312804

Brian S. Smith
Party of Record, Finance Docket No. 36873
8014 Cumming Hwy, Suite 403-169
Canton, GA 30115
smithbss.sti@gmail.com

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

November 5, 2026

By e-filing and by email to alj.soulikias.inbox@stb.gov

The Honorable Jenifer J. Soulikias
Administrative Law Judge
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Finance Docket No. 36873, *Union Pacific Corporation, et al.*—Control—*Norfolk Southern Corporation, et al.* — Letter brief of Brian S. Smith on discovery disputes with Norfolk Southern (Discovery Guidelines, Decision No. 24, Section F.1)

Dear Judge Soulikias:

Under Section F.1 of the Discovery Guidelines, I ask that four groups of my discovery requests to Norfolk Southern be placed on the agenda for the November 13, 2026 conference and that Norfolk Southern be directed to answer them as narrowed below. To the extent 49 C.F.R. § 1114.31(a) applies, this letter is also my motion to compel on those requests.

1. Relief requested

An order directing Norfolk Southern to answer Interrogatory Nos. 6, 7, 17 and 18 and to produce under Request for Production Nos. 2, 4, 13 and 14 of my First Set of Discovery Requests (served October 22, 2026), each as narrowed in Part 3, with the yes-or-no portions of Interrogatory Nos. 6, 7 and 17 answered by November 17, 2026, the remainder within five business days of the order, and the public responses described in Parts 3 and 4. I also ask for the two directions in Part 5.

Discovery reaches any matter, not privileged, "relevant to the subject matter involved in a proceeding," 49 C.F.R. § 1114.21(a)(1), and relevance is read "[b]roadly" (Decision No. 44 at 1, citing *Canadian Pac. Ry.—Control—Kan. City S.* (Decision No. 7), FD 36500, slip op. at 4 (Aug. 2, 2021)). The discovery requested "must be 'reasonably calculated to lead to the discovery of admissible evidence'" (id. at 2–3, quoting § 1114.21(a)(2)). Decision No. 44 agreed with "the general basis" of a movant's relevance argument and still denied its motion, because the movant did not "tailor (or narrow)" its request to that argument (id. at 3). The four groups were narrowed on November 3, and slightly further in Part 3, to what their stated relevance requires. Decision No. 44 also relied on a party's statement that its search found no responsive documents (id. at 3); each narrowed request treats a statement that none was located after a reasonable search as a complete answer to that part.

2. Background

I am a party of record (Notice of Intent to Participate, September 3, 2026) and represent myself. On October 22, 2026, I served Norfolk Southern with 21 interrogatories, 14 requests for production and 15 requests for admission concerning the communications structures, shelters and network that carry its train-control, dispatch and operating communications, and what combining them with Union Pacific's network would involve and cost. The set asks for existing records only: its Preliminary Statement says no new inspection, analysis or estimate is requested, and Instruction 2 accepts a count from an existing inventory or a statement that no record exists.

On October 29, in its Responses and Objections to my First Set ("Responses"), Norfolk Southern objected to all 21 interrogatories and all 14 requests for production and answered part of one (Interrogatory No. 20). Each response opens with the same objections: that the request is "neither relevant to the proceeding nor reasonably calculated to lead to the discovery of admissible evidence," that it is "unduly burdensome," and, for 24 of the 35 requests, that answering would require a special study or records "not maintained in the ordinary course of business." No response says what searches or steps a study would involve or what it would cost. On October 30, Norfolk Southern's counsel confirmed that the October 29 response is complete as to the interrogatories and that Norfolk Southern has nothing to produce pending our conference. Interrogatory answers were due today under Section E.1 of the Discovery Guidelines.

