

CSXT-3

BEFORE THE
SURFACE TRANSPORTATION BOARD

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DOCKET NO. FD 36727

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CSX TRANSPORTATION, INC.
—ACQUISITION AND OPERATION—
RAIL LINE OF MERIDIAN & BIGBEE RAILROAD, L.L.C.

CSXT'S RESPONSE TO THE COMBINED NORFOLK SOUTHERN NOTICE OF
INTENT TO PARTICIPATE AND REQUEST TO HOLD CPKC/CSXT TRANSCON
CORRIDOR TRANSACTION IN ABEYANCE

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Dated: October 27, 2023

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CSXT¹ hereby responds to the Combined Norfolk Southern Notice of Intent to Participate and Request to Hold CPKC/CSXT Transcon Corridor Transaction in Abeyance, filed by Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "Norfolk Southern"), on October 25, 2023, in the following dockets: FD 36732, FD 36731, FD 36727, FD 36730, FD 36724, AB 1335X, and AB 55 (Sub-No. 814X).

As a preliminary matter, it is not entirely clear what Norfolk Southern is asking for, other than for the Board to delay consideration of the proposed transactions. Norfolk Southern makes a number of overlapping requests and arguments, not all of which are consistent with each other. For example, on page 4, Norfolk Southern asks the Board to order "a resubmittal of the various applications,

¹ The acronyms and defined terms used in this Response are the same as those used in CSXT's Application.

notices, and petitions,” with additional information. In the next paragraph, Norfolk Southern requests that the parties file a “consolidated application.”

Regardless, there is no need for the applicants to either resubmit the October 6 filings with additional information or to submit a “revised, unified, application.” In Finance Docket No. 36727, CSXT seeks Board authority to reacquire from MNBR the Assets comprising the Eastern Line and to resume operating that line in place of MNBR (the CSXT Transaction). In Finance Docket No. 36732, CPKC seeks authority to acquire a different MNBR line segment, the Western Line (the CPKC Transaction). These are separate transactions that involve different parties and thus require separate Board authority. There is no consolidated transaction that requires Board authorization. The separate filings requiring separate Board authority were structured consistent with the Board’s rules and precedent. Norfolk Southern points to no precedent requiring a single, unified application and no rules that would even govern such an unprecedented filing.

Additionally, the filings are complete and provide more than enough information on the relationship between the proposed transactions and the combined effects of the transactions, if both are approved, for Norfolk Southern and the public to fully participate in the Board’s review during the ordinary course of the proceedings that the Board will institute. CSXT expects that the Board will want to consider the impact of approval of both transactions, and CSXT therefore provided the Board with all the information necessary to address those combined effects. CPKC did the same. There is no need for a formal consolidation of the two

proceedings for the Board to assess the combined effects of the two transactions, and certainly there is no need to hold the proceedings in abeyance or to require an unprecedented “unified” filing for the Board to assess the full effects of both transactions.

The Board should reject Norfolk Southern’s requests and accept the CSXT Application, the CPKC Application, and all notices filed on October 6, 2023 related to each Application.

I. The October 6 filings were structured consistent with the Board’s rules and precedent.

The Board has specific rules and precedent regarding consideration of transactions subject to Board approval under 49 U.S.C. §§ 11323-25. The structure used by the applicants is fully consistent with the Board’s rules and precedent regarding the Board’s consideration of requests for authority to enter into transactions pursuant to 49 U.S.C. §§ 11323-25. The case cited by Norfolk Southern regarding consolidation is simply not relevant here. *Honey Creek R.R.—Pet. for Declaratory Order*, FD 34869 (STB served June 4, 2008) involved an abandonment proceeding that has nothing to do with the filing requirements for transactions of the type involved here.

