

October 6, 2026
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Hon. Jenifer J. Soulikias
Administrative Law Judge
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

BNSF-62/CPKC-59/CSXT-33

ENTERED
Office of Chief Counsel
October 6, 2026
Part of
Public Record

*Re: STB Docket No. FD 36873 – Response to NS’s Supplemental Reply to Motion
Challenging Clawback*

Dear Judge Soulikias:

The one-page email at issue is a business email sent by an NS businessperson summarizing the marketing team’s analysis of synergies in order to reach consensus with UP on the combined entity’s projected synergies. NS has had several weeks to substantiate its work product claim over NS_00330539, and its last-minute declaration fails to do so. The conclusory declaration confirms the at-issue email—where a non-lawyer discusses synergy analyses prepared by business teams—is not attorney work product. NS’s position also underscores Applicants’ sweeping views of privilege; the lack of any consistent principle underlying their position on work product; and how far Applicants will go to shield certain ordinary course materials from the record and the STB.

NS bears the burden of establishing the work product claim. The core facts are undisputed: The at-issue discussions concerned synergy projections by the marketing and strategy teams (*i.e.*, a business projection of how much revenue the merged entity could attract because of the merger). In late summer 2025, business teams at NS and UP [REDACTED] up to that point. UP and NS [REDACTED]. The proxy to shareholders was going to be issued in weeks, and the business teams [REDACTED]. Business teams did that reconciliation work. Business teams shared and discussed that work among non-lawyers. When the business teams had completed their work, the NS strategy department copied Oliver Wyman into a thread about an upcoming meeting about those business-generated analyses. Oliver Wyman had been a business consultant for NS for years.

The at-issue email does not discuss any Oliver Wyman work, so it is not discussing any work product (regardless of whatever role Oliver Wyman later held). The email could not summarize a *future* meeting, so it could not be conveying or summarizing work product, if any, that might have been discussed at that meeting. The email discusses a commercial analysis and offers a businessperson’s commentary about that factual information. Simply stated, it is ordinary course, commercial information—not work product.

NS tries to back-fill its position with a vague declaration from Michael McClellan, the email’s author. There is a reason NS did not provide that declaration previously. It is most notable for what McClellan was unwilling to say. Nothing in his declaration undermines the fact that what was sent to Oliver Wyman was McClellan’s non-privileged commentary on ordinary course synergy projections. The declaration does not identify the name of a single lawyer who directed him to send that email or have the specific commercial discussions; the names of any lawyers who

reviewed the email or gave guidance on his team's assessments; or even the date that UP and NS retained Oliver Wyman for expert testimony (as opposed to Oliver Wyman's steady-state role as a commercial consultant for NS). The declaration stops far short of saying that the two-day meeting was exclusively about developing testimony (and even if someone from NS or Oliver Wyman were willing to swear to that, it would not convert to work product every email from a non-lawyer to Oliver Wyman ahead of that meeting.) So, even *if* Oliver Wyman's role at that point were exclusively related to the application, it would not immunize underlying facts provided to Oliver Wyman or shield all discussions that Oliver Wyman had with business leaders at NS. Again, this email was not about any meeting with Oliver Wyman or lawyers. It was about the marketing synergy analysis and discusses scheduling a future meeting.

NS's position is breathtaking in how far it stretches: NS would have any synergy-related work done by UP and NS after announcement of the merger treated as work product. That is not the law. It would shield ordinary course documents from the record available to the Board. NS does not even consistently maintain that position. For weeks, NS has properly allowed questioning about the goals of Oliver Wyman's analysis, the inputs Oliver Wyman used, and conversations with Oliver Wyman at other depositions. *See, e.g.,* Ex. A, Sept. 10, 2026, D. Lehlbach Dep. Tr. at 257:21-258:1 [REDACTED].

id. at 277:23-278:4 [REDACTED].

[REDACTED]. NS also allowed similar questions at the deposition of Mark George. *See, e.g.,* Ex. B, Sept. 17, 2026, M. George Dep Tr. at 94:22-96:18 [REDACTED].

[REDACTED]. So, to the extent there was any valid work product claim (and there is not), supplemental briefing would be needed to address potential waiver arguments.¹

In sum: This is a business email, sent by a businessperson, summarizing business information. He sent it to two Oliver Wyman employees that did business work for NS for years. That is not work product. It is an ordinary course document. As the Board recognized, access to ordinary course documents is imperative because they "will assist [the Board] in determining whether the proposed transaction is likely to have the effects attributed to it by Applicants." *See* Decision No. 13 at 5. To the extent NS wants to redact a single sentence that refers to a future application, we do not object (although we strongly maintain that a simple reference that an application will be the subject of further work does not make even that sentence privileged). But NS should not be permitted to redact facts, including factual observations from a non-lawyer about the conversion statistics from a prior merger.

¹ "Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the privilege." *Smith v. Ergo Sols., LLC*, 2017 WL 2656096, at *3 (D.D.C. June 20, 2017) (citation omitted). Thus, a party seeking to preserve privilege must "zealously protect the privileged materials." *Id.* (citation omitted). This includes "ensuring, by timely objection, that privileged information is not inadvertently revealed during deposition testimony." *Id.* (finding waiver and granting motion to compel allegedly privileged internal report that was discussed during deposition without objection).

Respectfully,

/s/ Daniel T. Donovan

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cc: Counsel of Record

EXHIBIT A

(Redacted)

EXHIBIT B

(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

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