

FD 36500
FD 36500 (Sub-No. 5)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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FINANCE DOCKET NO. 36500

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June 23, 2022
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**CANADIAN PACIFIC RAILWAY LIMITED, ET AL.
- CONTROL -
KANSAS CITY SOUTHERN, ET AL.**

**NORFOLK SOUTHERN RAILWAY COMPANY'S OPPOSITION TO CSX
TRANSPORTATION'S MOTION TO COMPEL THE APPEARANCE AND
TESTIMONY OF MICHAEL R. MCCLELLAN AT A VIDEO DEPOSITION ON JUNE
29, 30, OR JULY 1 2022**

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Norfolk Southern Railway Company (“NS”) files the following Opposition to CSX Transportation’s Motion to Compel the Appearance and Testimony of Michael R. McClellan at a Video Deposition on June 29, 30, or July 1 2022, served on NS on June 21, 2022 (“CSXT’s Motion” or the “Motion”).

INTRODUCTION

Counsel for NS and CSX Transportation (“CSXT”) were actively engaged in meet and confer discussions related to CSXT’s notice for the deposition of an NS corporate representative. Despite discussions occurring on Friday, June 17, and the holiday Monday, June 21, and another set for the afternoon of Wednesday June 22, CSXT inexplicably filed a motion to compel the deposition of an individual NS employee – Michael R. McClellan – late Tuesday night. NS opposes this Motion.

First, CSXT simply cannot move to compel the deposition of an individual witness when its noticed deposition was for an NS corporate representative. Neither CSXT nor its counsel gets to select the corporate representative for NS – that decision remains solely in the purview of NS. Second, the discovery CSXT seeks is not even relevant to the Proceeding at hand; neither to the

CP-KCS Transaction nor to NS's Amended Comments and Request for Conditions or Amended Responsive Application. Third, CSXT has less burdensome means to obtain this discovery, including from Kansas City Southern ("KCS") who is one of the Applicants and the majority member and operator of the Meridian Speedway. Despite all of these facts, NS has nevertheless endeavored to cooperate with CSXT in a vain attempt to avoid expending judicial resources and the costs and inefficiencies of discovery disputes. Indeed, NS offered a date for the deposition of a corporate representative. CSXT, however, argued that the offered date is too late as it is beyond a July 12, 2022, filing deadline. That deadline, however, is not CSXT's only opportunity to respond to NS. Indeed, CSXT has the opportunity to file a final brief, which is not due until September 20, 2022, two months after the offered deposition date. In addition, as relayed by NS counsel to CSXT, in an effort to compromise NS was willing to amend responses and produce documents on which the parties previously had disagreement and to respond to interrogatories that had been deferred in lieu of depositions both in advance of the July 12 deadline.

Further, as relayed to CXST counsel before this motion was filed, counsel for NS had been attempting to reach Mr. McClellan (who was already out of the office) to determine whether any earlier dates could be managed within his travel schedule. Yesterday afternoon, counsel for NS heard back that Mr. McClellan would be returning to the country late at night on Saturday, July 9th and could sit for a deposition on the next business day, of Monday July 11th. Prior to that, Mr. McClellan will be in the Canadian Rockies with his extended family for a trip planned pre-pandemic that cannot be rescheduled or refunded. To compel him to return to the United States or appear remotely from a family vacation ten days earlier is neither equitable nor necessary.

Given that the relevance of CSXT's discovery demands are tenuous at best, that CSXT will have a fulsome opportunity to incorporate that deposition into its September filings, that the same or similar discovery is also sought from the Applicants and will be provided in the coming days, and that NS has compromised repeatedly on discovery to CSXT, a deposition on July 11 should be sufficient. For these reasons, NS respectfully requests that Your Honor deny CSXT's Motion to Compel.

ARGUMENT

1. CSXT's Motion Is Based on NS Filings That Are No Longer Relevant to the CP-KCS Proceeding.

Throughout the CP-KCS Proceeding, CSXT has imparted chaos into an already complex procedural schedule by repeatedly relying on the wrong filings and jumping the gun on the procedural schedule set by the Surface Transportation Board ("STB" or "the Board") by filing anticipatory comments.

