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CSXT-2

March 10, 2025

VIA E-FILING

Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

Re: **STB Docket No. FD 36836, Norfolk Southern Corporation & Norfolk Southern Railway Company—Acquisition of Control—Norfolk & Portsmouth Belt Line Railroad Company**

Dear Ms. Brown:

On March 7, 2025, NS¹ filed in the above-referenced proceeding a reply (the “NS Reply”) to CSXT’s Petition to Reject Northern Southern’s Minor Application (the “CSXT Petition”). Much of the NS Reply simply repeats the arguments that NS made in its application. CSXT responded to those NS arguments in the CSXT Petition and CSXT will not repeat those responses here. However, NS included a few glaring errors in the NS Reply that demand correction.²

First, NS wrongly stated that the Virginia Port Authority (“VPA”) “did not specifically request the Application be rejected or supplemented.” (NS Reply 2 n.3.)

¹ The acronyms and defined terms used herein are the same as those used in CSX Transportation Inc.’s Petition to Reject Northern Southern’s Minor Application, filed in this proceeding on February 27, 2025.

² While the Board’s rules, 49 C.F.R. § 1104.13(c), do not permit a reply to a reply, the Board often accepts such replies in the interest of compiling a more complete record. To the extent that the Board deems it necessary, CSXT hereby seeks leave to file this letter in order to correct certain errors introduced into the record through the NS Reply. *See, e.g., Petition of Union Pac. R.R. Co. for Declaratory Order*, FD 35960, slip op. at 5 (STB served Sept. 30, 2016) (Board permitted a reply to a reply where the party sought to “correct the record”). To be clear, there are additional mischaracterizations and misstatements in the NS Reply not discussed in this letter. CSXT will respond to those issues if and when NS files a timely and complete significant application.

In fact, VPA very clearly stated in its March 5, 2025 letter that VPA “respectfully requests the Board to look at the transaction as though it is a significant transaction.” (VPA Letter 6.) Such a significant classification would require the STB to reject the NS minor application as incomplete, as CSXT explained in its Petition. VPA made it clear that the current NS/NPBL control structure that NS seeks to cement through this proceeding “has limited the ability of the port to offer competitive service at NIT.” (*Id.* at 1.) In its letter, VPA provided powerful data and public-facing perspective on why the competitive issues raised by the NS application extend well beyond some parochial dispute between two large railroads over market share, as NS would have the Board believe.

Second, NS wrongly characterized the USDOJ Antitrust Division investigation into alleged exclusionary conduct undertaken by NS and NPBL against CSXT at NIT, in potential violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. NS claims that “the DOJ investigation is a review of past behavior, not the forward-looking review that must be conducted by the STB.” (NS Reply 35-36.) In fact, USDOJ can *only* sue for forward-looking injunctive relief under the Sherman Act. *See* 15 U.S.C. § 25. And the Sherman Act specifically reserves the ability of the United States to seek injunctive relief against railroads subject to STB jurisdiction. *Id.* § 26. Indeed, NS expressly acknowledged that “the United States can always bring a suit for injunctive relief.” Norfolk S. Ry. Co. & Norfolk & Portsmouth Belt Line R.R. Co.’s Final Joint Response Brief 24, *CSX Transp., Inc. v. Norfolk S. Ry. Co. & Norfolk & Portsmouth Belt Line R.R. Co.*, No. 23-1537 (4th Cir. Dec. 18, 2023).

Third, NS wrongly alleges that, in CSXT’s antitrust lawsuit, “the court records were totally devoid of any direct evidence showing harm to shippers.” (NS Reply 21.) In fact, CSXT identified evidence from that lawsuit in its Petition about the effects of NS’s and NPBL’s exclusionary conduct on shippers, including higher prices to ocean carriers who relied on NIT. (*See* CSXT Petition CSXT-1-25.) And CSXT introduced a letter from VPA in its Petition that discussed the effect of CSXT’s exclusion from NIT on Virginia and the Port. (*See id.* at CSXT-1-28, CSXT-1-537 to 538.)

Fourth, NS wrongly claims that CSXT has asked NPBL for a “below-cost” switching rate for intermodal service to NIT. (NS Reply 19, 32.) In fact, CSXT has bent over backwards to propose to NPBL terms relating to rates and service for intermodal switching movements to NPBL that no reasonable independent railroad looking to grow volumes and profit would refuse. NS presents its fidelity to NPBL’s existing “cost-based uniform rate” as evidence of promoting competition and of fair treatment of CSXT, but CSXT will provide evidence that the existing rate is exclusionary.

Fifth, NS argues that the District Court decision concluded that NS did not act anti-competitively after 2012 in using NPBL to exclude CSXT from on-dock rail facilities. (*See id.* at 6.) In fact, the court accepted for its analysis that CSXT *had* proven harm from its market exclusion up to the present. However, the court found that the harm was the result of the setting of an anti-competitive rate in 2009 (which NPBL continues to charge today) and thus was barred by the statute of limitations.³ Moreover, the District Court found that CSXT had presented sufficient evidence that it faced the prospect of *future* harm from this very same anti-competitive conduct.⁴

As described more fully in the CSXT Petition, the Board should reject NS's absurd claim that no competitive issues are presented by NS's request for Board authority to control the only rail carrier, NPBL, that can provide competition to NS for on-dock rail access at NIT. CSXT continues to respectfully request that the Board issue a decision within the initial 30-day window that: (1) classifies NS's proposal as "significant," (2) rejects the NS minor application as untimely and incomplete, and (3) directs NS not to file a significant application seeking control authority regarding NPBL until after resolution of CSXT's District Court proceeding, including any appeals.

Please contact me with any questions.

Respectfully submitted,

/s/ Peter W. Denton

Peter W. Denton
Attorney for CSX Transportation, Inc.

cc: All parties of record

³ *CSX Transp., Inc. v. Norfolk S. Ry. Co.*, 648 F. Supp. 3d 679, 698 (E.D. Va. 2023) ("In other words, an overt act committed in 2009, that excludes a company from competing in a market and causes harm *beginning* in 2009 and continuing through 2020, may *not* be the basis for an antitrust suit filed in 2018.").

⁴ *Id.* at 723 ("As discussed throughout this opinion, CSX's strongest evidence of past wrongs is based on acts committed in and around 2009; however, emails and other evidence highlighted by CSX from 2015 and 2018, as well as the CSX-favorable inferences that can be drawn therefrom, when considered in the context of the past conduct, present a triable issue as to whether NSR will use its ability to control the NPBL Board to harm CSX in the future in the same way it allegedly did so in the past.").

CERTIFICATE OF SERVICE

I hereby certify that I have caused this Letter in Docket No. FD 36836 to be served electronically or by first class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Sally Mordi

Sally Mordi
Attorney for CSX Transportation, Inc.

March 10, 2025