

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

309487

DOCKET NO. FD 36836

ENTERED
Office of Proceedings
April 21, 2025
Part of
Public Record

**NORFOLK SOUTHERN CORPORATION
NORFOLK SOUTHERN RAILWAY COMPANY
– ACQUISITION OF CONTROL –
NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY**

**NORFOLK SOUTHERN CORPORATION &
NORFOLK SOUTHERN RAILWAY COMPANY
PETITION FOR STAY OF DECISION NO. 3**

EXPEDITED HANDLING REQUESTED

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EXPEDITED HANDLING REQUESTED

Pursuant to 49 C.F.R. 1115.3(f), Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, “NS”) hereby petitions the Surface Transportation Board (“STB” or “Board”) to stay the effectiveness of a portion of Decision No. 3 (in particular, the Board’s holding in footnote No. 2)¹ pending Board action NS’s Petition for Reconsideration of Decision No. 3, designated as NS-8.² Staying the effectiveness of footnote No. 2 of Decision No.

¹ In particular, for the reasons articulated in NS’s Petition for Reconsideration, NS seeks a stay of only that portion of Decision No. 3 contained in footnote No. 2 that made a substantive ruling on the timing of discovery without the opportunity for NS or any other party to comment on when discovery is appropriate in a significant transaction and citing a standard applicable to a Class I major merger rather than a significant transaction.

² NS also is filing today a housekeeping stay requesting the Board to toll the time period for NS to reply to CSXT’s two pending Motions to Compel (CSXT-6) (CSXT- 7) until Board action on a ruling on the NS Petition for Reconsideration and this Petition for Stay. NS-10. Resolution of the NS Petition for Reconsideration of the discovery portion of Decision No. 3 (footnote No. 2) is a pre-requisite for the handling of the CSXT’s multiple motions to compel, and an administrative tolling of the response to those motions to compel is necessary. An administrative tolling of the responses to those motions need not compress the procedural schedule governing

3 until the issues presented in NS-8 have been resolved is fully justified. There is a strong likelihood that NS will prevail on the merits of its Petition for Reconsideration, NS will suffer irreparable harm in the absence of a stay, other interested parties will not be substantially harmed by the grant of the stay, and the public interest fully supports the granting of the requested stay.

Expedited handling of this Petition for Stay is justified.³ At the time of the filing of this pleading and during a time in which NS is devoting substantial resources to providing the additional information requested by the Board to supplement its previously filed application, some of which is not readily available and is not contained in the STB's waybill or NPBL's or NS's traffic data, NS and NPBL are facing 103 discovery wide-ranging and extremely burdensome discovery requests. NS is facing two motions to compel with regard to those discovery requests, and there is every reason to believe that if the Board does not grant the requested stay, further discovery requests will be served on NS and NPBL during the pendency of the Board's consideration, an effort that will burden NS with discovery preventing NS from effectively responding to the Board's request in Decision No. 2. The Board should act, and act expeditiously, to grant a stay of that portion of the Board's Decision No. 3 that prematurely ruled on a discovery issue without NS's ability, or any other parties' ability, to present precedent and case law directly opposite of the Board's statement in that footnote.

the review of NS's application, once filed. The statutory deadlines in a control proceeding are measured from the time that "the primary application is accepted." 49 C.F.R. 1180.4(e)(2). A prefiling notice indicating the date of anticipated filing of that primary application "may be amended to indicate a change in the anticipated filing date." 49 C.F.R. 1180.4(b)(3).

³ The Board will provide expeditious handling when appropriate under the circumstances. See, e.g., CSX Trans., Inc. – Abandonment Exemption – in Pike County, KY, AB-55 (Sub-No. 653X) (STB served September 13, 2004) (granting CSXT's request for expedited handling and making its decision effective upon service); RailAmerica, Inc., et al. – Control Exemption – Marquette Rail, LLC, FD 35592 (served April 13, 2012) (permitting the decision to be effective upon service).

INTRODUCTION

NS respectfully requests that the Board promptly issue a stay of its directive in footnote No. 2 of Decision No. 3 until it has resolved issues raised by NS's Petition for Reconsideration of Decision No. 3, designated as NS-8. In Decision No. 3, the Board, either in response to the request for affirmative action made by CSXT-5⁴ (requests to which NS was not given the opportunity to respond), or on its own initiative, determined to grant CSXT and others general pre-application discovery. That grant was, for all the reasons set forth in NS-8 and not repeated here, contrary to the current statutory and regulatory structure and Board precedent. Furthermore, pre-application discovery would subject NS to an extraordinary burden not inflicted, to NS's knowledge, upon any other applicant in a significant transaction. There is a strong likelihood that NS will prevail on the merits of the Petition for Reconsideration.

