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Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: Norfolk Southern Railway Company – Control Acquisition – Norfolk & Portsmouth Belt Line Railroad Company, FD No. 36836

Dear Ms. Brown:

Norfolk Southern Corporation and Norfolk Southern Railway Company collectively submit this Reply to CSX Transportation, Inc's Petition to Reject Norfolk Southern's Minor Application.

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 Rose-Michelle Nardi, who can be reached at (202) 663-7852 or by e-mail at rnardi@mullinslawgroup.net.

Respectfully submitted,

/s/ William A. Mullins

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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'S AND NORFOLK SOUTHERN RAILWAY
COMPANY'S REPLY TO CSX TRANSPORTATION, INC'S PETITION TO REJECT
NORFOLK SOUTHERN'S MINOR APPLICATION**

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March 7, 2025

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INTRODUCTION

On February 14, 2025, Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, “NS”) filed a minor application (“Application”) seeking authority from the Surface Transportation Board (“STB” or “Board”) to formalize the same control over the Norfolk & Portsmouth Belt Line Railroad Company (“NPBL”) that NS has effectively exercised for the past several decades and which has been recognized and acknowledged over the years in the several proceedings leading up to the present, including those in which CSXT actively participated.¹ The Application was served on the United States Department of Justice (“DOJ”) and the United States Department of Transportation (“DOT”). It was served on the Governor’s, the state Departments of Transportation, and the heads of the Public Utility Commissions for 22

¹ The Minor Application was designated “NS-1”. On the same day, NS submitted a Motion for Protective Order, designated “NS-2”, a motion that was granted by the Board on February 19, 2025, and Petition for Proposed Procedural Schedule, designated “NS-3”, which petition remains pending before the Board.

states. Not one of these parties has filed a comment requesting the transaction be reclassified to “significant.” Likewise, no shipper, shipper organization, trucking/drayage company, shipping line, logistics company, container pool company or any similar type of party has requested the transaction be reclassified as significant. CSXT² – a competitor of NS for the transportation of international intermodal traffic that either originates or terminates at the Port of Virginia (“POV”) – has requested the transaction be reclassified to significant.³ A competitor that already has access to NIT through a switch from NPBL (at a cost -based rate) or through a 9-mile drayage move to CSXT’s rail yard.⁴ Most importantly, CSX has known since 1982 that NS controlled NPBL and has never objected to that control at the ICC or the STB. Indeed, CSX fully supported adoption of the agreement that created the current board structure of the NPBL, which codified NS’ control.⁵

² On February 28, 2025, CSX Transportation, Inc (“CSXT”) filed a Petition to Reject Norfolk Southern’s Minor Application (“CSXT Petition”).

³ On March 6, POV filed comments noting that “Virginia, and the customers it serves, would benefit from a comprehensive analysis of NPBL control by NSR.” POV did not specifically request the Application be rejected or supplemented. NS supports a “comprehensive analysis of NPBL control by NSR” but does not believe converting the transaction to significant is required for that analysis to take place. Such an analysis will occur during the comment and reply period during this minor transaction. NS notes that POV’s comments actually support NS’s claims that shippers have a myriad of transportation options, both within POV itself among the different terminals and between and among different East Coast Ports. Those comments also confirm that CSXT has a significant amount of market share vis-a-vis NS, which fully supports the analysis that the transportation for international containers is highly competitive.

⁴ What CSXT fails to disclose is that CSXT is actually NPBL’s largest customer and moves more non-intermodal traffic via an NPBL switch than NS. This obviously shows that NS is not using its control of NPBL to favor NS or discriminate against CSXT.

⁵ On March 1, 1989, CSXT, Norfolk and Western Railway (“NW”), and Southern Railway (“SR”) Company entered into a Supplemental Agreement detailing that CSXT would have two representatives, and that NW/SR would have three representatives on the NPBL Board based on ownership of common shares of 216 and 288 (144 each for NW and SR), respectively.

In its Petition, CSXT (1) demands the Board to reject the Application as being filed in an “untimely” manner; and (2) reject the Application as a minor application.. The STB must reject both of these CSXT demands.

First, this Application is timely. There is no legal impediment to NS filing an application with the Board for precisely the authority that both NS and CSXT believed it obtained decades ago. The Board instructed NS to “take appropriate steps to address the unauthorized control issue immediately following resolution of the district court proceeding, including any appeals.”⁶ The appeal process envisioned by the Board is over. CSXT’s most recent run at interference, the CSXT petition for certiorari to the U.S. Supreme Court, is narrowly focused on the timeliness of its claims regarding past conduct and is not focused on existing or future conduct. Indeed, because CSX did not appeal the ruling on its inability to seek injunctive relief under the antitrust laws, it’s only claim left is to seek another bite at the apple to relitigate “past conduct” in the district court. This Application is focused on whether NS’s future control of NPBL will likely result in a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States. Nothing in CSXT’s petition for certiorari will impact that question. The separate existence of that court proceeding does not need to delay the initiation of the STB proceedings, embodied in the NS Application, that everyone involved acknowledges must be undertaken.

Second, this Application is a minor transaction within the full meaning and understanding of the STB’s regulations. CSXT’s argument that demands the Board to reject the Application as a minor application and instead order NS and NPBL to file a “significant” application, is without

⁶ Norfolk Southern Railway Company – Petition for Declaratory Order, FD 36522, slip op., at 17, n. 25 at (STB served June 17, 2022)(“June 17th Decision”).

merit. CSXT continues to regurgitate its meritless arguments that it failed to demonstrate in federal court. The STB should be similarly unpersuaded in this matter as the court was with CSXT's lawsuit. The CSXT demand includes several references to studies and evaluations that often are included in other control applications. However, CSXT fails to acknowledge that such studies and evaluations have no practical application to the subject Application, given that it refers to a transaction that occurred 42 years ago. The CSXT demand also flies in the face of the fact that, as originally submitted, the NS Application is fully consistent with numerous other minor applications accepted by the STB and the Interstate Commerce Commission ("ICC") before it.⁷ Finally, these complaints ignore that CSX itself fully approved of and ratified NS's control by approving the existing governance structure of NPBL.

For the reasons set forth further herein, the Board should promptly reject the CSXT Petition, and adopt the procedural schedule proposed by NS in its NS-3 procedural schedule petition.

SUMMARY

There is no legal impediment to NS filing the Application at this time. CSXT even outlines a series of new litigation tactics it plans to employ in a never-ending attempt to sabotage what should be a straight-forward control proceeding to rectify an understandable oversight that occurred 42 years ago. CSXT inevitably will attempt to progress such litigation tactics in a

⁷ The NS Application seeks STB approval of the control of NPBL, a subsidiary of NS, and states clearly that that STB approval will not result in adverse changes (in fact, no changes) in service levels, no significant changes (in fact, no changes) in operations, and, consistent with practice over the past several decades. As such, the transaction actually qualifies for an exemption under 49 U.S.C. §10502. Regulation is not necessary to carry out the transportation policy of section 10101 of this title; it is limited in scope; and the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power. NS did not file such a petition for exemption because there is no set procedural process.

manner that will keep this issue unresolved and on the open burner for years to come.⁸ NS urges the Board to instead permit the Application to proceed in an orderly manner, in conformance with the regulatory procedures in place.

The proposed “transaction” pending before the Board is simple, even if it is unique. It is the going-forward formalization of the effective control that has existed since 1982. The fact that this is a unique transaction to be presented to the Board is no mystery, but it is a transaction that comes fully informed with what has happened over the past 42 years and further informed by the opinion of the federal courts on the CSXT antitrust litigation. No shipper will have fewer transportation options as a result of the Board’s approval. The NPBL will continue to operate as it has in the past, a history in which no shipper or shipper association (or CSXT for that matter) has ever filed a complaint at the ICC or the STB against NPBL or NS in the 42 years NS has effectively controlled NPBL.⁹ And this should not be surprising, as the relevant market here is international intermodal containers – perhaps the most competitive market in the United States. Even if the market is viewed as solely involving international containers at NIT, the Transaction does not change any existing competitive option. It is time to resolve this 42-year-old oversight.

CSXT claims that it can rewrite the past, and somehow “establish that the strong likelihood of anticompetitive effects and the lack of any countervailing public benefits will ultimately warrant denial of any complete and timely significant application that NS later files.”¹⁰ It asserts that these “anticompetitive effects” are so pervasive that the transaction

⁸ Recall that it was CSXT who requested that the trackage rights proceeding be delayed and held in abeyance. Their comments here are just another effort to further delay in an effort to try and force NS to acquiesce in its rate proposal.

⁹ Nor has CSXT during this 42-year period challenged the switch rate, NS’s control, or requested terminal trackage rights.

