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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36727[1]

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

Decision No. 6

Digest:[2] This decision authorizes CSX Transportation, Inc., to acquire from Meridian & Bigbee Railroad, L.L.C., and operate the Eastern Line between Burkeville, Ala., and Myrtlewood, Ala.

Decided: October 16, 2024

On October 6, 2023, CSX Transportation, Inc. (CSXT), filed an application seeking Board approval for CSXT to acquire from Meridian & Bigbee Railroad, L.L.C. (MNBR), and operate a rail line, known as the Eastern Line, between Burkeville (also known as Burkville), Ala., and Myrtlewood, Ala. This proposal is referred to as the Transaction. The Board now approves CSXT's application, subject to conditions.

BACKGROUND

CSXT seeks the Board's prior review and authorization pursuant to 49 U.S.C. §§ 11323-25 and 49 C.F.R. part 1180 for it to acquire from MNBR and operate the Eastern Line,[3] consisting of approximately 93.68 miles of rail line extending from (1) milepost XXB 189.00 near Burkeville to milepost XXB 222.00 at Western Junction, a distance of about 30.22 miles; and (2) from a connection with the first segment at Western Junction, milepost

[1] This decision embraces the following dockets: Alabama & Gulf Coast Railway—Trackage Rights Exemption—CSX Transportation, Inc., Docket No. FD 36724; and Meridian & Bigbee Railroad—Discontinuance of Incidental Overhead Trackage Rights—in Lowndes & Montgomery Counties, Ala., Docket No. AB 1335X.

[2] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

[3] The agreement by which CSXT would acquire the Eastern Line is referred to herein as the Transaction Agreement.

OOR 716.25 to milepost ORS 779.71 near Myrtlewood, a distance of about 63.46 miles.[4] (Appl. 1.) According to CSXT, the Eastern Line includes Selma Yard, at Selma, Ala., and the following stations: Myrtlewood, Linden, Thomaston, Safford, Orville, Beloit, Selma, Industrial Lead, Tyler, Benton, Whitehall, Burkeville, all in Alabama. (Id.)

Prior to 2003, CSXT and its predecessors owned and operated the Eastern Line. (Id. at 2.) In 2003, CSXT entered into a lease agreement (2003 Agreement) with M&B Railroad, L.L.C. (M&B),[5] whereby CSXT: (1) sold to M&B the tracks, rails, ties, ballast, other track materials, and any and all improvements or fixtures affixed to the Eastern Line (the Assets); (2) leased to M&B for a 20-year term the real property underlying the Eastern Line (the Real Property); and (3) granted M&B incidental overhead trackage rights over approximately 14 miles of CSXT trackage between Burkeville and Montgomery, Ala., to effectuate interchange between M&B and CSXT at CSXT's yard at Montgomery. See M & B R.R., L.L.C.—Acquis. & Operation Exemption—CSX Transp., Inc., FD 34423 (STB served Nov. 20, 2003). The 2003 Agreement provides that CSXT may reacquire the Assets from MNBR upon expiration of MNBR's leasehold interest. (Appl. 2-3.) The parties have entered an agreement for CSXT to reacquire the Assets from MNBR (Transaction Agreement). The 2003 Agreement was set to expire at the end of its 20-year term, on November 14, 2023. (Id. at 2.) However, the parties agreed to extend the 2003 Agreement until the first to occur of: (1) the closing date of the transactions contemplated under the Transaction Agreement; or (2) the Drop Dead Date, as defined in the Transaction Agreement. (Id. at 4.)

In addition to MNBR's operations on the Eastern Line, Alabama & Gulf Coast Railway LLC (AGR)[6] operates over an approximately 10-mile portion of the Eastern Line between Linden, Ala., and Myrtlewood to interchange traffic with MNBR at Myrtlewood. (Appl. 3.) AGR has a roughly north-south rail line that connects with and crosses the Eastern Line at Linden. (Id.)

MNBR also owns and operates a railroad line (the Western Line) that extends approximately 51 miles roughly east-west between the connection with the Eastern Line at Myrtlewood on the eastern end, and a connection with a line owned by Canadian Pacific Railway Company (CPKC) at Meridian, Miss., on the western end. (Id.) In addition to serving local traffic on the Eastern and Western Lines, and moving traffic to and from AGR, MNBR currently operates over the Eastern and Western Lines to move overhead traffic between CSXT at Montgomery and CPKC at Meridian, and to move a limited amount of Norfolk Southern Railway Company (NSR) traffic that it interchanges with NSR at Selma. (Id.) CPKC has concurrently filed an application seeking Board authority to acquire from MNBR and operate the

[4] All citations to the parties' filings use the consecutive page numbers provided in those filings.

[5] Genesee & Wyoming Inc. (GWI) acquired control of M&B in 2005 and later changed the name of M&B to MNBR. See Genesee & Wyo. Inc.—Control Exemption—Rail Partners, L.P., FD 34708 (STB served June 24, 2005).

[6] AGR and MNBR are both controlled by GWI. See Genesee & Wyo. Inc.—Control RailAmerica, Inc., FD 35654, slip op. at 3 n.7 (STB served Dec. 20, 2012).

Western Line (the CPKC Transaction).[7] CPKC Appl., Oct. 6, 2023, Canadian Pac. Kan. City Ltd.—Acquis. & Operation—Certain Rail Line of the Meridian & Bigbee R.R. in Lauderdale Cnty., Miss., FD 36732.

CSXT states that if the Board approves the Transaction, it would resume operating the Eastern Line, much as MNBR does today, and MNBR would cease operating on the Eastern Line. (Appl. 3.) CSXT does not expect the number of trains operating on the Eastern Line in the next five years to increase, (Id. at 3), though trains would operate seven days per week on the Eastern Line post-Transaction, whereas MNBR trains currently operate five days per week. (Appl. 223; compare Appl. 200-01(stating that westbound and eastbound CSXT road trains will operate seven days per week) with CSXT Letter, Feb. 1, 2024 (stating that westbound and eastbound MNBR road trains currently operate five days per week).) In addition, CSXT asserts that if the Transaction is approved, it would make significant investments in the Eastern Line, including upgrading a substantial portion of it to Federal Railroad Administration Class II standards within five years. (Appl. at 15-16.) CSXT states that these investments would improve safety and reliability and reduce transit times. (Id. at 16.) In addition, according to CSXT, its reacquisition of the Eastern Line would create redundancy in the southern portion of its network that would give it a greater ability to respond to unexpected network problems. (Id.) CSXT further states that if the Board approves both the Transaction and the CPKC Transaction, the principal aggregate effect would be to create a new direct interchange between CSXT and CPKC at the point where the Western Line and Eastern Line connect in Myrtlewood, thereby eliminating the need for MNBR to serve as an intermediary carrier in moving overhead traffic between CPKC in Meridian and CSXT in Montgomery. (Id. at 13.)

