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September 1, 2022

**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

ENTERED  
Office of Proceedings  
September 1, 2022  
Part of  
Public Record

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

Dear Ms. Brown,

This responds to Applicants' August 26, 2022, request (the "Request" or "CP-62/KCS-48")

"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."

CP-62/KCS-48 at 1. The Request supplements Applicants' baseless Motion to Strike (CP-55/KCS-41) and makes explicit their true objective: Not just that certain evidence be excluded, but that the issues and evidence to which these depositions would relate should "fall away" and the Meridian Speedway be given no further "attention." *Id.* We also respond to Norfolk Southern Railway Company's ("NSR's") Motion to Hold Deposition in Abeyance (NS-16) or ("NSR's Motion"), which only serves to confirm that NSR shares Applicants' objective. Where appropriate, we refer to the Applicants and NSR together as the "Co-Movants."

The old saying is "where there's smoke, there's fire." Here, the Co-Movants give new meaning to that saying by raising a smoke screen to distract from a fire that they hope the Board will not extinguish. Both are seeking to avoid Board scrutiny of the 2006 NSR-KCS Meridian Speedway Exclusivity Arrangements ("Exclusivity Arrangements")<sup>1</sup> that a) effectuated an

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<sup>1</sup> "Exclusivity Arrangements" refers to the unlawful and anticompetitive provisions of the Meridian Speedway Agreements. These include the exclusivity provisions regarding DITT between Dallas, TX and Shreveport, LA and NSR Traffic between Shreveport, LA and Meridian, MS, and the control provisions regarding NSR control over the MSLLC. Finance Docket No.

unlawful market division between NSR and KCS over the entire Meridian Speedway, and b) granted NSR unlawful control of the KCS-NSR joint venture railroad (“MSLLC”) that owns the portion of the Speedway between Shreveport, LA and Meridian, MS (the “MSLLC Line”). Both presume, without any basis in law, facts, or public policy, they can dissuade the Board from doing the job it has been commissioned to perform by Congress.<sup>2</sup>

CSXT seeks conditions to assure the Proposed Transaction will not perpetuate and exacerbate the restraints now imposed by KCS and NSR on competition to, from, and over the Meridian Speedway between Dallas, TX, and Meridian, MS. The requested conditions will advance the interests of shippers and benefit the public interest even if CSXT gains no traffic from the resulting competition. They will also enhance, not diminish, the anticipated public benefits from the Proposed Transaction because the “competition resulting from the condition are of greater benefit to the public interest than harm to the merger.” *Burlington Northern, Inc.-Control & Merger-St. L.*, 360 I.C.C. 788, 950 (1980).

There is no legitimate basis for Co-Movants’ extraordinary requests to preclude scrutiny of CSXT’s proposed conditions on the merits. And the arguments they make for quashing scheduled depositions that would enable CSXT and NSR to examine each other’s economic witnesses on the merits range from deceptive statements of the law to frivolous assertions that Applicants lack the resources to participate in these depositions.

The nexus between the Exclusivity Arrangements and the Proposed Transaction has been the subject of substantial briefing in the submissions of multiple parties.<sup>3</sup> The Board should resolve any dispute about that nexus or the merits of those arrangements in its final decision, based on evidence adduced through the Board’s ordinary procedures. Applicants offer no cognizable reason the Board should discard this process, shortcut its consideration of these issues, and forbid the parties from developing potentially relevant evidence through depositions that the Board’s procedures otherwise permit. *See generally* 49 C.F.R. 1114.22. *See also* 49 C.F.R. 1114.21(a).

The relationship between a proposed transaction and alleged public interest harm is a substantive issue as to which the Board’s procedures permit discovery reasonably calculated to

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36500, CSX Transportation Inc.’s Response to Comments and Responsive Applications (CSXT-13), at 10 (July 12, 2022).

