

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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DOCKET NO. FD 36836

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

**PETITION FOR
RECONSIDERATION OF A PORTION OF DECISION NO. 3**

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PREFACE AND SUMMARY OF ARGUMENT

Pursuant to 49 U.S.C. 1322(c) and 49 C.F.R. 1115.3(a), Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, “NS”) petitions for reconsideration of a portion of the decision, served by the Surface Transportation Board (“STB” or “Board”) on April 11, 2025 in the above-referenced docket (“Decision No. 3”). In particular, NS seeks reconsideration of the Board’s holding in footnote No. 2 of Decision No. 3 but of no other portion of the Decision. Footnote No. 2 granted unprecedented affirmative relief to CSX Transportation, Inc. (“CSXT”) by ordering the premature initiation of general discovery by adopting CSXT’s use of an erroneous and unanalogous major merger precedent¹ that has never before been applied in a minor or significant application. Allowing unlimited and general discovery by any party at this stage is inconsistent with the Board’s statutes and its regulations. It is also flatly inconsistent with numerous other cases, including major transactions, where discovery was not permitted until after an application was filed. Furthermore, the Board’s adoption of the CP/KCS case was done without providing NS an opportunity to even address CSXT’s use of that case – thereby depriving NS of fundamental due process to present its

¹ Canadian Pac. Ry. – Control – Kan. City S., FD 36500, Decision No. 7 (STB served August 2, 2021), slip op. at 4 (STB served February 21, 1997) (“CP/KCS”).

argument as to why the CP/KCS case was not appropriate for this proceeding.² The initiation of general discovery during the pre-notification period of a significant application, when that application has yet to be filed and accepted by the Board, and before a proceeding has yet to be initiated constitutes material error and should be reversed.

INTRODUCTION

On March 14, 2025, the Board issued a decision rejecting a previously-filed NS minor application, finding that the transaction proposed in that application to be a significant transaction.³ On its own initiative, the Board considered February 14, 2025 submission as a pre-filing notification normally required for a party intending to file a significant transaction. The Board ordered NS to propose a procedural schedule appropriate to a significant transaction so that the Board could publish that procedural schedule for comment in the Federal Register. NS complied with that order. However, before the Board published the proposed schedule for comment in the Federal Register, CSXT prematurely submitted comments on NS's proposed schedule and, in part, affirmatively petitioned the Board for a decision regarding the initiation of

² Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH, and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA, AB-556 (Sub-No. 2X) (STB served December 15, 2005), slip op. at 12 (“To ensure due process to RVI, we will afford it an opportunity to respond” to claims for reimbursement made by other parties); see also 12 Am. Jur. § 571, p. 264 (Due process of law generally means “law in the regular course of administration through courts of justice, according to those rules and forms which have been established for the protection of human rights); 12 Am. Jur. § 573, pp. 267, 268 (The essential elements of due process are “notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause”; see generally Carter v. Kubler, 320 U.S. 243, 88 L. Ed. 26, 64 S. Ct. 1 (1943); Ohio Bell Telephone v. Public Utilities Commission of Ohio, 301 U.S. 292, 81 L. Ed. 1093, 57 S. Ct. 724 (1937); Interstate Commerce Commission v. Louisville & Nashville Ry. Co., 227 U.S. 88, 57 L. Ed. 431, 33 S. Ct. 185 (1913); Conestoga Nat'l Bank v. Patterson, 442 Pa. 289, 295 (Pa. 1971).

³ Norfolk S. Corp. – Acquis. of Control – Norfolk & Portsmouth Belt Line R.R., (Decision No. 2), FD 36836 (STB served Mar. 14, 2025).

discovery, citing CP/KCS. Before NS could respond to CSXT's affirmative relief requests,⁴ the Board, on April 11, 2025, did not publish NS' proposed schedule for comment in the Federal Register as Decision No. 2 said it would.⁵ Instead, it published NS's proposed schedule, with one exception – it rejected NS's proposal to have discovery begin on acceptance of the application, a proposal that had been applied numerous times before and which parties should have had an opportunity to comment, and instead rendered a footnote granting the action requested by CSXT.