At the same time, NS will suffer irreparable harm in the absence of the grant of a stay, as NS is facing two motions to compel and, inevitably, numerous other discovery demands and motions as CSXT continues to pummel NS even as NS is faced with a set period for NS to assemble the materials that the Board has instructed it to file as a consequence of the Board's rejection of NS's minor application and direction for NS to file a significant application.

Other interested parties will not be substantially harmed, insofar as the procedural schedule proposed by the Board in Decision No. 3 runs from the date of the filing of the application, not the date of any pre-filing application. Further, notwithstanding protestations to the contrary (already asserted and anticipated) by CSXT, CSXT has been at the NPBL table for the past several decades, CSXT filed the complaint and was part of the district court proceedings,

⁴ CSX Transportation, Inc.'s Response to Norfolk Southern's Revised Motion for Proposed Procedural Schedule, CSXT-5, submitted March 28, 2025 ("CSXT-5").

and has been more than fully involved in all proceedings associated with the requested control that will be sought when NS files its application in this docket. CSXT will not be substantially harmed by the brief pause requested herein.

The public interest supports the granting of the stay. The Board has been clear that NS should correct the error made 42 years ago in not explicitly asking for control authority over NPBL. In doing so, NS filed an application for a minor transaction, the submission of which the Board has now treated as a pre-filing notification of a significant application and has requested additional analysis. Allowing NS to continue to prepare the required application during the period of time that it takes for the Board to consider NS's Petition for Reconsideration will substantially advance that effort. Failing to grant the stay will set this effort irretrievably back. Indeed, allowing discovery at this stage of the proceeding, which is unprecedented in the context of a minor or significant transaction,⁵ let alone where a minor application has been converted to a significant transaction, puts a substantial burden on any party that otherwise would engage in a control transaction within the jurisdiction of the Board. That includes any party who would

⁵ As set out in footnote 13, *infra*, in nearly a dozen cases over the past 20 years alone (including several involving CSXT), the Board has explicitly stated that discovery could "begin" upon the service of the decision accepting the application. In contrast, none of the cases cited in CSXT's Motion to Compel (CSXT-6, pp. 10-13), involved a Board decision permitting discovery in a significant or minor transaction prior to the filing of the application, let alone during the stage between pre-filing notice of a significant transaction and the filing of the application (or supplementing a minor application). The CP/KCS case cited by both CSXT and relied upon by the Board in footnote No. 2 involved a major transaction, and it involved a unique circumstance where CP desired to file a hostile application to takeover KCS. At that point of the dispute, KCS had terminated its agreement with CP and sought to merge with CN, nonetheless CP wanted to use the materials it had previously obtained from KCS to prepare a hostile takeover application. KCS refused to consent. In that unique circumstance, the Board allowed for CP to request documents in a manner governed by the Board's discovery rules, and to retain documents that it had already obtained, all to enable CP to prepare its hostile application. It did not provide for general discovery by any other party. As such, that case is certainly not analogous to this proceeding and it is not appropriate to apply in this proceeding

present what that party honestly believes is a minor transaction, for fear that the Board will, out of an abundance of caution or otherwise, determine the proposed transaction to be a significant transaction and then order discovery, while at the same time that party is trying to prepare its application. Not granting a stay of Decision No. 3 while the Board considers NS's Petition for Reconsideration would send a message that anyone seeking to inundate any future control applicant would have the freedom to do so even while similar pre-application matters are being ironed out.

THE APPLICABLE STAY CRITERIA

The Board has consistently applied the four criteria set forth in *Holiday Tours*⁶ in deciding whether to grant a request for a stay.⁷ The test consists of the following:

In deciding a request for stay, the Board considers: (1) whether the party seeking a stay is likely to prevail on the merits, (2) whether the party seeking a stay will be irreparably harmed in the absence of a stay, (3) whether issuance of a stay would substantially harm other parties, and (4) whether issuance of a stay is in the public interest.

Small Rate Disputes, at *id.*⁸

The party proposing the stay carries the burden of persuasion on each of these elements.⁹ In deciding whether to grant the stay, the Board will consider whether the moving party will be

⁶ Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (“Holiday Tours”).

