

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36732¹

CANADIAN PACIFIC KANSAS CITY LIMITED AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY, D/B/A CPKC—ACQUISITION AND OPERATION—CERTAIN RAIL LINE OF MERIDIAN & BIGBEE RAILROAD, L.L.C. IN LAUDERDALE COUNTY, MISS., AND CHOCTAW AND MARENGO COUNTIES, ALA.

Decision No. 6

Digest:² This decision authorizes Canadian Pacific Kansas City Limited, on behalf of itself and its wholly owned subsidiary, The Kansas City Southern Railway Company, to acquire from Meridian & Bigbee Railroad, L.L.C., and operate the Western Line between Meridian, Miss., and Myrtlewood, Ala.

Decided:

On October 6, 2023, Canadian Pacific Kansas City Limited, on behalf of itself and its wholly owned subsidiary, The Kansas City Southern Railway Company (KCS) d/b/a CPKC (collectively, Applicants), filed an application seeking Board approval for KCS to acquire from Meridian & Bigbee Railroad, L.L.C. (MNBR), and operate a rail line, known as the Western Line, between Meridian, Miss., and Myrtlewood, Ala.³ This proposal is referred to as the Transaction. The Board now approves the application, subject to conditions.

¹ This decision embraces the following dockets: CSX Transportation, Inc.—Discontinuance of Trackage Rights Exemption—in Marengo & Choctaw Counties, Ala. & Lauderdale County, Miss., Docket No. AB 55 (Sub-No. 814X); Alabama & Gulf Coast Railway—Trackage Rights Exemption—Kansas City Southern Railway d/b/a Canadian Pacific Kansas City, Docket No. FD 36731; CSX Transportation, Inc.—Trackage Rights Exemption—Kansas City Southern Railway, Docket No. FD 36730.

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 CPKC filed a revised application on December 11, 2023, in response to a Board order granting in part a motion to redesignate certain information that was initially designated highly confidential. See 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 Dec. 6, 2023). In addition to updating the confidentiality designations as directed by the Board, CPKC’s December 11, 2023 submission corrected minor,

BACKGROUND

Applicants seek the Board's prior review and authorization pursuant to 49 U.S.C. §§ 11323-25 and 49 C.F.R. part 1180 for KCS to acquire from MNBR and operate the Western Line, consisting of approximately 50.4 route miles of rail line between milepost 0.0± at Meridian and milepost 50.4± at Myrtlewood. (Appl. 11, Dec. 11, 2023.) According to Applicants, KCS would also acquire all the operating rail property owned by MNBR on the Western Line, including the yards at Meridian; Naheola, Ala.; and Myrtlewood; and the stations at Meridian; Whynot, Miss.; Yantley, Ala.; Cromwell, Ala.; Jachin, Ala.; Naheola; and Myrtlewood. (Id. at 31-32.)

CPKC's family of operating railroads in the United States includes two Class I rail carriers (including KCS) and four Class II rail carriers. (Id. at 33.) The CPKC system also includes operations in Canada by the Canadian Pacific Railway Company (CPRC) and in Mexico by the Kansas City Southern de México, S.A. de C.V. (KCSM). (Id.) Together, these railroad companies operate approximately 8,600 miles of track in the United States, which connects with approximately 7,700 miles that CPRC operates in Canada and approximately 3,800 miles that KCSM operates in Mexico. (Id.) KCS currently operates or possesses property rights in Alabama, Arkansas, Illinois, Kansas, Louisiana, Mississippi, Missouri, Oklahoma, Tennessee, and Texas. (Id. at 29.)

MNBR, a subsidiary of Genesee & Wyoming, Inc. (G&W), currently operates approximately 168 miles of single-track mainline between Meridian and Montgomery, Ala. (Id. at 31, 50.) MNBR owns and is the sole operator on the Western Line, where it provides overhead service and local service to the 11 customers on that line. (Id. at 31, 217-18, 229, 275.) In addition to the Western Line, MNBR operates a rail line that connects to the Western Line at Myrtlewood and extends east to Burkeville (also known as Burkville), Ala. (the Eastern Line).⁴ (Id. at 31, 229.) MNBR also operates between Burkeville (the eastern end of the Eastern Line) and Montgomery pursuant to incidental overhead trackage rights over line owned by CSXT. (Id.) On the Western Line, MNBR currently interchanges with CPKC and Norfolk Southern Railway Company (NSR) at Meridian. (Id. at 230.) On the Eastern Line, MNBR currently interchanges with Alabama & Gulf Coast Railway LLC (AGR) at Linden, Ala.,⁵ and with NSR at Selma, Ala. (Id.) MNBR also interchanges with CSXT at Montgomery. (Id.)

Applicants state that KCS seeks to acquire the Western Line to establish a direct interchange with CSXT at Myrtlewood, and that the Transaction is contingent on CSXT

non-material errors in its operating plan and added consecutive page numbers. All subsequent references to the application in this decision refer to the December 11, 2023 submission and the consecutive page numbers contained therein. Certain other filings in this docket also contain consecutive page numbers. References to those filings in this decision will also cite to the consecutive page numbers.

⁴ MNBR owns the Eastern Line but leases the underlying right of way from CSX Transportation, Inc. (CSXT). (Appl. 275, Dec. 11, 2023.)