Footnote No. 2 of the Board's Decision No. 3 incorrectly grants the substantive affirmative relief requested by CSXT, and it did so without permitting NS to reply – a right of reply that is granted to NS pursuant to the Board's regulations in addition to being required by procedural due process. The Board has initiated general discovery on an application and a proceeding that has yet to even be initiated and it has done so contrary to extensive Board precedent, the Board's own regulations, applicable statutory authority, and fundamental due process. By doing so, the Board has initiated a process that will impose an undue burden on NS.

The single case that the Board (and CSXT) cites for the proposition that the Board has permitted discovery before the filing of an application reflects an extremely narrow holding in response to an extremely narrow request and under factual circumstances is the opposite of the existing situation. Moreover, that decision did not initiate generalized discovery by all parties. It was rendered in a unique circumstance, in a major merger transaction, and has never

⁴ Indeed, if NS had responded at that time, it may have been challenged as an improper reply to a reply, notwithstanding the affirmative relief requested by CSXT. As such, NS submitted a letter on April 1, 2025 specifically noting that NS would reply to CSXT's affirmative requests after the Board published notice of NS's proposed procedural schedule for comment. Nonetheless, the Board adopted Footnote No. 2 without waiting for NS's response and without providing NS with an opportunity to address the merits of CSXT's affirmative requests.

⁵ The Board's April 11, 2025 Decision No. 3 was published in the Federal Register on April 16, 2025. 90 Fed. Reg. 72, at 16056-57.

been applied or adopted in a minor or significant transaction since. If the Board relies on the CP/KCS precedent then, in addition to effectively reversing a vast and long-term pool of precedent, in a manner that is inconsistent with its governing statutes and regulations, it does so without detailing its reasoning and justification, as required by the Administrative Procedures Act. If, however, the Board was reacting to the CSXT petition for initiation of discovery, carefully couched in its so-called “comments” on the procedural schedule,⁶ then the Board’s

⁶ On March 28, 2025, CSXT filed a document with the title “CSX Transportation, Inc.’s Response to Norfolk Southern’s Revised Motion for Proposed Procedural Schedule”, and this document was designated CSXT-5. In addition to specifically asking for the Board’s consent to begin discovery, CSXT effectively asked for consent to file comments addressing the sufficiency of the proposed Revised Application without sufficient time for NS to respond (at 3), and further petitioning the Board to reconsider its Decision No. 2 to the extent that it waived the obligations of NS with regard to consultation with the Board’s Office of Environmental Analysis and the submission of environmental data based upon the waiver of the obligation to file a more rigorous operating plan. NS had the right to respond to CSXT-5, particularly as to the requests for affirmative relief. See, e.g., Union Pacific Corp., et al. – Control and Merger – Southern Pacific Rail Corp., et al., FD 32760, Decision No. 86 (STB served July 12, 1999), slip op. at 6 (in rejecting certain requests of the National Industrial Transportation League instructing that “As a procedural matter, the request has not been properly presented. A request for affirmative relief should be presented in a pleading in the nature of a petition (i.e., a pleading to which an opposing party has a right to reply). A request for affirmative relief should not be presented in the form of a reply to a petition.”). Although the Board states that “Applicants responded to CSXT’s response [CSXT-5] by letter filed April 1, 2025,” the Board mischaracterizes that letter. In that letter, designated NS-5, NS noted that CSXT had filed for affirmative relief, but “mindful of the Board’s announced desire to reduce numerous rounds of pleadings and the Board’s goal to adopt procedures that are timely, efficient, and orderly in order to improve the Board’s ability to issue timely decisions,” NS specifically and explicitly stated that it would await the Board’s publication of the proposed procedural schedule to respond. If NS wanted to respond to the affirmative relief requested by CSXT, it had until April 17, 2025 to do so. The Board’s Decision No. 3, served on April 11, 2025, precludes the effectiveness of doing so, depriving NS of its procedural due process, at least as to the issue of the availability of pre-application discovery. It effectively tolled all other responses as well. Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH, and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA, AB-556 (Sub-No. 2X) (STB served December 15, 2005), slip op. at 12 (“To ensure due process to RVI, we will afford it an opportunity to respond” to claims for reimbursement made by other parties). See also, Dakota, Minnesota & Eastern R.R. Corp. – Construction Into the Powder River Basin, FD 33407 (STB served Nov. 3, 1998), slip op. at 1 (“procedural due process requires that the Coalition be given an opportunity to respond” to submitted evidence).

actions violated its own precedent, its own regulations, and Norfolk Southern's due process rights in failing to permit Norfolk Southern to respond to a petition for affirmative action. In either situation, the Board's decision is erroneous and should be reversed.

