

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS
2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

William A. Mullins

Direct Dial: (202) 663-7823
wmullins@bakerandmiller.com

September 23, 2021

303032

VIA E-FILING

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

ENTERED
Office of Proceedings
September 23, 2021
Part of
Public Record

Re: **NORFOLK SOUTHERN RAILWAY COMPANY – PETITION FOR
DECLARATORY ORDER, FD 36522**

Dear Ms. Brown:

Please find attached Norfolk Southern Railway Company's ("NSR") Opening Statement in the above-captioned proceeding. If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com. If I am unavailable, you may contact my associate, Crystal M. Zorbaugh, by telephone at (202) 663-7831 or by e-mail at czorbaugh@bakerandmiller.com.

Sincerely,

/s/ **William A. Mullins**

William A. Mullins

Enclosure

cc: Anthony J. LaRocca (CSXT)
Peter W. Denton (CSXT)
Lou Warchot (CSXT)
T.J. Litwiler (NPBL)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36522

NORFOLK SOUTHERN RAILWAY COMPANY – OPENING STATEMENT

**Joseph H. Carpenter, IV.
Thomas E. Zoeller
Hanna M. Chouest
NORFOLK SOUTHERN CORPORATION
650 West Peachtree St NW
Atlanta, GA 30308
Tel: (757) 323-5144
Fax: (757) 533-4872**

**William A. Mullins
Crystal M. Zorbaugh
BAKER & MILLER PLLC
Suite 300
2401 Pennsylvania Ave, N.W.
Washington, D.C. 20037
Telephone: (202) 663-7823
Facsimile: (202) 663-7849**

**Attorneys for Norfolk Southern
Railway Company**

September 23, 2021

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36522

NORFOLK SOUTHERN RAILWAY COMPANY – OPENING STATEMENT

INTRODUCTION AND SUMMARY OF ARGUMENT

On June 21, 2021, Norfolk Southern Railway Company (“NSR”) petitioned pursuant to section 5(d) of the Administrative Procedure Act, 5 U.S.C. §554(e), and 49 C.F.R. § 1117.1, for the Board to institute a declaratory order proceeding and establish a procedural schedule to address an issue that was raised in the context of litigation brought by CSX Transportation (“CSXT”) in the U.S. District Court for the Eastern District of Virginia (“District Court”) and referred to the Board.¹ In a decision served August 9, 2021 (“August 9th Decision”), which instituted this proceeding, the Board posed the question as follows:

Did the 1982 Transaction consolidation, whereby NSC^[2] acquired an indirect 57 percent interest in Belt Line, involve the ICC/STB granting NSC “approval” to control Belt Line, and if so, did such authorized “control” render it necessary for antitrust and/or state conspiracy laws to yield, whether because Belt Line was then deemed a “franchise” of NSC, or for any other reason?

¹ Based on the STB’s primary jurisdiction, the District Court issued an Opinion and Order on May 18, 2021, in CSX Transp., Inc. v. Norfolk S. Ry., No. 2:18-cv-00530 (E.D. Va. May 18, 2021) referring to the STB a question regarding the applicability of § 11321(a) immunity (“May 18th Decision”) to several transactions previously approved or authorized by the Interstate Commerce Commission (“ICC”) and the STB. The outcome of this proceeding is related to a proceeding currently being held in abeyance by the Board. See Norfolk S. Ry. Co. – Petition to Set Trackage Rights Compensation – Norfolk & Portsmouth Belt Line R.R. Co., FD 36223 (“FD 36223”).

² NSC = Norfolk Southern Corporation, the non-carrier parent company of NSR.

As NSR explains herein, the unequivocal answer to that question is: Yes, the ICC's 1982 Transaction³ approval authorized NSC to acquire indirect control of Norfolk and Portsmouth Belt Line Railroad ("NPBL" or "Belt Line"), and such control authority included immunity from the antitrust laws as necessary for NSC to exercise that control.

The 1982 Transaction authorized NSC to indirectly control NPBL by authorizing NSC to control Norfolk and Western Railway Company ("N&W") and Southern Railway Company ("SRC") directly and Norfolk Southern Railway Company ("Norfolk Southern")⁴ indirectly. It also included the authority to control any affiliated carriers of SRC, N&W, and Norfolk Southern, including NPBL, who was an affiliated carrier under the ICC's definitions and rules at the time.⁵ NSC's indirect control was further solidified and authorized again through two subsequent transactions, one in 1991 and the other in 1998,⁶ the end result of which NSR was authorized to exercise direct control over NPBL. Moreover, ICC and STB authorization of these

³ See Norfolk S. Corp. – Control – Norfolk and W. Ry. Co. and S. Ry. Co., 366 ICC 173, FD 24930 (Sub-No.1), at 48. (I.C.C. served March 19, 1982) ("1982 Transaction").

⁴ The use of "Norfolk Southern" is intended to reference the entity that was in existence in 1982 and was a Class II subsidiary of SRC. The use of "NSR" is intended to refer to the entity that has been in existence since December 31, 1990, when SRC merged Norfolk Southern into SRC and SRC changed its name to NSR.

⁵ In the 1982 Transaction, Norfolk Southern was at that time a Class II subsidiary of SRC that owned or co-owned shares in various rail carriers, including NPBL. As is relevant to this declaratory order, the 1982 Transaction decision resulted in NSC owning and controlling 57.14% of the shares of NPBL, as follows: SRC (14.29%), N&W (28.57%), and Norfolk Southern (14.29%).

⁶ See S. Ry. Co. – Control Exemption – Norfolk and W. Ry. Co., Chesapeake W. Ry., the Toledo Belt Ry. Co., and Wabash R.R. Co., FD 31791 (I.C.C. served Jan. 14, 1991); See Norfolk S. Ry. Co. – Exemption – Norfolk and W. Ry. Co., FD 33648 (S.T.B. served Aug. 31, 1998).

transactions included immunity from the antitrust laws as necessary to exercise the control authority.⁷

ARGUMENT

I. THE 1982 TRANSACTION AND SUBSEQUENT TRANSACTIONS UNEQUIVOCALLY AUTHORIZED NSC TO EXERCISE CONTROL OVER BOTH NPBL AND NSR

A. NPBL Was Included In The Application And Was Part Of The Approved Transaction

The 1982 Transaction sought approval for NSC to control SRC and its consolidated system companies and N&W and its subsidiary companies. NWS⁸ Enters.; Application To Control Norfolk & W. Ry. Co. and S. Ry. Co., 46 FR 173-02, at 174, 1981 WL 109712 (Jan. 2, 1981). Ultimately, the ICC approved NSC's direct control of N&W and SRC and each of those carriers' respective systems and subsidiaries indirectly, including Norfolk Southern, which was owned by SRC and part of the SRC consolidated system.

The District Court's May 18th Decision questions whether the 1982 Transaction included NSC's acquisition of control over NPBL because NPBL was not specifically named in the application as an "applicant" for which NSC was seeking specific control authority. The May 18th Decision devotes over a page and a half referencing passages and stating that it appears

⁷ Once control authority has been authorized and exercised, there is no further need for antitrust immunity to apply to the actions of companies within the same corporate family. It is not a violation of the antitrust laws for companies in the same corporate family to act cooperatively. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984); see e.g., The U.S. Department of Justice's 1988 Antitrust Enforcement Guidelines for International Operations, stating: "In the Department's view, however, the policies underlying the Sherman Act (as discussed in Copperweld) support the conclusion that a parent corporation and subsidiary corporation of which the parent owns more than 50 percent of the voting stock are a single economic unit under common control and are thus legally incapable of conspiring with one another within the meaning of section 1."

⁸ NWS Enterprise was the merger entity that filed the notice of intent to file an application. By the time the application was approved, NWS had changed its name to NSC.

from the record (and arguments offered by CSXT) that NSC never sought specific authority to acquire NPBL. What the Court did not fully understand is that given the ICC merger process and rules and regulations in place at the time, NPBL would have indeed had to be treated as an “applicant” for which relevant data would have been required but for the fact that N&W and SRC sought a specific waiver from the ICC from the requirement to treat NPBL as an “applicant” and from the requirement to present relevant operating, financial, and competitive data for NPBL.⁹ Despite this waiver, the respective ownership shares of NPBL were indeed listed and disclosed. As such, the ICC was fully aware of the respective ownership interests in NPBL and that approval of the transaction would result in NSC have majority ownership, and thus control, of NPBL.¹⁰

The District’s Court background and history of the 1982 Transaction did not fully explain the ICC process, perhaps because it appears that the District Court may not have been provided with all of the relevant pleadings that were involved in the ICC process. As indicated by the District Court in Footnote 12: “The Court has only been provided “Volume 2/2A” from the consolidation application.” See May 18th Decision, FN 12 (page 18/23). Thus the Court appears to be missing crucial information – the waiver information.

⁹ See NWS Enter., Inc. — Control Of — Norfolk and W. Ry. Co. and S. Ry. Co., FD 29430, Petition of Norfolk and Western Railway Company and Southern Railway Company Seeking Waiver and Clarification of the Railroad Consolidation Procedures (49 C.F.R. Part IIII), filed July 24, 1980 (“Waiver Request”), attached hereto as Exhibit A. In particular, Waiver Request at 4 noting that “applicant” means “all carriers with properties directly involved,” which would include NPBL, see also, Waiver Request at 11-12.

¹⁰ Aside from the wholly-owned carriers specifically named in the application, both SRC and N&W held individual interests in certain non-wholly owned railroad companies operated independently of the N&W or SRC systems, including interests in NPBL. Those interests were disclosed in Vol. 2, Exhibit 2A of the application.

At the time NSC sought control of N&W and SRC and their consolidated companies, the ICC had its proposed rulemaking in Railroad Consolidation Procedures, EP 282 (Sub-No. 3) pending, and applicants understood that the pending regulatory changes would govern their application. During the preparation of the application, it became apparent that the ICC intended to make further revisions to its proposed consolidation rules before issuing and allowing the new rules to take effect. To clarify what was required to be disclosed, who would be treated as applicants, and which subsidiaries would be required to provide operating, financial, and competitive evidence, NSC filed its Waiver Request.

In the Waiver Request, SRC disclosed to the ICC that it was a Class I railroad that controlled numerous terminal and other railroad companies, which were identified in Appendix A¹¹ to the Waiver Request. While SRC's consolidated companies were separate corporate entities, the transportation functions for those companies were under common management and generally reported on a consolidated system basis as SRC. In the Waiver Request, N&W likewise reported that it controlled five Class III railroads, one terminal company, and other non-operating railroad companies (Appendix B), and it too generally reported on the companies it controlled on a consolidated system basis. This corporate structure led to N&W and SRC seeking various waivers asking the ICC to limit disclosures and the required information to the consolidated system operations rather than for each wholly-owned or partially-owned subsidiary.

¹¹ See Waiver Request, Appendix A (SRC) and Appendix B (N&W) included all wholly controlled companies, which were part of the railroads' respective consolidated systems and for which each carrier individually held a controlling interest. NPBL was not listed in the SRC appendix because SRC did not control NPBL at the time. Likewise, NPBL was not listed in the N&W appendix because it did not control NPBL. Due to the Waiver Request, NSC was also not required to list partially-owned subsidiaries in Appendix and B.