⁵ AGR is also a subsidiary of G&W. (Appl. 14, Dec. 11, 2023.)

acquiring and resuming operations on the Eastern Line. (*Id.* at 12); see also CSX Transp., Inc.—Acquis. & Operation—Rail Line of Meridian & Bigbee R.R., Docket No. FD 36727. According to Applicants, CPKC trains post-Transaction would handle overhead traffic only and would not provide local service. (Appl. 218, Dec. 11, 2023.) Applicants state that they expect to interchange one train pair daily with CSXT, with an average volume of 70 cars per train, for at least the first five years. (*Id.* at 235.) According to Applicants, CPKC intends to grow the volumes served on this route, but one train pair daily should provide sufficient capacity to accommodate much of the growth in the first five to ten years. (*Id.*)

Applicants state that MNBR would continue to provide local and overhead rail service on the Western Line post-Transaction much as it does today, except that it would no longer act as an intermediate bridge carrier for CPKC-CSXT traffic. (*Id.* at 218.) Specifically, MNBR would retain exclusive trackage rights to operate over the Western Line to (1) serve existing customers on the Western Line and (2) interchange with, and handle freight rail traffic to and from, AGR at or near Myrtlewood for interchange with CPKC and NSR at Meridian. (*Id.* at 189.) MNBR would also retain non-exclusive trackage rights to operate over the Western Line to (1) interchange with, and handle freight rail traffic to and from, CSXT at or near Myrtlewood for interchange with NSR at Meridian and (2) if requested by CPKC, handle CPKC-CSXT overhead freight rail traffic between Meridian and Myrtlewood. (*Id.*)

By decision served November 3, 2023, the Board accepted the application, established a procedural schedule, and preliminarily determined that the Transaction is a minor transaction as defined by the Board’s regulations. See Canadian Pac. Kan. City Ltd.—Acquis. & Operation—Certain Rail Line of Meridian & Bigbee R.R. in Lauderdale Cnty., Miss., & Choctaw & Marengo Cntys., Ala. (Decision No. 1), FD 36732 et al., slip op. at 1, 8 (STB served Nov. 3, 2023). The decision also directed Applicants to supplement the record with certain additional information. *Id.* at 9-11.⁶ 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

⁶ Additionally, the Board accepted for consideration the related filings in Docket Nos. FD 36730 and FD 36731. Decision No. 1, FD 36732 et al., slip op. at 6. Noting that the verified notice of exemption in Docket No. AB 55 (Sub-No. 814X) did not qualify for the class exemption procedures under which it was filed, the Board accepted the verified notice as evidence bearing on consideration of whether to grant an individual exemption on the Board’s own motion. *Id.* at 7. 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.*

further supplemental information as necessary to complete the record. *Id.* at 8-9.⁷ 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, Applicants supplemented their application, as required by Decision No. 1.

Applicants included with their application statements of support for the Transaction from Mississippi State Senator Rod Hickman; Mississippi State Representative Charles Busby; Mississippi Department of Transportation Central District Commissioner Willie Simmons; Mississippi Department of Transportation Executive Director Brad White; Alliance For Growth; Mayor Jimmie Smith on behalf of the City of Meridian, Miss.; East Mississippi Business Development Corporation; Lauderdale County Board of Supervisors; Mississippi Development Authority; and the Southern Rail Commission. (Appl. 279-292, Dec. 11, 2023.) On October 11, 2023, Applicants submitted additional statements of support from Mississippi Governor Tate Reeves and Mississippi State Senator Jenifer B. Branning. (Applicants' Submission of Additional Statements, Oct. 11, 2023.)

Substantive comments and/or requests for conditions were filed by the Brotherhood of Railroad Signalmen (BRS) on December 11, 2023,⁸ and by Illinois Central Railroad Company (CNR), the National Railroad Passenger Corporation (Amtrak), and Norfolk Southern Corporation and Norfolk Southern Railway Company⁹ on December 29, 2023. On January 26, 2024, MNBR and Amtrak each filed a reply and Applicants filed their rebuttal.¹⁰ NSR filed a reply to Applicants rebuttal on February 2, 2024, to which Applicants responded on February 12, 2024. Applicants filed a letter on February 8, 2024, supplementing their operating plan to clarify the anticipated frequency of MNBR road trains on the Western Line. On March 21, 2024, NSR filed a motion to withdraw its filings in all seven dockets and terminate its participation in the proceedings "[i]n light of productive discussions and recent developments." (NSR Mot. to Withdraw 1-2). Applicants filed a letter supporting NSR's motion to withdraw on April 4, 2024, and copies of two agreements entered into between KCS and NSR related to NSR's withdrawal on April 23, 2024.

⁷ The procedural schedule was subsequently amended by decisions issued November 9, 2023, December 6, 2023, and December 15, 2023.

⁸ 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 CPKC to provide a comprehensive plan addressing the need for additional workers beyond those mentioned in its filing." (BRS Comment 1.) According to BRS, Applicants' filings lack clarification on CPKC's strategy for sustaining current assets. (*Id.*) Applicants respond that CPKC has begun planning the upgrade and maintenance of the Western Line and agrees that safety is paramount. (Rebuttal 44.)

⁹ For the purposes of this decision, Norfolk Southern Corporation and Norfolk Southern Railway Company will be referred to as NSR.