The import of the decision that the Board makes on this petition for reconsideration cannot be overstated. In just a week's time, CSXT has served 103 document discovery requests on two different parties.⁷ The Board's Decision No. 3 gives CSXT the green light to add to those document requests, and layering on to those requests for admissions, interrogatories, and demands for depositions – *all at a time before an application has been submitted and accepted by the Board*. Failing to correct footnote No. 2 of the Board's Decision No. 3 will have lasting effects not only on NS in attempting to comply with the Board's directive to file an application for control of the Norfolk & Portsmouth Belt Line Railroad Company ("NPBL") as soon as possible, but it impacts NS's ability to comply with Department of Justice demands with regard to a separate (but very much related) investigation⁸. Simultaneously, NS is defending against CSXT's collateral attacks in discovery, the procedural schedule, environmental review, and even the right to file the application in the first place.⁹ Failing to reconsider footnote No. 2 will have a

⁷ On March 19, 2025, CSXT served 7 document requests on Norfolk Southern. On March 26, 2025, CSXT served an additional 89 document requests on Norfolk Southern. On March 19, 2025, CSXT served 7 document requests on NPBL.

⁸ By letter dated February 19, 2025, the U.S. Department of Justice, Antitrust Division, informed NS that it had opened an investigation and specifically referenced the CSXT-initiated Federal District Court proceeding. That collateral attack is yet another burden on NS as it attempts to comply with the Board's admonition to seek its control consent.

⁹ In the brief time that has passed since NS filed its minor application (which was rejected by the Board), CSXT has filed 7 different pleadings, including a 596-page Petition to Reject Norfolk Southern's Minor Application (CSXT-1, filed on February 27), a 44-page Notice of Discovery Dispute (CSXT-4, filed on March 20, 2025), a 14-page response to the revised motion for a proposed procedural schedule (CSXT-5, filed prior to the Board's Decision No. 3 which published that proposed procedural schedule for comment), a 78-page motion to compel (CSXT-6, filed on April 9, 2025) and a 79-page second motion to compel (CSXT-7, filed on April 18,

lasting and artificially dampening impact on any future transactions that would be under the Board's jurisdiction, contrary to the Board's statutory directives, including but not limited to 49 U.S.C. 10101(2). The holding of footnote No. 2 and its reliance on CP/KCS, and the grant of affirmative relief without NS having an opportunity to reply, constitutes material and clear error.

ARGUMENT

A petition for reconsideration should be granted when a party is able to present new evidence or substantially changed circumstances that would materially affect the case or demonstrate material error that would mandate a different result.¹⁰ In this case, the Board has committed material error.

A. Allowing Discovery Before A Significant Application Has Been Filed Is Contrary To The Board's Statutory And Regulatory Authority

The Board's governing statute, and in particular, 49 U.S.C. §§ 11324 and 11325, clearly states that a formal Board proceeding begins no sooner than the submission of an application. "The Board may **begin** a proceeding to approve and authorize a transaction referred to in section 11323 of this title on **application** of the person seeking that authority." 49 U.S.C. 11324(a). Thus, contrary to CSXT's argument that there is a "proceeding" for which discovery is applicable, there is no "proceeding" at this time for which the Board's discovery rules can apply.

NS attempted to initiate a proceeding on February 14, 2025 when NS filed its minor application (the "Proposed Transaction"). Consistent with Board rules and practice, NS

2025). In all, CSXT has filed over 800 pages with the Board and served an additional 40 pages of discovery to two different parties, far exceeding (by many magnitudes) that which NS has filed. Decision No. 3, if left as is, will only serve to exacerbate this, even though NS is supposed to be trying to perfect its case-in-chief for submission to the Board

¹⁰ Savage Tooele Railroad Co. – Construction and Operation Exemption – Line of Railroad in Tooele County, UT, FD 36616 (STB served March 3, 2025), slip op. at 3 – 4.

simultaneously submitted the filing fee prescribed for a minor application,¹¹ filed a motion for protective order with regard to that minor application, designated NS-2,¹² and submitted a proposed procedural schedule appropriate to a proceeding for review of a minor application.

