

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

**CANADIAN PACIFIC RAILWAY LIMITED, ET AL.
- CONTROL -
KANSAS CITY SOUTHERN, ET AL.**

**NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY TO CSX
TRANSPORTATION, INC.'S MOTION TO REJECT RESPONSIVE APPLICATION OF
NORFOLK SOUTHERN RAILWAY COMPANY AS INCOMPLETE**

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On March 22, 2022, CSX Transportation (“CSXT”) filed a motion to reject the responsive application of Norfolk Southern Railway Company (“NS”)² as incomplete (“CSXT-9”)³. In the motion, CSXT claims the Responsive Application does not meet the requirements for an application under 49 C.F.R. § 1180.6 (2000), in part because the Responsive Application, according to CSXT, should be treated as a Significant Transaction. In doing so, CSXT seeks to characterize the Responsive Application as an effort to extend market division agreement between NS and Kansas City Southern (“KCS”). However, NS is only seeking contingent trackage rights between Shreveport, LA and Wylie, TX for (i) a narrow category of traffic for

¹ This reply is being filed in the Main Docket (FD 36500) in light of CSXT filing its motion there, but also in the sub-docket (FD 36500 Sub-No. 5) that pertains specifically to the Responsive Application.

² Responsive Application of Norfolk Southern Railway Company (NS-8) (filed February 28, 2022) [hereinafter “Responsive Application”].

³ CSX Transportation, Inc.’s Motion to Reject Responsive Application of Norfolk Southern Railway Company as Incomplete (CSXT-9) (filed March 22, 2022) (“CSXT-9”)

which NS would already have haulage rights (ii) that would only be exercisable in the event of a Major Service Standard Failure by CPKC (the “Proposed Transaction”). The Proposed Transaction would have no impact on the type of traffic that NS can service or on the geographic scope of NS’s service, and as such, even if the contingent trackage rights are triggered, there would be no anticompetitive effects. Instead, the purpose of the Responsive Application is to ensure that service to intermodal shippers who utilize the route between Shreveport, LA and the Wylie Intermodal Terminal will not be disrupted, deterred, or eliminated as a result of the CP-KCS Transaction.⁴ The Responsive Application was properly filed as a Minor Transaction and provided all of the information required for a Minor Transaction.⁵

I. The Responsive Application is Properly Considered a Minor Transaction.

CSXT’s argument that the Proposed Transaction should be considered a Significant Transaction under 49 C.F.R. § 1180.2(b) is premised on factual inaccuracies and unsupported characterizations, and is wholly inconsistent with Board precedent.

CSXT states that the Responsive Application would “exten[d] NSR’s exclusive rights over the Meridian Speedway to NSR’s Wylie Intermodal Traffic.”⁶ However, CSXT is simply wrong on the facts. The contingent trackage rights requested in the Responsive Application *do not give NS new rights or access to any location*, let alone extend NS exclusive rights to any traffic. Rather, the requested contingent trackage rights merely change the nature of the move

⁴ Responsive Application at 9.

⁵ NS is filing this reply to CSXT’s motion consistent with the Board’s procedural schedule established in Decision No. 11 (served November 23, 2021) and the statutory 30-day review period for the Board’s review of the completeness of the Responsive Application. Given the suspension of the procedural schedule in Decision No. 16 (served on March 16, 2022) in light of the “apparent inconsistency in” the CP-KCS operating plan data, NS reserves its rights to amend this reply consistent with the Board’s resolution of the CP-KCS operating plan data discrepancy.

⁶ CSXT-9 at 2.

from pre-existing NS contractual rights for movement in haulage for its own account between the Wylie Intermodal Terminal and Shreveport, LA to movement in NS trackage rights.

