

SERVICE DATE – JUNE 13, 2025

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36836

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

Decision No. 5

Digest:¹ This decision denies a petition for reconsideration and petition for stay filed by Norfolk Southern Corporation and Norfolk Southern Railway Company; lifts a housekeeping stay; directs the parties to meet and confer on discovery issues; establishes a timeline for briefing two pending motions to compel; and provides that, to expedite processing, decisions resolving the two motions to compel will be issued by the Director of the Office of Proceedings.

Decided: June 9, 2025

Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, Applicants) seek the Board's authorization under 49 U.S.C. §§ 11323-25 and 49 C.F.R. part 1180 of their acquisition of control of Norfolk & Portsmouth Belt Line Railroad Company (NPBL). By order dated April 11, 2025,² the Board determined that it would be appropriate for discovery to begin at that time rather than, as proposed by Applicants, upon the Board's acceptance of Applicant's application for a significant transaction. See Norfolk S. Corp.—Acquis. of Control—Norfolk & Portsmouth Belt Line R.R. (Decision No. 3), FD 36836, slip op. at 2 n.2 (STB served Apr. 11, 2025). On April 21, 2025, Applicants filed a petition seeking reconsideration of that determination, a petition to stay that portion of Decision No. 3, and a petition for housekeeping stay to toll the deadlines for replies to two motions to compel pending before the Board. By decision served April 24, 2025, a housekeeping stay was imposed.

For the reasons discussed in this decision, the Board will deny Applicants' petitions for reconsideration and stay, lift the housekeeping stay, direct the parties to meet and confer on the discovery issues raised in the motions to compel, and set a timeline for briefing the two pending motions to compel should any discovery issues remain following the parties' meet-and-confer.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² The decision was published in the Federal Register on April 16, 2025 (90 FR 16056).

BACKGROUND

On February 14, 2025, Applicants filed a submission, styled as an application for a “minor” transaction, seeking the Board’s authorization of their acquisition of control over NPBL. By decision served March 14, 2025, and published in the Federal Register on March 17, 2025 (90 FR 12440), the Board found that the transaction should be classified as a “significant” transaction. See Norfolk S. Corp.—Acquis. of Control—Norfolk & Portsmouth Belt Line R.R. (Decision No. 2), FD 36836, slip op. at 7-8 (STB served Mar. 14, 2025). Accordingly, the Board determined that it could not accept Applicants’ February 14, 2025 submission as an application at that time and treated the submission as a prefiling notification for a significant transaction. Id. at 7. The Board stated that Applicants could perfect their application by supplementing the February 14, 2025 submission and provided direction to Applicants on what to include when perfecting their application. Id. at 7-8. The Board also directed Applicants to file with the Board, by March 21, 2025, a revised proposed procedural schedule reflecting the Board’s determination that the transaction is a significant transaction. Id. at 8-9. The Board stated that the revised proposed procedural schedule should indicate the year to be used for the impact analysis required in significant transactions and the approximate filing date of Applicants’ anticipated supplement. (Id.)

On March 21, 2025, Applicants filed a “revised motion for proposed procedural schedule.” In that motion, Applicants proposed that discovery begin on the date the Board publishes notice of its acceptance of the application for a significant transaction in the Federal Register. (Applicants Revised Mot. 3, Mar. 21, 2025.) On March 28, 2025, CSX Transportation, Inc. (CSXT), filed a response to Applicants’ motion. As relevant here, CSXT argues that Applicants’ proposal to start discovery when the application is accepted is inconsistent with the Board’s regulations and practice. (CSXT Response 7-9, Mar. 28, 2025.) According to CSXT, the Board does not typically set a specific period for discovery in control proceedings, and discovery should be allowed to proceed without awaiting the submission of the application. (Id. at 7-8.) On April 1, 2025, Applicants filed a letter in response to CSXT’s filing. Applicants argue that CSXT’s response requests affirmative action by the Board and state that they intend to comment on CSXT’s proposed modifications to their proposed procedural schedule after the Board publishes notice of it in the Federal Register. (Id. at 1-2.)