By decision served November 3, 2023, the Board accepted CSXT's application, established a procedural schedule, and preliminarily determined that the Transaction is a minor transaction as defined by the Board's regulations. The decision also directed CSXT to supplement the record with certain additional information. See CSXT Transp. Inc.—Acquis. & Operation—Rail Line of Meridian & Bigbee R.R. (Decision No. 1), FD 36727 et al. (STB served

[7] CSXT states that the Transaction and the CPKC Transaction are not "directly related" within the meaning of 49 C.F.R. § 1180.4(c)(2)(vi) because "the Transaction could proceed regardless of whether the CPKC Transaction occurs." (Appl. 7-8.) CSXT nonetheless provided the Board with information regarding the effects of the Transaction standing alone and with information regarding the combined effects of the Transaction and the CPKC Transaction. Because the Board is approving the CPKC Transaction, Canadian Pac. Kan. City Ltd.—Acquis. & Operation—Certain Rail Line of Meridian & Bigbee R.R. in Lauderdale Cnty., Miss., & Choctaw & Marengo Cntys., Ala., FD 36732 et al. (STB served Oct. 17, 2024), the competitive analysis in this decision considers the effects of the two transactions combined and grants authority for CSXT to go forward with the Transaction under the assumption that CPKC will also go forward with its proposed transaction. However, as explained in more detail below, CSXT may go forward with the Transaction under the authority granted in this decision in the event that the CPKC Transaction does not occur.

Nov. 3, 2023).[8] Based on the application and the record at that time, the Board found that the efficiency and other public interest benefits of the Transaction would clearly outweigh any potential anticompetitive effects. Id. at 8. The Board explained, however, that its findings regarding anticompetitive effects were preliminary and that it would conduct a careful review before making a final determination as to whether the Transaction would be likely to substantially lessen competition, create a monopoly, or restrain trade, and whether any anticompetitive effects would be outweighed by the public interest in meeting significant transportation needs. Id. at 9 (citing 49 U.S.C. § 11324(d)(1)-(2)). The Board noted that it may consider imposing conditions on the Transaction and reserved the right to require the filing of further supplemental information as necessary to complete the record. Decision No. 1, FD 36727 et al., slip op. at 8-9.[9] Finally, the Board stated that an Environmental Assessment (EA) would be prepared to comply with the Board's obligations under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370m-11, and related environmental laws. On November 21, 2023, CSXT supplemented its application as required by Decision No. 1.

Statements of support for the Transaction were filed from Congresswoman Terri A. Sewell, the Alabama Department of Commerce, the Selma & Dallas County Economic Development Authority, and Ferroglobe USA Quartz, Inc.[10]

Substantive comments and/or requests for conditions were filed by the Brotherhood of Signalmen (BRS) on December 11, 2023,[11] and Norfolk Southern Corporation and Norfolk

[8] The Board also accepted for consideration the related filing in Docket No. FD 36724. Decision No. 1, FD 36727 et al., slip op. at 8. In addition, noting that the verified notice of exemption in Docket No. AB 1335X did not qualify for the class exemption procedures under which it was filed, the Board accepted that verified notice as evidence bearing on consideration of whether to grant an individual exemption on the Board's own motion. Id. at 7-8. The Board permitted CSXT to supplement the record in that docket with any additional information and argument it would like the Board to consider in determining whether the proposed discontinuance meets the exemption standard of 49 U.S.C. § 10502(a). Id.

[9] The procedural schedule was subsequently amended by decisions issued November 9, 2023, December 6, 2023, and December 15, 2023.

[10] The statements from Congresswoman Terri A. Sewell and Ferroglobe USA Quartz, Inc. were filed separately from CSXT's application on October 30, 2023, and November 20, 2023, respectively. The other statements of support were filed as Exhibit 23 of the application.

[11] In its comments, BRS does not oppose the Transaction or request conditions, but states that multiple crossings along the line require maintenance and that "it would be wise for CSXT to provide a comprehensive plan addressing the need for additional workers beyond those mentioned in its filing." (BRS Comment 1.) According to BRS, CSXT's filings lack clarity on its strategy for sustaining current assets. (Id.) CSXT disagrees that any additional information is required and emphasizes that it expects to provide sufficient employees as necessary to maintain, operate, and dispatch the Eastern Line. (CSXT Reply 23, Jan. 26, 2024.)

Southern Railway Company (collectively, NSR) on December 29, 2023.[12] On January 26, 2024, MNBR[13] and CSXT each filed a reply to comments and requests for conditions. On February 1, 2024, CSXT filed a letter with supplemental information regarding its operating plan, clarifying the anticipated frequency of MNBR trains on the Eastern Line. On March 21, 2024, NSR filed a request to withdraw its filings in all dockets related to the Transaction and the CPKC Transaction and to terminate its participation in the proceedings "[i]n light of productive discussions among the parties and recent developments." (NSR Mot. to Withdraw 1-2.)

DISCUSSION AND CONCLUSIONS

Statutory Criteria. Under 49 U.S.C. § 11323(a)(3), the acquisition of control of a rail carrier by another rail carrier requires prior Board approval. See also 49 U.S.C. § 11324. Here, CSXT seeks to acquire from MNBR and operate the Eastern Line. Because the Transaction does not involve the merger or control of two or more Class I railroads, it is governed by § 11324(d), which directs the Board to approve the application unless it finds that: (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

The Board must approve the application unless there would "likely" be anticompetitive effects of the type described in subsection 11324(d)(1) (e.g., substantial lessening of competition). 49 U.S.C. § 11324(d)(1). And, even if the Board were to find that there would be a likely and substantial lessening of competition (or a likely creation of a monopoly or restraint of trade), the Board must approve the transaction unless the anticompetitive effects outweigh the public interest in meeting significant transportation needs, see 49 U.S.C. § 11324(d)(2), and cannot be mitigated through conditions. See Soo Line Corp.—Control—Cent. Me. & Que. Ry. US (Soo Line/CMQR), FD 36368, slip op. at 4 (STB served May 4, 2020); Norfolk S. Ry.—Acquis. & Operation—Certain Rail Lines of the Del. & Hudson Ry. (NS/D&H), FD 35873, slip op. at 14 (STB served May 15, 2015); Paducah & Louisville Ry.—Acquis.—CSX Transp., Inc., FD 34738, slip op. at 4 (STB served Nov. 18, 2005).

Under 49 U.S.C. § 11324(c), the Board has broad authority to impose conditions on a transaction subject to § 11324(d). See Grainbelt Corp. v. STB, 109 F.3d 794, 798 (D.C. Cir. 1997) (the agency "has 'extraordinarily broad discretion' in deciding whether to impose protective conditions in the context of railroad consolidations"). Typically, the Board uses its

[12] On October 25, 2023, NSR filed a request to consolidate this proceeding with the proceeding relating to the CPKC Transaction and to hold the consolidated proceeding in abeyance. In Decision No. 1, the Board stated that it would not grant NSR's request at that time but that it might further address consolidation in a subsequent decision. Decision No. 1, FD 36727 et al., slip op. at 9-10 n.11. NSR has since withdrawn its request for consolidation, (see NSR Mot. to Withdraw 1-2), and the Board will therefore not address the issue further.

[13] MNBR limited its reply to responding to a request for mediation included in NSR's comment, (see MNBR Reply 4, Jan. 26, 2024), which NSR subsequently withdrew, (see NSR Mot. to Withdraw 1-2).

conditioning authority to ameliorate competitive harm that would result from the transaction. See Soo Line/CMQR, FD 36368, slip op. at 4, 7; see also Norfolk & W. Ry.—Purchase—Ill. Term. R.R., 363 I.C.C. 882, 891 (1981). In doing so, the harm "must be distinguished from pre-existing disadvantages that other railroads, shippers, or communities may have been experiencing . . . i.e., pre-existing disadvantages that will neither be caused nor exacerbated" by the transaction. Canadian Nat'l Ry.—Control—Duluth, Missabe & Iron Range Ry., FD 34424 et al., slip op. at 14 (STB served Apr. 9, 2004); see also NS/D&H, FD 35873, slip op. at 14 (STB served May 15, 2015). The Board's conditioning power is thus "used to preserve competitive options (not to expand them)." Burlington N. Inc.—Control & Merger—Santa Fe Pac. Corp., 10 I.C.C.2d 661, 745 (1995).