¹⁰ MNBR limits its reply to responding to a request for mediation included in NSR's comment, (see MNBR Reply 4 (citing NSR Comment 60, Dec. 29, 2023)), which NSR subsequently moved to withdraw, (see NSR Mot. to Withdraw 1-2).

DISCUSSION AND CONCLUSIONS

Preliminary Issue. According to CNR, traffic handled over the new CPKC-CSXT corridor to or from Dallas, Tex., and points further south, including Mexico, would move via the Meridian Speedway,¹¹ which uses trackage rights over a 0.44-mile segment (the Jackson Switch Tender) of CNR’s mainline at Jackson, Miss. (CNR Comment 3.) In its comments, CNR argues that CPKC failed to comply with the Board’s order that CPKC assess the impacts of the Transaction on other rail lines, including CNR’s line at Jackson. (*Id.* at 5.) More specifically, CNR claims that CPKC failed to perform a credible study projecting future traffic volumes as a result of the Transaction. (*Id.*) CNR asserts that CPKC and CSXT should have jointly analyzed their projected traffic data, the scope of CPKC’s traffic analysis was too narrow, CPKC’s projections were incomplete, and CPKC failed to explain the diversion determinations in its study. (*Id.* at 6-9.) Additionally, CNR argues that CPKC failed to provide the required analysis of operational impacts on the CNR line at Jackson. (*Id.* at 9-10.) CNR requests that the Board order CPKC to supplement its application further, including providing a meaningful analysis of the potential impacts of its proposed transaction on freight and passenger operations in Jackson. (*Id.* at 13.)

In response, Applicants argue that CNR’s request is nothing more than an attempt to delay the Transaction. (Rebuttal 19.) Applicants state that they have provided the Board with extensive and sophisticated evidence addressing likely traffic gains flowing from the Transaction, and that CNR’s arguments disregard the fact that the regulations governing minor transactions do not require a market analysis. (*Id.* at 19 (citing 49 C.F.R. § 1180.7).) Moreover, Applicants argue that CN fails to explain how the traffic study it requests might affect any fact bearing on the operational issues it raises. (Rebuttal 19.) According to Applicants, the modest increase in Transaction-related trains would have an inconsequential impact on CN’s line, in part because MSLLC previously invested tens of millions of dollars to improve capacity at the Jackson Switch Tender. (*Id.* at 8-9.) Lastly, Applicants argue that CNR’s claims relate to the completeness of CPKC’s application, which the Board has already determined was complete, and CNR did not seek timely reconsideration of that determination. (*Id.* at 19.)

The Board finds that Applicants have provided the information required by the Board’s regulations for minor transactions and by the Board in Decision No. 1, and that the information provided is sufficient for the Board to make an informed decision on the application. For minor transactions, such as this one, the regulations require a “detailed discussion of the public interest justifications in support of the application,” including “the effect of the transaction on inter- and intramodal competition.” 49 C.F.R. § 1180.6(a)(2).¹² Not only have Applicants provided the requisite detailed description, (*see* Appl. 24-28, 259-60, Dec. 11, 2023), but they have also provided additional information, requested by the Board in Decision No. 1, FD 36732 et al., slip

¹¹ The Meridian Speedway is a 320-mile single track line between Shreveport, La., and Meridian. It is jointly owned by CPKC and NSR and is operated by CPKC on behalf of Meridian Speedway, LLC (MSLLC). (Applicants Suppl. 12, Nov. 21, 2023.)

¹² For major and significant transactions, the regulations require an impact analysis describing the impacts of the transaction on inter- and intramodal competition, including the underlying data and a study of the implications of those data. *See* 49 C.F.R. § 1180.7(a).

op. at 10-11, including origination/destination areas for the projected diverted and new traffic, interchange partners participating in current movements of this traffic as well as projected diverted and new movements, and associated volumes for projected diverted and new traffic by origination/destination areas, (see Applicants Suppl. 7-8, Nov. 21, 2023; id., Ex. A). Nothing in the governing regulations or Decision No. 1 requires Applicants to “provide a robust traffic study, evaluating the full universe of current traffic plausibly divertible to the new Myrtlewood route, as well as new businesses potentially drawn to that [option],” as CNR suggests. (CNR Comments 9.)

Applicants’ traffic projections, which were submitted in support of its application, also comply with the governing regulations. Applicants state that, in developing their forecasts, they identified shippers, both existing and future, that could benefit from a CPKC-CSXT direct routing relative to existing alternatives. (Appl. 265, Dec. 11, 2023.) The forecasts submitted by Applicants were developed by CPKC’s Senior Vice President of Sales & Marketing, Bulk Intermodal, and his team, who, based on verified testimony, have knowledge and experience with the transportation markets. (Id. at 265.) CNR provides no reason for the Board to question that expertise.

