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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
June 25, 2025
Part of
Public Record

Re: Norfolk S. Corp. and Norfolk S. Ry. Co. – Acquisition of Control – Norfolk & Portsmouth Belt Line R. Co., FD No. 36836

Dear Ms. Brown:

Enclosed for filing in the above-captioned docket is Norfolk Southern Corporation's and Norfolk Southern Railway Company's Reply in Opposition to CSX Transportation, Inc.'s Restated and Amended Motion to Compel Production of Documents by Norfolk Southern Corporation and Norfolk Southern Railway Company and Norfolk & Portsmouth Belt Line Railroad Company, which was filed on June 20, 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 John Edwards, who can be reached at (202) 663-7853 or by e-mail at jedwards@mullinslawgroup.net.

Respectfully submitted,

/s/ William A. Mullins

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

Enclosures

**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**

**NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY
COMPANY’S REPLY IN OPPOSITION TO CSX TRANSPORTATION, INC.’S RESTATED
AND AMENDED MOTION TO COMPEL PRODUCTION OF DOCUMENTS BY NORFOLK
SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY AND
NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY**

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June 25, 2025

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TABLE OF CONTENTS

SUMMARY OF ARGUMENT	1
ARGUMENT.....	5
I. THE ANTITRUST CASE AND THE STB CASE FOCUS ON TWO DIFFERENT STATUTES AND TWO DIFFERENT APPROACHES, THEREFORE IT CANNOT BE SAID THAT “ALL” DISCOVERY FROM THE ANTITRUST CASE IS RELEVANT TO THE STB CONTROL CASE	5
A. <u>The Federal Court Litigation Involved The Sherman Act Focus On Past Conduct While This Proceeding Involves A Forward Looking Process Similar To the Clayton Act</u>	6
B. <u>The Importation of the Aggregated Pool of Discovery Sought by CSXT Ignores The Above Distinction And Would Result In Shielding the Underlying Discovery Requests from Examination Under The Principles Of ICCTA, Guided By The Clayton Act</u>	9
C. <u>Allowing “All” Discovery Not Only Ignores The Distinction Between The Federal District Court Case And This Case Under ICCTA, But Would Also Be Inefficient, Costly, and Fail to Properly Balance Relevancy Considerations.</u>.....	11
II. THE AGGREGATED POOL APPROACH IS AN IMPROPER INTENT TO RELITIGATE THE CASE CSXT PRESENTED TO THE DISTRICT COURT FOR ITS DETERMINATION	16
III. NS DID NOT WAIVE ITS OBJECTIONS TO THE WHOLESALE IMPORTATION OF THE POOL OF DISCOVERY PRODUCED IN THE FEDERAL DISTRICT COURT PROCEEDING.....	20
IV. THE BOARD SHOULD NOT OVERRIDE WHAT SOPHISTICATED PARTIES CAREFULLY NEGOTIATED AS TERMS OF THE PROTECTIVE ORDER, INCLUDING RESTRICTIONS ON USE OF DISCLOSED MATERIAL OUTSIDE THE DISTRICT COURT.	24
V. THE BOARD SHOULD NOT COMPEL NS TO PRODUCE SO-CALLED “NEGOTIATION FILES” WITH ANY ACTUAL OR POTENTIAL CUSTOMER FOR WHOM NS OR CSXT MOVES FREIGHT THROUGH ANY EAST COAST PORT.	26
CONCLUSION	28

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SOUTHERN RAILWAY COMPANY AND NORFOLK & PORTSMOUTH BELT LINE
RAILROAD COMPANY**

SUMMARY OF ARGUMENT

In its failed litigation, CSXT engaged in broad discovery that resulted in the production of 93,214 documents, 40 depositions, and 5 expert reports. Having lost its case in federal court, CSXT seeks to relitigate those claims here, starting with its desire to bring the entirety of the federal district court discovery, the same 93,214 documents, 40 depositions, and 5 expert reports, into this STB control docket and without regard to their relevance to 49 U.S.C. §11324(d). NS objects to this broad and largely irrelevant fishing expedition.

After the Board’s decision of June 14, 2025 allowing for discovery to move forward, NS did meet and confer with CSXT regarding its request. NS objected to the wholesale approach demanded by CSXT because significant portions of the discovery in the federal court matter are not relevant to the issues in this matter. CSXT refused to compromise and filed its motion to

compel, insisting that NS must produce the entire antitrust docket in this matter. CSXT's "Aggregated Pool" approach to discovery¹ should be denied for four reasons.

First, it is simply not true that all of the 93,214 documents, 40 depositions, and 5 expert reports are relevant to this proceeding. As discussed herein, the two proceedings involved different statutes, aimed at answering different questions. The antitrust laws and the Virginia state laws at issue before the district court look at past conduct. The pending control proceeding requires the STB to determine whether the control of NPBL by NS will result in a substantial lessening of competition in the future, which requires the application of a different antitrust law analysis. There may be some relevant documents from that past that would facilitate an analysis of that question, but the wholesale approach advocated by CSXT is vastly overbroad.

CSXT's position effectively prevents NS from having an opportunity to make relevancy arguments, including in response to individual discovery requests tendered in this proceeding. CSXT's demand that the parties forego the standard discovery process in proceedings such as this one in favor of a sweeping "if it was produced there, produce it here" approach is the antithesis of what is expected of discovery at the STB. Discovery requests should be drawn

¹ The CSXT Restated and Amended Motion to Compel seeks to incorporate what CSXT calls "the entire district court record," which normally refers simply to the pleadings and the decisions, but which CSXT defines as consisting of: (1) all documents (NS and NPBL) produced in discovery; (2) all pleadings and filings (NS and NPBL) filed; (3) initial disclosures made by NS and NPBL; (4) all deposition records, including but not limited to, transcripts of each deposition, corresponding exhibits, video recordings and errata; (5) all declarations, affidavits or other sworn statements entered by NS and NPBL; (6) all expert reports offered by NS and NPBL; and (7) all of NS and NPBL's responses and objections to written discovery, including requests for production, interrogatories and requests for admissions in the Board's record. As discussed further hereinafter, NS objected to the discovery on several grounds, but CSXT only addressed three of those in its motion to compel – timing, relevance, and application of the district court's Protective Order. The issue of timeliness, now having been resolved by the Board, NS turns to the only two other issues addressed by CSXT.

narrowly, directed to a relevant issue at issue before the Board in that particular proceeding,² and not used for the proverbial fishing expedition, especially considering that CSXT's counsel has admitted that it has not even reviewed the discovery in the federal court matter and thus cannot possibly know that *all* of the discovery is relevant here.

To be clear, NS understands that there will be documents that were the subject of discovery in the federal case that are relevant to this proceeding. But the mere fact that the parties produced documents in a prior matter should not relieve CSXT from having comply with its obligation to propound narrowly tailored discovery requests in this proceeding, nor should it prevent NS from making appropriate relevance (or other appropriate) arguments in response to such requests.³

Second, STB precedent dictates that CSXT is not entitled to relitigate the same claims that it lost in federal court in this proceeding. Yet, CSXT's position on discovery shows that it is trying to do just that and get another bite at the apple, hoping for a different result. CSXT's Aggregated Pool approach is designed to do exactly what CSXT is not allowed to do – relitigate the case. As such, unless CSXT can show the relevancy of a particular document from the antitrust case to this case, NS should not be required to simply concede to the notion that all documents from the antitrust case should be allowed here.