Competitive Analysis. After considering the application and the full record in this proceeding, the Board finds that CSXT's acquisition of the Eastern Line—either standing alone or when considered in conjunction with CPKC's proposed acquisition of the Western Line—would not likely cause a substantial lessening of competition, the creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States. And, even if the Transaction were to result in some limited anticompetitive effects, those effects would be outweighed by the public interest in meeting significant transportation needs.

Nothing in the record indicates that the Transaction would reduce competitive rail alternatives for traffic currently moving over the Eastern Line. Most of the traffic on the Eastern Line today is traffic interchanged between MNBR and AGR or overhead traffic moved by MNBR between CSXT in Montgomery and CPKC in Meridian. (Appl. 214.) CSXT states that traffic currently interchanged between AGR and MNBR moves to CSXT, and it would continue to do so after the Transaction—although through a direct connection between CSXT and AGR at Myrtlewood—and that other traffic moving on AGR would have the same competitive options it has today. (Appl. 222.) CSXT further states that overhead traffic moving between CSXT at Montgomery and CPKC at Meridian would continue to do so post-Transaction but without the need for MNBR as an intermediate carrier. (Appl. 239.) With respect to local traffic on MNBR, CSXT states that shippers of this traffic would not lose any competitive options; CSXT would simply replace MNBR as the carrier for this traffic. (Appl. 203-04, 222.) CSXT also notes that although local shippers today have the ability to move on MNBR to interchange with NSR at Selma, MNBR's shippers do not currently use this option for any notable volume of traffic. (Appl. 222.) However, CSXT commits to keeping the gateway with NSR at Selma open on commercially reasonable terms and is asking the Board to impose this commitment as a condition to approval of the Transaction.[14] (Id.) In short, no shipper would see a reduction in the number of rail carriers to which it currently has access and the vast majority of existing traffic would move more efficiently due to the elimination of MNBR as an intermediate carrier.

While CSXT expects some traffic that currently does not move between CSXT and CPKC over the Montgomery-Meridian route to shift to that route post-Transaction, the record does not support a finding that these potential diversions would cause adverse competitive

[14] According to CSXT, one MNBR shipper currently does move traffic on MNBR to NSR at Selma. CSXT commits that it will continue to provide service to NSR at Selma for this shipper at current rates, subject to reasonable cost escalation, for five years. (Appl. 222-23.)

impacts. CSXT anticipates that some existing traffic currently moving between CSXT and CPKC through interchange operations at New Orleans, La., East St. Louis, Mo., and Brookwood, Ala., would shift following the Transaction to the shorter, more efficient route through Myrtlewood. (Appl. 22.) Such diversions would simply shift existing CSXT-CPKC traffic currently moving through existing gateways to the new, more efficient CSXT-CPKC Myrtlewood gateway and thus would not adversely affect competition. CSXT also states that if the CPKC Transaction goes forward, it anticipates that a relatively small amount of certain traffic currently moving between CSXT-served points in the Southeastern United States and CPKC-served points in Mexico, would be diverted through the new Myrtlewood gateway.[15] (CSXT Suppl. 18-19.) CSXT currently interchanges this traffic with a bridge carrier in New Orleans. (Id. at 19.) Post-Transaction, the Myrtlewood routing would provide customers with an alternative that would require fewer handling events and avoid the congested New Orleans gateway, offering a reduction of both transit time and cost. (Id.)[16]

CSXT also addressed the issue of whether the Transaction could lead it to engage in anticompetitive behavior by restricting or closing gateways. In a reply to NSR's request for consolidation, CSXT asserted that "[n]o gateways would be closed as a result of [the Transaction]" and that previously used gateways "would remain fully open." (CSXT Reply 7, Oct. 27, 2023.) In Decision No. 1, the Board ordered CSXT to explain these statements more fully and to address to what extent the Transaction would give it the ability and incentive to shift traffic away from existing interline routing arrangements with carriers other than CPKC to routes through the CPKC-CSXT gateway at Myrtlewood in order to obtain a longer haul on CSXT's network for such traffic. Decision No. 1, FD 36727 et al., slip op. at 10. CSXT replied that it would have no incentive to close or restrict gateways to shift traffic in such a manner because the traffic densities it has achieved for gateway movements with carriers other than CPKC are key to efficiently organizing blocking and staging practices and controlling costs. (CSXT Suppl. 5-6.) In addition, CSXT states that competition from trucks, transloads, and other nearby carriers would prevent CSXT from trying to direct traffic over inefficient routes simply to earn long-haul revenue. (Id. at 10-11.) According to CSXT, such efforts would result in the loss of traffic and revenues. (Id. at 11.)

[15] While attempting to avoid references to confidential or highly confidential information in Board decisions, the Board reserves the right to rely upon and disclose such information in decisions when necessary. In this case, the Board determined that it could not adequately present its findings with respect to the issues without disclosing certain general information designated by CSXT as confidential regarding the current routing of traffic between CSXT-served points in the Southeastern United States and CPKC-served points in Mexico and potential shifts in the routing of this traffic post-Transaction. However, the Board also notes that this same information is treated by CPKC as public information and is publicly available in Docket FD 36732. See, e.g., CPKC Appl. 253-54, Dec. 11, 2023, Canadian Pac. Kan. City Ltd., FD 36732 et al.

[16] As noted in the decision concurrently being served in Docket No. 36732 approving the CPKC Transaction, the bridge carrier interchanges this traffic with CPKC in Laredo, Tex. Canadian Pac. Kan. City Ltd., FD 36732 et al., slip op. at 11 (STB served Oct. 17, 2024). That decision explains that CPKC is subject to an existing gateway commitment to keep the Laredo gateway open on commercially reasonable terms. Id. at 9.

The Board generally agrees with CSXT that the implications of reducing traffic densities for non-CPKC interchanges and existing competition would limit CSXT's ability to restrict or close gateways to shift non-CPKC interline traffic to the Myrtlewood gateway post-Transaction to obtain a longer haul for itself. Indeed, those factors appear sufficient to prevent CSXT from engaging in such behavior today. And, while there may be some limited circumstances post-Transaction in which CSXT could have an incentive to restrict or close gateways to shift traffic, (see id. at 12-13 (identifying longer haul opportunities)), this possibility is speculative and not sufficient to find that the Transaction is "likely to cause a substantial lessening of competition, the creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States." 49 U.S.C. § 11324(d). Given the efficiencies and competitive pressures that CSXT identified, which diminish its ability and incentive to close or restrict gateways, the record before the Board does not suggest that CSXT is "likely" to engage in such anticompetitive conduct, much less to a degree that would cause a "substantial" lessening of competition.[17]

For these reasons, the Board does not find that the Transaction is likely to cause a substantial lessening of competition, the creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States. Even if the Transaction were to result in some limited anticompetitive effects, they would be outweighed by the public interest in meeting significant transportation needs, to which the Board will now turn.

