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April 28, 2025

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VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

ENTERED
Office of Proceedings
April 28, 2025
Part of
Public Record

Re: Norfolk Southern Railway Company – Control Acquisition – Norfolk & Portsmouth Belt Line Railroad Company, FD No. 36836

Dear Ms. Brown:

Enclosed for filing in the above-captioned docket is the Comments of Norfolk Southern Corporation and Norfolk Southern Railway Company in response to Decision No. 3 in the above-referenced docket, which was served by the Board on April 11, 2025. If there are any questions about this matter, please contact me directly, either by telephone: at 202-663-7823 or by e-mail: wmullins@mullinslawgroup.net. If I am unavailable, you may contact Rose-Michelle Nardi, who can be reached at (202) 663-7852 or by e-mail at rnardi@mullinslawgroup.net.

Respectfully submitted,

/s/ William A. Mullins

William A. Mullins
Attorney for Norfolk Southern Corporation and
Norfolk Southern Railway Company

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36836

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

**COMMENTS OF NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN
RAILWAY COMPANY IN RESPONSE TO DECISION NO. 3**

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April 28, 2025

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Company**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**COMMENTS OF NORFOLK SOUTHERN CORPORATION AND NORFOLK
SOUTHERN RAILWAY COMPANY IN RESPONSE TO DECISION NO. 3**

Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, “NS”) responds to the proposed procedural schedule that the Board published in Decision No. 3.

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 14, 2025, NS submitted a minor application in the above-referenced docket. NS also submitted on February 14, 2025, a proposed procedural schedule and a protective order. On March 14, 2025, the Board rejected the minor application and, on its own initiative, decided to treat NS’s February 14, 2025 submission as a pre-filing notification to a significant transaction. Decision No. 2 directed NS to propose a procedural schedule appropriate for a significant transaction to be published for comment in the Federal Register. On March 21, 2025, NS submitted its proposed revised procedural schedule. See NS-6.

On March 28, 2025, before NS’s proposed procedural schedule was published for comment, CSX Transportation, Inc. (“CSXT”) prematurely filed a response to the proposed revised procedural schedule. On April 11, 2025, the Board issued Decision No. 3 providing for

comment on the proposed schedule that was largely based on the revised procedural schedule proposed by NS, incorrectly deciding on the initiation of discovery before seeking comment and holding action on other CSXT requests until a later time. On April 16, 2025, the Board's Decision No. 3 was published in the Federal Register.

NS subsequently filed a Petition for Reconsideration (NS-7), a Petition for Stay (NS-9), and a Petition for a Housekeeping Stay (NS-10), all involving the Board's determination to permit early general discovery as outlined in Footnote 2 of Decision No. 3. The Petition for a Housekeeping Stay was granted on April 24, 2025. CSXT, on April 25, 2025, submitted a reply to the NS Petition for Stay and Petition for Reconsideration. See CSXT-8. Decision No. 3 sought comments on the Board's proposed procedural schedule by April 28, 2025. NS hereby submits its comments in response to Decision No. 3.¹

DISCUSSION

With the exception of the holding in Footnote No. 2 of Decision No. 3, the procedural schedule proposed by the Board should be adopted. Modifications proposed by CSXT are not appropriate, suffer administrative due process concerns, and are contrary to the Board's

¹ On March 28, 2025, before the Board published most of NS's proposed procedural schedule for comments, CSXT filed extensive comments in opposition and made several requests for affirmative relief, including a request to the Board to have discovery start immediately. See CSXT-5. Rather than filing a reply to a reply to respond to CSXT's March 28, 2025 comments and affirmative requests, NS filed a letter, designated NS-5, on April 1, 2025, and before the Board had issued its decision publishing a proposed procedural schedule for comment, that acknowledged the Board's admonition to avoid replies to a reply but noted that "parties may comment on the revised proposed procedural schedule **after it** [i.e., NS's proposed revised procedural schedule] is published in the Federal Register." Decision No. 2, slip op. at 9, n.10 (emphasis added). CSXT, in its filing made on April 25, 2025, and designated CSXT-8, actually criticizes NS for failing to file a reply to a reply and failing to address the merits of CSXT's March 28, 2025 comments in its April 1 letter. CSXT-8 also specifically noted that all parties may respond to aspects of CSXT-5 in response to Decision No. 3. See CSXT-8 at 10. As such, NS will address herein some aspects of CSXT's arguments made both in CSXT-5 and CSXT-8.