I requested a conference on October 30. On November 3, I sent Norfolk Southern's counsel the narrowed versions set out in Part 3 and asked for Norfolk Southern's position on each by 10:00 a.m. today (Parts 3(b) and 3(c) now narrow them slightly further). We conferred on November 4. Counsel asked how the requests relate to the Proposed Transaction; I explained, and set the explanation out in a written summary that day (Part 3 states it for each request). Norfolk Southern did not commit to answering any of the four. Counsel replied to the summary (November 4, 11:31 a.m.) that Norfolk Southern would "review and revert" and would provide information it shared with Union Pacific in diligence and on integration, but only to participants who have signed the Protective Order's undertakings; and, in answer to my questions (5:23 p.m.), that the diligence materials (NSPROD010) are "generally designated Highly Confidential," that "[i]ntegration material responsive to your discovery requests has not been produced" and would be designated Highly Confidential, and that "NS is not preparing confidentiality designation redactions." By 10:00 a.m. today Norfolk Southern had not committed to answering any of the four groups as narrowed, and I received no further response by the noon time I gave for corrections to my summary. The correspondence is available on request.

3. The four groups of requests, as narrowed

Each request below is narrowed to counts, dates, yes-or-no answers and records Norfolk Southern keeps; none calls for a new inspection, engineering analysis or cost estimate.

(a) Request for Production No. 2 — structural analyses of structures built before 2000

As served, the request asks for the most recent structural analysis and inspection report for each Communications Structure constructed before 2000, "or, if production of all is unduly burdensome, Documents sufficient to show each such structure's most recent analysis date, the standard revision used, and whether the structure passed." As narrowed, I ask only for documents sufficient to show, for each such structure, the date of its most recent structural analysis, the revision of ANSI/TIA-222 applied, and the conclusion recorded in that analysis on structural adequacy for the loading evaluated. Existing summaries or report excerpts are sufficient; full reports are not required. Where Norfolk Southern locates no such record for a structure after reasonable inquiry, a count of those structures is a complete response.

Norfolk Southern objected that the request would require "a new assessment of whether each structure passed" (Responses at 29). The narrowed request asks for no new assessment, only the conclusion an existing analysis already records, and only what its stated relevance requires: when the structures built before 2000 were last analyzed, and to which standard. The request accepts existing analyses, summaries or extracts, and the objection, though it refers to historical engineering records, does not describe the search required or quantify the burden. If Norfolk Southern's records cannot show which structures were built before 2000, or cannot reach their most recent analyses, without a special study, Norfolk Southern should state how far back its records reach and answer from them.

(b) Interrogatory No. 18 and Request for Production No. 14 — recorded replacement costs

As served, Interrogatory No. 18 asks for each program, budget line or capital project since May 19, 2013 for inspecting, replacing or remediating Communications Structures or Shelters,

with budgets, spending, yearly counts, any discontinuance and any compliance assessment; Request No. 14 asks for documents showing them. Norfolk Southern objected that the request is "not reasonably time-limited, as it seeks over 13 years of records" (Responses at 24).

As narrowed, I ask for each Communications Structure Norfolk Southern replaced since May 19, 2013 — a new structure built in place of an existing one — with the year the replacement was completed and its recorded cost, excluding the communications equipment installed on it where that cost is separately recorded, or otherwise the recorded project cost, including the total for a project covering several structures, with a description of what it includes; no new allocation is requested. Separately, by year, I ask for the number of structures inspected, reinforced or modified, counted as Norfolk Southern records them, noting any overlap between the categories. Request No. 14 is satisfied by records sufficient to show those figures, such as a capital-project or capital-budget extract. Parts (a), (d) and (e) of the interrogatory are set aside for the present.

The request accepts existing project or budget records in the form Norfolk Southern keeps them and asks for no new engineering analysis or cost calculation. The Applicants' October 30 letter on their discovery efforts (UP-123/NS-121) lists "capital budgets and forecasts" (NS PROD003) among the categories Norfolk Southern has already produced to other parties. The period gives Norfolk Southern's own recorded experience of what such work costs. As narrowed, the request asks only what its stated relevance requires: what Norfolk Southern has spent replacing such structures since May 19, 2013. If its records cannot reach back to that date without a special study, Norfolk Southern should state how far back they reach and answer to that point.

(c) Interrogatory Nos. 6 and 7 and Request for Production No. 4 — integration plans and cost

As served, Interrogatory No. 6 asks whether any structural analysis or estimate for modifying, reinforcing or replacing communications structures, buildings or shelters for Network Integration has been performed, commissioned or received since January 1, 2025, and its particulars; Interrogatory No. 7 asks the same of any integration plan, proposal or assessment; Request No. 4 asks for the documents behind both. Norfolk Southern objected that Interrogatory No. 6 reaches "every analysis, study, mapping, estimate, or other material" concerning potential Network Integration, privileged material and "a special compilation of estimates not maintained in the ordinary course of business" (Responses at 11); that Interrogatory No. 7 "calls for speculation about future changes or schedules that have not been determined" (id. at 12); and that Request No. 4 reaches "preliminary, speculative, or superseded materials" (id. at 30).

