

CSXT-10

BEFORE THE
SURFACE TRANSPORTATION BOARD

307605

DOCKET NO. FD 36727

CSX TRANSPORTATION, INC.
—ACQUISITION AND OPERATION—
RAIL LINE OF MERIDIAN & BIGBEE RAILROAD, L.L.C.

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CSXT'S RESPONSE TO THE COMBINED NORFOLK SOUTHERN MOTION TO
ALLOW FOR COMPLETION OF DISCOVERY AND AMEND THE PROCEDURAL
SCHEDULE

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Dated: December 7, 2023

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CSX TRANSPORTATION, INC.
—ACQUISITION AND OPERATION—
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CSXT'S RESPONSE TO THE COMBINED NORFOLK SOUTHERN MOTION TO
ALLOW FOR COMPLETION OF DISCOVERY AND AMEND THE PROCEDURAL
SCHEDULE

CSXT¹ hereby responds to the Combined Norfolk Southern Motion to Allow for Completion of Discovery and Amend the Procedural Schedule, filed on December 5, 2023. NSR requests that the Board extend the comment and reply periods in this proceeding by 18 days, from December 11, 2023 to December 29, 2023, with responses and rebuttal in support of the applications due 30 days later, on January 26, 2024 or Sunday, January 28, 2024. (*See* NSR Motion at 5, 20.)²

CSXT requests that the Board reject the NSR request. Congress has mandated that the Board should process minor transactions such as the CSXT Transaction subject to an expedited schedule with specified deadlines for comments and the conclusion of evidentiary proceedings. *See* 49 U.S.C. § 11325(d). The Board's current procedural schedule in this case appropriately accounts for this statutory mandate and the lack of complexity presented by the CSXT Transaction.

¹ The acronyms and defined terms used in this Response are the same as those used in CSXT's Application or in Decision No. 1 in this proceeding, served by the Board on November 3, 2023.

² NSR also makes a number of unsubstantiated claims and arguments on the merits of the CSXT Transaction. CSXT will not address those claims and arguments in this Response. Rather, CSXT will respond to those claims and arguments in the normal course of the Board's procedural schedule.

Moreover, NSR has shown no real need for the Board to extend the procedural schedule. Indeed, the timing woes that NSR complains about in its motion are a crisis of its own making. CSXT has diligently responded to NSR's overbroad and slapdash discovery requests, and CSXT's confidentiality designations have been appropriate and consistent with the applicable protective order. NSR has capable outside counsel and consultants who can review highly confidential material.³ In short, CSXT has already provided all required information, and extensive supplemental information, for NSR and the public to fully participate in the Board's review under the current schedule.⁴

As NSR set out in its motion, CSXT indicated to NSR that CSXT was agreeable to a limited three-day extension in order to allow NSR a full week to review the final document production that CSXT made on December 6, 2023. But CSXT does not believe that an 18-day extension is necessary or appropriate here.

However, CSXT notes that on December 6, 2023, the Board issued a decision in the CPKC Transaction proceeding, granting in part and denying in part NSR's motion for a Board order re-designating certain information that was designated Highly Confidential in the CPKC Application. The Board's decision also amends the procedural schedule in the CPKC proceeding, extending the comment period to December 18, 2023, with responses, protests, requests for conditions, other opposition, and rebuttal due by January 18, 2024. *Canadian Pac. Kan. City Ltd.—Acquis. & Operation—Certain Rail Line of Meridian & Bigbee R.R. in Lauderdale*

³ The Board recognized that NSR's "outside counsel and consultants who execute the required undertaking will have full access to any highly confidential information for purposes of reviewing and analyzing potential operational impacts." Decision No. 3, FD 36732, slip op. at 6-7.

⁴ Much like the CPKC application, "the information needed to assess the [CSXT] transaction from an operational standpoint is already included in the public version of the [CSXT] Application." See Decision No. 3, FD 36732, slip op. at 6.

Cnty., Miss., & Choctaw & Marengo Cntys., Ala. (Decision No. 3), FD 36732, slip op. at 8 (STB served Dec. 6, 2023).

While the Board's decision does not amend the procedural schedule in the CSXT Transaction proceeding, the current schedule contemplates concurrent filing of comments and replies in the CPKC and CSXT proceedings. Although CSXT believes that no extension of the procedural schedule is justified, CSXT would not object to an extension of the schedule in this proceeding to maintain the concurrent filing schedule originally established for the CSXT and CPKC proceedings. Accordingly, CSXT would not object to a modification of the current schedule in FD 36727 to have comments and requests for conditions filed by December 18, 2023, and responses and rebuttal due by January 18, 2024.

1. CSXT has diligently responded to NSR's discovery requests.

NSR's complaints about the timing and substance of the discovery process have no merit and do not justify NSR's requested 18-day extension. On November 3, 2023, the Board ordered that the parties could begin discovery immediately and encouraged the parties "to resolve all discovery matters expeditiously and amicably." Decision No. 1, slip op. at 12. After waiting six days, on November 9, 2023, NSR served 47 discovery requests on CSXT. NSR requested that objections be made within 10 days and that responses be served by November 24, 2023, notwithstanding the Board's rules explicitly providing that responses and objections cannot be due "less than 15 days after the service thereof." 49 C.F.R. § 1114.26(a).