regulatory and statutory framework and precedential guidance. NS opposes: (1) a procedural schedule call for comments on the sufficiency of the revised application at F+15, (2) an extended 90-day period for comments, protests, and requests for conditions, (3) reconsideration of the environmental approach taken by the Board in Decision No. 2, and (4) the extension of the other procedural schedule provisions proposed by CSXT, including an extension of the time period available for discovery.

NS generally supports the proposed procedural schedule. NS reiterates its concerns with regard to the initiation of general discovery, as detailed in NS-7, NS-9, and NS-10. The proposed procedural schedule is appropriate to significant control proceedings. Once NS files a revised application, and that application is accepted by the Board, there should be ample opportunity for an orderly discovery process and consideration of any issues that may be presented. The schedule is consistent with the Board's statutory framework and precedent.

With regard to the orderly conduct of discovery, CSXT has proposed that in this proceeding general discovery should be permitted for all parties prior to the submission and acceptance of an application. NS has already responded to that CSXT request for affirmative relief in NS-7,² NS-8, and NS-9, and will repeat those arguments here.³ Indeed, the NS Petition

² NS's April 1 letter should have been designated NS-7 but was accidentally designated NS-5.

³ CSXT, in its comments, cites a Board decision from the CP/KCS proceeding (CSXT-5, at 7) (citing Canadian Pac. Ry. Ltd. – Control – Kansas City S., FD 36500, slip op. at 4 (STB served Aug. 2, 2021) (“CP/KCS”)) arguing that that CP/KCS decision deals with the initiation of *general* discovery for all parties, when in that decision the STB was simply responding to the request of the *applicant* in that proceeding for continued access to certain documents that it already had as well as access to other specified documents that it had been promised, and prescribing the discovery process as the means for fulfilling that request. That decision did not provide for general discovery by all parties. Indeed, CSXT-8 continues to ignore the difference between general discovery by parties under the Board's general rules and how discovery is treated in the context of control or merger proceedings. Discovery in control and merger proceedings has never been authorized to allow general discovery during the period between

for Reconsideration should be granted so that the initiation of discovery is the same for NS in this proceeding as CSXT proposed for one of its own recent transactions. In the CSX/Pan Am proceeding, involving what the STB determined to be a “significant transaction,” CSXT explicitly proposed that discovery would not begin until the Board accepted that application,⁴ which is the same process that NS advocates here.

NS, however, does take this opportunity to respond to one other issue raised by CSXT in comments made in CSXT-5, specifically that discovery (and the evidentiary record) should not close at F+135.⁵ See CSXT-5 at 9. CSXT argues that discovery should be permitted by CSXT

notice of a transaction and the filing of the application, as CSXT argues should be the case here. CSXT has not presented one case holding as such. In contrast, NS has presented numerous merger and control cases where discovery was not allowed until the application was accepted.

⁴ CSXT/PAR-1, CSX/Pan Am, submitted February 25, 2021, at 14 (“Board accepts application and establishes schedule. Discovery begins.”). The fact that CSXT after the Board rejected the minor application and accepted it as a pre-filing notification *voluntarily* engaged in discovery in the period between that notification and the filing of the application does not create precedent that discovery is “compelled” in accordance with the general discovery rules in control and merger proceedings. As discussed *infra* with regard to EP 582, the Board has recognized the need to permit prospective applicants the freedom to develop their applications free of the burden imposed by compelled generalized discovery. See, infra, n. 8 and accompanying text.

