

BEFORE THE
SURFACE TRANSPORTATION BOARD

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DOCKET NO. NOR 42183

CSX TRANSPORTATION, INC.
v.
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY

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DOCKET NO. FD 36859

CSX TRANSPORTATION, INC.
—TERMINAL TRACKAGE RIGHTS—
NORFOLK SOUTHERN RAILWAY COMPANY AND
NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY

CSX TRANSPORTATION, INC.'S REPLY TO
NORFOLK SOUTHERN CORPORATION &
NORFOLK SOUTHERN RAILWAY COMPANY'S
COMBINED MOTION TO HOLD IN ABEYANCE

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For much of the last half-century, NS¹ has unlawfully controlled NPBL, a terminal railroad owned jointly by NS and CSXT. CSXT should be able to use NPBL's switching services to access on-dock rail at NIT in Norfolk, Virginia, one of the most important marine terminals on the East Coast. But NS has wielded its unlawful control of NPBL to effectively exclude CSXT from such access, reducing competitive options for shippers at NIT from two carriers to one carrier. Through

¹ Unless otherwise defined, the acronyms and defined terms used herein are the same as those used in the Board's decision served on June 5, 2025. *CSX Transp., Inc. v. Norfolk S. Corp. & Norfolk S. Ry. Co. (CSXT Complaint)*, NOR 42183 (STB served June 5, 2025), *CSX Transp., Inc.—Terminal Trackage Rights—Norfolk S. Ry. Co. & Norfolk & Portsmouth Belt Line R.R. Co. (CSXT Terminal Trackage Rights)*, FD 36859 (STB served June 5, 2025) (the "June 5 Decision").

the complaint, application for terminal trackage rights, and petition to reject or reopen and revoke² filed by CSXT in these Related Proceedings, CSXT will obtain the necessary relief to remedy these violations of law and to restore the competitive landscape for rail transportation in the Norfolk region to its appropriate two-carrier balance.

In response to CSXT's filings in the Related Proceedings, NS has filed a blizzard of overlapping and duplicative procedural requests, all based on an assumption that NS should have priority in seeking to buttress the exclusion of CSXT from NIT on-dock rail access through increases in trackage rights fees and through authority to control NPBL. By complaining about CSXT's filings in the Related Proceedings, NS is trying to divert the Board's attention away from the central issue in the underlying dispute: NS's continuing stranglehold over access to NIT. But as CSXT has explained, the Board needs to have the full story of NS's unlawful efforts to exclude CSXT from access to NIT and the full scope of CSXT's requested relief – not the self-serving bits and pieces that NS would like to present.

CSXT hereby replies to NS's motion to hold the Related Proceedings in abeyance (the "Abeyance Motion"), filed on June 2, 2025.³ The Abeyance Motion and

² On June 9, 2025, CSXT filed the final piece of its affirmative cases, the petition to reject or reopen and revoke in Docket No. AB-290 (Sub-No. 299X), *Norfolk S. Ry. Co.—Discontinuance of Service Exemption—in Chesapeake, VA* and Docket No. AB-1024X, *Norfolk & Portsmouth Belt Line R.R. Co.—Discontinuance of Trackage Rights Exemption—in Chesapeake, VA*. CSXT expects that the Board will treat CSXT's petition in these discontinuance proceedings consistent with CSXT's requests in the Related Proceedings for abeyance and scheduling purposes. CSXT does not oppose NS's June 11 request to extend the short-term housekeeping stay already in place in the Related Proceedings to the discontinuance proceedings, although CSXT does oppose any long-term abeyance order.

³ CSXT has already replied (CSXT-3 and CSXT-4) to NS's May 30 request for a 30-day extension and NS's June 2 request for a housekeeping stay. On June 5, the Board mooted NS's extension motion by granting NS's housekeeping stay petition,

NS's other requests all seek to put off consideration of CSXT's requested relief pending resolution of NS's apparently forthcoming application for control of NPBL. NS seems to believe that the Board will rubber stamp its application, cementing NS's and NPBL's exclusion of CSXT from NIT on-dock rail access and immunizing NS's and NPBL's blatantly anticompetitive behavior.