On February 28, 2022, CSXT purported to respond to NS's Comments and Request for Conditions and NS's Responsive Application that were simultaneously filed on February 28, 2022 ("NS's February 28th Filings"). CSXT filed Amended Comments and Request for Conditions (CSXT-11) on June 9, 2022, again purporting to respond to NS's Amended Filings that were simultaneously filed on June 9, 2022. However, to no surprise, CSXT's filings were not in fact responsive – as the NS filings to which CSXT purported to respond were filed at the same time. As a result, the arguments CSXT raises in its Comments and Amended Comments with respect to NS, and subsequently in its Motion to Compel, are misguided and irrelevant. For example, CSXT's deposition notices demands the deposition of a corporate representative

who is knowledgeable in all aspects of the Meridian Speedway relationship between KCS and the Norfolk Southern Railway Company, including but not limited to the formation of the Meridian Speedway LLC, the financing, economics, maintenance, marketing, and

operations of the Meridian Speedway, and the negotiation of pricing for movements over the Meridian Speedway.¹

To support such expansive deposition subject matter – all aspects of a joint venture from formation and including all operations for a sixteen year period – CSXT’s asserts that the Meridian Speedway was “the focus of both CSXT’s and NS’s February 28. [sic] 2022 comments.”² Yet, the “focus of ... NS’s February 28” comments is irrelevant. Those filings were explicitly and completely replaced by NS’s Amended Comments (NS-12) and Amended Responsive Application (NS-13) (jointly “NS’s Amended Filings”).³ And even a cursory review of the operative NS Amended Filings show that the Meridian Speedway is not the focus.

The Board’s schedule provides an opportunity for all participants, including CSXT, to file responses *after* comments and requests for conditions have been filed (currently July 12, 2022) precisely to avoid this inefficiency and confusion. CSXT should not benefit from its attempt to subvert the process set by the Board.

2. Discovery Related to CSXT’s Claimed Harm Is Not Relevant to the Subject Matter Involved in this Proceeding Because It Lacks a Clear Nexus to the CP-KCS Proceeding or NS’s Amended Filings.

Under 49 C.F.R. §1114.21, parties may obtain discovery that is “relevant to the subject matter involved in a proceeding.” The discovery that CSXT seeks related to certain traffic on the Meridian Speedway is simply not relevant to CP-KCS Proceeding, including the central issue of the CP-KCS Transaction or even NS’s Amended Filings.

First, neither the CP-KCS Transaction nor NS’s Amended Filings envision any changes to the Meridian Speedway LLC structure or the contractual arrangements between NS and KCS

¹ Amended Notice of Deposition For Norfolk Southern Railway Company (served June 13, 2022).

² CSXT Motion at 1.

³ NS-12 at 2. “Norfolk Southern Railway Company (“NS”) hereby submits these amended Comments and Request for Conditions, which fully replace the previous Comments and Request for Conditions filed by NS on February 28, 2022 (NS-9) that was in response to Applicant’s original operating plan.”)

(or NS and CPKC if the CP-KCS Transaction is approved) that are the subject of CSXT's filings. The mere fact that KCS is one of the Applicants in the CP-KCS Transaction and is also a joint venture partner with NS for the Meridian Speedway LLC does not mean that the Meridian Speedway is subject matter involved in either the CP-KCS Transaction or NS's Amended Filings.

Second, CSXT's assertion that it is seeking conditions from the Board related to the Meridian Speedway does not automatically transform the Meridian Speedway into subject matter relevant to the CP-KCS Proceeding. The Board has been clear that it would not impose a condition unless the condition "bears a sufficient nexus to the proposed transaction." Decision No. 9 (served April 14, 2022) STB FD 36472 ("Pan Am-CSX") at 27. Because the CP-KCS Transaction and NS's Amended Filings, if approved, do not change the contractual relationships between KCS and NS contained in the Meridian Speedway Agreements that are the subject of CSXT's filings, CSXT's requested conditions relating to the Meridian Speedway do not have a nexus to the CP-KCS Transaction.⁴

For example, CSXT is seeking as a condition of the CP-KCS Transaction that the Board deny any NS Responsive Application or condition that would permit NS to expand its exclusive rights over the Meridian Speedway. NS is not seeking any conditions to, nor would NS's Amended Responsive Application, expand NS's rights on the Meridian Speedway. Accordingly, CSXT's "condition" is a nonissue, and discovery on this topic is unwarranted.

CSXT is engaged in exactly the kind of "fishing expedition" that the Board has condemned in past proceedings. *Duke Energy Corp. v. Norfolk So. Rwy. Co.*, 2002 WL

⁴ See Finance Docket No. 32760 ("UP-SP"), Decision No. 44 (served August 6, 1996) (stating the harm to be solved by a condition must be "directly and causally related to the merger").

1730020, at *3 (S.T.B., July 26, 2002) (“Discovery requests must be narrowly drawn, directed toward a relevant issue, and not used for a general fishing expedition.”).