As explained in the Responsive Application, NS currently connects to the Wylie Intermodal Terminal through an interline route with KCS at Shreveport, LA.⁷ NS has non-exclusive haulage rights for NS Wylie Intermodal Traffic⁸ that become effective if NS exercises its option to purchase the Wylie Intermodal Terminal.⁹ The contingent trackage rights that NS seeks in the Responsive Application would be exercisable only if NS purchases the Wylie Intermodal Terminal and only after a Major Service Standard Failure occurs.¹⁰ Stated another way, NS's requested contingent trackage rights would only be exercisable if NS purchases the Wylie Intermodal Terminal and if CPKC fails to abide by its existing contractual obligations to NS.¹¹ If the contingent trackage rights ever become exercisable and are exercised by NS, the only effect will be to change from movement between Shreveport, LA and the Wylie Intermodal Terminal via haulage to movement via trackage rights. With these facts, the Responsive Application cannot have any anticompetitive effects on CSXT or any other rail carrier and therefore the Responsive Application is not a Significant Transaction.

⁷ Responsive Application at 7.

⁸ As defined in NS-9, NS Wylie Intermodal Terminal Traffic consists of all domestic intermodal containers or trailers with an origin and destination in the United States, with a lift or drop at the [Wylie] Terminal, that moves over the [Subject Trackage] and over KCSR's tracks between Shreveport and the [Wylie] Terminal, and that originates or terminates at or east of Meridian, and that originates or terminates at or west of the Dallas/Ft. Worth, TX, Standard Metropolitan Statistical Area (SMSA) as published by the Office of Management and Budget (OMB). Comments of Norfolk Southern Railway Company and Request for Conditions (NS-9) (filed February 28, 2022) at 15 n. 35.

⁹ NS Application at 7-8.

¹⁰ NS Application at 8.

¹¹ NS Application at 7.

In addition to misstating the facts, CSXT makes baseless, conclusory allegations of competitive harm regarding the Meridian Speedway joint venture. The Meridian Speedway joint venture was and remains a pro-competitive transaction that increases—rather than reduces—options for shippers. CSXT baldly asserts that the MSLLC constitutes an unlawful market division agreement.¹² This is completely devoid of merit given that KCS, including its subsidiary the Kansas City Southern Railway Company, and NS were not competitors for the transport of intermodal shipments over the Meridian Speedway prior to the formation of MSLLC. CSXT’s vague and unsupported reference to Board required review of MSLLC as a pooling agreement fails for the same reason under 49 U.S.C. 11322.¹³ NS will address CSXT’s facially meritless claims in detail in its forthcoming response to CSXT’s Comments and Requests for Conditions (CSXT-8).

Further, CSXT’s contention that the Responsive Application constitutes a Significant Transaction is inconsistent with Board regulations and precedent. “A significant transaction is a transaction not involving the control or merger of two or more class I railroads that is of regional or national transportation significance as that phrase is used in 49 U.S.C. 11325(a)(2) and (c).”¹⁴

¹² CSXT’s made-for-litigation position is a complete about-face from its prior reliance upon the Board precedent established by the Meridian Speedway transaction. CSXT relied on a Board decision holding that the Meridian Speedway LLC (MSLLC) included reasonable restrictions to protect the investments by NS as support for CSXT’s own proposed joint use agreement with the Louisville & Indiana Railroad Company, Inc. CSX Transportation, Inc. – Joint Use – Louisville & Indiana Railroad Company, Inc. (FD 35523) (CSXT/L&I-3) (filed October 21, 2013).

¹³ See NSR Co., Pan Am Railways Inc. – Joint Control and Operation/Pooling Agreements – Pan Am Southern LLC. (FD 35147) (service date March 10, 2009), at 20 (“This agency has long held that pooling authority is necessary only for arrangements between parties that would otherwise be competitors.”); Entergy Arkansas, Inc. and Entergy Services Inc. v. UP & Missouri & Northern Arkansas Railroad Co. (FD 32187) (service date June 26, 2009), at 13 (“The agreement must not only be between existing regulated carriers, but, as the ICC held in Union Pacific RR. et al. – Trackage Rights Over CNW, 7 I.C.C.2d 177, 184 (1990), those carriers must also be competitors.”).

¹⁴ 49 C.F.R. § 1180.2(b).