Moreover, certain of CNR’s contentions are simply incorrect. CNR erroneously alleges that Applicants failed to justify why, with respect to existing CPKC-CSXT manifest traffic, they examined only traffic currently interchanged at New Orleans, Brookwood, and East St. Louis. (See CNR Comment 7.) However, Applicants have provided the basis for their selections. For example, Applicants state that the Myrtlewood routing would provide a shorter and more efficient route for some existing domestic CPKC-CSXT interline manifest traffic and therefore, that traffic would be an “obvious candidate[] for rerouting.” (Appl. 266-67, Dec. 11, 2023.) Applicants also note that, where certain of this traffic originates or terminates near one of those three locations, it “would not benefit from rerouting.” (Id. at 267.) Thus, it appears that, in making these determinations, Applicants have appropriately focused on the traffic most likely to be attracted to the new routing. (See also Applicants Suppl. 4-5, Nov. 21, 2023 (discussing the three categories of traffic that CPKC expects would be attracted to Myrtlewood from other rail routings); id. at Ex. A, Table 4 (detailing automotive, automotive parts, and intermodal traffic that were included in CPKC’s forecasts for projected diverted and new traffic).)

The Board also finds that Applicants have sufficiently addressed the potential operational impacts of the Transaction at Jackson. Applicants have provided several reasons why the modest increase of trains resulting from the Transaction would not impact service on CNR’s line. (See Rebuttal 8-9, 38-40.) As Applicants note, significant investment to modernize the Jackson Switch Tender and increase capacity on the Meridian Speedway was made by MSLLC in 2011 and 2015 to address CNR’s concerns regarding cross-traffic on the Meridian Speedway. (Id. at 38.) According to Applicants, these investments reduced the time between when a Meridian Speedway train receives a signal from CNR dispatch and when it clears the Jackson Switch Tender to as little as four minutes for an 8,500-foot train, which is twice the length of the projected Transaction-related trains within the first five years. (Id. at 39.) CNR also controls and dispatches the Jackson Switch Tender, and CPKC and CNR each have an incentive to maintain fluid operations on their respective lines. (Id. at 9, 40.)

For these reasons, the Board finds that the information provided by Applicants complies with the Board’s regulations and Decision No. 1, and is sufficient to permit the Board to make an informed decision on the application. Accordingly, the Board will deny CNR’s request that the Board require Applicants to further supplement their application.

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, KCS seeks to acquire from MNBR and operate the Western 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 it finds that 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 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, 891-92 (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 KCS’s acquisition of the Western Line—even when considered in light of CSXT’s proposed acquisition of the Eastern 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 customers located on the Western Line. Service on the Western Line post-Transaction would remain largely the same as it is today. MNBR would retain exclusive trackage rights—including pricing authority—to serve the 11 local shippers on the Western Line and to perform some overhead service without any restriction on interchange. (Appl. 12, 81, Dec. 11, 2023.) As a result, no shipper would lose access to a rail carrier to which it currently has access. (*Id.* at 12, 25.) MNBR would also retain the ability to interchange without restriction. (*Id.* at 25.) MNBR would continue to have the ability to interchange directly with NSR at Meridian and with AGR and CSXT at Myrtlewood. (*Id.*) Accordingly, no connecting railroad would be foreclosed from interchange.

While Applicants expect some traffic to shift post-Transaction from other rail carriers to the new routing over the Western Line, (*id.* at 221), the record does not support the conclusion that these potential diversions would cause adverse competitive impacts. Applicants anticipate three categories of traffic might divert to the Myrtlewood routing from other rail routings: (1) traffic already moving on CPKC-CSXT interline routings, (2) traffic interchanged between CPKC and NSR at Meridian, and (3) traffic moving between KCSM-served points in Mexico and CSXT via the Laredo, Tex., and New Orleans, La., gateways with Union Pacific Railroad Company (UP) as an intermediate carrier.¹³ (Applicants Suppl. 4-5, Nov. 21, 2023.)

With regard to traffic already moving on CPKC-CSXT interline routings, the Myrtlewood routing would provide a more efficient route, thereby providing procompetitive efficiencies. (*Id.* at 4.) Applicants state that they would coordinate with CSXT to determine the most efficient routings for their shared interline traffic, as is standard industry practice. (*Id.*) With regard to traffic currently interchanged between CPKC and NSR at Meridian, the Transaction would provide a new competitive option for shippers, thereby increasing competition as CSXT and NSR would compete to attract traffic to their networks. (*Id.* at 4-5.) Moreover, CPKC would not gain a materially longer haul by taking the traffic to Myrtlewood instead of Meridian, and hence has no incentive to force traffic to the Myrtlewood routing. (*Id.*) Lastly, with regard to traffic moving between points served by KCSM in Mexico and CSXT in the Southeastern United States via Laredo and New Orleans, with UP as an intermediate carrier, the Transaction would create an efficient, new routing option. (*Id.* at 5; *see also* Appl. 267, Dec. 11, 2023 (“The available direct links between the CPKC and CSXT networks generally do not provide competitive options for this traffic category . . .”).) Post-Transaction, the Myrtlewood routing would provide a competitive, alternative routing that would require fewer handling events and avoid the New Orleans gateway, offering the potential for a reduction of

¹³ In their application, Applicants implied that traffic moving between KCSM and CSXT (with UP as the bridge carrier) via the Memphis and East St. Louis gateways might also be diverted to the new Myrtlewood routing post-Transaction, (*see* Appl. 21, 267-68, Dec. 11, 2023); however, Applicants’ supplemental filing suggests that only such traffic interchanged at New Orleans is expected to be diverted, (*see* Applicants Suppl. 4-7, Nov. 21, 2023).

