

CSXT-5

BEFORE THE
SURFACE TRANSPORTATION BOARD

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NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
—ACQUISITION OF CONTROL—
NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY

CSX TRANSPORTATION, INC.'S RESPONSE TO NORFOLK SOUTHERN'S
REVISED MOTION FOR PROPOSED PROCEDURAL SCHEDULE

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1. INTRODUCTION

CSXT¹ hereby responds to NS's Revised Motion for Proposed Procedural Schedule (the "NS Motion"), filed on March 21, 2025 pursuant to *Decision No. 2*, served on March 14, 2025 in this proceeding.

As CSXT stated in its Petition to Reject, filed on February 27, 2025, CSXT intends to participate fully in this proceeding. CSXT believes that NS's unlawful control of NPBL until now has produced substantial harm to competition, to international intermodal shippers and to CSXT, and CSXT will oppose NS's attempt to obtain Board authorization to continue control of NPBL. While CSXT firmly believes that NS's request for control authorization should be denied, CSXT also intends to request that the Board require conditions if authorization were to be approved, and CSXT intends to file responsive, including inconsistent, applications. Given the breadth and importance of the competitive issues that will need to be

¹ Unless otherwise defined, the acronyms and defined terms used herein are the same as those used in the Board's *Decision No. 2*, served on March 14, 2025 in this proceeding, or in CSX Transportation Inc.'s Petition to Reject Northern Southern's Minor Application, filed on February 27, 2025.

addressed in this proceeding, it will be important for the Board to provide adequate time for the parties to develop the record and for the Board to consider the issues raised. Accordingly, CSXT proposes certain modifications to NS's proposed procedural schedule to ensure the creation of an adequate record, including opposition to NS's inappropriate attempt to limit discovery. CSXT also addresses NS's proposed treatment of the base year and environmental matters.

2. PROPOSED PROCEDURAL SCHEDULE

CSXT requests that the Board adopt certain modifications to the procedural schedule proposed by NS. Set forth below is a redline of the proposed procedural schedule, showing the changes that CSXT proposes to the NS proposed schedule.

Procedural Schedule Proposed by CSXT
(with Changes Shown to NS's Proposed Schedule in Redline)

- | | |
|-------------------|---|
| F + 0 | Revised Application filed. |
| <u>F + 15</u> | <u>All comments on the sufficiency of the Revised Application filed.</u> |
| F + 30 | <u>If the Board determines that the Revised Application is incomplete, the Board shall reject the Revised Application; if the Board accepts the Revised Application,</u> Board notice of acceptance of the Revised Application to be published in the Federal Register. Discovery may begin. |
| F + 40 | Notices of intent to participate in the Proceeding are due. |
| F + 60 | Descriptions of anticipated responsive, including inconsistent, applications due. Petitions for waiver or clarification with respect to such applications due. |
| <u>F + 90</u> | All comments, protests, requests for conditions, and any other evidence and argument in opposition to the Revised Application or Related Transactions due, including filings by the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (USDOT). |
| F + 90 | Responsive, including inconsistent, applications due. |

- F + 135 Responses to comments, protests, requests for conditions, other opposition due, including to DOJ and USDOT filings. Responses to responsive, including inconsistent, applications due. Rebuttal in support of the Application due. ~~Discovery Closes.~~
- F + ~~165~~180 Rebuttal in support of responsive, including inconsistent, applications due.
- TBD Public hearing ~~(if necessary)~~.
- F + ~~180~~210 Final briefs due. (Close of the evidentiary record.)
- F + ~~270~~300 Final decision served, 90 days after the date of the closing of the evidentiary record in the Proceeding.
- F + ~~300~~330 Date by which a final decision will become effective, 30 days after it is served.

The reasons for the proposed changes to NS's proposed schedule are discussed below.

First, CSXT proposes that the Board provide a deadline for comments addressing the sufficiency of the Revised Application (F + 15). Given the paucity of information included in NS's original February 14, 2025 submission, NS's reliance on false assertions and the patently inadequate economic analysis, CSXT believes there is a strong likelihood that the Revised Application will be similarly flawed. Having a specific date for filing comments on the sufficiency of the Revised Application will help the Board manage the limited time it has to make a decision on whether to accept or reject the Revised Application.

Second, CSXT modified the description of day F + 30 to parallel the statute, 49 U.S.C. § 11325(a), in recognition of the possibility that the Board will find that the application is incomplete.

