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SERVICE DATE – AUGUST 9, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36522

NORFOLK SOUTHERN RAILWAY COMPANY—  
PETITION FOR DECLARATORY ORDER

Decided: August 9, 2021

On June 21, 2021, Norfolk Southern Railway Company (NSR) filed a petition for declaratory order requesting that the Board institute a proceeding and establish a procedural schedule to address the issues referred to the Board by the U.S. District Court for the Eastern District of Virginia in CSX Transportation, Inc. v. Norfolk Southern Railway, No. 2:18-cv-00530 (E.D. Va. May 18, 2021). As explained below, a declaratory order proceeding will be established and the parties' proposed procedural schedule adopted.

NSR's petition arises from a broader dispute between NSR and CSX Transportation, Inc. (CSXT) concerning issues related to the Norfolk & Portsmouth Belt Line Railroad Company (NPBL).<sup>1</sup> CSXT filed the complaint from which the district court referral arose on October 4, 2018, alleging that NSR and NPBL have taken actions to effectively prevent CSXT from using NPBL's switching services to access customers at the Norfolk International Terminals and that these actions constitute a violation of federal antitrust laws, a breach of contract, and a violation of state law in several respects. A few weeks before CSXT filed its court complaint, NSR had filed a petition with the Board asking it to set trackage rights compensation for NPBL's use of NSR rail lines; that proceeding is being held in abeyance pending the resolution of the federal court litigation. See Norfolk S. Ry.—Pet. to Set Trackage Rts. Comp.—Norfolk & Portsmouth Belt Line R.R., FD 36223 (STB served Dec. 19, 2019).

On May 18, 2021, the District Court issued a decision referring to the Board the following questions raised in the court proceeding:

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<sup>1</sup> NPBL is owned approximately 57% by NSR and 43% by CSXT. (NSR Pet. 3, Sept. 13, 2018, Norfolk S. Ry.—Pet. to Set Trackage Rts. Comp.—Norfolk & Portsmouth Belt Line R.R., FD 36223.)

Did the 1982 consolidation, whereby [NSR] acquired an indirect 57 percent interest in [NPBL], involve the ICC/STB granting [NSR] “approval” to control [NPBL], and if so, did such authorized “control” render it necessary for antitrust and/or state conspiracy laws to yield, whether because [NPBL] was then deemed a “franchise” of [NSR], or for any other reason?

CSX Transp., No. 2:18-cv-00530, slip op. at 29 (E.D. Va. May 18, 2021).

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. The questions above have been referred by a court of competent jurisdiction and otherwise appear to be within the Board’s jurisdiction. A proceeding therefore will be instituted to address the issues referred by the district court.

NSR, CSXT, and NPBL have jointly proposed a procedural schedule in which simultaneous opening statements and evidence would be due 45 days from the date on which the Board initiates a proceeding and simultaneous reply statements and evidence would be due 75 days from the date on which the Board initiates a proceeding. The proposed schedule is reasonable and will be adopted.

It is ordered:

1. A declaratory order proceeding is instituted.
2. The procedural schedule for this proceeding is as follows:

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| Opening statements and<br>evidence (including expert reports) | September 23, 2021 |
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| Reply statements and evidence | October 25, 2021 |
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3. This decision is effective on its service date.

By the Board, Valerie O. Quinn, Acting Director, Office of Proceedings.