⁷ See, e.g., General Railway Corp., D/B/A Iowa Northwestern Railroad – Exemption for Acquisition of Railroad Line – in Osceola and Dickinson Counties, IA, FD 34867 (STB served July 13, 2007), slip op. at 1; Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes, EP 765 (STB served February 14, 2023) (“Small Rate Disputes”), slip op. at 3.

⁸ See also, Norfolk Southern Ry. Co. – Abandonment Exemption – In the City of Baltimore, MD, AB 290 (Sub-No. 412X) (STB served April 14, 2025), slip op. at 5 (citing R.J. Corman R.R. Prop. – Aban. Exemption – in Scott, Campbell, & Anderson Cntys., Tenn., AB 1296X, slip op. at 2-3 (STB served Dec. 1, 2020); Ind. Harbor Belt R.R. – Trackage Rts. – Consol. Rail Corp. (IHB), FD 36099 et al., slip op. at 4 (STB served Mar. 14, 2017).

⁹ Small Rate Disputes, at *id.*

irreparably harmed without it.¹⁰ Following a brief introduction to the status to date, NS will address each of these Holiday Tour criterium in order.

ARGUMENT

On April 11, 2025, the Board served Decision No. 3 in this docket. In that decision, the Board rejected the minor application that NS filed on February 14, 2025 (designated “NS-1”) because the Board had determined that the transaction described by that minor application appeared to be a significant transaction. The minor application thus was deficient for, among other things, the failure to provide information normally required of a significant application, the failure of NS to provide the required pre-filing notification, and the failure of NS to provide the required filing fee. In a decision served on the Board on March 14, 2025 (Decision No. 2), the Board determined to treat the February 14, 2025 NS-1 submission as a pre-filing notification normally required to be filed in anticipation of the submission of an application for a significant transaction by 49 C.F.R. 1180.4(b)(1).¹¹

One consequence to the determination that the transaction proposed by NS in this docket should be considered as a significant transaction was the need for NS to submit a revised proposed procedural schedule. On March 21, 2025, NS filed that proposed procedural schedule in a pleading designated as NS-6.

¹⁰ Id., (citing R. J. Corman R.R. Prop.—Aban. Exemption—in Scott, Campbell, & Anderson Cntys., Tenn., AB 1296X, slip op. at 3 (STB served Dec. 1, 2020)).

¹¹ A pre-filing notification must include a brief description of the proposed transaction, the year to be used for the impact analysis, the approximate filing date of the application, and whether the transaction is either a major or significant transaction. 49 C.F.R. 1180(b)(1). None of that was contained in NS-1. Therefore, even though the Board was treating NS-1 as a pre-filing notification, the Board had to order NS to supplement that pre-filing notification with other information necessary and appropriate for a pre-filing notification for a future application seeking control authority of a proposed significant transaction. Decision No. 2, slip op. at 10.

At the same time, CSXT initiated a full-scale general discovery, serving its first set of requests for production of documents on NS on March 19, 2025, its first set of requests for production of documents on NPBL, the same day, and a second set of requests for the production of documents on March 26, 2025. This second set of discovery served on NS is remarkable due to the very size and scope that it demanded. The March 26th discovery requests consisted of 89 requests that ranged from “[a]ll Documents relating to railroad costs for traffic moving to or from all East Coast Ports” for a period of nearly 20 years (Request No. 79), to “[a]ll written policies, protocols, instructions and other documents relating to the terms and rates of NS intermodal service, including Documents relating to how such rates should be determined,” again for a period of nearly 20 years (Request No. 73), to 20 years of documents concerning the market for waterborne container ship transportation (Request No. 71), to several years of traffic tapes (Request No. 54), and more.

It was in this environment that NS filed its proposed procedural schedule, providing explicitly for the commencement of discovery when normally that would not be necessary. It is also in this environment that the Board issued Decision No. 3. Among other things, the Board determined that general pre-application discovery was available “given the initiation of the proceeding and the treatment of Applicants’ February 14, 2025 submission as a pre-filing notification.”¹²

NS has today filed a Petition for Reconsideration of Decision No. 3 to the extent that it permits general discovery to take place on an application that has not yet been filed, let alone accepted by the Board, contrary to the Board’s statutory and regulatory framework, and contrary to the vast majority of its own precedent. In order to prevent irreparable harm to NS, NS

¹² Decision No. 3, slip op. at 2, note 2.

respectfully requests that the Board issue a stay on Decision No. 3 until it has decided NS's Petition for Reconsideration.