The Board published notice of, and invited comment on, Applicants’ revised proposed procedural schedule by decision served April 11, 2025, and published April 16, 2025. Decision No. 3, FD 36836, slip op. at 8-9. The Board did not include in the proposed schedule that discovery would begin on the date the Board accepted the application, as Applicants proposed. Id. at 2 & n.2. In footnote 2 (Footnote 2) of the decision, the Board explained that it has, in the past, “permitted discovery after the initiation of a proceeding under 49 U.S.C. § 11323 but before the filing of an application” and determined that it would be appropriate in this case for discovery to begin immediately “given the initiation of the proceeding and the treatment of Applicants’ February 14, 2025 submission as a pre-filing notification.” Id. at 2 n.2 (citing Canadian Pac. Ry.—Control—Kan. City S. (CP Discovery Order), FD 36500, slip op. at 4 (STB served Aug. 2, 2021); 49 C.F.R. § 1114.21(a)). Comments on the proposed procedural schedule were due by April 28, 2025. Decision No. 3, FD 36836, slip op. at 1.

On April 21, 2025, Applicants filed a petition seeking reconsideration of the Board's determination in Footnote 2. According to Applicants, the Board materially erred in initiating discovery before they filed their application for a significant transaction. (Pet. for Recons. 2.) Applicants argue that Footnote 2 provided affirmative relief to CSXT that is contrary to the Board's statutes, regulations, and precedent. (*Id.* at 1.) Additionally, Applicants argue that they were deprived of due process because they were not given the opportunity to respond to what Applicants call a petition by CSXT to begin discovery. (*Id.* at 1-2, 4.)

Also on April 21, 2025, Applicants filed a petition for stay and a petition for housekeeping stay. In their petition for stay, Applicants ask the Board to stay the holding in Footnote 2 until the Board rules on their petition for reconsideration. (Pet. for Stay 2.) Applicants argue that the stay should be granted because Applicants are likely to prevail on the merits of their petition for reconsideration, Applicants 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 supports granting the requested stay. (*Id.* at 3.) In the petition for housekeeping stay, Applicants asked the Board to toll the deadlines for replies to two pending motions to compel.³ (Pet. for Housekeeping Stay 1.) By decision served April 24, 2025, a housekeeping stay was imposed. See Norfolk S. Corp.—Acquis. of Control—Norfolk & Portsmouth Belt Line R.R., FD 36836, slip op. at 2 (STB served Apr. 24, 2025).

CSXT replied to Applicants' petitions for reconsideration and stay on April 25, 2025. CSXT argues that Applicants' petition for reconsideration should be denied because Applicants failed to establish material error. (CSXT Reply to Pet. for Recons. 3.) According to CSXT, the determination in Footnote 2 is consistent with the Board's statutes, regulations, and precedent. (*Id.* at 2-3.) CSXT further argues that the Board has discretion over the management of its docket, including the determination of when discovery may begin. (*Id.* at 3.) Additionally, CSXT asserts that Applicants' petition for stay must be denied because Applicants have not shown irreparable harm or any of the other factors required for a stay to be imposed. (*Id.*)

On April 28, 2025, Applicants filed comments on the proposed procedural schedule. Among other things, Applicants reiterate their arguments concerning the start of discovery. (Applicants Comments 4-7.) Applicants also argue that, in control proceedings, the timing of discovery is dictated by the controlling statutes and regulations and may not be ignored by the Board in its own discretion. (*Id.* at 8.)

DISCUSSION AND CONCLUSIONS

A party may seek reconsideration of a Board decision by submitting a timely petition that presents new evidence or substantially changed circumstances that would materially affect the case, or demonstrates material error in the prior decision. See 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. In a petition alleging material error, a party must do more than simply make a general

³ CSXT filed a motion to compel production of certain documents and information on April 9, 2025. CSXT filed a second motion to compel on April 18, 2025. The reply deadlines for CSXT's first and second motions to compel were April 29, 2025, and May 8, 2025, respectively.

allegation; it must substantiate its claim of material error. See Reasonableness of BNSF Ry. Coal Dust Migration Tariff Provisions, FD 35557, slip op. at 4 (STB served May 15, 2015) (citing Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009)). If a party presents no new evidence, changed circumstances, or material error that “would mandate a different result,” then the Board will not grant reconsideration. Montezuma Grain Co. v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); see also Canadian Nat’l Ry.—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 5 (STB served Oct. 30, 2017).