¹⁰ CSXT Petition at 6 (CSXT-1-9).

requires treatment as a significant transaction. But while CSXT and its experts raise many questions, they offer absolutely zero competitive analysis or evidence to show that the transaction *might* result in reduced competitive options for shippers, changes in routes, operating practices, rates, or the potential for vertical foreclosure – which are factors that have been relied upon in previous minor transactions to justify converting a transaction to significant. Nor could CSXT make such a showing because NS’s control has not resulted in any such competitive or operational changes since NS took control of NPBL 42 years ago.

All CSXT offers is pages and pages of materials previously filed in its unsuccessful antitrust case. A case in which the Judge explicitly stated that “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 contracts, or a majority of its lost contracts, or a notable minority percentage of its lost contracts, or even a non-speculative de minimis percentage of its lost contracts, is predicated on actionable overt acts occurring after 2012.”¹¹

What is even more remarkable is that CSXT’s position in the antitrust litigation and its Petition is completely contrary to CSXT’s position in the various EP 711 proceedings. Here, CSXT is arguing that something nefarious is happening unless NIT has two carriers serving it and at below market rates. In EP 711, CSXT opposed the concept that shippers should have the right to invoke reciprocal switching and advocated that if access were granted, the switching rate should be market-based.¹²

¹¹ CSX Transportation, Inc. v. Norfolk Southern Railway Company, No. 2:18cv530 at *705 (emphasis in original). The use of 2012 was not a reflection that there was anticompetitive conduct prior to 2012. That statement reflects the statute of limitations and the time period of CSXT’s damages analysis.

¹² See discussion at 17-18, *infra*.

CSXT also makes much of the fact that CSXT and NS have received a letter from an attorney in the Department of Justice's ("DOJ") Antitrust Division noting that it is now investigating CSXT's litigation claims. This is not a surprising development. There are many reasons the Antitrust Division looks into claims that are being litigated, including a request by an interested party, like CSXT. But in its investigation, the Antitrust Division will see the same undisputed facts presented at the district court; facts which demonstrates (1) a general increase of traffic flowing through the NIT terminal and the Port of Virginia; (2) investment by the railroads, the Port and others all to the benefit of shippers and transportation providers along the Eastern U.S.; (3) NPBL's disputed rate being true to the principles of cost-based (not market-based) uniform service provided for the benefit of its owners; and (4) as POV's filing confirms and as the record in the antitrust case reflects, CSXT's movement of containers through NIT and through POV has increased significantly during the exact time period in which CSXT claims anticompetitive actions by NS and NPBL.

The Application should be accepted as a minor transaction as it clearly shows, on its face, that there are no shippers who will see any reduction in their competitive routings and options and it clearly shows that NPBL will operate consistent with and in the same manner as it was when it was formed in 1897. If there are alleged "anticompetitive effects" to shippers that are likely to result in the substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States, it is for CSXT to show it during the merit stages of this proceeding. They certainly have not shown such potential effects yet so as to justify converting this proceeding to significant. There is no reason to delay this proceeding any further – especially when the Board specifically requested NS to take expeditious

action to remedy its unauthorized control as soon as the appeals are done, which, for all prospective relief, they are.

ARGUMENT

I. THE APPLICATION IS TIMELY AND RIPE AND SHOULD BE ACCEPTED

A. The Procedural History Leading to the Application is Long, Known by All, and Presents No Surprises to Any Party Involved.

The history leading to the submission of the Application goes back over a century. We do not repeat it all here, but instead simply raise some highlights. What is abundantly clear from that history is that NS's exercise of control has been reasonable, above-board, informed, and, until recently, with CSXT's full consent. Further impediments to final resolution of this matter should be viewed as precisely that – impediments cast by CSXT to delay the proceeding.

NPBL's history began back in 1897. Through the years, purchases and corporate restructurings resulted in NS effectively owning, beginning in 1982, a majority share of the company.¹³ NS inadvertently failed to ask for explicit ICC approval to control NPBL, even though the result was evident in the transactional documents presented to the ICC and others participating in the proceeding, including CSXT which (along with being the then-current largest single shareholder of NPBL) participated in the ICC proceeding in its own right.¹⁴ If the ICC had reviewed NS's control transaction back in 1982, it would have come to the same conclusion as the STB should now: NS's authorized control would not have resulted in any reduction of any

¹³ Approval was conferred pursuant to a decision in Norfolk Southern Corporation – Control – Norfolk and Western Railway Company and Southern Railway Company, FD 29430 (ICC served March 25, 1982) (“1982 ICC Control Decision”).

¹⁴ See, Appendix 2, page 10 of 18, of Volumes 2 and 2A of the 1980 control application (detailing the resulting 57.14% interest to be held by NS). See also, 1982 ICC Control Decision at 2 (detailing the CSX Corporation participation in the proceeding).

shippers' competitive options and that authorized control would not likely result in the substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States.

In fact, if the control transaction had been reviewed in 1982, there is no indication that CSXT would have objected. Indeed, CSXT's anticompetitive claims are not based on the competitive landscape that existed in 1982 but are based on an NPBL rate that was established in 2009, **27 years** later.¹⁵ CSXT has been fully aware of NS's effective control of NPBL, and the assumption of the approval of that control, through subsequent control proceedings before the STB.¹⁶ For decades, CSXT has had a seat at the table and that control has been recognized without CSXT objection. CSXT even approved the contract that changed the board structure to give NS the majority of board seats.

It was not until 2018 that CSXT initiated its quixotic campaign to flex a pressure point by filing litigation in federal district court against NS and NPBL alleging all sorts of behavior that it failed to prove under the antitrust laws. It was only as a result of that 2018 litigation that NS was informed definitively that it lacked the STB authority that NS thought that it had already received. As a part of that litigation, the control issue was raised and referred to the STB for resolution, and the STB determined that neither the ICC approval of the 1982 Control

¹⁵ It is disingenuous for CSXT and its experts to argue that the STB should view the control application in the lens of a pre-1982 world versus a post NS control world when CSXT did not raise any concerns about NS control until 2018.

¹⁶ See, Southern Railway – Control Exemption – Norfolk & Western Railway Company, Chesapeake Western Railway, The Toledo Belt Railway Company, and Wabash Railroad Company, FD 31791 (ICC served January 14, 1991) and Norfolk Southern Railway Company – Merger Exemption – Norfolk and Western Railway Company, FD 33648 (STB served August 31, 1998). These are cases where it was acknowledged that NS controlled NPBL, and that acknowledgment came without objection from the ICC, the STB, or CSXT.

Transaction nor the subsequent 1991 and 1998 control authorizations (identified above in note 16) authorized NS's control of NPBL.¹⁷ NS appealed the STB's finding. NS lost that appeal and no further appeals involving the control issue have occurred. As such, NS has followed the Board's directive and has filed this Application.

B. There is No Legal Impediment to the Submission of the Minor Application at this Time, and the Submission and Prompt Resolution of the Same is in the Public Interest.

In determining that NS did not obtain the necessary authority to control NPBL in 1982, the STB stated that, “[g]iven this [2022 NS Declaratory Order] decision, the Board expects the parties to take appropriate steps to address the unauthorized control issue immediately following resolution of the district court proceeding, including any appeals.”¹⁸ The district court has ruled, the appellate court has ruled, and their input has been received. NS has taken the appropriate steps to address the unauthorized control issue, and CSXT has taken, and continues to take, additional steps to delay consideration of the issue by the Board.

CSXT argues that the NS Application is not timely because there is a petition for certiorari pending before the U.S. Supreme Court. The Board instructed NS to file an application to take any necessary additional steps to resolve the unauthorized control issue expeditiously following resolution of the litigation. The litigation is over, except for a certiorari petition where the issue involved has no bearing on whether this transaction should be approved. As such, NS took the STB's admonition seriously and filed its Application. As noted above the certiorari petition, even if granted, will have no impact on the Board's review of the Application. That

¹⁷ Norfolk Southern Railway Company – Petition for Declaratory Order, FD 36522 (STB served June 17, 2022) (“2022 NS Declaratory Order Decision”).

¹⁸ Id., slip op. at 17, n.25.

petition is based solely on *past* conduct. Indeed, CSXT did not appeal the court's ruling on its inability to seek injunctive relief based on its antitrust litigation, so any appeal is necessarily limited to past conduct. In contrast, the Board's review of this Application is focused on the *future* impact NS' control of NPBL and whether it will likely result in the substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States. Similarly, the DOJ investigation does not advance CSXT's position for delay of the Application. If DOJ desires to participate in the NS Application proceeding before the STB, it is free to do so, as it has done in other proceedings¹⁹. Accordingly, there is no currently pending legal proceeding or appeal that would impact, guide, or otherwise illuminate any analysis that this Board is required by statute to analyze when determining whether NS's authorized control of NPBL in the future will likely result in a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States.