3. CSXT Has Less Burdensome Means to Obtain the Requested Information.

NS is a minority partner in the Meridian Speedway joint venture. KCS, on the other hand, not only is the majority owner and operator of the Meridian Speedway, but is also an Applicant to the CP-KCS Transaction. KCS is better situated to provide the information that CSXT is seeking and is a more appropriate party on which to place the burdens of discovery. In fact, CSXT issued near-identical deposition notices to KCS and NS seeking information about the Meridian Speedway.⁵ The deposition of KCS is scheduled for Friday, June 24, 2022, which gives CSXT ample time to incorporate the information from the deposition in its anticipated July 12th filing. Additionally, CSXT issued nearly identical written discovery requests (requests for documents and interrogatories) to KCS and NS including interrogatories seeking the same information relating to the Meridian Speedway. NS has responded to those interrogatories and has and will continue to produce documents in response to CSXT’s document requests.

To date, CSXT has not articulated what information it needs from an NS witness that a KCS witness cannot provide. The Board has expressed a clear preference for obtaining discovery from a less obtrusive means when available. *Duke Energy Corp. v. Norfolk So. Rwy. Co.*, 2002 WL 1730020, at *3 (S.T.B., July 26, 2002) (“[I]t is unduly burdensome to require a party to produce information that is available from public records or through less intrusive means.”).

⁵ Both notices cover the following topics, and only the following topics, “all aspects of the Meridian Speedway relationship between KCS and [NS], including but not limited to the formation of the Meridian Speedway LLC, the financing, economics, maintenance, marketing, and operations of the Meridian Speedway, and the negotiation of pricing for movements over the Meridian Speedway.” *Compare* Amended Notice of Deposition for the Kansas City Southern Railway *with* Amended Notice of Deposition for Norfolk Southern Railway Company.

Additionally, despite what CSXT's Motion suggests, CSXT will have an opportunity to incorporate information from a deposition on July 11th either into its July 12th filing or in CSXT's final brief, which is not due until September 20, 2022. In fact, Mr. Paul Cunningham, counsel for CSXT, suggested that NS may want to wait to take its own noticed deposition of CSXT's expert, Ms. Julie Carey, after July 12th to account for additional information that will be contained in CSXT's July 12th filing. CSXT recognized that the information gained in depositions after July 12th can still be incorporated in filings in the CP-KCS Proceeding.

When less burdensome means exists to obtain the same or similar information, as is the case here, it is inappropriate to require a participant to engage in the more burdensome option, especially when the participant has offered reasonable alternatives as NS has.

4. NS Has Attempted to Work With CSXT to Find a Mutually-Acceptable Compromise on Discovery.

CSXT's Motion suggests that NS unilaterally delayed responses to discovery. In reality, at each step in the process, NS and CSXT mutually agreed to delay certain discovery responses to each other's discovery requests to account for changes in the procedural schedule and CP-KCS Application.⁶ On March 16, 2022, the Board suspended the procedural schedule for an unspecified amount of time pending the Board's review and decision on an apparent inconsistency in the CP-KCS Application.⁷ On March 22, 2022, CSXT noticed the deposition of NS. Given the uncertainty around the procedural schedule and the possibility that Applicants would be required to file an amended application, counsel for CSXT and NS mutually agreed to postpone both the NS and CSXT depositions.

⁶ NS strongly disputes the representations made in CSXT's premature motion related to statements purportedly made by NS counsel during meet and confer discussions. In the interest of judicial efficiency and finding a path forward, NS will refrain from responding to each misrepresentation in this brief.

⁷ Finance Docket No. 36500, Decision No. 16 (served March 16, 2022).

The Board issued a revised procedural schedule on April 27, 2022, directing Applicants to file an amended application that addressed the apparent inconsistency in the CP-KCS Application.⁸ The Amended Operating Plan ultimately filed by Applicants on May 13, 2022,⁹ presented significantly different traffic forecasts for the section of the CP-KCS network relevant to NS's requests. As a result, NS filed its Amended Filings on June 9, 2022, to address the new data.¹⁰ CSXT filed Amended Comments and Request for Conditions on the same day.¹¹

It was not clear until the amended filings were made on June 9, 2022 whether the deposition of NS or the original topics of that deposition would even be relevant in this Proceeding. In fact, the changes NS made in its Amended Filings in response to the Amended Operating Plan filed by Applicants significantly deemphasized the Meridian Speedway. The Amended Operating Plan showed the potential for harm to NS shippers on the section of track from Shreveport, LA, to an intermodal terminal in Wylie, TX, *not* on the Meridian Speedway. As discussed above, CSXT is not entitled to discovery without a nexus to the CP-KCS Transaction or NS's Amended Filings.