both transit time and cost. (*Id.* at 20, 267.) Applicants state that KCS would have no incentive or ability to force this traffic over Myrtlewood because doing so could lead shippers to route their traffic through Eagle Pass and bypass CPKC entirely. (Applicants Suppl. 5, Nov. 21, 2023.) Additionally, as Applicants note, any potential concern about gateway foreclosure is mitigated by the continued applicability of KCS’s prior commitment to keep the Laredo gateway open on commercially reasonable terms. See Kan. City S.—Control—Kan. City S. Ry. (KCS-Tex Mex), 7 S.T.B. 933, 950 (2004). That commitment was imposed as a condition when KCS received authority to acquire control of The Texas Mexican Railway Company, see *id.*, and it remains an enforceable obligation, see Canadian Pac. Ry.—Control—Kan. City S. (CPKC Approval Decision), FD 36500 et al, slip op. at 6 n.9, 54 (STB served Mar. 15, 2023) (stating that KCS remains subject to the conditions imposed in KCS-Tex Mex).¹⁴ CPKC contends that this condition means that it “cannot ‘force’ traffic away from UP to the new CPKC-CSXT direct connection at Myrtlewood,” and the “new route will attract the traffic only if shippers prefer it” to other options. (Applicants Suppl. 6, Nov. 21, 2023.)

NSR alleged that the Transaction, together with CSXT’s proposed acquisition of the Eastern Line, would have significant anticompetitive impact.¹⁵ (NSR Comment 35, Dec. 29, 2023.) NSR argued that the existing rail infrastructure at Meridian is antiquated and complex, and that the terminal was not designed to handle even the volume or length of trains that pass through it now.¹⁶ (*Id.* at 38.) According to NSR, hand-thrown switches, diamonds that are often

¹⁴ The Board would be available to resolve disputes regarding KCS’s gateway commitment in the future, should any arise.

¹⁵ 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, 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 it finds that the anticompetitive effects outweigh the public interest in meeting significant transportation needs. See 49 U.S.C. § 11324(d). Therefore, although NSR subsequently moved to withdraw its filings in these proceedings, which the Board is granting in this decision, the Board will address NSR’s arguments to the extent they allege that the Transaction would cause adverse competitive impacts. This decision, however, should not be construed as opining on any argument raised by NSR that is not expressly addressed herein.

¹⁶ Several rail lines converge at Meridian. (NSR Comment 120, Dec. 29, 2023; see also Applicants Suppl. 9, Nov. 21, 2023.) The Western Line runs west into Meridian from Myrtlewood. (NSR Comment 74, Dec. 29, 2023.) NSR has lines into Meridian from the north and south, which are connected by a short stretch of CPKC-operated track. (*Id.* at 73.) NSR’s north-south line connects to and crosses the Meridian Speedway, which runs east from Shreveport into Meridian, where it terminates. (*Id.* at 73; Applicants Suppl. 9, Nov. 21, 2023.) CPKC’s Artesia Line, which crosses NSR’s mainline, runs south into Meridian from Artesia, Miss. (NSR Comment 74, Dec. 29, 2023; Applicants Suppl. 9, Nov. 21, 2023.) Amtrak also operates its New York-to-New Orleans *Crescent* service twice daily on NSR’s lines. (NSR Comment 74, Dec. 29, 2023; Amtrak Comment 2.) The *Crescent* service trains run through Meridian on NSR’s north-south mainline, stopping at an Amtrak station in Meridian.

blocked, grade crossings that impede the holding of trains, and a lack of reserve capacity all impede rail operations at the terminal. (*Id.* at 38-39.) NSR claimed that the additional traffic contemplated by the Transaction would exacerbate the current complexity and congestion at the terminal, (*id.* at 89-91, 97-98), causing competitive harm to NSR and adversely affecting Amtrak’s *Crescent* service, (*id.* at 51-52, 75).

Applicants contend that the Meridian terminal can easily accommodate more cross traffic without negatively impacting freight or passenger rail operations on NSR’s line. (Applicants Suppl. 9-10, Nov. 21, 2023.) According to Applicants, the Transaction would streamline CPKC’s operations at Meridian. (Rebuttal 32-34.) Applicants state that post-Transaction, CPKC would be able to eliminate the only train work event that blocks NSR’s mainline when conducting switching operations at Meridian. (*Id.* at 33.) Applicants further state that the Transaction would reduce the number of cars that CPKC interchanges in Meridian since CPKC would handle CSXT-bound traffic that is currently interchanged with MNBR. (*Id.* at 33.) Lastly, Applicants expect that some traffic currently moving on CPKC’s Artesia line would shift to the Myrtlewood routing, which would reduce traffic volumes on the Artesia line, or at a minimum, reduce the length of trains that use the diamonds located to the east of the Amtrak station. (*Id.* at 34, 62.) Applicants also state that CPKC took Amtrak’s schedule into account when it developed the schedule for the new train service post-Transaction and included a cushion between CPKC’s and Amtrak’s scheduled use of the crossovers at Meridian. (Applicants Suppl. 11-12, Nov. 21, 2023.)

