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VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

Re: **Docket No. FD 36522**
Norfolk Southern Railway Company --
Petition for Declaratory Order

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is the **Reply Statement of Norfolk and Portsmouth Belt Line Railroad Company**, dated October 25, 2021.

If you have any questions regarding this filing, please feel free to contact me.
Thank you for your assistance on this matter. Kind regards.

Respectfully submitted,

/s/ *Thomas J. Litwiler*

Thomas J. Litwiler
Attorney for Norfolk and Portsmouth
Belt Line Railroad Company

TJL:tl

Attachment

cc: Parties on Certificate of Service

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36522

NORFOLK SOUTHERN RAILWAY COMPANY --
PETITION FOR DECLARATORY ORDER

**REPLY STATEMENT OF
NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY**

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**ATTORNEYS FOR
NORFOLK AND PORTSMOUTH BELT
LINE RAILROAD COMPANY**

Dated: October 25, 2021

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36522

NORFOLK SOUTHERN RAILWAY COMPANY --
PETITION FOR DECLARATORY ORDER

**REPLY STATEMENT OF
NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY**

Norfolk and Portsmouth Belt Line Railroad Company (“NPBL”) hereby replies to the opening statements in this proceeding submitted by CSX Transportation, Inc. (“CSXT”) and Norfolk Southern Railway Company (“NSR”).

CSXT’s Opening Statement, in particular, is noteworthy for what it avoids addressing. Specifically, CSXT never specifies whether NPBL is, in fact, controlled by NSR, which has had (either directly or through its parent, Norfolk Southern Corporation (“NS”)) a 57.14% ownership interest in NPBL for almost 40 years. *E.g.*, CSXT Opening Statement at 11 (referring to NSR’s “purported control of NSR”); *Id.* at 26 (referring to NPBL as “supposedly controlled by NSR”). Instead, CSXT appears to have purposely limited its focus strictly to asserting that, in the 1982 *NS-Control* proceeding,¹ no such NPBL control authority was conveyed, and thus no antitrust immunity would have attached to such control under former 49 U.S.C. § 11341 (now 49 U.S.C. § 11321), an argument that CSXT offers insufficient evidence to prove, as is discussed below.

Taken to its logical conclusion, CSXT’s argument that NS failed to seek and obtain Interstate Commerce Commission (“ICC”) authorization in 1982 (and its presentation of entirely

¹ *Norfolk Southern Corp. – Control – Norfolk & Western Ry. Co.*, 366 I.C.C. 171 (1982) (“*NS-Control*”).

circumstantial evidence intended to reinforce that assertion)² would mean that NS has for decades exercised unauthorized control of NPBL in violation of the Interstate Commerce Act. CSXT Opening Statement at 4 (“The statute is crystal clear that a railroad seeking to control another railroad must ask the Board (previously the Commission) for control authority and cannot assert control over another railroad until such authority is granted. See 49 U.S.C. § 11323.”). Tellingly, CSXT avoids any such discussion of unauthorized control, despite overwhelming evidence that control exists, and has been exercised – without CSXT objection (until now) – since shortly after the issuance of *NS-Control*.

The reason for CSXT’s evasion regarding actual NPBL control is easy to grasp: as NPBL explained in its opening statement, CSXT (like all other relevant parties) has intrinsically understood since consummation of the *NS-Control* transaction in 1982 that NS possessed a controlling ownership interest in NPBL, and, for decades, all involved parties acted accordingly without objection. NPBL Opening Statement at 3-5 (explaining, among other things, how CSXT’s own auditors provided for the consolidation of NPBL’s financial statements with those of its parent NS in the first year of NS’s majority ownership of NPBL, and CSXT personnel responsible for overseeing NPBL’s insurance function deferred to insurance placement within NS once NS assumed controlling ownership). Four decades later, CSXT offers nothing to explain why it waited so long to allege a supposed statutory violation.

CSXT is on particularly weak ground when it claims that it expected the merger partners in *NS-Control* – Norfolk and Western Railway Company (“NW”) and Southern Railway

² As discussed below, CSXT’s circumstantial evidence relies heavily upon a flawed contention that the merging parties would have needed to account for inclusion of NPBL in their combined system operation plans as presented to the ICC.

Company (“SRC”) – would continue to act independently of each other in conducting NPBL’s affairs:

Since neither NW nor SRC already controlled independent railroads – like NPBL – in which they each held a minority ownership interest, and since NW and SRC would continue to be operated separately, there was no reason to expect the combination of NW and SRC to have any effect on the control or operations of such railroads. NW and SRC would continue to exercise whatever governance powers they previously had regarding such non-controlled companies independent of one another.

CSXT Opening Statement at 17. Yet CSXT subsequently – *and explicitly* – agreed that NS would appoint a controlling majority of NPBL’s board of directors regardless of the number of individual railroad subsidiaries holding NPBL stock. NPBL Opening Statement at 3-4 and Coleman V.S., Exhibit D, March 1, 1989 Supplemental Agreement. Accordingly, CSXT plainly understood that, post-transaction, NS would control NPBL.