Despite this tenuous at best connection to the proceeding, NS has attempted to work with CSXT to reach mutually agreeable compromises on discovery. NS and CSXT were in the midst of meet and confers when CSXT filed its Motion – including a meet and confer on Friday, June 17, shortly after NS counsel was made aware that Mr. McClellan's was out of the country for an extended period of time, and then again, at the request of CSXT's counsel on the Monday

⁸ Finance Docket No. 36500, Decision No. 17 (served April 27, 2022).

⁹ Finance Docket No. 36500, Amended Operating Plan (CP-47/KCS-34) (filed May 13, 2022).

¹⁰ Finance Docket No. 36500, Amended Comments of Norfolk Southern Railway Company and Request for Conditions (NS-12) (filed June 9, 2022) n. 5 ("The Amended Operating Plan provides significantly different traffic density estimates for each of the segments addressed by NS in its initial Comments and Request for Conditions (NS-9). Accordingly, NS has incorporated significant amendments in these Amended Comments and the accompanying Amended Responsive Application.")

¹¹ Finance Docket No. 36500, Amended Comments and Request for Conditions (CSXT-11) (filed June 9, 2022).

holiday of June 20 after CSXT's counsel had had the opportunity to digest the information and continue discussion on any possible compromise position forward. Following that discussion, counsel for CSXT and NS were scheduled to have another discussion on the afternoon of Wednesday, June 22 to discuss a global compromise proposal, pursuant to which NS would amend responses to written discovery and provide documents and information in advance of July 12 to compensate for its later than planned deposition date. Instead of continuing these good faith discussions, however, CSXT opted to file its surprise attack motion to compel late Tuesday night. NS has been and remains willing to work with CSXT to resolve discovery disputes but the premature and surprise filing of its motion to compel amidst discussions that could have been productive at resolving disputes is neither an efficient nor good faith path forward.

5. NS Is Willing to Make a Corporate Designee Available for Deposition with Ample Time for CSXT.

At the outset, and in each subsequent meet and confer, NS made clear that it is NS's decision who to put forward as the corporate designee for purposes of the NS deposition that CSXT noticed. To be clear, CSXT did not issue a notice of deposition for Mr. McClellan, and CSXT cannot now claim that it is entitled to his deposition as opposed to another corporate representative. While Mr. McClellan was a natural candidate based on personal knowledge and his availability was the subject of recent discussions, CSXT cannot seek to compel an individual witness deposition it did not notice.

Far from the methodical master plan of delay CSXT describes in its motion, counsel for NS was not aware that Mr. McClellan would be unavailable until shortly before they so informed counsel for CSXT. Mr. McClellan has been on personal travel to Bermuda and will be travelling to the Canadian Rockies on a long planned family trip with his extended family, which was planned before the Covid-19 pandemic began and is completely non-refundable. Counsel for NS

originally was advised, and relayed to counsel for CSXT, that Mr. McClellan would not be available for deposition until July 22, 2022. Counsel for NS did not have full details on Mr. McClellan's travel, however, and had been endeavoring to reach him in the past days while discussions with CSXT ensued. On the afternoon of July 22, 2022, counsel for NS received a response from Mr. McClellan that he returns from Canada on the night of July 9th and is willing to sit for a deposition on Monday, July 11th – the first business day he is back in the office.

CSXT is seeking discovery that is not relevant to the CP-KCS Transaction or NS's Amended Filings and the same or similar discovery is also sought from the Applicants and will be provided in the coming days. Despite this, NS has endeavored to reach reasonable compromises in response to CSXT's expansive discovery request and has offered a deposition on July 11. CSXT will have ample information to incorporate in both its July 12 filing and its final brief in September. Accordingly, its demand that an individual witness be compelled to sit for deposition ten days earlier from a family vacation in the Canadian Rockies is simply unreasonable. NS strongly opposes CSXT's Motion and respectfully requests that Your Honor deny CSXT's Motion.

Respectfully submitted,

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June 23, 2022

Certificate of Service

I hereby certify that on this 23rd day of June 2022 the above Opposition to CSX Transportation's Motion to Compel the Appearance and Testimony of Michael R. McClellan at a Video Deposition on June 29, 30, or July 1 2022 was served by electronic or first class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Daniel Baquet

Daniel Baquet