Third, CSXT is simply wrong that NS has somehow “waived” its objection to the Aggregated Pool approach and has already consented to the production of “all” of the discovery

² Duke Energy Corp. v. Norfolk So. Rwy. Co., NOR 42069, slip op. at 4 (STB served, July 26, 2002); see also, FD 36836, Decision No. 5 at 7 (“Discovery requests should always be tailored and proportional to the needs of the case...” (“Duke”).

³ NS does not object to counsel for CSXT in this proceeding reviewing the documents from the antitrust case to determine what, if any, of them might be relevant to this case.

from the antitrust litigation. NS had not and does not consent to the Aggregated Pool approach. Nor, contrary to what CSXT says, has the Board determined that “all” of the discovery is relevant or made any statements to indicate that it believed NS should be required to produce “all” of the discovery. At best, the statements by NS and the Board indicate that the *decisions* issued in the antitrust litigation can and should be part of the record in this docket. Nothing more and nothing less.

Fourth, allowing the Aggregated Pool approach would be contrary to Protective Order issued in the district court proceeding. That Protective Order was carefully negotiated between the parties and adopted by the court. It does not allow those documents to be used outside of that proceeding. If CSXT (or NS or NPBL for that matter) desire to use its own documents from that proceeding, it may do so without violating the Protective Order. But CSXT cannot require NS (or NPBL) to import all of their documents into this record without violating the court’s Protective Order.⁴

In the end, CSXT’s motion did not establish that is Aggregated Pool approach should trump the standard STB process of allowing each party to question the relevancy of any individual document before it is produced. To the extent that any of the documents produced in the district court litigation are relevant to this proceeding, NS is willing to produce only those documents that are requested by CSXT and are relevant to whether NS’s control of NPBL will result in a lessening of competition, creation of a monopoly, or a restraint of trade in the future.

⁴ The White Paper, Exhibit C, did include two minor references to the depositions of Mr. Moss and Mr. Coleman and to one CSXT document. However, the depositions and CSXT document have not been reviewed or submitted in this proceeding. CSXT’s Request for Documents No. 25 sought all documents relating to any investigations by the U.S. Department of Justice (“DOJ”), and NS produced that White Paper as responsive to that request. NS specifically notes that the court Protective Order does not cover DOJ. The White Paper was not produced in the court proceeding, and it is not a concession by NS that “all” discovery is relevant to this proceeding.

The Aggregated Approach, however, disregards basic concepts of relevancy and denies NS's well-established right to refuse to produce non-relevant documents.

ARGUMENT

I. THE ANTITRUST CASE AND THE STB CASE FOCUS ON TWO DIFFERENT STATUTES AND TWO DIFFERENT APPROACHES, THEREFORE IT CANNOT BE SAID THAT "ALL" DISCOVERY FROM THE ANTITRUST CASE IS RELEVANT TO THE STB CONTROL CASE

The district court proceeding, brought by CSXT, involved allegations of violations of the Sherman Act, in addition to claims made pursuant to various Virginia state laws.⁵ However, the Board, in its control dockets, is guided by the principles that underlie the Clayton Act.⁶ Hence, what is appropriate for discovery in one proceeding is not necessarily appropriate in the other, even though both proceedings involve application of the "antitrust laws."⁷

⁵ CSXT sued NS (and NPBL) in U.S. district court in October of 2018, alleging four federal antitrust claims and various state law claims. CSXT's claims included Count One, a § 1 Sherman Act conspiracy to restrain trade claim against NS and NPBL; Count Two, a § 2 Sherman Act conspiracy to monopolize claim against NS and NPBL; Counts Three and Four, § 2 Sherman Act monopoly and attempted monopoly claims against NS; Count Five, a Virginia state law breach of contract claim against NS; Count Six, a derivative claim, Count Seven, tortious interference with business expectancy, and Counts Eight and Nine, Virginia state law conspiracy claims against NS and NPBL. See CSXT v. NS 2018; see also CSX Transp., Inc. v. Norfolk S. Ry. Co. No. 2:18-cv-00530-MSD, 2023 WL 2552343, at *11 (E.D. Va. Jan. 27, 2023) (dismissing request for injunctive relief).

⁶ 15 U.S.C. §§ 12-27.

⁷ The vast umbrella term "antitrust laws" is as wide-ranging as is the term "contract law," but nobody would argue that discovery for the purpose of application of contract law in the real estate environment is relevant to a proceeding involving the application of contract law in the intellectual property environment. Both, of course, could involve the buying and selling of "property", but the relevant statutes and applications of those statutes are simply not the same, just as is the case where, here, there is a fundamental difference between the district court proceeding, which adjudicated (and dismissed) CSXT allegations of antitrust behavior in the past, with consideration by the Board of a request for the Board's consent for NS to control NPBL in the future, with due consideration of any antitrust potential that would result from the Board's grant of that requested consent. But the approach to the importation of the pool of discovery in the district court case goes far beyond what is relevant in this proceeding.

A. The Federal Court Litigation Involved The Sherman Act Focus On Past Conduct While This Proceeding Involves A Forward Looking Process Similar To the Clayton Act

This wholesale aggregation and importation of discovery from the district court proceeding is decidedly inappropriate. The Board has been clear that “discovery requests must be narrowly drawn, directed toward a relevant issue, and not used for a general fishing expedition.” Duke, slip. op. at 4. The discovery propounded in CSXT’s First Request for Production of Documents and the First Motion to Compel and reasserted in this Restated and Amended Motion to Compel, are not narrowly drawn, are not directed to any particularized relevant issue, and are being used by CSXT for a general fishing expedition to blur the distinction between the two statutes and forums and to relitigate that which it lost before the federal district court.

CSXT’s Aggregated Pool approach simply assumes that “all” discovery from the federal court should be available for use at the STB. This is an interesting assertion, given that, in its motion to compel, CSXT claims that it does not even know what is in the district court discovery pool.⁸ But more fundamentally, this approach shields the underlying discovery requests from examination for relevance to this proceeding. The issues in the antitrust case before the district court and the issues before the Board in the control docket are distinct. The Board does not need to have the entire discovery record from the federal court proceeding incorporated into this proceeding to make the required determinations in the control docket. For example, antitrust cases before the courts look at alleged *past* violations of the Sherman Act Sections 1 and 2. The standard the Board applies in the minor and significant applications is based upon the principles

⁸ See Revised and Amended Motion to Compel at 15 (complaining that it does not have access to the district court discovery pool to know how to respond to the White Paper submitted to the U.S. Department of Justice). CSXT’s concerns on this are further discussed at fn [4] above.

of the Clayton Act and focuses on *future* implications stemming from the Board granting NS authority to continue to control NPBL.

The STB's focus (and that of its predecessor, the ICC) is based upon the principles of the Clayton Act⁹ to provide substantial guidance in its assessment of the competitive impact of a proposed rail consolidation.¹⁰ Put differently, the STB looks at what will happen going forward (Clayton Act review) rather than backward-looking (Sherman Act review). In fact, the controlling STB statute, 49 U.S.C. § 11324(d), is substantially similar to language in Section 7 of the Clayton Act,¹¹ which addresses mergers and acquisitions, and prohibits those that *may* substantially lessen competition or tend to create a monopoly in any line of commerce, while also prohibiting acquisitions of stock or assets where the effect may be to substantially lessen

⁹ See 15 USCS § 18.

