

Before the
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 36522

NORFOLK SOUTHERN RAILWAY COMPANY
—PETITION FOR DECLARATORY ORDER

CSXT's Reply Statement

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TABLE OF CONTENTS

1.	Introduction and Summary	1
2.	Reply Argument	5
2.1	ICC/STB control authority cannot be obtained as a “byproduct” of another transaction.	6
2.2	Far from supporting NSR’s claim, the Petition conclusively demonstrates that NSR did not seek or obtain control authority.	8
2.3	The mere disclosure of NW’s and SRC’s ownership interests in NPBL was not enough for NSC to obtain ICC authority to control NPBL.	12
2.4	The ICC’s related authorization to construct and operate over a new connection track in the Norfolk area has no bearing on whether the ICC authorized NSC to control NPBL.	16
2.5	NSR did not obtain ICC/STB control authority over NPBL in later exemption proceedings.	18
2.6	The conduct of NPBL’s owners cannot substitute for ICC/STB control authority.	19
2.7	NSR cannot assert antitrust immunity based on control authority it never obtained.	20
2.8	Accepting NSR’s position could lead to widespread abuse of the Board’s processes and the statutory immunity that flows from grants of control authority.	21
3.	Conclusion	22

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CSXT's Reply Statement

1. Introduction and Summary

CSXT,¹ NSR and NPBL each submitted opening statements in this proceeding on September 23, 2021. CSXT hereby replies to NSR and NPBL.

NSR argues that it acquired authority to control NPBL in 1982, when the ICC authorized NSR's predecessor to control NW and SRC and the rail carriers that were already controlled by NW and SRC, and that the control authority it obtained in 1982 gave NSR antitrust immunity with respect to dealings with NPBL for all time. NSR's theory as to how it came to obtain control authority and corresponding antitrust immunity is unprecedented and is a direct challenge to the STB's authority over rail carrier control transactions.

According to NSR, its predecessor NSC managed to obtain authority to control NPBL and the power to treat NPBL as a commercial instrument to advance NSR's interests merely as the "byproduct" of a different transaction (the transaction involving NW, SRC and its already-controlled subsidiaries). Under NSR's theory, NSC obtained such "byproduct" control authority without

¹ Unless otherwise defined herein, the acronyms and defined terms used in this CSXT Reply are the same as those used in the CSXT Opening Statement.

ever asking for authority to control NPBL; without submitting a scrap of evidence supporting the exercise of control over NPBL; without the ICC ever acknowledging a request for control authority over NPBL; and without any ICC ruling or statement whatsoever indicating that it was authorizing control over NPBL. Indeed, perhaps most astonishing is that under NSR's theory, NSC supposedly obtained control authority over NPBL and antitrust immunity even though applicants specifically told the ICC that they had no intention of exercising control over NPBL or other similarly situated carriers after the NW/SRC transaction was approved.

NSR's Opening Statement does not focus on how it is possible to acquire control authority under a statute that explicitly requires an applicant to request authority to control another rail carrier and that further explicitly requires the agency to determine whether such control authority would have any anticompetitive effects and would be in the public interest. Nor does NSR explain how antitrust immunity could be available to exercise a control authority it never requested and the ICC never evaluated. NSR's Opening Statement doesn't even acknowledge that its predecessors explicitly told the ICC that they were not seeking to control NPBL. Under NSR's "byproduct" theory, ICC control authority and broad antitrust immunity simply appeared out of thin air.

Accordingly, NSR's Opening Statement puts into stark relief the contrast between the parties' positions. As CSXT explained, an applicant for authority to control another rail carrier must actually ask the ICC/STB for such authority, the ICC/STB must then review the request, evaluate evidence submitted in support of it and then grant, deny, or modify the request based

on the statutory public interest standard. Only after the ICC/STB has evaluated the public interest factors, including potential competitive effects, is antitrust immunity available under § 11321 to avoid interference with the ICC/STB's authority.

Under NSR's theory, however, control authority can be obtained without asking for it, without submitting any evidence on the competitive effects of such control authority, without any evaluation by the agency of the competitive effects of control, and without any statement by the agency that it was granting control authority. Indeed, for NSR it is possible to obtain control authority even after telling the agency that the applicant did not intend to control the rail carrier and then obtain antitrust immunity in order to conspire with the carrier. The dangers to the STB's licensing regime should be obvious; accepting NSR's position would encourage merger applicants to evade scrutiny of control transactions and claim immunity that the agency never intended or granted.

Most of NSR's Opening Statement sets forth various defensive arguments seeking to explain why NSR never asked for control authority. None of these arguments supports NSR's claim that it obtained ICC authority to control NPBL and antitrust immunity in its treatment of NPBL.

NSR first argues that the ICC allowed its predecessors to ignore NPBL and information relating to the potential effects of controlling NPBL when the ICC granted their petition for waiver and clarification. But what NSR fails to acknowledge is that the ICC clarified that the applicants did not need to provide information about rail carriers such as NPBL precisely because the applicants told the ICC that they were not seeking authority to control those rail carriers.

NSR then argues that its predecessors didn't have to provide any information about NPBL because they disclosed the fact, in a corporate ownership chart, that subsidiaries of NW and SRC would, in the aggregate, own 57% of NPBL. But the mere "disclosure" of these ownership interests in a chart buried in an application for control authority over different rail carriers cannot possibly constitute a request for control authority sufficient to satisfy the statute. Indeed, NSR had also "disclosed" to the ICC that regardless of any combined ownership interest resulting from the transaction, NSR was not seeking control authority over NPBL. Moreover, ownership interest, on its own, is not dispositive on the question of control.

Next, even though the Court's referral only focuses on the 1982 ICC decision, NSR argues that it obtained authority to control NPBL after 1982 by invoking the "class" exemption established by the ICC/STB for "corporate family" transactions. But NSR fails to grapple with the fact presented by CSXT that NPBL was never mentioned in the filings or decisions associated with those ICC/STB exemption proceedings. NSR also neglects to acknowledge that the class exemption invoked in those proceedings is only available for a transaction that does not result in "a change in the competitive balance with carriers outside the corporate family." 49 C.F.R. § 1180.2(d)(3).

Finally, NSR and NPBL suggest that various actions taken by NPBL and its owners since the 1982 NW/SRC transaction are evidence that NSR obtained control authority at some point from the ICC/STB.² It is unnecessary to address the accuracy of the facts alleged by NSR and NPBL because they

² Despite NSR claiming that NSR and NPBL should be treated essentially as part of a single family, NSR and NPBL are participating separately in this proceeding and are represented by different counsel.

are irrelevant to the question posed to the Board by the Court. The statute requires that control authority be affirmatively granted by the ICC/STB, not simply evidenced via third-party conduct. It is absurd to suggest that NSR's predecessors and the owners of NPBL could, through their own private actions, create antitrust immunity.

NSR and CSXT generally agree that statutory immunity to allow a person (such as NSR) to exercise control over a railroad (such as NPBL) can only exist if the ICC/STB has granted that person authority to control that railroad. But that antitrust immunity does not and cannot exist where, as here, a railroad uses another rail carrier as its commercial instrument to exclude a competitor without ever asking for control authority, without submitting any information supporting its request for control authority, when ICC/STB never analyzed whether such control is in the public interest, and when neither the ICC nor the STB ever authorized such control. NSR cannot claim a statutory immunity from CSXT's court claims that NSR and NPBL have illegally monopolized NIT and stifled competition with CSXT.

2. Reply Argument

NSR advances various theories in a discursive and ultimately unavailing attempt to establish that the ICC granted NSC authority in 1982 to control NPBL. CSXT established definitively in its Opening Statement that NSC did not seek or obtain ICC authority to control NPBL through the NW/SRC consolidation. As described below, none of the NSR arguments set forth in their Opening Statement contradict this conclusion.

2.1 ICC/STB control authority cannot be obtained as a “byproduct” of another transaction.

NSR’s basic theory is that it obtained authority to control NPBL as a “byproduct” of the transaction in which the ICC authorized NSC, the predecessor to NSR, to control NW, SRC, and the rail carriers that NW and SRC already controlled. According to NSR, “[t]here was no need for specific ‘approval’ of NPBL or for an ‘announcement’ that NSC would indirectly control NPBL. The indirect control was a byproduct of the 1982 [t]ransaction.” NSR Opening at 10. Under this unprecedented “byproduct” theory, an ICC control license and full antitrust immunity for all time simply materialized implicitly. NSR didn’t have to ask for it, the ICC didn’t have to evaluate evidence about it, and the ICC didn’t have to grant the authority. It just came into effect *sub silentio* as a byproduct of the NSC, NW, and SRC transaction.