C. CSXT's Petition Is Just Another Attempt To Manipulate This Board's Processes

The Board correctly directed the parties to proceed as quickly as possible to resolve the outstanding control issues, informed by the decision of the federal district court and the appeals therefrom. NS is following that directive. CSXT is not. Instead CSXT has bluntly told the STB that, notwithstanding repeated defeats at the federal courts, CSXT wants to flood the STB with petitions for divestiture, damages and civil penalties, and a variety of other unreasonable efforts to prevent NS's authorized control – all notwithstanding that CSXT contractually agreed to and ratified that control. CSXT is trying to take advantage of an inadvertent oversight 42 years ago

¹⁹ See e.g., CSXT/Pan Am, *infra.*, n. 24.

and manipulate the Board's proceedings in a blatant attempt to undo the contractual arrangement it agreed to in an attempt to weaken CSXT's competition.

Just as the courts denied CSXT's antitrust claims, in part, because CSXT slept on its rights, the Board should take a similar approach. At some point, the continuous flow of new and alarming claims and concerns being raised by CSXT for actions that occurred decades ago – actions that CSXT never objected to and a control that CSXT specifically approved of by ratifying the contract granting NS the majority of Board seats – must stop. CSXT's recent efforts really have shown themselves to be nothing but an effort to obfuscate, delay, and litigate in order to gain any advantage possible to force NS to accept settlement of CSXT's choosing, regardless of the fact that CSXT's efforts are not supported in fact or law and have been rejected by every court that has considered them.²⁰ For all the reasons discussed above, the CSXT motion to dismiss the NS Application as “untimely” must be denied.

²⁰ One of the conditions that CSXT claims that it is wants to seek (or to file a complaint about) is to have the Board “order[] NS to restore an active line of railroad allowing for efficient access to NIT that NS unlawfully removed without obtaining the required abandonment authority.” CSXT Petition at 6 (CSXT-1-9). CSXT does not specify what line of railroad would be the subject of this demand, but NS believes that it is the track covered by Norfolk Southern Railway Company – Discontinuance of Trackage Rights Exemption – in Chesapeake, VA, AB 290 (Sub-No. 299X), Norfolk and Portsmouth Belt Line Railroad Company – Discontinuance of Trackage Rights Exemption – in Chesapeake, VA, AB 1024X (STB served May 15, 2008), referenced by CSXT on page 18 of its Petition (CSXT-1-21). CSXT did not object to that discontinuance and even supported it. The Verified Notice of Exemption filed in that proceeding included a verification of the Resolution of the Board of Directors of NPBL (which Board of Directors included representatives of CSXT) approving the action, dated December 19, 2007. It also included an explicit recitation that the NPBL was “a jointly owned company of Norfolk Southern Railway Company (57.143%) and CSX Transportation, Inc. (42.857%)”. Verified Notice of Exemption, filed April 25, 2008, at 4. CSXT had plenty of time between the action of the Board of Directors and the filing of the Verified Notice of Exemption, and certainly subsequent to the filing of that Verified Notice of Exemption nearly 18 years ago, to raise concerns at the STB if it truly felt aggrieved by that discontinuance. It did not and still has not.

II. THE CSXT CLAIM THAT THE APPLICATION SHOULD BE DISMISSED BECAUSE IT IS A SIGNIFICANT TRANSACTION RATHER THAN A MINOR TRANSACTION IS UNWARRANTED AND AGAINST THE FACTS AND THE LAW

The NS Application is clear and unequivocal. Following the grant of the approval of the NS Application and the transaction described therein, there will be no changes in operating practices, interchange options, existing routing options, or vertically foreclosed routings resulting from the Board authorizing the effective NS control over NPBL. CSXT argues that the Board must still nonetheless determine the NS Application is a “significant” application, not a “minor” application, and NS should refile the Application at some later date with more information. CSXT’s demand that the STB reject the NS Application is unsupported and should be denied.

The NS Application is clear that there will be no competitive concerns from STB authorizing NS’s continued control over NPBL. The results of the antitrust case support that conclusion (and support prompt handling of the NS Application as opposed to continued delay). CSXT’s role in providing competition, directly and via drayage operations, will go forward unabated. Through testimony submitted via verified statement, CSXT implies that it has a very small share of the NIT through-put traffic. But, that statement, like so many CSXT statements, is misleading because it implies that NS handles most of the POV traffic. In reality, based on information CSXT included in its own Petition, the Virginia Port Authority states that only 36% of the Virginia Port Authority’s cargo moves by rail,²¹ which indicates that CSXT moves a far greater portion of the rail throughput at the entire POV than they acknowledge. Indeed, CSXT is NPBL’s largest customer and its market share at NIT (via its drayage program) and POV as a whole has increased substantially during NS’s control. There is vigorous competition between

²¹ Comments of the Virginia Port Authority, at 3, submitted on November 7, 2023, in the STB’s Reciprocal Switching for Inadequate Service, EP 711 (Sub No. 2) proceeding.

CSXT, NSR and direct truck service for traffic moving through the Port and in competition with other ports, and that competition will continue in a post-authorized control world.

CSXT continues to raise the specter of antitrust behavior. But the federal courts have already discounted this ghost story. And, just as the federal district and appeals court rejected CSXT's claims, NS is confident that DOJ will reach a similar conclusion after a review of the facts.

Finally, CSXT fails to present any evidence that this transaction will harm competition for the shippers. Rather, it presents hundreds of pages of material – all from the antitrust case that it lost. All of those materials focus on alleged harm to CSXT, not to shippers or to shippers' competitive options, and harm under the antitrust statutes, not the STB's obligations under ICCTA.

CSXT presents all of its "best evidence" and argument to convince the Board that NS has acted in an anticompetitive manner. CSXT does not present any counter evidence. Yet, even if one viewed only CSXT's evidence, none of this material is relevant to the Board's analysis under the Board's statute. Unlike how the STB analyzes competitive effects, CSXT's antitrust case focused on the narrow issue of whether there was adequate rail to rail competition at NIT. CSXT's theories relied on the much-discredited analysis that if there were not two railroads directly serving a given location, there must be anticompetitive conduct. But that is not supported by the ICC's/STB's views (and certainly not CSXT's views in the EP 711 proceeding), and that is not the focus of this proceeding and the relevant statute applicable to this Application.

A. The Cases Cited by CSXT are Inapposite Or Actually Support the Treatment of the NS Application as a Minor Transaction

CSXT discusses two cases in which the applicant first designated the proposed transaction as a minor transaction but where the Board determined the proposed transaction to be a significant transaction. Both are inapposite.

The first of these is the proposed acquisition of the DM&E by Canadian Pacific (“CP”), considered in FD 35081. Although CSXT discusses one part of the Board’s decision in that case (specifically where the Board points out that there is no assurance that there would be no anticompetitive effects that might result from the proposed transaction), the CP/DM&E case is important for another matter.

The purpose of the test articulated in Section 1180.2 of the Board’s regulations is to allow the Board to lessen the regulatory burden when “a determination can clearly be made, at the time the application is filed, that the transaction passes muster under” the statute. * * * It permits the Board to select the most appropriate procedures to apply to a proposed transaction. * * * The Board considers each proposed transaction *based on its unique factual circumstances* and our regulatory criteria for classifying transactions.

Canadian Pacific Railway Company, et al. – Control – Dakota, Minnesota & Eastern Railroad Corp., et al., Decision No. 2, FD 35081, slip op. at 6-7 (STB served November 2, 2007), (underline emphasis in the original; italicized emphasis added).

In the CP/DM&E proceeding, several parties requested the transaction be reclassified to significant and there was a clearly present question of whether there could be competitive issues introduced through STB approval of a transaction that had not happened.²² What CSXT ignores,

²² CSXT points most directly to the Board noting that CP did not include information that rules out the possibility that there are some shippers whose competitive options would be reduced post-transaction and information about stations that both CP or DM&E had current access to, but only one of the two carriers actually served originating or terminating traffic – a clear indication that there was a possible direct competitive service impact. In the NS Application, there is none

and its experts in their verified statements fail to understand,²³ is that the transaction pending before the Board in the NS Application is unique and in no fashion has the complexities of the CP/DM&E proceeding. This transaction is a product of a long series of proceedings that have gone before it. In most cases, the Board is presented with various informed, but nonetheless hypothetical, views of how granting its control authority will change the competitive and operating landscape for shippers and receivers if the proposal is adopted. In this case, however, the Board is presented with various informed, but not hypothetical, views of how NS's effective control has fostered a competitive landscape for shippers and receivers that has existed for the past 42 years and before. Unlike other transactions presented to the Board for their review, here the facts are known, having been developed through the many proceedings that have gone before it, and are further informed through federal judicial opinions dealing with the history as presented by the primary parties.