Applicants argue that the Board materially erred in allowing discovery to begin before Applicants filed an application. (Pet. for Recons. 1.) According to Applicants, there is currently no “proceeding” in this docket to which the Board’s discovery regulations could apply.⁴ (*Id.* at 6.) Applicants assert that, under 49 U.S.C. §§ 11324 and 11325, control proceedings before the Board begin upon application. (*Id.*) Applicants state that they “attempted to initiate a proceeding when [they] filed [their] minor application,” but the Board rejected their application when it accepted that submission as a prefiling notification. (*Id.* at 6-7.) According to Applicants, that rejection was a final action of the Board under § 11325(a). (*Id.* at 7-8.) Applicants cite to certain Board regulations in support of their position. (*Id.* at 8 (discussing the definition of “primary application” in 49 C.F.R. § 1180.3(f), the deadlines for the close of the evidentiary period in 49 C.F.R. § 1180.4(e)(2), and the procedure for accepting or rejecting an application in 49 C.F.R. § 1180.4(c)(7)(ii)).) According to Applicants, until they supplement their application and pay the remainder of the filing fee for a significant transaction, the Board cannot begin a “proceeding.” (*Id.* at 7.)

Applicants also assert that initiating discovery at this stage is inconsistent with Board precedent in minor, significant, and major control proceedings. (*Id.* at 9.) Applicants cite to a number of minor transactions and one significant transaction where the Board stated, in the decisions accepting the applications, that discovery “may begin.” (*Id.* at 10 & n.19, 12-13.) Applicants also point to two Board decisions in a major transaction: one, where the Board granted a motion for protective order, in which the parties stated that the protective order would facilitate discovery “at subsequent stages of the proceeding;” and another, where the Board noted, in the decision publishing notice of the proposed procedural schedule, that the applicants proposed starting discovery when the application was filed. (*Id.* at 11.) According to Applicants, the Board has explicitly stated that there would be no broad, pre-application discovery in major transactions. (*Id.* at 12 (citing Major Rail Consolidation Procs., EP 582 (Sub-No. 1), slip op. at 52-53 (STB served June 11, 2001)).) Applicants also contend that the Board’s reliance on the CP Discovery Order in Footnote 2 was misplaced. (*Id.* at 13-15.) Applicants argue that the holding in that case was exceedingly narrow, allowing one party only (not all parties to the proceeding) to obtain a specific batch of information that it needed to prepare an application. (*Id.* at 15.)

CSXT urges the Board to reject Applicants’ petition for reconsideration, arguing that Applicants have failed to establish material error. (CSXT Reply to Pet. for Recons. 3.) CSXT

⁴ In Board proceedings, parties are entitled to discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” 49 C.F.R. § 1114.21(a)(1).

argues that the Board has initiated a proceeding, noting the various filings submitted and decisions issued in this docket. (*Id.* at 4-5.) CSXT further argues that Footnote 2 is consistent with the Board’s discovery regulations, which allow for discovery as long as a proceeding is in place and do not require the filing of a petition or prior Board approval for discovery to begin. (*Id.* at 7 (citing 49 C.F.R. § 1114.21(a)-(b)).) CSXT also disputes Applicants’ assertion that Footnote 2 is contrary to the Board’s precedent in prior control proceedings, arguing that the Board is not required to affirmatively state in a proceeding that discovery may begin and noting that the parties in the most recent significant transaction engaged in pre-application discovery without the Board making any such affirmative statement. (*Id.* (citing CSX Corp.—Control & Merger—Pan Am Sys., Inc. (CSXT/Pan Am), Docket No. FD 36472).)