NSR never explains how this “byproduct” control license is consistent with the explicit requirement of the statute that control over another rail carrier can only be acquired “with the approval and authorization of the Board,” 49 U.S.C. § 11323, and only “on application of the person seeking that authority.” 49 U.S.C. § 11324(a). As CSXT established in its Opening Statement, if ICC/STB authority is required to control a carrier (especially a terminal railroad owned by connecting railroads), such authority must be explicitly requested, evaluated based on evidence submitted, and expressly authorized by the ICC/STB. *See* CSXT Opening at 26-29. None of that occurred here with respect to NPBL.³

³ NSR also argues that, because NPBL was purportedly an “affiliated carrier” of NW and SRC at the time of the NW/SRC transaction, the language in the ICC’s 1982 decision authorizing NSC to control the “affiliated carriers” of NW and SRC encompassed NPBL. NSR Opening at 11-12. Regardless of whether or not NPBL met the dictionary definition of “affiliated” with respect to NW or SRC, the ICC said clearly that “[t]he affiliated companies of NW and [SRC] are set forth in appendix A” to the decision. *Norfolk S. Corp.—Control—Norfolk*

NSR claims that the ICC’s 1982 decision “authorized NSC to acquire indirect control” over NPBL. NSR Opening at 3. To be clear, language to that effect appears nowhere in the ICC’s 1982 decision. NSR never explains how its predecessors were able to avoid the explicit statutory requirements for an applicant to seek control authority, submit relevant information, and for the agency to expressly grant such authority. The statute cannot be circumvented merely by claiming that control authority was “indirectly” granted as a result of another transaction. As discussed below in Section 2.8, adopting NSR’s argument would be dangerous precedent that would open the door to abuse of the Board’s licensing regime and the statutory immunity provision.

The STB recognizes that a member of a corporate family may have “indirect” control over a rail carrier if another member of that corporate family *already controls* the rail carrier. Thus, if Company A owns Company B, Company A “directly” controls Company B. And if Company B owns Company C, then Company C is “directly” controlled by Company B, and “indirectly” controlled by Company A. But a direct control relationship must exist before there can be an indirect control relationship.⁴ Here, NPBL was never

& W. Ry. Co. & Southern Ry. Co., 366 I.C.C. 173, 177 n.3 (1982). As CSXT established in its Opening Statement at 20, the NW and SRC system companies listed in Appendix A to the ICC decision did not include NPBL. Yet again, NSR mischaracterizes the unambiguous text from the 1982 ICC proceeding.

⁴ A recent control transaction involving the Genesee & Wyoming corporate family of short-line railroads provides an example of how indirect control authority is correctly obtained. Genesee & Wyoming Inc. (“GWI”) was a publicly-traded non-carrier holding company that controlled, through direct or indirect equity ownership, 106 rail carriers (the “GWI Railroads”). The transaction involved DJP XX, LLC (“DJP”) obtaining all of the shares of GWI, and Brookfield Asset Management, Inc. (“Brookfield”) controlling DJP through equity ownership. Applicants explained that the transaction caused (1) DJP to indirectly control the GWI Railroads through DJP’s direct control of GWI, and (2) Brookfield to indirectly control the GWI Railroads through Brookfield’s direct control of DJP and DJP’s direct control of GWI. See *Brookfield Asset Mgmt., Inc. & DJP XX, LLC—Control Exemption—Genesee & Wyo. Inc., et al.*, FD 36326, Verified Notice of Exemption at 2 (filed July 9, 2019). Applicants listed in an exhibit

controlled by any other entity at the time of the 1982 transaction and the ICC never granted any entity control authority over NPBL through that transaction.

The 1982 transaction involved both “direct” and “indirect” control authorization, but not with respect to NPBL. While the ICC’s 1982 decision did not differentiate between direct and indirect control, NSC clearly obtained ICC authority to directly control NW and SRC. Moreover, NW and SRC already controlled several consolidated system railroads. Those controlled railroads were identified in the appendices to the Petition. When NSC was authorized to control NW and SRC, NSC obtained “indirect” control over those already controlled subsidiaries.

But NPBL was not controlled by any other company at the time. NSC did not obtain “indirect” authority to control NPBL because there was no pre-existing control relationship and no control authority (whether direct or indirect) was either sought by applicants or granted by the ICC. ICC/STB control authority, whether direct or indirect, cannot be created out of nothing. It did not exist with respect to NPBL prior to 1982 and it was not created in 1982. NSR never obtained any type of authority to control NPBL, direct or indirect.

2.2 Far from supporting NSR’s claim, the Petition conclusively demonstrates that NSR did not seek or obtain control authority.

NSR seeks to justify the failure to submit any information in the 1982 proceeding about the potential effects of an acquisition of control over NPBL

to their notice of exemption each of the GWI Railroads that Brookfield and DJP would indirectly control.

on grounds that the ICC granted the petition for waiver and clarification (the “Petition”) of NW and SRC and thereby freed the transaction applicants “from the requirement to present relevant operating, financial, and competitive data for NPBL.” NSR Opening at 5. NSR mischaracterizes the Petition. Indeed, the reason that the ICC waived the information requirements that would have been required if control of NPBL was being sought was that NW and SRC explicitly stated in the Petition that they did not seek to control NPBL.

CSXT provided a comprehensive analysis of the Petition in its Opening Statement at 12-15. As CSXT explained, at the time of the NW/SRC consolidation, the NW and SRC railroad systems consisted of NW and SRC, along with a number of subsidiary rail carriers controlled by NW and SRC. Under the ICC’s regulations, all of these subsidiary rail carriers would have been considered “applicants” in the forthcoming control application, and extensive data would have been required for each carrier. Through the Petition, NW and SRC successfully sought to narrow the term “applicant” used in the ICC’s regulations to only the “initiating parties” in the control transaction – NW, SRC, NWS,⁵ and D&H – and not “the numerous subsidiary carriers of the initiating parties.” Petition at 11.

NW and SRC listed the rail carriers that they controlled in Appendices A and B to the Petition.⁶ Petitioners sought clarification from the ICC that they

⁵ NWS changed its name to NSC after filing the application and before the issuance of the ICC’s decision approving the transaction. *See* 366 I.C.C. at 173 n.2.

⁶ NSR incorrectly states that “[t]he only carriers required to be listed in those Appendixes were carriers that were wholly-owned by SRC and [NW].” NSR Opening at 10. NSR uses this as a purported basis for NW and SRC not listing NPBL in these Appendixes, because NPBL was not wholly-owned by either NW or SRC. *See id.* In fact, the criteria for listing a carrier in the Appendixes was not whether SRC or NW owned 100% of a subsidiary carrier, but rather whether the carrier was *controlled* by SRC or NW, was part of their respective consolidated systems, and therefore would be controlled by NSC post-transaction. Indeed, a number of the carriers listed in these appendices were *not wholly-owned* by either

would not need to submit separate data regarding these controlled subsidiaries because (1) SRC and its consolidated companies already submitted their required reports to the ICC on a system basis, and (2) NW had the overwhelming share of gross operating revenues and expenses of the NW system, even though NW and its controlled carriers did not generally consolidate its reporting on a system basis. *Id.* at 4-7. Petitioners made it clear that they submitted this request in order to reduce burden and red tape, and that the ICC could sufficiently evaluate the NW/SRC proposal using the information provided on a consolidated system-basis for SRC and on a company-basis for NW. *See id.* at 6-7.

In addition to the rail carriers controlled by NW and SRC and listed in Appendices A and B to the Petition, NW and SRC each held *non-controlling* minority equity interests in several other rail carriers – such as NPBL – “which are operated independently of the NW or SRC systems.” *Id.* at 11-12. Petitioners clearly contrasted these “non-controlled” railroads with the “consolidated system companies” of NW and SRC. *See id.*

Petitioners were concerned that the ICC’s regulations would also consider such non-controlled companies as “applicants,” and therefore require the submission of extensive data regarding their operations and finances. Petitioners noted that this “would serve no useful purpose and would substantially burden the record,” because the Petitioners “*have no intention of exercising control over any such companies after the control transaction is*

SRC or NW. There is no doubt that the ICC authorized NSC to acquire control of these carriers – not because of any arbitrary ownership percentage, but because the applicants represented to the ICC that they were part of their consolidated systems and that NSC would control the carriers post-transaction. Accordingly, the ICC listed those system carriers in Appendix A to its approval decision. That is how the ICC process was supposed to work, and it demonstrably did not happen as to NPBL.

approved.” Id. at 12 (emphasis added). Therefore, Petitioners also sought clarification that the term “applicant” in the ICC’s rules did not include such non-controlled carriers. *Id.* The ICC ultimately granted the Petition and made the clarifications requested by Petitioners.

The difference between these two requests is vital to the instant analysis. Petitioners sought clarification that the subsidiary carriers controlled by NW and SRC were not “applicants,” because – despite the fact that NWS would control those carriers after the transaction – the data submitted by NW and SRC was sufficient for the ICC to consider the effect of NWS obtaining control of the NW and SRC systems. On the other hand, Petitioners sought clarification that the numerous non-controlled carriers in which NW and SRC held minority equity interests (including NPBL) were not “applicants” because NW and SRC would not seek to control those carriers, and thus data submitted about them would “serve no useful purpose.” *Id.*

In its discussion of the Petition, NSR acknowledges that NPBL was one of the non-controlled carriers. *See* NSR Opening at 7. But NSR conveniently glides over the differing treatment in the Petition of controlled and non-controlled carriers. Incredibly, NSR *fails to even mention* Petitioners’ definitive statement that they did not intend to exercise post-transaction control over non-controlled carriers such as NPBL. Petitioners sought and received ICC clarification that such non-controlled carriers would not be “applicants” because Petitioners had no intention for the transaction to result in the control of such carriers. In fact, the Petition established conclusively that the forthcoming control application would not result in NWS/NSC controlling NPBL or the other non-controlled carriers.