As narrowed: Interrogatory No. 6 — whether any such analysis or estimate exists and, if so, its date, the number of structures it covers and the total estimated cost, in public form, as a rounded figure or range if that resolves a confidentiality concern, or a statement that no meaningful public figure can be given. Interrogatory No. 7 — whether, since January 1, 2025, Norfolk Southern has received, prepared or participated in preparing any plan, proposal or assessment for integrating the two companies' communications systems, and whether the integration materials it has produced to other parties address communications. Request No. 4 — existing documents sufficient to show the plans and estimates so identified, including the communications portions of integration materials already produced to other parties, identified by production number where available, with the public response stating the number of documents withheld and logging anything withheld as privileged, including the work of consultants retained by counsel.

As narrowed, these requests ask only what their stated relevance requires: whether Norfolk Southern has studied or estimated the structural work that integration calls for. Whether a study or plan exists, its date and the structures it covers are present facts; a plan that may change still exists today, and if none exists, Norfolk Southern can say so. Counsel has now written that "[i]ntegration material responsive to your discovery requests has not been produced," so by counsel's own description responsive material exists; what it covers is unresolved. Counsel also wrote that the integration information "generally does not include communications but, rather, documents shared by NS with UP." "Generally" leaves the exceptions unnamed, and "communications" there may

mean correspondence rather than the communications systems my requests define; a complete yes-or-no answer to Interrogatory No. 7 resolves it.

(d) Interrogatory No. 17 and Request for Production No. 13 — compliance cost

As served, Interrogatory No. 17 asks whether any cost of bringing the communications structures, buildings, shelters or network into structural, environmental, historic-preservation, asbestos, security or FCC compliance was identified or reflected in any valuation, due-diligence, purchase-price or synergy analysis for the Proposed Transaction, and the amount; Request No. 13 asks for those documents. Norfolk Southern objected that the requests seek "every reference to potential regulatory or infrastructure compliance costs" in those analyses, reach privileged material, and would require "a new compilation of costs across disparate analyses" (Responses at 22–23, 37–38).

As narrowed: yes or no; if yes, the amounts as recorded, in public form on the same terms as Interrogatory No. 6; and a log of any document withheld as privileged. If Norfolk Southern gives a complete answer to Interrogatory No. 17 as narrowed, with that log, I will not seek production under Request No. 13 at this conference.

As narrowed, the request asks only what its stated relevance requires: whether that cost was counted in the transaction. Whether such a cost was identified is a fact about what the Applicants' analyses contain, not the analyses themselves, and needs no compilation. Counsel wrote on November 4 that Norfolk Southern "assembled due diligence information in the course of business and assigned no particular cost to it." That sentence may mean that no compliance cost was identified, or only that assembling the information carried no particular cost; a yes-or-no answer resolves it. If Norfolk Southern contends that the answer itself is designated information, it should say so and state the basis; any claim of privilege belongs in the log.

4. Why the requests should be answered

The subject matter here includes whether the transaction is consistent with the public interest, including "the adequacy of transportation to the public," 49 U.S.C. § 11324(b)(1). The merged railroad's train-control and dispatch traffic will run over Norfolk Southern's communications structures. My search of the Revised Application found no discussion of them; the Application represents that no property fifty years or older will be disposed of or altered (Vol. 1 at 1-72). Norfolk Southern's recorded replacement costs, when older structures were last analyzed and to which standard, whether integration requires structural work, and whether that work was costed in the transaction bear on the cost and feasibility of combining the two networks.