N&W and SRC in the Waiver Request also sought clarification of the term “Applicant.” As N&W explained, N&W and SRC had interests in certain railroad companies which were operated independently of the N&W and SRC systems and for which N&W and SRC did not hold a controlling interest in such companies, such as NPBL. Waiver Request at 11-12. The filing noted that these companies’ interests were maintained separate and apart from N&W and SRC consolidated system data and requiring the inclusion of data related to each such carrier, of which neither N&W nor SRC individually held a controlling interest at that time, would serve no useful purpose and would substantially burden the record. Id.

The ICC agreed with N&W and SRC that individual data for each non-wholly owned subsidiary would not be required and that such carriers need not be treated as an “applicant,” which, if they were, would have required specific information for each such non-controlled carrier. In its decision regarding the Waiver Request served on October 8, 1980, the ICC found:

The records of such companies [we]re maintained separate and apart from NW and SRC consolidated system data. We believe it would serve no useful purpose to produce detailed information for these companies (other than identifying them as required by 49 C.F.R. 1111.1(c)(8) which may be done on the corporate charts). We agree with petitioners that the term “applicant”, as used in our regulations, does not encompass such non-controlled carriers.

See 45 Fed. Reg. 66911 (October 8, 1980). Absent this decision, NSC would have been required to include NPBL as a specific applicant, just like it had to do for SRC, Norfolk Southern, and N&W. Thus, the only reason NPBL was not listed as an “applicant” was due to this waiver granted by the ICC. This did not mean that NPBL would not be included in the scope of the application nor was not an affiliated carrier of the applicants. It simply meant that NPBL would not have to be an “applicant” itself for purpose of the application.

Although NPBL was not required to be treated as an applicant, the fact that after the transaction NSC would own a controlling interest in NPBL was fully disclosed to the ICC. As

set forth in Volume 2, Exhibit 2A of the 1982 Transaction application, the “applicants” (NSC, SRC, Norfolk Southern, and N&W) did disclose the various share ownership interests in NPBL. As noted, due to the waiver, NPBL did not have to be treated as an “applicant” nor did the “applicants” have to provide separate operating and financial data for NPBL. The disclosure of the ownership share information by the applicants was included as part of ICC’s requirement in Sections 1111.1(c)(7) through (11) of the ICC’s then consolidation regulations requesting data disclosing the extent to which applicants are controlled by any other corporation or corporations, the measure of control of ownership exercised by applicants over other carriers subject to the Act, the degree to which applicants and their affiliates share common officers or directors, and the existence of any other intercorporate relationships between applicants, or their affiliates, and any other carrier. As such, the ICC was fully aware that after the transaction, NSC would own 57.14% of NPBL, which unequivocally gave NSC “control” over NPBL.¹²

As further clarification that the ICC was fully aware that NSC would control NPBL after the transaction through NSC’s control of SRC, N&W, and Norfolk Southern, there was a related sub-docket that involved connecting SRC and Norfolk Southern in Chesapeake, VA (the territory served by NPBL) and consolidating their operations with N&W so that they could all operate, along with NPBL, in the Chesapeake/Portsmouth area. In FD 29430, N&W and SRC had to file several related applications to consolidate operations of the two systems into a unified system and dispose of redundant assets. As relevant here, a related application was filed in FD 29430

¹² See 49 U.S.C. §11323(b). NSC and the carriers that NSC would control after the transaction (and which carriers would be affiliates of each other) would have the "power to exercise control or management, in a common interest of more than one of those rail carriers" (i.e., NPBL); 49 U.S.C. §10102(3). As a result of owning 57.14% of NPBL, NSC would have actual control, legal control, or the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) any other means.

(Sub-No. 3) for SRC and Norfolk Southern, one of its Class II subsidiaries, to construct and operate a connection at Chesapeake, VA.¹³ As explained in FD 29430 (Sub-No. 3),¹⁴ in the primary application: NSC sought authority pursuant to 49 USC §§ 11343-11347 to acquire control through stock ownership of N&W and SRC. As a result of its acquisition of control of N&W and SRC, NSC would also obtain indirect control of the existing subsidiaries of SRC (and of N&W), including Norfolk Southern (a subsidiary of SRC) and of any interests such subsidiaries held in other carriers, i.e., NPBL (and others). As part of the control transaction, N&W and SRC would consolidate their facilities in the Norfolk, Virginia, area.

The application filed in FD 29430 (Sub-No. 3) recognized that as a result of the consolidation of N&W and Norfolk Southern's parent company, SRC, all N&W, and SRC/Norfolk Southern terminal operations and facilities in the Norfolk area would be combined under the supervision of N&W.¹⁵ The point being that NSC, as the ultimate parent company, would have the authority and the ability in a post-transaction environment to control both NPBL and N&W operations in the Chesapeake/Portsmouth area. This would not be a competitive concern because, in 1982, Chesapeake, VA (where the Portlock Yard consolidated operations were to be located) was served by several railroads.¹⁶ Of course today, through a series of later

¹³ The new connection track would extend from a point near MP NS 2.48 on the Norfolk Southern mainline between Elizabeth City, North Carolina, and Norfolk, Virginia, to a point near MP V 4.6 on the Sewells Point Branch of the N&W, approximately in the City of Chesapeake, Virginia.

¹⁴ The ICC approved the transactions proposed in FD 29430 (Sub-No. 3) in the underlying 1982 Transaction.

¹⁵ See Volume 7 at 6. With STB approval, N&W was later merged into NSR so that NSR would control and supervise all terminal operations and facilities in the Norfolk area, which by default included NPBL.

¹⁶ The railroads included the Chesapeake and Ohio Railroad Company; Norfolk, Franklin and Danville Railway Company; Seaboard Coast Line Railroad Company; Virginia & Maryland Railroad Company, and NPBL in addition to Norfolk Southern and N&W.

approved transactions, the area is served by NSR, CSXT, and NPBL, with NSC having controlling ownership of both NSR and NPBL.

CSX and the Court make much of the fact that NPBL was not listed in the application as a carrier for which control authority was sought. But NPBL would not have been listed in Appendix A or Appendix B due to the waiver decisions and the regulations. The only carriers required to be listed in those Appendixes were carriers that were wholly-owned by SRC and N&W. Neither Norfolk Southern, SRC, nor N&W wholly-owned NPBL at that time. Therefore, NPBL would not have been listed because neither one of them individually controlled NPBL. Yet, as the Court acknowledges, the shares were fully disclosed to the ICC. May 18th Decision at 15, n. 9. The ICC granted the application, which authorized NSC's direct/indirect control of three railroads, SRC, N&W, and Norfolk Southern, which, in turn, would give NSC a controlling interest in NPBL. There was no need for specific "approval" of NPBL or for an "announcement" that NSC would indirectly control NPBL. The indirect control was a byproduct of the 1982 Transaction.

The decision to exclude NPBL from the definition of applicant, however, does not mean NSC was not granted authority to control NPBL. Applicants disclosed the extent of NPBL share ownership held by SRC, N&W, and Norfolk Southern. The ICC and the public were therefore on notice that after the transaction NSC would own a combined interest of 57.14% and have de facto control of NPBL. The rules and procedures at the time did not require every single entity over which NSC would obtain control to be listed. Likewise, the decision did not have to specifically name every single entity that was being approved for control. Even today, there are decisions granting control or merger approval that do not list every single entity that, absent a waiver, would have to be treated as an applicant or applicant carrier and thus involved in the

transaction. CSX Corp. and CSX Transp., Inc., Norfolk S. Corp., and Norfolk S. Ry. Co. – Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corp., FD 33388, 1997 STB LEXIS 327, at * 4-7 (S.T.B. served Sept. 18, 1997); see also Canadian Nat’l Ry. Co.; Grand Trunk Corp., and Grand Trunk W. R.R. Inc. – Control – Ill. Cent. Corp., Ill. Cent. R.R. Co., Chicago, Cent., and Pac. R.R. Co., and Cedar River R.R. Co., 1998 STB Lexis 250, at *12-14 (S.T.B. served Sept. 18, 1998). The important fact was that NSC was given authority to control SRC, N&W, and Norfolk Southern, and thus granted the authority to control NPBL.

B. The 1982 Transaction Granted NSC The Right To Exercise Control Of NPBL

In the decision served on March 25, 1982, the ICC approved the acquisition of control by NSC of N&W and SRC, including their affiliates. Specifically, the ICC held:

[W]e find (a) that the acquisition by Norfolk Southern Corporation of control of Norfolk and Western Railway Company and Southern Railway Company *and their affiliated carriers*, the granting of related trackage rights among these carriers, and the acquisition of part of the main line of the Norfolk, Franklin and Danville Railway Company by Southern Railway Company, all as discussed above, are transactions within the scope of 49 U.S.C. §11343, are consistent with the public interest, will not adversely affect the adequacy of transportation to the public and will not substantially restrain trade, lessen competition or create a monopoly in freight surface transportation in any region of the United States; (b) that failure to include other railroads in the area involved in these transactions will not adversely affect the public interest; (c) that any guarantee, assumption of payment of dividends or of fixed charges resulting from the transactions are consistent with the public interest; (d) that the interests of employees affected by the proposed transactions will be adequately protected by the imposition of conditions; and (e) that the transactions will not have an adverse effect on competition among rail carriers in the affected region.¹⁷

¹⁷ See 1982 Transaction at 66 (emphasis supplied).

It is undeniable that the decision granted NSC the authority to control SRC (and its subsidiary Norfolk Southern) and N&W. Absent the waiver, NPBL would have been an “applicant carrier” for which full information would have been presented and over which the ICC would have specifically granted control authority. If NPBL had been required to be treated as an applicant, this proceeding would be moot and the Court’s concerns fully resolved as the 1982 decision would have fully “announced” control over NPBL. Yet, there should not be different treatment for NPBL from that of SRC and N&W, or any other of the subsidiaries and affiliated carriers covered by the control decision, simply because NSC was granted a waiver from having to treat NPBL as an applicant carrier.

Furthermore, even if there is some doubt as to whether NPBL was specifically included in the scope of the application (and there should not be), at a minimum, NPBL was an “affiliated carrier” of SRC and N&W and which NSC was therefore authorized to control. The decision did not define “affiliated carrier” and it is not a capitalized defined term, but is generally understood to mean a carrier that was partially owned, as opposed to wholly-owned.¹⁸ At the time of the application and approval, NPBL was an affiliate carrier of SRC, Norfolk Southern, and N&W and for which NSC was granted authority to control. It remains an “affiliated carrier” today. Since the 1982 Transaction, NSC (either directly or indirectly) has exercised control over NPBL.

¹⁸ In the investment world, “Affiliate is used primarily to describe a business relationship wherein one company owns less than a majority stake in the other company's stock.” <https://www.investopedia.com/terms/a/affiliate.asp>. “Affiliate” has also been defined as “[A] business concern owned or controlled in whole or in part by another concern.” <https://www.dictionary.com/browse/affiliate>. These definitions are consistent with CSX Corp. and CSX Transp., Inc., Norfolk S. Corp. and Norfolk S. Ry. Co. – Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corp., FD 33388, 1997 STB LEXIS 345, at * 10, fn 4 (S.T.B. served Sept. 11, 1997) (granting a waiver that “applicants” in a control application may exclude affiliates, defined as carriers in which it or its subsidiaries possessed 50% or less interest.)

