1-1114.31 (STB’s evidence and discovery regulations). The Federal Rules of Evidence are persuasive authority. See 49 C.F.R. § 1114.1. Under Rule 502(d), Federal Rules of Evidence, “[a] federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding.” The explanatory note to Rule 502 states, in relevant part:

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product—**specifically those disputes involving inadvertent disclosure** and subject matter waiver.

2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic

discovery. See, e.g., Hopson v. City of Baltimore, 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass “millions of documents” and to insist upon “record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation”).

....

Subdivision (d). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the communications or information could be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case is enforceable in other proceedings. See generally Hopson v. City of Baltimore, 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law. The rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, its terms are enforceable against non-parties in any federal or state proceeding. For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; **the rule contemplates enforcement of “claw-back” and “quick peek” arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product.** See Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that **parties may enter into “so-called ‘claw-back’ agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents”**). The rule provides a party with a predictable protection from a court order—predictability that is needed to allow the party to plan in advance to limit the prohibitive costs of privilege and work product review and retention. . . .

Fed. R. Evid. 502 explanatory note (emphasis added).

At the discovery conference, Applicants argued that many federal cases included the language “inadvertent or otherwise,” as a search on the Westlaw database revealed. Applicants did not cite as authority a case supporting the entry of a clawback agreement where the parties contested its scope and resulted in the court entering an order based on “inadvertent or otherwise” disclosure under Federal Rule of Evidence 502(d).¹ (See Apps. Letter Brief, Aug. 13, 2026.) The explanatory note to Rule 502, Federal Rule of Evidence implies that parties may specifically request the “inadvertent or otherwise” language when they forego privilege review or enter into a “quick peek” arrangement. See Fed. R. Evid. 502 explanatory note (subdivision

¹ In general, if parties present a proposed agreed order, its language will not receive the same scrutiny as when the parties disagree about the language’s import. Although, while the parties have not argued about them, I sua sponte deleted some stray commas that do not affect the substance of the proposed order.

(d)). The parties have not done agreed to voluntarily disclose privilege information here to save discovery costs, and thus, this is not a reason to include “or otherwise” in the clawback order. Applicants have not argued that an intentional disclosure should not result in waiver of privilege or protection for some other reason. (See Applicants’ Letter, August 21, 2026.)

Instead, at the discovery conference, Applicants explained that for the clawback’s provisions to apply, they do not want to litigate whether a disclosure was inadvertent. I am particularly familiar with the scope of discovery in this proceeding. (See, e.g., Applicants’ Letter, August 21, 2026.) As of Friday, August 21, 2026, and according to Applicants’ discovery status letter, Applicants received 441 discovery requests (not including subparts). (Id. at 1.) Applicants have produced more than **2.5 million pages of documents** and more than 2,600 GB of data in response to discovery requests. (Id. at 1.) Applicants **continue** to make rolling productions. (See id.)

The Board has now entered a procedural schedule. See Decision No. 30 (Aug. 18, 2026). With the procedural schedule in place, the parties will need to complete discovery correspondingly. Given the pace and extent of discovery, and number of interested parties all participating in discovery—without much more—an argument that a document was produced (or a communication made) **not** inadvertently will **not** be well taken.

Non-Applicant Class Is argued that Applicants’ proposed “inadvertent or otherwise” language permits Applicants to use the clawback order as a sword and a shield. (Opp. Letter 2, Aug. 18, 2026.) Specifically, Non-Applicant Class Is are concerned about documents or communications that are intentionally produced or made in support of their position but then clawed back if no longer useful. (See id. at 2.)

Taken all together, the parties do not have a reason to include the “or otherwise” language without a “quick peek” arrangement or foregoing privilege review based on their agreement to save discovery costs. Applicants have not offered an express argument in support of waiver for intentional disclosure.

As explained earlier, I considered Applicants’ argument that it did not want to litigate whether any disclosure was inadvertent. However, I considered the scope of discovery and the fact that a procedural schedule is now in place and without much more would not find any such argument to be well made. On the other hand, Non-Applicant Class Is argued that they were concerned about intentionally produced documents that were later clawed back if no longer useful (i.e., sword and shield).

On balance, I will not include the proposed “inadvertent or otherwise” language. Applicants’ motion is granted in part and denied in part. The clawback order will be entered separately.

It is ordered:

1. Applicants' Motion for the Entry of Their Proposed Order Regarding Clawback Procedures is GRANTED in part and DENIED in part as set forth above. The clawback order will be entered separately.

2. This decision is effective on the date of service.

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