Third, NS proposed that comments, protests, requests for conditions, and any other evidence and argument in opposition to the application should be due 60 days after the application is filed, which would be the same deadline as descriptions of

anticipated responsive, including inconsistent, applications; and petitions for waiver or clarification with respect to such applications. (NS Motion 3, Mar. 21, 2025.) In contrast, CSXT proposes that comments, protests, requests for conditions, and any other evidence and argument in opposition to the application should be due 90 days after the application is filed, which would be the same deadline as responsive, including inconsistent, applications.

The Board should extend the deadline for written comments to 90 days after the application is filed, as proposed by CSXT. While a 60-day comment period was included in the procedural schedule originally proposed by the Board in *CSX Corp. & CSX Transp., Inc.—Control & Merger—Pan Am Systems, Inc. (CSX/Pan Am)*, FD 36472, slip op. at 3 (STB served April 22, 2021), the only other “significant” transaction that has been reviewed by the Board—*Canadian Pacific Railway Company—Control—Dakota, Minnesota & Eastern Railroad Corp. (CP/DM&E)*, Docket No. FD 35081—provided for a 90-day period after the application was filed for the submission of written comments. *See CP/DM&E*, FD 35081, slip op. at 18 (STB served Dec. 27, 2007).

The 90-day period provided in *CP/DM&E* would be more appropriate here than the 60-day period in *CSX/Pan Am* for several reasons. First, in *CSX/Pan Am*, most of the competitive issues had been resolved before the application was filed through agreements among the parties potentially affected by the transaction. Here, in contrast, a serious competitive dispute is at the heart of this proposed transaction. Second, given the serious, extensive, and longstanding competitive issues that will need to be addressed in this proceeding, and the existence of a substantial record that will need to be reviewed, CSXT and other interested parties will need adequate time to review the record, analyze the impacts of the proposed transaction, and prepare written comments.

Moreover, the Board should extend the deadline for the submission of written comments to 90 days after the application is filed so that the comment deadline is synchronized with the deadline for responsive, including inconsistent, applications. Synchronizing the deadlines for written comments and responsive applications would create efficiencies for the parties, and it is consistent with Board practice in significant and major control proceedings. *See, e.g., CP/DM&E*, FD 35081, slip op. at 18; *Canadian Pac. Ry. Ltd.—Control—Kansas City S. (CP/KCS)*, FD 36500, slip op. at 17 (STB served Nov. 23, 2021); *Canadian Nat’l Ry. Co.—Control—Illinois Cent. Corp. (CN/IC)*, FD 33556, slip op. at 16 (STB served Aug. 14, 1998); *CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc.*, FD 33388, slip op. at 26 (STB served July 23, 1997); *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP)*, FD 32760, 1995 WL 758788, at *10 (ICC served Dec. 27, 1995). In fact, in *CP/KCS*, the Board specifically stated that it would synchronize the deadlines for written comments and responsive applications “in response to concerns raised by commenters, including Applicants.” *CP/KCS*, FD 36500, slip op. at 13 (STB served Nov. 23, 2021).

Although the governing statute, 49 U.S.C. § 11325(c)(1), provides that written comments may be filed in a significant transaction “within 30 days after notice of the application is published” (i.e., 60 days after the application is filed), the Board and its predecessor have recognized that they have substantial flexibility in setting a schedule in control proceedings, and they have extended the deadline for submitting written comments in various significant and major² control proceedings. *See, e.g., CP/DM&E*, FD 35081, slip op. at 18 (issuing a procedural schedule which

² Under 49 U.S.C. § 11325(b)(1), in proceedings involving the merger or control of two or more Class I railroads, written comments about an application may be filed within 45 days after notice of the application is published (i.e., 75 days after the application is filed).

extended the deadline for submitting written comments to 90 days after the application was filed); *CP/KCS*, FD 36500, slip op. at 17 (STB served Nov. 23, 2021) (issuing a procedural schedule which extended the deadline for submitting written comments to 120 days after the application was filed notwithstanding the statute setting out 75 days); *CN/IC*, FD 33556, slip op. at 16 (issuing a procedural schedule which extended the deadline for submitting written comments to 90 days after the application was filed); *UP/SP*, FD 32760, 1995 WL 758788, at *10 (issuing a procedural schedule which extended the deadline for submitting written comments to 120 days after the application was filed).

Fourth, NS proposed that rebuttal in support of responsive, including inconsistent, applications should be due 165 days after the application is filed. (NS Motion 3.) CSXT proposes that rebuttal in support of responsive, including inconsistent, applications should be due 180 days after the application is filed. Under CSXT's proposal, the time period would be the same for NS to reply to comments (45 days) and for parties filing responsive, including inconsistent, applications to file their rebuttal to comments on those applications (also 45 days). As CSXT has previously indicated in its Petition to Reject, CSXT intends to submit one or more responsive applications in this proceeding in the event the Board were to approve NS's application.