⁵ CSXT also argues with NS’s concerns with wholesale importation of discovery taken in the district court into the Board’s control proceedings. NS will undertake that discussion at the proper time, but herein notes that not all discovery produced in the context of the antitrust case is relevant here. CSXT’s arguments are also contrary to a proceeding significantly parallel to this control docket, where the Board denied a request for a party (Potomac Electric Power Company (“PEPCO”)) to use material produced in discovery in one Board proceeding in another Board proceeding. It was CSXT that argued strenuously against that at the time, and the Board agreed with the CSXT arguments. “We have serious concerns that granting PEPCO’s request and permitting it to use the control proceeding’s information for other purposes would have a chilling effect on the discovery process not only in this case, but in our proceedings generally.” CSX Corp. et al. – Control and Operating Leases/Agreements – Conrail Inc. and Consolidated R. Corp., FD 33388 (Decision No. 18), slip op. at 3 (STB served August 5, 1997). The Board went on to note that, if PEPCO wanted to obtain the same type of information produced in one proceeding in another proceeding, PEPCO could conduct discovery within the confines of that other proceeding. The Board’s concerns there are well received here when the discovery sought in one proceeding (the district court proceeding) is sought to be imported, wholesale, into a

and others on NS responses to CSXT's many threatened responsive and inconsistent applications. The CSXT proposal is an undisguised prelude to a never-ending proceeding, notwithstanding CSXT's (unproven) claims that it is harmed by the continuation of control of NPBL by NS. At some point CSXT's consistent and repeated delays and diversions in this proceeding must end. For CSXT to argue that "[i]t is premature to establish a close to discovery," is to argue that it is premature to establish the close of the evidentiary proceeding, a fact that is rebutted by the Board's regulations and statutory framework. See CSXT-8 at 9.

The structure of a procedural schedule in a control proceeding is, in fact, different than that in other proceedings heard by the Board. There are specific statutory limits on the permitted duration of proceedings,⁶ and the close of the evidentiary record (and the discovery that is permitted to feed into that evidentiary record)⁷ is vital to adherence to those specific statutory limits. The Board has recognized the fundamental difference between discovery in a control proceeding and discovery in other proceedings. For example, in control proceedings involving major transactions, the Board requires that applicants make available 100% traffic tapes while specifically withholding "broad pre-application discovery," which the Board specifically

Board control proceeding, without recognition that: (1) the discovery rules may be applied differently in the two different forums; (2) access to that discovery material would be governed by different protective orders to be enforced in different jurisdictional forums, and (3) the assumptions and derivations of the information produced in discovery (such as base years and the like) may be different.

⁶ 49 U.S.C. § 11325.

⁷ See CSX Corp. et al. – Control and Merger – Pan Am Systems, Inc. et al. ("CSX/Pan Am"), FD 36472, Decision No. 2, slip op. at 2 (STB served April 22, 2021) ("Under 49 U.S.C. § 11325(c), the Board must conclude the evidentiary proceedings for a significant transaction no later than 180 days after publication of notice in the Federal Register that the Board has accepted the application.").

withheld, with the explicit note that that “would not impede the prospective applicants in the preparation of their application.”⁸

CSXT continues to cite Board decisions regarding general discovery in non-merger and control proceedings and attempts to shoehorn them into this proceeding, but none of those general discovery cases are applicable here. And the claim that a decision from the CP/KCS proceeding⁹ supports adoption of the *general* discovery for all parties in all merger and control proceedings¹⁰ stretches credulity. That decision was simply responding to the request of the *applicant* in that proceeding for continued access to certain documents that it already had as well as access to other specified documents that it had been promised, and prescribing the discovery process as the means for fulfilling that request.

Of particular note is yet another example, again coming from CSXT’s April 25, 2025 pleading:

The Board has the discretion to manage and control the discovery process in this proceeding. The Board was well within its authority to determine that discovery is open. The exercise of this discretion does not constitute material error. *See Norfolk S. Ry. Co. – Petition for Exemption – in Baltimore City & Baltimore Cnty., MD*, AB 290 (Sub-No. 311X), slip op. at 10 (STB served Jan. 27, 2012) (“It is within the Board’s discretion to determine how much weight to accord to evidence submitted by parties; the exercise of this discretion does not constitute material error.”).