<sup>2</sup> In a proceeding involving the merger or control of at least two Class I railroads, the Board shall consider at least “(1) the effect of the proposed transaction on the adequacy of transportation to the public...[and] (5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system.” 49 U.S.C. § 11324(b)(1) and (b)(5).

<sup>3</sup> One indicator of the nexus between the Exclusivity Arrangements’ and the Proposed Transaction is NS’ claim that Proposed Transaction, if approved without NSR’s conditions, will reduce service over the Speedway. Finance Docket No. 36500, Comments of Norfolk Southern Railway Company and Request for Conditions (NS-9) (Feb. 28, 2022). This threat of deteriorating service would not exist if the Speedway were open to competition and KCS were free and have incentive to make such investments as the market required.

lead to admissible evidence. Therefore, the scheduled depositions about the Meridian Speedway could be proscribed only if they were barred by a protective order decreeing all issues related to the Exclusivity Arrangements irrelevant. Such an extraordinary interim order declaring what does and does not bear a nexus to the Proposed Transaction—without the benefit of the evidence, hearing, and final briefs the Board ordinarily relies upon to make such determinations—is precisely what Co-Movants aim to secure.

Applicants' Motion to Strike would deny the Board the evidence presented in CSXT-13 that NSR's investment in MSLLC was as much an investment in a monopoly over traffic traversing the Meridian Speedway as an investment in improved service capacity.

Co-Movants' requests that the Board delay and quash the scheduled depositions (which NSR had earlier pledged not to oppose and agreed with CSXT to schedule<sup>4</sup>) have an additional purpose: to assure that NSR's economic witness cannot be impeached regarding, among other things, his claim that the Exclusivity Arrangements did not pre-empt existing competition and imminent arrangements that would have given shippers even more choices to from and over the Speedway.

The Board can reasonably assume that Applicants' Request and NSR's Motion both have ignored the Board's assignment of initial discovery dispute resolution to Judge McCarthy.<sup>5</sup> Co-Movants likely understand their request could not stand up to the scrutiny they would receive in a discovery hearing. They offer no support for their requests based on the Board's standards for protective orders.

Co-Movants also offer no support for Applicants' assertion that there is no nexus between the Proposed Transaction and the harms CSXT seeks to alleviate. Instead, Like Applicants' Motion to Strike, their requests rest primarily on a false assumption: simply because KCS and NSR originated the harm in 2006, the Board should disregard the public interest and ignore the harm to competition and shippers that will be exacerbated by the Proposed Transaction. That is not the Board's standard, and it never has been. *See, e.g., CSX Corp.-Control-Pan Am Systems, Inc.*, FD 36472, slip op. at 10-11 (STB served April 14, 2022) (“[T]he harm caused by the transaction ‘must be distinguished from ... pre-existing disadvantages that will neither be caused *nor exacerbated*’ by the transaction.” (emphasis supplied)); *Burlington N., Inc.-Control & Merger- St. Louis-San Francisco Ry. Co.*, 360 I.C.C. 788, at 950 (I.C.C. 1980) (“The overriding factor governing the imposition of all conditions in the past has been the public interest.”).

Moreover, contrary to Applicants' assumptions, CSXT's proposed conditions do not concern backward-looking antitrust liability. Rather, they relate directly to the Board's mission in addressing the future of railroad transportation by conducting a full and fair inquiry into the

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<sup>4</sup> See Correspondence from counsel to NSR, attached as Exhibit A.

<sup>5</sup> “The Board hereby assigns and authorizes Administrative Law Judge Thomas McCarthy to entertain and rule upon discovery matters and to resolve initially all disputes concerning discovery in this proceeding.” *Canadian Pacific Railway Limited, et al.—Control—Kansas City Southern, et al.*, Decision No. 3, STB Finance Docket No. 36500, at 3 (served April 21, 2021).

public interest concerning the largest railroad consolidation in over 20 years. That inquiry requires an examination of the competitive impacts from the Exclusivity Arrangements that would perpetually bind the implementation of the Proposed Transaction if it were approved without CSXT's requested conditions.<sup>6</sup> Yet Applicants' Motion to Strike and their Request both fail even to acknowledge the public interest as the governing standard, and both imply Applicant's own interests should instead be paramount.

