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BEFORE THE
SURFACE TRANSPORTATION BOARD

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STB Finance Docket No. 36500

CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION; AND DELAWARE & HUDSON RAILWAY COMPANY, INC. – CONTROL – KANSAS CITY SOUTHERN; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; GATEWAY EASTERN RAILWAY COMPANY; AND THE TEXAS MEXICAN RAILWAY COMPANY

CSX TRANSPORTATION, INC.'S MOTION TO REJECT RESPONSIVE APPLICATION OF NORFOLK SOUTHERN RAILWAY COMPANY AS INCOMPLETE

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Dated: March 22, 2022

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On February 28, 2022, Norfolk Southern Railway Company (“NSR”) filed a Responsive Application (“NS-8”). NSR seeks contingent trackage rights over the Kansas City Southern Railway Company (“KCSR”) line between Shreveport, LA, and Wylie, TX (the “Line”). CSX Transportation, Inc. (“CSXT”) moves the Surface Transportation Board (“Board”) under 49 CFR §§ 1180.4(c)(7) and (d)(4)(iii) to reject NS-8.¹

The Board should reject NS-8 because it assumes the legality of a market division between NSR and KCSR that was never the subject of competition review under 49 U.S.C. § 11322, which requires Board approval of pooling agreements, including agreements to divide markets. Pending that review, for the reasons explained in CSXT’s Comments filed on February 28, 2022, (“CSXT-8”) at 7-21, NSR should not be able to secure additional rights that could cement any anticompetitive effects of that market division.

The Board should also reject NS-8 because it is incomplete. 49 CFR § 1180.6 (2000) specifies the information NSR should have included in NS-8. NS-8 does not meet several of

¹ All section references are to 49 CFR § 1180.6 (2000).

those requirements. And NSR did not seek a waiver, clarification, extension of time, or for leave to file an incomplete application as required by 49 CFR 1180.4(d)(4) (2000).

Under 49 U.S.C. § 11325(a) “[t]he Board shall publish notice of an application under section 11324 in the Federal Register by the end of the 30th day after the application is filed with the Board. *However, if the application is incomplete, the Board shall reject it by the end of that period.*” 49 U.S.C. § 11325(a) (emphasis added). The Board’s regulations establish the procedures by which an application shall be submitted. They provide that “[a] complete application contains all of the information for all applicant carriers required by these procedures, except as modified by advance waiver.” 49 CFR § 1180.4(c)7(i). All applications filed under 49 U.S.C. 11323 must include specific supporting information enumerated under 49 CFR § 1180.6 (2000). An application that does not include the information required under 49 CFR § 1180.6 is incomplete and should be rejected by the Board as such under 49 CFR § 1180.4(c)7(ii).

A. NS-8 Does Not Demonstrate that NSR’s Proposal for Trackage Rights Is a “Minor Transaction” Under the Provisions of 49 CFR § 1180.2(b).

NS-8 asserts that “the KCS Section Trackage Rights Agreement clearly will not have any anticompetitive effects and therefore is not a Significant Transaction under 49 C.F.R. §1180.2(b).” NS-8 at 5. However, the Application does not address the significant potential competitive harms that would come from extending NSR’s exclusive rights over the Meridian Speedway to NSR’s Wylie Intermodal Traffic, should NSR exercise its option to purchase the Wylie Intermodal Terminal.

Under 49 C.F.R. § 1180.2, a transaction that does not involve two or more Class I railroads is to be classified as “minor”— and thus not having regional or national transportation significance—if a determination can be made that either: (1) the transaction clearly will not have any anticompetitive effects; or (2) any anticompetitive effects will clearly be outweighed by the

transaction's anticipated contribution to the public interest in meeting significant transportation needs. A transaction not involving the control or merger of two or more Class I railroads is to be classified as "significant" if neither of these determinations can be made.

As explained CSXT-8, NSR's "exclusive control of overhead intermodal traffic on the Meridian Speedway appears to have resulted in significant foreclosure of competition for service to and from the east end of the Speedway." CSXT-8 at 17. NSR's proposal for additional trackage rights involving the Wylie Intermodal Terminal, particularly in conjunction with its right to acquire the Wylie Terminal, may increase the scope of NSR's vertical integration into previously competitive service, allowing NSR to extend its capacity to exclude competitors and both entrench and expand these anticompetitive effects. These competitive concerns, apparent from the nature of NSR's request but not addressed in NSR's Responsive Application, preclude the conclusion that the relief sought in NSR's Responsive Application clearly will not have any anticompetitive effects, or that any anticompetitive effects will clearly be outweighed by its contribution to the public interest. 49 C.F.R. § 1180.2(b).

A transaction classified as "significant" must meet different procedural and informational requirements than one classified as "minor." For example, applicants are required to submit more detailed information regarding competitive effects, operating plans, and other issues for a "significant" transaction than for a "minor" transaction. 49 C.F.R. §§ 1180.6(c), 1180.7(a) & (c); 1180.8(b). *Id.*

NS-8 provides no information or analysis demonstrating these competitive harms do not exist, nor that they "will clearly be outweighed" by anticipated public interest benefits, as required by 49 CFR §1180.2(b).

NS-8 not only fails to provide the information required for a minor transaction, but it does not even mention or attempt to address the information required in a Significant Transaction.

B. NS-8 Does Not Identify Any New Securities or Other Financial Arrangements as Required by Section 6(a)(1)(iv).

Section 6(a)(1)(iv) requires NSR to specify “[t]he nature and amount of any new securities or other financial arrangements.” NS-8 does not include any information regarding any financial arrangements related to its request for contingent trackage rights for NS Wylie Intermodal Traffic.