The second case that CSXT presents to support treatment of the NS Application as a significant transaction is its own acquisition of Pan Am Railways, with the spill-over effects on Pan Am Southern, Vermont Railway and the shipping public that before the proposed transaction were experiencing a significant amount of competitive options in the Northeast United States. In its application in that proceeding, CSXT acknowledged the transaction would involve over 1,200 miles of rail and an ownership interest in two important and parallel rail corridors serving the Boston region. CSXT further acknowledged in its application that there could be an effect on

of that. CSXT also ignores that there were numerous parties objecting to the designation of the transaction as minor transaction and further expressing concerns over foreclosure, loss of routing options, and the potential for increased rates. Here, no party has expressed such concerns.

²³ In Section II(E) *infra*, NS will demonstrate that the three verified statements submitted in support of the CSXT Petition suffer from the same, fundamental flaw – they ignore the factual predicates of the proposed transaction pending before the Board.

competition to customers. As with the CP/DM&E transaction, several parties objected to treatment of the transaction as a minor one, pointing out the significant changes in routing options, interchanges, and operating characteristics. Given all of that, the Board concluded that classifying the CSXT/Pan Am transaction as a significant transaction “would provide the Board with the additional information and time needed to develop a more comprehensive record so that the Board may analyze the competitive concerns identified here (and any others not apparent from the Notice).”²⁴

In the NS/NPBL proceeding, no shipper or any other party (other than CSXT with a letter of support from POV) has objected to the treatment of the transaction as a minor transaction. And there will be no changes in operating practices, routing options, rates, services, or other practices. The facts experienced over the past 42 years of service are known and speak for themselves. They have been reviewed and examined in the federal courts, and that analysis (as desired by the Board) is available to the parties and the Board. CSXT, through its primary expert, argues that there needs to be an economic analysis that “would compare a pre-transaction state of the world that is free from NSR’s control of NPBL,” apparently dating back to 1982, “to a post transaction state of the world with NSR’s control.”²⁵ The analysis suggested is simply nonsensical, evoking thoughts of time travel paradoxes and the innumerable timelines that arguably could result from such an effort.²⁶ It is even more non-sensical insofar as the timeline

²⁴ CSX Corp.—Control & Merger – Pan Am Systems, Inc., FD 36472, slip op. at 10 (STB served March 25, 2021).

²⁵ VS Carey, at 2 (CSXT-1-561).

²⁶ Even if the Board could “recreate” the 1982 world and compare how the NPBL was operated prior to NS’s taking control with how NS has operated NPBL since taking control, it would find no difference. Prior to 1982, NPBL operated in accordance with the 1897 governing document and charged a uniform, cost-based tariff rate. This is precisely how NS is currently operating the NPBL.

between 1982 and today is known. To ignore that historical information would be inappropriate. An examination of that timeline clearly demonstrates that shippers, NPBL, and the POV have all benefitted from NS's effective, yet inadvertently unauthorized, control.

B. The Proposed Transaction, as Correctly Framed, Clearly Will Have No Adverse Competitive Effect.

NS is on the record stating that the conditions that help define the current timeline (and the competitive benefits currently resulting from those conditions) will continue into the future. There will be no changes in operating practices. There will be no changes in interchange options. There will be no changes to existing routing options. There will be no vertically foreclosed routings. None of these will result from the Board authorizing the effective NS control over NPBL. Contrary to CSXT's argument that granting the NS Application will result in its exclusion from NIT, CSXT will continue to have access to NIT via switch with NPBL and via drayage.²⁷ – the precise type of CSXT access supported by POV in POV's comments submitted in the Ex Parte 711 proceeding²⁸ and the precise type of access CSXT has had for over 100 years.

²⁷ CSXT argues that its relatively small share of the throughput at NIT demonstrate that NS is manipulating NPBL to keep switching fees artificially high, thus precluding CSXT from on-dock (NPBL-switched) service at NIT. VS of Maryclare Kenney, at 2-3 (CSXT-1-541 through CSXT-1-542). The fact that drayage service procured by CSXT may be less than the cost-based switching fee charged by NPBL does not make that cost-based switching fee anticompetitive, it simply reinforces that there are competitive options available to carriers at NIT for the benefit of shippers. Maryclare Kenney also discusses only the relative market share captured by CSXT, comparing it to the total throughput of the terminal, and fails to even discuss the other competitive elephant in the room – the direct truck competition available to shippers at NIT. NIT is a competitive intermodal marketplace with an important role in the overall international port marketplace discussed by Maryclare Kenney, the international port terminals on the Eastern Seaboard and the Gulf Coast. *Id.* at 1 (CSXT-1-540).

²⁸ See POV's comments submitted in the CSXT Petition, Exhibit 4 where the POV argued that any rules adopted should include ports, including the POV. Of course, the remedy in that

The access CSXT has to NIT is, and will continue to be, via a cost-based uniform rate. While CSXT may want a lower NPBL switching rate to NIT than that currently in place, the current switching rate is lower than what CSXT has argued for in such cases as EP 711, where it argued that switching rates should “reflect market forces and conditions” and reflect “differen[ces] by junction, locations, and types of traffic.”²⁹ Here, NS commits to ensure, in continued compliance with NPBL’s governing documents, that NPBL will charge a cost-based, not a market-based, switch rate. Unlike in EP 711, CSXT here argues the need for a *below*-cost rate, which would undoubtedly be good for CSXT, but not for NPBL or NS as NPBL’s majority owner. Such a rate would actually discriminate in favor of CSXT – contrary to NPBL’s principle of neutrality. NS’s commitment to maintaining a cost-based, uniform switch rate for NPBL is not only faithful to the NPBL governing documents (which, CSXT selectively is willing to ignore), it also is the lowest terminal switching rate of any East Coast intermodal terminal – a fact not contradicted by CSXT’s Petition.

It is not a remarkable revelation, but one of the primary cost components of NPBL’s cost-based switch rate is the payment of trackage rights by NPBL to NS. Rather than trying to manipulate the NPBL switch rate indirectly through the NS’s trackage rights charges, NS has proposed that the NPBL trackage rights charges be determined in a proceeding before the Board in which CSXT has an integral part. Far from playing competitive games, NS has been working for the past 42 years to do just the opposite.

proceeding was for NIT to be eligible to obtain a reciprocal switch from CSXT. A remedy that already exists.

²⁹ Reply Comments of CSX Transportation, Inc., Petition for Rulemaking to Adopt Revised Competitive Switching Rules, E.P. 711 (submitted May 30, 2013), at 69.

The proposed authority sought by NS in its Application leaves nothing for further development in a significant transaction format. There is no additional information that NS could provide because there will be no changes. There is no means for NPBL to produce a detailed explanation on how operations will change between pre-approval and post-approval; they will be the same. There is no means for NPBL to produce a detailed explanation on how CSXT access will change between pre-approval and post-approval; they will be the same. There is no means for NPBL to produce a list of rail construction or rail retirement projects because there will be absolutely none that arise from the approval sought by the Application.

C. CSXT's Claims that the Federal Court Cases Demonstrate Antitrust Behavior When They Do Not

Notwithstanding the litany of allegations that CSXT claims to have presented to the federal courts, “CSX’s lone antitrust damages theory is that it was excluded as a competitor from on-dock rail access at NIT....”³⁰ The court found that, “even when CSX[T]’s evidence is viewed in the light most favorable to CSX[T], the evidence is insufficient for a reasonable juror to conclude that ... even a non-speculative de minimis percentage of its lost contracts, is predicated on actional overt acts occurring after 2012.”³¹ Similarly, in response to claims that NS unlawfully rejected CSXT’s 2018 service proposal, the court noted “CSX fails to demonstrate that its service proposal was denied, either expressly or implicitly, further failing to point to evidence capable of demonstrating that any presumed denial or implicit denial by NPBL was

³⁰ CSXT Transp. V. Norfolk S. Ry. Co., 648 F. Supp. Ed 679 *703 (E.D. Va. 2023) (“Summ. J. Op.”). Of course, CSXT is not excluded from accessing NIT. It has access via a switch by NPBL. The type of access that shippers voraciously advocated for in EP 711 but CSXT opposed. It is important to note that not one shipper has supported the notion that CSXT’s current access to NIT via switching is inadequate.

³¹ Summ. J. Op. at *705.

based on anything other than lawful business concerns or historic NPBL operating procedures.”³² Neither of these conclusions by the court has stopped CSXT from recycling similar claims before the Board. Most importantly, the federal antitrust case focused on harm to CSXT, not on harm to shippers. In fact, the court records were totally devoid of any direct evidence showing harm to shippers. In sharp contrast, the fundamental principle that governs the STB’s consideration of this minor application is what if any impacts there will be to the shippers. The bottom line is under the STB’s standard governing approvals of minor applications, the Board focuses on impacts to shipper not competing railroads, and future changes, if any, to shippers’ routing options. This Application clearly has no anticompetitive effects to the shipping community.