Subsequently, there were several corporate changes—all of which further consolidated ownership of NPBL so that since 1998, the majority of NPBL’s shares are owned directly by NSR. NSR thus directly controls NPBL, and NSC, through its 100% ownership of NSR, indirectly controls NPBL. After the 1982 Transaction, SRC (who directly owned and controlled Norfolk Southern) and N&W continued to operate as separate subsidiaries, although controlled by NSC. In 1991, SRC was granted authority to directly control N&W. See S. Ry. Co. – Control Exemption – Norfolk and W. Ry. Co., Chesapeake W. Ry., the Toledo Belt Ry. Co., and Wabash R.R. Co., FD 31791 (I.C.C. served Jan. 14, 1991). At that time, SRC changed its name to Norfolk Southern Railway Company (“NSR”), which then directly controlled N&W and its subsidiaries. Eight years later, in 1998, the Board authorized N&W’s merger into its parent, NSR. See Norfolk S. Ry. Co. – Exemption – Norfolk and W. Ry. Co., FD 33648 (S.T.B. served Aug. 31, 1998)(“1998 Transaction”). There was no question that NSC could, and did, exercise its control authority over N&W, SRC, Norfolk Southern, and their affiliates and subsidiaries over this time. Furthermore, since 1998, NSR has had direct control of NPBL.

This control was acknowledged and approved by CSX in a 1989 supplemental agreement, attached hereto as Exhibit B. In that agreement, CSX, NW, and SRC signed an agreement to modify the number of directors appointed by each company such that NW and SRC (both owned by NSC) would collectively appoint three directors. CSX would have the right to appoint two directors. Absent the ability to agree with CSX on the sixth seat, NSC, given that it had the majority of directors, had the unilateral ability to appoint the sixth seat. This gave NSC (and since 1998, NSR) the ability to control 4 out of six voting seats.¹⁹ There is no ICC or STB

¹⁹ NPBL has six voting Directors and a seventh, non-voting director. See Exhibit C, Bylaws as amended in 1996.

precedent known to NSR holding that a party that holds the majority of shares and the majority of director seats does not have control.²⁰

Even if one could argue that the 1982 Transaction somehow did not grant either NSC or NSR the ability to directly or indirectly control NPBL, these later transactions resolved that question. At the time of the 1991 transaction, SRC would have owned and controlled SRC's 14.29% and Norfolk Southern's 14.29% ownership of NPBL, giving SRC 28.58% ownership and control of NPBL. N&W, which SRC was given authority to directly control in the 1991 notice, would have owned 28.57%. This would have given NSR (the merged Norfolk Southern and SRC and renamed NSR) indirect control of NPBL. Then, in the 1998 Transaction, which authorized the merger of N&W into its parent, NSR, NSR would have been given 57.14% direct control of NPBL. Thus, since 1982, NSC has indirectly controlled NPBL, and since 1998, NSR has directly controlled NPBL. Even if NSR was not given direct control of NPBL in the 1982 Transaction, NSR has had that direct control since 1998.²¹

²⁰ NSR's ownership of the majority of the shares and the voting seats is the classic definition of control as defined by the STB. "(b) Control (including the terms controlling, controlled by, and under common control with) means the possession directly or indirectly, of the power to direct or cause the direction of the management and policies of a company, whether such power is exercised through one or more intermediary companies, or alone, or in conjunction with, or pursuant to an agreement, and whether such power is established through a majority of minority ownership or voting of securities, common directors, officers or stockholders, voting trusts, holding trusts, associated companies, contract or any other direct or indirect means." 49 C.F.R. § 1201, Subpart A, Definition 5.

²¹ Accordingly, even if one could make an argument that the 1982 Transaction did not include control over NPBL, there is no doubt that the consolidation of 57.4% of NPBL's shares under the direct ownership and control of NSR in 1998 gave NSC and NSR control over NPBL and such control includes antitrust immunity as necessary for NSR to exercise its control over NPBL. The current switching rate for which CSXT alleges competitive harm was established in 2009, well after NSR itself was granted authority to directly control NPBL. As such, at a minimum, since 1998, NSR has had the authority to exercise its control over NPBL, including NPBL's rates and practices. The establishment of the 2009 rate and the maintenance of that rate between two affiliated carriers/companies that are controlled by NSC and over which NSC and NSR were granted authority to control cannot, therefore, be the product of unlawful collusion.

To be clear, post-1982, carriers in the NSC corporate family collectively had a 57% ownership interest in NPBL, which gave NSC the ability to dominate the Board of Directors. NSC also had the authority to direct the NPBL Board as to whom to appoint as President, a fact that CSXT has also recognized as discussed above. The public was put on notice in the 1982 Transaction application that in a post-transaction environment, NSC would have a controlling interest in NPBL. NSC was given control over SRC, Norfolk Southern, N&W, and affiliated carriers (i.e., NPBL). This control of NPBL was further consolidated and reauthorized in both the 1991 transaction and the 1998 Transaction.

II. HAVING BEEN INCLUDED IN THE APPLICATION (OR THE LATER CORPORATE FAMILY EXEMPTIONS), NSC’S CONTROL OVER NPBL IS ENTITLED TO ANTITRUST IMMUNITY FROM CAUSES OF ACTIONS RELATED TO NSC OR NSR EXERCISING CONTROL OVER NPBL

As explained in Section I above, NSC was given indirect control over NPBL and NSR was given direct control over NPBL as a result of the 1998 transaction. Having established that NSC and NSR have control over NPBL, and have exercised that control, the answer to the Court’s question as to whether “NSC acquired an indirect 57 percent interest in Belt Line, involve[d] the ICC/STB granting NSC “approval” to control Belt Line?” is an unequivocal “yes.” As to the second question, whether “such authorized ‘control’ render[s] it necessary for antitrust and/or state conspiracy laws to yield, whether because Belt Line was then deemed a “franchise” of NSC, or for any other reason?” that answer is “yes” as well.

The Court's language confirms this answer. The Court notes that the ICC did not “announce” that NSC would control Belt Line or that NSC was exempt from federal antitrust laws or state conspiracy laws to control NPBL. But the ICC didn’t have to. Having granted NSC authority to control SRC, Norfolk Southern, and N&W, and their affiliated carriers, such approval comes with antitrust immunity. As the Court notes:

[T]he STB and federal courts have repeatedly held that § 11321 is not predicated on the agency “announcing that a particular exemption is necessary”; rather, the immunity exemption is “self-executing.” Consol. Coal Sales Co. v. Consol. Rail Corp., 2002 STB Lexis 317, at *9-10 (S.T.B. May 23, 2002) (quoting I.C.C. v. Locomotive Eng’rs, 482 U.S. 270, 298 (1987) (Stevens, J., concurring)); see Soo Line R.R. Co. v. Consol. Rail Corp., No. 2:17cv106, 2018 WL 1566816, at *7 (N.D. Ind. Mar. 29, 2018) (“The statute makes the exemption self-executing whenever necessary to carry out an STB-approved transaction.”); CSX Corp.—Control—Chessie Sys., 8 I.C.C. 2d at 723 n.12 (same).

Indeed, the 1982 Transaction decision specifically noted that its “approval of an agreement as part of a consolidation proceeding carries with it immunity from the operation of the antitrust laws pursuant to 49 U.S.C. § 11341 (a).” Norfolk S. Corp. – Control – Norfolk and W. Ry. Co. and S. Ry. Co., FD 24930 (Sub-No.1), slip op. at 58 (I.C.C. served March 19, 1982).

Moreover, because control over NPBL was acquired by NSC in the 1982 Transaction and subsequent transactions, transactions over which the ICC or STB approved, then, as the Court notes, “it is arguably ‘necessary’ under the scheme implemented by Congress and the STB to permit NSC/NSR to exercise its majority control over its newly acquired subsidiary free from the confines of antitrust or state conspiracy law.” See 49 U.S.C. § 11321(a); CSX Corp.—Control—Chessie Sys., 8 I.C.C. 2d at 723 n.12. Indeed, the whole purpose of ICC, and now STB, approval and the antitrust immunity flowing from such approval, is to allow for the consolidation, coordination, conglomeration, and control of the various carriers within the same corporate family, including affiliate carriers, free from the confines of the antitrust laws.

The Court’s use of the word “franchise” does not change this analysis. In asking its necessity and immunity question, the Court appears to be equating the word “franchise” with the word “subsidiary.” To the extent the word “franchise” means “subsidiary,” then NSC and NSR were authorized to control NPBL as a result of the 1982 Transaction and the 1998 Transaction. Understandably, the Court used the phrase “franchise” because that word appears in the statutes

at both 49 U.S.C. §11321(a) and 49 U.S.C. §11323(a)(1). Both statutes refer to exercising control over the acquired property or franchise and in granting antitrust immunity to exercise such control over the acquired property or franchise, but in ICC/STB practice, parties fully understand that in control cases, as opposed to assets purchases, control is being granted over companies and subsidiaries. Regardless of whether NPBL is considered a franchise or subsidiary, the issue is whether control over NPBL was authorized, which it was.

The word "franchise" in the ICC and STB context is rarely used. Where it has been specifically used, in context, it is generally understood as operating rights that may be bought and sold as property and almost always in the context of an asset sale, not a transfer of control through stock purchase. For this reason, it is often discussed using different terms as meaning a railroad lease, an easement; or operating rights. In perhaps the most recent case to use the word 'franchise', the STB equated the word to the use of an easement to transfer the rail operating rights from one party to another. Port of Pend Oreille - Acquisition And Operation Exemption - BNSF, FD 33561, 2000 STB LEXIS 246, (S.T.B. served May 2, 2000).²² In another case, the ICC dropped a footnote addressing who has common carrier obligations where the seller keeps the real estate (and right of way) and sold everything else. The ICC noted that without the real estate lease agreement it could not comment on who has the common carrier obligation since the

²² The term was used in 1991 in the context of a motor carrier case where the ICC treated the word to mean the ICC operating certificates held by the motor carriers.

This transaction involves two regulated motor carriers and a purchase of property, namely, a franchise or "certificates of authority to operate." The Commission has broad authority under § 11343 in connection with mergers or the purchase of operating rights. The purchase of operating rights only, whether entire or in portions, comes within the terms of the statute. See Bowman Transp., Inc. v. United States, 308 F.Supp. 1342 (3-judge court, N.D. Ala. 1970)."

Wash. Trucking - Purchase (Portion) Exemption - Maddox Transfer, 7 ICC 2d 372 (1991).

right of way was required for the continued exercise of the rail franchises being conveyed.²³ In that context involving the transfer of certain assets, the word “franchise” appeared to mean who will have control over the property and operating rights, i.e., the assets.

Concerning the 1982 Transaction, NSC was not buying the separate assets of the various carriers. The carriers would remain intact as separate companies and did so for many years. What was being sold in 1982 was the right to control those assets by purchasing the shares of the various companies, or, in subsequent transactions, the right to merge the properties into a single carrier. As such, the word franchise, at least as used in ICC and STB precedent, was not applicable to the 1982 Transaction. Instead, the ICC authorized NSC to exercise indirect control over NPBL and later authorized NSR to exercise direct control over NPBL, whether considered a franchise or subsidiary.