¹⁰ See U. Pac. Corp. – Control – Mo. Pac. Corp., 366 I.C.C. 462, 503 (1982) (“UP/MP”); see also Bessemer and Lake Erie Railroad Company – Acquisition and Operation – Certain Rail Lines of CSX Transportation, Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence, and Franklin Counties, N.Y., FD 36347 slip op at 19, n. 12 (STB served February 25, 2021) (“B&LE Merger”) (citing Burlington N. Inc. – Control & Merger – St. Louis, 360 I.C.C. 784, 931-33 (1980) (“BN Merger”) (noting that “[T]he agency has long acknowledged that pertinent to its examination are policies embodied in the antitrust laws, particularly Section 7 of the Clayton Act.”)). The STB's heavy reliance on the Clayton Act has historical roots in ICC case law. See Seaboard Coast Line Railroad Company, Et. Al. Investigation of Control and Modification of Traffic Conditions, 360 I.C.C. 582 (Dec. 27, 1979).

¹¹ The conference report on the ICC Termination Act of 1995 specifically modified the Clayton Act, not the Sherman Act, to correct references to the “Interstate Commerce Commission” by replacing said references with the “Surface Transportation Board.” See Conference Report on H.R. 2539, ICC Termination Act of 1995, 141 Cong. Rec. H 14993 (“Conference Report”). Specifically, the ICCTA modified 15 U.S.C.S. §21(a), Enforcement Provisions, which provides that the “[a]uthority to enforce compliance with sections 2, 3, 7, and 8 of the [Clayton] Act [15 USCS 13, 14, 18, 19] by persons respectively subject thereto is hereby vested with the Surface Transportation Board where applicable to common carriers subject to jurisdiction under subtitle IV of title 49, United States Code [49 US CS 1010 et seq.]. See 15 U.S.C.S. § 21(a).” (emphasis added). Thus, pursuant to the ICCTA, the authority of the ICC to enforce compliance with the Clayton Act transferred to the STB.

competition.¹² In the context of transactions subject to subsection (d), the purpose of which is to expedite and encourage non-major transactions, it is without question that the STB does not function as an antitrust court. Section 7 of the Clayton Act prohibits mergers and acquisitions where the effect “may be substantially to lessen competition, or to tend to create a monopoly,” a forward-looking approach rather than a backward-looking approach employed by the courts.

CSXT argues NS’s unauthorized (past) control over NPBL, and the alleged anticompetitive effects of that conduct, are before the Board for adjudication. That is not correct. NS is not looking for antitrust immunity for its past conduct. CSXT already brought litigation for alleged past conduct and failed. The STB is not an antitrust court that examines Sherman Act claims. And the STB is not being asked to immunize NS’s past conduct. Therefore, the only relevant documents from the antitrust case are those that go to the potential loss of competition in the future due to NS’s control of NPBL, not on what conduct has happened in the past.

CSXT itself recognizes that the Board’s approval is a forward-looking approval. CSXT argued that the Board should not permit the proposed transaction described in the application submitted on February 14, 2025, in this docket to be designated as a “minor transaction” because the Board could not determine that no competitive effects “will occur if the Board approves NS’s application.”

CSXT claims that the Aggregated Pool of discovery in the district court proceeding, and the pleadings and filings made in the same, are relevant to the Board’s resolution of the control docket because the issues raised in that district court proceeding “overlaps completely with the statutory review standard in this control proceeding which focuses on the same anticompetitive

¹² See B&LE Merger, citing UP/MP, 366 I.C.C. 462, 503 (“explaining section 7 of the Clayton Act provides substantial guidance in our assessment of the competitive impact of rail consolidations”).

effects of NS’s manipulation of NPBL.” While this is false, CSXT goes on to recognize that “the Board’s primary focus is on the *anticipated* competitive effects,” (emphasis added) that is, effects that can be expected in the future, not the acts already litigated before the district court, acts that allegedly happened in the past.

CSXT’s position ignores the fact that, while competition or alleged illegal restraint thereof were at issue in the federal court case, the Board, the federal district court, and the DOJ all have different focuses in enforcing, evaluating, and/or approving actions related to ensuring competition. The federal district court in CSXT v. NS evaluated CSXT’s allegations that NS had committed violations of the Sherman Act Sections 1 and 2. This makes sense (to a limited degree) because federal courts and the DOJ, but not the Board, are responsible for enforcing certain federal antitrust laws and looking at past conduct or settlement agreements entered into by parties (backward-focus), which, upon implementation, violate(d) antitrust laws. The Board’s job, however, is to examine whether NS’s future control of NPBL, if approved, will result in anticompetitive effects that outweigh the public interest in meeting significant transportation needs.” 49 U.S.C. § 11324(d)(2) (emphasis added). The Board’s focus is future-looking, not backward looking as was the case in the district court.

B. The Importation of the Aggregated Pool of Discovery Sought by CSXT Ignores The Above Distinction And Would Result In Shielding the Underlying Discovery Requests from Examination Under The Principles Of ICCTA, Guided By The Clayton Act

CSXT also claims that it is “easy” for NS simply to grant CSXT the right to dip into the well of discovery that was produced in the federal district court. While this certainly would be expedient for CSXT, it is improper and prejudicial, as CSXT’s wholesale aggregation of the discovery requests (and objections, and discovery result determinations) effectively hides those

underlying requests from review.¹³ What may be “easy” is one thing, but just because it is easy does not make it “right.”

CSXT’s position effectively shields from scrutiny in this proceeding the dozens of discovery requests that led to the production of documents in the district court proceeding.¹⁴ That, in turn, means that NS would be deprived of its rights to contest a discovery request that may have been appropriate in the federal court proceeding, but not appropriate in this NS/NPBL control docket before the Board.

Indeed, several of the counts adjudicated before the federal district court were alleged violations of Virginia state law, including a state law breach of contract claim and a tortious interference with business expectancy claim. The Aggregated Approach advanced by CSXT would, by definition, permit importation into the STB record any documents that were produced in the federal district court solely in response to discovery requests based solely on these state law claims. It is simply not true when CSXT asserts “The district court proceeding involved precisely the same issue that is the focus of this proceeding – the competitive effects of NS’s unlawful manipulation of NPBL to preclude CSXT’s access to NIT.”¹⁵

¹³ At a minimum, importation of the Aggregated Pool of Discovery outright muddles the record before the Board. It not only deprives NS of an opportunity to make objections that it would otherwise raise on a request-by-request basis, but it leaves the parties and the Board to guess at what materials were produced/response to any individual request. Even more egregious, just because certain materials were relevant to specific federal and/or state law claims, does not make the same true concerning the considerations the Board evaluates in authorizing NS to control NPBL.

¹⁴ See FN 16 (giving some of the reasons easy is not right here).

¹⁵ CSXT’s Restated and Amended Motion to Compel, at 2. CSXT further claims that “[t]he district court record ... overlaps completely with the statutory review standard in this control proceeding which focuses on the same anticompetitive effects of NS’s manipulation of NPBL.” CSXT’s Restated and Amended Motion to Compel at 12. First, by definition it does not (as it also included several Virginia state law claims that may have been the subject of discovery).