Applicants' notion that the Exclusivity Arrangements have been reviewed and sanctioned by the Board (*see* CP-62/NS-48 at 2) is also wrong. As CSXT has explained,<sup>7</sup> and no party has contradicted, the Exclusivity Arrangements were not reviewed or sanctioned in 2006. The 2006 Notice of Exemption: 1) cannot have exempted a pooling arrangement, *compare* 49 C.F.R. 1180.2 (2000) (governing transactions proposed under 49 U.S.C. 11323) *with* 49 U.S.C. 11322 (governing pooling); 2) cannot have exempted a transaction that results in "a change in the competitive balance with carriers outside the corporate family," 49 C.F.R. 1180.2(d)(3); and 3) cannot have exempted a transaction granting NSR joint control over the MSLLC Line, which would not have qualified as an intracorporate transaction, *see id.*; STB Finance Docket No. 35063, *Mich. Cent. Rwy., LLC-Acquisition and Operation Exemption-Lines of Norfolk S. Rwy. Co.* (served December 10, 2007).<sup>8</sup> The Exclusivity Arrangements did each of these things, and the Notice of Exemption<sup>9</sup> could not have exempted those actions from scrutiny.

Similarly, repetitive table-pounding by Applicants and NSR that the Board has declared it *res judicata* that the Exclusivity Arrangements were reviewed, found to be procompetitive, and established to be properly exempted cannot change the fact that the Board has stated the opposite.

As the Board explained in 2007, regarding the MSLLC agreements specifically, the exemption procedure relied upon by KCS in 2006 allows transactions to be "authorized subject only to an after-the-fact Board review if objections are received," and because no such objection was received, no such review occurred. STB Finance Docket No. 35063, *Mich. Cent. Rwy., LLC-*

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<sup>6</sup> "A rail carrier, corporation, or person participating in [a Board] approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction." 49 U.S.C. § 11321.

<sup>7</sup> CSXT-13, at 23.

<sup>8</sup> For other examples of NS's failure to expressly seek control authority under Section 11323, See Docket No. 36522, *Norfolk Southern Railway Company-Petition for Declaratory Order* (served June 17, 2022) and STB Finance Docket No. 35063, *Michigan Central Railway, LLC-Acquisition and Operation Exemption-Lines of Norfolk Southern Railway Company* (served December 10, 2007).

<sup>9</sup> STB Finance Docket No. 34822, *Kansas City Southern, The Kansas City Southern Railway Company, and Meridian Speedway LLC-Exemption Transactions Within a Corporate Family*, served February 16, 2006, which allowed the transfer of a portion of the Speedway to MSLLC and allowed control of MSLLC by KCS and KCSR.

*Acquisition and Operation Exemption-Lines of Norfolk S. Rwy. Co.* (served December 10, 2007), slip op. at 10. The notices of exemption simply “became effective” because they “were unopposed.” But that does not establish that the Exclusivity Arrangements were properly subject to exemption or were procompetitive. *See id.* (“Meridian Speedway has no precedential value” regarding matters outside the scope of an intracorporate exemption.). The Board has *never* examined whether the exemption extended to the Exclusivity Arrangements, *has never assessed the competitive effects of the Exclusivity Arrangements*, and has *never* determined whether the Proposed Transaction will perpetuate and exacerbate competitive harms stemming from the Exclusivity Arrangements.