Thus, irrespective of whether NPBL should be classified as a “franchise” or a “subsidiary,” the fact remains that control of NPBL was a direct result of NSC’s 1982 acquisition of direct control of N&W, SRC, and indirect control of Norfolk Southern. Such actions were disclosed to the ICC, and as an involved carrier, and certainly, as an affiliated carrier, NPBL was included in the ICC’s approval. Indeed, absent the Waiver Request, NPBL itself would have been required to be an “applicant” carrier in the transaction and specifically included in the application. The 1982 Transaction, and the subsequent transactions, including where NSR was

²³ San Joaquin Valley Rail - Acquisition and Lease – S. Pac. Trans., FD 31993 (Sub-No. 1), 1993 ICC LEXIS 192, 1993 ICC LEXIS 192 (I.C.C. served Sept. 30, 1993).

Absent the lease or other evidence fully setting forth the nature of the relationship governing the respective rights and access to the rights-of-way, clearly necessary for continued exercise of the rail franchises being conveyed, we do not and cannot rule on whether SP will continue to have a common carrier obligation with respect to these lines upon consummation of the transaction."

granted direct control of NPBL, came with self-executing antitrust immunity as necessary for NSC (and later, NSR) to carry out the approved transaction.²⁴

CONCLUSION

NSR believes that the Board should find that: (1) The 1982 Transaction approved and authorized NSC to indirectly control NPBL; and (2) Pursuant to 49 U.S.C. 11341(a), the ICC authorization included immunity from actions under the antitrust laws as necessary to allow NSC to exercise its control of SRC, N&W, and Norfolk Southern and their affiliated carriers (including NPBL) and carry out the approved transaction.²⁵

²⁴ Furthermore, even if there were no immunity, and there was, once NSC undertook the actions to control NPBL and exercised that control, it would not have been a violation of the antitrust laws for a parent company, such as NSC (or later NSR itself), to use its control for the benefit of the parent company as a whole. Therefore, no immunity would be needed for NSC or NSR to exercise its control over NPBL, or if immunity is needed, that immunity extends to NSC's and NSR's control over NPBL so that NSR cannot be held to conspire with its own subsidiary. It is important to note that NSC/NSR is not asking the Board to hold that in the context of an approved ICC/STB transaction that antitrust immunity forever shields NSC, NSR, and NPBL from the otherwise lawful application of the antitrust laws, *i.e.*, NSR cannot exercise its control over NPBL in a manner that would result in an agreement between NPBL and a carrier outside of the NSC corporate family (*e.g.*, CSXT) to restrain trade and then claim antitrust immunity over that arrangement. The antitrust immunity applies to the actions within the same corporate family not between those actions with carriers outside of the NSC corporate family. NPBL is controlled by NSR and therefore NSR can exercise that control without antitrust implications as between NPBL and NSR.

²⁵ As an alternative finding, the STB should hold that the 1998 Transaction, which CSXT did not oppose and which allowed all carriers (and any ownership shares in other affiliated carriers owned by those carriers), authorized NSR to directly control NPBL.

Respectfully Submitted,

/s/ ***William A. Mullins***

Joseph H. Carpenter, IV.
Thomas E. Zoeller
Hanna M. Chouest
NORFOLK SOUTHERN CORPORATION
650 West Peachtree St. NW
Atlanta, GA 30308
Tel: (470) 867.4778
Fax: (757) 533-4872

William A. Mullins
Crystal M. Zorbaugh
BAKER & MILLER PLLC
Suite 300
2401 Pennsylvania Ave, N.W.
Washington, D.C. 20037
Telephone: (202) 663-7823
Facsimile: (202) 663-7849

Attorneys for Norfolk Southern Railway
Company

September 23, 2021

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36522

NORFOLK SOUTHERN RAILWAY COMPANY – OPENING STATEMENT

EXHIBIT A

SIDLEY & AUSTIN

FILE IN DOCKET

1730 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D. C. 20006

TELEPHONE 202: 624-9000

TELEX 89-463

Founded in 1898 as
Williams & Thompson

CHICAGO OFFICE
ONE FIRST NATIONAL PLAZA
CHICAGO, ILLINOIS 60600
TELEPHONE 312: 339-8400
TELEX 25-4364

EUROPEAN OFFICE
9 HOLLAND PARK
LONDON, W11 3TE, ENGLAND
TELEPHONE 01: 727-0132
TELEX 21781

July 24, 1980

Mr. James Bayne
Acting Secretary
Interstate Commerce Commission
12th & Constitution Ave., N.W.
Washington, D.C. 20423

FILED
JUL 24 1980

Re: Finance Docket No. 29430, NWS
Enterprises, Inc. -- Control --
Norfolk and Western Railway
Company and Southern Railway
Company

INTERSTATE
COMMERCE COMMISSION

JUL 29 4 54 PM '80
INTERSTATE
COMMERCE
COMMISSION

RECEIVED
PROCESS SERVING
BRANCH

Dear Mr. Bayne:

Enclosed for filing in the above-referenced proceeding are an original and twenty (20) copies of the "Petition of Norfolk and Western Railway Company and Southern Railway Company Seeking Waiver and Clarification of the Railroad Consolidation Procedures (49 C.F.R. Part 1111)."

Please direct any inquiries regarding this matter to the undersigned.

Sincerely,

INTERSTATE
COMMERCE COMMISSION

Richard J. Flynn

JUL 24 1980

Enclosures 2

ADMINISTRATIVE SERVICES
MAIL UNIT

JUL 25 2 00 PM '80
INTERSTATE
COMMERCE
COMMISSION

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 29430

NWS ENTERPRISES, INC. -- CONTROL --
NORFOLK AND WESTERN RAILWAY COMPANY AND
SOUTHERN RAILWAY COMPANY

PETITION OF
NORFOLK AND WESTERN RAILWAY COMPANY
AND
SOUTHERN RAILWAY COMPANY
SEEKING WAIVER AND CLARIFICATION OF
THE RAILROAD CONSOLIDATION PROCEDURES
(49 C.F.R. PART 1111)

THOMAS M. McMAHON
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603

RICHARD J. FLYNN
JOHN E. HALEY
MICHAEL A. NEMEROFF
G. PAUL MOATES
TERENCE M. HYNES
Sidley & Austin
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006

JAMES L. TAPLEY
R. ALLAN WIMBISH
PETER S. CRAIG
NANCY S. FLEISCHMAN
DAVID J. KAUFMAN
Southern Railway Company
920 15th Street, N.W.
Washington, D.C. 20005

JOHN S. SHANNON
DONALD M. TOLMIE
WILLIAM C. WOOLDRIDGE
HENRY D. LIGHT
ANGELICA D. LLOYD
Norfolk and Western
Railway Company
8 North Jefferson Street
Roanoke, Virginia 24042

Dated: July 24, 1980

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 29430

NWS ENTERPRISES, INC. -- CONTROL --
NORFOLK AND WESTERN RAILWAY COMPANY AND
SOUTHERN RAILWAY COMPANY

PETITION OF
NORFOLK AND WESTERN RAILWAY COMPANY
AND
SOUTHERN RAILWAY COMPANY
SEEKING WAIVER AND CLARIFICATION OF
THE RAILROAD CONSOLIDATION PROCEDURES
(49 C.F.R. PART 1111)

COME NOW Norfolk and Western Railway Company (NW), on behalf of itself and its subsidiary companies, and Southern Railway Company (SRC), on behalf of itself and its consolidated system companies, and seek waiver and clarification of the Interstate Commerce Commission's regulations (49 C.F.R Part 1111) governing the preparation, filing, and procedural details of applications under 49 U.S.C. §§11343 et seq.. NW and SRC intend to file with the Commission an application seeking approval of the control of NW and SRC by a new holding company, initially named NWS Enterprises, Inc.

NW and SRC will file their control application and all related applications before the end of 1980. To meet

the 1980 filing date, NW and SRC have already begun preparation of the necessary applications. NW and SRC had believed, as they began their preparations, that the rather extensive proposed revisions to the railroad consolidation regulations contained in the notice of proposed rulemaking served November 8, 1979, in Ex Parte No. 282 (Sub-No. 3), Railroad Consolidation Procedures, would be finalized by the time of, and would govern, their application. Only within the last two weeks NW and SRC have been advised by Commission staff members that, rather than adopting the proposed regulations, the Commission will issue a new set of proposed regulations. The new proposal will, we understand, solicit additional comments and will, therefore, not become final until some indefinite future date.

As the Commission must be aware, preparation of the evidence necessary to demonstrate that a control transaction is consistent with the public interest takes a long time, involves preparation of a considerable amount of technical data, and requires the efforts of many railroad employees and outside consultants. Given the large amount of resources already dedicated to or earmarked for preparation of the NW/SRC application, NW and SRC require immediate guidance as to the requirements which will govern their application.

NW and SRC preparations for filing their application are already well underway. To postpone additional preparations until new proposed regulations, and eventually final regulations, are issued could prevent filing of the NW/SRC application during 1980 or early 1981. Therefore, NW and SRC hereby advise the Commission that their control application and any related applications will be filed pursuant to the existing regulations found at 49 C.F.R. Part 1111, except to the extent portions of those regulations are modified pursuant to waiver requests in this petition. NW and SRC do intend to file their direct testimony concurrently with such applications.

NW and SRC also request that the existing consolidation regulations, as modified pursuant to this petition, be applied to and govern all procedural aspects of the submissions of all other parties to the NW/SRC control proceeding. NW and SRC believe that it is essential that the existing regulations apply across the board to assure the Commission of comparable data and to assure the parties that all applications and other pleadings will be prepared and handled under the same rules.

To assure that all interested parties are fully aware of the requirements and procedures which will govern the NW/SRC control proceeding, NW and SRC have prepared a notice of the type required by Section 1111.6(B) of the

proposed regulations. This notice, which was filed on July 23, 1980, advised both of the proposed filing date of the NW/SRC application and of the fact that the existing regulations (as modified by Commission order) will govern all aspects of, and all other pleadings filed in, the proceeding. NW and SRC request that the Commission publish the notice promptly in the Federal Register.

NW and SRC's current preparations have led them to conclude that waiver of certain provisions of the existing regulations would be appropriate for the type of transaction NW and SRC propose. The waivers NW and SRC deem essential, and certain additional clarifications, are set forth below.

I. Waiver to Permit Submission of Data on a System Basis.

Numerous provisions of the regulations require submission of information for "applicants," which is defined as "all carriers with properties directly involved." 49 C.F.R. §1111.1(a), fn 1.