It is impossible here to argue the specifics with regard to any one document that was produced to CSXT as a result of any individual discovery request propounded in the district court proceedings. It is impossible here to argue the propriety of any individual discovery request that gave rise to the production of any particular document. In both cases, the fact that CSXT has not propounded the underlying discovery requests here effectively shields both the underlying discovery requests and the discovery produced from examination, including arguments over whether such materials are relevant to the issue before the Board. And that is the problem. What might have been relevant and appropriately produced in the district court proceeding, with reference to the specific allegations that CSXT made therein (and rejected by the district court), and pursuant to the protective order governing that proceeding, may not be relevant and appropriate here. But it is impossible to examine that unless CSXT propounds the discovery request here that gave rise to the production of any individual document there and allow NS to examine that request.

C. Allowing “All” Discovery Not Only Ignores The Distinction Between The Federal District Court Case And This Case Under ICCTA, But Would Also Be Inefficient, Costly, and Fail to Properly Balance Relevancy Considerations.

Time and again, CSXT relies on the general rule that “the Board allows parties to obtain discovery regarding any matter, not privileged, which is relevant to the subject matter in the

Second, as noted, the record below was based upon Sherman Act claims, not Clayton Act claims. Third, the argument assumes as true an allegation made by CSXT in the district court proceeding (that NS actually manipulates NPBL, which it does not, and which allegation was not established at the district court level); an allegation that has not been factually adjudicated by a judge or jury.. Finally, the claim assumes that NS had a motive (“to prelude CSXT’s access to NIT”), that NS does not have. Id. “Under 49 C.F.R. § 1114.21(c), discovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought.” CSX Transp., Inc. and Delaware and Hudson Ry. Co., Inc. – Joint Use Agreement, FD 35348, slip op. at 3 (STB served August 16, 2010). In this instance, the burdens and the risks of producing the discovery sought far outweigh likely value of the information sought, particularly given the other avenues available for evaluating the assertions sought to be explored.

proceeding,”¹⁶ to permit CSXT to seek discovery of all documents and information produced by NS and NPBL to other parties in the district court case (which, again, includes 93,214 documents, 40 depositions, and 5 expert reports, and, again, regardless of whether any individual one of these documents and the like ever saw the light of day in a pleading to the court).¹⁷ NS explains above why it is legally not accurate to say that all documents that were relevant to the Sherman Act claims or the Virginia state law claims should be automatically produced in the context of this proceeding, which is under ICCTA and guided by the Clayton Act principles. As a result, all pleadings and filings made in the district court are not appropriate for discovery in a docket where the intent is for the Board to reach a decision on NS’s future control of NPBL. Such an approach fails to balance relevancy considerations and creates a tremendous burden on the Board and the parties.

Importing into this STB docket the entirety of the Aggregated Pool of discovery, and all pleadings and filings assembled in the district court proceeding, irrespective of whether the entire record is relevant to NS’s future control of NPBL, would not only unduly broaden the issues before the Board, but would waste the parties’ and the Board’s time reviewing and rearguing pleadings and filings, decisions and arguments, and the tens of thousands of documents, all on issues already decided by the courts, instead of focusing on what is proposed by NS – which should be the focus of the Board. Such an approach is unnecessary and inefficient. If CSXT has arguments to be made (and CSXT certainly has the background to understand and to focus those arguments), it can formulate appropriate, focused discovery and make its arguments.

¹⁶ See Restated and Amended Motion to Compel at 12-13.

¹⁷ Id. at 5.

For example, to the extent CSXT believes certain specific NS documents are necessary to show that NS's future control of NPBL will result in a substantial lessening of competition,¹⁸ CSXT should present a list of what it believes are the most relevant documents to that question and ask NS to produce such documents on a case-by-case basis.¹⁹ Or CSXT is free to produce its own documents in this proceeding to make its case, and without the need for discovery. That is the proper approach in STB proceedings. This is not the approach CSXT wants NS or this Board to take.

Either method is not difficult. For example, in the Restated and Amended Motion to Compel, CSXT claims that the evidence presented in the 2018 District Court Proceeding of exclusionary conduct by NS and NPBL was extensive and was summarized in CSXT's Consolidated Opposition to Defendants' Motion for Summary Judgment. See Restated and Amended Motion to Compel at 5. CSXT further states that the district court concluded that CSXT had presented substantial antitrust claims based on the record developed and presented at summary judgment, but the Court dismissed CSXT's claims on various grounds. See Restated and Amended Motion to Compel at id.

¹⁸ It is important to note that the district court found no evidence that NS began or continued actions necessary to keep CSXT out of the relevant market beyond 2011. See CSXT v. NS 2018 at 703. Moreover, as the district court noted, "CSX remain[ed] NS's active competitor for international intermodal containers arriving at NIT ... and had an established avenue to seek re-evaluation of the condition (the excessive NPBL switch rate) that most directly excluded CSX from the industry for many years." See CSXT v. NS 2018 at 701. NS does not agree that the NPBL switch rate "excluded CSXT from the industry for many years," and notes that the statement made by the district court was made in the context of a summary judgment motion which explicitly assumes the evidence and allegations in the light most favorable to the party opposing the motion for summary judgment.

¹⁹ CSXT chose not to do this originally, instead opting to paint NS as an obstructionist because NS expected CSXT consistent with Board precedent to serve narrowly-tailored written requests. See CSXT's First Motion to Compel at 8.

Assuming, arguendo, that as CSXT alleges, such evidence is potentially relevant to the matter before the Board, CSXT has access to its own such documents and could present evidence to the Board in opposition to the Proposed Transaction. It does not need discovery to present its own documents and make its argument. Alternatively, it could seek, through narrowly-drawn requests, related documents from NS. Such an individualized approach would be far more consistent with the long-held maxim that “discovery requests must be narrowly drawn, directed toward a relevant issue, and not used for a general fishing expedition.” See Duke.

If the Board were to grant the Restated and Amended Motion to Compel, it would be accepting as true CSXT’s assumption that the entire Aggregated Pool of discovery is relevant to the Board’s analysis, again without permitting a review of the underlying court proceeding discovery requests that led to the production of the discovery contained in that Aggregated Pool. This cannot and should not be assumed. It also would invite CSXT to relitigate all of the issues it presented to the federal court, which were resoundingly rejected by the federal court and the Fourth Circuit Court of Appeals. This cannot and should not be permitted. At a minimum, NS should have the opportunity to question the relevancy of every interrogatory, document request, deposition, report, and other item in the Aggregated Pool from the federal district court case²⁰ in

²⁰ CSXT understands this and has done so itself in responding to motions to compel brought against it in prior Board proceedings. See Reply of CSX Corporation and CSX Transportation, Inc. (collectively, “CSX”) to Petitioner’s Motion to Compel Responses to Discovery Requests Involving Relevancy Objections, filed in Finance Docket No. 33388 (Sub-No. 100) (filed on Sept 11, 2006) (“FD 33888 (Sub-No. 100) Proceeding”). Ironically, in the FD 33888 (Sub-No. 100) Proceeding, CSXT made various objections to the scope of discovery. Specifically, CSXT objected to the extent such discovery related to any date that is (x) prior to the date that CSXT made its first offer to acquire Conrail in 1996 or (y) after the date of the Transaction Agreement. CSXT further argued that the agreements speak for themselves, and anything that occurred outside of the period was not relevant to the matter before the Board. The Board, based on CSXT’s argument, denied the motion to compel after finding the parties failed to demonstrate how the information sought would aid the Board (be relevant) in deciding the matter before the

light of the discovery request made to elicit that item and to determine its relevance to this proceeding.