Less than two weeks later, on February 27, 2025, CSXT filed a 596-page Petition to Reject Norfolk Southern's Minor Application, in a pleading designated CSXT-1. On March 14, 2025, the STB served a decision determining that NS's February 14, 2025 did not describe a minor transaction, but instead a significant transaction. "Accordingly, Applicants' submission cannot be treated as an application at this time."¹³ The STB thus rejected the submitted application and, on its own initiative, considered the February 14, 2025 filing as a prefiling notification. The STB ordered NS to proceed to submit certain information required of a significant application, to file a revised proposed procedural schedule appropriate to a significant application, and to submit a filing fee as would be required for the submission of a significant application.¹⁴ As such, according to the statute, the Board cannot begin a "proceeding" until NS completes and supplements its significant application and pays the filing fee applicable to a significant transaction.

Neither the Board's regulations nor precedent allow for the initiation of general discovery during this pre-filing period. The "order of rejection [of NS's minor application] is a final action

¹¹ NS-1, cover letter.

¹² The Motion for Protective Order and the STB decision granting that Protective Order specifically referred to the relevant proceeding as one involving a minor application. NS-2, at 1; STB Decision No. 52482, served February 19, 2025.

¹³ Norfolk Southern Corp. and Norfolk Southern Ry. Co. – Acquisition of Control – Norfolk & Portsmouth Belt Line Rr. Co., FD 36836, Decision No. 2 (STB served March 14, 2025), slip op. at 1.

¹⁴ Id.

of the Board.”¹⁵ 49 U.S.C. Section 11325(a). Although the Board has determined to consider the minor application as a pre-filing notice of an upcoming filing of a significant application, NS is not bound to file such a significant application. NS has the choice: proceed with the proposed transaction and treating its earlier filing as a pre-filing notification; appealing the Board’s March 14, 2025 decision to the appropriate appellate court; restructure the proposed transaction in light of the Board’s decision; take corporate actions to avoid control issues; or file an individual petition for exemption. Until NS files an application for a significant transaction, there is no official proceeding that enables discovery.

The Board’s regulations are clear: it is the “primary application,” not the pre-filing notification of an intent to file a primary application, which is *the* document that “begins a new proceeding.” 49 C.F.R. 1180.3(f). See also, 49 C.F.R. 1180.4(e)(2) (clarifying that the statutory deadlines are measured from the time that “the primary application is accepted”). Importantly, the Board’s regulations also are clear that when the Board rejects an application presented to it, as it rejected the NS minor application filed on February 14, 2025, “[t]he resubmission or refiling of an application shall be considered a *de novo* filing for the purpose of computing the [statutory] time periods, provided that the resubmitted application is accepted as complete.” 49 C.F.R. 1180.4(c)(7)(ii).

The proper filing fee has not yet been submitted for FD 36836, and until that is done, there is no proceeding before the Board. The filing fee for a minor transaction is \$10,300, while

¹⁵ CSXT claims that “the Board declined to reject NS’s February 14, 2025 submission...” CSXT-5 at 8. This is incorrect. In Decision No. 2, the Board stated that “[b]ecause the Board cannot make either of the determinations required by 49 CFR 1180.2(b), the Board finds that the Proposed Transaction is a significant transaction. The Board is therefore unable to accept the February 14, 2025 submission as an application.” Decision No. 2, slip op. at 7.

that for a significant transaction is \$439,100.¹⁶ When the Board determines that the minor application filed by an applicant describes a significant transaction, and directs that applicant to file a significant application in its place, the applicant again is presented with a choice of whether to submit that supplemented application together with funds covering the difference between a significant application fee and a minor application fee, or undertake a series of other actions that may make the filing of that significant application moot.¹⁷ Until NS has filed a revised application, *and* paid the proper filing fee, there is no proceeding. Moreover, NS may consider several options that do not necessitate going forth with a significant application.