Southern Railway Company, which will be an applicant in the proposed transaction, is a Class I railroad and also controls three Class III railroads, and numerous terminal and other railroad companies (Appendix A). SRC and each of its consolidated companies are separate corporate entities, but the transportation functions of the companies are under

common management, and in most instances required reports to the Commission and to other regulatory agencies are submitted on a system basis.*

The validity, propriety, and accuracy of system reporting and accounting by SRC and its consolidated system lines have been substantiated by long usage. Southern Ry. Co. Purchase, 275 I.C.C. 724, 732 (Div. 4, 1950). Use of consolidated system accounting for all abandonments by SRC and its consolidated system companies was approved by the Commission in Finance Docket No. 28479, Southern Railway Company--Petition for Clarification or Waiver of Portions of the Regulations Governing Abandonment of Railroad Lines and Discontinuance of Service (49 C.F.R. Sections 1121.10-46) (order of Division 3, served August 2, 1977). Most recently, in Finance Docket No. 28961, Southern Railway Company, Eastern Kentucky Railway Company, and Western Florida Railway Company-Acquisition of Properties--Chessie System, Inc., and Seaboard Coast Line Industries, Inc., (decision of the Com-

* All railroad reports required by the Commission, with the sole exception of the R-1 and R-2 annual reports, are filed by SRC and its consolidated system lines on a consolidated system basis, not by individual railroads, and do not reflect individual railroad accounts. In addition, the quarterly Operating Statistics-A, -B, and -C reports, and the quarterly Revenue, Expense, and Income (RE&I) report, which summarizes information from annual R-1's and R-2's, are compiled and submitted on a consolidated system basis.

mission, served April 13, 1979), the Commission approved the use of SRC consolidated system data in preparation of an inconsistent application filed pursuant to Section 11345(c).

Norfolk and Western Railway Company, also an applicant in the proposed transaction, controls five Class III railroads, one terminal company, and other non-operating railroad companies (Appendix B).^{*} As in the case of SRC, each of these companies is a separate corporate entity, but the rail operations of each are effectively controlled by NW. For the year 1979, the gross operating revenues and expenses of all of these subsidiary companies constituted no more than 1.26 and 1.36 percent, respectively, of NW's gross operating revenues and expenses on a consolidated basis. The 1979 income from railway operations and the total assets of the subsidiaries amounted to 0.89 and 3.67 percent, respectively, of the NW system figures. Similarly, changes in railway employment, freight car fleets, revenue freight traffic information, and commodity revenue and tonnage on NW's subsidiary rail lines are minimal when compared to NW statistics and, furthermore, either are not readily retrievable or overlap NW data and thus cannot be added to NW's data without extensive manual processing. NW submits that exclusion of all data relating to these subsidiaries, except

^{*} Delaware & Hudson Railway Company is not included in Appendix B for reasons discussed herein.

to the extent that it is currently maintained on a consolidated basis, as in financial reporting, will not inhibit the Commission's evaluation of the NW/SRC proposal.

Delaware and Hudson Railway Company (D&H) will also fall within the definition of "applicant" in this proceeding because its stock is held by Dereco, Inc., a wholly-owned subsidiary of NW. However, the operations of D&H are not effectively controlled by NW, nor will NW, SRC, or their future holding company exercise control over D&H operations. Data with regard to D&H traffic and equipment is kept by D&H, not NW. Therefore, information with regard to D&H will be submitted separately from that for NW. D&H controls two Class III carriers* which, as in the case of NW, are a negligible part of the D&H system. For the year 1979, the gross operating revenues and expenses of D&H's subsidiary railroads equalled 1.86 and 1.68 percent, respectively, of D&H's gross operating revenues and expenses on a consolidated basis. Therefore, it is requested that NW be permitted to disregard these two subsidiaries in compiling the required data for D&H.

Because much of the data sought to be filed on a system basis is compiled by SRC only on a system basis,

* These are the Greenwich and Johnsonville Railway Company and the Napierville Junction Railway Company.

recreation of this data on an individual railroad basis would be extremely burdensome. This burden cannot be justified when submission of consolidated system data by SRC will result in a more accurate and complete application. A similarly unjustifiable burden would fall on NW and D&H if they were required to develop manually information on their subsidiary carriers which, in both cases, would have a very insignificant impact on the data for NW or D&H alone. Therefore, NW and SRC request a waiver to submit data on the bases indicated below for the following items and exhibits:

- §1111.1(d)(5) - Principal routes and terminals, principal points of interchange, main line and branch line mileage to be described separately for NW system, D&H system, and SRC system without differentiation by subsidiaries within these systems.
- §1111.1(d)(7) - Property values to be given for SRC on a consolidated system basis and for NW and D&H only.
- Exhibit 8 - Map to show, separately, NW system lines, D&H system lines, and SRC system lines without distinguishing individual subsidiary lines within these systems.
- Exhibit 10 - Impacts on railway labor, including information relating to pension plans, work changes, costs and savings, and rate of attrition, to be based upon consolidated system data, where so maintained, or if not so maintained in the case of NW and D&H, upon data for NW and D&H only.

- Exhibit 12 - Environmental information and calculations to be based upon consolidated system data, where so maintained, or if not so maintained in the case of NW and D&H, upon data for NW and D&H only.
- Exhibit 13 - Energy information and calculations to be based upon consolidated system data, where so maintained, or if not so maintained in the case of NW and D&H, upon data for NW and D&H only.
- Exhibit 14(i) - Density charts to be prepared for SRC on a consolidated system basis and for NW and D&H only.
- Exhibit 14(ii), Table A - Carload interchange data to be prepared for SRC on a consolidated system basis and for NW and D&H only.
- Exhibit 14(ii), Table B - State-to-state data to be provided for SRC on a consolidated system basis and for NW and D&H only.
- Exhibit 14(iii) - Carload origin and destination data to be given for SRC on a consolidated system basis and for NW and D&H only.
- Exhibit 15(i) - Freight car fleet to be shown for SRC on a consolidated system basis and for NW and D&H only.
- Exhibit 15(ii) - Revenue freight traffic to be shown for SRC on a consolidated system basis and for NW and D&H only.
- Exhibit 15(iii) - Commodity revenue data to be given for SRC on a consolidated system basis and for NW and D&H only.

- Exhibit 15(iv) - Commodity tonnage data to be given for SRC on a consolidated system basis and for NW and D&H only.
- Exhibit 16(i-vii) - Traffic study data to be given on consolidated system bases.
- Exhibit 17 - Operating plan to be developed on consolidated system bases.
- Exhibit 18(i-vi) - Balance sheets to be provided for NW on a consolidated system basis, for D&H on a consolidated system basis, for SRC on a consolidated system basis, and for the new holding company.*
- Exhibit 18(vii) - Pro forma balance sheets, if required, to be based on consolidated system bases.**
- Exhibit 19(i-vi) - Income statements to be provided for NW on a consolidated basis, for D&H on a consolidated system basis, for SRC on a consolidated system basis, and for the new holding company.***
- Exhibit 19(vii) - Pro forma income statements if required, to be based on consolidated system data.****
- Exhibit 19(viii) - Statement of sources and application of funds, if required, to be based upon consolidated system data.*****

* See waiver request VIII, pp. 26-27 for more detailed explanation.

** See waiver request IX, pp. 27-28 for more detailed explanation.

*** See waiver request VIII, pp. 26-27 for more detailed explanation.

**** See waiver request IX, pp. 27-28 for a more detailed explanation.

***** See waiver request X, pp. 28-29 for a more detailed explanation.

II. Clarification of the Meaning of the Term "Applicant".

A. Clarification that "Applicant"
Refers Only to the Initiating Parties.

As noted in waiver request I, the term "applicant" is defined in the consolidation regulations to encompass "all carriers with properties directly involved." 49 C.F.R. §1111.1(a), n.1. However, the first sentence in that definition states that "applicant" is used "as a general reference to persons initiating an application." NW and SRC believe that, particularly with regard to corporate data, the intent of the regulations is to require information only about initiating parties. To compile and submit such data for all of the numerous subsidiary carriers of the initiating parties, NW and SRC, and of D&H would be a considerable burden and would significantly increase the paperwork required for the control application.

NW and SRC request clarification that the term "applicant," as used in Section 1111.1(b) and (c), applies only to NW, SRC, and the new holding company, which are the initiating parties in this control transaction, and to D&H, which is operated separately from NW.

B. Clarification That The Term "Applicant" Does
Not Encompass Non-Consolidated Companies.

In addition to the consolidated system companies of NW, SRC and D&H, both NW and SRC have interests in

certain railroad companies which are operated independently of the NW or SRC systems. NW and SRC hold 50 percent or less of the stock of such companies, do not now exercise control over them, and have no intention of exercising control over any such companies after the control transaction is approved. The records of these companies are maintained separate and apart from NW and SRC consolidated system data. NW and SRC believe that bringing into this proceeding data concerning these carriers (other than identifying them in the response required by Section 1111.1(c)(8)) would serve no useful purpose and would substantially burden the record. Therefore, NW and SRC seek clarification that the term "applicant" does not encompass such non-controlled carriers.

III. Waiver to Permit Submission of Exhibit 14(i) in the Form of a Density Map and Explanatory List.

Exhibit 14(i) requires submission of a density chart showing principal lines, yards, terminals, station and common names, density in each direction by segment, and mileage by segment. Section 1111.2 (b)(1)(i) indicates that all of this data must be placed upon the face of the chart.

NW and SRC in prior consolidation proceedings have found that inclusion of all the required data on the face of the map often results in an illegible product. To make the

density chart more readable, SRC submitted as Exhibit A-14(i) in its recent application in Finance Docket No. 28961 both a density chart and supplemental explanatory list. NW followed a similar format in Finance Docket No. 29009 (Sub-No. 1) and related subnumbers. NW and SRC believe that Exhibit 14(i) in their control application would be more useful to the Commission and interested parties in the form of maps supported by explanatory lists.

NW and SRC seek waiver to permit filing of Exhibit 14(i) in the form of density maps showing graphically the density in each direction on line segments between given end points plus a detailed explanatory list containing for each segment the additional required information.

IV. Waiver to Permit Alphabetical Sequencing of Gateways in Exhibit A-14(ii), Tables A and B

Section 1111.2(b)(1)(ii) requires submission of detailed revenue carload interchange data and precisely prescribes the form in which such data shall be submitted. This NW/SRC waiver request does not address the substance of the material to be filed, but only the form of such submission.

Gateways are required to be submitted by geographic sequence from east to west. The existing NW, SRC and D&H rail systems cover states extending westward from the Atlantic coastline to Omaha, Nebraska, and also

northward from Florida and the Gulf Coast to Canada. To list gateways from east to west in any sequence which would be useful to a person in need of information from Exhibit A-14(ii), NW, SRC and D&H would have to construct artificially a grid over each of their systems by which gateways could be divided. Sequencing of the gateways would require many hours of completely manual effort, because the computerized records from which the substantive data will be drawn are not in geographical sequence.

To avoid the considerable burden of this strictly manual process and to provide the Commission and other interested parties a simpler and more useful exhibit, NW, SRC and D&H propose to sequence gateways in Exhibit A-14(ii) alphabetically by state and alphabetically by gateways within each state. A similar waiver was granted SRC in Finance Docket No. 28961.

- V. Waiver to Permit Submission of Two Copies Only of Exhibit A-14(ii), Table B, and to be Relieved of the Requirement That Exhibit A-14(ii), Table B Be Served.

Section 1111.4(a)(3) states that all applications filed with the Commission or served upon parties shall contain all exhibits. However, by waiver regularly sought and granted in recent consolidation proceedings (including Finance Docket Nos. 28583, 28905, and 28961), the Commis-

sion has recognized the considerable size of Exhibit 14(ii), Table B, the major expense involved in producing and serving multiple copies of this exhibit, the limited interest in this exhibit among parties to the proceeding, and the significant burden upon applicants to reproduce and serve multiple copies of this exhibit. Under these circumstances the Commission has in the past required that only two copies of Exhibit A-14(ii), Table B, be filed with the Commission and has also permitted deletion of this exhibit from service copies of the application.