CSXT also argues that there would be no burden on NS by incorporating the entire record into the docket. This too is not true. In addition to the undue burden proceeding in the manner proposed by CSXT would impose on the Board, only one team member of NS's legal team in this docket was at best tangentially involved in the district court litigation. Like many railroads, NS generally uses different counsel for Board matters than it does in federal court or appellate work. While Mr. Mullins had limited involvement in the District Court Proceeding, he and the rest of the Mullins Law Group team would have to essentially undertake a special study to review from the ground up a discovery record in a matter already decided.²¹ While discovery is broad, it is not unlimited.²²

Appellate courts have upheld the Board's denial of discovery when, as is here, the information sought is unlikely to be necessary for the STB or the ICC to decide the issue before

Board. See CSX Corp. and CSX Transp., Inc., Norfolk S. Corp. and Norfolk S. Ry. Co. – Control and Operating Leases/Agreements – Conrail and Consolidated Rail Corp., FD 33388 (Sub-No. 100) (STB served Nov. 30, 2006). NS should, at a minimum, be afforded the opportunity to conduct some of the same type of analysis here with regard to discovery requests served in a different proceeding before a different adjudicative body and based on a different set of allegations.

²¹ Reviewing the entire Aggregated Pool of discovery would impose a significant burden for little, if any, probative value, given that issue and claim preclusion prohibit the parties from relitigating the issue before the Board.

²² See Tongue River Railroad Co., Inc.—Rail Construction & Operation—In Custer, Powder River & Rosebud Counties, Mont., FD 30186, slip op. at 4 (STB served Sept. 10, 2014) (“discovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought”); CP/DM&E, Decision No. 8, (STB served Mar. 27, 2008).

it.²³ The need for the Board to place reasonable limits on discovery is especially important in proceedings with statutory deadlines. As explained *supra*, the Board, in deciding to compel discovery responses, must determine whether the information sought has probative value, justifies any burdens imposed on the parties, is narrowly tailored, and is likely to lead to admissible evidence. Because CSXT has failed to articulate how these competing considerations have been met, the Board should deny the Restated and Amended Motion to Compel.

II. THE AGGREGATED POOL APPROACH IS AN IMPROPER INTENT TO RELITIGATE THE CASE CSXT PRESENTED TO THE DISTRICT COURT FOR ITS DETERMINATION

The U.S. Supreme Court held in Parklane Hosiery Co. v. Shore,²⁴ that parties cannot seek to relitigate the same issue they previously had a full and fair opportunity to litigate. The Board, too, has previously held that parties to federal proceedings are bound by those rulings and cannot seek to relitigate before the Board the same issues already decided by the federal courts.²⁵ CSXT unabashedly has stated its intention to use the documents produced to relitigate its antitrust case at the Board, contrary to U.S. Supreme Court, district court, and Board precedent. CSXT argues that the Board “must consider the same issue that was examined in the District Control Proceeding – the anticompetitive effects of NS’s control over the NPBL.” That is not right. To put it simply, res judicata and collateral estoppel (claim and issue preclusion) prevent

²³ See Trailway Lines, Inc. v. ICC, 766 F.2d 1537, 1546 (D.C. Cir. 1985) (holding the “Commission was simply not required to allow a dragnet, expensive exercise in discovery ... when that discovery was seen by the agency as unlikely to affect its decision”).

²⁴ 439 U.S. 322, 332-333 (1979) (“Parklane”).

²⁵ See 212 Marin Boulevard, LLC, et. al. – Petition for Declaratory Order, FD 35825 (STB served August 11, 2014) (“212 Marin”).

CSXT from relitigating issues before the Board that CSXT already had a full and fair opportunity to litigate, did so competently, and yet lost.²⁶

The Board, too, has previously held that parties to federal court proceedings are bound by the court rulings and cannot seek to relitigate before the Board the same issues already decided by those courts.²⁷ Similarly, in a merger case in 1996, the Board found an appeal of an arbitrator's decision, to be barred by res judicata.²⁸ The Board has time and again rejected efforts to relegate matters already decided by the Board and the courts.²⁹

²⁶ Both collateral estoppel and res judicata exist for the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or its representative and thus promoting judicial economy by preventing needless litigation.

²⁷ See 212 Marin (denying a request for a declaratory order seeking a jurisdictional request after finding that a court had already determined that the trackage at issue was conveyed as a line of railroad).

²⁸ Norfolk and Western Railway Company and New York, Chicago and St. Louis Railroad Company – Merger, etc., FD 21510 (Sub-No. 6) (STB served Dec. 3, 1996). In St. Louis Southwestern Railway Company Arbitration Appeal, Docket No. FD 28799 (Sub-No. 9) (ICC served Aug. 15, 1995) (“SSW”), the ICC recognized that the doctrines of res judicata and collateral estoppel may be applied to labor disputes to prevent continuous and piecemeal litigation. As discussed in SSW, the doctrine of res judicata or “claim preclusion” forecloses litigation of issues that, although not themselves litigated, could have been raised in a prior suit between the parties. Collateral estoppel or “issue preclusion” forecloses the re-litigation of a matter that has been litigated and decided. Id.

²⁹ See, e.g., Union Pacific R. Co. – Abandonment Exemption – In Rio Grande and Mineral Counties, CO, AB-33 (Sub-No. 132X), slip op. at 3 (STB served May 3, 2005) (denying petitioners’ request to reopen prior decisions, finding that the petitioners had not presented any new material evidence or shown material error, noting that the petition was largely repetitive of, and sought to relitigate matters already considered and disposed of previously). With regard to the current NS/NPBL control docket and the discovery that CSXT seeks to compel by this Restated and Amended Motion to Compel, the district court determined that the most recent anticompetitive conduct that CSXT alleges occurred more than a decade ago. The issues related thereto have thus already been fully litigated. Moreover, the district court found CSXT's claims of additional anticompetitive conduct in 2015 and 2018 speculative and/or unpersuasive. See also, JGB Properties, LLC - Petition for Declaratory Order, FD 35817, slip op. at 6 (STB served Dec. 10, 2015) (the Board agreed to determine track status as an administrative convenience and in order to avoid the possible need for further action by the parties before the Board on that track status issue, noting that, “[t]he Board does not want to waste the parties’ time and resources re-

CSXT’s own statements confirm that CSXT intends to use the proceeding to relitigate its antitrust case at the Board, contrary to U.S. Supreme Court, district court, and Board precedent. There is simply no reason for the parties and the Board to be burdened with reexamining 93,214 documents, 40 depositions, and 5 expert reports in a record that the District Court found could not sustain a Sherman Act³⁰ cause of action, especially when this proceeding is aimed at future competitive effects and the Board has no authority to resolve past claims of unlawful conduct under the Sherman Act.