Fifth, CSXT proposes that the Board provide 30 days to file final briefs after the final scheduled filing of evidence and argument rather than 15 days, as proposed by NS. A 30-day period will assist the Board by giving the parties a better opportunity to summarize what will likely be a complex record. This approach is consistent with the governing statute, which states that "[t]he Board must conclude any evidentiary proceedings by the 180th day after the date of publication of notice" (i.e., 210 days after the application is filed). 49 U.S.C. § 11325(c)(3).

Sixth, CSXT believes that a public hearing will be necessary in this proceeding. It is clear from the responses to NS's original submission that there are serious competitive issues that the Board will need to address. Moreover, parties other than CSXT have already indicated concern over NS's proposed acquisition of control authority, and the Board will need to consider the views of other stakeholders.³ A hearing will be necessary to provide an opportunity for the Board to hear directly from CSXT and other interested stakeholders.

Seventh, CSXT objects to the discovery period proposed by NS. Discovery issues are discussed further below.

3. DISCOVERY

NS's treatment of discovery in the proposed schedule is unprecedented, inconsistent with the Board's regulations and practice and completely inappropriate in a case that is as factually complex as this one. Under NS's proposed procedural schedule, discovery would not begin until 30 days after the application is filed, and discovery would close 135 days after the application is filed, before any rebuttal is filed on responsive, including inconsistent, applications. There is no basis for arbitrarily assigning a starting date and ending date for discovery.

In control proceedings, the procedural schedule issued by the Board typically does not establish a specific time period for discovery, but rather allows discovery to go forward once a proceeding is initiated by a prefiling notification. For example, in *CP/KCS*, Canadian Pacific Railway Limited and additional entities (collectively, "CP") filed on March 22, 2021 a notice of intent to file an application. On May 27, 2021, CP filed a petition asking the Board, among other things, to confirm that Kansas City Southern was obligated to provide CP with information CP needed to complete its application. *See CP/KCS*, FD 36500, slip op. at 3 (STB served Aug. 2,

³ (See VPA Comments, Mar. 5, 2025; CSXT Letter, Mar. 12, 2025 (enclosing a letter from CMA CGM).)

2021). In a decision served on August 2, 2021, the Board confirmed that CP could “seek materials from [Kansas City Southern] through the discovery process in this proceeding that [were] relevant to its preparation of an application for authority to acquire control of [Kansas City Southern] and [could] do so now without first filing an application in this docket or an inconsistent application in Docket No. FD 36514.” *Id.*, slip op. at 4. Here, in *Decision No. 2*, the Board declined to reject NS’s February 14, 2025 submission, and instead stated that it will treat NS’s submission as a prefiling notification. *Decision No. 2*, slip op. at 7, 7-8 n.8. Accordingly, discovery should be allowed to proceed without waiting for further action by NS.

Indeed, the Board’s regulations clearly provide that as long as a proceeding is in place, discovery may be conducted. Under the Board’s rules at 49 C.F.R. § 1114.21(a)(1), “[p]arties may obtain discovery . . . regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding other than an informal proceeding.” No purported “start date” is needed to be ordered by the Board for discovery. “All discovery procedures may be used by parties without filing a petition and obtaining prior Board approval.” *Id.* at § 1114.21(b).

NS’s assumption that parties must hold off on discovery until some arbitrary “start date” is flatly inconsistent with prior cases. For example, in *Navajo Transitional Energy Company, LLC v. BNSF Ry. Co.*, FD 42179, slip op. at 4 (STB served Aug. 7, 2023), the Board explicitly stated that its “regulations do not prevent parties from starting discovery before a procedural schedule is issued,” citing 49 C.F.R. § 1114.21(b). In *Norfolk S. Ry. Co.—Acquisition & Operation—Certain Rail Lines of the Delaware & Hudson Ry. Co., Inc.*, FD 35873 (STB served May 15, 2015), the Board rejected a commenter’s argument that the Board had erred in failing to provide for discovery in its procedural schedule. *Id.*, slip op. at 8. The Board stated that its regulations “clearly provide for discovery,” and that the commenter “could have served the parties in this matter with discovery requests *at any time* under the

Board's regulations." *Id.* (emphasis added). In *Riverview Trenton R.R. Co.—Acquisition & Operation Exemption—Crown Enterprises, Inc.*, FD 33980 (STB served Feb. 15, 2002), the Board noted that a party had filed a request that the Board issue a procedural schedule and asked that "time be set aside for discovery." *Id.*, slip op. at 11 n.17. Citing 49 C.F.R. § 1114.21(b), the Board stated that the party "required no authority from [the Board] to undertake discovery if it wished to do so." *Id.*