D. The Board’s Focus is on Impacts to Shippers, Not Competitors, and When Viewed in that Light, the NS Application “Clearly” has No Anticompetitive Impacts

1. The Impact on Shippers Anticipated from a Proposed Transaction has been the Consistent Focus of the STB.

Unlike the arguments advanced by CSXT in its failed antitrust case, the STB is not in the business of protecting competitors, especially with regard to disadvantages they already experienced.³³ Instead, “it is well settled that harm to individual competitors is not the same as harm to competition, and it is the latter that the statute requires us to assess.”³⁴ In the case of the

³² Id. at *712-713

³³ Norfolk Southern Railway Company, et al. – Joint Control and Operating/Pooling Agreements – Pan Am Southern LLC, FD 35147 (STB served July 21, 2008), slip op at 4 (citing Rio Grande Ind., Inc – Pur. & Track. – Soo Line R. Co., 6 I.C.C. 2d 854, 875 (1990) and Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 337-38 (1990) (the purpose of the antitrust laws is to protect competition, not competitors)).

³⁴ See, e.g., Canadian National Railway Co., et al. – Control – Illinois Central Corporation, et al., Decision No. 37, FD 33556 (STB served May 25, 1999), slip op. at 20 (“Competitive harm results from a merger to the extent that the merging parties gain sufficient market power to profit from raising rates or reducing service (or both). In evaluating claims of competitive harm, we

NS Application, CSX anticompetitive claims focus on the intermodal traffic flowing through NIT, an international intermodal throughput facility that, on the domestic side, experiences a significant amount of competition through rail, barge, drayage and long-distance trucking, and, on the ocean side, is extremely successful in competing with other Eastern US ports. It is this myriad of competitive options which CSXT conveniently forgets throughout its Petition, but it is that focus which forms the groundwork for determining whether a particular transaction described by an application is “minor” or “significant.”

2. The Standard the Board Applies when Determining Whether to Accept an Application as a “Minor” Transaction Focuses on Competitive Options for the Shipper, Not Whether There Is Rail To Rail Access To A Given Location

The standard the Board applies when determining whether to accept an application as “minor” is a simple one – one that CSXT itself articulated in a substantially similar case to this one, involving the renewal of a lease by CSXT of a rail line in Georgia:

The Board has determined that a transaction is minor when no “shipper would have fewer competitive rail alternatives as a result of the transaction.”[8] Not only will CSXT continue to operate over the Line, but GNRR and NSR will retain their existing rights. Under the Lease, no shipper would have fewer competitive rail alternatives. The Lease will not have any anticompetitive effects.

* * * *

There will be no reduction in the number of railroads serving any shipper and no railroads will be foreclosed from interchange as a result of the Lease. There will be no 2-1 corridors or shippers. The Lease is not a significant transaction as that term is defined in 49 C.F.R. §1180.2(b).

* * * *

The number of rail carriers serving each shipper on the Line will remain the same. The Lease will not result in a reduction in the number of competitive options for shippers. There are no instances where the Lease will result in any shipper served by two railroads being served by one railroad. The Lease will not change rail

distinguish harm caused by a transaction from disadvantages that other railroads, shippers, or communities may have already been experiencing.”)

operations or result in a reduction in rail service or competitive options. The Board has concluded that there would be “no adverse impact on competition” where a railroad acquired a line that it had been leasing.

CSXT Application – CSXT-1, at pp. 5, 6, and 9 (footnotes omitted), filed in CSX Transportation, Inc. – Lease – Western and Atlantic Railroad, FD 36220 (STB served April 8, 2019) (“W&R Decision”).

In that case, CSXT wanted the Board to approve a revised and amended lease whereby CSXT leased approximately 137.33 miles of rail line of the Western and Atlantic Railroad (“W&R”) since 1890. CSXT filed a minor application and made the points noted above in support of that application. Remarkably, CSXT only discussed “effects on competition” in less than a page. CSXT argued that “The Board has determined that a transaction is minor when no ‘shipper would have fewer competitive rail alternatives as a result of the transaction.’”³⁵ and relied solely upon the “no impacts” on shippers or operations argument.³⁶

CSXT also did not demonstrate that its control over the line had any positive effect on competition. CSXT argued that since there would be no effective change in impacts on competition and shippers resulting from STB approval of a continuation of the status quo, “the

³⁵ Minor Application filed by CSXT in CSX Transportation, Inc. – Lease – Western and Atlantic Railroad, FD 36220, submitted October 22, 2018, at 6.

³⁶ In its 2018 minor application, CSXT argued that it concerned a “minor” transaction based on the fact that the “Lease maintains the status quo to continue CSXT’s long-standing occupancy of the Line and is not a control or merger transaction.” *Id.* at 5. In a circumstance remarkably similar to that presented to the Board by the NS Application, CSXT itself omitted any of the voluminous but unnecessary analysis and studies it argues for in this proceeding. Instead, CSXT relied upon the fact that the status quo over the years would be maintained after the requested STB authority. “There will be no reduction in the number of railroads serving any shipper and no railroads will be foreclosed from interchange as a result of the Lease. There will be no 2-1 corridors or shippers. The Lease is not a significant transaction as that term is defined in 49 CFR 1180.2(b).” *Id.* In contrast, here, NS has put forth a robust competitive analysis as set out in the verified statements of Mr. McClellan and Mr. Fapp.

Board does not need to consider the public interest factors” in the granting of the STB consent for continuation of that status quo.³⁷

Instead, CSXT argued that STB approval of the status quo (the renewal of its lease), “will not increase CSXT’s market power. The Lease will not result in either higher rates or worsened service. It will provide stability.” The Board accepted that argument and approved it, finding:

Renewal of the lease is competitively neutral because it leaves CSXT in the same position that CSXT and its predecessors have occupied for more than a century. Nothing in the record indicates that existing transportation options for shippers and carriers would be reduced, or that any shipper would lose a competitive rail option. The record indicates that, not only would CSXT continue to operate over the Line, but that the lease does not reduce or limit existing rights of NSR and GNRR.⁴ (See Appl. 6.)

W&R Decision at 3.

Likewise, here, NS’s authorized control of NPBL will result in NPBL being operated in a manner wholly consistent with the governing document dating back to 1897. No existing transportation options for shippers and carriers will be reduced. No shipper will lose a competitive rail option. No existing rights of CSXT or NPBL will be reduced or limited in any way.

The notion that transactions should be viewed by the impacts on shippers, and not competing carriers, has been endorsed by the ICC and STB for decades. “It is well settled that harm to individual competitors is not the same as harm to competition, and it is the latter that the statute requires us to assess.” See, n. 33, *supra*; see also, Exhibit 1 detailing the numerous cases making the same point.

Here, no shipper will have fewer transportation options as a result of the transaction. In fact, no shipper or shipper association has ever filed a complaint at the ICC or the STB against

³⁷ Id. at 12.

NPBL or NS in the 42 years NS has controlled NPBL. No shipper organization, shipper, trucking company, or intermodal company has filed in support of CSXT's Petition in opposition to treatment of the transaction as minor. This opposition is being driven by CSXT - a competitor of NS- and solely because CSXT does not think NPBL's cost-based rate is low enough and/or CSXT believe it should have direct terminal trackage rights to NIT (which would add yet another carrier to an already constrained rail infrastructure to the potential detriment of shippers). When viewed in the correct context of "will the transaction have any impacts on shippers' existing options," the Application clearly shows that it will not. As such, the Application should be accepted as "minor."

E. None of the Verified Statements of Maryclare Kenney, Professor Carey, and Dr. Huneke Rebut The Fact That There Will Be No Adverse Impacts On Shippers

CSXT submits three verified statements with its Petition, consisting of statements from Maryclare Kenney, CSXT's Vice President of Intermodal and Automotive, Professor Julie M. Carey, an economist and Senior Managing Director with National Economic Research Associates, Inc., and Dr. William Huneke, a former Chief Economist and Director of the Office of Economics with the STB. None of what these individuals actually testify to, however, addresses the underlying issues before the Board. In fact, none of them actually provide analysis or evidence that establish that shippers, as opposed to CSXT, will see any reduction in their competitive options. Nor do they rebut the notion that NIT competes against other East Coast Ports and that the NPBL switching rate is the lowest rate among its peers at other ports. Simply raising questions, pointing to cases where there were significant changes in routing options, and pointing to an antitrust case it lost do not support converting this transaction from "minor" to "significant."