2.3 The mere disclosure of NW's and SRC's ownership interests in NPBL was not enough for NSC to obtain ICC authority to control NPBL.

NSR also argues that the mere disclosure in the Application of the equity ownership interests of NW and SRC in NPBL was sufficient for NSC to obtain ICC authority to control NPBL through the ICC's approval of the NW/SRC consolidation. NSR claims that, because Applicants disclosed the extent of share ownership held by NW and SRC, "[t]he ICC and the public were therefore on notice that after the transaction NSC would own a combined interest of 57.14% and have de facto control of NPBL." *Id.* at 10. *See also id.* at 5 ("[T]he ICC was fully aware of the respective ownership interests in NPBL and that approval of the transaction would result in NSC have [sic] majority ownership, and thus control, of NPBL.").

NSR's "notice" theory based on disclosure of the ownership amounts has a fatal and obvious flaw. Applicants may have notified the ICC and the public that the transaction would result in NSC controlling *separate* companies (NW and SRC) that had an aggregate ownership of 57% of NPBL. But NSR's predecessor also notified the ICC and the public that *it was not seeking control over NPBL*. The Petition could not be clearer on that point, and the ICC and the public are entitled to rely on its words in evaluating the proposed transaction. NSR is simply wrong to state that "[t]he ICC and the public were therefore on notice that after the transaction NSC would . . . have de facto control of NPBL." *Id.* at 10.⁷ To the contrary, the ICC and the public were on

⁷ One of the meanings of "de facto" is "[a]ctual; existing in fact; having effect even though not formally or legally recognized," and another is "[i]llegitimate but in effect." *De facto*, Black's Law Dictionary (11th ed. 2019). By using this term, it is not clear whether NSR is conceding that the ICC did not legally recognize any NSC control of NPBL, or that any NSC control of NPBL was illegitimate.

notice, by virtue of NSC's explicit representation in the Petition, that NSC was *not* going to control NPBL.

There is no doubt that the Application included a corporate chart listing all of the railroads in which NW and SRC held an ownership interest. This was a basic information requirement in any control transaction. The chart included NW and SRC system railroads that NSC would control post-transaction, in addition to the independent railroads over which NW and SRC had "no intention of exercising control" post-transaction, as discussed above. NPBL is listed in the chart, along with the information that NW owned 28.57%, SRC owned 14.29%, and Norfolk Southern (a wholly-owned SRC system railroad) owned 14.28%, for a total of 57.14%.

But the mere fact that NPBL was listed in the corporate chart is totally irrelevant to the question whether control authority was sought or granted relating to NPBL. Moreover, NSR does not even attempt to explain how the mere listing of NPBL on the corporate chart could begin to satisfy the statutory and regulatory requirements that control authority be sought, evaluated, and granted by the agency. Indeed, the corporate chart listed several belt and terminal railroads in which NW and SRC held some ownership interest, and some of those railroads were listed in Appendix A to the ICC decision as those railroads that NSC would control post-transaction, and others (including NPBL) were not.⁸

⁸ For example, the following belt/terminal railroad companies listed on the corporate chart *were not* included in Appendix A to the ICC decision: (1) The Akron & Barberton Belt Railroad Company (25% owned by a wholly-owned NW subsidiary), (2) The Cincinnati Union Terminal Company (14.29% owned by a wholly-owned SRC subsidiary and 14.28% owned by NW), and (3) NPBL (28.57% owned by NW and 28.57% owned by SRC and a wholly-owned SRC subsidiary). On the other hand, the following belt/terminal railroad companies *were* included in Appendix A to the ICC decision: (1) Atlanta Terminal Company (100% owned by

The fact that NPBL is listed on the corporate chart is therefore irrelevant to the question of control. The applicants apparently made the deliberate choice to exclude NPBL and other not-wholly-owned terminal railroads from the list of railroads that NSC would control. This makes sense, given (1) the structure and purpose of NPBL and other terminal railroads as independent entities intended to serve their owners on a neutral and non-discriminatory basis, and (2) applicants' intention to keeping NW and SRC as separate railroad systems and corporate entities under common control of NSC.

NSR's argument appears to be that the Board should assume that, because the corporate chart disclosed a cumulative interest greater than 50% in NPBL, the ICC "was fully aware that NSC would control NPBL after the transaction," *id.* at 8 – notwithstanding the express statement otherwise in the Petition. Again, the mere disclosure of the resulting amount of aggregate ownership interest in NPBL – without the additional facts required by the rules so that the ICC could address any competitive issues – could not possibly satisfy the statutory and regulatory requirements that control authority be sought, evaluated and granted by the agency.

Moreover, the argument is based on the flawed premise that the amount of ownership interest in another carrier is, on its own, dispositive on the question of control. The case law is abundantly clear that a person's ownership interest in a carrier is not dispositive of control.⁹ Control is not a single-factor

SRC and SRC's wholly-owned subsidiary), and (2) The Lake Erie and Fort Wayne Railroad Company (100% owned by NW).

⁹ See, e.g., *Paducah & Louisville Ry., Inc.—Control Exemption—Paducah & Ill. R.R. Co.*, FD 33362, slip op. at 2 (STB served Aug. 25, 1997) ("Instead of an arbitrary formula based upon the percentage of stock ownership, [the Board] look[s] at a number of additional factors, including distribution of the remaining stock, the ability to elect directors and otherwise

inquiry. Applicants in ICC/STB proceedings have sought authority to control carriers where the Applicants hold less than a 50% equity interest in the carrier – sometimes much less. *See, e.g., RFM HoldCo LLC—Control Exemption—Pioneer Railcorp, et al.*, FD 36306 (Sub-No. 1), et al., Verified Notice of Exemption at Ex. 1 (filed Dec. 2, 2020) (one of the entities obtaining control authority had a 0.55% equity interest in the railroads at issue).

NSR cites the U.S. Department of Justice (“DOJ”) 1988 Antitrust Enforcement Guidelines for International Operations to support its claim that the ICC and the public simply should have been able to guess which of the independent non-system railroads on the chart that NSC would control—and obtain implicit perpetual immunity for—based only on the disclosure of ownership interests in the corporate chart. Quoting from those 1988 Guidelines, NSR states that the DOJ believes that “a parent corporation and subsidiary corporation of which the parent owns more than 50 percent of the voting stock are a single economic unit under common control and thus legally incapable of conspiring with one another.” NSR Opening at 4 n.7.

Whatever the DOJ said in 1988 about its own “enforcement guidelines” has no bearing on the ICC/STB’s organic statute and its rules. Additionally, the DOJ’s 1988 guidelines preceded *Am. Needle, Inc. v. NFL*, 560 U.S. 183 (2010), where the U.S. Supreme Court made it clear that the inquiry into whether two companies are incapable of conspiring by virtue of ownership interest is a “functional” inquiry, not based on objective factors such as the amount of ownership interest. *Id.* at 191. In other words, the 1988 guidelines that supposedly support NSR’s position are neither controlling nor any longer

control or influence decision-making machinery, and the existence of management, marketing, operating and financial ties.”).

even persuasive authority on the question at hand. The current structural analysis required by *American Needle* is consistent with the ICC/STB test regarding control, which is fact-based and not reliant on any particular ownership interest.

2.4 The ICC’s related authorization to construct and operate over a new connection track in the Norfolk area has no bearing on whether the ICC authorized NSC to control NPBL.

NSR argues that an application, filed alongside the lead NW/SRC Application, to obtain ICC authority for SRC and Norfolk Southern (one of SRC’s system railroads) to construct and operate over a new connection track in the Norfolk area (the “Connection Application”) somehow serves “[a]s further clarification that the ICC was fully aware that NSC would control NPBL after the transaction” NSR Opening at 8. NSR states that the Connection Application was a necessary part of the effort to consolidate NW and SRC operations in the Norfolk area. *Id.* at 9. According to NSR, the Connection Application shows that “NSC, as the ultimate parent company, would have the authority and ability in a post-transaction environment to control both NPBL and N&W operations in the Chesapeake/Portsmouth area.” *Id.* NSR further states that “[t]his would not be a competitive concern” because multiple railroads served that area at the time. *Id.*¹⁰

NSR provides no support or coherent explanation for why the Connection Application would have made the ICC “fully aware that NSC would control NPBL after the transaction,” even putting aside the effect on the ICC’s “awareness” of the representation in the Petition that NSC was not seeking to

¹⁰ Because NSR cited to, but did not attach the application in question, CSXT attaches it here as Exhibit A.

control NPBL. Moreover, a close review of the Connection Application itself and related discussion of the Norfolk region in the Application shows that NSR is simply incorrect.

On its face, the Connection Application says nothing about NSC control of NPBL. The only mention of NPBL is in a list of other railroads, including railroads completely unrelated to any party in the 1982 transaction, that operate in the area. *See* Connection Application at 11. Nothing in the Connection Application suggests that NSC would assert control over NPBL, or that the consolidated NW/SRC system would interact with NPBL in any way different from before. Nothing in the Connection Application would have made the ICC “fully aware” that NSC would be controlling NPBL after the 1982 transaction.