The Board will deny Applicants’ petition for reconsideration. Applicants have failed to demonstrate that the Board materially erred in allowing discovery to proceed at this time with respect to their 1982 acquisition of control over NPBL. Even if the Board’s decision to accept Applicants’ February 14, 2025 submission as a prefiling notification could be considered a rejection, it was clear by the time the determination in Footnote 2 was made that Applicants had subjected the transaction to the Board’s regulatory authority. Applicants acquiesced to the Board’s ongoing jurisdiction, including by explicitly recognizing that the Board would treat their initial application as a prefiling notification, indicating that they would supplement the initial application, and complying with the Board’s direction to file a revised proposed procedural schedule as appropriate for a significant transaction. (See Applicants Revised Mot. 3 n.7, Mar. 21, 2025.) And on many occasions in the revised motion for a proposed procedural schedule, petition for reconsideration, and petition for stay, Applicants referred to the fact that a proceeding is underway.⁵

Moreover, while Applicants suggest that 49 U.S.C. § 11324 requires that a “formal Board proceeding begins no sooner than the submission of an application,” (Pet. for Recons. 6), that provision is far more permissive. It specifically provides that the Board “may begin” a proceeding to approve or authorize a transaction upon the filing of an application. 49 U.S.C. § 11324(a). Per its regulations, the Board has elected to initiate such proceedings upon the filing of a notice of intent to file an application. 49 C.F.R. § 1180.4(b)(4) (providing that in “*any proceeding* involving either a major transaction or a significant transaction,” the Board will solicit comments on a proposed procedural schedule, enter a protective order if requested, and take comments and consider use of a voting trust, all during the pre-application “stage”)

⁵ (See, e.g., Applicants Revised Mot. 1 n.1, Mar. 21, 2025 (“[T]he issues involved in this proceeding are well known.”); *id.* at 4 (“[I]f the STB 2024 waybill data becomes available in time for use in this proceeding, [Applicants] would prefer to use 2024 as the base year.”); *id.* at 3 n.7 (“[T]he application to be submitted in this [p]roceeding should be filed between April 14, 2025 and June 14, 2025.”); Pet. for Recons. 1-2 (“[T]he [CP Discovery Order] was not appropriate for this proceeding”); Pet. for Stay 5 (“[A]llowing discovery at this stage of the proceeding . . . puts a substantial burden on any party.”); *id.* at 5 n.5 (“[T]hat case is certainly not analogous to this proceeding and it is not appropriate to apply in this proceeding.”); *id.* at 16 (“[CSXT] does not need discovery to help it plan for document development in this proceeding.”).)

(emphasis added).⁶ This approach, which Applicants do not expressly challenge, makes sense because the proposed transaction is sufficiently identifiable at the notice stage, as is certainly the case here. See, e.g., 49 C.F.R. § 1180.4(b)(1)(i) (calling for the notice to describe the transaction).

None of the cases Applicants cite in their petition for reconsideration indicate that discovery is prohibited at this stage. Indeed, several of the cases cited by Applicants demonstrate that discovery may begin as of the Board’s publication of a notice of intent. In Major Rail Consolidation Procedures, EP 582 (Sub-No. 1), slip op. at 52-53, the Board required applicants in major transactions to make certain traffic tapes available to outside counsel and consultants for interested parties “as soon as practicable after the filing of the notice of intent.” Id. at 52; see also 49 C.F.R. § 1180.4(b)(4)(iii).⁷ In Canadian Pacific Railway—Control—Kansas City Southern, FD 36500, slip op. at 3 (STB served Apr. 21, 2021), the Board’s publication of a notice of intent was accompanied by the Board’s assignment of an administrative law judge to oversee discovery. Later in that docket, the Board confirmed that Canadian Pacific Railway—then a former co-applicant in the proposed acquisition of Kansas City Southern (KCS)—could “seek materials from KCS through the discovery process in this proceeding that are relevant to its preparation of an application for authority to acquire control of KCS and may do so now without first filing an application in this docket or an inconsistent application.” CP Discovery Order, FD 36500, slip op. at 4. Additionally, as neither Applicants nor CSXT dispute, discovery also began before an application was filed in CSXT/Pan Am, Docket No. FD 36472.⁸

⁶ When the Board’s predecessor, the Interstate Commerce Commission, adopted the regulations that provide for prefiling notifications, it expressly contemplated that parties could use the prefiling period to “develop their evidence.” R.R. Consol. Procs., 366 I.C.C. 75, 81 (1982).