The granting of contingent trackage rights for NS to move in trackage rights what it would already have the rights to move in haulage simply is not something of regional or national transportation significance. First, requests for trackage rights are generally exempt from Board review when based on a written agreement and not sought as part of a rail consolidation proceeding.¹⁵ Second, the only two Significant Transactions that the Board has ever reviewed after the passage of ICCTA both involved the acquisition by one rail carrier of another rail carrier and thus contained broad operational impacts that simply do not exist here.¹⁶ The narrow contingent trackage rights requested by NS in the Responsive Application contrast sharply with the two Significant Transactions previously reviewed by the Board, not only because NS submitted the Responsive Application in response to the CP-KCS Application but also because the subject of the Responsive Application is the grant of contingent trackage rights for NS to move in trackage rights what NS would already have rights to move in haulage.

Consider, for example, CSXT's proposed acquisition of Pan Am Systems et al ("Pan Am") in FD 36472 currently before the Board ("CSXT-Pan Am Transaction"). CSXT filed an application to acquire control of over 1,200 miles of rail line throughout New England from Pan Am Systems, as well as a 50% membership interest in Pan Am Southern, its primary competition into the Greater Boston area. CSXT acknowledged (i) the CSXT-Pan Am Transaction could

¹⁵ 49 C.F.R. § 1180.2(d)(7)

¹⁶ The Board has only ever reviewed two Significant Transactions: CSX-PanAm in FD 36472 and CP/D, M&E in FD 35081. In CSX-PanAm, the Board referenced this fact by referring to CP-DM&E as "the only other 'significant' transaction that has been reviewed by the Board." CSX-PanAm, at 7. Although the ICC had previously reviewed significant transactions, following the Board's establishment nearly 30 years ago it has only ever reviewed two significant transactions. What is more, both significant transactions it has reviewed each involved an acquisition of another rail carrier.

give CSXT “some influence over competition for movements into New England,”¹⁷ (ii) CSXT and Pan Am had some jointly served shippers,¹⁸ and (iii) operational changes as a result of the CSXT-Pan Am Transaction could raise competitive concerns.¹⁹ CSXT also entered into settlement agreements with NS and Genesee & Wyoming, Inc. (GWI) to ameliorate other competitive concerns by, among other things, introducing a completely new operator to the Pan Am Southern, on top of the Springfield Terminal, the current operator of both its own railroad and that of Pan Am Southern. Despite this backdrop, CSXT argued to the Board that the CSXT-Pan Am Transaction should be considered a Minor Transaction.²⁰ The Board disagreed, finding that the additional information required for a Significant Transaction was necessary to analyze the competitive concerns identified by the CSXT application.²¹

Conversely, the Board has consistently considered trackage rights requests in prior responsive applications to Class I merger proceedings to be Minor Transactions. In response to the Conrail application, the Ann Arbor Railroad filed a Responsive Application seeking trackage rights.²² While the Board rejected the request on other grounds, the Board affirmatively found that the trackage rights request constituted a Minor Transaction.²³ Similarly, New England

¹⁷ CSX Corporation, et al. – Control and Merger – Pan Am Systems, Inc., et al. (CSXT/PAR-1) (FD36472) (filed February 25, 2021) Ex. 22, V.S. Huneke at 3.

¹⁸ CSXT/PAR-1, Ex. 22, V.S. Reishus 20 n. 44.

¹⁹ CSXT/PAR-1, Ex. 22, V.S. Reishus 13 (“[T]here are limited instances where the operation of PAS by a GWI-owned railroad could raise competitive concerns.”).

²⁰ CSXT/PAR-1 at 8 (“Applicants are filing this Application as a minor transaction because it is clear that the Proposed Transaction, as enhanced by the Related Transactions, will have no adverse impact on competition.”).

²¹ Decision No. 1 in Docket No. FD36472 (served March 25, 2021) at 10.

²² Responsive Application and Request for Conditions by Ann Arbor Acquisition Corporation D/B/A Ann Arbor Railroad (FD 33388 Sub-No. 78) (AA-5) (filed November 4, 1997).