The Connection Application is consistent with the discussion elsewhere in the Application of the Applicants’ post-transaction plans for operations in the Norfolk area. For example, the Connection Application at 14 references the treatment in the Application operating plan of the Norfolk region that CSXT discussed in its Opening Statement at 18-19. CSXT explained that the operational and competitive analysis of the transaction set forth in the Application – including with respect to the Norfolk area – was only focused on the system companies of NW and SRC, and not independent railroads such as NPBL that would not be controlled by NSC. And as CSXT pointed out in the Opening Statement, NSC’s expert on competition issues never mentioned NPBL in his discussion of impacts of the proposed transaction in the Norfolk area, and the ICC’s discussion of impacts of the proposed transaction in the Norfolk area do not even refer to NPBL. CSXT Opening at 18, 21.

2.5 NSR did not obtain ICC/STB control authority over NPBL in later exemption proceedings.

The Court's May 18, 2021 referral decision did not ask the STB to address the effect of post-1982 regulatory proceedings on NSR's control over NPBL. Nevertheless, NSR argues that certain corporate reorganizations following the 1982 NW/SRC transaction "further consolidated ownership of NPBL." NSR Opening at 13. CSXT already identified each of these prior transactions and explained that neither NSR nor its predecessors ever requested or obtained ICC/STB authority to control NPBL in those later proceedings. *See* CSXT Opening Statement at 21-22, 26.

Applicants in those proceedings invoked an exemption from the otherwise applicable ICC/STB control authority requirements, established by the ICC/STB for a class of "corporate family" transactions that do not result in "a change in the competitive balance with carriers outside the corporate family." 49 C.F.R. § 1180.2(d)(3). Because NSC did not obtain ICC authority to control NPBL in connection with the 1982 NW/SRC consolidation, all later class exemption proceedings reorganizing NSC and later NSR could not and did not result in NSR obtaining ICC/STB authority to control NPBL. The exemption decisions could not have created control authority for the first time because the creation of new control authority would have been a "change in the competitive balance with carriers outside the corporate family," for which an exemption was not available. Indeed, NPBL is never even mentioned in the ICC and STB notifications of the exemption filings.

2.6 The conduct of NPBL's owners cannot substitute for ICC/STB control authority.

Finally, NSR argues that its control over NPBL was subsequently “acknowledged and approved by CSX” under a 1989 agreement between CSXT, NW, and SRC relating to the appointment of NPBL directors. NSR Opening at 13-14. Similarly, NPBL submitted evidence that it characterizes as actions taken by NPBL's owners since the 1982 NW/SRC merger that “confirm the common understanding” that NSR obtained control of NPBL through the 1982 merger. NPBL Opening at 4. This evidence includes minutes from NPBL board meetings.

In short, these materials are irrelevant to the issue at hand. The question from the Court about the effect of the 1982 ICC decision cannot be answered by relying on evidence of actions taken by NPBL and its owners after the NW/SRC transaction, even if there was a complete factual record on the issue, which there is not. ICC/STB authority to control a rail carrier cannot simply be created by the conduct of parties interacting with that rail carrier. The statute is clear that control over another rail carrier can be obtained only through the grant of authority by the agency. Either NSR obtained control authority from the ICC in 1982 or it did not, and nothing that the parties did subsequent to 1982 has any bearing on that question.

The materials are irrelevant for another reason. NSR and NPBL do not even try to suggest that the materials they cite indicate that CSXT acquiesced to NSR's use of NPBL to accomplish NSR's independent commercial objectives. There is no evidence that CSXT ever agreed to allow NSR to manipulate the commercial policies of NPBL to NSR's advantage—and indeed, CSXT's repeated efforts both preceding and including the Court lawsuit that is the

basis for the referred question demonstrate the opposite. In any event, the question before the STB is whether NSR or its predecessors ever obtained from the ICC/STB the authority to control NPBL, and for the reasons explained above, such control authority was never sought or obtained.

2.7 NSR cannot assert antitrust immunity based on control authority it never obtained.

CSXT and NSR are apparently in agreement that the question of antitrust immunity under 49 U.S.C. § 11321 turns on whether the ICC granted NSR authority to control NPBL in 1982. If the ICC or STB grants a rail carrier authority to control another rail carrier, which the STB can do under the statute only after a full analysis of competitive effects and impact to the public interest, then the antitrust laws are displaced so that the control authority can be implemented.¹¹ Here, however, no control authority was ever sought, no analysis of the impact of control authority was ever conducted and no grant of control authority was ever made. NSR cannot hide behind antitrust immunity when it never obtained authority to control NPBL.

Moreover, as both CSXT and NSR have noted, the statute granting antitrust immunity specifies that immunity is available only “as necessary to let that rail carrier, corporation, or person carry out the transaction, . . . and exercise control or franchises acquired through the transaction.” 49 U.S.C. § 11321(a). When the STB explicitly grants control authority after evaluating potential competitive effects, the purpose of the antitrust immunity is to avoid

¹¹ CSXT also agrees with NSR that the term “franchise” used in the statute does not affect the analysis, at least in this case. The decision to allow a carrier to control another carrier appears to be basically the same as the decision to allow a carrier to become part of another carrier’s “franchise” of controlled carriers.

interfering with a decision made by the regulator pursuant to the regulator’s explicit statutory authority.

NSR never explains how perpetual antitrust immunity was “necessary to let [NSR] . . . carry out the transaction” in a case like this where NSR’s predecessor never asked for authority to control NPBL, the ICC never evaluated the competitive effects of such control, and the ICC never issued a decision granting control authority. Nor does NSR explain why antitrust immunity would be appropriate here when applicants in other roughly-contemporaneous consolidation transactions did indeed specifically ask for and receive authority to control terminal railroads in similar circumstances as NPBL’s role in the NW/SRC transaction. The statutory immunity does not shield NSR from CSXT’s antitrust claims.

2.8 Accepting NSR’s position could lead to widespread abuse of the Board’s processes and the statutory immunity that flows from grants of control authority.

The Board has rightly been focused in recent years on protecting the integrity of its licensing regime. This is especially important because the Board generally relies on applicants requesting authority for control and merger transactions to accurately describe the transaction, to specifically request the necessary authority, and to provide the relevant information required for the Board to perform its role in applying the statutory public interest standard.

For example, in *RFM HoldCo LLC—Control Exemption—Pioneer Railcorp, et al.*, FD 36306 (Sub-No. 1), et al. (STB served Mar. 19, 2021), the Board considered information about prior transactions that had occurred without required Board authority. The Board noted that it “remains troubled that the parties did not adequately consider the required authorizations at the

appropriate time.” *Id.*, slip op. at 6. In a dissent to the majority decision, Board Member Primus stated that “[his] hope is that, moving forward, the Board will begin to look at ways to effectively promote greater compliance and transparency as it relates to the licensing of rail activities.” *Id.*, slip op. at 8.

We recognize that the NW/SRC transaction occurred nearly forty years ago, but accepting NSR’s argument that an STB license to control NPBL somehow materialized as an unstated “byproduct” of a control transaction that never contemplated control over NPBL would run counter to the Board’s current efforts to ensure transparency and compliance with their licensing regime. It would encourage applicants in other control transactions to play fast and loose with the Board’s rules, with the understanding that they could later claim immunity that the Board never intended or granted.

3. Conclusion

NSR’s predecessor did not obtain authority from the ICC to control NPBL in the 1982 transaction, and therefore it cannot claim antitrust immunity under 49 U.S.C. § 11321 for conduct “necessary” to implement control authority it never obtained.

Respectfully submitted,

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Attorneys for CSX Transportation, Inc.

Dated: October 25, 2021

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36522

NORFOLK SOUTHERN RAILWAY COMPANY
—PETITION FOR DECLARATORY ORDER

EXHIBIT A

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 29430 (Sub No. 3)

Application and Return to Questionnaire of
Southern Railway Company and Norfolk Southern
Railway Company for a Certificate of
Public Convenience and Necessity,
Pursuant to 49 USC § 10901, Authorizing
Construction and Operation of a Connection
Track Between Trackage of Norfolk Southern
Railway Company at MP NS 2.48 and of
Norfolk and Western Railway Company at MP V 4.6,
A Distance of Approximately 1155 Feet, in
the City of Chesapeake, Virginia

COME NOW Southern Railway Company (SR) and Norfolk
Southern Railway Company (NS) to request that the
Interstate Commerce Commission (Commission) issue to NS a
certificate of public convenience and necessity pursuant
to 49 USC § 10901 authorizing construction of and
operations over a new connection track. The new
connection track will extend from a point near MP NS 2.48
on the NS main line between Elizabeth City, North
Carolina, and Norfolk, Virginia, to a point near MP

V 4.6 on the Sewells Point Branch of the Norfolk and Western Railway Company (NW), approximately 1155 track feet, in the City of Chesapeake, Virginia.