A. NS is Likely to Prevail on the Merits.

NS will not reiterate here each and every argument set forth in NS-8, its Petition for Reconsideration of Decision No. 3.¹³ It is clear on the face of that document, however, that Decision No. 3, to the extent that it permits generalized discovery before the NS significant application is filed and accepted, is erroneous and must be reconsidered.

The Board's governing statute clearly provides that a formal control proceeding begins on the application (not the pre-application notice) of the person seeking that authority. 49 U.S.C. 11324(a). Until NS files its significant application, and until NS has submitted the appropriate filing fee, a proceeding has not yet begun. The Board's regulatory structure bolsters this fact, to the degree that even the definition of a "primary application" (as opposed to a responsive or inconsistent application) is the document that "begins a new proceeding." 49 C.F.R. 1180.3(f). So general discovery is not appropriate upon the pre-filing notification and not appropriate at any time prior to the submission of a primary application. This is consistent as well with regard to all other proceedings before the Board and neither CSXT nor the Board have cited one case holding otherwise in the context of a minor or significant application.

Further, though, as to control proceedings involving minor or significant applications in particular, and in some cases involving major transactions, the Board is clear that general discovery is not available prior to acceptance of the submitted application. In nearly a dozen cases over the past 20 years alone (including several involving CSXT), the Board has explicitly

¹³ With due consideration of the Board's resources, NS hereby adopts the entirety of NS-8 as if it was reproduced herein, and merely summarizes its arguments below.

stated that discovery could “begin” upon the service of the decision accepting the application filed as an application seeking approval of a minor transaction.¹⁴ Importantly, had discovery been permitted under the Board’s rules upon the filing of the application, as opposed to the acceptance of that application, then the Board’s numerous decisions in these cases would have been in error. Those decisions were not in error.

Even the Board’s decisions in major transactions support the fact that general discovery is not permitted prior to the acceptance of the applicants’ case-in-chief. Not only has the Board clearly stated that its 2001 revisions to the manner in which it handles major transactions explicitly was not to permit “broad pre-application discovery,”¹⁵ the few major transaction

¹⁴ See, e.g., Fortress Investment Group LLC, et al. – Control – Florida East Coast Ry. LLC, FD 35031, Decision No. 2 (STB served June 21, 2007). See also, Canadian Pacific Kansas City Limited and The Kansas City Southern Railway Company, D/B/A/ CPKC – Acquisition and Operation – Certain Rail Line of Meridian & Bigbee Railroad, L.L.C. in Lauderdale County, Miss., and Choctaw and Marengo Counties, Ala., FD 36732, Decision No. 1 (STB served November 3, 2023), slip op. at 12; CSX Transportation, Inc. – Acquisition and Operation – Rail Line of Meridian & Bigbee Railroad, L.L.C., FD 26727, Decision No. 1. (STB served November 3, 2023), slip op. at 12; Dakota, Minnesota & Eastern Rr. Corp. and Cedar American Rail Holdings, Inc. – Control – Iowa, Chicago & Eastern Rr. Corp., FD 34178, Decision No. 2 (STB served September 26, 2002), slip op. at 14; Kansas City Southern – Control – The Kansas City Southern Ry. Co. et al., FD 34342, Decision No. 2 (STB served June 9, 2003), slip op. at 17; Canadian National Ry. Co. and Grand Trunk Corp. – Control – EJ&E West Co., FD 35087, Decision No. 2 (STB served Nov. 26, 2007), slip op. at 13; Paducah & Louisville Ry., Inc. – Acquisition – CSX Transportation, Inc., FD 34738, Decision No. 2 (STB served August 29, 2005), slip op. at 10; Massachusetts Coastal Rr., LLC – Acquisition – CSX Transportation, Inc., FD 35314, Decision No. 2 (STB served December 21, 2009), slip op. at 7; Canadian National Ry Co., et al. – Control – Wisconsin Central Trans. Corp., et al., FD 34000, Decision No. 2 (STB served May 9, 2001), slip op. at 11; The Indiana R.R. Co. – Acquisition – Soo Line Rr. Co., FD 34783, Decision No. 2 (STB served January 13, 2006), slip op. at 6; Norfolk Southern Ry. Co., Pan Am Railways, Inc., et al. – Joint Control and Operating/Pooling Agreements – Pan Am Southern LLC, FD 35147, Decision No. 2 (STB served June 26, 2008), slip op. at 11.