²³ Decision No. 30 (FD 33388 Sub-No. 76).

Central Railroad filed a responsive application for trackage rights, which contained only the information required for a Minor Transaction, in the Conrail proceeding.²⁴ The Board imposed New England Central Railroad's requested trackage rights as a condition of the Conrail merger. The Board's imposition of those trackage rights further demonstrate that requests for trackage rights are properly considered to be Minor Transactions. Because requests for trackage rights are viewed by the Board as Minor Transactions, NS's narrowly tailored request for *contingent* trackage rights for traffic NS would already have rights to move under haulage, unambiguously a lesser request, is also a Minor Transaction.

For these reasons, CSXT's assertion that additional information is needed to address the competitive effects of *contingent* trackage rights, which may never become exercisable or actually be exercised, is completely unsupported by CSXT's own motion and by Board precedent and procedure.

II. The Responsive Application Does Not Require Any New Securities or other Financial Arrangements.

Section 1180.6(a)(1)(iv) requires an applicant to include the nature and amount of any new securities or other financial arrangements. The Responsive Application does not involve any new securities or other financial arrangements, and accordingly, this section is not applicable and was not included. The compensation for the proposed contingent trackage rights is outlined in the draft trackage rights agreement included as Exhibit 2 with the Responsive Application.

²⁴ Responsive Application of New England Central Railroad, Inc. (FD33388 Sub-No. 75) (filed October 21, 1997).

III. The Contingent Trackage Rights Do Not Implicate Any Financial Considerations Required by Section 1180.6(a)(2)(ii).

NS does not anticipate any increase in traffic, revenues, earnings available for fixed charges, or net earnings as a result of the Proposed Transaction. As described in the Responsive Application, the contingent trackage rights, if exercised, would merely maintain the same traffic moving between the same origins and destinations. The only effect would be to change the nature of the movement from haulage to trackage rights. The compensation for the trackage rights is described in the Responsive Application and the KCS Section Trackage Rights Agreement submitted as Exhibit 2.²⁵

IV. The Contingent Trackage Rights, if Exercised, Would Have No Effect on Employees of Any Carrier.

As detailed above, the contingent trackage rights, if exercised, would only change the nature of the movement and would not expand the type of traffic or geographic scope. The only change that would result if the contingent trackage rights become exercisable and are actually exercised is that traffic moving by haulage would move by trackage rights. KCS employees (and CPKC employees post-acquisition) would continue to dispatch, maintain, and operate over the line if the contingent trackage rights are exercised.

CSXT's citation to the Board's decision in the Pan Am docket is misguided. In its initial application in the Pan Am docket, CSXT outlined specific actions it would take that would result in the abolishment of positions on Springfield Terminal.²⁶ The Board required CSXT to address the changes in workforce resulting from CSXT's plans that CSXT failed to address in its

²⁵ NS Application at 10, Ex. 2.

²⁶ Application by CSX Corporation, et al. and Pan Am Systems, Inc. et al. (FD 36472) (filed February 25, 2021), Appendix 1.

application.²⁷ But what CSXT failed to address was the more relevant Pan Am proceeding – the original Pan Am Southern proceeding that involved issues similar to those at issue here. In the original Pan Am Southern proceeding – reviewed in STB Finance Docket No. 35147 – NS received contingent trackage rights over Pan Am Southern in the event of a service standard failure. Those contingent trackage rights were the subject of Norfolk Southern Railway Company – Trackage Rights Exemption – Pan Am Southern LLC – Between Mechanicville, NY and Ayer, MA, STB Finance Docket No. 35147 (Sub-No. 2). The STB did not require a labor impact statement for the grant of those contingent trackage rights and nor should it do so here.

While NS does not believe that there may be any impact whatsoever on any employees if the contingent trackage rights are exercised, any impacted employees would be entitled to protection under *Norfolk and Western Railway Co.-Trackage Rights-Burlington Northern, Inc.*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Railways, Inc.-Lease and Operate-California Western Railroad*, 360 I.C.C. 653 (1980).