CSXT and CPKC plan to make significant investments in the Eastern and Western Lines respectively. (Appl. 8, 215.) These investments would improve safety, reliability, and speeds between Montgomery and Meridian, thereby improving service for existing traffic. (Appl. 8, 215.) The Transaction would also create a direct east-west Class I rail connection between CSXT and CPKC at Myrtlewood rather than using MNBR as an intermediate carrier for overhead traffic moving between Montgomery and Meridian. (Appl. 194.) The elimination of MNBR as an intermediate carrier would result in more efficient movement of existing overhead traffic between Montgomery and Meridian. (Id.)

The Transaction would also provide benefits for traffic that does not currently move through Myrtlewood. The condition of the Eastern and Western Lines and use of MNBR as an intermediate carrier makes a CSXT-CPKC route through Myrtlewood a non-viable option for a significant amount of traffic despite it being the most direct route. (Appl. 24, 215.) However, with the creation of a direct CSXT-CPKC interchange and the improvements to the Eastern and Western Lines, CSXT would be able to divert traffic currently moving between CSXT and CPKC from longer, less efficient routes through existing gateways—including New Orleans, La., Brookwood, Ala., and East St. Louis, Mo.—to the new Myrtlewood gateway. (Appl. 6-7.) These diversions would significantly reduce transit distances and/or times in many cases. For example, moving traffic between Montgomery and Shreveport, La., through the new Myrtlewood gateway would shorten such movements by over 150 miles compared to the current route through the New Orleans gateway. (Id. at 7.) Similarly, moving traffic between

[17] Moreover, in the unlikely event that CSXT restricts or closes any gateway post-Transaction, despite its contention that it would lack the ability and incentive to do so, and also has "no intention" of doing so, (CSXT Suppl. 8), the Board has continuing jurisdiction pursuant to 49 U.S.C. § 11327 to enter supplemental orders under 49 U.S.C. § 11323. .

Cincinnati, Ohio, and Shreveport through the new Myrtlewood gateway would shorten such movements by approximately 150 miles compared to the current route through the East St. Louis gateway. (Id.) In addition, as explained above, the new Myrtlewood gateway would provide a new routing option that eliminates the use of a bridge carrier between CSXT and CPKC for certain traffic that currently moves between CSXT-served points in the Southeastern United States and CPKC-served points in Mexico. Rerouting CSXT-CPKC interline traffic away from less efficient routes and instead through Myrtlewood would not only improve service with respect to the traffic that is rerouted but could also benefit some traffic that continues to move through gateways other than Myrtlewood by reducing congestion at those gateways.

In addition, the Transaction could benefit future shippers that locate on CSXT's network. For example, new automobile plants are planned to be built in the Southeastern United States with access to CSXT's network. (Id.) The creation of a reliable, Class I freight corridor through Myrtlewood would provide these shippers with an efficient rail option for movement to and from the Southwestern United States and Mexico via Myrtlewood. (Id. at 8.) The existence of the direct CSXT-CPKC connection in Myrtlewood would also increase opportunities for new shippers that require efficient east-west rail service to locate in the region. (Id. at 8-9, 12.)

The creation of an efficient direct connection between CSXT and CPKC at Myrtlewood would also provide public benefits by creating redundancy in CSXT's network. (Id. at 12.) This redundancy would allow CSXT to reroute east-west traffic that would normally move through other gateways that may be experiencing problems (e.g., when the New Orleans gateway is experiencing weather-related disruptions).[18] (Id. at 12.)

Conditions and Other Relief Sought.

In this case, NSR is the only third-party that requested conditions be imposed on the Transaction. However, NSR later moved to withdraw these requests and terminate its participation in this proceeding, which is being granted in this decision. As noted above, before approving a proposed transaction, the Board must determine whether a proposed transaction would cause likely anticompetitive effects of the type described in subsection 11324(d)(1) (e.g., substantial lessening of competition) and whether any such anticompetitive effects outweigh the public interest in meeting significant transportation needs. See 49 U.S.C. § 11324(d). Therefore,

[18] The competitive analysis above assumes that both the Transaction and the CPKC Transaction go forward. However, if for some reason the CPKC Transaction does not go forward, this decision authorizes CSXT to consummate the Transaction on its own because the competitive analysis above with respect to existing traffic on the Eastern Line would be unaffected, including the protections afforded by CSXT's commitment to keep the Selma gateway open on commercially reasonable terms. If only the Transaction goes forward, existing local and overhead traffic on the Eastern Line will continue to move as they do today but with CSXT replacing MNBR as the carrier and with the benefit of CSXT's planned upgrades. (Appl. 10-11.) In short, the Transaction—standing alone—is not likely to result in the substantial lessening of competition, and may yield benefits, such that approval is warranted under 49 U.S.C. § 11324(d).

despite NSR's withdrawal, the Board will address NSR's requests to the extent they address potential adverse competitive impacts of the Transaction.

CSXT requests that the Board impose a condition requiring it to keep the Selma gateway open on commercially reasonable terms. (Appl. 13.) However, NSR requested that the condition be clarified to ensure CSXT is prohibited from doing "anything either physically or financially to take away the competitive option that exists today at Selma." (NSR Comments 57.) NSR further stated that CSXT should be ordered to "provide all shippers, whether in existence today or in the future, and regardless of their physical locations, the same level of frequency and reliable service that is available to shippers today." (Id.) In response, CSXT states its commitment to keep Selma open on commercially reasonable terms is not limited to financial terms but also includes a commitment to keep the gateway open on commercially reasonable operating terms. (CSXT Reply 21, Jan. 26, 2024.) Thus, according to CSXT, its commitment means that it would not "do anything either physically or financially that is going to take away a competitive option that exists today" as NSR requests. (Id.) However, CSXT takes issue with NSR's request to order CSXT to maintain, for all current and future shippers, the same level of frequency and reliability of service that is available to shippers today. CSXT argues that such a prescriptive and inflexible approach is unwarranted and inconsistent with Board precedent. (Id. at 21-22.)

The Board will hold CSXT to its representation that it will keep the gateway open on both financially and operationally reasonable terms for current and future shippers. The Board, however, will not impose a condition a requiring that CSXT maintain the same level of frequency and reliability of service for all current and future shippers. As the Board has previously explained, a flexible approach to what constitutes "commercially reasonable" terms for a gateway condition is preferable to a rigid one that imposes specific terms in perpetuity. Canadian Pac. Ry., FD 35600 et al., slip op. at 74. Market conditions change over time and in the future, commercial reasonableness may require a different level of service than is offered today. Per CSXT's request, the Board will also hold CSXT to its representation that it will provide access to the one shipper located on the Eastern Line that currently moves traffic to NSR at Selma at MNBR's existing rate for movements, for a period of five years and subject to reasonable cost escalation. (See Appl. 13.)

NSR also requested that the Board impose a condition requiring CSXT to adhere to all the representations it makes in the course of this proceeding, consistent with conditions imposed in other recent proceedings. (NSR Comments 61-62.) The Board will impose such a condition under the circumstances here. While the Board has recently expressed some concern that this type of broad order may "create uncertainty" for various reasons, it ultimately imposed such a condition where the applicants did not oppose it. See CSX Corp.—Control & Merger—Pan Am Sys., Inc., FD 36472 et al., slip op. at 35 (STB served Apr. 14, 2022); Canadian Pac. Ry.—Control—Kan. City S. (CPKC Approval Decision), FD 36500 et al., slip op. at 143 (STB served Mar. 15, 2023). Here, CSXT states that it "expects to be held to specific commitments it has made on the record in this proceeding" and that it "does not oppose the Board imposing as a condition to its approval of the CSXT Transaction the requirement that CSXT adhere to the representations that it has made in the course of this proceeding." (CSXT Reply 22, Jan. 26, 2024.) Given that CSXT has indicated its agreement, the Board will impose a condition

requiring CSXT to adhere to all of its representations made on the record in this proceeding. However, in any future attempt to enforce what may be claimed to have been a "representation" made on this record by CSXT, the Board would carefully consider changed circumstances, the difference between a forecast or claim and a commitment, and the context offered by CSXT on the record. See CPKC Approval Decision, FD 36500 et al., slip op. at 143; CSX Corp., FD 36472 et al., slip op. at 35-36.

