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ALJ

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 REGARDING CLAWBACK PROCEDURES

Decision No. 34

Decided: August 27, 2026

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 ordered:

This decision is effective on the date of service.

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