The additional traffic resulting from the Transaction is not likely to impair operations at Meridian. The Transaction contemplates minimal additional traffic—just one to two train pairs daily. (Appl. 235, Dec. 11, 2023.) On average, approximately 22 trains operate through Meridian daily, though daily volumes can reach up to 28 trains on peak days. (NSR Comment 128, Dec. 29, 2023; Rebuttal 52.) Given the existing variation in daily traffic volumes, and that operations in the terminal would be streamlined post-Transaction, the one to two additional train pairs contemplated by this Transaction are unlikely to significantly affect the fluidity of the terminal. And while not dispositive, the Board notes that NSR withdrew its request for conditions despite nothing in the record indicating that accommodations have been made to address its concerns about fluidity at the Meridian Terminal. (See NSR Mot. to Withdraw 1-2 (stating without elaboration that NSR was withdrawing “[i]n light of productive discussions and recent developments”); CPKC Ltr., Apr. 4, 2024 (explaining that “the recent developments . . . as they relate to this proceeding” involved resolution of a separate issue raised by NSR regarding CPKC’s contractual rights to operate through Meridian); CPKC Ltr., Apr. 23, 2024 (attaching two “recently executed agreements” with NSR “to ensure a complete record,” neither of which pertained to fluidity concerns).)¹⁷

(Applicants Suppl. 11, Nov. 21, 2023.) A fifth railroad, the Meridian Southern Railroad (MDS) also operates and interchanges in the terminal, but it does not operate on or across NSR’s, CPKC’s, or MSLLC’s lines. (Rebuttal 25.) CPKC, NSR, MDS, and MNBR also each have yard areas in the terminal. (NSR Comment 73, Figure 1, Dec. 29, 2023.)

¹⁷ Based on the record, the limited additional traffic is also unlikely to negatively impact operational fluidity beyond the Meridian terminal. In the first five years, CPKC forecasts that

NSR also alleged that one provision of the draft transaction agreement between CPKC and G&W, referred to as the Second Train Trigger, could cause adverse competitive impacts. (NSR Comment 14-17, Dec. 29, 2023.) The draft transaction agreement provides for G&W to receive additional compensation if certain criteria are met. (Appl. 26, 186, Dec. 11, 2023.) According to NSR, this provision could incentivize G&W, through another of its subsidiaries, to route traffic in a manner that may adversely impact NSR and shippers. (NSR Comment 17, Dec. 29, 2023.) Applicants respond that NSR’s argument is baseless and speculative. (Rebuttal 17 n.3.)

The Board agrees with CPKC that NSR’s concern is speculative. Nonetheless, should concerns regarding interchange or the availability of through routes materialize, parties may seek relief from the Board through the available statutory remedies, as appropriate.

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.

Based on the record before the Board, the Transaction would result in more efficient rail service and increase the competitive options available to shippers. Applicants state that they intend to create a “premium train service,” with direct interchange with CSXT at Myrtlewood, that would provide a new competitive routing option for intermodal, automotive, and other shippers. (See Appl. 246, Dec. 11, 2023.) According to Applicants, the Myrtlewood routing would provide a shorter, more efficient route than the existing CPKC-CSXT routes. (*Id.* at 251.) Applicants state that CPKC and CSXT today do not have an efficient direct connection in the Southeast. (*Id.* at 264.) For instance, most non-automotive traffic moving between CPKC-served points in Mexico and the Southwestern United States and CSXT-served points in the Southeast follows a circuitous route, via Shreveport, then south to a connection at New Orleans. (*Id.*) Post-Transaction, CPKC could route traffic directly from Shreveport, due east, to interchange with CSXT at Myrtlewood. (*Id.* at 20, 252.) This route would be 158 miles shorter, would eliminate the need for an intermediate switch carrier at New Orleans (which is often congested and subject to weather disruptions), and could reduce transit time by at least 24 to 48 hours. (*Id.* at 20, 252.) Shippers of cross-border automotive traffic could also access a new, direct route. (*Id.* at 253.) Currently, this traffic is interchanged with UP at Laredo and delivered to CSXT at either New Orleans, Memphis, or East St. Louis. (*Id.* at 253-54.) Post-Transaction, this traffic could be interchanged directly at Myrtlewood, eliminating the need for a bridge carrier. (*Id.* at 254.)

the Transaction would result in one additional train pair that would operate between Shreveport and Myrtlewood. (Applicants Suppl. 8, Nov. 21, 2023.) Applicants state that CPKC does not forecast the need to operate a regularly scheduled second train pair until year eight, at the earliest. (*Id.*) According to Applicants, existing capacity between Shreveport and Meridian can easily accommodate this additional train service with no material impact on the fluidity of rail operations. Beyond Shreveport, Applicants state that new and diverted traffic would be handled in existing train service without impacting the fluidity of operations on those lines. (*Id.*)

These reductions in route miles could put new markets within reach for shippers. (*Id.* at 256.) And by reducing the number of carriers in a move, the number of operational events (e.g., car handlings and power changes) would also decrease. (*Id.* at 254.) Together, all these changes (reducing the number of carriers and handling events, shortening the route, and avoiding congested areas and areas susceptible to seasonal weather disruptions) would reduce the risk of delay in transit. (*Id.* at 255.)