Related Filings. In connection with the Transaction, the Board received filings in two additional dockets. The Board will address each of these proceedings below.

MNBR Discontinuance: In Docket No. AB 1335X, MNBR filed a verified notice of exemption under the class exemption at 49 C.F.R. part 1152, subpart F to discontinue overhead trackage rights along an approximately 14-mile segment of track owned by CSXT extending between milepost XXB189 near Burkeville and Montgomery Yard in Montgomery (Trackage Rights Segment). MNBR states that it does not intend to exercise discontinuance authority unless and until the Transaction is consummated. (MNBR, Notice 2, Oct. 6, 2023, AB 1335X.) MNBR states that upon consummation of the Transaction, it would terminate these overhead trackage rights because post-Transaction, MNBR would interchange with CSXT at Myrtlewood rather than in Montgomery. (Id. at 5.) According to MNBR, its proposed discontinuance qualifies for the Board's two-year out-of-service class exemption procedures because it seeks to discontinue overhead trackage rights and has not provided any local service within the past two years. (Id. at 3.) However, as the Board explained in Decision No. 1, MNBR may not proceed under the Board's two-year-out-of-service class exemption procedures because CSXT has been providing local service over the Trackage Rights Segment during the two-year period. Decision No. 1, FD 36727 et al., slip op. at 7; see Austin Area Terminal R.R.—Discontinuance of Serv. Exemption—in Bastrop, Burnet, Lee, Llano, Travis, & Williamson Cntys., Tex., AB 578X (STB served Nov. 3, 2023) (reaffirming that to qualify for the two-year-out-of-service class exemption a carrier must certify that *no local traffic* has moved over the line for two years, not just its own traffic). The Board stated that it would nonetheless consider whether to grant an individual exemption for this discontinuance authority on its own motion as it considers the Transaction and permitted MNBR to supplement the record in Docket No. AB 1335X with any additional information and argument it would like the Board to consider in determining whether the proposed discontinuance meets the exemption standard of 49 U.S.C. § 10502(a). Decision No. 1, FD 36727 et al., slip op. at 7.

MNBR supplemented its filing on November 21, 2023. MNBR states that it uses the overhead trackage rights to reach an interchange with CSXT at Montgomery and that these rights would no longer be necessary once the Transaction is consummated. (MNBR, Suppl. 3, Oct. 6, 2023, AB 1335X.) In fact, MNBR states that post-Transaction, it would no longer be able to exercise the trackage rights because it would no longer have the ability to reach Burkeville after CSXT acquires the Eastern Line. (Id.) MNBR further states that it holds no rights to serve, and has never served, local traffic on the Trackage Rights Segment. (Id.) CSXT has continuously held and would continue to hold the right and obligation to serve local traffic along the Trackage Rights Segment. (Id.)

Under 49 U.S.C. § 10903, a rail carrier may not discontinue operations without the Board's prior approval. Pursuant to 49 U.S.C. § 10502(a), however, the Board shall, to the maximum extent consistent with 49 U.S.C. subtitle IV, part A, exempt a transaction or service from regulation upon finding that (1) regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101, and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not needed to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed discontinuance under 49 U.S.C. § 10903 is not necessary to carry out the RTP. Granting an exemption here would eliminate the additional time and expense associated with preparing and filing a formal application, thereby furthering the RTP by reducing regulatory barriers to exit, see 49 U.S.C. § 10101(7), minimizing the need for federal regulatory control over the transaction, see 49 U.S.C. § 10101(2), and providing for the expeditious handling and resolution of this proceeding, see 49 U.S.C. § 10101(15). An exemption would also encourage efficient management of railroads by permitting MNBR to discontinue its rights to operate on trackage where it would no longer be able, or have any need, to operate. See 49 U.S.C. § 10101(9). Other aspects of the RTP would not be adversely affected.

Regulation of the proposed discontinuance is also not needed to protect shippers from the abuse of market power.[19] MNBR never had the right to serve local traffic on the Trackage Rights Segment. Post-Transaction, CSXT would continue to have an obligation to provide that service. (MNBR, Suppl. 3, Oct. 6, 2023, AB 1335X.) In addition, shippers' access to overhead service would not be affected by the discontinuance. After the Transaction is consummated and MNBR discontinues its trackage rights, CSXT would replace MNBR as the carrier providing overhead service on the Trackage Rights Segment. (Appl. 193.)

Accordingly, under 49 U.S.C. § 10502, the Board exempts from the prior approval requirements of 49 U.S.C. § 10903 the discontinuance of overhead traffic rights on the Trackage Rights Segment by MNBR. The exemption will take effect on the effective date of this decision. As a condition to the use of this exemption, any employees adversely affected by the transaction would be protected by the conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

AGR Acquisition of Trackage Rights. In Docket No. FD 36724, AGR filed a verified notice of exemption under 49 C.F.R. § 1180.2(d)(7) to acquire overhead trackage rights from CSXT over approximately 9.5 miles of rail line running between milepost 59.9 at Linden, and milepost 50.4 near Myrtlewood. AGR states that it does not intend to consummate the trackage rights transaction unless and until CSXT consummates the Transaction. (AGR Notice 2, Oct. 6, 2023, FD 36724.) AGR intends to use its overhead trackage rights for the interchange of traffic with MNBR, CSXT, and other carriers at Myrtlewood. (Id.)

[19] Because regulation is not necessary to protect shippers from the abuse of market power, the Board need not determine whether the transaction is limited in scope. See 49 U.S.C. § 10502(a)(2).

The notice of exemption will take effect on the effective date of this decision. As a condition to the use of this exemption, any employees adversely affected by the transaction would be protected by the conditions set forth in Norfolk & Western Railway—Trackage Rights, 354 I.C.C. 605 (1978), as modified in Mendocino Coast Railway—Lease & Operate, 360 I.C.C. 653 (1980).

Employee Protection. Under 49 U.S.C. § 11326(a), the Board must impose employee protective conditions on its approval of the Transaction. Because the Transaction is a line sale under 49 U.S.C. § 11323(a)(2), the appropriate employee protective conditions to impose are those set out in New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 I.C.C 60 (1979), aff'd, New York Dock Railway v. United States, 609 F.2d 83 (2d Cir. 1979), as modified by Wilmington Terminal Railroad—Purchase & Lease—CSX Transportation Inc., 6 I.C.C. 2d 799, 814-26 (1990), aff'd sub nom. Railway Labor Executives' Ass'n v. ICC, 930 F.2d 511 (6th Cir. 1991).