CSXT once again frames its allegations in the district court as evidence of anticompetitive action, and once again frames those allegations in a manner that implies that the district court would have granted relief had the claims not been time precluded. CSXT states that “[t]he district court concluded that CSXT had presented substantial antitrust claims based on the record developed and presented at summary judgment, but the Court dismissed CSXT’s claims for monetary damages on statute of limitation grounds.”³¹ It bears repeating that CSXT directs the Board to its *pleading* before the district court,³² and that the court was weighing that evidence in a summary judgment environment, which meant that the court had to suspend evaluation of the evidence so presented:

litigating an issue from the ground up when the current record already provides an answer; re-litigating this issue under the circumstances here would be unnecessary and inefficient.”).

³⁰ To sustain a Sherman Act violation requires either direct proof, or in the absence of direct proof, it is increasingly accepted that there must be circumstantial proof of effective coordination to commit a violation, not simply a control relationship between parties. See, e.g., Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1301 (11th Cir. 2003).

³¹ CSXT Petition at 5 (citing CSX Transp., Inc. v. Norfolk S. Ry. Co., 648 F. Supp. 3d 679, 721, 727 (E.D. Va. 2023), aff’d, 114 F.4th 280 (4th Cir. 2024)).

³² Id. (citing allegations and evidence presented in “CSXT’s Consolidated Opposition to Defendant’s Motion for Summary Judgment”).

Because credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge, the Court must only evaluate the evidence to the extent necessary to determine whether there is sufficient disagreement to require submission to a jury or whether the evidence is so on-sided that one party must prevail as a matter of law:

CSX Trans., Inc. v. Norfolk S. Ry. Co., 648 F. Supp. 3d at 690.³³

Responding to that CSXT submission in the district court proceeding, the court stated “Here, CSX remains NSR’s active competitor for international intermodal containers arriving at NIT, and more importantly, CSX had an established avenue to seek re-evaluation of the condition (the excessive NPBL switch rate) that CSXT [alleges] most directly excluded CSX from the industry for many years.”³⁴ Indeed, “even when CSX’s evidence is viewed in the light most favorable to CSX, the evidence is insufficient for a reasonable juror to conclude that the entirety of CSX’s lost customer contract, or a majority of its lost contracts, or a notable minority percentage of its lost contracts, *or even a non-speculative de minimus percentage* of its lost contracts, is predicated on actionable overt acts occurring after 2012.”³⁵ In fact, not only did the court make that determination, it found no actionable conduct since 2013.³⁶

³³ See, *id.* (noting that “a district court shall grant summary judgement in favor of a movant if such party shows that there is no genuine dispute as to any material fact and the movement is entitled to judgment as a matter of law. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.”) (internal quotation marks and citations omitted).

³⁴ CSX Transp., Inc. v. Norfolk S. Ry. Co., 648 F. Supp. 3d at 701 (inserted parenthetical necessary to distinguish between an assumption that the court had to rely upon in a motion for summary judgment versus a “fact” that a jury would have had to conclude had the claim reached that stage). The court found that CSXT remained an owner of NPBL and that NPBL had procedures to address its concerns. *Id.*

³⁵ *Id.* at 705 (emphasis in the original)..

³⁶ The Board revisiting allegations dismissed in the district court record would likewise be duplicative of the Department of Justice’s (“DOJ”) efforts. As CSXT states in the Restated and Amended Motion to Compel, DOJ is reviewing matters raised by CSXT in the district court

Likewise, there is no reason for the Board to be asked to relitigate, through the pleadings and filings submitted to the district court, the exact issues raised in those pleadings and filings. These seven requests in the Restated and Amended Motion to Compel lack probative value, in that every piece of evidence was already used by CSXT to argue and by the district court to decide the case; as a result, all parties are bound by those rulings and may not use that record to relitigate the underlying issues before the Board. CSXT does not get to seek a different result in this docket, simply because it did not like the verdict in the district court.

III. NS DID NOT WAIVE ITS OBJECTIONS TO THE WHOLESALE IMPORTATION OF THE POOL OF DISCOVERY PRODUCED IN THE FEDERAL DISTRICT COURT PROCEEDING.

In 2021, NS filed a petition for declaratory order requesting that the Board institute a proceeding to address certain issues referred to the Board by the district court, including whether the Interstate Commerce Commission (“ICC”) granted NSC approval to control NPBL when it approved the 1982 Transaction.³⁷ In 2022, the Board held that the ICC did not authorize NSC’s control of NPBL in the 1982 Transaction or the notices of exemption in 1991 and 1998.³⁸ The

proceeding. DOJ has issued a civil investigative demand (“CID”) to CSXT, NS, and NPBL to preserve all records. At a time when the Board is reforming practices to maximize efficiency, it simply does not make sense to force the parties to expend time and resources re-litigating an issue from the ground up when the current record already provides an answer, particularly because the Board has acknowledged time and again it does not enforce antitrust laws. See Motor Carrier Bureaus - Periodic Review Proceeding, EP 656, slip op. at 2 (STB served October 25, 2007) (explaining that “the Board has not been delegated the authority to directly enforce the Sherman Act. Rather, the authority to interpret the Sherman Act primarily resides in DOJ and the federal courts.”) (in turn citing McLean Trucking Co. v. United States, 321 U.S. 67, 79 (1944) (wherein the Court explained that, “[t]hus, here, the Commission has no power to enforce the Sherman Act... [i]t cannot decide definitively whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act”)).

³⁷ See Norfolk S.—Pet. for Declaratory Ord., FD 36522, slip op. at 1 (STB served June 17, 2022), aff’d sub nom. Norfolk S. Ry. v. STB, 72 F.4th 297 (D.C. Cir. 2023), cert. denied, 144 S. Ct. 1343 (2024) (“NS Pet. for Declaratory Ord.”).

³⁸ Id. at 1, 9-17.

Board noted that any future decision concerning control would benefit from the “*findings of the district court*,” and its expectation that appropriate steps would be taken to address the unauthorized control issue immediately following resolution of the district court proceeding, including any appeals.³⁹ The Board did not ask for a wholesale importation of the discovery, pleadings, arguments, and decisions of the district court and the appellate courts to permit the Board to relitigate the issues presented there – it asked for the *findings* of the district court. Those findings are contained in the District Court’s decision – nothing more and nothing less.

Likewise, when NS used the phrase “[t]he record is known by all and ready for presentation and argument before the Board.” CSXT-6 at 1-2 (quoting and citing NS-4 at 37), it was not conceding that all of the documents from that proceeding are relevant here. NS was referring to all of the record as set forth in the decisions and findings, not all of the documents that constituted the “record” of those proceedings, as expansively defined by CSXT.

The findings of the district court, contained in the decisions rendered by that court (as well as subsequent decisions rendered by the appellate and Supreme Court, in each case denying CSXT relief arising from the allegations CSXT placed before those courts), can be referenced, quoted, and reproduced in filings by parties to the proceeding before the Board to the extent a party feels it necessary, but not all *documents* underlying those *findings* are relevant to this case. NS’s comments merely meant that the decisions rendered by the district court and the appellate court (and now the Supreme Court) are well known by all and ready for presentation and argument before the Board.

Further, CSXT has been at the NPBL board table for over 42 years. And over the past decade CSXT has been involved in a significant amount of litigation with regard to the NPBL.

³⁹ *Id.* at 17 & n.25 (emphasis added).