NW and SRC request that Section 1111.4(a)(3) be waived to the extent necessary to permit filing only two copies of Exhibit A-14(ii), Table B, with the Commission, to permit the deletion of Exhibit A-14(ii), Table B, from all service and other copies of the application, and to require NW, SRC and D&H to make available at each corporate headquarters copies of Exhibit A-14(ii), Table B, upon request.

VI. Waiver to Permit Submission of Certain Historical Data Only For 1976, 1977, 1978, and 1979.

Exhibit 15 requires the submission of certain historical equipment and traffic data for 10 calendar years prior to the filing of an application. Similarly, employee attrition data under Exhibit 10(vi) must be for 6 years

prior to filing. The counterparts of Exhibit 15 in the proposed regulations (Exhibits 21, 22, 23, and 24) reduce the requirement to cover only the first, fifth, and tenth years preceding filing.

In the opinion of NW and SRC, the 10 year data requirement of Section 1111.2(b)(2) results in preparation and submission of an enormous amount of data which is rarely used, as the proposed regulations recognize. On the other hand, first, fifth and tenth year data does not provide the Commission with a particularly useful basis for evaluating the future effects of the proposed control transaction. NW and SRC suggest that more current historical data is a more realistic basis upon which to project the future impact of NW and SRC under common control.

NW and SRC therefore request that the Commission permit submission of Exhibits 10(vi) and 15 containing data for calendar years 1976, 1977, 1978, and 1979. NW and SRC have chosen the most recent four year period because calendar year 1978 data is not representative for NW, because such data was distorted by two major strikes during that year.

VII. Waiver and Clarification of Certain Requirements of Exhibit A-16, Traffic Study.

Section 1111.2(b)(3) of the regulations sets forth in considerable detail the requirements for a rail traffic

diversion study, Exhibit A-16. Because of the large number of shipments potentially involved in such a study, the long time required to do the study, and the dependence of numerous other exhibits upon the results of such a study, NW and SRC have already begun the preparations for their rail diversion study. Although these preliminary efforts conform generally with Section 1111.2(b)(3), the need for waiver or clarification has become obvious.

A. Clarification That Certain Assumptions Made
By NW and SRS Evaluators Are Appropriate

As required by Section 1111.2(b)(3)(i), the NW, SRC and D&H data bases will cover "the latest full calendar year," in this instance calendar year 1979. However, neither subparagraph (i) of Section 1111.2(b)(3) nor any other paragraph in that section requires that marketing, operating, or any other conditions which prevailed during the calendar year chosen be adopted by the traffic evaluators as assumptions governing their diversion judgments. Indeed, the regulations are silent as to particular assumptions which may or should be made, leaving the choice thereof to the applicants.

NW and SRC believe this flexibility with regard to assumptions is essential, considering the unavoidable lag between the study year and the filing of an application, and in

light of the potential for significant developments during that time. Such developments during and subsequent to calendar year 1979, with which NW and SRC must deal, clearly demonstrate the necessity of applicants' developing and articulating the assumptions peculiar to their traffic study.

To assure that their traffic study is not merely an artificial construction bearing no resemblance to present realities upon which their decision to join under common control was made, NW and SRC have made, in their traffic studies and resulting operating plan, certain assumptions with regard to the structure of and constraints upon the railroad industry. These assumptions were discussed with members of the Commission's staff, who suggested that the Commission be advised in advance of the assumptions.

Because preparations for the rail diversion study were, of necessity, begun immediately upon agreement by the managements of NW and SRC to go forward with the control transaction, NW and SRC decided to prepare two versions of the rail diversion study. The first version will include the following assumptions with regard to industry structure and regulatory constraints:

- 1) 1979 rates and routes are in effect, subject to the following modifications:
 - a) The most direct NW/SRC routes are available;
 - b) Traffic protective conditions will not be imposed by the Commission;
 - c) Carriers' known and existing routing practices will be considered.
- 2) The structure of the railroad industry is as it was during 1979, subject to the following modifications:
 - a) NW, SRC and the system lines of each are operating under common control with an efficient Cincinnati interchange;
 - b) D&H will retain traffic and operating independence;
 - c) The Burlington Northern/Frisco merger, as approved by the Commission, has been consummated;
 - d) Grand Trunk Western has acquired control of the Detroit, Toledo & Ironton but has no ownership interest in the Detroit and Toledo Shore Line;
 - e) Rock Island is no longer operating, but certain Rock Island properties are being operated pursuant to temporary authority orders in effect on June 15, 1980 (including operation by Cotton Belt on the Santa Rosa-St. Louis line);
 - f) Of those Milwaukee lines no longer operated by the Trustee, certain lines are being operated pursuant to temporary authority orders in effect on June 15, 1980.

The second version of the NW/SRC rail diversion study will be based upon the assumptions listed above, plus the following additional assumptions:

- 1) The Chessie System/Seaboard Coast Line consolidation has been approved by the Commission and has been consummated.
- 2) NW has obtained trackage rights between Hagerstown, MD, and Connellsville, PA; and between Lynchburg and Glasgow, VA.
- 3) D&H has obtained trackage rights between Lurgan, PA, and Hagerstown, MD.

NW and SRC believe strongly that a traffic study which considers only 1979 circumstances and ignores subsequent developments would not provide the Commission and interested parties with a realistic basis upon which to evaluate the effects of the NW/SRC control transaction. Therefore, NW and SRC have made every effort to develop a traffic study which reflects their judgment as to the structural and regulatory climate likely to exist at the time the Commission considers their control application.

Both versions of the rail diversion study will be progressed by NW and SRC, and the other application exhibits affected thereby (including the operating plan) will be predicated upon the more appropriate version of the two. Therefore, should the Commission approve the Chessie/Seaboard

Coast Line consolidation, Exhibit A-17 to the NW/SRC application would be premised on the second version of the traffic study. Similarly, should the Chessie/Seaboard Coast Line transaction be disapproved by the Commission, version one of the traffic study would be adopted.

NW and SRC seek clarification that Section 1111.2(b)(3) permits applicants sufficient flexibility to recognize, in making their traffic diversion estimates, structural and regulatory developments subsequent to the calendar year of their data bases and to carry the effects of such developments forward into their operating plan.

B. Clarification that Certain Deletions from the Traffic Study Data Base Either Prior to or Following Sample Selection Are Permissible

The data base for the NW/SRC rail diversion study includes the entire 1979 traffic universes of NW, SRC and D&H, arranged in proper hierarchy to eliminate duplication. This data base includes millions of individual shipments.

Shipments for which NW, SRC or D&H system lines provided only a switch movement and did not participate in the line haul are not included in the NW, SRC or D&H data bases. Complete data necessary for evaluation of such movements is not kept by NW, SRC or D&H, and to obtain the complete data would involve a manual process requiring

cooperation from other roads which could not be completed without considerable delay to the entire traffic study and application. To the extent that traffic handled by NW, SRC or D&H system lines as a switch movement only could be diverted by NW, SRC or D&H system lines for a future line haul movement, this data would be in the traffic base of the carrier now enjoying the line haul and would appear most logically in that carrier's traffic diversion study.

In addition, both SRC and NW systems handle a small amount of U.S. Postal Service traffic under negotiated contracts. Because of the unique circumstances of such government traffic, it is not susceptible to classic diversion study analysis.

Finally, NW and SRC know that the traffic sample will include a considerable number of movements which can be identified by computer as : (1) geographically irrelevant to the control transaction; (2) entirely local to NW, SRC or D&H systems; or (3) interlined only among NW, SRC and D&H system lines. NW and SRC propose to delete such traffic from either their data base or their sample prior to the evaluation process by which possible gain or loss will be estimated.

NW and SRC seek clarification that Section 1111.2(b)(3) will permit exclusion from the traffic base,

prior to sampling, of shipments for which NW, SRC or D&H system lines served only as the switching carrier, of shipments which were local to NW, SRC or D&H system lines, or of shipments which were interlined only among NW, SRC or D&H system lines. In addition, NW and SRC request clarification that exclusion, following sampling and prior to the evaluation process, of complete study movement sheets for U.S. Postal Service traffic and traffic which can be identified by computer as geographically irrelevant to the consolidation is permitted under Section 1111.2(b)(3). NW and SRC would prepare, and have available for inspection at their offices, a computer printout summarizing such omitted movements.* Thus, should the Commission or an interested party request information about excluded U.S. Postal Service traffic or movements excluded as geographically unrelated, NW and SRC will possess sufficient data to identify such movements.

C. Clarification That the Expanded Gain or Loss
Need Not Be Provided on the Study Movement
Sheets

Section 1111.2(b)(3) does not prescribe the format or contents for the study movement sheets to be prepared and

* The computer printout will contain for each movement the following: car initial and number, waybill date and number, origin and destination, origin and destination road, STCC code, off-junction and connecting road, on-junction and connecting road.

submitted for each sample movement. However, proposed Section 1111.2(H)(3) and Appendix C to the November 1979 proposed regulations did reveal the Commission's thinking about material needed on an SMS. NW and SRC are prepared to include on each SMS all of the information which the Commission has most recently indicated it needs, with one exception.

NW and SRC intend to provide for each study movement the sample gain or loss for NW, SRC and D&H system lines and for all connecting lines. However, the SMS will show the expansion factor for the study movement, not the expanded gain or loss. The format of the SMS which NW and SRC have prepared will not permit inclusion of both sample and expanded revenue for each carrier. Furthermore, expansion from sample to expanded revenue is a manual process which cannot be computerized for entry on the SMS. Therefore, NW and SRC seek waiver of the requirement that expanded revenue be entered manually on each SMS and propose in the alternative to provide on each SMS the gain or loss for each affected road for that sample movement plus the expansion factor for that sample movement as provided by computer.

D. Clarification That an Estimate of Costs and Net Revenue Gain or Loss Are Required Only for NW, SRC and D&H.

Section 1111.2(b)(3)(viii) requires submission of gross revenue gains or losses, estimated cost of handling

traffic gained or lost, and net revenue gain or loss. As noted in waiver request VII C above, each SMS will show the estimated gross revenue gain or loss for each affected road. NW and SRC will have the computer capability to summarize and expand this data by carrier. NW and SRC also intend to cost each diverted movement and to submit the resulting net revenue effects upon NW, SRC and D&H.

However, NW and SRC lack access to the data necessary to determine the costs of other roads and to make net revenue calculations for those roads. NW and SRC seek clarification that Section 1111.2(b)(3)(viii) recognizes the unavailability of such information and requires costing and submission of net revenues only for NW, SRC and D&H.