BACKGROUND

By application filed this date in Finance Docket No. 29430 (Sub No. 1), NWS Enterprises, Inc. (NWS), seeks authority pursuant to 49 USC §§ 11343-7 to acquire control through stock ownership of NW and SR. As a result of its acquisition of control of NW and SR, NWS will obtain indirect control of existing subsidiaries of SR (and of NW), including NS. As a matter directly related to the NW/SR control transaction, NW and SR will consolidate their facilities in the Norfolk, Virginia, area. The proposed consolidation of facilities is described in Exhibit A-17, §1(viii) (see Volume 4). As a part of the Norfolk area consolidation, NS will retire its Carolina Yard and operate to and from NW's Portlock Yard, both of which are located adjacent to Norfolk in the City of Chesapeake, Virginia. To reach Portlock Yard from the NS main line, a new connection track, which is the subject of this application, is needed at Carolina Junction, where the NS main line and NW's Sewells Point Branch intersect. NS will also obtain trackage rights over NW from the new connection track to Portlock Yard, for which authority is sought in Finance Docket No. 29430 (Sub No. 1).

By petition filed July 24, 1980, NW and SR sought, among other things, waiver of certain items of the Commission's regulations (49 CFR Part 1120) governing applications for a certificate of public convenience and necessity authorizing construction of and operations over a line of railroad. Waivers sought include filing of the application and return to questionnaire at the same time, advance Commission approval and early publication of the required notice of filing, and waiver of certain information. By decision served October 1, 1980, in Finance Docket No. 29430, the NW/SR request for waivers was granted. Therefore, the NS application and return to questionnaire are both combined herein, notice of filing has been published in a local newspaper and served upon state officials, and responses to those items which were waived are deleted or incorporated by reference from other volumes, as appropriate.

APPLICATION

§ 1120.1

(a) Exact corporate name of applicants.

Southern Railway Company and Norfolk Southern Railway Company.

- (b) Whether applicants are carriers by railroad subject to the Interstate Commerce Act.

Applicants are carriers by railroad subject to the Interstate Commerce Act.

- (c) Date of incorporation and State under the laws of which applicants were organized.

See Volume 2, §1111.1(c)(i) for information concerning SR's incorporation. NS was incorporated on March 11, 1895, in the State of North Carolina as the Carolina & Northwestern Railway Company. *

- (d) Whether it is proposed (1) to construct a new line of railroad or an extension of an existing line of railroad or (2) to acquire and operate, or to operate, a line of railroad not at the time owned or being operated by a common carrier.

NS proposes to construct a new connection track between its main line and NW's Sewells Point Branch and to operate over the new connection track.

- (e) Each state, and each county thereof, in which the line would be or is located.

The new connection track will be located in the Independent City of Chesapeake, Virginia.

*/ On January 1, 1974, NS was merged into the Carolina & Northwestern Railway Company. The latter was the surviving company, but its name was changed to Norfolk Southern Railway Company. The former NS was incorporated on September 19, 1939, in the Commonwealth of Virginia as successor in reorganization of Norfolk & Southern Railway Company, incorporated April 30, 1910, in the Commonwealth of Virginia.

- (f) The route and termini of the line it is proposed to construct, acquire, or operate. Give the name of each incorporated city or village through which the line would or does pass.

The new connection track will be constructed in the southern quadrant of Carolina Junction. It will extend from NS MP NS 2.48 to NW MP V 4.6, a total distance of 1155 track feet, all within the City of Chesapeake.

- (g) The total number of miles of track proposed to be constructed, acquired, or operated, showing main lines and branch lines separately.

The new track to be constructed and operated will total 1155 track feet of main line connection track.

- (h) The reasons, briefly stated, why the present or future public convenience and necessity require or will require the proposed construction, acquisition, or operation.

The NS main line from Elizabeth City and Raleigh, North Carolina, has its northern terminus at Norfolk. NW's main line from Roanoke, Virginia, also terminates at Norfolk. NS' principal yard in the Norfolk area -- Carolina Yard -- and NW's principal yard for merchandise traffic in the Norfolk area -- Portlock Yard -- are both located in the City of Chesapeake, immediately southeast of the City of Norfolk.

As a result of the consolidation of NW and of NS' parent company SR, all NW and SR/NS terminal operations

and facilities in the Norfolk area will be combined under the supervision of NW. Both NW and SR/NS activities at Norfolk will be consolidated at NW's Portlock Yard, and NS' Carolina Yard will be retired.

The existing connection between NW and NS near NS Junction is located such that direct movements between the NS main line and Portlock Yard cannot be efficiently performed. Therefore, NS will construct and operate over a new connection track in the southern quadrant of Carolina Junction, where the NS main line and NW's Sewells Point Branch now intersect. This new connection track will permit NS road trains to operate directly and efficiently between the NS main line and Portlock Yard.

The new connection track is essential to the consolidation of NW and SR/NS terminal operations at Norfolk. The Norfolk area consolidation is discussed in detail in Exhibit A-17, §I (viii) in Volume 4. As a result of the consolidation and operations over the new connection track to and from Portlock Yard, NS and SR/NS customers in eastern Virginia and North Carolina will have available direct, single system service via NW main lines to the west without the delays of conventional interchange at Norfolk.

- (i) Applicants' general plan for financing the proposed construction or acquisition, and applicants' relation, if any, traffic or financial, to any other corporation or corporations.

Construction of the new connection is estimated to cost approximately \$620,000. This cost will be paid from general corporate funds.

See Appendix 2 to Volume 2 for a full description of the relationships of NS to SR, NW, and other corporations.

- (j) Reference to action by stockholders or directors of the applicants authorizing the making and filing of the application, giving date and place of meeting.

See Exhibits 3 and 4 in Volume 3 for resolutions of SR and NS directors authorizing the making and filing of this application.

- (k) Name, title, and post office address of counsel or officer to whom correspondence in regard to application is to be addressed.

Nancy S. Fleischman
Assistant General Attorney
Southern Railway Company
Post Office Box 1808
Washington, D.C. 20013

R. Allan Wimbish
General Solicitor
Southern Railway Company
Post Office Box 1808
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- (l) Detailed map of subject line.

See Appendix 1.

RETURN TO QUESTIONNAIRE

§1120.6

1. The essential facts to show that the applicant is a carrier by railroad, engaged in the transportation of passengers or property, subject to the Interstate Commerce Act or is a corporation organized to construct and operate a railroad. If not incorporated, so state, giving complete description of party or parties filing the application.

See Volume 2, §1111.1(c)(i) for information concerning SR's incorporation. See response to §1120.1(c), above, for full information about NS' incorporation. Both SR and NS are carriers by railroad subject to the Interstate Commerce Act and have been continuously engaged in operations as common carriers since incorporation.

2. Whether the proposed new line of railroad would be both constructed and operated by the applicant.

The proposed connection track would be both constructed and operated by NS.

3. Whether any corporation, individual, or trustee holds control over the applicant at the date of filing this return. If so:
 - (a) The form of control, whether sole or joint, and whether in trust.
 - (b) The name and business address of the controlling corporation, individual, or trustee.
 - (c) The manner in which control was established.
 - (d) The extent of control.
 - (e) Whether control is direct or indirect; if indirect, the name and business address of the intermediary through which it was established and is exercised.

(f) The name and business address of the beneficiaries for whom the trust, if any, is maintained.

(g) The purposes of the trust.

NS is controlled through stock ownership by Southern Railway Company. See Appendix 2 to Volume 2 for full details of the relationship of NS to SR, NW, and other companies.

4. Whether the applicant is connected by stock ownership, or otherwise, with any industry to be served by the line proposed to be constructed, acquired, or operated. If so, state the facts.

No industry will be served directly from the connection track for which authorization is sought.

5. The chief uses and purposes of the proposed line or operation.

The new connection track will provide an efficient connection between NS' main line and NW's Portlock Yard, via NW's Sewells Point Branch. NS road trains will operate over the new connection to reach Portlock Yard.

6. The classes of service to be performed, as passenger, freight, express, and switching.

The classes of service to be performed over the new connection track are predominately road freight and some switching.

7. The kind of motive power to be used. If electric power, state source and estimated cost.

Diesel-electric motive power will be used.

8. Whether the line proposed to be constructed, acquired, or operated would receive material revenue from the territory traversed or serve any material public convenience and necessity of the local territory.

The connection track will receive no revenue directly from the territory traversed. The Norfolk/Chesapeake area will benefit from the terminal consolidation which the new connection track will facilitate. Principal benefits will be improved rail service, reduced interyard switching, elimination of conventional interchange between NS and NW, and release of some property for non-rail use.

9. The name, area, and population of each county in which the new line is to be constructed or in which the line to be acquired or operated is located, and the name and population of each city, town, and village at which a station would be or is established together with its distance from a designated initial point, with the source of information as to population.

The new connection track will be located in the City of Chesapeake, an independent city in the State of Virginia, which had an area of 341 square miles and a population of 89,580 in 1970.* No new stations will be established, but as a result of the Norfolk area terminal consolidation, the NS agency station at Carolina Yard will be consolidated with that of NW at Portlock Yard, both in the City of Chesapeake.

