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PUBLIC VERSION

NS-115

October 5, 2026

312656

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

ENTERED
Office of Chief Counsel
October 5, 2026
Part of
Public Record

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

Dear Judge Soulikias:

Movants argued for the first time at the October 2 hearing, based on “exhibits” filed the night before, that Oliver Wyman’s prior work as a business consultant to NS renders NS_00330539 an ordinary business communication rather than one made for the purpose of preparing the STB application in this proceeding. But the fact that Oliver Wyman performed some nonprivileged consulting work for Norfolk Southern before the merger was announced does not change the fact that in August 2025 it was plainly acting as a litigation consultant working with counsel and internal business personnel to prepare the STB application. Oliver Wyman and NS were not communicating about “business consulting”—they were working on preparing a complex regulatory filing in a contested merger approval proceeding. Indeed, NS_00330539 is an invitation to an application planning meeting that was attended by counsel and held under the direction of counsel for the purpose of developing the intermodal growth plan that would be a key element of the merger application. NS_00330539 is protected by the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3)(A); *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992).

As explained in the attached Verified Statement of Michael R. McClellan, the development of the merger approval application required a coordinated effort among business personnel at both railroads, outside experts, and in-house and outside counsel. V.S. McClellan ¶¶ 2–3. Because of the detailed requirements set forth in the STB’s rules, an application is not a legal argument that can be drafted by lawyers—it is a fact-intensive and data-intensive effort that requires significant input from railroad personnel and outside experts, all working under the direction of counsel. Oliver Wyman was retained by Applicants to perform a traffic diversion

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analysis for the STB application, including both rail-to-rail diversions and truck-to-rail diversions. *Id.* ¶ 3.

[illegible]

As NS explained in its September 24 letter reply, the federal work product doctrine protects materials prepared in anticipation of litigation by or for a party or a party's consulting expert even if the material does not reflect the advice or mental impressions of an attorney. Fed. R. Civ. P. 26(b)(3)(A); *Nat'l Union Fire Ins. Co.*, 967 F.2d at 984. NS_00330539 is unquestionably a communication made in anticipation of litigation and therefore is protected work product. {} [REDACTED]

}} _____

In short, nothing about NS_00330539 suggests it was a “business consulting” communication; every sentence is oriented toward the presentation of a compelling application in the merger proceeding and how the September 3–4 meeting would facilitate that objective. At the time Oliver Wyman was not acting as a business consultant; it was building the diversion analysis that it would ultimately sponsor in the merger application, as prior testimony has shown. *See* T. Rynaski Depo Tr. 295:11–23 (excerpt attached as Ex. A).

Movants argue that NS_00330539 is discoverable because it contains facts considered by the expert. But there is no indication in the document or Mr. Hunt's verified statement that he relied on this email in his analysis. The excerpts from his report cited in Movants' October 1 "exhibit" do not refer to this email as a material

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he relied upon. And Movants are free to ask Mr. Hunt at his deposition what he did rely on.

The email communication at NS_00330539 is protected work product in its entirety and NS respectfully requests that Your Honor deny Movants' request for a ruling to the contrary.

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

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36873

**UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD
COMPANY**

—CONTROL—

**NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN
RAILWAY COMPANY**

Verified Statement of Michael R. McClellan

I, Michael R. McClellan, declare as follows:

1. I am currently Senior Vice President and Chief Strategy Officer for Norfolk Southern Corporation. I have held my current position since February 16, 2022, and have served in a variety of positions at Norfolk Southern since 1998.

2. I have been involved in the development of the application submitted to the Surface Transportation Board (“STB”) on December 19, 2025, and subsequently amended thereafter. This application development process was a coordinated effort between business personnel at both railroads, outside experts, and in-house and outside counsel.

3. Oliver Wyman performed traffic diversion analysis for the STB application, including both rail-to-rail diversions and truck-to-rail diversions.

{{ [REDACTED]

[REDACTED]

[REDACTED] }}

4. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

5. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

6. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

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VERIFICATION

I, Michael R. McClellan, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to sign this statement.

Executed on this 5th day of October, 2026.

A handwritten signature in black ink, appearing to read "M. R. McClellan", written over a horizontal line.

Michael R. McClellan
Senior Vice President and Chief
Strategy Officer
Norfolk Southern Corporation

Exhibit A

Highly Confidential Material Redacted