1. Kenney Statement

Ms. Kenney introduces herself as one of the architects behind the CSXT strategy to change the CSXT position at NIT.³⁸ Ms. Kenney's verified statement thus begins on the wrong foot, as these proceedings before the Board are not intended to be a vehicle to leverage a better competitive position for individual carriers, but in order to determine whether a transaction will prove harmful to shippers or (as it will be in this case) sustain the current competitive environment for shippers. Ms. Kenney furthers the common CSXT approach of raising as many questions as possible whether they have any substance or not while presenting no evidence of its own.³⁹

She claims that the 42 years of NS effective control of NPBL is precisely the problem notwithstanding that CSXT has the same access to NIT that it had prior to NS taking control of NPBL. In fact, CSXT has the same access it had in 1897, *i.e.*, switching access to the facilities served by NPBL and at a cost-based, uniform rate. Had CSXT believed that the NS control over NPBL constituted unlawful conduct that resulted in a clear and effective restraint on competition, as she alleges, then CSXT would have opposed the 1982 transaction and would have opposed the numerous subsequent transactions where the documents submitted to the ICC and STB clearly identified NS's control of NPBL. Certainly, if CSXT were concerned about NS's control, it would not have ratified that control when it contractually agreed to giving NS the majority of Board seats. At no time has CSXT opposed NS's control of NPBL (until now) or filed a

³⁸ VS Kenney at 1 (CSXT-1-540).

³⁹ *Id.* (stating that CSXT "will address the merits of NSR's request for control authority at the appropriate time"). See also, *Id.* at 5 (CSXT-1-544) ("my purpose in presenting this statement is not to address the underlying merits of NSR's application for control authority but to urge the Board not to treat the transaction as a minor application").

complaint alleging unauthorized control. In fact, as noted, CSXT specifically approved of and supported the codification of NS's control of NPBL when it ratified the agreement governing the existing Board structure. Ms. Kenney ignores this fact.

Ms. Kenney claims that CSXT has not used NPBL to switch traffic at NIT, relying instead on drayage,⁴⁰ but that is an economic choice made by CSXT with regard to how it provides service at one of several East Coast port terminals that it serves. Ms. Kenney claims that during the “extraordinary” events accompanying the February 2015 West Coast port labor strike, “the cargo surge at NIT created demand for drayage to CSXT’s rail terminal that could not be supported by truck drayage capacity.”⁴¹ Ms. Kenney does not discuss how CSXT or NS or other rail and carriers and trucking firms used their positions at other Eastern US ports to handle the surge in traffic caused by the strike. Ms. Kenney does not discuss how the entirety of the transportation network was brought to its knees by what NS agrees was an “extraordinary” event. Ms. Kenney does not discuss the simple fact that since 2010 CSXT’s movement of containers through NIT via its drayage operation has increased substantially or that CSXT’s share of traffic at the Port of Virginia has also increased substantially. All of this occurred during the precise time period that CSXT claims NS and NPBL were taking anticompetitive action against CSXT.⁴²

⁴⁰ VS Kenney at 2 (CSXT-1-541).

⁴¹ Id. This statement alone proves that drayage, either from NIT to CSXT or directly from NIT to destination, is an effective competitive option for shippers. NS’s Application already established that drayage from NIT to destination is already the preferred shipper alternative and has the largest market share.

⁴² POV’s March 6 filing confirms these comments.

Ms. Kenney makes much of the fact that drayage from NIT is difficult, having to traverse the Old Dominion University (“ODU”) campus and multiple residential areas, together with all of the traffic restrictions that naturally would be expected from that circumstance.⁴³ However, Ms. Kenney utterly fails to explain how, given the alleged difficulties of drayage, that drayage/trucking as a whole constitutes 59% of all POV cargo, compared to 36% by rail and 5% by barge.⁴⁴ NS is well aware that CSXT desires to use this proceeding to enhance its competitive position at NIT, but it is the STB’s role to address the competitive impacts of the proposed transaction for shippers; it is not the STB’s role to address the effects of the expansion and development of ODU (which was completely unrelated to NS’s control of NPBL) on one of CSXT’s avenues of access to one dock on the Eastern coast of the United States that is part of a vast competitive international intermodal transportation network.

2. Carey Statement

The verified statement of Professor Julie M. Carey makes much of the fact that there is no data or analysis regarding actual historical traffic movements, including origins, destinations, commodities moved, or routes/lanes currently used by NPBL shippers. In the case of a proposed acquisition of a rail line or other rail facility, or the actual acquisition of effective control of one rail carrier by another, where there are changes in routes, vertical foreclosure impacts, changes in operations and interchange points, such analysis should be provided. All of this would be important to “evaluate the potential competitive effects of the Transaction,” according to

⁴³ VS Kenney at 3 (CSXT-1-542).

⁴⁴ Application at 91, VS Fapp at 8.

Professor Carey. VS Carey at 3 (CSXT-1-562).⁴⁵ Similarly, Professor Carey argues that Mr. Fapp failed to do an analysis that compared other eastern seaboard terminals with regard to competitive route options, prices, and quality of service standard, and that Mr. McClellan failed to produce a detailed study of CSXT use of NPBL including analysis of products, origin/destination, and the like.⁴⁶

But none of those statements reflect the unique nature of this Application – one in which (1) there is no new transaction, but only a transaction that took place 42 years ago, and (2) a commitment by NS to continue to exercise its control in the same manner dictated by NPBL’s founding principles. Given that the conditions governing CSXT’s use of the NPBL line will not change if the STB grants the NS Application and that a pre and post transaction analysis would show no changes from what shippers have (and use) today, such studies will have no practical use for this Application.

For example, consider Professor Carey’s insistence on an economic analysis of a theoretical current state where there would be no NS control and a comparison of that world to what it is today.⁴⁷ Such a study would be similar to trying to determine what the US transportation system would be like had the Conrail transaction not been approved, and comparing that to today’s rail system. But, as noted, even if it could be done, it would show that NS’s control changed none of the means or methods by which NPBL operated prior to and after 1982. NPBL provides the same switching access it did prior to 1982 and its rate today is subject

⁴⁵ VS Carey at 7 (CSXT-1-566) (arguing that in this proceeding there is a need for an analysis that “would compare a pre-transaction state of the world that is free from NSR’s control of NPBL to a post transaction state of the world with NSR’s control”).

⁴⁶ Id. at 5 (CSXT-1-564), n. 13.

⁴⁷ Id. at 7 (CSXT-1-566).

to the same uniform cost-based principles set forth in NPBL's 1897 governing document. In fact, NS control arguably benefits CSXT. Absent NS control, an independent NPBL could charge market-based rates subject only to an unreasonable rate challenge. It is only because of NS's commitment to NOT changing the governing documents and to continuing to abide by the neutrality principle that has kept rates cost-based – and to CSXT's benefit.⁴⁸

Professor Carey claims that NSR's statement that it will keep NPBL's rates reasonable based on costs and will develop an appropriate trackage rights fee is "unsupported" even though NS specifically proposed to do exactly that under the guidance and direction of the STB itself.⁴⁹ But, she ignores the numerous precedents in major, significant, and minor transactions where the ICC and the Board relied upon such commitments in its analysis and findings. She also appears unaware that if in the future NS fails to abide by such commitments, a party can seek appropriate relief at the STB. NS has maintained the neutrality principle for 42 years and it plans to do so in the future.

In pointing out what she believes are major downfalls to the evidence submitted by NS, Professor Carey reveals her own shortcomings. She claims that "Mr. Fapp and Mr. McClellan identify transportation options theoretically available to shippers in the area. However, there is no evidence that any affected shippers *on the NPBL line* can and do use the alternative competitors identified by Mr. Fapp or Mr. McClellan (other ports, NPBL/CSXT, drayage to CSXT, NSR on-dock) for any product types and route options/lanes."⁵⁰ This demonstrates an

⁴⁸ As NS is the majority owner of NPBL, it could have voted its shares at any point to change the governing documents or to direct NPBL to charge a market based rate sufficient to achieve revenue adequacy. NS has not taken such actions and is committed to not taking such action in the future.

⁴⁹ VS Carey at 8 (CSXT-1-567).

⁵⁰ Id. at 4 (CSXT-1-563) (Emphasis added).

elemental misunderstanding of the appropriate scope of this Application. The relevant shippers are not those located “on the NPBL line,” but those shipping international intermodal containers. These shippers can use the POV, the Port of New York/New Jersey, Savannah, or others to move traffic in international shipping to and from a variety of internal US locations. Shippers can and do use rail at other ports, not only at POV but also at the Port of New York/New Jersey, Savannah, and other locations, in addition to alternative such as drayage and trucking. And at the POV (and even NIT itself), shippers have the option to use trucks to destination, NS direct, or drayage to CSXT. These options are not merely “theoretical” but are actually used by POV shippers – a fact that Professor Carey provides no evidence to counter the data provided by Mr. McClellan or Mr. Fapp. These options are very real and that fact stands unchallenged. Similarly, CSXT has not challenged the reality that these same transportation options will continue to exist if the STB grants its approval of the Application.