* Source: Rand McNally & Company Commercial Atlas & Marketing Guide, 1980 - 111 ed.

10. The names of places mentioned in question 9 that are now served by common carrier railroads (excluding street railways), and the name of each such carrier serving the several places.

The City of Chesapeake is served by Chesapeake and Ohio Railroad Company, Norfolk, Franklin and Danville Railway Company, Seaboard Coast Line Railroad Company, Virginia & Maryland Railroad Company, and Norfolk and Portsmouth Beltline Railroad Company in addition to NS and NW.

11. The names of the places mentioned in question 9 that have no common carrier railroad service, the distance in miles of each such place from the nearest station of a common carrier railroad, and the character of the connecting highway.

None.

[Responses to questions 12 and 13 were waived by decision served October 1, 1980.]

14. The names of common carrier railroads with which the line would connect and the proposed points of track connection.

The new connection track will connect with the Elizabeth City-Norfolk main line of NS at MP NS 2.48 and with NW's Sewells Point Branch at MP V 4.6.

[Responses to questions 15-22 were waived by decision served October 1, 1980.]

23. If the line is to be or is an extension of an existing railroad or a branch, connecting track, or cutoff, the extent to which it is expected to be directly profitable in itself, and the extent to which it is expected to be justified by its effect on the business of the existing lines.

The new connection track will not be directly profitable. The construction of the new connection track will be fully justified by the more efficient and economical interchange between NS and NW and the consolidated terminal operation it will facilitate.

[Responses to questions 24 and 25 were waived by decision served October 1, 1980.]

26. The facts concerning any agreement, tentative or otherwise, with existing carriers covering operation, interchange of traffic, division of rates, or trackage rights in connection with the line.

NW and SR have agreed to consolidate terminal activities in the Norfolk/Chesapeake area, and NW has granted to NS trackage rights over the Sewells Point Branch for approximately one half mile from the west end of the connecting track at MP V 4.6 to the entrance to Portlock Yard. Agreements reflecting these transactions are in Exhibit 9 in Volume 3.

27. Whether any aid, gift, grant of right-of-way, or other donation has been promised in connection with the proposed new line of railroad; if so, state specifically the nature, amount, and value of such proposed donations.

No aid, gift, grant of right-of-way, or other donation has been promised to NS in connection with the new connection track.

28. The manner in which it is proposed to finance construction and equipment or acquisition, the kind and amount of securities to be issued, and the approximate terms of their sale; to what extent funds for financing are now available and which if any of such securities would be underwritten by industries to be served by the proposed line.

The cost of construction of the new connection track will be borne by NS from general corporate funds. No additional equipment will be required as a result of the new connection track.

[Responses to questions 29-31 were waived by decision served October 1, 1980.]

32. The dates on which it is expected to begin and to complete the construction of the proposed new line of railroad.

Construction will begin as soon as practicable after consolidation of NW and SR and will be completed within one year.

33. The engineering work in full detail which has been done with respect to the proposed new line at the time of filing the return.

No actual construction work has been done. The drawing in Appendix 2 reflects the engineering work completed to date.

34. The following details concerning the line to be constructed:

(a) The gage and number of main line tracks.

Standard 4'8 1/2" gage, single track.

(b) Weight of rail for main line tracks.

132 lb. rail.

- (c) Rate of maximum grade in each direction and whether and how compensated for curvature.

The maximum grade in each direction will be 0.5%, non-compensated for curvature.

- (d) Rate of limiting grade that will fix train loading in each direction and whether and how compensated for curvature.

See response to question 34 (c).

- (e) If helper grades are to be used, the location, length, rate, and direction of ascent for each.

None.

- (f) The maximum rate of curve.

12°.

- (g) The average amount of curvature per mile in degrees.

Not applicable.

- (h) The approximate length and height of wooden trestles or other temporary construction.

None.

[Response to question 35 was waived by decision served October 1, 1980.]

36. Any additional facts or reasons to show that the public convenience and necessity require the granting of this application.

See Exhibit A-17, §I(viii) in Volume 4 for a detailed description of the consolidation of the Norfolk area terminal operations of SR/NS and NW and the benefits therefrom, which will be facilitated by the new connection track.

EXHIBITS

§1120.7

- A. A copy of the engineering report of reconnaissance for the proposed line, if record of location surveys are not submitted.

No separate engineering report of reconnaissance was prepared for the new connection track. See Appendices 2 and 3 for detailed location and estimate information.

- B. A copy of the specifications as to construction, if any exist.

Work will be accomplished with standard NS specifications.

- C. A map of the location projected or actually staked for the proposed line, if such location has been made. This map should show the alignment in detail, with the usual topographic features map.

See Appendix 2.

- D. A copy of the best available profile of the proposed line.

Appendix 2 includes a profile of the proposed connection track.

- E. (1) A detailed estimate of the cost of building the proposed line, with all necessary appurtenances (except equipment), classified by Interstate Commerce Commission primary accounts; also a concise detail of estimated quantities and prices covering what is set down under accounts 3 to 12, inclusive.

See Appendix 3.

- E. (2) Detailed estimates of the kind and cost (or rental cost) of the equipment required to handle the estimated traffic separately for the first and fifth years of complete operation. State whether the equipment is to be bought or rented, show second-hand equipment as such; give number of units, class of service, and general type, with the weight and tractive power of locomotives and capacity of freight cars.

No additional equipment will be required as a result of the proposed connection track itself. The additional equipment needs of the NWS system are discussed in Exhibit A-17, §E(i) and (ii) in Volume 4.

- F. If the applicant is a going concern, copies of the income account for the five preceding calendar years and for the months of the current year for which the figures are available; also copies of the latest profit and loss account and general balance sheet.

See Volume 2, Exhibits A-18 and A-19 for financial statements of SR and its consolidated subsidiaries, including NS.

- G. Opinion of counsel that the proposed construction or acquisition is within the charter powers of applicant.

See Volume 3, Exhibit 7.

ADDITIONAL INFORMATION

§1120.2 and §1120.4

One of the waivers sought by SR and NW and granted in the decision served October 1, 1980, permitted advance approval by the Commission's staff of the notice of the intended filing of this application, publication of the

notice in local newspapers prior to filing, and simultaneous service of the notice, application, and return to questionnaire upon the appropriate governor and public service commission. By letter dated November 14, 1980, Ernest B. Abbott, Rail Merger Coordinator, Section of Finance, approved applicants' proposed notice. The certificate of service appended to the transmittal letter of Richard J. Flynn, counsel for SR and NW, certifies that the required service has been accomplished. Appendix 4 is a statement affirming publication of the notice of this application, and Appendix 5 is a copy of the actual newspaper notice.

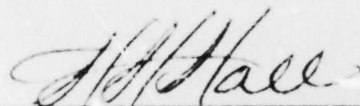
49 CFR Parts 1106 and 1108

Section 1106.5(a) of the Commission's energy regulations classifies construction applications as major regulatory actions requiring a Statement of Energy Impact. Section 1108.8(d) of the Commission's environmental regulations establishes construction applications as actions which may require preparation of an Environmental Impact Statement. Although applicants assert that construction of the new connection track which is the subject of this application will have no significant impact upon the environment or upon energy

consumption, both environmental and energy aspects of this application and all related applications are discussed in Exhibits 12 and 13 in Volume 5.

THEREFORE, applicants Southern Railway Company and Norfolk Southern Railway Company respectfully request that a certificate of public convenience and necessity be issued authorizing the construction and operation of a connection track in the City of Chesapeake, Virginia.

Respectfully submitted,



H. H. Hall, President and
Chief Executive Officer of
Southern Railway Company and
President of Norfolk Southern
Railway Company

Of Counsel:

R. Allan Wimbish
General Solicitor
Southern Railway Company
P. O. Box 1808
Washington, D.C. 20013

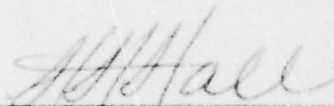
Nancy S. Fleischman
Assistant General Attorney
Southern Railway Company
P. O. Box 1808
Washington, D.C. 20013

Dated: December 1980

DISTRICT OF COLUMBIA:

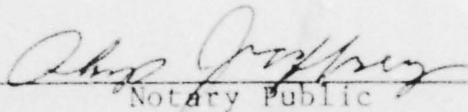
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H. H. Hall, being duly sworn, states that he is President and Chief Executive Officer of Southern Railway Company and President of Norfolk Southern Railway Company; that he is duly authorized to sign, verify, and file the foregoing application, return to questionnaire, and exhibits thereto on behalf of said applicants; that he has knowledge of the matters and things stated in the foregoing documents; and that such matters are true and correct to the best of his knowledge, information, and belief.

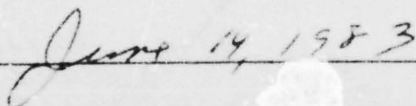


H. H. Hall

Subscribed and sworn to before me
this 28th day of November, 1980.