This is a vastly different situation from that faced (for example) by a shipper when its rail carrier option is being acquired in an unforeseen STB control transaction. It is quite a different situation from that faced (to present another example) by a rail carrier that is suddenly faced with an STB control proceeding involving one of its connecting rail carriers being acquired by its competitors. CSXT comes to this NS/NPBL control proceeding with a lot of knowledge and history with the issues, including the district court antitrust case that CSXT itself brought and prosecuted. CSXT is free to use its own documents but it is not allowed to import in the entire record from another proceeding under a completely different statute.

Further, just because the Board sought to be informed by the “findings” of the district court does not translate into a desire of the Board to have the “entire district court record” imported into a control proceeding, nor does it translate into an acknowledgement by the Board of the relevance of the documents in the district court record, as is argued by CSXT.⁴⁰

Moreover, the “entire district court record” does not include every item of discovery produced by one party to another, many of which, while produced to other parties in discovery, were never presented to or discussed before the court. Certainly, it is to CSXT’s benefit to wholly transport all the discovery in the one proceeding over to this one so that CSXT, as it readily admits, can attempt to relitigate many of the same issues with the benefit of hindsight as to how the district court viewed the evidence that CSXT presented. But that is not what the Board sought, and it simply is not permitted.

⁴⁰ CSXT Revised and Restated Motion to Compel at 12. The Board often seeks information on the findings of district court proceedings when the Board is dealing with an issue that relies on those findings. To the knowledge of the undersigned attorney, which has never translated into an assumption that the entire aggregated set of discovery produced in the referenced court proceeding should be, or could be, wholesale imported into the STB proceedings.

To overcome NS’s objections concerning the relevance and application of the district court’s Protective Order, CSXT really relies on two simple responses. CSXT claims that the STB has sought the submission of the record, but as discussed above, this is not the case. The Board clearly stated that “any future decision concerning control would benefit from the *findings* of the district court.”⁴¹ In furtherance of that, the Board specifically directed the parties to submit the relevant “merits decision of the court within 15 days of its issuance.”⁴² The Board was not looking for a wholesale importation into this control proceeding of the entirety of the pool of discovery produced in the district court proceedings. Nor is it asking for all pleadings and filings in the district court proceedings.

Nor was NS conceding that all documents produced in the antitrust case should be “presented” to the Board when it said, “[t]he record is known by all and ready for presentation and argument before the Board.” CSXT-6 at 1-2 (quoting and citing NS-4 at 37). The decisions rendered by the district court and the appellate court (and now the Supreme Court) are well known by all and ready for presentation and argument before the Board. But that statement does not waive NS’s objections to the discovery that CSXT has served on NS. Further, the “district court record” does not include every item of discovery produced by one party to another, many of which never saw the light of day.

⁴¹ Norfolk S. Corp. & Norfolk S. Ry. Co.—Acquisition of Control—Norfolk & Portsmouth Belt Line R.R. Co. (Decision No. 2), FD 36836, slip op. at 3 (STB served Mar. 14, 2025) (citing Norfolk S.—Pet. for Declaratory Ord., FD 36522, slip op. at 1 (STB served June 17, 2022), *aff’d* sub nom. Norfolk S. Ry. v. STB, 72 F.4th 297 (D.C. Cir. 2023), cert. denied, 144 S. Ct. 1343 (2024)), quoted in CSXT-6 at 3.

⁴² Norfolk S. Ry. Co.—Petition to Set Trackage Rights Compensation—Norfolk & Portsmouth Belt Line R.R. Co., FD 36223, slip op. at 3 (STB served July 25, 2019).

The referenced NS statements merely reflect the reality that CSXT has been fully engaged with NPBL and NS's effective control over NPBL since 1980 – in the boardroom, at the STB, and the federal district, appellate, and Supreme Court forums. Consequently, CSXT has the knowledge and wherewithal to understand its case, plan its litigation strategy, and execute on that litigation strategy when the time is ripe for doing so. As opposed to many other parties in control proceedings, CSXT has a great advantage in knowing what it wants and will argue, and CSXT has repeatedly said as much.⁴³

IV. THE BOARD SHOULD NOT OVERRIDE WHAT SOPHISTICATED PARTIES CAREFULLY NEGOTIATED AS TERMS OF THE PROTECTIVE ORDER, INCLUDING RESTRICTIONS ON USE OF DISCLOSED MATERIAL OUTSIDE THE DISTRICT COURT.

The Aggregated Pool approach violates the carefully negotiated federal court Protective Order and it is not consistent with that order to have the documents produced in this proceeding. The years-long antitrust case started as any case does, with NS, CSXT, and NPBL, all of which are sophisticated parties,⁴⁴ negotiating the Protective Order and proposing a procedural schedule for the district court's consideration. CSXT, a multi-billion-dollar company, is a sophisticated party. As such, it fully understood what it was successful in getting included in the Protective

⁴³ See e.g., CSXT-1, at 6 (describing the several remedies it will seek including a request for terminal trackage rights (and now the subject of a separate CSXT application in FD 36859), awarding damages to CSXT and imposing civil penalties on NS (and now the subject of a second separate CSXT complaint in NOR 42183, ordering NS to restore a line of discontinued trackage (and now the subject of a third separate CSXT petition for revocation) and dismissing an on-going proceeding, currently held in abeyance, in yet another docket, that being FD 36223).

⁴⁴ See Alea London Ltd. v. Howard, 2008 U.S. Dist. LEXIS 19134, *10, 2008 WL 693799, citing First St. Underwriters Agency of New Engl. Reins. Corp. v. Travelers Ins. Co., 803 F.2d 1308, 1311-12 (3d Cir. 1986) (noting that courts have applied the sophisticated party rule in agreement interpretation to “large corporations, advised by counsel and having equal bargaining power”). Sophisticated parties are required to exercise reasonable diligence in commercial dealings, including acquainting themselves with available information. See Hooks v. Samson Lone Star, Ltd. P'ship, 457 S.W.3d 52, 57 (Tex. 2015).

Order, and the concessions it made. In the Restated and Amended Motion to Compel, CSXT seeks a “workaround” of the terms in the protective order that it agreed to. The Board should not grant CSXT that workaround.⁴⁵

CSXT claims that it presented NS with two options: (1) grant CSXT consent to import, for use in the Board’s control proceeding, all materials produced or entered into in the district court proceeding record by NS, or, in the alternative, (2) NS could reproduce all of the discovery that NS produced in the district court proceeding for CSXT for free and unfettered use in the STB control docket. Both of CSXT’s proposed options are unrealistic for many reasons and violate the intent of the Protective Order, which was to limit those documents to that proceeding and for the “attorneys’ eyes only” in that proceeding.⁴⁶

First, in negotiating the federal court protective order, one of NS’s primary considerations was to ensure CSXT could not arbitrarily and at its sole discretion disclose NS documents (or by extension the entire Aggregated Pool of discovery) outside of the district court proceeding.⁴⁷ NS is perfectly within its rights to stand on what it and CSXT agreed to in the district court proceeding. Second, as NS explained above, NS has not conceded the relevancy of the entire Aggregated Pool of discovery produced in the district court proceeding, nor the relevancy of the

⁴⁵ What CSXT refers to as NS seeking to “run afoul” of the district court protective order (see First Motion to Compel at 16) is simply NS seeking to protect what it agreed to in the district court proceeding.