Environmental Matters. NEPA requires that the Board take environmental considerations into account in its decision-making. Under the Board's environmental regulations, an acquisition under 49 U.S.C. § 11323 generally requires the preparation of an Environmental Assessment (EA) where certain thresholds would be exceeded. See 49 C.F.R. § 1105.6(b)(4). The thresholds for assessing environmental impacts from increased rail traffic on rail lines in acquisitions are an increase in rail traffic of at least 100% (measured in gross ton miles annually) or an increase of at least eight trains per day. 49 C.F.R. § 1105.7(e)(5). For air quality impacts, rail lines located in areas classified as being in "nonattainment" areas under the Clean Air Act (42 U.S.C. §§ 7401-7671q) are also assessed if they would experience an increase in rail traffic of at least 50% (measured in gross ton miles annually) or an increase of at least three trains per day. 49 C.F.R. § 1105.7(e)(5)(ii).

Based on the record, neither the eight-trains-per-day nor the three-trains-per-day thresholds for environmental review would be exceeded as a result of the Transaction. However, because there would be an increase in gross-ton miles in excess of 100% on the line segments involved in the Transaction, the gross-ton mile threshold would be exceeded and therefore, the Board's Office of Environmental Analysis (OEA) prepared an EA.[20] See 49 C.F.R. §§ 1105.7(e)(5)(i); 1105.10(b).

The NEPA Process. OEA issued a Draft Environmental Assessment (Draft EA) on March 18, 2024. The Draft EA assessed the potential environmental impacts of the Transaction, including grade crossing delay, energy, air quality and climate change, noise and vibration, environmental justice, and cumulative effects. (Draft EA 1-6, 3-1 to 3-45.) According to the Draft EA, the only resource area for which the Transaction would have some impacts is noise, and OEA concluded that the noise impacts on the Eastern Line could be appropriately minimized with four preliminary noise mitigation measures (MM-Noise-01, 02, 03 and 04) recommended in

[20] For expediency and efficiency, OEA determined that it was appropriate to prepare one EA to encompass both the Transaction and CPKC's proposed acquisition of the Western Line. See Decision No. 1, FD 36727 et al., slip op. at 13.

the Draft EA.[21] (Id. at S-3, S-6 to S-7; 3-35.) OEA invited public comment on all aspects of the Draft EA. (Id. at 5-4.)

OEA received one comment on the Draft EA from CSXT, clarifying the projected traffic on the Eastern Line. (Env't Comment EI-33419.) On May 3, 2024, OEA issued a Final Environmental Assessment (Final EA), consisting of an errata sheet and response to CSXT's comment.[22] (Final EA 2.) In the Final EA, OEA made clarifying changes to mitigation measure MM-Noise-01a.[23] (Id. at 7.) In addition, in the Final EA, OEA removed one receptor from its recommended noise mitigation measure MM-Noise-01a because, based on the new traffic information provided by CSXT's and an updated noise analysis there would be no noise impacts on that receptor.[24] (Id. at 2.) However, the Final EA inadvertently failed to make this change. In the Appendix to this decision, the Board has corrected mitigation measure MM-Noise-01a so that it applies to the four severely impacted receptors and has made additional minor editorial changes to OEA's final recommended mitigation. All of the final environmental mitigation for the Eastern Line is set forth in the Appendix to this decision.

Conclusions on the Environmental Issues. The Board is satisfied that OEA took the requisite "hard look" and identified and independently evaluated the potential environmental impacts associated with the Transaction. The Board finds that the final environmental mitigation measures recommended by OEA for the Eastern Line are reasonable and feasible measures to reduce or eliminate potential adverse noise impacts of the Transaction. Accordingly, after carefully considering the entire environmental record, the Board adopts OEA's analysis and conclusions, as well as mitigation measures MM-General-01, MM-Noise-01a, MM-Noise-02, MM-Noise-03, and MM-Noise-04, as modified by the Board in the Appendix to this decision. Further, the Board concludes that OEA properly determined that, with the environmental mitigation conditions

[21] First, in mitigation measure MM-Noise-01a, OEA recommended that CSXT install appropriate building sound insulation (upgraded acoustical windows and doors) on five receptors that would experience severe noise impacts. (Draft EA 4-3 to 4-4.) Second, to minimize noise and vibration, OEA recommended mitigation measure MM-Noise-02 that CSXT and CPKC maintain rail and railbeds according to American Railway Engineering and Maintenance-of-Way Association standards. (Id. at 4-4.) Third, in mitigation measure MM-Noise-03, OEA recommended that CSXT and CPKC comply with Federal Railroad Administration regulations establishing decibel limits for train operations. (Id.) Fourth, OEA recommended in mitigation measure MM-Noise-04 that CSXT and CPKC consider lubricating curves where doing so would both be consistent with safe and efficient operating practices and significantly reduce noise for residential or other noise receptors. (Id.)

[22] The Council on Environmental Quality's regulations contemplate that a Final EA can consist of an errata where comments on the Draft EA are minor and make only factual corrections. See 40 C.F.R. § 1503.4.

[23] The Final EA also made the same clarifying changes to the recommended mitigation for the Western Line. (Final EA 2.)

[24] OEA also revised the environmental justice analysis in the Final EA in light of CSXT's comment. (Final EA 6.)

imposed here, the Transaction would not have potentially significant environmental impacts, and the preparation of an Environmental Impact Statement is unnecessary.

Historic Review. The Board's regulations provide that historic review normally is not required for acquisitions where there would be no significant change in operations and properties 50 years old and older would not be affected. See 49 C.F.R. § 1105.8. Based on the record, no historic review was required. See Decision No. 1, FD 36727 et al., slip op. at 6.

This action, as conditioned, will not significantly impact the quality of the human environment or the conservation of energy resources.

It is ordered:

1. In Docket No. FD 36727, the application seeking Board approval for CSXT to acquire and operate the Eastern Line is approved subject to the conditions imposed herein.

2. Approval of the Transaction is subject to the employee protective conditions set out in New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 I.C.C 60 (1979), aff'd, New York Dock Railway v. United States, 609 F.2d 83 (2d Cir. 1979), as modified by Wilmington Terminal Railroad—Purchase & Lease—CSX Transportation Inc., 6 I.C.C.2d 799, 814-26 (1990), aff'd sub nom. Railway Labor Executives' Ass'n v. ICC, 930 F.2d 511 (6th Cir. 1991).

3. The Board adopts environmental mitigation measures MM-General-01, MM-Noise-01a, MM-Noise-02, MM-Noise-03, and MM-Noise-04, as modified by the Board in this decision and set forth in the Appendix to this decision, and imposes them as conditions here.

4. CSXT is required to adhere to its representation that it maintain the Selma gateway open on commercially reasonable terms as described above and for the one shipper located on the Eastern Line that currently moves traffic to NSR at Selma, CSXT is required to provide access to NSR at Selma at MNBR's existing rate for five years, subject to reasonable cost escalation.

5. CSXT is required to adhere to any and all of the representations it made on the record during the course of this proceeding, whether or not such representations are specifically referenced in this decision.

6. Any condition requested by any party in this proceeding that has not been specifically approved in this decision is denied.

7. In Docket No. AB 1335X, the Board exempts from the prior approval requirements of 49 U.S.C. § 10903 the discontinuance of overhead trackage rights by MNBR, subject to the employee protective conditions set out in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

8. In Docket No. FD 36724, AGR's verified notice of exemption to acquire overhead trackage rights is approved, subject to the employee protective conditions set out in Norfolk & Western Railway—Trackage Rights, 354 I.C.C. 605 (1978), as modified in Mendocino Coast Railway—Lease & Operate, 360 I.C.C. 653 (1980).

9. NSR's motion to terminate its participation in this proceeding and withdraw its filings is granted.

10. Petitions for reconsideration of this decision must be filed by November 6, 2024. Requests for stay must be filed by November 6, 2024.