B. Allowing Discovery At This Stage Is Also Inconsistent With Long Standing Precedent.

The Board, and the Interstate Commerce Commission before it, has consistently held that discovery begins upon the initiation of a proceeding, and not before. That rule has been applied uniformly with respect to control proceedings, as well as other types of proceedings before the Board. With regard to minor control proceedings, the Board is often very explicit on that point. The same with respect to those involving proposed significant and major transactions. While there have been a limited number of significant transaction proceedings, the historical record is

¹⁶ 89 FR 76434, September 18, 2024 (specifying “the fees that the public must pay to file certain cases and pleadings with the Board”).

¹⁷ It is not correct that NS *must* file a significant application in this proceeding. It has every right to resolve the issues presented by the Board’s decision in Norfolk S. Ry. Co. – Pet. For Declaratory Order, FD 36522 (STB served June 17, 2022), slip op at 17, note 25 (directing the parties “to take appropriate steps to address the unauthorized control issue immediately following resolution of the district court proceeding, including any appeals”) in other ways. In fact, CSXT has already argued that NS was not even permitted to file the minor application rejected by the Board in Decision No. 2 in FD 36836.

consistent: the Board has not initiated discovery prior to the submission and acceptance of the significant application. The Board's Decision No. 3 is against all precedent.¹⁸

1. Footnote 2 Is Contrary To The Board's Precedent In Minor Transactions.

The vast majority of control transaction proceedings handled by the Board are those determined to describe proposed minor transactions. The Board reviews the application and determines whether it will accept that application as a minor transaction or, instead, rejects the application.

If the Board accepts the application as one describing a minor transaction, the Board inevitably serves a decision stating exactly that and, often in the same decision, setting forth a procedural schedule. At this juncture, the Board consistently states that discovery may "*begin*" immediately upon the issuance of a decision accepting a minor transaction.¹⁹ That specific

¹⁸ The fact that CSXT voluntarily agreed to respond to discovery prior to acceptance of its supplemented application in the CSXT/Pan Am transaction is not Board precedent and is not binding on NS or any other party.

¹⁹ 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.,

statement in the numerous Board decisions would be unnecessary if discovery had been permitted during the time period between the filing of the application and acceptance of the application. Footnote 2 is completely inconsistent with decades of Board precedent.

2. Footnote 2 Is Contrary To The Board's Consistent Precedent In Major Transactions.

There have been very few major transactions presented to the Board. But when there were, the Board has been specific with regard to discovery. For example, with regard to the ill-fated proposed merger of Canadian National Railway Company ("CN") and the BNSF, a few weeks after the applicants had filed a notice of intent with the Board, the applicants filed a proposed protective order that would "facilitate any necessary discovery *at subsequent stages of the proceeding*," clearly indicating that the protective order was being entered into for the purpose of managing discovery when it began in the future, not as it was then permitted to happen following the filing of the notice of intent.²⁰ The Board granted that request. Had discovery been permitted at the time of the filing of the proposed protective order (that is, upon the filing of the notice of intent), the Board would have stated so.

Even more telling, though, are the subsequent decisions involving the proposed procedural schedule. In Decision No. 5, the Board published for comment the applicants' proposed procedural schedule and noted specifically that the applicants had proposed that "discovery relating to applications and other filings (including responsive and inconsistent applications), where permitted, will begin immediately upon their [i.e., the application's] filing; and that the ALJ assigned to this matter will have the authority initially to resolve any discovery

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.

²⁰ Canadian National Railway Co. et al. – Common Control, FD 33842 ("CN/BN"), Decision No. 2 (STB served January 12, 2000), slip op. at 1 (emphasis added).

disputes.”²¹ Importantly, not only did the Board specifically note that discovery was not available on the primary application before it was filed and accepted by the Board, it did so as well for responsive and inconsistent applications even as it required parties who intended to file such responsive and inconsistent applications to submit notices of intent to file the same.²²

The proposal for a CN/BN combination initiated a significant restructuring of the handling of major transactions and resulted in adoption of new rules regarding major transactions. In those new rules, applicants contemplating a major transaction were required to provide their 100% traffic tapes to other parties prior the filing of the application. However, the Board explicitly stated that the procedural restructuring it envisioned for handling proposed major transactions did *not* include the availability of “broad pre-application discovery.”²³ Footnote 2 runs directly contrary to the rules regarding major transactions, yet alone in significant transactions. Indeed, even in major transactions, general discovery is *not* permitted upon the filing of a notice of intent.