As explained below, the Board should deny the Abeyance Motion. First, holding the Related Proceedings in abeyance would be fundamentally unfair to CSXT. CSXT is the victim of NS's on-going unlawful conduct, and CSXT is clearly entitled to seek the prompt termination of that unlawful conduct as well as other relief from the effects of that conduct. This is a rare case where the plaintiff and the defendant each agree that the defendant has violated the law. NS openly admits to controlling NPBL for more than 40 years without the necessary Board authority. The Board established the existence of this statutory violation three years ago, and NS has nevertheless continued to abuse that control. Notwithstanding these unclean hands, NS now seeks litigation priority to avoid any consequences for – and indeed immunize – its actions through the Control Proceeding.

Second, holding the Related Proceedings in abeyance would not promote efficiency. To the contrary, as the Board has acknowledged, the “Control Proceeding and the Related Proceedings stem from the same facts, present many of the same arguments, and potentially implicate the same requests for relief.” *June 5 Decision*, slip op. at 3. CSXT expects that the Board will ultimately reject or outright deny any application filed by NS in the Control Proceeding. By granting the Abeyance Motion, the Board would create the potential for asynchronous and duplicative

thereby tolling the procedural deadlines in the Related Proceedings until the Board rules on the Abeyance Motion. *June 5 Decision*, slip op. at 3.

proceedings, first in the Control Proceeding and then in the Related Proceedings. This clearly is not an efficient process for resolving the underlying dispute.

NS clearly wants to put off as far as possible the day it must comply with governing law and compete on a level playing field with CSXT for the on-dock rail market at NIT. The Board should not accept such gamesmanship to achieve such an improper result.⁴

1. LEGAL STANDARD

The Board has broad discretion to determine whether to hold a proceeding in abeyance. *Norfolk S. Ry. Co.—Petition to Set Trackage Rights Compensation—Norfolk & Portsmouth Belt Line R.R. Co. (NS Trackage Rights Compensation)*, FD 36223, slip op. at 3 (STB served Dec. 19, 2019). In deciding whether to hold a proceeding in abeyance, the Board “considers whether abeyance would promote efficiency and whether it would be fundamentally unfair to any party.” *NS Trackage Rights Compensation*, FD 36223, slip op. at 2 (STB served July 25, 2019). The Board’s decision to hold a proceeding in abeyance “is highly dependent on the facts and circumstances of the case.” *NS Trackage Rights Compensation*, FD 36223, slip op. at 3 (STB served Dec. 19, 2019).

⁴ The Abeyance Motion, as with NS’s other pleadings in these proceedings, is riddled with errors and misrepresentations. CSXT does not address most of these in this Reply because they have no real relevance to NS’s arguments. As an example, NS claims that “CSXT intentionally filed these actions on the Friday before Memorial Day as a means to short circuit NS’s time to respond.” (Abeyance Motion 4; *see also id.* at 15.) Of course, CSXT filed its complaint and application for terminal trackage rights on Tuesday, May 20, 2025 – six days before Memorial Day.

2. ARGUMENT

2.1 The Board should reject the Abeyance Motion because holding the Related Proceedings in abeyance would be fundamentally unfair to CSXT.

There is no valid reason to force CSXT to wait to litigate its claims for relief while NS pursues a request to authorize its on-going unlawful control of NPBL. CSXT is the party that has been aggrieved by NS's unlawful control of NPBL, the effect of which has been to keep CSXT from effectively competing for business at the important NIT terminal. There is no dispute that NS controls NPBL. NS and NPBL have both admitted that NS controls NPBL, even though NS never obtained the necessary ICC/STB authority to do so.⁵ CSXT has suffered and continues to suffer direct economic damages⁶ and other harm from this unlawful conduct. Other parties, including shippers and the Port of Virginia, are also continuing to suffer harm due to NS's on-going unlawful conduct. CSXT is clearly entitled to ask the Board promptly to remedy those harms and to prevent further harm through remedial measures designed to ensure effective competition at NIT.