11. This decision will be effective on November 16, 2024.

By the Board, Board Members Fuchs, Hedlund, Primus, and Schultz. Board Members Fuchs and Schultz concurred with separate expressions.

BOARD MEMBER FUCHS, concurring:

The Board was required, by law, to issue a final decision on this application months ago. See 49 U.S.C. § 11325(d)(2).[1] The statute not only sets a deadline but gives a clear, specific command: the Board "shall approve" an application "unless" it finds the transaction results in likely substantial anticompetitive effects and the anticompetitive effects outweigh the public interest in meeting significant transportation needs.[2] 49 U.S.C. § 11324(d). Based on CSXT's submission, the Board does not find the transaction results in any anticompetitive effect that would permit it to withhold approval. No party to this proceeding opposes approval. Yet the Board fails to comply with a law that Congress enacted precisely to discipline the overly long and inefficiently scoped reviews that plagued the agency and industry for years. See, e.g., Ill. v. ICC, 687 F.2d 1047, 1054 (7th Cir. 1982). With great respect for my colleagues' priorities and perspectives, I hope the Board can correct and prevent this type of lapse going forward. The

[1] The Board was required, by statute, to issue a final decision by April 5, 2024. Notice of acceptance of the application was published in the Federal Register on November 9, 2023. 88 Fed. Reg. 77,403. Under 49 U.S.C. § 11325(d)(2), the Board was thus required to conclude evidentiary proceedings by February 22, 2024 (105 days) and to issue a final decision by April 5, 2024 (45 days, accounting for weekend). If one were to argue about when evidentiary proceedings closed, such date may have been even earlier. And the Board's Final Environmental Assessment was issued on May 3, 2024, more than five months ago. While the Board, on limited occasions, has missed statutory deadlines when the environmental review process was not complete, it must do all it can to avoid and mitigate any deadline problems when complying with other statutes. Moreover, the magnitude of the delay here is not readily explained when considering the record and context of this case.

[2] I use the abbreviated term "likely substantial anticompetitive effects" for the standard in subsection (d)(1) purely for readability purposes. The full text is: "(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States."

Board must not delay capital investments and operational improvements, undermine agency compliance and enforcement efforts, and create undue uncertainty for shippers, railroads, and the broader public. See, e.g., Surface Transportation Board, Growth in the Freight Rail Industry, EP 775, YOUTUBE (Sept. 17, 2024), https://www.youtube.com/live/Uh7TTmEz4d4?t=11870s at 3:17:50-3:18:43; Decision at 8-9.

The Board cannot offer an excuse for this delay. In recent months, the agency has issued many decisions in matters without statutory deadlines—declaratory orders, hearing orders, and other discretionary decisions—ahead of this mandatory action. Moreover, for at least a half-year, the Board has had all the evidence and argument it needed to decide this straightforward case, and the agency has had ample opportunity to resolve any controversy with prompt, clear action and supporting reasoning. Against this backdrop, I share Member Schultz's concern regarding the imposition of a non-specific representations condition, Decision at 15, because such an action introduces unnecessary confusion without any articulated practical benefit. Nonetheless, I will vote to approve the application and conditions because I am concerned that—if the Board were to split two-to-two on a condition—a questionable legal theory might be advanced that an even split on any single condition would defeat the application.[3] Given the construct of the relevant statutes here,[4] this legal theory does not appear to have merit. Still, I do not judge opposition to the non-specific representations condition in this case as worth the risk of the theory delaying or harming public benefits, particularly considering CSXT's position on the matter.[5] However, going forward, the agency should follow best practices and impose any

[3] In addition to the specific approval command and statutory deadline, I note that imposing a condition upon an application is discretionary and requires a Board majority.

[4] I also considered that the agency, rightly or wrongly, has recently sought to differentiate agreed-upon representations conditions from other types of conditions because representations can be seen as effectively becoming part of the underlying application. CSX Corp.—Control & Merger—Pan Am Sys., Inc. (Pan Am), FD 36472 et al., slip op. at 11 n.20 (STB served Apr. 14, 2022). Such a view arguably confirms that a non-specific representations condition is unnecessary. It also may affect whether the legal theory even applies in a split on this type of condition.

[5] It is not clear to me why today's decision—unlike recent unanimous decisions—discusses the Board's conditioning authority in this non-major case by including a citation to a major merger case, Grainbelt Corp. v. STB, 109 F.3d 794 (D.C. Cir. 1997). Grainbelt references the (current) section 11324(c) approval standard that governs major mergers, cites condition-related regulations that do not apply here, and involves the agency's denial of a requested condition (not the imposition of one). Grainbelt, 109 F.3d at 796-98. I do not want this citation alone to be relied upon to define or affect the scope of the Board's conditioning power in a section 11324(d) transaction (i.e., non-major), so I concur only in outcome in this case. At the same time, I recognize that today's decision also cites cases that explain or show that—with section 11324(d) transactions—the agency's review, including its consideration of conditions, has been constrained by the section 11324(d) approval standard, which is the more specific and recently-enacted statute that governs these types of transactions. Norfolk & W. Ry.—Purchase—Ill. Term. R.R., 363 I.C.C. 882, 891 (1981); Soo Line Corp.—Control—Cent. Me. & Quebec Ry. US Inc., FD 36368, slip op. at 7 (STB served May 4, 2020); see also Ill., 687 F.2d at

appropriate conditions with greater clarity and specificity, and it must conclude its reviews in a timely manner.

BOARD MEMBER SCHULTZ, concurring:

Board decisions should strive for clarity. The Board is tasked with making decisions that have significant effects on businesses in this country, and when we order a regulated entity to do something, it should be clear *what* we are ordering and *why* we are ordering it. The Board's vague condition holding CSXT to its representations in this proceeding fails on both counts.

Preliminarily, I note that although CSXT "does not oppose the Board imposing as a condition to its approval of the CSXT Transaction the requirement that CSXT adhere to the representations that it has made in the course of this proceeding," (CSXT Reply 22, Jan. 26, 2024), that does not mean that CSXT has "indicated its agreement" with such a condition, Decision at 10. Where CSXT agreed to a condition, or affirmatively requested a condition, it did so clearly. See, e.g., CSXT Appl. 13 ("CSXT requests that the Board impose these commitments as conditions to approval of the CSXT Transaction."). Without such an affirmative request or agreement from an applicant, the Board's authority to impose conditions is restricted—CSXT's lack of opposition to the Board's exercise of its conditioning authority does not absolve the Board from following statutory authority and finding that the exercise of its conditioning authority is required.