⁴⁶ CSXT correctly points out that per the district court protective order (and in the regular course of business), NS and NPBL can use their own material, whether it was produced in discovery or otherwise, however they choose, unless the information is otherwise restricted by, for example, the fact that it contains another parties’ information requiring that the other party needs to voluntarily agree to its use.

⁴⁷ As noted previously, assuming that the discovery was proper, which it was not, NS and CSXT could have evaluated whether any particular one of the requested documents was subject to production, and if so, whether under the protective order in the Board docket required such documents to be produced as a highly confidential, confidential, or public document.

pleadings and the filings, and not (by extension) the underlying discovery produced in the district court proceeding argued in those pleadings and filings. Third, in typical Board dockets involving confidential materials, the docket is governed by a protective order pursuant to which parties can designate documents as “Public”, “Confidential”, and “Highly Confidential”; whereas in the court proceeding, documents could be designated as “Confidential” or “Confidential-Attorney Eyes only”.⁴⁸ Granting CSXT’s Restated and Amended Motion to Compel without CSXT justifying the extraordinary relief it seeks would be analogous to the Board or anyone authorizing the building of a bridge without first ensuring the foundational requirements are met.

V. THE BOARD SHOULD NOT COMPEL NS TO PRODUCE SO-CALLED “NEGOTIATION FILES” WITH ANY ACTUAL OR POTENTIAL CUSTOMER FOR WHOM NS OR CSXT MOVES FREIGHT THROUGH ANY EAST COAST PORT.

While not related to the district court proceeding, CSXT also seeks to compel production of all “request for proposals, responses to requests for proposals, term sheets, draft or final contracts or agreements” (basically, all negotiation files) for any actual, or potential, customer for whom NS or CSXT moves freight through any East Coast port. This was Request No. 20 of CSXT Second Request for Document Production. NS and CSXT did meet and confer and reached agreement on the second and third requests, except for this Request.

CSXT’s motion to compel all documents related to Request 20, even as narrowed by CSXT, should be denied. CSXT request is an extraordinarily broad demand for what is essentially the entirety of all negotiation files when all that is relevant is the rate and market shares of NS and CSXT for intermodal containers at the East Coast Ports. That information may

⁴⁸ Another of CSXT’s assumptions in the Restated and Amended Motion Compel was that the Board and parties can simply assume the same designations and/or objections in the district court case would apply to the STB case. This cannot be assumed. However, in both forums, documents can be withheld on privileged grounds.

be obtained without the need for “all negotiation” files and emails, which could be in the thousands and would be time consuming and burdensome to produce.

NS has offered to produce final contracts for all customer moving intermodal traffic through any East Coast port that NS believes is also a customer that CSXT could serve. CSXT has access to its own negotiation files for those customers, and for others that might have contacted and contracted with CSXT without ever approaching NS. That universe of evidence, together with access to waybills and other data sources, provides CSXT to assess assertions that the Port of Virginia faces robust competition from other East Coast ports, a point that seems almost without dispute.⁴⁹ Access to the entirety of the NS negotiation files leading up to these final contracts, and access to the entirety of the NS negotiation files leading up to contracts that CSXT won, however, would result in the production of extremely commercially sensitive strategy approaches⁵⁰ that do not go to the underlying asserted claim, a claim that is far more confined.

⁴⁹ CSXT’s website contains a page devoted to, and entitled, “U.S. East Coast Ports.” On that site, CSXT says: “Shipping internationally? CSX offers customized, rail-centric solutions that connect you and your customers to more than 70 ocean, lake and river port terminals via the largest rail network in the eastern United States.” [CSXT US East Coast Port Webpage](#).

⁵⁰ The STB has recognized that the Interstate Commerce Commission exempted intermodal transportation services from regulation more than 40 years ago. “The basis for the ICC’s exemption of TOFC/COFC traffic from economic regulation was the agency’s finding that transportation of these intermodal shipments is market-driven and subject to widespread and effective competition from both motor carriers and other railroads. Shippers can truck their freight to any railroad intermodal ramp, or move it entirely over the highways, enabling them to choose the most effective and commercially responsive service and price offerings.” WTL Rail Corp. pp Petition for Declaratory Order and Interim Relief, EP No. 230 (Sub-No. 9), slip op. at 1-2 (STB served February 17, 2006). The CSXT request should be viewed in light of the fact that the STB has recognized the fact that the intermodal transportation environment is so competitive that it has exempted it from regulation.

The request for the entirety of the NS negotiation files is significantly overbroad for the purpose enunciated, and full production risks are evident. NS is very willing to provide the final contracts, which would provide sufficient information when combined with other sources available to CSXT (including CSXT's own negotiation files for any contracts for which it competed for the same traffic) would not suffer from either the overbreadth or risk concerns inherent in the CSXT request.

CONCLUSION

Contrary to CSXT's claims, NSR neither agreed that the Aggregated Pool of Discovery, nor that all of the pleadings and filings submitted in the district court proceeding, were relevant. NSR has not waived its objections to CSXT incorporating the district court proceeding in its entirety into this docket. Allowing the discovery sought through the Restated and Amended Motion to Compel would effectively permit CSXT to shield the underlying discovery requests from scrutiny. The Board's statement that any future proceeding would benefit from district court findings was never intended to express an intent by the Board to permit the entire Aggregated Pool of discovery to be imported to this proceeding.

Granting CSXT's Aggregated Pool approach also would allow CSXT to relitigate the district court case simply because CSXT did not like the results of that proceeding. But precedent is clear that CSXT cannot use this STB proceeding to relitigate issues that have already been litigated and found wanting.

CSXT's attempt to compel discovery to import the entire Aggregated Pool of discovery and all of the pleadings and filings submitted in the district court proceedings into the STB record is simply an attempt by CSXT to relitigate the issues it already raised before the federal

district court. Relitigating the issues and claims already decided in the federal district court antitrust case is barred by the legal doctrines of res judicata and collateral estoppel.

Finally, this attempt ignores the distinction between the Sherman Act case, which looks backwards, with the Board's statutory directive, which is to look "forward," similar to the principles and precedents underlying the Clayton Act. CSXT has provided no reason for the Board to deliver to CSXT a workaround to the obligations imposed by the district court protective order. This attempt further ignores the fact that the federal district court discovery was based not only on CSXT's Sherman Act claims, but also on claims grounded in Virginia state law.

The NS offered compromise with regard to production of final agreements for agreements involving the movement of intermodal traffic to and from all East Coast ports addresses the significant overbreadth of the request posed by CSXT, gives CSXT the relevant information needed to analyze rates, and prevents the significant commercial strategic risks inherent in CSXT's intrusive discovery request.

For all these reasons explained herein, the Board should deny CSXT's Restated and Amended Motion to Compel in its entirety.

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June 25, 2025

Attorneys for Norfolk Southern Corporation and
Norfolk Southern Railway Company

CERTIFICATE OF SERVICE

I certify that, on June 25, 2025, in keeping with 49 CFR §1114.21(f), I have caused to be served a copy of the foregoing Reply to CSXT's Revised and Amended Motion to Compel upon each Party of Record in these proceedings.

/s/ William A. Mullins
William A. Mullins

Attorney for Norfolk Southern Corporation and
Norfolk Southern Railway Company