⁷ To be sure, in Major Rail Consolidation Procedures, the Board declined to propose “broad, pre-application” discovery for major mergers. EP 582 (Sub-No. 1), slip op. at 52-53. To the extent that Footnote 2 may imply that broad, pre-application discovery is appropriate in every control transaction, the Board clarifies that such discovery is not the default rule for transactions. But the Board has authority to authorize discovery at this stage of the proceeding, and it is appropriate to do so here. The proposed transaction occurred years ago, there has been significant litigation between Applicants and CSXT over control of NPBL, and the record to date suggests that this proceeding may be contested as well. Allowing discovery at this time will help facilitate prompt resolution of this matter consistent with the statutory deadlines at 49 U.S.C. § 11325(c), notwithstanding related longstanding disputes, and ensure that the Board has a complete record on which to base its decision. And the Board’s interest in administrative efficiency (which benefits all parties, including Applicants) outweighs the alleged inconvenience to Applicants of needing to respond to discovery while completing their revised significant application and meeting the demands of litigation in non-Board proceedings.

⁸ Applicants attempt to distinguish CSXT/Pan Am, Docket No. FD 36472, arguing that CSXT “voluntarily agreed” to discovery after publication of CSXT’s notice of intent. (See Pet. for Recons. 10 n.18.) However, the fact that CSXT may have agreed to discovery is irrelevant to whether discovery was permissible. (See CSXT Reply to Pet. for Recons. 7 n.6.)

Applicants' due process claim also lacks merit. Applicants mischaracterize CSXT's March 28, 2025 filing as a "petition for initiation of discovery," claiming that Applicants should have been allowed to respond to that petition. (See Pet. for Recons. 4.) In fact, CSXT's filing was a response to Applicants' motion for a proposed procedural schedule. Applicants had ample opportunity to present their views on when discovery should begin—both in moving for a revised procedural schedule and in commenting on the proposed procedural schedule that was published by the Board. In any event, the Board granted Applicants' petition for a housekeeping stay, thereby relieving them of any obligation to respond to CSXT's motions to compel while the Board considered Applicants' petition for reconsideration, which it has now done. Applicants have had due process.

Because the Board is denying Applicants' petition for reconsideration, the Board will deny Applicants' petition for stay as moot. Additionally, the housekeeping stay imposed on April 24, 2025, will be lifted.

Motions to Compel. The record indicates that Applicants and CSXT have not yet conferred following service of Applicants' responses to CSXT's second motion to compel. (See CSXT Second Mot. to Compel, Ex. 3 at 1.) In that light, and given the Board's determination that discovery may begin immediately, the parties will be directed to meet and confer on the discovery issues raised in CSXT's first and second motions to compel. CSXT will be directed to inform the Board by June 20, 2025, whether any discovery disputes remain following the parties' discussion and shall, in that filing, modify or withdraw its pending motions as appropriate given the parties' negotiations. Applicants' reply to any remaining motion to compel by CSXT, as modified, will be due by June 25, 2025.

It is essential that discovery in this case be conducted in a timely manner given the tight statutory deadlines applicable to this proceeding. See 49 U.S.C. § 11325(c). Accordingly, the Board expects that CSXT and Applicants will make intensive, good faith efforts to promptly resolve their discovery disputes. The Board also strongly encourages the parties to resolve their disputes without further Board intervention. Discovery requests should always be tailored and proportional to the needs of the case, and any objection must be substantiated. To the extent that issues pertaining to discovery requests made here mirror those raised during the related litigation before the District Court, the parties are encouraged, as appropriate, to look to the handling of those issues in that case to guide discovery in this proceeding. To expedite processing, decisions resolving the two pending motions to compel (including as modified), to the extent that they are not withdrawn as discussed above, will be issued by the Director of the Office of Proceedings.

It is ordered:

1. Applicants' petition for reconsideration is denied.
2. Applicants' petition for stay is denied as moot.
3. The housekeeping stay is lifted.

4. The parties are directed to meet and confer on the discovery issues raised in CSXT's first and second motions to compel.

5. CSXT is directed to inform the Board by June 20, 2025, whether any discovery disputes remain and shall modify or withdraw its motions to compel as required given the parties' negotiations.

6. Applicants may reply by June 25, 2025.

7. The Board directs that decisions resolving the two pending motions to compel (including as modified), to the extent that they are not withdrawn, be issued by the Director of the Office of Proceedings.

8. This decision is effective on the date of service.

By the Board, Board Members Fuchs, Hedlund, Primus, and Schultz.