E. Waiver to Permit Filing With the Commission of Only the Study Movement Sheets.

Section 1111.2(b)(3)(ii) requires that two copies of an abstract, containing all SMS's and other information upon which diversion evaluations were based, be filed with the Commission. Undoubtedly in recognition of the enormous bulk of the abstracts which have been filed with the Commission in recent consolidation proceedings, Section 1111.3(H)(3) of the November 1979 proposed regulations requires that only SMS's be filed with the Commission and that all other material relied upon in the evaluation process, including

waybills, be kept by applicants as workpapers. NW and SRC believe that this provision in the proposed regulations is a laudable improvement. NW and SRC request that Section 1111.2(b)(3)(ii) be waived to the extent necessary to permit NW and SRC to submit with their application two copies of the study movement sheets only, with waybills and/or any other information sources relied upon in making individual evaluations to be made available as workpapers.

VIII. Waiver of the Requirement That Balance Sheets and Income Statements Be Submitted on a Corporate Entity Basis

As a result of the requirements in Exhibits 18(i-vi) and 19(i-vi) that balance sheets and income statements be submitted on both corporate entity and consolidated bases, NW, SRC and D&H would be required to prepare more than 85 separate balance sheets and more than 255 separate income statements for themselves and their many carrier and non-carrier subsidiaries. Most of these financial statements would be for small NW, SRC or D&H affiliates not directly involved in the control transaction. NW, SRC and D&H each currently prepare balance sheets and income statements on a consolidated system basis.*

* Commencing with the preparation of financial statements for the year 1979, D&H was eliminated from NW's consolidated statements.

To require preparation of financial statements for each subsidiary of these carriers would divert valuable resources from ordinary railroad business and from preparation of other portions of the control application, would greatly expand the size of the NW/SRC application contrary to the clear intent of the Commission, and would provide little additional useful information to the Commission.

NW and SRC request that the requirements of Exhibits 18(i-vi) and 19(i-vi) be waived and that NW and SRC be permitted to submit balance sheets and income statements for 1) Norfolk and Western Railway Company and its subsidiaries on a consolidated system basis, 2) Southern Railway Company and its subsidiaries on a consolidated basis, 3) Delaware and Hudson Railway Company and its subsidiaries on a consolidated basis, and 4) the new NW/SRC holding company on a corporate entity basis as of the date of its formation. If this waiver is denied, NW and SRC request that, with respect to their subsidiary companies, they be required to provide balance sheets and income statements only for operating railroad subsidiaries and that calendar year 1979 be treated as the most current period, waiving the requirement that the most current data be not more than 6 months old.

**IX. Clarification That Pro Forma Balance Sheets and
Income Statements Are Not Required for the NW/SRC
Transaction**

Pro forma balance sheets and income statements are to be submitted as Exhibits 18(vii) and 19(vii) only "where the transaction involves a proceeding other than a control." Section 1111.2(b)(5)(vii) and Section 1111.2(b)(6)(vii). Norfolk and Western Railway Company, Southern Railway Company, Delaware and Hudson Railway Company, and all of their subsidiaries will remain as separate corporate entities, to be controlled by a new holding company. NW and SRC believe that the proposed transaction constitutes a control proceeding and seek confirmation that their interpretation is correct.

In lieu of pro forma balance sheets, pro forma income statements, and forecasts of sources and application of funds,* NW and SRC plan to submit a statement of benefits summarizing the benefits expected to result from the control transaction.

* See waiver request X, pp. 28-29.

X. Clarification That Forecasts Of Source and Application of Funds Are Not Required For a Control Application Or in the Alternative May be Submitted on a Consolidated Basis.

As noted in waiver request IX, supra, Sections 1111.2(b) (5)(vii) and 1111.2(B)(6)(vii) eliminate the requirements that pro forma balance sheets and pro forma income statements be submitted in control transactions. Section 1111.2(b)(6)(vii) is not consistent with these prior sections because it does not create a similar exception for control transactions and, therefore, does not recognize that a pro forma statement of source and application of funds is derived from pro forma balance sheets and income statements and is no more appropriate or informative in a control transaction than are the other pro forma statements.

NW and SRC seek clarification that submission in Exhibit 19(viii) of forecasts of source and application of funds is not required in a control transaction. In the alternative NW and SRC request clarification that Exhibit 19(viii) may contain a statement of source and application of funds for 1979 (the most current year) for NW, for SRC and for D&H, each on a consolidated basis, and for the new holding company, and may provide a pro forma statement of source and application of funds only for the holding company on a consolidated basis. Submission of the pro forma state-

ment on a consolidated holding company basis is essential because allocation of certain benefits among NW, SRC and D&H would in many areas be impossible and in others would be artificial and would inaccurately present the effects of the consolidation.

XII. Waiver of Certain Requirements of 49 C.F.R. Part 1120 Governing Applications for Construction and Operation of Railroad Lines

NW and SRC are currently in the preliminary stages of developing the operating plan for the rail carriers to be commonly controlled. Early studies indicate that one or more projects may require filing an application under Section 10901 for authority to construct and operate certain rail lines. If such applications are needed, NW and SRC read Section 1111.4(a)(5) to require that such applications be filed concurrently with the control application.

As the Commission is aware, the construction regulations at 49 C.F.R. Part 1120 have not been recently revised. As a result, certain of those regulations appear to conflict with the consolidation regulations, to overlap the consolidation regulations, or to make strict compliance with both the consolidation and construction regulations virtually impossible. Therefore, NW and SRC seek the following waivers of 49 C.F.R. Part 1120.

A. Waiver to Permit Incorporation by Reference
of Data in the Control Application.

Much of the information sought under Part 1120 will already be submitted, in identical or similar form, in the control application. NW and SRC seek waiver of the following sections of Part 1120 to permit incorporation by reference of substantially similar data in the control application:

§1120.1(c)	- incorporation
§1120.6(1)	- incorporation
§1120.6(3)	- control
§1120.6(4)	- common control
§1120.7(E)	- related costs
§1120.7(F)	- financial statements
§1120.7(G)	- opinion of counsel

B. Waiver to Permit Deletion of Certain Data
Required by 49 C.F.R. Part 1120

The projects contemplated by NW and SRC which could require applications under §10901 are not extensions of railroad lines which will permit NW and SRC to reach new markets or customers but instead are projects which will permit more efficient connection between NW and SRC's existing operations. These efficiencies and related operating changes will be explained in the operating plan, Exhibit A-17 to the control application. For this reason many of the

requirements of Part 1120 appear to NW and SRC to be irrelevant to the applications they might file or to be extremely burdensome. NW and SRC request that the following sections be entirely waived:

- §1120.6(12) - nearby but unrelated municipalities
- §1120.6(13) - rail service to nearby but unrelated municipalities
- §1120.6(15) - motor carrier service
- §1120.6(16) - character of adjacent territory
- §1120.6(17) - use of adjacent territory
- §1120.6(18) - nearby industries
- §1120.6(19) - facts about nearby industries
- §1120.6(20) - service to nearby industries
- §1120.6(21) - chief support of track to be constructed
- §1120.6(22) - beneficiaries of track to be constructed
- §1120.6(24) - volume and economies of interchange
- §1120.6(25) - service for existing interchange traffic
- §1120.6(29) - character and volume of anticipated traffic
- §1120.6(30) - revenues and expenses related to anticipated traffic
- §1120.6(31) - diversion estimates
- §1120.6(35) - increase in charges to road and equipment accounts
- §1120.7(F) - income statements prior to those required in proposed Exhibit 34.

C. Waiver of Certain Procedural Requirements of Part 1120

NW and SRC believe that the procedural requirements covering construction and operation applications are not consistent with the procedural requirements governing their control application. To permit filing complete construction applications and supporting testimony at the same time as the control application, NW and SRC request the following procedural waivers:

Section 1120.2(c) - Notice

Permit the Commission's staff to approve the notice of filing prior to the filing of the application. NW and SRC will serve the notice and the construction application upon the required state officials at the time the construction application is filed with the Commission. The notice will provide that state officials have the same time to advise of their intent to participate in the construction application as they have with regard to the control application (45 days from Federal Register publication of the notice of acceptance of the application).

§1120.2(d) - Return to Questionnaire

Permit the return to questionnaire to be included within and filed and served with the application itself.

Order that any construction and operation applications directly related to the NW/SRC control application be handled in the same proceeding as that application, not under separate proceedings with additional, cumulative evidence.

Any construction and operation applications which NW and SRC might file with their control application will be an integral part of the control transaction and subject to evaluation only as a part of that transaction. NW and SRC believe that the above waivers are necessary to permit coordinated filing and consideration of these related applications.

THOMAS M. McMAHON
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603

JAMES L. TAPLEY
R. ALLAN WIMBISH
PETER S. CRAIG
NANCY S. FLEISCHMAN
DAVID J. KAUFMAN
Southern Railway Company
920 15th Street, N.W.
Washington, D.C. 20005

Respectfully submitted,

Richard J. Flynn

RICHARD J. FLYNN
JOHN E. HALEY
MICHAEL A. NEMEROFF
G. PAUL MOATES
TERENCE M. HYNES
Sidley & Austin
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006

JOHN S. SHANNON
DONALD M. TOLMIE
WILLIAM C. WOOLDRIDGE
HENRY D. LIGHT
ANGELICA D. LLOYD
Norfolk and Western
Railway Company
8 North Jefferson Street
Roanoke, Virginia 24042

Dated: July 24, 1980

SOUTHERN RAILWAY COMPANY'S
CONSOLIDATED SUBSIDIARIES

CLASS I

The Alabama Great Southern Railroad Company
Central of Georgia Railroad Company
The Cincinnati, New Orleans and Texas Pacific Railroad Company

CLASS II

Georgia Southern and Florida Railway Company
Norfolk Southern Railway Company

CLASS III

Atlantic and East Carolina Railway Company
Birmingham Terminal Company
Camp Lejeune Railroad Company
Chattanooga Station Company
The Georgia Northern Railway Company
Interstate Railroad Company
Live Oak, Perry and South Georgia Railway Company
Louisiana Southern Railway Company
New Orleans Terminal Company
St. Johns River Terminal Company
State University Railroad Company (54%)
Tennessee, Alabama & Georgia Railway Company
Tennessee Railway Company

OTHER COMPANIES

Airforce Pipeline, Inc.
The Atlanta and Charlotte Air Line Railway Company
Atlanta Terminal Company
Blue Ridge Railway Company
Charlotte-Southern Corporation
Chattanooga Terminal Railway Company
Danville and Western Railway Company
Durham and South Carolina Railroad Company
Elberton Southern Railway Company
The Georgia Midland Railway Company

High Point, Randleman, Asheboro and Southern Railroad
Company (86%)
Macon Terminal Company
Memphis and Charleston Railway Company
Mobile and Birmingham Railroad Company (78%)
Norfolk Southern Industrial Development Corp.
The North Carolina Midland Railroad Company (97%)
Southern Region Motor Transport, Inc.
The South Western Rail Road Company (99.8%)
Transylvania Railroad Company (97%)
Virginia and Southwestern Railway Company
Yadkin Railroad Company (74%)

NOTE: Control 100% or as indicated

NORFOLK AND WESTERN RAILWAY
COMPANY'S RAILROAD SUBSIDIARIES

CLASS III

The Akron, Canton & Youngstown Railroad Company
Chesapeake Western Railway
The Lorain & West Virginia Railway Company
New Jersey, Indiana & Illinois Railroad Company
Norfolk, Franklin and Danville Railway Company

TERMINAL COMPANY

The Lake Erie and Fort Wayne Railroad Company

OTHER RAILROAD COMPANIES

The Scioto Valley and New England Railroad Company
The Toledo Belt Railway Company
Wabash Railroad Company
The Wheeling and Lake Erie Railway Company

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36522

NORFOLK SOUTHERN RAILWAY COMPANY – OPENING STATEMENT

EXHIBIT B

Dated: March 1, 1989

NORFOLK AND PORTSMOUTH BELT LINE
RAILROAD COMPANY

NPBL not made a party to this
Agreement - Copy of Supplemental
Agreement between Proprietary Companies
of the Belt Line) AS INFORMATION

AMONG

CSX TRANSPORTATION

and

NORFOLK AND WESTERN

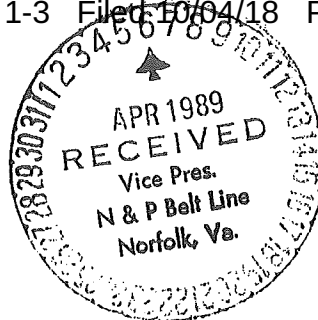
and

SOUTHERN RAILWAY

Copy of Supplemental Agreement
between Proprietary Companies, relating
to the NPBL Operating Agreement No. 267
dated July 7, 1897, and No. 267 dated
February 1, 1924.



Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-2191



Writer's Direct Dial Number

(804) 629-2818

Norfolk, VA - April 5, 1989

Mr. J. M. Donnelly
Vice President, Secretary and Comptroller
Norfolk and Portsmouth Belt Line Railroad Company
P. O. Box 3669
Norfolk, VA 23514

Dear Mr. Donnelly:

Enclosed for your information is a copy of the Supplemental Agreement dated March 1, 1989, among CSXT, Norfolk and Western, and Southern Railway, relating to the NPBL operating agreement dated July 7, 1897. The parties have agreed that, notwithstanding Article Fourth of the 1897 agreement, CSXT will continue to have the right to appoint two representatives to the NPBL Board of Directors, and NW and Southern will have the right to appoint a total of three representatives.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'J. Gary Lane'.

J. Gary Lane
General Attorney

Enclosure

CC L.W. FISHER

SUPPLEMENTAL AGREEMENT

THIS SUPPLEMENTAL AGREEMENT, dated as of March 1, 1989, is between CSX TRANSPORTATION, INC., a Virginia corporation ("CSX"), NORFOLK AND WESTERN RAILWAY COMPANY, a Virginia corporation ("NW"), and SOUTHERN RAILWAY COMPANY, a Virginia corporation ("SR").

WITNESSETH:

WHEREAS, CSX owns 216 shares of the common stock of Norfolk and Portsmouth Belt Line Railroad Company, a Virginia corporation ("NPBL");

WHEREAS, NW and SR each owns 144 shares of the common stock of NPBL;

WHEREAS, CSX, on the one hand, and NW and SR, on the other hand (NW and SR together being hereinafter referred to as "NW/SR"), are successors in interest to railroad companies that were parties to an Agreement dated July 7, 1897 (the "NPBL Agreement"), relating to the ownership and operation of NPBL;

WHEREAS, Article Fourth of the NPBL Agreement provides that the number of directors of NPBL shall always be fixed to correspond to the number of companies owning stock in NPBL;

WHEREAS, as of the date hereof, two of the directors of NPBL are representatives of CSX and three of the directors are representatives of NW/SR, and the parties hereto desire to retain such representation on the board of directors of NPBL ("NPBL Board") notwithstanding the provisions of Article Fourth of the NPBL Agreement;

NOW, THEREFORE, the parties hereto agree as follows:

1. Notwithstanding the first sentence of Article Fourth of the NPBL Agreement, CSX shall have the right to appoint two representatives to the NPBL Board, and NW/SR shall have the right to appoint three representatives to the NPBL Board.

2. Nothing herein shall be deemed to amend, alter, or affect any other provision of the NPBL Agreement.

-2-

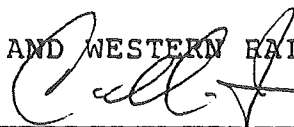
IN WITNESS WHEREOF, the parties have caused this Supplemental Agreement to be executed by their duly authorized officers.

CSX TRANSPORTATION, INC.

By: 

~~Vice President~~ Treasurer

NORFOLK AND WESTERN RAILWAY COMPANY

By: 

Vice President

SOUTHERN RAILWAY COMPANY

By: 

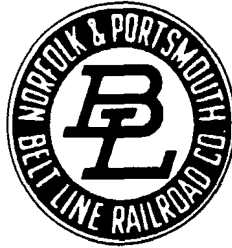
Vice President

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36522

NORFOLK SOUTHERN RAILWAY COMPANY – OPENING STATEMENT

EXHIBIT C



BY-LAWS

OF THE

NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY

AMENDED APRIL 10, 1996

B Y - L A W S

of the

NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY

ARTICLE FIRST

The principal office of the Company shall be in the City of Portsmouth, Virginia.

ARTICLE SECOND

The annual meeting of the Stockholders for election of Directors and for the transaction of such other business as may come before the meeting shall be held on the second Wednesday of April in each year hereafter.

Special meetings of the Stockholders shall be held whenever called by the President, the Board of Directors or the holders of not less than one-tenth of all the shares of stock entitled to vote at the meeting, as provided in §13.1-25 of the Code of Virginia of 1950 as amended. All meetings of the Stockholders shall be held at the office of the Company in Portsmouth, Virginia or at such place as may be designated by the Board of Directors or by the party or parties who may call a special meeting as hereinabove provided.

Notice of annual and special meetings of the Stockholders shall be given in the manner provided by the laws of the State of Virginia.

At any meeting of the Stockholders each shareholder shall be entitled to one vote for each share of stock standing in its name on the books of the Company and may cast such vote in person or by proxy.

ARTICLE THIRD

The Board of Directors shall consist of six voting members and one non-voting member who shall be elected by the Stockholders at this meeting and at all annual meetings thereafter.

Any vacancy occurring in the Board of Directors between elections of the Stockholders shall be filled by the remaining voting members of the Board at their first meeting after the vacancy shall have occurred.

Meetings of the Board of Directors shall be called by the Secretary, on order of the President, or at the request, in writing, of two or more voting members of the Board.

Four voting members of the Board of Directors shall constitute a quorum for the transaction of business.

The Directors shall continue in office until their successors have been elected and duly qualify.

The President of the Company shall preside at meetings of the Board of Directors and in his absence the Directors shall elect a President pro tem.

ARTICLE FOURTH

At their first meeting after their election by the Stockholders, the Board of Directors shall elect from their own number a President and General Manager and shall appoint a Vice-President, a Secretary and Comptroller and a Treasurer. The Board may then, or at any time, appoint an Assistant Secretary and an Assistant Treasurer, and such subordinate officers as they see fit. All the said officers shall hold their offices during the pleasure of the Board.

ARTICLE FIFTH

The President shall have the general supervision and direction of all the Company's activities, preside at all meetings of the Stockholders or Directors and perform such acts in the name of the Company as he may be authorized by the Directors to do and such other duties as generally are discharged by a President.

ARTICLE SIXTH

The Vice-President shall act for the President in his absence and perform such other duties as may from time to time be assigned by the President or Directors.

ARTICLE SEVENTH

The Secretary and Comptroller shall be present at the meetings of the Board of Directors and shall keep the minutes of the same. He shall keep the stock and transfer ledgers and issue new certificates of stock.

He shall also be the custodian of the corporate seal of the Company, and shall perform all such other duties as appertain to the office of Secretary. He shall have charge of the general accounting records of the Company and shall audit the accounts of the Treasurer monthly. He shall see that all accounts of the Company are promptly settled and shall perform such other duties as appertain to the office of Comptroller.

ARTICLE EIGHTH

The Treasurer shall be the custodian of all moneys and securities of the Company. He shall keep accurate accounts of all receipts and disbursements and his books shall at all times be open to the inspection of Directors, the President, the Vice President and the Secretary and Comptroller. Before entering upon the duties of his office the Treasurer shall give a bond in the sum of \$25,000, with sureties to be approved by the Board of Directors, for the faithful discharge of his duties. Said bonds shall be filed with the President.

ARTICLE NINTH

All agents of the Company who may receive or disburse moneys on account of the Company shall give bonds, to be approved by the Board of Directors, in such sums as may be required by the Board of Directors, and all such bonds shall, when approved, be filed with the President.

ARTICLE TENTH

All deeds, bonds, mortgages, and other instruments required to be under the seal of the Company shall be executed by the President, or Vice-President, in the name of the Company, and attested by the Secretary, and have the seal of the Company affixed.

ARTICLE ELEVENTH

The Capital Stock of the Company is transferable only on the books of the Company in person or by attorney upon surrender of certificate, and no transfer of the same shall be made to any other person or persons, corporation or corporations until the other owners of the stock shall have first been given the right to purchase the same in an amount pro rata to the amount of stock held by each, and at a price not to exceed what may be offered by others. Notice shall be given to the President and Board of Directors of this Company of the desire of any shareholder to sell its stock, the remaining stockholders to have thirty (30) days from the delivery of such notice within which to purchase the same under the terms set forth. The certificates of stock to be issued by the Company shall provide that the same are transferable only upon these conditions.

ARTICLE TWELFTH

No other locomotives than those of the Company shall be allowed to use its tracks, excepting under such rules and regulations as may be established by the President, and the President shall immediately report to each member of the Board any consent that may be given by him under this by-law for the use of the tracks by other locomotives, and any such arrangement shall be subject to confirmation or rejection by the Board at any subsequent meeting.

ARTICLE THIRTEENTH

These by-laws may be amended at any annual meeting of the Stockholders or at any special meeting of the Stockholders called for the purpose.

Original By-Laws adopted by Stockholders July 28, 1897.

Amendments made as follows:

ARTICLE FIRST: April 8, 1987

ARTICLE SECOND: April 2, 1930
April 7, 1938
April 8, 1959
April 11, 1973
April 10, 1996

ARTICLE THIRD: April 7, 1911
April 8, 1942
April 10, 1946
April 13, 1960
April 10, 1968
April 10, 1974
April 12, 1978
April 11, 1979
April 8, 1981
April 8, 1987
April 10, 1996

ARTICLE FOURTH: April 8, 1942
April 10, 1946
April 13, 1960
April 12, 1972

ARTICLE FIFTH: April 4, 1917
April 3, 1929
April 8, 1942
April 14, 1943
Repealed April 13, 1949
New Article Fifth adopted April 13, 1960

ARTICLE SIXTH: April 8, 1942
April 13, 1960

ARTICLE SEVENTH: April 13, 1960
April 12, 1972

ARTICLE EIGHTH: April 13, 1960
April 12, 1972

ARTICLE NINTH: April 13, 1960

ARTICLE THIRTEENTH: April 8, 1959

CERTIFICATE OF SERVICE

I hereby certify that a true copy of Norfolk Southern Railway Company's ("NSR") Opening Statement in the above-captioned proceeding was served by first-class mail, postage prepaid, or by a more expeditious manner, this 23rd day of September 2021, on all Parties of Record.

/s/ Crystal M. Zorbaugh
Crystal M. Zorbaugh
Attorney for Norfolk Southern Railway Company