CSXT and NS offer very different interpretations of the petition for waiver filed in *NS-Control*, and CSXT emphasizes that the control application did not contain the same kind of detailed information regarding system integration for NPBL as it did for other components of the NS system. But CSXT’s argument on the subject conflates whether “control” exists with the question of whether two or more related carriers will operate as a “single system.” *Compare Fox Valley & Western Ltd. – Exempt., Acq. & Oper.*, 9 I.C.C.2d 209, 217-218 (1992) (single system doctrine considers whether two railroads are “managed and operated as an integrated family system” and “a degree of integration beyond mere common control is required”; Green Bay and Western Railroad Company (“GBW”) and Fox River Valley Railroad Corporation (“FRVR”) found not to constitute a single system), *aff’d sub nom. Fox Valley & Western Ltd. v. ICC*, 15 F.3d 641 (7th Cir. 1994) *with Itel Rail Corp. and Itel Corp. – Continuance in Control Exemption – FRVR Corporation*, Docket No. FD 31206 (ICC served Feb. 28, 1989) (authorizing common control of

GBW and FRVR). That the applicants in *NS-Control* did not plan to fully consolidate NPBL into NS's operations is wholly distinct from, and is in no way dispositive of, the existence of a control relationship. And, as CSXT well knows, the application in the *NS-Control* proceeding plainly disclosed that NS would obtain a majority ownership interest in NPBL. CSXT Opening Statement at 381, Exhibit F (NS Control Application, Vol. 2 at 83).³

Against this backdrop, including evidence of CSXT's clear and immediate recognition after the *NS-Control* decision that NS had obtained control of NPBL, it strains credulity for CSXT – having admitted that it “would have been most impacted” by such control⁴ – to claim that it was oblivious to, or deprived of the opportunity to address, the NPBL element of the transaction. The evidence – dating all the way back to 1982, and ever since – shows that the parties understood that *NS-Control* effectively (if not explicitly) authorized NS control of NPBL. If formal and definitive ICC authority for such control is lacking, that would appear to be no more than a technical, administrative matter that, for years, had escaped the attention of NS, CSXT and this agency.

If that is the case, NPBL – as the “controlled” entity involved in the matter – obviously has an interest in what the administrative resolution of such collective oversight would be. So, too, would the Board. Neither NSR nor CSXT has addressed what should occur if NS needed control authority for NPBL in 1982 but did not, in fact, obtain it. Presumably, in that situation, NS could elect to seek agency authority now to control NPBL. *E.g., Assoc. of P&C*

³ This listing showed the current NW and SRC holdings in NPBL, as well as the combined 57.14% interest that NS would hold in NPBL, in a single entry in the application. One could not read that portion of the application and not understand that NS would hold majority control of NPBL as a result of the proposed transaction.

⁴ CSXT Opening Statement at 29.

Dock Longshoremen v. The Pitts. & C. Dock Co., 8 I.C.C.2d 280, 295 (1992). Under governing precedent, favorable agency action on an NS-NPBL control request could extend retroactive antitrust immunity to NSR and NPBL pursuant to 49 U.S.C. § 11321. *Interstate Investors, Inc. v. Transcontinental Bus Sys., Inc.*, 310 F. Supp. 1053, 1063 (S.D.N.Y. 1970) (“[Section 11321] may be applied retroactively to immunize aspects of a transaction thereafter approved by the I.C.C.”). *Interstate Investors*’ in-depth consideration of the retroactive application of the antitrust immunity contained in what is now Section 11321 would govern any subsequent grant of control authority for NPBL here,⁵ and would, in turn, shape the Board’s response to the issues referred to it by the District Court.

The record evidence and the 40 years of conduct of the parties collectively, on balance, supports the proposition that NSR not only has control of NPBL, but that NSR also possesses authorization legitimately to exercise such control. But even if the Board were to hold that NS had not obtained the requisite control authority for NPBL, it should retain this matter until such time as any required remedial control proceeding is completed, and, at which point, a full response to the matters referred by the District Court can be provided.

⁵ *Interstate Investors* establishes that control authorization under 49 U.S.C. § 11321 has retroactive effect for purposes of antitrust immunity, and is distinct from the issue of whether and when, in other contexts and for other purposes, the Board may exercise the discretion to grant a party relief retroactively. *E.g.*, *Grand Elk Railroad, Inc. – Acquisition of Incidental Trackage Rights Exemption – Norfolk Southern Railway Company*, Docket No. FD 35187 (Sub-No. 1) (STB served Nov. 20, 2017) at 6-7.

WHEREFORE, NPBL respectfully requests that the Board accept these reply comments for consideration in this proceeding.

Respectfully submitted,

/s/ *Thomas J. Litwiler*

By: _____

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**ATTORNEYS FOR
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LINE RAILROAD COMPANY**

Dated: October 25, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2021, a copy of the foregoing **Reply Statement of Norfolk and Portsmouth Belt Line Railroad Company** was served by electronic mail upon:

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/s/ *Thomas J. Litwiler*

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