V. The Responsive Application Lists the States Required by Section 1180.6(a)(5).

The Responsive Application includes a list of all states where NS’s property is situated.²⁸ Nothing in Section 1180.6(a)(5) suggests that there is a requirement to list separately the states where each subsidiary or affiliate owns property; and regardless, the list that NS did provide includes the states in which the Alabama Great Southern Railroad is situated (Alabama, Georgia, Louisiana, Mississippi, and Tennessee). In fact, CSXT responded to Section 1180.6(a)(5) without separately listing the states where its subsidiaries or affiliates own property in its

²⁷ Decision No. 3 in Docket No. 36472 (served May 26, 2021) at 14.

²⁸ NS Application at 12.

application for control of Pan Am Systems, et al., which was accepted by the Board.²⁹ Thus, CSXT's assertion that NS provided an incomplete response to Section 1180.6(a)(5) by not separately listing NS's subsidiaries is unsupported by CSXT's own responses to the same section in its application in the CSXT-Pan Am Transaction.³⁰

KCSR is not an applicant, and accordingly, no reference to states where KCSR owns property is required.

VI. The Responsive Application Included All Necessary Maps of the Relevant Locations.

The contingent trackage rights requested in the Responsive Application are limited in geographic scope. NS provided maps of the relevant geography and all relevant connections within the NS network. Contrary to CSXT's suggestion in CSXT-9, Section 1180.6(a)(6) does not require NS to include traffic flows on any map or to submit a map of the proposed CPKC system.

VII. Section 1180.6(a)(7)(vi) Only Requires Information on the *Principal* Routes and Termini of the Lines Involved, which NS Provided.

Section 1180.6(a)(7)(vi) requires a brief description of the principal routes and termini involved, the principal points of interchange on those routes, and the amount of main-line mileage and branch line mileage involved. The principal route involved is the KCS line between Shreveport, LA and Wylie, TX. The Responsive Application includes the brief description of that line, the termini involved, and the length, as required by Section 1180.6(a)(7)(vi). The requested contingent trackage rights are strictly overhead trackage rights, and accordingly, other

²⁹ Amended and Supplemented Application (CSXT/PAR-11) (filed July 1, 2021) at 32 (listing the states where CSXT owns and operates but not listing anything for CSXT's affiliates or subsidiaries).

³⁰ *Id.*

than the beginning and end points of the contingent trackage rights (Wylie, TX at MP T-197.8 and Shreveport, LA at MP V-169.85) which were clearly identified, there are no points of interchange implicated by the Responsive Application.

The map included in Appendix A of the Responsive Application shows KCS's connection between Wylie, TX and Metro Junction, TX in addition to the KCS Section, which is a term defined in the Responsive Application as the KCS line between Shreveport, LA and Wylie, TX.³¹ The Appendix A map clearly indicates the mileposts marking the beginning of the line at Shreveport, at Mile Post V-169.85 and the terminating milepost at Wylie, at milepost T-197.8 and does not change the scope of the contingent trackage rights NS is requesting in the Responsive Application.

VIII. Conclusion.

CSXT's motion to reject the Responsive Application as incomplete presents a series of unsupported claims and factual inaccuracies. The Proposed Transaction envisioned in the Responsive Application merely changes the nature of the movement of traffic for which NS would already have haulage rights. The Responsive Application makes clear that the contingent trackage rights, if exercised, would merely maintain the *status quo* and consequently would have no effect on competition. The Responsive Application, as filed, contains the information required by 49 CFR § 1180.6 and sufficient to show the Proposed Transaction is properly classified as a Minor Transaction.

³¹ Responsive Application at 2.

Respectfully submitted,

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March 29, 2022

Certificate of Service

I hereby certify that on this 29th day of March 2022 the above Reply to CSXT's Motion to Reject Responsive Application of Norfolk Southern Railway Company as Incomplete was served by electronic or first class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Daniel Baquet

Daniel Baquet