Although the Board has not yet set a procedural schedule in the Control Proceeding, if NS files its application by the June 14, 2025 deadline, the governing

⁵ (See, e.g., NS Minor Appl. 7-8, Feb. 14, 2025, *Norfolk S. Corp. & Norfolk S. Ry. Co.—Acquisition of Control—Norfolk & Portsmouth Belt Line R.R. Co.*, FD 36836; Opening Statement & Evidence of NPBL 1, 5, Sept. 23, 2021, *Norfolk S. Ry. Co.—Pet. for Declaratory Order (NS Petition for Declaratory Order)*, FD 36522.)

⁶ NS incorrectly states that CSXT should not be able to recover damages in CSXT's complaint proceeding for the same actions that CSXT sought to recover in the district court litigation and which claims were denied. (See Abeyance Motion 3 n.3.) While the facts developed in that court proceeding are directly relevant to the issues raised now before the Board, the legal causes of action, and therefore the basis for seeking damages, in CSXT's district court complaint (antitrust law violations) and CSXT's complaint here (unauthorized control) are entirely different. The grounds for dismissing CSXT's damages claims in the district court litigation have no bearing on CSXT's ability to seek the relief requested here from the STB.

statute provides that the Board will have 300 days to issue a decision in the Control Proceeding.⁷ It would be unfair for the Board to require CSXT, shippers, and the Port of Virginia to continue to suffer economic damages and other harm due to NS's unlawful conduct for another 300 days (or potentially much longer). Instead, the Board should promptly consider CSXT's claims in the Related Proceedings.

NS's stated rationale for putting off CSXT's claims for relief is the false premise that the Board intended to prioritize an NS request for control authority. In 2022, the Board found that NS had never obtained the necessary STB authority to control NPBL. *NS Petition for Declaratory Order*, FD 36522, slip op. at 17 (STB served June 17, 2022). The Board stated that it "expects the parties to take appropriate steps to address the unauthorized control issue immediately following resolution of the district court proceeding, including any appeals." *Id.*, slip op. at 17 n.25. NS brazenly claims that this Board statement "was directed at NS, not CSXT,"⁸ notwithstanding the Board's explicit reference to the "parties" of FD 36522, which included CSXT.

NS claims that, by filing a control application, it "is trying to do what the Board told it to do." (Abeyance Motion 3; *see also id.* at 6, 8-9). But the Board never told NS to file a control application. Rather, the Board directed the parties to "take appropriate steps to address the unauthorized control issue." Indeed, CSXT tried to do exactly what the Board directed "the parties" to do by proposing NPBL governance changes in November 2024 that would have prevented further unlawful control from being exercised by either owner of NPBL. (*See CSXT Compl. Ex. 12,*

⁷ Specifically, under 49 U.S.C. § 11325, the Board must publish notice of the application within 30 days, conclude any evidentiary proceedings by the 180th day after publishing notice, and issue a final decision by the 90th day after concluding the evidentiary proceedings. 49 U.S.C. §§ 11325(a), (c)(3).

⁸ (NS Letter 2, June 4, 2025, *CSXT Complaint*, NOR 42183; NS Letter 2, June 4, 2025, *CSXT Terminal Trackage Rights*, FD 36859.)

May 20, 2025, *CSXT Complaint*, NOR 42183.) NS, however, used its unlawful control to prevent NPBL from considering those changes, thus requiring that CSXT now come to the Board for relief. The Board should not accept NS's false and unfounded assumption that a control application is the only "appropriate step" to address the unauthorized control issue.

