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ENTERED
Office of Proceedings
August 26, 2022
Part of
Public Record

August 26, 2022

EXPEDITED CONSIDERATION REQUESTED

BY ELECTRONIC FILING

The Honorable Cynthia T. Brown
Chief, Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street S.W.
Washington, D.C. 20423

Re: Finance Docket No. 36500, *Canadian Pacific Ry. – Control – Kansas City Southern*

Dear Ms. Brown:

I write on behalf of Applicants to request that the Board hold in abeyance and ultimately quash three depositions noticed yesterday by CSXT and Norfolk Southern. The noticed depositions should be held in abeyance pending the Board's resolution of Applicants' pending Motion to Strike filed on July 20, 2022 (CP-55/KCS-41), and quashed in the event the Board grants that motion.

The depositions in question have been noticed for the second and third weeks of September, when Applicants will be busy preparing for the Board's hearing in this matter scheduled for September 28-30. Applicants submit that these depositions should not go forward at all, because they relate solely to issues that CSXT has improperly inserted in this proceeding, and the expert witness testimony to which the depositions relate will fall away if the Board grants Applicants' pending Motion to Strike. Were these depositions allowed to proceed, they would unnecessarily and inappropriately consume the time and attention of Applicants (and other parties) to prepare for and participate in them.

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Background

The newly noticed depositions relate to positions taken by CSX in this proceeding regarding the Board's 2006 exemption of the MSLLC transaction in Finance Docket No. 34822. In particular, CSX seeks to depose the Norfolk Southern expert witness (John W. Mayo) who filed testimony accompanying Norfolk Southern's August 11 rebuttal submission (NS-15). *See* CSX Notice of Deposition, served August 25, 2022 (attached). Norfolk Southern submitted Dr. Mayo's testimony for the express purpose of responding to the evidence filed by CSXT on July 12 that is the subject of Applicants' Motion to Strike. When Norfolk Southern filed that evidence, it agreed with Applicants that CSX's "Response should be stricken in its entirety," but nonetheless submitted Dr. Mayo's verified statement for the sole purpose of rebutting that evidence. NS-15 at 6; *id.*, Mayo R.V.S. at ¶ 3. Norfolk Southern now also seeks to depose the two CSXT expert witnesses (Julie M. Carey and Ramsey Shehadeh) whose testimony Dr. Mayo was rebutting (and, again, which Applicants have moved to strike). *See* Norfolk Southern Notices of Deposition, served Aug. 25, 2022 (also attached).

The starting point for this continuing frolic is CSXT's inexplicable injection into this proceeding of the Board's 2006 exemption of the MSLLC transaction, which the Board exempted in Finance Docket No. 34822. In its July 12 submission, CSX witness Carey contends that "the original request to the Board for approval for the MSLLC JV was incomplete and inappropriate," and she argues about the "perpetual nature of the Meridian Speedway's exclusivity arrangements." CSXT-13, Carey R.V.S. at 2. CSX witness Shehadeh's July 12 testimony likewise addresses his "economic opinion regarding the competitive effects resulting from the Meridian Speedway LLC Joint Venture ('MSLLC' or 'JV') between Applicant Kansas City Southern ('KCS') and Norfolk Southern Railway Company ('NSR') related to the Meridian Speedway Agreements." *Id.*, Shehadeh R.V.S at 1.

The Board Should Hold in Abeyance and Ultimately Quash the Noticed Depositions

As Applicants have explained in their July 12 Rebuttal submission, CSX's desire to bring an antitrust-style case against the MSLLC agreements has *nothing to do* with this Transaction (*see* CP-53/KCS-39 at 263-65), and further litigation over these issues would be an abuse of this proceeding and a waste of all parties' time and expense.

Were that not enough reason to quash these depositions, the only valid purpose of depositions at this late date in the proceeding would be to enable the cross examination of those witnesses for potential use in briefs.¹ But here, the witness testimony for which the depositions would be used for

¹ *See CSX Corp. & CSX Transportation, Inc., Norfolk Southern Corp. & Norfolk Southern Ry. – Control & Operating Leases/Agreements – Conrail Inc. & Consolidated Rail Corp.*, Finance Docket No. 33388 (STB Decision No. 64, served January 29, 1998) (permitting "circumscribed discovery of

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cross examination should itself be stricken from the record. CSX's Carey and Shehadeh July 12 verified statements should be stricken for the reasons set forth in Applicants' Motion to Strike (CP-55/KCS-41 at 8), and the Mayo statement (filed by Norfolk Southern for the express and sole purpose of rebutting the Carey/Shehadeh testimony) would fall away as soon as the CSX evidence is no longer in the record.