The filing requirements for requests for Board authority for separate but related transactions under 49 U.S.C. §§ 11323-25 were described in a recent decision accepting an application and related filings for consideration by the Board. *CSX Corp.—Control & Merger—Pan Am Systems, Inc.*, FD 36472 (STB served July 30, 2021). In that case, commenters argued that a request for Board authority for

an ancillary transaction contingent on a primary transaction should have been included as part of the application for the primary transaction, rather than through a separate petition for exemption. The Board rejected those arguments, accepted the separate petition for the “related” transaction, and embraced the application and petition proceedings in order to consider the requests in a single decision.

The Board explained that “in past merger/control proceedings, related transactions have generally been ones that are **separate from** the merger/control transaction but **contingent upon** approval and consummation of the merger/control transaction.” *Id.*, slip op. at 21-22 (emphasis added). The Board noted that it “can still impose conditions relating to [the related transaction] as part of the [primary transaction] approval, even if the [related transaction] is in a separate docket. Indeed, that is why such transactions are considered as *related* transactions—so that the Board can consider the transactions together.” *Id.*, slip op. at 22.

CSXT clearly stated in its Application that the CSXT Transaction and the CPKC Transaction are independent transactions governed by different agreements between different parties: CSXT and MNBR on the one hand, and CPKC and MNBR on the other hand. Therefore, separate applications were filed for each transaction. CSXT and CPKC are not proposing to enter into any transactions with each other that require Board authority, apart from some ancillary trackage rights necessary to effectuate interchange.

Not only are the CSXT Transaction and the CPKC Transaction “separate” for application structuring purposes, they are also not “related” to each other, because the CSXT Transaction could proceed regardless of whether the CPKC Transaction occurs. The 2003 Agreement that leased the Eastern Line to MNBR will expire soon, and CSXT has the right under the 2003 Agreement to repurchase the Assets from MNBR and resume operating the Eastern Line upon termination of the 2003 Agreement. CSXT could do this regardless of whether the CPKC Transaction occurs, and CSXT has preserved this flexibility through the Transaction Agreement with GWI, contrary to Norfolk Southern’s allegations.

However, as described further in the CSXT Application, there are certain ancillary transactions that are “related” to either the CSXT Transaction or the CPKC Transaction, because those ancillary transactions are contingent upon approval and consummation of either of the primary transactions. Notices of exemption were properly filed in different dockets for those separate ancillary transactions.²

² Norfolk Southern stated that holding the proceedings in abeyance would give the applicants time to correct “other apparent deficiencies in Applicants’ collective filings” and suggested that such deficiencies include the invocation of the class exemption in the related discontinuance proceedings. (See Norfolk Southern Combined Notice 10, 10 n.22.) The proposed MNBR Discontinuance in AB 1335X and CSXT Discontinuance in AB 55 (Sub-No. 814X) both appropriately invoked the class exemption. Long-standing Board precedent indicates that it is appropriate to invoke a class exemption to discontinue overhead trackage rights over active line segments. See, e.g., *Soo Line R.R. Co.—Discontinuance of Trackage Rights Exemption—in Wayne, Washtenaw, Oakland, Livingston, Ingham, Clinton, Easton, Barry, Ionia, Kent, Ottawa, Allegan, Van Buren, and Berrien Counties, Mich., LaPorte, Porter, & Lake Counties, Ind., & Cook County, Ill.*, AB 57 (Sub-No. 59X) (STB served June 30, 2010); *Illinois Cent. R.R. Co.—Discontinuance of Trackage Rights Exemption—in Madison, Yazoo, Holmes, Carroll, Montgomery, Grenada, Yalobusha, Tallahatchie, Panola, Tate, & Desoto Counties, Miss.*, AB 43 (Sub-No. 185X) (STB served Oct. 18, 2011); *Norfolk S. Ry. Co.—Discontinuance of Trackage Rights Exemption—in Luzerne and Carbon Counties, Pa.*, AB 290 (Sub-

In sum, each of the transactions presented in the applications and notices of exemption is separate. They are appropriately addressed in separate requests for authority. Some of the transactions are “related” to the CSXT Transaction or the CPKC Transaction under the Board’s rules and precedent and they should be embraced within the CSXT Transaction or the CPKC Transaction, consistent with the Board’s precedent. The “revised, unified, application” requested by Norfolk Southern is simply not appropriate here.³

II. The October 6 filings are complete and provide Norfolk Southern and the public with ample opportunity to participate in the Board’s proceedings.