¹⁵ EP 582 (Sub-No. 1), Major Consolidation Procedures, slip op. at 53 (STB served June 11, 2001) (Board specifically noted that it was not proposing broad pre-application discovery). Here, CSXT is seeking just that – broad pre-application discovery involving hundreds of thousands of documents – discovery that would not even be allowed in a major transaction at this stage of the proceeding.

proceedings it has considered provided that discovery could commence upon acceptance of the application. The only case holding otherwise was the CP/KCS case cited in footnote No. 2 of Decision No. 3 and as noted in footnote No. 4, *supra*, that case did not permit general discovery for all parties, and in any event it was highly unique as it involved an anticipated hostile primary application to acquire KCS.

In a docket that mirrors the current one, the Board again decided that discovery could begin upon service of a Board decision accepting the application. That case, involving the proposed acquisition of the Dakota, Minnesota & Eastern Railroad Company (“DM&E”) by the Canadian Pacific Railway Company (“CP”). The parallels are remarkable. CP submitted a minor application for approval of what it believed was a minor transaction, just as NS has done in this docket. The Board subsequently determined the CP-submitted minor application to describe a significant transaction, just as the Board has done so here. The Board, in the CP case, decided on its own initiative to treat the CP initial submission as a pre-filing notification, but, perhaps in recognition that the document was *not* a pre-filing notification, the Board required CP (as it has required of NS) to supplement the previously filed application to provide the Board and others the prefiling notification normally required of a significant transaction. The Board did not permit pre-application general discovery in that proceeding. Instead, the Board waited until it had reviewed and accepted the revised and supplemented application to affirmatively state that “Discovery *may begin* immediately.”¹⁶ It would have been entirely inappropriate of the Board to do so if general discovery was already permitted to the parties in the proceeding.

¹⁶ Canadian Pacific Ry Co., et al. – Control – Dakota, Minnesota & Eastern Rr. Corp., et al., FD 35081 (“CP/DM&E”), Decision No. 4 (STB served December 27, 2007), slip op at 10 (emphasis added).

The Board did not review any of this or try to distinguish its conclusion in footnote No. 2 in Decision No. 3 in order to conclude that general discovery should be permitted in this docket. Instead, the Board notes that it “has permitted discovery after the initiation of a proceeding under 49 U.S.C. § 11323 but before the filing of an application,” erroneously citing a 2021 decision as standing for that proposition. As described further in NS-8, that decision, served in Canadian Pac. Ry. – Control – Kan. City S., did *not* authorize generalized discovery available to all parties to the proceeding. It authorized the applicant to obtain a specified set of information from its former co-applicant (and the retention of information that it had already received) and to do so following the processes involved in discovery, in order to prepare the hostile application that CP anticipated filing with the Board.¹⁷ It is clear that footnote No. 2 in Decision No. 3 is directly contrary to the governing body of statutes, regulations, and decisions on this subject, and as such, NS can demonstrate that it is likely to prevail on the merits of its petition for reconsideration in this matter.

B. NS will suffer irreparable harm absent the grant of a stay.

The second Holiday Tours criterion requires NS to demonstrate that it will suffer irreparable harm absent the grant of a stay. There is no question on this factor, and CSXT has gone far in presenting that argument on behalf of NS.

If the Board does not stay the portion of Decision No. 3 at issue, to the extent that it permits generalized discovery by all parties, then CSXT, and potentially others, will continue the onslaught that has already begun. As discussed above, and in NS-8, CSXT has filed extensive discovery involving 103 requests for documents, submitted not only to NS but also to NPBL, all

¹⁷ In CSXT-5, CSXT sets for a few cases that it claims supports the proposition that general discovery must be available to all parties upon the filing of a pre-filing notification, but none of those cases come even close to supporting that proposition. See, NS-8 at [16-18].

within the first week of CSXT's discovery efforts. It has filed a notice of discovery dispute with the Board, CSXT-4, filed on March 20, 2025, and a Motion to Compel, CSXT-6 filed on April 9, 2025. It filed a subsequent Motion to Compel, CSXT-7, on April 18, 2025, demanding a response from NS in just five days, which five days included the Easter holiday.¹⁸ That is just the beginning, particularly given that CSXT has already vowed to seek terminal trackage rights to NIT, damages, the imposition of civil penalties, an order of NS to restore trackage, and an order dismissing another proceeding.¹⁹

As things stand today, NS has less than 2 months left for it to assemble supplemental material for submission to the Board to satisfy the requirements of Decision No. 2. There is a great deal of material to assemble. In addition to an impact analysis (49 C.F.R. 1180.7(a)), for example, the Board has required that NS address and present information on costs and operating efficiencies of alternative approaches to moving containerized freight by rail in and out of NIT and VIG, including cost information involving third party drayage operations. This is not publicly available information and is not contained in any STB waybill source or NS or NPBL databases. Indeed, it is unclear at this stage how NS is to comply with that request given no ability to subpoena such information.