Professor Carey also fails to even understand some of the simpler arguments made by Mr. Fapp. In its Application, NS stated that “to the extent that CSXT seeks a lower rate for its traffic than that charged to all other users and NS, it is CSXT who seeks to impose a discriminatory rate in favor of its operations at NPBL and NSR’s expense.”⁵¹ In discussing this statement, Professor Carey states that the “NSR Application does not explain how CSXT could discriminate against NSR given that it does not use the NPBL line for intermodal traffic.”⁵² She misses the point. The whole remedy CSXT requests is for NPBL to charge a lower rate for intermodal traffic to/from NIT for CSXT’s sole benefit. In essence, CSXT was proposing the exact discriminatory treatment it claims to abhor, but apparently it would be acceptable if it

⁵¹ Id. at 9 (CSXT-1-568) (quoting from the NS Application at page 27, note 46).

⁵² Id.

avored CSXT rather than anyone else. CSXT wants to force NS to engage in differential pricing, but only for one market – the highly competitive market for intermodal containers. CSXT seeks to manipulate the Board processes to achieve a below-cost switching fee.

The STB should see CSXT's actions for what they are – an attempt to use government regulation to force its competitor, NS, to subsidize its operations. In contrast, NS prefers that NPBL be faithful to its governing documents by treating all parties equally and through a uniform, cost-based switching rate. Failure to do otherwise would require NPBL to charge higher rates to other users of the NPBL to make up the difference between its existing revenues (which, already are generated by a cost-based rate) and the lower revenues NPBL would receive by providing CSXT with an even lower switching rate. This in effect requires NS, as the majority owner, to shoulder any unreimbursed costs, and thus put NS in the role of subsidizing CSXT, its primary competitor. Importantly, neither Professor Carey nor CSXT detail why the existing NPBL-based switching rate prevents CSXT from using NPBL switching to/from NIT, and why the solution cannot be for CSXT simply to lower its line-haul rate.

Professor Carey's testimony in this proceeding also seems directly contrary to her testimony in other proceedings where she argued that "artificially low non-market rate[s]" (similar to the cost-based rate NPBL charges all users of its tracks) have "a profound impact on the competitive market dynamic," and that such rates, as opposed to a higher market-based rate, gave the trackage rights tenant (and not the landlord) "undue economic advantage for more than two decades."⁵³ Yet, here, she seems to argue for NPBL to charge an artificially low non-market

⁵³ KCS's Opening Statement and Evidence on Compensation Concerning BNSF's use of the Rosebluff Lead, submitted January 26, 2021, in BNSF Railway Company – Terminal Trackage Rights – The Kansas City Southern Railway Company And Union Pacific Railroad Company, FD 32760 (Sub-No. 46) at 15, note 28 ("Lake Charles Proceeding").

rate so that the tenant/user (CSXT) can have an undue economic advantage – she can’t have it both ways.⁵⁴

3. Huenke Statement

Dr. Huenke’s verified statement is the equivalent of crying fire in a crowded theater (ominously raising the specter that “if the STB rules that this is a minor transaction, given all of the history of competitive concerns associated with it, it begs the question: Will there ever be another significant transaction case if this precedent is set?”).⁵⁵ Despite his alarm, the history of the “competitive concerns” have been heard and have been soundly rejected by the court. He, like Professor Carey, presents no evidence of any potential reduction in shippers’ competitive options to justify rejecting the Application as “minor.” Rather, both he and Professor Carey simply raise questions to which they have no answers. He approaches the NS Application in a vacuum, completely ignoring the fact that the transaction at issue is formal confirmation of the effective control that NS has exercised over NPBL over the past 42 years, assumes the validity of antitrust allegations that have not been proven correct, and conflates protection of competition on behalf of shippers with protection of competition to benefit a particular competitor. This is surprising given Dr. Huneke’s numerous writings, listed in his verified statement, supporting the notion that what matters is the level of competition and impact on shippers and not the number of rail competitors or the impact on a particular competitor.

Dr. Huneke selectively quotes from Mr. Fapp’s verified statement, claiming that Mr. Fapp believes that “NS can unilaterally reduce competitive options without having a competitive

⁵⁴ If she were consistent with her testimony in the Lake Charles Proceeding, she should admit that even the SSW rate that NS proposes for NPBL’s trackage rights access will give CSXT (to the extent it uses NPBL) an “undue economic advantage” because it is not market based.

⁵⁵ VS Huneke at 3 (CSXT-1-588).

impact.”⁵⁶ That is not what was said, or implied. To be clear, Mr. Fapp was discussing the fact that the international container market served by NIT was already extremely competitive for ports, railroads, and trucking companies. The competition up and down the entire Eastern United States coast “leads to a highly competitive marketplace that provides NS’s competitors, including CSXT, numerous options to compete against NS for NIT traffic.”⁵⁷ The fact that drayage operations have been working for CSXT over the many years for traffic through NIT simply means that that drayage operation will continue be present for customers.

He also ignores that NS and CSXT are competing against trucking at POV or that POV competes against other East Coast ports. Customers currently using, or interested in using, CSXT services to move traffic to or from the Eastern United States coastal ports for access to international marine-served markets will, in a post-transaction environment, continue to have an enormous panoply of opportunities to do so. Nevertheless, NS has clearly committed to continue the CSXT access to NIT via NPBL switch at a uniform, cost-based rate, which rate includes, as a principle element, trackage rights over NS that is set in a Board proceeding based on SSW principles. This is the same type of access that CSXT had in 1897 and in 1982.

CONCLUSION

Boiled to its essence, CSXT’s Petition offers three main reasons to either reject the Application or convert it to significant: (1) the appeal process is not yet complete because the Supreme Court has not ruled on its petition for certiorari; (2) DOJ’s Antitrust Division wants to “investigate” CSXT’s allegations of past alleged collusion – allegations that have been rejected

⁵⁶ *Id.* What “competitive option” is being reduced is not explained. CSXT has the same competitive access to NIT now as it had prior to NS taking control of NPBL in 1982. And at the same cost-based uniform rate.

⁵⁷ VS Fapp at 16 (NS-1 at 98).

by every court that has reviewed them; and (3) three witness statements claim that the Application raises significant competitive concerns (while presenting no evidence or analysis themselves showing anticompetitive effects) and that NS should be required to provide substantial market analysis and data of the type required in other applications. None of these reasons justify reclassifying this Application as significant.

CSXT argues that the NS Application should be rejected because the Board stated it would benefit from the arguments and thoughts of the antitrust case brought by CSXT, including any appeals from such a decision. The history of that litigation (including the decision of the appeals court) is also known and available to all of the parties. The antitrust case has been tried before a federal district court which soundly decided the case against CSXT on the basis of a summary judgment motion. The case was heard on appeal, and again the decision went against CSXT. As discussed above, even if CSXT's certiorari petition is granted, such a review would only focus on past conduct. Accordingly, this petition will have no impact on the Board's review of the any *future* impact of NS's control of NPBL. The record is known by all and ready for presentation and argument before the Board. Further delaying tactics by CSXT should not be tolerated by the Board.

The fact that the Antitrust Division has opened an investigation into past conduct undertaken by NS and NPBL also does not justify delay here. The claims apparently being investigated by the Antitrust Division have already been the subject of extensive briefing and adjudication in the federal antitrust litigation, with the courts determining any alleged antitrust behavior, even when viewed in a light most favorable to CSXT, must be dismissed. NS is confident that, upon review of the facts, DOJ will reach the same conclusions as the courts did. In addition, the DOJ investigation is a review of past behavior, not the forward-looking review

that must be conducted by the STB. The STB's focus is impact on competition, not competitors. If CSXT or POV have evidence of potential competitive harm to shippers that will occur in the future if the Application is approved, it will have the opportunity to present such evidence; there is no need for further delay.

The fact that other minor transactions were converted to significant is not justification to do so here. Those transactions had significant changes in routes, operating practices, changes in interchange, and vertical foreclosure issues. There is no need for a myriad of studies to determine the likely effects that would occur if NS controlled NPBL, because in this case, the Board and all interested parties already have access to the best possible evidence: 42 years of actual evidence of what has happened since NS took control. This evidence shows that NS has not forced NPBL to act in other than a neutral manner consistent with its 1897 governing document. NS has not forced NPBL to charge CSXT more than a uniform cost-based switching fee. NS has not forced NPBL to agree to pay an NS market-based trackage rights fee, which NPBL then would need to account for in setting NPBL's cost-based switch fee, thereby increasing the costs to CSXT and others. And on a going forward basis, NS has committed to do the same.