The Board's conditioning authority under 49 U.S.C. § 11324(c) is typically used to ameliorate competitive harm that would result from the transaction. See Decision at 5-6. In minor transactions, the Board can only exercise its conditioning authority after finding that it is necessary under § 11324(d), as recognized by the Board in Bessemer & Lake Erie Railroad Co.—Acquisition and Operation—Certain Rail Lines of CSX Transportation, Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence, & Franklin Counties, N.Y., FD 36347, slip op. at 9 (STB served Feb. 25, 2021) ("[T]he Board will impose competition-related conditions in non-major transactions only after concluding that absent such conditions, there is likely to be a substantial lessening of competition, creation of a monopoly, or restraint of trade under § 11324(d)(1)."). I and Board Member Fuchs dissented in that case and would have required the Board to also find,

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1053. Grainbelt itself cites Lamoille Valley R.R. v. ICC, 711 F.2d 295 (D.C. Cir. 1983), where the D.C. Circuit stated that it "reject[s] the suggestions . . . that the [agency] has broader discretion in imposing conditions on a merger than in approving or rejecting the merger as a whole." Lamoille Valley R.R., 711 F.2d at 301 n.3. Given that CSXT does not oppose any of the imposed conditions, that this area of law requires complex analysis of multiple statutes, and that parties here have not fully briefed the matter, I do not judge this case as a suitable vehicle for adjudicating the full scope of the Board's conditioning power. See Pan Am, FD 36472, slip op. at 11 n.20, 27; see also Bessemer & Lake Erie R.R.—Acquis. & Operation—Certain Rail Line of CSX Transp., Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence & Franklin Cntys., N.Y., FD 36347 (STB served Feb. 25, 2021); compare Vill. of Barrington, Ill. v. STB, 636 F.3d 650, 660-61 (D.C. Cir. 2011), with Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 2266 (2024).

under § 11324(d)(2), that "the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs" before imposing the relevant competition-related conditions on the transaction. See id. at 22-24 (Board Member Fuchs, dissenting); id. at 33-35 (Board Member Schultz, dissenting). Here, the Board has not found a substantial lessening of competition, creation of a monopoly, or restraint of trade under § 11324(d)(1), which both the Bessemer decision and the dissents require.[1] Accordingly, the Board has not made the requisite findings to impose the condition.

Beyond the failure to follow our own precedent, the "representations" condition also runs afoul of fundamental principles of good government as well as the Administrative Procedure Act. Process matters, and predictability matters. The Board should follow a process in its decisions, which at a minimum should include the reason that the Board is taking an action. When we reach outcomes without reasoning, we are failing in our role and doing a disservice to the people and entities regulated by the Board because such decisions provide little predictability for stakeholders to know how the Board will decide future cases. Unpredictable, unreasoned decisions invite additional litigation, increasing time and expense for all involved, and invite arbitrary Board actions that do not survive appeal.

Accordingly, while the Board has discretion in imposing conditions, the Board must "exercise its discretion in a reasoned manner." Judulang v. Holder, 565 U.S. 42, 53 (2011). This means that the Board must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)). Here, the Board has not stated *why*, under § 11324(d), conditions are needed, nor why this specific condition is needed. The Board has not stated *what* harms it is preventing or attempting to address by imposing this condition, nor has the Board stated *how* this condition will address those harms. Why is the Board imposing this condition? For no other reason than *because we can*, and that is not a valid basis for Board action.[2] Further, the complete lack of reasoning as to the purpose and scope of the

[1] Relatedly, the Board's citation to Grainbelt Corp. v. STB, 109 F.3d 794 (D.C. Cir. 1997), for our "broad authority to impose conditions" in minor transactions is misleading. Decision at 5. First, the court in Grainbelt made that statement in the context of a major transaction involving the merger of two Class I railroads, not in the context of a minor transaction like the one before the Board today. Under either the Bessemer decision or the dissents, the Board's conditioning authority is substantially restricted in minor transactions under § 11324(d).

[2] Contrast the Board's approach in this case with that taken in CSX Corp.—Control & Merger—Pan Am Systems, Inc. (Pan Am), FD 36472 et al. (STB served Apr. 14, 2022). There, the Board imposed a similar condition in a case with a voluminous record after weighing the uncertainty created by a broad condition holding the applicants to their representations and noting that the better practice is to state conditions with specificity. Pan Am, FD 36472 et al., slip op. at 35. Further, the Board set out seven specific representations in the ordering paragraphs. Id. at 50-51. In retrospect, however, imposing the "representations" condition may have been in error, because the applicants merely stated that they were not opposed to the

condition provides no guidance to CSXT, commenting parties, other stakeholders, or a future Board tasked with deciding whether to enforce a "representation" made by CSXT in this proceeding.

If it were up to me, the Board would approve this transaction without the unnecessary "representations" condition. But, despite my strong concerns about the Board's arbitrary use of its authority, I will not oppose the imposition of the condition. As Member Fuchs notes, the effect of the Board voting two to two on a condition is unclear. At the very least, further delay of this transaction would be a possibility, and the Board must not delay this beneficial transaction even further past the statutory deadline. The Board's lack of timeliness in this and other matters has already subjected CSXT and many other stakeholders to unnecessary uncertainty and expense while awaiting long-delayed Board actions.[3]

For the reasons above, I concur with the Board's decision.

condition—they did not affirmatively request or agree to it, and the Board did not find that the exercise of its conditioning authority was necessary under § 11324(d).

[3] Member Fuchs aptly and thoroughly explains the extent and indefensibility of the delay in this case. I raise the issue only to make a separate point that the Board cannot reasonably expect to hold stakeholders accountable to Board rules if we do not hold ourselves to the same standard. The Board must prioritize issuing its decisions in a timelier manner.

APPENDIX: ENVIRONMENTAL CONDITIONS

General Mitigation

MM-General-01. If there is a material change in the facts or circumstances upon which the Board relied in imposing specific environmental mitigation conditions, and upon petition by any party who demonstrates such material change, the Board shall consider revising its final mitigation, if warranted and appropriate.

Noise and Vibration

MM-Noise-01a. CSXT shall install appropriate building sound insulation (upgraded acoustical windows and doors) on the 4 receptors OEA identified that would experience severe noise impacts. See receptors 33-36 in Attachment 1 to Appendix E of the Draft EA. CSXT should begin implementing the required building sound insulation mitigation within one month of the Board's authorization of the CSXT transaction. Specifically, CSXT shall do the following:

- CSXT shall meet with and communicate with the residents and owners of the 4 receptors that would experience severe noise impacts to discuss implementation of the required building sound insulation.
- Using industry standard loudspeaker testing, the existing building sound insulation performance shall be determined in accordance with ASTM 966-90, *Standard Guide for Field Measurements of Airborne Sound Insulation of Building Facades and Façade Elements* by a qualified acoustics consultant. The qualifications for the acoustic consultant shall include at least 5 years of experience with major transportation noise projects, and board certification membership with the Institute of Noise Control Engineering or registration as a Professional Engineer in Mechanical Engineering or Civil Engineering.
- The design goal for the sound insulation shall be a 10 dBA noise reduction. The calculated Noise Level Reduction (NLR) improvement shall be at least 5 dBA. If the calculated NLR associated with acoustical replacement windows and doors is less than 5 dBA, no mitigation shall be required since the improvement would be minor and likely not noticeable. The overall goal of the required sound insulation analysis is to demonstrate that interior noise levels (under the CSXT Transaction) at severely impacted receptors would be 45 DNL or lower, and to implement sound insulation to result in an NLR improvement of 5 dBA or more, where feasible and reasonable based on the characteristics of each property. CSXT shall provide written documentation to OEA that a 5 dBA reduction has been achieved or specify the reasons why this reduction would not be achievable based on the characteristics of the property and the test results from the qualified acoustics consultant. CSXT shall also provide written documentation to OEA in the event that a homeowner declines any mitigation.

MM-Noise-02. To minimize noise and vibration, CSXT shall maintain rail and rail beds according to American Railway Engineering and Maintenance-of-Way Association standards.

MM-Noise-03. CSXT shall comply with FRA regulations establishing decibel limits for train operations.

MM-Noise-04. CSXT shall consider lubricating curves where doing so would both be consistent with safe and efficient operating practices and significantly reduce noise for residential or other noise receptors.