3. Footnote 2 Is Contrary To The Board’s Precedent In Significant Transactions.

In a case almost identical to this one, CP filed a minor application seeking Board authority to acquire Dakota, Minnesota & Eastern Railroad Company (“DM&E”).²⁴ A month later, the STB published a decision finding the proposed CP/DM&E transaction to be a

²¹ CN/BN, Decision No. 5 (STB served February 10, 2000), slip op. at 4. The applicants withdrew their notice of intent by means of a filing submitted on July 21, 2000, before the STB was able to publish a final procedural schedule.

²² *Id.*, slip op. at 3.

²³ Major Rail Consolidation Procedures, EP 582 (Sub-No. 1) (STB served June 11, 2001), slip op. at 52 – 53.

²⁴ 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 1.

significant transaction.²⁵ The Board stated that it would consider the October 5, 2007 document to be a prefiling notification.²⁶ The applicants filed supplemental material on December 5, 2007. On December 27, 2007, the Board accepted the revised application as a significant application and affirmatively stated that “Discovery may begin immediately.”²⁷ Footnote 2 is directly contrary to this case and thus constitutes material error.

Here, without providing NS with an opportunity to respond to the merits of CSXT’s affirmative request, the Board accepted, in footnote No. 2 of Decision No. 3 in FD 36836, the CSXT’s interpretation of a different case not involving a significant transaction, but a major transaction. CP/KCS Decision No. 7. A more thorough examination of that case, and the other cases cited by CSXT in CSXT-5, demonstrate that this interpretation – an interpretation contrary to the governing statutes, regulations, and precedent – is incorrect.

The CP/KCS decision was based upon issues and decisions issued during the Conrail transaction.²⁸ The CP/KCS transaction involved the proposed major transaction acquisition of KCS by CP, and the initial preparation of many of the required regulatory documents, only to be

²⁵ Id. (citing CP/DM&E, Decision No. 2 (STB served November 2, 2007)).

²⁶ Id.

²⁷ Id. at 10 (emphasis added). See also, Canadian Pacific Ry. Co., et al. – Control – Dakota, Minnesota & Eastern Rr. Corp., et al., FD 35081, Decision No. 8 (STB served March 27, 2008), slip op. at 1 (after describing the December 27, 2007 Decision No. 4 as “accepting for consideration the application filed by Canadian Pacific Railway Corporation,” the Board went on to state that “Decision No. 4 authorized parties to begin discovery immediately”).

²⁸ The CP/KCS proceeding reached back to the Conrail proceeding for precedent on the granting of waivers for information normally required for a major transaction application that CP would perhaps not be able to acquire from KCS in a hostile takeover attempt. Canadian Pac. Ry. – Control – Kan. City S., FD 36500, Decision No. 7 (STB served August 2, 2021), slip op. at 4 (citing Norfolk S. Corp. – Control – Conrail Inc., FD 33286 (STB served February 21, 1997), slip op. at 1-2 (addressing various waivers that Norfolk Southern needed in order to develop its own competing application for acquisition of Conrail in light of Conrail’s then agreements with CSXT)).

followed by a competing offer from Canadian National Railway Company (“Canadian National”) that KCS’s board of directors felt obligated to accept.²⁹ CP sought a declaratory order from the Board in FD 36500 “confirm[ing] that KCS remain[ed] obligated to provide CP with information CP need[ed] to complete its [FD 36500] application and that CP may retain and continue to use materials provided by KCS before their merger agreement was terminated for the purposes of preparing and defending CP’s application.”³⁰

The CP request is important for two reasons: (1) the CP request was not a clarification that general pre-application discovery in the CP proceeding (FD 36500) was available, and (2) Decision No. 7 was not a holding that allowed for general pre-application discovery available to all parties.³¹ It was *not* a motion to compel regarding discovery that had been served. It was a focused petition for specific relief not otherwise permitted by the Board’s regulations. In fact, there is little doubt that CP would have fought bitterly had Canadian National, or any other party, attempted to initiate general pre-application discovery at that particular time, particularly given the fact that at the time of the CP request and the Board’s decision on that request, it was *Canadian National* that had an agreement with KCS, not CP.