¹⁸ CSXT-7 at 8. Given the strong precedent supporting NS's position, precedent which CSXT's attorneys should have known existed but apparently refrained from mentioning in any of its filings, it is not NS's behavior that should be at issue. NS has strictly complied with the Board's regulations and orders. NS has responded to CSXT's discovery by issuing proper objections. Objections that should be dealt with in accordance with the Board's rules and precedents.

¹⁹ This is not hyperbole or hypothetical. For example, the second set of document requests filed by CSXT against NS includes three document requests aimed at information involving the "Diamond" with the reference to the Diamond being track between two junctions, the operations over which were the subject of a discontinuance of service exemption filed in STB Docket No. AB-290 (Sub-No. 299X) and AB 1024X. That was a discontinuance proceeding that CSXT did not oppose. CSXT, so far, is the only party to bring up issues involving the so-called "Diamond" in this Board proceeding.

In the meantime, CSXT's regulatory efforts against NS continue unabated. CSXT has served on NS literally dozens of requests for the production of documents. Absent the grant of the portion of Decision No. 3 at issue while CSXT prepares and submits its response to the NS Petition for Reconsideration, and the Board considers the matters presented, NS would suffer irreparable harm if NS was required, during the several weeks of that process, to respond to discovery on several fronts, especially (but not solely) to the extent that responding to that discovery gave CSXT information about the internal deliberative processes normally not available for discovery, such as the exploration of alternative commitments to present to the Board to address concerns enunciated by various parties (such as those already presented concerning cost-based, uniform switching rates and cost-based trackage rights rates for NPBL over NS trackage).

Permitting general discovery would inflict irreparable harm on NS.²⁰ Here, there is a limited period of time to develop NS's case in chief, and NS has no choice but to live with that once that case in chief (the significant application) is filed. Many of the same people who are instrumental in developing the case in chief are those who would have to respond to the discovery, all of which discovery surrounds that same case in chief, even while they work to perform their operations, marketing and other work for the railroad.²¹ At the same time, even though the Board's regulations provide that applicants have the discretion to explore different approaches to submitting an impact analysis, permitting discovery during this pre-application period while the Board considers the Petition for Reconsideration would expose much

²⁰ FOP Library of Cong. Labor Comm. v. Library of Cong., 639 F. Supp. 2d 20 at **9 (irreparable harm is harm that a court does not have the power to remedy adequately if the requested action is not stayed pending reversal).

²¹ NAACP v. Trump, 321 F. Supp. 3d 143 at **16 (full implementation of the Court's order could not be handled by existing staff and would require hiring additional personnel and reassigning others).

of that exploration to CSXT.²² That would not only create a substantial burden on NS, but possibly would impact its service, which would have the spillover effect of harming the shipping public it serves.

Moreover, by letter dated February 19, 2025, the U.S. Department of Justice, Antitrust Division, informed NS that it had opened an investigation with regard to NS and NPBL. The letter specifically referenced the CSXT-initiated Federal District Court proceeding. A full understanding of the investigation and its implications are not yet understood,²³ but that collateral attack is yet another burden on NS as it attempts to comply with requests for information by DOJ and at the same time prepare its supplement to its minor application.

Having to respond to CSXT's far-reaching and overly broad discovery and at the same time having to prepare its supplement to its application, all because the Board has made a fundamental error in footnote No. 2 and without allowing NS to present a contrary view before erroneously applying unanalogous precedent, will cause NS to expend significant amount money, time and energy that cannot be recovered in the absence of a stay.²⁴ It also risks CSXT

²³ CSXT claims to know more about the USDOJ investigation, stating that "NS wrongly characterized the USDOJ Antitrust Division investigation into alleged exclusionary conduct undertaken by NS and NPBL against CSXT at NIT, in potential violation of Sections 1 and 2 of the Sherman Act...." CSXT claims that USDOJ can only sue for forward-looking injunctive relief. At this juncture, NS only knows that the opening lines of the USDOJ letter reads: "The United States Department of Justice, Antitrust Division has opened an investigation into alleged exclusionary conduct undertaken by Norfolk Southern Railway Company ("Norfolk Southern") and the Norfolk & Portsmouth Belt Line Railroad Company ("NPBL") against CSX Transportation, Inc. ("CSXT"), a potential violation of Sections 1 and 2 of the Sherman Act...." That letter asks NS to maintain certain specified documents and information. NS further understands that if USDOJ were to file for future injunctive relief that action may be impacted by a Board decision in this docket which seeks the Board's approval for the continued control of NPBL by NS.