The limits on discovery proposed by NS are an inappropriate attempt to constrain the development of a full record in this proceeding. This strategy by NS is already becoming clear. As CSXT explained in its March 20, 2025 letter to the Board, there is already an apparent discovery dispute between the parties as a result of NS's desire to prevent the Board from having access to the full record in the district court proceeding, notwithstanding NS's prior representation to the Board that the district court "record is known by all and ready for presentation and argument before the Board." (NS Reply 35, Mar. 7, 2025.) When CSXT asked NS to consent to allow the district court record to be used in the STB control proceeding, NS refused, necessitating the submission of formal discovery requests that may need to be addressed by the Board if NS continues to object to the use of the district court record in this proceeding.

Finally, there is no reason why discovery should close 135 days after the application is filed, as proposed by NS. This "end date" proposal is an obvious attempt to avoid any discovery on assertions made by NS in response to responsive, including inconsistent, applications. It is premature to establish a close of discovery before it can be known whether discovery will be appropriate or necessary. As long as the record is open, and a party has a need for discovery, the party is entitled to discovery.

4. BASE YEAR

In *Decision No. 2*, the Board stated that “[t]he proposed procedural schedule shall indicate the year to be used for the impact analysis.” *Decision No. 2*, slip op. at 9. In the NS Motion, NS indicated that the year to be used for the impact analysis is “calendar year 2023 due to the unavailability of the 2024 STB waybill data at this time. However, if the STB 2024 waybill data becomes available in time for use in this proceeding, NS would prefer to use 2024 as the base year.” (NS Motion 1 n.1.)

CSXT does not object to the base year identified by NS. However, it is important for NS and the Board to understand that the significance of the base year in this proceeding will be fundamentally different from the base year in other proceedings. In prior control proceedings, the base year has typically been used as a baseline to evaluate the impact of providing the requested control authority. Here, in contrast, NS has acknowledged that the base year, whether 2023 or 2024, is a year during which NS exercised unlawful control over NPBL. As a result, if 2023 or 2024 is used as the base year, the data for the base year will already show the effects of control, albeit unlawful control.

Accordingly, the STB will need to use the base year data in this case as the starting point for determining what would happen if NS *did not* unlawfully control NPBL. As CSXT explained in its Petition to Reject, the Board will need to consider the competitive effects of NS’s proposal by looking at two scenarios: (1) NPBL operating as an independent, neutral railroad (without NS control), and (2) NPBL operating as an alter-ego of NS (with NS control). (CSXT Petition to Reject 4.) The base year data in this case would apply to the NS-control scenario, unlike other proceedings where the base year data apply to real world circumstances where there is no control. If NS’s significant application contains only the base year data, on the theory that such data already reflects the effects of its control over NPBL, without adequately showing data for the alternative scenario of an independent

NPBL, the Board will have to reject the application as incomplete. *See, e.g., CSX/Pan Am*, FD 36472, slip op. at 7, 12 (STB served May 26, 2021) (finding that an application did not contain information sufficient for the Board to assess the impacts of the proposed transaction and rejecting the application).

5. ENVIRONMENTAL MATTERS

In the NS Motion, NS asserted that, “because the proposed acquisition of control will not result in either operational changes that would exceed any of the thresholds in 49 CFR 1105.7(e)(4) or (5), no environmental assessment is required or accounted for in the proposed procedural schedule. 49 CFR 1105.6(c)(1)(i).” (NS Motion 2.)

CSXT contends that it is too early for the Board to make any decisions related to environmental matters in this proceeding. As noted above, the basis for NS’s position that there will be no operational changes, and therefore that the environmental thresholds are not exceeded, is that NS already controls NPBL, even though that control is unlawful. It is unclear how NS’s unlawful control over NPBL affects the STB’s environmental review, so the STB should not exclude environmental issues from the proceeding at this time.

6. CONCLUSION

For the reasons set forth above, CSXT respectfully requests that the Board adopt CSXT’s modifications to the proposed procedural schedule.

Respectfully submitted,

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Dated: March 28, 2025

CERTIFICATE OF SERVICE

I hereby certify that I have caused this CSX Transportation, Inc.'s Response to Norfolk Southern's Proposed Procedural Schedule in Finance Docket No. 36836 to be served electronically or by first class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Sally Mordi

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Attorney for CSX Transportation, Inc.

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