²⁹ The Board accepted a Canadian National notice of intent to file a major transaction application by Decision No. 2 in a competing docket. Canadian National Railway Co., et al. – Control – Kansas City Southern, et al., FD 36514 (“CN/KCS”) (Decision No. 2) (STB served May 17, 2021). KCS subsequently entered into a merger agreement with Canadian National, CN/KCS, Decision No. 4 (STB served June 8, 2021), slip op. at 2, which set up the tensions dealt with in the CP/KCS decision discussed in CSXT-5 and cited by the Board in Decision No. 3.

³⁰ Canadian Pac. Ry. – Control – Kan. City S., FD 36500, slip op. at 3.

³¹ Similarly, the request was not for general pre-application in the competing Canadian National acquisition proceeding, FD 36514 (where Canadian National, as opposed to CP, sought to acquire control of KCS), in large part because under the applicable protective order material produced in discovery in that Canadian National proceeding would not have been available to CP in its own FD 36500 proceeding.

The STB, in its August 2, 2021 Decision No. 7 in this CP/KCS proceeding explored a number of different approaches to granting CP the very narrow request (which was along the lines of a petition for relief not otherwise covered as provided for in Part 1117 of the Board’s regulations) that CP had presented to the Board,. The Board decision was exceedingly narrow. It determined that only CP (*not all parties to the proceeding*) would be permitted to obtain a *narrow batch of information* (that information required by CP for the preparation of an application, and not, for example, information on competing applications – such as that of Canadian National – for the acquisition of KCS) and, to the extent that CP could not obtain that information from KCS, CP would be permitted to seek waivers. That decision cited both by CSXT in CSXT-5 and relied upon as the sole basis for the Board’s holding in Footnote No. 2 simply does not support general pre-application discovery available to non-applicants in proposed control proceedings describing a significant transaction.

CSXT cites other non-relevant cases supporting pre-application discovery, but none of them involved discovery in a minor or significant transaction governed by 49 U.S.C. §11324(a) nor were they relied upon for supporting the Board’s holding in footnote 2. For example, the Board’s decision in Navajo Transitional Energy Co., LLC v. BNSF Ry. Co., FD 42179, slip op. at 4 (STB served Aug. 7, 2023), is cited by CSXT for the proposition that there is no arbitrary discovery start date. Not only is that case not applicable to control transactions, but even CSXT’s stretches that decision beyond reasonable bounds.³² That case involved a complaint filed against BNSF by Navajo Transitional Energy Company (“NTEG”). The main issue being resolved in the decision was when the discovery window *closed* – the Board was not asked when discovery could *begin*. In that case, the Board correctly found that, in that type of proceeding (a complaint)

³² CSXT-5 at 8.

initiated by the filing of a complainant's case-in-chief, BNSF should have known that serving discovery on a complaint that had already been filed did not depend upon the issuance of a procedural schedule. But this FD 36836 docket is not a complaint proceeding.

CSXT-5 also discusses a 2015-2016 proceeding involving the acquisition of certain rail lines of the Delaware & Hudson Railway Company ("D&H") by NS, which, again, is not a control proceeding.³³ CSXT claims that the cited decision stands for the proposition that a party may serve discovery "at any time" pursuant to the Board's regulations. CSXT fails to explain that the case involved a minor transaction in which the Board had already accepted the application.³⁴ In the decision cited by CSXT, the Board approved the proposed transaction over the complaints of James Riffin, who, by that time, had also filed a petition for review in the U.S. Court of Appeals, and engaged in a variety of other interference tactics. In his comments on the proposed transaction, Riffin complained that the Board did not *explicitly* provide, in issuing a procedural schedule, for the beginning of discovery. The Board addressed Riffin's arguments by stating that its regulations provided for discovery, and that the Board did not need, in the procedural schedule, to explicitly authorize discovery once it issued Decision No. 1 accepting the application.³⁵

³³ CSXT-5 at 8-9.