C. NS-8 Does Not Address the Financial Considerations Associated with the Public Interest Justifications Asserted, as Required by Section 6(a)(2)(ii).

Section 6(a)(2)(ii) requires “detailed discussion of the public interest justifications... with particular regard to... The financial consideration involved in the proposed transaction, and any economies, to be effected in operations, and any increase in traffic, revenues, earnings available for fixed charges, and net earnings, expected to result from the consummation of the proposed transaction.” 49 CFR § 1180.6(a)(2)(ii).

NSR’s response to Section 6(a)(2)(ii) briefly offers that NSR (1) anticipates that it will pay reasonable trackage rights charges negotiated with CPKC (the “Applicants”) or set by the Board and (2) that compensation for the additional trackage rights shall be typical in the industry for trackage rights and consistent with Board decisions. Its two sentences addressing the financial considerations involved in the proposed transaction are not detailed, make no connection between their generalities and the public interest and include no information regarding the expected result of the proposed transaction on economies to be affected in operations. Nor does NSR provide any information regarding the impact of the proposed

transaction on increases in traffic, revenues, or earnings. NS-8 provides none of the detailed information required by the Board to permit an informed assessment of the public interest in NSR's proposal.

D. NS-8 Does Not Address the Effect of the Proposed Transaction on Employees, as Required by Section 1180.6(a)(2)(v).

Section 1180.6(a)(2)(v) requires a “detailed discussion of the public interest justifications... with particular regard to... The effect of the proposed transaction upon applicant carriers' employees (by class or craft), the geographic points where the impact will occur, the time frame of the impact (for at least 3 years after consolidation), and whether any employee protection agreements have been reached.” NS-8 asserts that “[r]equiring the Applicants to execute the KCS Section Trackage Rights Agreement itself, however, will have no effect on employees of the Primary Applicants.” By limiting information to the act of signing the Trackage Rights Agreement, NS-8 does not address the effects of the Proposed Transaction on employees of NSR or KCSR if the proposed contingent rights were exercised.²

E. NS-8 Not Identify the States Where Applicants Own Property, as Required by Section 1180.6(a)(5).

Section 1180.6(a)(5) requires the applicant to provide “[a] list of the State(s) in which any part of the property of each applicant carrier is situated.” In response, NS-8 only identifies where NSR operates and where the contingent trackage rights it seeks are located. NS-8 does not identify the states in which “each applicant is situated,” omitting any reference to KCSR. In addition, NS-8 does not include information covering the entire NSR system including specific information about the states in which its subsidiaries and/or affiliates (including the Alabama

² See *CSX Corporation, et al.-Control and Merger Pan Am Systems, Inc., et al.*, Docket No. 36472, Decision No. 3 (served May 26, 2021), at 14, requiring applicant to address operating modifications and potential job losses.

Great Southern Railroad Company, the official member of the Meridian Speedway, LLC (NS-8 at 1, fn. 1)) operate.

F. NS-8 Does Not Submit Maps, as Required by Section 1180.6(a).

Section 1180.6(a)(6) requires the applicant “[s]ubmit a general or key map indicating clearly, in separate colors or otherwise, the line(s) of applicant carriers in their true relations to each other, short line connections, other rail lines in the territory, and the principal geographic points in the region traversed. If a geographically limited transaction is proposed, a map detailing the transaction should also be included.” In response, NS-8 includes four maps. None provide critical information including (1) the points of interchange, (2) the flow of traffic between the Wylie Intermodal Terminal and points east of Meridian, or (3) the specific routes over which that traffic would move east of Meridian. NS-8 also does not include a map of the proposed CPKC system or the traffic flows over the CPKC system to which NSR says it is responding or other railroads in the territory of the proposed contingent trackage rights.

G. NS-8 Does Not Fully Identify the Principal Routes, Termini, Points of Interchange, and Amount of Mileage Involved in the Proposed Transaction, as Required in Section 1180.6(a)(7)(vi).

Section 1180.6(a)(7)(vi) requires NS-8 to “[b]riefly describe the principal routes and termini of the lines involved, the principal points of interchange on the routes, and the amount of main-line mileage and branch line mileage involved.” But NS-8 does not specify the routes over NSR’s network affected by the Proposed Transaction. It is unclear and unknown where traffic will move to, from, or through Shreveport, LA, Meridian, MS, or Wylie, TX.

The maps in NS-8 show NSR trackage rights extending to Metro, TX, even though the text of NS-8 identifies the western end of the trackage rights as Wylie, TX. The potential connections to KCSR at Wylie, TX include the Dallas Garland and Northeastern Railroad, while

the line extending to Metro also connects to the BNSF Railway Company. Neither company is mentioned, making a complete analysis of the competitive effects of the proposed trackage rights impossible.

Conclusion

For the reasons set forth above, the Board should reject the Responsive Application.

Respectfully Submitted,

/S/ Paul A. Cunningham

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Dated: March 22, 2022

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing CSX Transportation Inc. First Set of Discovery Requests to the Norfolk Southern Railway Company to be served electronically or by first-class mail, postage pre-paid, on the Secretary of Transportation, the Attorney General of the United States, Applicants' representatives, Administrative Law Judge Thomas McCarthy, and all parties of record in this proceeding.

/s/ Paul A. Cunningham
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March 22, 2022