CSXT is the aggrieved party here. CSXT sought to engage NS in efforts to address the unlawful control issue before coming to the Board but was rebuffed by NS's refusal to consider governance changes. CSXT then promptly started the Related Proceedings shortly after resolution of the district court litigation, as directed by the Board.⁹ The Related Proceedings provide the appropriate steps for the Board to remedy NS's unlawful conduct and they should not be put into abeyance.

2.2 The Board should reject the Abeyance Motion because abeyance would not promote efficiency.

The efficiency factor under the abeyance standard favors outright rejection of NS's request. Granting NS's request to hold the Related Proceedings in abeyance would be patently inefficient.

NS claims that permitting "all of the overlapping CSXT actions to proceed at the same time" threatens the efficiency of the Board's process governing the Control Proceeding. (Abeyance Motion 12.) But NS has it backwards. It would be inefficient if the parties and the Board develop a record in the Control Proceeding, the Board considers and denies NS's request in the Control Proceeding, and then the parties and the Board do it all over again in the Related Proceedings. Instead, it would be

⁹ The district court litigation was resolved on April 21, 2025. *See CSX Transp., Inc. v. Norfolk S. Ry. Co.*, No. 24-591, 2025 WL 1151230 (U.S. Apr. 21, 2025) (denying CSXT's petition for writ of certiorari). CSXT filed its complaint and application for terminal trackage rights in the Related Proceedings on May 20, 2025.

far more efficient for the parties and the Board to develop the record one time and for the Board to consider the Control Proceeding and the Related Proceedings at the same time.

In the Control Proceeding, CSXT will ask the Board in the first instance to reject or deny any NS application. CSXT will also make alternative requests for the Board to impose conditions on any Board approval of any NS application or for the Board to grant responsive applications, ensuring proper mitigation of the competitive harm caused by NS's control of NPBL. However, if the Board outright rejects or denies any NS application in the Control Proceeding, as CSXT expects, the Related Proceedings may be necessary to ensure that the Board provides proper going-forward remedies for the competitive harm wrought by NS's unlawful control of NPBL. In any event, the complaint proceeding **will be** necessary for CSXT to recover damages to remedy NS's unlawful exercise of control over NPBL.

Abeyance of the Related Proceedings would not promote efficiency. The Board has acknowledged that the Control Proceeding and the Related Proceedings “stem from the same facts, present many of the same arguments, and potentially implicate the same requests for relief.” *June 5 Decision*, slip op. at 3. The proceedings also involve the same parties and decisionmaker – the STB.

NS nevertheless asserts that the Board has “routinely held matters in abeyance where issues, parties, or fact patterns overlap,” and argues that the Board should do so here as well. (Abeyance Motion 14.) But NS conveniently fails to mention that those cases typically involve *different forums and decisionmakers*, such as the STB and state or federal courts.¹⁰ Here, the STB will review and decide

¹⁰ See, e.g., *NS Trackage Rights Compensation*, FD 36223, slip op. at 2-3 (STB served July 25, 2019) (ordering a proceeding to be held in abeyance until a federal district court proceeding was resolved); *Lake Providence Port Comm’n—Feeder Line Application—Line of Delta S. R.R. Located in E. Carroll & Madison Parishes, LA.*, FD 36447, slip op. at 3-4 (STB served Aug. 2, 2024) (holding a proceeding in

both the Control Proceeding and the Related Proceedings. There is no reasonable explanation for NS's position that it would be efficient to hold the Related Proceedings in abeyance until resolution of the Control Proceeding.