The new routing would also provide an alternative option for intermodal and automotive shippers currently utilizing other carriers. (*Id.* at 21.) According to Applicants, the Myrtlewood routing would provide a new alternative for imported finished automotive traffic that currently moves by ocean vessel from Mexico to the Southeastern United States or by truck between Florida ports and Dallas. (*Id.* at 269-70.) These potential highway-to-rail diversions would reduce highway congestion and fuel consumption. (*Id.* at 255, 264.)

Shippers would also benefit from improved service post-Transaction. As noted above, because MNBR would no longer handle CSXT-bound traffic in haulage for CPKC, fewer cars would be switched at Meridian, thereby streamlining operations at the terminal. (Rebuttal 33.) CPKC also intends to coordinate interchange with CSXT to minimize dwell and plans to operate using run-through power. (Appl. 21-22, Dec. 11, 2023.) Applicants are also planning an extensive track maintenance and rehabilitation program to improve the track. (*Id.* at 21-22, 254.) Applicants state that CPKC plans to get to work on eliminating deferrals as soon as the Transaction is consummated. (Applicants Suppl. 18, Nov. 21, 2023.) According to Applicants, the Western Line currently supports sustained maximum speeds of 10 miles per hour, and, when daytime temperatures exceed 95 degrees, MNBR must operate at night due to the condition of the track. (Appl. 22, Dec. 11, 2023.) CPKC intends to invest approximately \$46 million to upgrade the infrastructure of the Western Line to Class I railroad standards and approximately \$9 million on bridge repair and improvements, elevating the Western Line from a lower-density line to a competitive east-west corridor that can support operations at a sustained maximum speed of 25 miles per hour. (*Id.* at 22-23.) CPKC also intends to embark on a multi-year bridge rehabilitation program, which it estimates would cost over \$100 million. (*Id.* at 23.) These infrastructure improvements would benefit both CPKC's interline shippers and MNBR's local customers. Applicants state that their planned improvements would more than halve the time it takes CPKC to traverse the Western Line, which would enable it to operate with one crew between Jackson and Myrtlewood. (Applicants Suppl. 18, Nov. 21, 2023.) The track would also be more stable, reliable, and resilient, which in turn would support more reliable local and overhead service and reduce the risk of derailments. (*Id.* at 18-19.)

Conditions and Other Relief Sought. CNR and Amtrak have asked the Board to impose certain conditions upon its approval of the Transaction.

CNR's Requested Condition. CNR argues that, to protect future freight and passenger service at Jackson, the Board should impose a reporting condition. (CNR Comment 11.) Specifically, CNR requests that the Board require CPKC to report, on a monthly basis for all traffic traversing CNR's line in Jackson that is moved via CPKC trains (including those moved on its own account or the account of others, and including all MSLLC traffic), the average and maximum number of trains per day and the average and maximum train length. (*Id.* at 11-12.)

CNR states that the condition would ensure that the Board and other parties receive timely information about increases in traffic on CNR's line in Jackson and that it would allow the Board to consider supplemental orders if CPKC fails to mitigate any resulting congestion. (Id. at 11.)

On rebuttal, Applicants argue that CNR's requested oversight and reporting condition is unnecessary and serves no purpose. (Rebuttal 41-42.) Applicants state that CPKC already reports traffic data to CNR to facilitate billing under the Jackson Switch Tender trackage rights agreement and that CNR dispatch requires train crews to report crew, tonnage, loaded cars, and empty cars before it will provide a signal for the Jackson Switch Tender. (Id. at 41.) Applicants argue that CNR has not identified any risk of competitive harm that would warrant the use of the Board's conditioning power or any credible concern regarding potential harm to operations on CNR's line. (Id.) According to Applicants, both CPKC and CN have an incentive to coordinate to maintain efficient and fluid operations through the Jackson Switch Tender, which is evidenced by CPKC's prior investment in the Jackson Switch Tender and MSLLC's adjoining track. (Id.) Lastly, Applicants state that, should an issue arise in the future, CNR and MSLLC should address it within the context of the agreements governing the Jackson Switch Tender. (Id.)

The Board declines to adopt CNR's requested reporting condition. Applicants forecast that, in the first five years, one additional train pair would operate daily over the Meridian Speedway (and therefore over the 0.44-mile stretch of CNR's line in Jackson) as a result of the Transaction. (Applicants Suppl. 8, 10, Nov. 21, 2023.) As previously noted, this modest increase of trains resulting from the Transaction should not impact service on CNR's line in Jackson. See supra p. 6; (see also Rebuttal 8-9, 38-40). Moreover, based on the record, CNR already receives similar information from CPKC. (Rebuttal 41.) Should an issue arise in the future related to Transaction-related traffic, CNR may raise the issue with the Board at that time.

Amtrak's Requested Conditions. According to Amtrak, the additional freight trains resulting from the Transaction would cross the path of Amtrak's *Crescent* service at Meridian and also could impact its future *I-20* service, which would run between Meridian and Dallas/Fort Worth over the Meridian Speedway. (Amtrak Comment 2.) Amtrak contends that a significant cause of freight train interference with passenger service is oversized trains, i.e., trains that are longer than the length of sidings on the route, because those trains make it difficult for Amtrak trains to pass the freight train. (Id. at 4.) Amtrak acknowledges the claims made by Applicants in their filings¹⁸ and the commitments made by CPKC's predecessor, Canadian Pacific Railway Company (CP), in an agreement entered into between CP and Amtrak in connection with CP's acquisition of KCS in Docket No. FD 36500 (the CP-Amtrak Agreement).¹⁹ However, Amtrak

¹⁸ (See, e.g., Applicants Suppl. 12-13, Nov. 21, 2023 (stating that Transaction-related traffic could "easily be accommodated" on the Meridian Speedway and that the additional traffic should have "little or no impact on what additional infrastructure is needed to support passenger operations").)