See CSXT-8 at 9. CSXT cites this abandonment case to the Board for the proposition that the exercise of the Board’s “discretion to manage and control the discovery process in this proceeding” includes the “authority to determine that discovery is open” and that the exercise of that discretion in any way it chooses “does not constitute material error.” But the decision CSXT

⁸ See Major Rail Consolidation Procedures, EP 582 (Sub-No. 1), at 53 (STB served June 11, 2001).

⁹ See CSXT-10 at 3, citing CP/KCS.

¹⁰ See CSXT-8 at 7.

cites not only does not involve the exercise of the Board's discretion with regard to the initiation of discovery – *it does not deal with discovery in any way*. It deals, as CSXT's parenthetical makes clear, solely with the Board's discretion as to how much weight the Board must give to evidence that is presented to the Board. In control proceedings, when discovery may begin and when it must end are very much dictated by controlling statutes and the Board's regulations, which are not freely ignored by the Board in its own discretion.

CSXT's comments also argue that the procedural schedule should include a call for comments on the sufficiency of the revised application to be filed fifteen days after the submission of the revised application. See CSXT-5 at 2, 3. CSXT makes several pejorative remarks concerning the strength and validity of the NS case presented in the minor application (matters which NS respectfully disagrees) and argues that it should be able to argue that the NS case presented in the revised application would be similarly flawed. See CSXT-5. But many of those comments, if justified (which they will not be), are more properly filed later in the proceeding, and specifically to be filed 60 days after the revised application has been filed. To permit those comments to be filed a mere 15 days after the submission of the revised application significantly deprives NS of an opportunity to review the comments and respond to them and to do so in time for the Board to consider them in deciding whether to accept the supplemented application.¹¹ Furthermore, it is the Board who is statutorily directed in 49 U.S.C. §11325(a) to publish the application after 30 days or to reject it. Unlike other parts of that statute that specifically provide for written comments by other parties for the Board to consider, subsection (a) does not provide an opportunity for parties to comment before the Board acts.

¹¹ Further, CSXT specifically included notations in its proposed procedural schedule for responsive pleadings in most other cases, indicating as well that NS should not have an opportunity to respond to any comments filed on F+15.

Indeed, CSXT does not cite any prior precedent for the inclusion of such an entry in the control proceeding procedural schedule. CSXT did not propose this in its proposed procedural schedule for its own significant application.¹² Just as it would not have been appropriate there, it is similarly inappropriate here.

CSXT also proposes that comments, protests, requests for conditions and any other evidence or argument in opposition to the Revised Application or related applications should be due on F+90, the same day that responsive, including inconsistent, applications are due. CSXT claims that this reflects the Board's action in the CP/DM&E proceeding. See CSXT-5 at 4 (citing Canadian Pacific Railway Co. – Control – Dakota, Minnesota & Eastern Railroad Corp. (CP/CM&E), FD 35081, slip op. at 18 (STB served December 27, 2007)). But CSXT fails to note that not only did the *applicants* propose the extended comment period (thus waiving its right to a 60-day comment period as prescribed by 49 U.S.C. § 11325(c)(1)¹³), but that no party filed comments in opposition to the extended procedural schedule.¹⁴ Id. at 8.

¹² “Motion of Applicants to Establish Procedural Schedule,” CSX/Pan Am, CSXT/PAR-7, submitted April 1, 2021, at 2.

¹³ CSXT proposes extension of “the deadline for submission of written comments to 90 days after that application is filed so that the comment deadline is synchronized with the deadline for responsive, including inconsistent applications.” See CSXT-5. CSXT blends review of significant transactions with those of major transactions, contrary to the provisions of the governing statute. Compare 49 U.S.C. § 11325(b) and 49 U.S.C. § 11325(c).

¹⁴ 49 U.S.C. § 11325(c)(1) provides that, if the application describes a significant transaction, then “the following conditions apply: (1) Written comments about an application, including comments of the Attorney General and the Secretary of Transportation, may be filed with the Board within 30 days after notice of the application is published [in the Federal Register] under subsection (a) of this section.”