The Board should not permit its procedural schedule in this case to be misused by CSX as the vehicle for endless antitrust-style litigation over a 2006 transaction unrelated to this case. Were the noticed depositions allowed to go forward, Applicants would have no choice but to expend attention, time, and resources preparing for them, attending them, and potentially addressing anything arising from them, all during the period of time when the Board's schedule calls for Applicants to be preparing for the hearing in this proceeding.

Applicants urge the Board (1) to issue an order holding these depositions in abeyance until the Board has determined (in response to Applicants' Motion to Strike) whether CSX's July 12 evidence is permitted to remain in the record, and (2) make explicit in any order granting Applicants' Motion to Compel that these depositions may not proceed.

Please contact me with any questions.

Respectfully submitted,



David L. Meyer

*Attorney for Canadian Pacific Railway
Limited*

Attachments

cc: All Parties of Record

applicants' rebuttal witnesses and inclusion of the resulting cross-examination testimony in the deponents' briefs").

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 36500

CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION; AND DELAWARE & HUDSON RAILWAY COMPANY, INC. – CONTROL – KANSAS CITY SOUTHERN; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; GATEWAY EASTERN RAILWAY COMPANY; AND THE TEXAS MEXICAN RAILWAY COMPANY

NOTICE OF DEPOSITION FOR JOHN W. MAYO

Counsel for CSX Transportation, Inc. (“CSXT”), pursuant to 49 C.F.R. § 1114.22, will depose John W. Mayo, expert witness for the Norfolk Southern Railway Company (“NS”). The deposition will commence on Thursday, September 15, 2022, at 10:30 AM EDT and continue until completed. The deposition will take place over videoconference. If any party to this proceeding would like access to the remote deposition or its transcript, please notify bmc@harkinscunningham.com.

Respectfully submitted this 25th day of August, 2022.

/s/ Paul A. Cunningham

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*Attorneys for CSX Transportation,
Inc.*

Dated: August 25, 2022

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing CSX Transportation, Inc. Amended Notice of Deposition for Norfolk Southern Railway Company to be served electronically or by first-class mail, postage pre-paid, on the on the Secretary of Transportation, the Attorney General of the United States, Applicants' Representatives, Administrative Law Judge Thomas McCarthy, and all parties of record in this proceeding.

/s/ Paul A Cunningham
Paul A. Cunningham
*Attorney for CSX
Transportation, Inc.*

August 25, 2022

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 36500

CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY
COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC
RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION;
AND DELAWARE & HUDSON RAILWAY COMPANY, INC.

– CONTROL –

KANSAS CITY SOUTHERN; THE KANSAS CITY SOUTHERN RAILWAY COMPANY;
GATEWAY EASTERN RAILWAY COMPANY; AND THE TEXAS MEXICAN RAILWAY
COMPANY

NOTICE OF DEPOSITION FOR CSX TRANSPORTATION, INC.

Counsel for Norfolk Southern Railway Company, pursuant to 49 C.F.R. § 1114.22, will
depose Ms. Julie M. Carey. The deposition will commence on September 23, 2022 at 9:30am
Eastern and continue until completed. The deposition will take place over video conference.

Respectfully submitted this 25th day of August, 2022.

Nabanita C. Nag
Jason M. Morris
Thomas E. Zoeller
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*Attorneys for Norfolk Southern Railway
Company*

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August, 2022 the above Notice of Deposition has been served electronically or by first class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Daniel Baquet

*Attorney for Norfolk Southern Railway
Company*

August 25, 2022

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 36500

CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY
COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC
RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION;
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GATEWAY EASTERN RAILWAY COMPANY; AND THE TEXAS MEXICAN RAILWAY
COMPANY

NOTICE OF DEPOSITION FOR CSX TRANSPORTATION, INC.

Counsel for Norfolk Southern Railway Company, pursuant to 49 C.F.R. § 1114.22, will
depose Dr. Ramsey Shehadeh. The deposition will commence on September 22, 2022 at 9:30am
Eastern and continue until completed. The deposition will take place over video conference.

Respectfully submitted this 25th day of August, 2022.

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/s/ Daniel Baquet

*Attorney for Norfolk Southern Railway
Company*

August 25, 2022