²⁴ Cf. Virginia Petroleum Jobbers Association v. FOC, 259 F. 2d 921, 925 (D.C. Cir. 1958). Here, such time, money, and energy cannot be recovered at a later date nor could exposure of highly strategic deliberative processes be undone.

obtaining highly sensitive information about potential settlement ideas, conditions that NS may be willing to accept on the transaction, and other information regarding NS's litigation and policy positions all before an application is actually filed and accepted. Clearly NS would suffer substantial irreparable harm should the Board not grant the requested stay.

C. Issuance of a Stay Will Not Substantially Harm Any Other Party.

No other party will suffer substantial harm if the Board grants the requested stay. CSXT will claim it will suffer harm, and no doubt that harm will be characterized as grievous harm, but the facts demonstrate otherwise.

CSXT is very fond of quoting 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."²⁵ NS's statement is true. The record as reflected in two court cases and two decisions is "known by all," including the Board. Indeed, CSXT filed the complaint in the district court, appealed the adverse decisions rendered on that complaint, and is now before the Supreme Court of the United States arguing for certiorari regarding the adverse decision it received from the appellate court. CSXT knows that record well and does not need discovery to help it plan for document development in this proceeding. The NS statement does not argue that the *full* record of the federal district and appellate courts are relevant in the STB proceeding, because it is not. What is relevant to the Board's findings is what is already contained in the court decisions. Moreover, those records clearly demonstrate that CSXT would not be harmed by the proposed stay.

CSXT may argue that it should be able to conduct discovery in order to develop the plethora of other demands and applications it has threatened in this proceeding. CSXT has been

²⁵ See, e.g., CSXT-5 at 9.

clear that it intends to go no-holds-barred in this proceeding, regardless of whether the relief sought is available or justified:

- CSXT intends to ask the Board to impose other remedies to address NS's unauthorized control of NPBL, including granting direct CSXT terminal trackage rights to NIT;
- awarding CSXT damages and imposing civil penalties on NS resulting from NS's violation of the statutory requirement to obtain STB authority before controlling NPBL;
- ordering NS to restore an active line of railroad allowing for efficient access to NIT that NS unlawfully removed without obtaining the required abandonment authority; and dismissing NS's sham trackage rights fee proceeding.

CSXT-1 at 6. CSXT has been in the NPBL boardroom since 1982, when, following a 2-year proceeding that included full CSXT participation, the effective (albeit unauthorized by the STB) control of the NPBL began. CSXT affirmatively approved the current NPBL Board structure giving NS three Board seats to two Board seats for CSXT. NS approved of and authorized NPBL to file its discontinuance proceeding, which, upon being granted, allowed NPBL to remove a diamond crossing that was no longer needed and that could be used elsewhere on its system, all without objection from CSXT until recently. CSXT has abided by and has not sought to change the Operating Agreement that calls for a uniform cost based rate that would apply to NPBL intermodal shippers. It was a full participant in NS's petition to set trackage rights compensation,²⁶ CSX has not challenged any of NPBL's practices at the STB as unreasonable.

Indeed, CSXT has accepted NS's control of NPBL for over 42 years. But in 2018, it decided that it simply did not like the switching rate that was adopted in 2010 and has been trying to do everything it can to pressure NPBL to change that rate. CSXT does indeed "know the record well" and it can present that record in a timely fashion and in accordance with the

²⁶ Norfolk Southern Ry. Co. – Petition to Set Trackage Rights Compensation – Norfolk & Portsmouth Belt Line R.R. Co., FD 36223.

Board's standard procedural rules involving discovery in minor and significant transaction.

CSXT is not in the position of many typical outside parties in control transactions handled by the Board – CSXT is an insider. There is no harm to CSXT whatsoever if a stay were issued and CSXT is required to seek discovery upon acceptance of the application or the filing of the application itself.²⁷

D. The issuance of a stay is in the public interest.

The issues arising from the action by footnote No. 2 in Decision No. 3 as it relates to pre-application and pre-acceptance discovery are disconcerting and wide-ranging – potentially impacting not only the progress of this proceeding but also the handling of all future minor and significant control transactions yet to be filed before the Board.