CSXT's witnesses offer absolutely zero competitive analysis as to how NS's 42 years of control of NPBL will result in reduced competitive options for shippers in the future or how NS's control has resulted in changes to how NPBL operated prior to NS taking control. Failing to show any evidence, shipper support, or case law in support of its requests, CSXT's demands should be rejected.

The NS Application should be accepted as a minor transaction as it clearly shows, on its face, that there are no shippers who will see any reduction in their competitive routings and

options, just as those shippers have seen no reduction in their competitive routings and options over the past decades when NS acted on the mistaken belief that NS had the very control approval NS seeks today. NS has committed to continue to operate NPBL on the basis of a uniform cost-based switch fee, consistent with its 1897 governing principle. In addition, NS will try (once again) to have the NPBL trackage rights compensation determined on SSW principles through an open proceeding before the Board.

It is time to move forward. CSXT should not be permitted to delay this further. Its Petition must be denied.

Respectfully submitted,

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March 7, 2025

**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**

EXHIBIT 1

Proceeding and case citation	Description	Decision Reason
CSX Corp, et al. – Control and Operating Leases/Agreements – Conrail, Inc. et al., Decision No. 96, FD 33388, served October 19, 1998		“The Board’s role here is to protect competition, not competitors. We find that intermodal shippers in Northeast Ohio will benefit from the transaction, and that Neomodal will benefit from the conditions we have imposed to protect the essential service offered by W&LE. No additional conditions are necessary or warranted.” Slip op. at 18.
CN Railway Co., et al. – Control – IC, et al., Decision No. 37, FD 33556, served May 25, 1999		Competitive harm results from a merger to the extent that the merging parties gain sufficient market power to profit from raising rates or reducing service (or both). In evaluating claims of competitive harm, we distinguish harm caused by a transaction from disadvantages that other railroads, shippers, or communities may have already been experiencing. Wherever feasible, we impose conditions to ameliorate significant harm that is caused by a merger. Our general policy statement on rail consolidations, codified at 49 CFR 1180.1, recognizes that potential harm from a merger may occur from a reduction in competition, 49 CFR 1180.1(c)(2)(i), or from harm to a competing carrier’s ability to continue to provide essential services. 49 CFR 1180.1(c)(2)(ii). In assessing the probable impacts and determining whether to impose conditions, our concern is the preservation of competition and essential services, not the survival of particular carriers. An essential service is defined as one for which there is a sufficient public need, but for which adequate alternative transportation is not available. 49 CFR 1180.1(c)(2)(ii).” Slip op. at 20.

NSR, et al. – Joint Control and Operating/Pooling Agreements – Pan Am Southern LLC, FD 35147, July 21, 2008	NS and Pan Am developing the Pan Am Southern. VRS seeking to reclassify the proceeding as a significant transaction because the transaction would lessen the need for haulage over the VRS, and thus the reciprocal haulage of VRS over the NECR, through which VRS connects with CSXT.	Denied. “Even if this would adversely affect VRS, it is well settled that harm to individual competitors is not the same as harm to competition, and it is the latter that the statute requires us to assess.” Slip op. at 4 (citing Rio Grande Ind., Inc – Pur. & Track. – Soo Line R. Co., 6 I.C.C. 2d 854, 875 (1990) and Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 337-38 (1990) (the purpose of the antitrust laws is to protect competition, not competitors).
CPR Limited, et al. – Control – KCS, et al., Decision No. 35, FD 36500, served March 15, 2023.	NS responsive application for contingent trackage rights between Meridian and Wylie and CN seeks divestiture of an IC line. Decided under pre-2001 policy.	“It is also not surprising that the other Class I railroads seek conditions and other remedies that appear aimed at protecting their own traffic from competition with CPKC and at limiting the ability of the combined CPKC to meet its potential. Consistent with the Board’s policy to protect competition and not competitors, the Board is denying those requests while also ensuring that existing competitive gateway options are preserved.” Slip op. at 3-4. “In evaluating claims of competitive harm, the Board recognizes the distinction between harm caused by a transaction and disadvantages that other railroads, shippers, or communities may have already been experiencing. CN-IC, 4 S.T.B. at 140. The Board’s concern is the preservation of competition, not the survival of particular carriers. Id.” Slip op. at 19.
Genesee & Wyoming Inc. – Control – RailAmerica, Inc., et al., Decision No. 2,	G&W seeking to acquire control of RailAmerica, seeking designation	“Our analysis of the effect on competition appropriately examines not how many railroad holding companies there are, or how many miles they operate, but rather whether the combination would have an

FD 35654, served Sept. 5, 2012	of the transaction as minor.	adverse effect on shippers and communities.” Slip op. at 5.
CSX Transportation, Inc. – Lease – Western and Atlantic Railroad, Decision No. 1, FD 36220, served November 21, 2018	CSX wants to continue to lease the W&A from the State of Georgia,	“Based on a review of the application, the Board finds that the proposed Lease would be a “minor transaction” under 49 C.F.R. § 1180.2(c). Nothing in the record thus far suggests that the Lease would have anticompetitive effects, because the Lease proposes to generally maintain the status quo by allowing CSXT to continue operating over the Line as it and its predecessors have done since 1890. The application indicates that, not only would CSXT continue to operate over the Line, but NSR and GNRR would “retain their existing rights.” (Appl. 6.) It does not appear, under the terms of the proposed Lease, that any shipper would have fewer competitive rail alternatives as a result of the transaction.” Slip op. at 5.
NSRC, et al. – Acquisition – Trustees of the Cincinnati Southern Ry, Decision No. 2, FD 36699, served Sept. 20, 2023	Change a lease to acquisition with no changes in operations etc.	Transaction would not likely result in a substantial lessening of competition or create a monopoly or restraint of trade. “As the Board noted in Decision No. 1, Applicants state that they will continue to operate the CSR Line in the same manner as they have for more than a century, with no change in service patterns or train operations anticipated as a result of the Transaction. Decision No. 1, FD 36699 et al., slip op. at 4; (see also Appl. 7). The record indicates that the Transaction will not cause reduction in the competitive options available to shippers and that no connecting railroad will be foreclosed from interchange. (Appl. 7.) The record further indicates that no shipper will have fewer competitive rail options and that longstanding operations on the Line will continue unchanged. (Id. at 6.) Notably, no comments were filed asserting that the Transaction would have any

		anticompetitive effects, let alone ones that are both “likely” and “substantial.” Due to the absence of anticompetitive effects, the Board need not analyze and weigh the Transaction’s anticipated contribution to the public interest in meeting significant transportation needs, see 49 C.F.R. § 1180.2(b), or consider the imposition of competition-related conditions.” Slip op. at 4.
Soo Line Corp. – Control – Central Maine & Quebec Railway US Inc., Decision No. 3, FD 36368, served May 4, 2020	Soo acquires control of Central Maine and Quebec	“Nothing in the record indicates that any shippers would experience reduced competitive rail service options as a result of the Transaction.” Slip op. at 4.
NSRC – Acquisition and Operation – Certain Rail Lines of the Delaware and Hudson Rwy Co., Inc., Decision No. 6, FD 35873, served May 15, 2015	Authorizes the acquisition of the D&H	“In addition, although a transaction may result in some general changes to competition for specific shippers, the Board seeks to protect competition overall, not specific competitors. See, e.g., Canadian Nat’l Ry. Co.,—Control—III. Cent. Corp., FD No. 33556, slip op. at 20 (STB served May 25, 1999); Wisc. Cent. Transp. Corp.—Continuance in Control—Fox Valley & W. Ltd., (Wisc. Cent/Fox Valley 1992) 9 I.C.C.2d 233, 239-40 (ICC served Dec. 4, 1992).” Slip op. at 18. “In addition, it is well settled that, in exercising its conditioning power, the Board seeks to protect competition, not individual competitors. See CN/IC, slip op. at 20 (stating that “[i]n assessing the probable impacts and determining whether to impose conditions, our concern is the preservation of competition and essential services, not the survival of particular carriers.”); Wisc. Cent/Fox Valley 1992, 9 I.C.C.2d at 239-40 (denying request for haulage arrangements or pricing and service commitment authority where

		party's request centered on "traffic subject to diversion from its system," rather than on potential harm to competition). While the termination of the haulage, marketing, and rate agreements on the Southern Tier might increase the complexity of GWI's routing options by adding another carrier, GWI has not presented evidence that this change is actually anticompetitive. The Board expects that NSR will continue to work cooperatively with GWI and other carriers to maximize the timely and efficient handling of freight and ensure the fluidity of service in the region. However, the Board will deny all of GWI's requested conditions." Slip op. at 26.
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