Notary Public

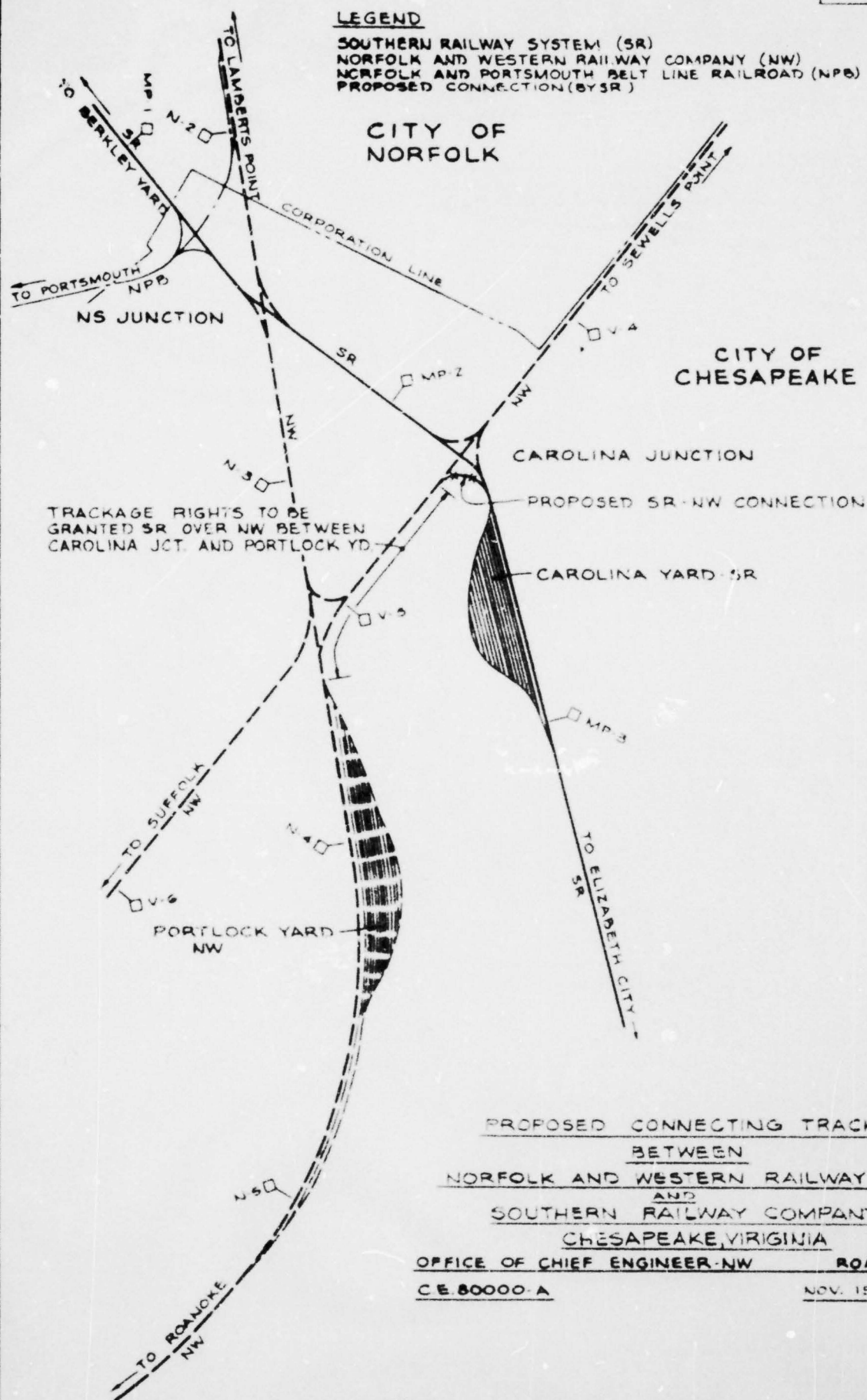
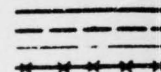
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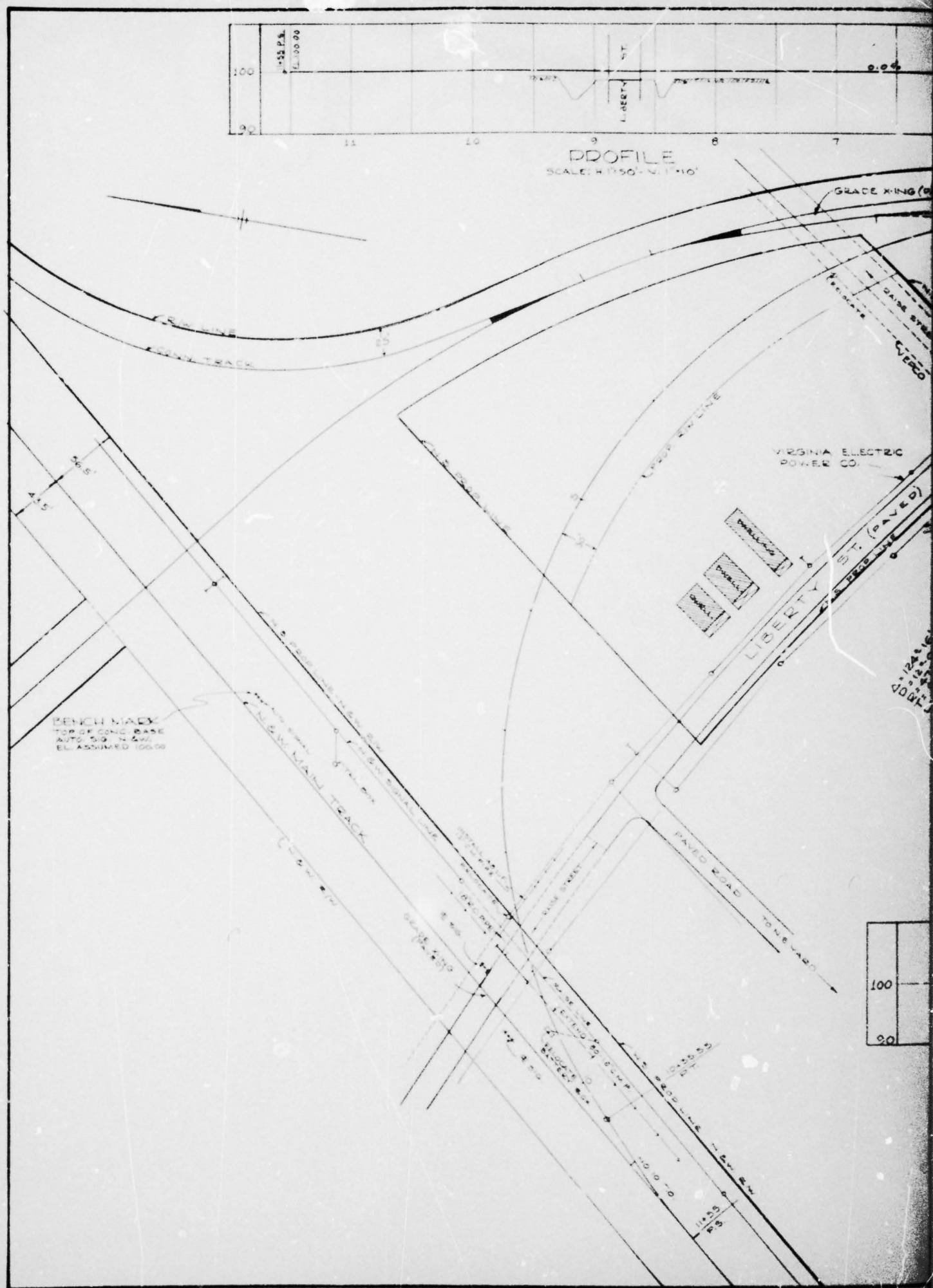