Norfolk Southern suggests that the Board should “hold the current proceedings in abeyance until such time as the Applicants submit information that reflects the consolidated nature of the Applicants’ proposed transaction.” This request is completely unnecessary because the parties have already submitted information about the effects of Board approval of both sets of transactions.

The CSXT Application and the other October 6 filings provide all of the information required by the Board’s rules. CSXT acknowledged in its Application that the Board may wish to analyze the aggregate effects of all of the transactions, whether through a single proceeding that embraces all of the dockets or through

No. 410X) (STB served Aug. 20, 2021). In any event, this procedural issue should not prevent the Board from accepting the filings and establishing a procedural schedule.

³ CSXT explained in its Application that it did not believe that the CSXT Transaction and the CPKC Transaction should be embraced in a single transaction under the Board’s precedent. (*See* Appl. APP-14 to APP-15.) But even if the Board were to embrace the two sets of transactions, Norfolk Southern’s request for a new, single application would be inappropriate and unnecessary. If the Board wanted to conduct a single “embraced” proceeding, it could do so without any new filings and without the delay and contorted process proposed by Norfolk Southern.

two separate proceedings for the CSXT and CPKC transactions. Therefore, CSXT provided information in its Application regarding the overall effects on railroad operations and competition of all of the transactions, in the event that all of the transactions are implemented.

Norfolk Southern does not identify any issues relating to the possible effects of the two transactions that have not already been adequately addressed in the Applications. The focus of Board review is the competitive effects of a proposed transaction, and both parties explained in detail why there would be no adverse competitive effects. Indeed, CSXT and CPKC explained that the creation of a new east-west corridor through Myrtlewood would be highly pro-competitive by creating new shipper options for efficient service between the east and the west. No gateways would be closed as a result of either transaction. There are no commercial agreements between CSXT and CPKC that would force a rerouting of traffic. Rather, shippers would simply have a new competitive option to route traffic over the Myrtlewood interchange instead of moving through other congested locations, like New Orleans. Those gateways would remain fully open, but shippers would now have efficient alternatives to them.

Norfolk Southern and any other interested parties will have ample opportunity to comment on the Board's consideration of the proposed transactions through the procedural schedule mandated by 49 U.S.C. § 11325. The issues raised by Norfolk Southern can be fully addressed during that process.

Norfolk Southern's suggested abeyance approach would also be inconsistent with the Board's statutory mandate to either accept a complete application or to reject an incomplete application. *See* 49 U.S.C. § 11325(a). The CSXT Application and the other October 6 filings are complete. They contain all required information relating to the transaction for which Board approval is sought and all information needed by the Board to assess the impact of Board approval in connection with possible Board approval of the CPKC Transaction. Under the Board's rules, the Board should accept the CSXT Application and the other October 6 filings related to the CSXT Application and set a procedural schedule for their consideration.

III. Conclusion

The Board should reject Norfolk Southern's requests and accept the CSXT Application, the CPKC Application, and all notices filed on October 6, 2023 related to each Application and set a procedural schedule for their consideration.

Respectfully submitted,

/s/ Peter W. Denton

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Dated: October 27, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have caused this CSXT's Response to the Combined Norfolk Southern Notice of Intent to Participate and Request to Hold CPKC/CSXT Transcon Corridor Transaction in Abeyance in Docket No. FD 36727 to be served electronically or by first class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Sally Mordi

Sally Mordi
Attorney for CSX Transportation, Inc.

October 27, 2023