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Washington, DC 20036-1795
202 429 3000 main
www.steptoelaw.com

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CSXT-41

VIA E-FILING

Chief of Case Administration
Office of Chief Counsel
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: **STB Docket No. FD 36836, Norfolk Southern Corporation & Norfolk Southern Railway Company—Acquisition of Control—Norfolk & Portsmouth Belt Line Railroad Company**

Dear Chief of Case Administration:

CSXT¹ respectfully submits this letter to respond to a new legal argument presented by NS in its January 6, 2026 final brief in contravention of the Board's instruction to the parties that the "final briefs are not intended to serve as an opportunity for parties to raise new evidence or arguments, but to provide a concise summary of the parties' positions." *Decision No. 13*, Dec. 18, 2025, FD 36836. A short response to the new argument is needed to ensure that the record is complete.

The issue involves the exemption from regulation of intermodal freight at 49 C.F.R. § 1090.2. Prior to the final brief, NS argued that the intermodal exemption reflects the Board's view that intermodal traffic is highly competitive. (*See, e.g.*, NS-1 at 17, NS-13 at 28-29, NS-32 at 42.) Competition for the international intermodal traffic at issue in this case was addressed extensively by both parties in their evidence. At no point prior to filing its final brief did NS argue that the intermodal exemption removed the Board's *jurisdiction* to consider the impact of a control or merger application submitted under 49 U.S.C § 11324 on intermodal traffic. NS made an obscure procedural argument in a footnote to its rebuttal comments about the possible need to revoke the intermodal exemption (NS-32 at 42 n.131), but NS

¹ The acronyms and defined terms used herein are the same as those used in the Board's *Decision No. 7*, served on July 10, 2025 in Docket No. FD 36836.

never argued that the Board lacked the legal authority to consider intermodal impacts in control proceedings.

Yet that is one of the primary arguments in NS's final brief. Argument II, covering pages 15-20 of NS's brief, boldly states that the "Board has no legal authority to deny a control application on the basis of competitive impacts arising from rates and services applicable to intermodal traffic." (NS-36 at 15.) NS further argues that "because the Board has exempted intermodal movements and pricing pursuant to Section 10502, it has effectively determined that intermodal movements and pricing cannot be the source of competitive harm protected by the Rail Transportation Policy or otherwise cognizable in Section 11324 proceedings." (NS-36 at 17.)

This is not a "concise summary of the parties' position" developed in the existing record but a new legal argument, presented for the first time in NS's final brief. And it is clearly wrong. The ICC directly refuted it over 30 years ago, stating that "[t]he fact that particular rail movements have been exempted from Commission regulation does not, by itself, preclude the possibility that a rail control transaction could lead to competitive harm for those movements." *Wisc. Cent. Transp. Corp., et al.—Continuance in Control—Fox Valley & W. Ltd.*, 9 I.C.C.2d 730, 741 n.14 (1993); *see also, Santa Fe S. Pac. Corp.—Control—S. Pac. Transp. Co.*, 2 I.C.C.2d 709, 739-40 (1986) (holding that "it is clear that exempt traffic would have to be examined to determine if the proposed rail merger would have an effect on rail competition").

NS's argument that intermodal traffic should not be considered in the Board's competitive analysis of the NS-NPBL transaction is especially puzzling in light of the proposed UP-NS merger, which is largely focused on the impact of the proposed merger on intermodal traffic. In light of the importance of intermodal traffic to the UP-NS merger application, NS cannot be taken seriously to argue here that the Board must – as a legal matter – ignore the evidence of competitive impact on intermodal freight in this proceeding.

Respectfully submitted,

/s/ Peter W. Denton

Peter W. Denton

Attorney for CSX Transportation, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have caused this Letter in Docket No. FD 36836 to be served electronically or by first class mail, postage pre-paid, on the Secretary of Transportation, the Attorney General of the United States, Administrative Law Judge Jenifer Soulikias, Applicants' representative, William Mullins, and all parties of record in this proceeding.

/s/ Jensen Matsuda

Jensen Matsuda

Attorney for CSX Transportation, Inc.

January 15, 2026