CSXT argues that it is too early for the Board to make any decisions with regard to environmental matters in the proceeding, but that clearly is not the case. Under 49 CFR § 1105.6(c):

“No environmental documentation will normally be prepared ... for the following actions: * * * (1) Any action that does not result in significant changes in carrier operations (*i.e.*, changes that do not exceed the thresholds established in section 1105.7(e)(4) or (5)), including (but not limited to) all of the following actions that meet this criterion: (i) An ... acquisition of control under 49 U.S.C. 11323 ... that does not come within subsection (b)(4) of this section,”

referring to an acquisition of control that would not result in operational changes that exceed any of the identified thresholds.

The Board, in Decision No. 2, waived a more detailed operating plan than is required for significant applications, and that decision was informed specifically by the information provided by NS in its rejected minor application.¹⁵ Because of this, no environmental documentation would normally be prepared and submitted in accordance with 49 CFR part 1105. In addition, had the Board anticipated supplemental environmental material, the Board would have instructed NS to consult with the Board’s Office of Environmental Analysis for the proper format of the environmental report. CSXT, in CSXT-5, requests the Board to reconsider the Board’s entire approach to the environmental reporting obligations as set forth in Decision No. 2, but that request should be denied because there will be no operational changes, abandonments, or impacts to historic structures that would trigger such environmental and historic reporting requirements.

Similarly, CSXT makes various other modifications to the procedural schedule that are purely designed to extend the proceedings that CSXT characterizes as likely to involve a

¹⁵ See Decision No. 2, slip op. at 8.

complex record. CSXT-5 at 6. It goes yet again almost without saying that CSXT was at the table during the early 1980s when it participated in the proceeding that gave rise to this action. It has been in the Board room, and the court room, since. It never challenged NS's control of NPBL or argued that NS did not have authority to control NPBL until the antitrust case.

The control proceeding is actually not that complex. It is only complex because CSXT will do anything and everything to litigate, relitigate, and produce as much smoke as possible to mask what is in fact a transaction that will not change the way NPBL has operated for over 100 years. The major transactions that CSXT puts forth as precedent for extending the procedural schedule to its statutory limit involved major restructurings of the rail marketplace that had far-reaching implications for numerous shippers. This docket involves the question of whether the Board should grant its consent to what has been 42 years of effective control of NPBL by NS that have not been the subject of concerns or complaints (of anyone other than CSXT) during that time.

CONCLUSION

With the exception of Footnote No. 2 allowing for general discovery before an application is accepted, the procedural schedule set forth by the Board in Decision No. 3 is appropriate to the proceeding and should be adopted. The several changes proposed by CSXT are not appropriate, suffer administrative due process concerns, and are contrary to the Board's regulatory and statutory framework and precedential guidance. The CSXT call for comments on the sufficiency of the revised application at F+15 is without precedent and would be inappropriate. The CSXT call for an extended 90-day period for comments on the revised application is not permitted by statute, absent a waiver of the applicant's rights. The Board should not reconsider the environmental approach taken by the Board in Decision No. 2, as that

is absolutely appropriate in the circumstances envisioned by the proposed transaction. The extension of the other procedural schedule provisions proposed by CSXT are inappropriate, unnecessary given CSXT's long involvement in the events leading up to this docket and merely serve to permit additional time for CSXT relitigate concepts repeatedly rejected by the federal courts.

Respectfully submitted,

/s/ William A. Mullins

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April 28, 2025

Attorneys for Norfolk Southern Corporation and
 Norfolk Southern Railway Company

CERTIFICATE OF SERVICE

I certify that, on this April 28, 2025, I have caused to be served a copy of the forgoing Comments of Norfolk Southern Corporation and Norfolk Southern Railway Company in response to Decision No. 3 on all parties of record in this proceeding.

/s/ *William A. Mullins*

William A. Mullins
Attorney for Norfolk Southern Railway Company