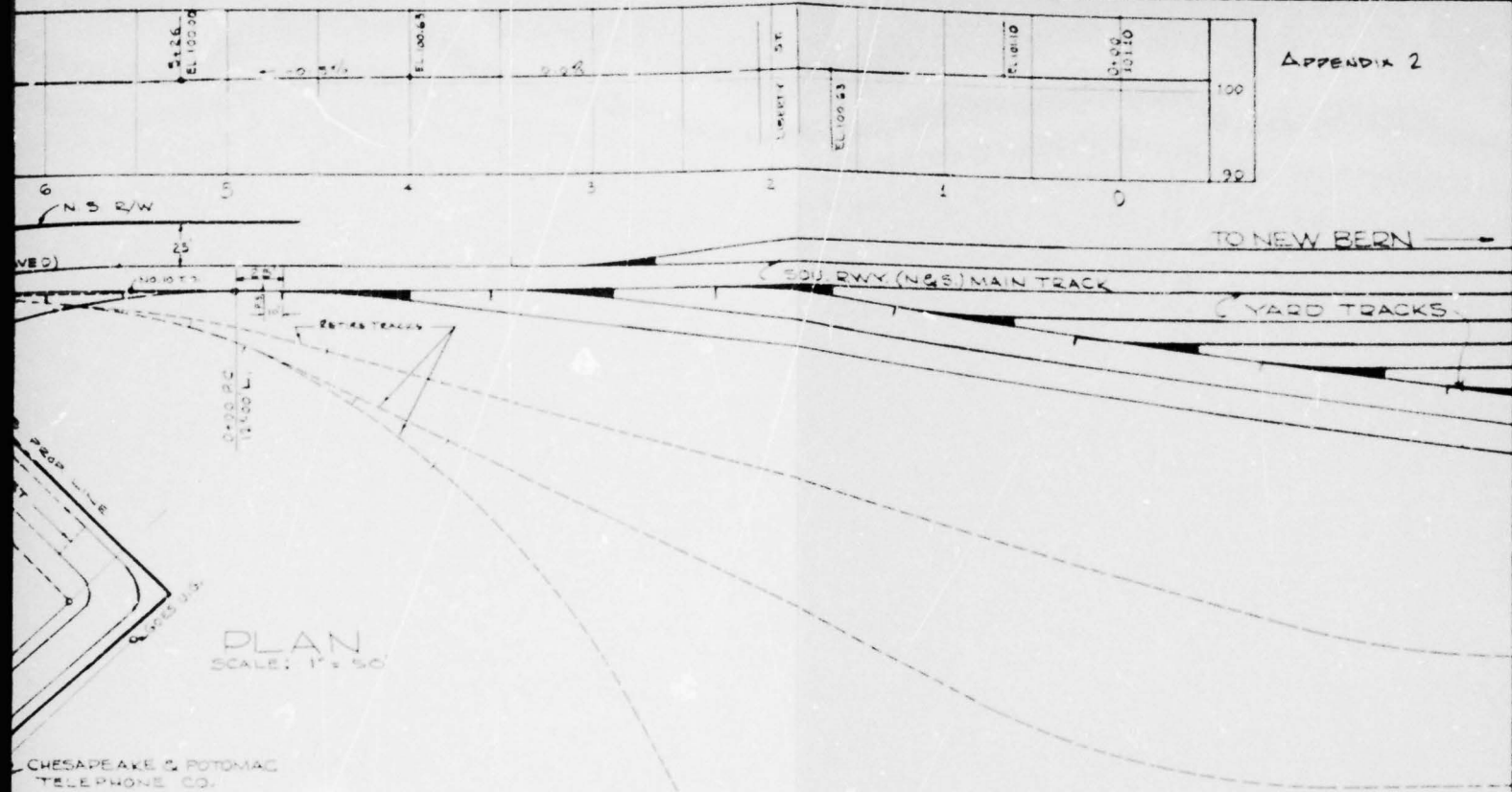
PHILIP J. CAFFEY
NOTARY PUBLIC
IN AND FOR THE DISTRICT OF COLUMBIA
MY COMMISSION EXPIRES JUNE 14, 1983

LEGEND

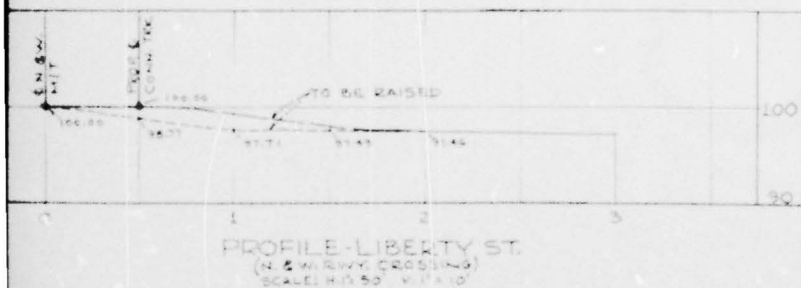
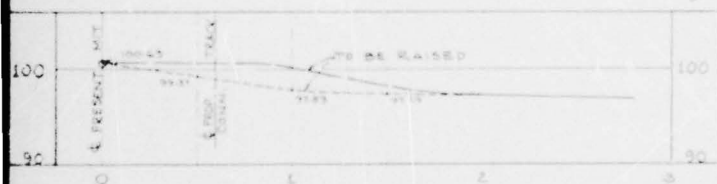
SOUTHERN RAILWAY SYSTEM (SR)
 NORFOLK AND WESTERN RAILWAY COMPANY (NW)
 NORFOLK AND PORTSMOUTH BELT LINE RAILROAD (NPB)
 PROPOSED CONNECTION (BY SR)







103.64
103.57
103.50
103.43



SCALE AS SHOWN

DO NOT SCALE THIS DRAWING FOR DIMENSIONS NOT GIVEN

NORFOLK COUNTY VA

NORFOLK, VA.
PROPOSED CONNECTION TRACK
SOU Rwy (NOR SOU) & N & S Rwy.



COST ESTIMATE - ROADWAY

Company NORFOLK SOUTHERN

TD-79-0152 Sheet 1 of 2

☒ New☐ Retirement

PROGRAM NUMBER

F.D. No. 29430 (Sub No. 3)

Appendix 3

LOCATION	STATE	VAL. SEC. NO.	STATION OR MP		DIVISION		
	Virginia	2	Norfolk				
	DESCRIPTION OF ITEM		CODE	ACCT. NO.	UNIT	QUANTITY	COST UNIT TOTAL
	<u>Proposed Connection Track - Southern/N&W Railway</u>						
	Engineering & Contingencies			1	LS		118,955
	R/W for Track			2	LS		100,000
	Grading			3	LS		97,040
	Drainage:						
	12" BCCMP (Ctr. #14)			6	LF	48	20.00 960
	18" BCCMP (Ctr. #14)				LF	80	25.00 2,000
				6			2,960
	Crossties (Grade #5)			8	EA	561	18.00 10,098
	Switch Ties (2 Sets - No. 10)				MBM	8,536	500.00 4,268
				8			14,366
	Rail, 132# New Jtd.			9	MTF	.935	18,348 17,155
	OTM, New 132#			10	MTF	.935	3,952 3,695
	Turnout, 132# No. 10 MI				EA	3	20,000 60,000
	Tie Plates, 14 3/4" New				EA	1,122	7.00 7,854
	Switch Stand (51-B)				EA	3	400.00 1,200
				10			72,749

APPENDIX 4

STATEMENT OF PUBLICATION OF NOTICE OF APPLICATION:

Southern Railway Company and Norfolk Southern Railway Company, having made application to the Interstate Commerce Commission under Section 10901 of the Interstate Commerce Act for construction and operation of a 1,155 foot connection track between the lines of Norfolk Southern Railway Company and Norfolk and Western Railway Company in the City of Chesapeake, Virginia, which application is filed in the office of the Commission in Finance Docket No. 29430 (Sub No. 3), hereby affirm that notice of the application has been published in the form prescribed by the Commission, at least once during each of three consecutive weeks, in the following newspaper:

Norfolk Virginian Pilot

that said newspaper is of general circulation in the City of Chesapeake, Virginia, which is the only state and the only independent city in which the new connection track would be located; and that the newspaper clipping in Appendix 5 is a true copy of the notice as published in said newspaper.

2 Legals

Finance Docket No. 29430 (Sub No. 3)
NOTICE OF INTENT

Southern Railway Company hereby gives notice that on or about December 1, 1980, it intends to file with the Interstate Commerce Commission, on behalf of itself and its wholly owned subsidiary, Norfolk Southern Railway Company, an application seeking a certificate of public convenience and necessity permitting construction and operation of a new connecting track in the City of Chesapeake, Virginia. The connecting track will extend from a point near Norfolk Southern milepost NS 2.48 on the main line from Elizabeth City, North Carolina, in a westerly direction for approximately 1155 feet to the point of connection with Norfolk and Western Railway Company's Sewell Point Branch at milepost V 4.0. The connecting track to be constructed and operated will provide a more efficient connection between Southern's system lines and Norfolk and Western's lines in the Norfolk, Virginia area. Southern trains will operate over the new connecting track to and from Norfolk and Western's Portlock Yard, approximately one half mile southwest of the connecting track.

In the opinion of Southern, this application does not present environmental issues, and the requested Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, in accordance with the Commission's regulations (49 C.F.R. Section 1108.12(e)), any protests or other representations may include a statement indicating the presence or absence of any effect of the requested Commission action on the quality of the human environment.

The construction and operation of the proposed connecting track in the City of Chesapeake, Virginia, is directly related to the consolidation under common control of Southern Railway Company and Norfolk and Western Railway Company. An application for approval of the common control transaction will also be filed with the Interstate Commerce Commission on or about December 1, 1980. The construction and operation application will be consolidated with the common control transaction and will be handled without separate public hearings unless protests are received which contain information indicating the need for separate hearings. Any person desiring to submit representations with regard to the construction and operation of the connecting track should advise the Interstate Commerce Commission, 12th Street and Constitution Avenue, N.W., Washington, D.C. 20420, within 45 days after the date the Interstate Commerce Commission acts by publishing a notice in the Federal Register of the application of Southern and N.W. to consolidate under common control. An original and six copies of such representations, referencing Finance Docket No. 29430 (Sub No. 3), shall be filed with the Interstate Commerce Commission, and a copy of any such representation shall be sent at the same time to Southern's representatives.

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Southern Railway Company
P. O. Box 1808
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CERTIFICATE OF SERVICE

I certify that I have, on October 25, 2021, served copies of CSXT's Reply Statement upon all parties of record in this proceeding, by electronic mail.

/s/ Sally Mordi

Sally Mordi

Attorney for CSX Transportation, Inc.