

September 21, 2026

Hon. Jenifer J. Soulikias
Administrative Law Judge
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

312388
ENTERED
Office of Chief Counsel
September 21, 2026
Part of
Public Record

BNSF-57 / CPKC-51 / CSX-29

Re: FD 36873 – Motion Challenging NS Privilege Assertion over One Document

Dear Judge Soulikias:

We write to request Your Honor review *in camera* a one-page email that is not privileged (NS_00330539). The email does not include a single lawyer. It does not reflect or request legal advice (and NS does not claim the email is protected on attorney-client privilege grounds). Rather, it is a business communication between two business executives at NS (Michael McClellan and David Lehlbach) and two individuals at Oliver Wyman, a consulting firm, regarding {{ [REDACTED] }} according to NS's privilege log.

The document is significant—and NS knows it. The night before Mr. Lehlbach's deposition, where we intended to question him about it, NS clawed back the email. Complying with NS's request, we did not use the email at the Lehlbach deposition (although we gave NS's counsel the opportunity to retract the clawback during a break). Later, NS served a privilege log describing the basis for the clawback. We now seek *in camera* review of the email in advance of the September 29 deposition of its author, Mr. McClellan.

To qualify as work product, NS must establish both that the document was prepared in anticipation of litigation and that it reveals “the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.” *F.T.C. v. Boehringer Ingelheim Pharms., Inc.*, 778 F.3d 142, 151 (D.C. Cir. 2015) (reversing in part and remanding where lower court applied an overly expansive definition of work product).

In camera review will confirm the one-page email is not work product. It does not include lawyers or reflect the mental impressions or opinions of any lawyer. The only impressions and opinions in the document are those of Mr. McClellan, a non-lawyer, concerning business issues in his purview as the head of corporate strategy at NS. *See Farmland Indus., Inc. v. Gulf Cent. Pipeline Co.*, No. 40411, 1992 WL 156741, at *3 (ICC served July 9, 1992) (“The attorney-work-product privilege generally protects from discovery documents and tangible items which might reveal the *attorney's* mental impressions, conclusions, opinions, or legal theories concerning the litigation.”) (emphasis added).

The fact that Oliver Wyman submitted an expert report four months later does not make this email attorney work product. If anything, that Oliver Wyman report confirms the at-issue email is discoverable. At least 11 times in his report, the Oliver Wyman expert said he relied on discussions with—or assessments from—UP and NS business people. *See, e.g.,* D. Hunt Verified Statement (April 29, 2026) (second errata served Sept. 4, 2026) at 50, 59, 61, 62, 71, 82, 86, 144, 146, 149, 185. When an expert relies on conversations with business people to try to bolster his credibility, discovery is allowed into the discussions on which the expert purports to rely. *Yeda*

Rsch. & Dev. Co. v. Abbott GmbH & Co. KG, 292 F.R.D. 97, 104 (D.D.C. 2013) (Rule 26 “require[s] disclosure of any material considered by the expert, from whatever source, that contains factual ingredients.” (quoting 2010 Ad. Comm. Note)). In addition, facts provided to experts are not privileged. *See Farmland Indus.*, 1992 WL 156741 at *2 (“[U]nderlying facts are not protected.”). And to the extent a business provides assumptions to the expert to build the expert analysis, the assumptions are discoverable. *See Fed. R. Civ. P. 26(b)(4)(C)(iii)* (communications are not protected if the communications “identify assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be expressed”); *see also Potomac Elec. Power Co. v. CSX Transp., Inc.*, 2 S.T.B. 290, at *1 n.5 (1997) (explaining the Board’s discovery rules “follow generally those in the Federal Rules of Civil Procedure”).

[illegible]

This is not an email from Oliver Wyman about its view of its testimony or its opinions – it is the opposite, it is the thoughts, views and hopes of a NS business person. That is not privileged. The reason NS clawed back *this* email is because it is substantively damaging to the application—not because it is actually attorney work product.

* * * * *

Your Honor should order NS to provide a copy of NS_00330539 for *in camera* review. *In camera* review will confirm the email is not protected attorney work product. The email is a significant document in this case, and it should be part of the record available to the Board as it evaluates whether this merger is in the public interest. We respectfully request a ruling on this issue before Mr. McClellan's deposition scheduled for September 29. Otherwise, Mr. McClellan's deposition will likely need to be deferred.

[Signature page follows.]

Sincerely,

/s/ Daniel T. Donovan

Daniel T. Donovan, P.C.

Counsel for BNSF

/s/ Eric Enson

Eric Enson

Counsel for CSX Transportation, Inc.

/s/ Joseph J. Matelis

Joseph J. Matelis

Counsel for Canadian Pacific Kansas City

EXHIBIT 1

(Redacted)

CERTIFICATE OF SERVICE

I certify that I caused the foregoing 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 Williams

Attorney for BNSF Railway Company
September 21, 2026