Finally, Applicants’ complaint about the supposed inconvenience they would suffer if the depositions went forward is not credible. Applicants object to depositions of witnesses sponsored by parties not affiliated with Applicants by other parties not affiliated with Applicants. None of the deponents are affiliated with Applicants. Whether Applicants even attend those depositions is within their discretion. If Applicants wish to expend resources to assist NSR with the depositions, or they wish to attend and ask questions of the deponents, they have the resources to do so without burdening their hearing preparations. Their team consists of a host of consultants and lawyers authorized to review the Board’s confidential waybill sample, including Mr. Meyer’s firm and one of the most capable Wall Street law firms, Sullivan & Cromwell.

Applicants’ Request and NSR’s Motion, like Applicants’ Motion to Strike, asks the Board to pre-judge CSXT’s requests for conditions without reviewing much of the evidence CSXT has presented and without allowing the development of additional evidence through the scheduled depositions. The Board should deny both Applicants’ Request and NSR’s Motion, allow the scheduled depositions to proceed, and address CSXT’s requested conditions on the merits, as Congress intended, to properly ascertain the public interest.

Sincerely,

/s/ Paul A. Cunningham

Paul A. Cunningham

*Attorney for CSX*

*Transportation, Inc.*

September 1, 2022

cc: All Parties of Record

**CERTIFICATE OF SERVICE**

I hereby certify that I have caused the foregoing CSX Transportation, Inc. Response to be served electronically or by first-class mail, postage pre-paid, 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/ Jill Burtis

September 1, 2022

# Exhibit A

From: Paul A. Cunningham/Harkins Cunningham/US  
To: "Mahan, Carrie" <Carrie.Mahan@weil.com>  
Cc: "Kucerik, Brianne" <brianne.kucerik@weil.com>, "Scribner, John" <John.Scribner@weil.com>  
Date: 08/25/2022 01:53 PM  
Subject: RE: Deposition Requests - further

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Carrie,

In case you are too busy to call: Per your preferences, this is to confirm we will notice Mayo's deposition for September 15; we will produce Shehadeh for deposition on September 22; and we will produce Carey for deposition on September 23.

Best wishes,

pac

Good morning, Carrie,

I think we're set for the 15th, 22nd, and 23rd. Please call me to confirm details.

Thank you,

pac

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"Mahan, Carrie" ---08/24/2022 14:36:36---A day each. Thanks

From: "Mahan, Carrie" <Carrie.Mahan@weil.com>  
To: "pac@harkinscunningham.com" <pac@harkinscunningham.com>

Cc: "Kucerik, Brianne" <brianne.kucerik@weil.com>, "Scribner, John" <John.Scribner@weil.com>  
Date: 08/24/2022 14:36  
Subject: RE: Deposition Requests

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A day each.

Thanks

**From:** pac@harkinscunningham.com <pac@harkinscunningham.com>  
**Sent:** Wednesday, August 24, 2022 1:47 PM  
**To:** Mahan, Carrie <Carrie.Mahan@weil.com>  
**Cc:** Kucerik, Brianne <brianne.kucerik@weil.com>; Scribner, John <John.Scribner@weil.com>  
**Subject:** Re: Deposition Requests

Carrie,

Do you anticipate a day each for Carey and Shehadeh or one day for both?

Thanks.

pac  
**Paul A. Cunningham**  
Harkins Cunningham LLP  
[1750 K Street, NW](#)  
[Washington, DC 20006](#)

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On Aug 24, 2022, at 12:21, Mahan, Carrie <[Carrie.Mahan@weil.com](mailto:Carrie.Mahan@weil.com)> wrote:

Dear Paul,

I have discussed your request of yesterday afternoon for the deposition of Professor Mayo with my client. NS will not oppose you taking the deposition, but of course we reserve all rights to move to strike or otherwise respond to any use of such testimony that is inconsistent with the rules of the STB and the procedures/schedule put in place for this case. Professor Mayo is not available on September 8th, but can be available for remote deposition on September 15th.

We also seek the depositions of CSX experts Julie M. Carey and Ramsey Shehadeh between September 20 to 23. Please let me know which dates work for each of them by COB tomorrow so we can get notices issued.

Thank you

Carrie

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