As it relates to this particular transaction (the request by NS for the Board's authorization for the control that NS had previously believed it had already received), it goes without saying that there is a strong public interest in allowing for the orderly assembly of the application in an expeditious manner, consistent with the Board's admonition of the parties "to take appropriate steps to address the unauthorized control issue immediately following resolution of the district court proceeding, including any appeals."²⁸ Indeed, failure to impose a stay would be contrary to

²⁷ CSXT has access to thousands of its own documents that it used in the antitrust proceeding and thousands of NS and NPBL documents that are public and not covered by the court's protective order. CSXT also has access to the STB's waybill database and its own 100% traffic tapes. CSXT also has access to any other publicly available database. The failure to obtain discovery until such time as the application is accepted does not prevent CSXT from undertaking its own competitive analysis and preparing its argument. In fact, it has over 90 days to undertake such studies before its comments and evidence in response to the application would be due.

²⁸ Norfolk S. Ry. Co. – Pet. For Declaratory Order, FD 36522, slip op. at 17 n.25 (STB served June 17, 2022). This language is cited by CSXT in support of an argument that, had it prevailed, would have prevented any action by NS in response to the Board's admonition, such as the filing of its own pre-filing notification, even to this day.

the public interest insofar as discovery burdens continue to build and pile on even during the pendency of the Board's consideration of the Petition for Reconsideration.

As it relates to the broader railroad industry regulated by the Board, especially in the continued development over the coming years, the public interest also is implicated. In regulating the railroad industry, it is the clear policy that the Board:

- (1) advance "fair and expeditious regulatory decision when regulation is required" (49 U.S.C. 10101(2));
- (2) "to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information" (49 U.S.C. 10101(13)); and
- (3) "to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought" before the Board (49 U.S.C. 10101(15)).

The public interest requires that rail carriers contemplating transactions that they believe are class exempt, appropriate for an individual petition for exemption, appropriately classified as minor or significant transactions, or even subject to the major transaction rules are free to develop and present their case to the Board and other potential parties without fearing undue interference in the development and presentment of that case. Failing to grant a stay in this docket at this time opens future initiatives up for the same level of interference in violation of a party's administrative due process is in jeopardy.

CONCLUSION

The Board should act as soon as possible to stay the effectiveness of the implication of footnote No. 2 in Decision No. 3 pending Board action on NS's Petition for Reconsideration of

Decision No. 3. As demonstrated above, each of the elements required for the issuance of a stay are met.

The Petition for Reconsideration as supplemented herein clearly establishes that there is a strong likelihood that NS will prevail on the merits of its Petition for Reconsideration. The Board erred in granting general pre-application and acceptance discovery, a decision that goes against the statutory and regulatory framework within which the Board operates. The decision is contrary to the consistent and long-term Board precedent and is unprecedented in the context of a minor or significant transaction. The diversion from past Board precedent is neither recognized nor supported by the single decision cited by the Board and none of the decisions cited by CSXT. The sole case cited by the Board in footnote No. 2 involved a major merger transaction, provided that only CP could undertake discovery and did not involve the Board opening the transaction for all parties to perform discovery and has never before been applied in a minor or significant transaction. Instead, it is a very narrow decision rendered under extraordinary unique circumstances that are inapplicable to the factual situation here or to any other minor or significant transaction.

NS will suffer irreparable harm in the absence of a stay, burdened in its attempt to assemble its application and in its efforts to deal with the CSXT-initiated proceeding before the U.S. Supreme Court, and efforts in being responsive to USDOJ. Other interested parties will not be substantially harmed by the grant of the stay, and the Board's regulations are flexible enough to deal with the stay during pendency of the Board's consideration of the Petition for Reconsideration. The public interest fully supports the granting of the requested stay permitting the efficient, fair, and correct advancement of the control request directed by the Board. The Board should act expeditiously and grant a stay of Decision No. 3.

Respectfully submitted,

/s/ William A. Mullins

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April 21, 2025

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CERTIFICATE OF SERVICE

I certify that, on April 21, 2025, in keeping with 49 CFR §1114.21(f), I have caused to be served a copy of the foregoing Petition for Stay of Decision No. 3 upon each Party of Record in this Proceeding.

/s/ William A. Mullins
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