³⁴ Norfolk Southern Ry. Co. – Acquisition and Operation – Certain Rail Lines of The Delaware and Hudson Ry. Co., Inc., FD 35873, Decision No. 1 (STB served December 16, 2014).

³⁵ Indeed, the Director of the Office of Proceedings had approved a protective order in the proceeding in a decision served on December 17, 2014, explicitly to govern discovery, but according to the Board, James Riffin had never sought discovery during the entire pendency of the proceeding. Norfolk Southern Ry. Co. – Acquisition and Operation – Certain Rail Lines of The Delaware and Hudson Railway Co., Inc., FD 35873 (STB served December 17, 2014); NS/D&H, slip op. at 8. In fact, if anything, that case supports NS's view that discovery is only available after an application is filed and accepted.

Finally, CSXT-5 cites a decision in the 2002 Riverview Trenton proceeding for the proposition that a party needs no explicit authority from the Board to undertake discovery.³⁶ In that proceeding, Riverview Trenton Railroad Company (“RTR”) had filed a notice of exemption for the acquisition of operating authority. Several parties filed petitions to revoke the exemption. A flurry of activity followed including RTR arguing that no discovery should be allowed. . Ultimately, the Board decided to revoke the exemption. The Board noted that “the revocation proceeding has been pending for a year and the petition for individual exemption for more than 9 months, and no party, to our knowledge, has undertaken discovery in either docket.” The Board, in the language quoted by CSXT, was explicitly telling the parties that they had more than a year to conduct discovery on pending proceedings after the applicant’s case-in-chief had been submitted, and that the parties had failed to do so. The decision in the Riverview Trenton proceeding has absolutely nothing to do with whether pre-application discovery is permitted in a control proceeding.³⁷

A case not discussed by CSXT but nonetheless relevant is a Paducah & Louisville Railway (“P&L”) case from 1999 in which the Board stated that “Both discovery and rebuttal statements become relevant only if we agree to institute the requested proceeding and establish a procedural schedule.”³⁸ P&L, at the time an affiliate of CSXT, had just received an exemption from the Board for its approval to acquire a partial ownership in the Paducah & Illinois Railroad

³⁶ CSXT-5 at 9 (citing Riverview Trenton R.R. Co. – Acquisition & Operation Exemption – Crown Enterprises, Inc., FD 33980 (STB served February 15, 2002)).

³⁷ Another aspect that should be garnered from the above is that the right to perform discovery really does stem from the submission of a case-in-chief and, when necessary, the acceptance of that case-in-chief for processing.

³⁸ Paducah & Louisville Ry., Inc. – Control Exemption – Paducah & Illinois Rr. Co., FD 33362 (STB served July 9, 1999), slip op. at 2.

Company (“P&I”). Two other railroads, The Burlington Northern and Santa Fe Railway Company (“BNSF”) and the Illinois Central Railroad Company (“IC”), also owned interests in P&I. Two years later P&L filed a related petition with the Board, sought discovery, and filed a motion to compel discovery. The Board declined to grant discovery finding that “[a]s a result of our decision here not to institute such a [show cause] proceeding, these requests [on instituting discovery and the stay] are moot and, accordingly, both motions will be dismissed.”³⁹

CONCLUSION

The Board committed material error in footnote 2 when, relying upon an unanalogous case involving a major merger transaction, it provided permitted discovery before NS has filed its application and that application had been accepted by the Board. Permitting such discovery is contrary to the governing statutes and regulations that define when a proceeding begins. It is contrary to the vast majority of the Board’s precedents both in control and non-control proceedings. The sole case cited for the contrary (the CP/KCS decision) involved the Board granting an applicant (but not any other parties) a very narrow exception and directed the methodology (discovery) for that applicant to obtain otherwise necessary material. Accordingly, Footnote 2 should be reversed.

Respectfully submitted,

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³⁹ Id.

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April 21, 2025

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 Objections to CSXT's Second Set of Request for Production of Documents to Norfolk Southern Corporation & Norfolk Southern Railway Company upon each Party of Record in this Proceeding.

/s/ William A. Mullins
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