CSXT informed NSR that it would serve its responses and objections on November 22, 2023, and produce documents on a rolling basis starting on November 27, 2023. CSXT attempted in good faith to substantively respond to NSR's discovery requests, despite the fact that few of NSR's Requests sought discoverable information in CSXT's possession. Instead, the majority of the Requests appeared to

be the product of copying and pasting from the requests that NSR served on CPKC, regardless of whether they applied to CSXT.⁵ Instead of seeking a protective order—which CSXT had every right to do—CSXT endeavored to interpret and respond to NSR’s Requests despite their frequent lack of focus or their irrelevance to CSXT or the CSXT Application.

CSXT diligently responded to the NSR discovery requests. CSXT conducted interviews with those involved in creating its Application, collected documents, and responded to the 47 discovery requests prior to NSR’s requested deadline. CSXT made three document productions: (1) on November 27, 2023, CSXT produced 23 documents; (2) on December 1, 2023, CSXT produced 60 documents; and (3) on the morning of December 6, 2023, CSXT completed its production with 28 documents.

Yesterday, 15 days after CSXT filed the supplemental information required by the Board, NSR served additional discovery requests on CSXT related to that supplemental filing. NSR argues in its motion that “[t]he discovery process related to information in Applicants’ November 21, 2023, would not be completed in time to include that information in comments to be filed just 20 calendar days later.” (NSR Motion at 12.) But if NSR needed more than 20 days to review CSXT’s November 21, 2023 filing, or more than two weeks to even propound discovery regarding this filing, NSR should have filed an extension on this basis weeks ago.⁶

⁵ For example, many of the Requests sought information regarding the Western Line, Meridian, the Meridian Speedway, and the Verified Statement of James Clements of CPKC, none of which is the subject of the CSXT Application or even within CSXT’s knowledge. In fact, NSR sought the same information from CPKC and did not need to complicate the discovery process by also seeking that information from CSXT. If NSR had truly been concerned about expediting the discovery process, it could have prepared far more streamlined discovery requests.

⁶ Moreover, NSR’s motion is not timely. NSR should have requested an extension “not less than 10 days before the due date” of its comments. *See* 49 C.F.R. § 1104.7(b) (“(b) Extensions. Any time period . . . may be extended by the Board in its discretion, upon request and for good cause. . . . A request for an extension must be filed not less than 10 days before the due date.”).

Indeed, there is no need now for NSR, a large railroad represented by capable outside counsel and consultants, to spend an additional 18 days reviewing CSXT-produced materials, particularly because the vast majority of the information requested by NSR was already contained in the CSXT Application and November 21, 2023 supplemental filing.

2. NSR's complaints about CSXT's confidentiality designations lack merit and do not justify an extension of the schedule.

NSR also claims that its ability to prepare comments has been hindered by CSXT's confidentiality designations. NSR's confidentiality complaints are a red herring. CSXT's confidentiality designations have been appropriate and consistent with the protective order issued by the Board. Indeed, CSXT's redactions in the public filings have been very limited.

As to the Highly Confidential information, CSXT understands that NSR has retained outside experts who have access to all of the relevant data and information CSXT has submitted to the Board and provided in discovery. Additionally, CSXT already agreed to re-designate certain information in its Application from Highly Confidential to Confidential, pursuant to separate requests from NSR and CN.⁷ There is no need to extend the procedural schedule in order to address any confidentiality designation issues raised by NSR.

In short, CSXT does not believe that any extension of the current procedural schedule is necessary or justified. However, CSXT acknowledges that the STB has

⁷ In the discovery context, NSR has only brought to CSXT's attention two questions about confidentiality designations in its productions. First, on December 4, 2023, attorneys for NSR stated that CSXT produced documents as Confidential related to NSR's pending motion for re-designation and inquired if they were inadvertently designated. CSXT re-designated these documents on the same day. That night, NSR requested CSXT provide a Highly Confidential version of a document CSXT produced as Confidential with certain redactions. CSXT allowed NSR to keep the current version, which could be viewed in-house, and also produced the same document as Highly Confidential without the redactions. To date, NSR has not questioned the confidentiality designation of any other documents produced by CSXT.

extended the procedural schedule in FD 36732 to address issues relating to confidentiality designations in that proceeding. In order to maintain concurrent procedural schedules in FD 36727 and FD 36732, which was contemplated by the STB's original scheduling order, CSXT would not object to a corresponding extension of the comment period in the CSXT Transaction proceeding to December 18, 2023, with responses, protests, requests for conditions, other opposition, and rebuttal due by January 18, 2024.

Respectfully submitted,

/s/ Peter W. Denton

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Attorneys for CSX Transportation, Inc.

Dated: December 7, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have caused this CSXT's Response to the Combined Norfolk Southern Motion to Allow for Completion of Discovery and Amend the Procedural Schedule in Docket No. FD 36727 to be served electronically or by first class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Sally Mordi

Sally Mordi
Attorney for CSX Transportation, Inc.

December 7, 2023