The Board has previously declined to hold related Board proceedings in abeyance. For example, in Docket Nos. NOR 42144, NOR 42150, and NOR 42152, various parties filed three separate complaints involving largely similar allegations against a rail carrier. *N. Am. Freight Car Ass'n v. Union Pac. R.R.*, NOR 42144 et al., slip op. at 2 (STB served Mar. 31, 2017). The Board considered three options: (1) consolidate all three proceedings; (2) do not consolidate the proceedings, but hold the second and third complaint proceedings in abeyance until the Board reached a decision in the first complaint proceeding; or (3) do not consolidate and do not hold the second and third complaint proceedings in abeyance. *Id.*, slip op. at 3. The Board stated that it weighed the advantages and disadvantages of the various options and concluded that “the better course of action” was to consolidate and not hold any of the proceedings in abeyance. *Id.*, slip op. at 3-4.

As noted above, the Board's decision to hold a proceeding in abeyance is highly dependent on the facts and circumstances of the case. Here, since the Control Proceeding and the Related Proceedings involve the same parties, facts, decisionmaker, and many of the same arguments, it would be more efficient for the Board to deny NS's request for abeyance and to consider the Control Proceeding and the Related Proceedings at the same time.

CSXT recognizes “the demand on the Board's resources” created by the Control Proceeding and the Related Proceedings. *June 5 Decision*, slip op. at 3. But

abeyance pending resolution of state court actions); *Grafton & Upton R.R. Co.—Petition for Declaratory Order*, FD 36518, slip op. at 3 (STB served Nov. 3, 2021) (holding a proceeding in abeyance and noting that a court was the more appropriate forum to decide the relevant property issues).

CSXT does not anticipate that the demand on the Board's resources would be significantly greater should the proceedings advance concurrently. The parties would develop the record themselves pursuant to the Board's rules and present their cases for the Board's consideration. If the Board needs more time to "carefully consider how to proceed in these related dockets," *id.*, the Board should not allow the Control Proceeding to take precedence over CSXT's cases. CSXT will seek any such necessary scheduling relief in the Control Proceeding at the appropriate time. *See id.*, slip op. at 3 n.5.

2.3 The Abeyance Motion is an effort to unnecessarily delay resolution of the dispute.

NS's obvious objective in seeking abeyance of the Related Proceedings is to put off for as long as possible any Board action to restore the proper competitive balance at NIT. NS has profited immensely by keeping CSXT from competing at NIT, and it clearly wishes to maintain its unlawful dominance over access to NIT for as long as it can. NS has not even tried to mask its strategy in its various discovery-related efforts to this point in the Control Proceeding, and its abeyance request continues these delay efforts.

CSXT believes that the Board will inevitably deny, sooner or later, NS's request for authority to control NPBL. NS's control request, on its face, seeks to implement a transaction that reduces competitive options from two carriers to one carrier, in contravention of the Board's competition policy and the NPBL charter. The Board and its predecessor have not allowed 2-to-1 transactions to go forward, and CSXT is confident that the Board will not rubber stamp this 2-to-1 transaction. CSXT should be able to pursue relief under the Related Proceedings on an overlapping schedule with the Control Proceeding to prevent further delay in having the Board address and remedy NS's unlawful conduct.

The Board should ensure the creation of a record that will allow it to take appropriate action in response to NS's continuing unlawful control of NPBL by having the Related Proceedings go forward at the same time as the Control Proceeding. In this way, a denial of NS's request for control (which CSXT expects given the circumstances) will not result in the restarting of litigation under the Related Proceedings, including the need to create the record a second time. Under CSXT's approach, a record will be available to support immediate necessary relief from NS's unlawful conduct.

3. CONCLUSION

For the reasons stated above, CSXT respectfully requests that the Board deny NS's request to hold the Related Proceedings in abeyance pending resolution of the Control Proceeding. The Board should allow the Control Proceeding and the Related Proceedings to advance concurrently.

As we have consistently stated, CSXT stands ready to participate in a scheduling or case management conference with the Board to ensure efficient consideration of the Related Proceedings, including potential consolidation or concurrent development of the record in each case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused this Reply in Docket Nos. NOR 42183 and FD 36859 to be served electronically or by first class mail, postage pre-paid, on all parties of record in these proceedings.

/s/ Sally Mordi

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