



SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, DISTRICT OF COLUMBIA 20005
+1 202 736 8000
+1 202 736 8711 FAX

+1 202 736 8996
MJWARREN@SIDLEY.COM

312433

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September 24, 2026

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Public Record

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

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

Dear Judge Soulikias:

NS opposes the September 21, 2026 letter motion from BNSF, CPKC, and CSX (“Movants”) challenging NS’s clawback of an inadvertently produced email. Movants’ assertion that NS_00330539¹ is not work product rests on a critical misapprehension of the doctrine—that work product protection only applies to a communication if an attorney is on the document or the document reveals the mental impressions or legal advice of an attorney. That is not the law. Work product protection extends to materials prepared in anticipation of litigation by or for any party representative, not just attorneys. The email at issue is ordinary work product, because it was prepared by NS personnel to convey strategic direction and analytical framing to Oliver Wyman, an expert consultant retained by outside counsel for the purpose of supporting Applicants’ application to the STB. Movants do not dispute that NS_00330539 was created in anticipation of litigation, identify no substantial need for the document, and would suffer no undue hardship from its return. The motion should be denied.

The federal work product doctrine protects from discovery materials “prepared in anticipation of litigation or for trial by or for another party or its representative” including attorneys and consultants. Fed. R. Civ. P. 26(b)(3)(A). The doctrine creates two tiers of protection.² Ordinary or fact work product enjoys

¹ NS_00330539 has been provided separately by email to Judge Soulikias for her *in camera* review.

² *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992); *United States v. Adams*, No. 17-cr-64, 2018 WL 5311410, at *5 (D. Minn. Oct. 27, 2018); *Jacquelyn v. Macy’s Retail Holdings, Inc.*, No. 4:16-

qualified protection: a party seeking disclosure may overcome it by demonstrating a substantial need for the materials and an inability to obtain their substantial equivalent through other means without undue hardship.³ Opinion work product—which reveals the “mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation”—receives near-absolute protection.⁴

NS_00330539 qualifies as ordinary work product that is shielded from discovery. This email plainly was created in anticipation of litigation, and Movants make no claim to the contrary. Oliver Wyman was engaged as an expert consultant by outside counsel for NS (Sidley Austin LLP) and UP (Covington & Burling LLP) for the purpose of supporting Applicants’ efforts to obtain regulatory approval for their proposed merger, and an Oliver Wyman witness sponsored the diversion analyses in the merger application. Nor do they dispute that this email was sent by NS (a party to this proceeding) to Oliver Wyman (NS and UP’s representative). *See* Fed. R. Civ. P. 26(b)(3)(A). Indeed, the entirety of the email concerns the development of critical pieces of the merger application that was ultimately submitted by Applicants on December 19, 2025.

Movants make much of the fact that no attorney was copied on the communication. But a document need not be prepared by or for an attorney to qualify for protection, as the rule extends to *any party representative*.⁵ Nor is it necessary that ordinary or fact work product contain the mental impressions or

cv-52, 2016 WL 6246798, at *5 (S.D. Ga. Oct. 24, 2016); *see FTC v. Boehringer Ingelheim Pharms., Inc.*, 778 F.3d 142, 151 (D.C. Cir. 2015).

³ Fed. R. Civ. P. 26(b)(3)(A)(ii); *Nat’l Union Fire Ins. Co.*, 967 F.2d at 984; *US Connect, LLC v. Capital Solutions Bancorp LLC*, 2:12-cv-615, 2014 WL 12616970, at *1 (M.D. Fla. Apr. 22, 2014).

⁴ Fed. R. Civ. P. 26(b)(3)(B); *Nat’l Union Fire Ins. Co.*, 967 F.2d at 984; *Adams*, 2018 WL 5311410, at *5; *Jacquelyn*, 2016 WL 6246798, at *5.

⁵ *See Coffey v. Tyler Staffing Servs., Inc.*, No. 7:19-cv-15, 2020 WL 1307233, at *3 (W.D. Va. Mar. 19, 2020) (“The fact that these materials were not prepared by an attorney does not, by itself, disqualify them from falling under the work product doctrine.”).

advice of an attorney.⁶ Movants' own case, *Boehringer*, recognizes these well-established principles.⁷

Movants also argue that NS_00330539 is discoverable because it “contains factual ingredients” considered by the expert. Ltr. Mot. at 2 (citation omitted). NS does not dispute that “underlying facts” are generally not protected by the work product doctrine, but efforts to “uncover the theory of a case” is unquestionably protected.⁸ The at-issue email reflects an NS official's views on the appropriate strategy for obtaining regulatory approval of the Application with respect to diversion analyses and the operating plan as conveyed to the expert consultant hired by Applicants' outside counsel to perform that work. There are no “underlying facts” in this communication that are properly discoverable.

Movants' motion is also devoid of any articulation of “substantial need” for the information contained in NS_00330539, and Movants will suffer no “undue hardship” from the proposed clawback. Fed. R. Civ. P. 26(b)(3)(A)(ii). Mr. David Hunt of Oliver Wyman authored a verified statement concerning the diversion analysis prepared in support of the Application and he is scheduled to sit for a two-day deposition in early October. Movants will have an adequate opportunity to probe Mr. Hunt's work and the underlying facts he considered in developing his expert opinion. They similarly are free to ask Mr. McClellan at his upcoming deposition about his views about Mr. Hunt's diversion analysis.

Movants' suggestion that NS clawed back NS_00330539 because it is “significant” is unavailing. NS is clawing back this email because it was prepared by NS to convey strategic framing and analytical direction to an expert consultant related to the submission of an application for authority to merge with UP that would commence an adversarial licensing proceeding. The fact that NS has not

⁶ See *Castle-Foster v. Cintas Corp. No. 2*, No. 4:19-cv-139, 2021 WL 601877, at *6 (S.D. Ga. Feb. 16, 2021) (“[T]he work-product analysis cares little for whether an attorney is involved, but cares a great deal for why a document was created.”).

⁷ See 778 F.3d at 149, 151 (explaining that “*fact* work product” “does not” contain attorney mental impressions or advice but is nevertheless subject to qualified protection).

⁸ *Advanced Polymer Tech. Corp. v. Textile Mgmt. Assocs., Inc.*, No. 4:08-cv-18, 2009 WL 10669413, at *3 (N.D. Ga. Aug. 10, 2009); see *Nat'l Union Fire Ins.*, 967 F.2d at 984 n.5 (noting that the work product doctrine does not shield “actual evidence” or “facts” concerning the underlying incident).

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clawed back similar documents is irrelevant. NS issues clawback notices as it becomes aware of the inadvertent production of privileged or work-product protected documents. And NS has now issued a clawback notice for the documents cited in the motion, namely NS_00187539; NS_00186867; and NS_00331137.

NS respectfully requests that Your Honor deny Movants' request for a ruling that NS_00330539 is not protected by the work product doctrine.

Respectfully submitted,

/s/ William Mullins

/s/ Matthew J. Warren

William Mullins

Matthew J. Warren

*Counsel for Norfolk Southern Corporation and
Norfolk Southern Railway Company*

cc: Parties of Record