Even for a non-party, the question the ALJ has asked is whether the information sought is significant and "proportional to the proceeding" (Decision No. 43 at 7 n.4). These are four groups of written requests to a party about its own records, narrowed to counts, dates, yes-or-no answers and extracts; the objections name categories of records but do not describe the searches required or quantify the burden. On October 23, the ALJ directed a requesting party to narrow broad requests and confer before enforcement (Decision No. 43 at 6–7); I have done both. Norfolk Southern has answered other parties' requests, under the same general objections, by agreeing to produce what "can be located after a reasonable search" (NS's Oct. 29, 2026 responses to NOTR's Second Set, Request Nos. 1–6); I ask for the same commitment on the four narrowed groups.

On the public version: Norfolk Southern objected to 34 of the 35 requests to the extent they seek non-public information, calling that "inconsistent with Instruction No. 3," in which I state that I have not executed the Protective Order undertaking and will receive only public material (e.g., Responses at 11, 12, 22). Instruction No. 3 asks for a public version, not for no answer, and the Discovery Guidelines provide for one: a response containing designated information "shall be served only in redacted form" on a party that has not executed the undertaking (Decision No. 24 § D.2). Norfolk Southern now says it will prepare no redactions (Part 2), and the material it offers is generally, or would be, designated Highly Confidential, which counsel says goes to "outside counsel and consultants"; under the Protective Order as written, signing the Confidential

undertaking would not give me, as a self-represented party, access to it. A designation requires "a confidential business nexus" (Decision No. 43 at 5, aff'd, Decision No. 45 at 5–7), and the protective order protects information the custodian has an "intent and reasonable need to keep private" (Decision No. 45 at 6). The order covers "confidential financial and cost data, and other confidential or proprietary business information" (Decision No. 1, Appx. ¶ 1(b)), but a yes or no on whether a compliance cost was identified, or a count of documents withheld, does not on its face disclose the cost or the substance of the documents. I ask that Norfolk Southern answer Interrogatory Nos. 7 and 17 yes or no, in public form, signed and verified as 49 C.F.R. § 1114.26(a) provides, and state publicly the number of documents withheld under Request No. 4 and a log of any withheld as privileged. Where Norfolk Southern withholds any requested answer, count, range or amount as designated information, it should identify that portion and state why it cannot be given publicly, for the ALJ to decide. I do not ask that any protected document be made public.

On timing: Decision No. 30 sets no discovery cutoff, notes that discovery disputes "may continue into the comment period," and states that the Board "continues to expect that Applicants and other parties will expeditiously respond to any outstanding requests" (Decision No. 30 at 10). Comments, protests and requests for conditions are due November 18. I ask that the yes-or-no portions of Interrogatory Nos. 6, 7 and 17 be answered by November 17, so my comments can report what Norfolk Southern has said, and the remainder within five business days of the order.

5. Two directions

First, the requests in my First Set not raised here — Interrogatory Nos. 1–5, 8–16 and 19–21, Request for Production Nos. 1, 3 and 5–12, and parts (a), (d) and (e) of Interrogatory No. 18 — are reserved, not withdrawn. Several concern records that federal rules require Norfolk Southern to make or keep, as the First Set's Preliminary Statement lists, and can be answered from those records. Norfolk Southern has not agreed that they may be raised at a later conference without objection on timeliness grounds. I ask that the conference confirm that Section F of the Discovery Guidelines governs the timing of any later request to confer on them and, to the extent 49 C.F.R. § 1114.31(a) applies, that my time to move on them be extended to a date the ALJ sets.

Second, Norfolk Southern's answers to my Second and Third Sets of requests, served November 2 and 3, are due November 17 and 18, and documents ordered on November 13 may not be produced before my November 18 comments. The Board "may order the submission of additional argument or evidence" before it closes the record (Decision No. 30 at 10). I ask for direction on how material received after November 18 that bears on the comments may be placed before the Board.

Respectfully submitted,

/s/ Brian S. Smith
Brian S. Smith
Party of Record, Finance Docket No. 36873

cc: Counsel for Norfolk Southern (by email)

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2026, I served the foregoing letter brief by email on Administrative Law Judge Jenifer J. Soulikias and on each party of record in Finance Docket No. 36873 with an email address on the Board's service list. On November 6, 2026, I will serve it by first-class mail on each party of record without an email address on that list, including the Secretary of Transportation and the Attorney General of the United States, and on each party of record whose email address on that list has failed to deliver.

/s/ Brian S. Smith
Brian S. Smith