¹⁹ (See Applicants Suppl., Ex. B, Amtrak-Canadian Pac. Agreement, para. 5, Nov. 21, 2023; Rebuttal 42 ("CPKC, of course, intends to adhere to that agreement.")) Under the agreement, CPKC agreed, among other things, "to participate in a joint study including Amtrak, [NSR], [UP], and relevant governmental agencies, with the goal of the introduction of a single

states that it remains concerned about the impact of the Transaction. (Amtrak Comment 3-4; Amtrak Reply 2.) Amtrak therefore requests that the Board require CPKC to adhere to (i) its commitments that were imposed as conditions in CPKC Approval Decision, FD 36500 et al., (ii) the commitments and representations regarding Amtrak that CPKC has made in this proceeding, and (iii) except in an emergency, its representation that train lengths on the Meridian Speedway will not be permitted to exceed the length of sidings along the Speedway. (Amtrak Comment 4-5.)

On rebuttal, Applicants assert that CPKC regularly receives an A+ rating on Amtrak's Host Railroad Report Card and intends to work cooperatively with Amtrak to maintain that rating. (Rebuttal 42.) Additionally, Applicants reiterate that the limited additional trains on the Meridian Speedway would have little to no impact on the future *I-20* Amtrak service. (*Id.*) Applicants further state that CPKC will remain committed to adhering to its agreement with Amtrak, but that no purpose would be served by re-imposing here the conditions imposed in CPKC Approval Decision. (Rebuttal 42.) Applicants claim doing so could create unnecessary confusion. (*Id.*) Further, Applicants state that they generally do not object to a condition requiring CPKC to adhere to the formal representations made in this proceeding, though CPKC is concerned that such a condition might be applied in an overbroad manner. (*Id.* at 43.) According to Applicants, this concern is validated by Amtrak's third condition regarding train lengths, which Applicants state "attempts to turn CPKC's representation that it does not currently permit over-length trains to operate on the Meridian Speedway into a hard and fast rule that CPKC will not permit such trains in the future." (*Id.*) Applicants also note that all of the commitments made in this proceeding relate to the continued viability of the agreement between CP and Amtrak, which was already imposed as a condition in CPKC Approval Decision. (Rebuttal 43.) Lastly, Applicants argue that the Board should not impose a condition limiting train lengths on the Meridian Speedway because there are instances where operating a train that exceeds the length of some number of sidings on a line would make good operational sense, and there is no reason to believe that any and all such movements would impact the fluidity of Amtrak service. (*Id.* at 44.)

The Board declines to impose a condition requiring that CPKC adhere to the commitments already imposed as conditions in CPKC Approval Decision. Those conditions remain enforceable obligations.²⁰ Thus, CPKC is already required to adhere to those conditions, and re-imposing them here is unnecessary.

The Board also declines to impose a condition that would restrict the length of trains permitted on the Meridian Speedway. With its request, Amtrak seeks to freeze in place a current operating practice. However, as Applicants note, there are instances where running an over-length train on the Meridian Speedway might make operational sense without any potential risk

round trip Amtrak train between [Meridian] and [Dallas] and with the potential for a 2nd daily round trip, subject to identical terms, not sooner than four (4) years following such [Board] approval." (Applicants Suppl., Ex. B, Amtrak-Canadian Pac. Agreement, para. 5, Nov. 21, 2023.)

²⁰ This includes CP's commitments made in the CP-Amtrak Agreement. CPKC Approval Decision, FD 36500 et al., slip op. at 139, 173.

of impacting passenger rail service. Cf. Guilford Transp. Indus., Inc.—Control—Del. & Hudson Ry., 366 I.C.C. 396, 419 (1982) (noting that freezing operating practices can prove inefficient if circumstances change). Moreover, Applicants themselves acknowledge the importance of carriers aligning their operations with their physical capacity. (Rebuttal 40.)

The Board will hold Applicants to all of the representations that they have made on the record in this proceeding. 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 Systems, Inc. (CSX-Pan Am), FD 36472 et al., slip op. at 35 (STB served Apr. 14, 2022); CPKC Approval Decision, FD 36500 et al., slip op. at 143. Here, in response to Amtrak’s more-limited request, Applicants state that they “generally do not object to a condition requiring CPKC to adhere to the formal representations made in this proceeding,” though they express concern that Amtrak’s requested condition might be applied in an over-broad manner. (Rebuttal 43.) And in response to a broader request from NSR that Applicants be required to adhere to all of the representations made on the record in this proceeding, (see NSR Comment 64, Dec. 29, 2023), Applicants state without equivocation that they have “no objection to a condition that requires CPKC’s adherence to the representations relating to this Transaction that CPKC made on the record in this proceeding.” (Rebuttal 38.) Given that Applicants have indicated their agreement, the Board will impose a condition requiring Applicants to adhere to all of their 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 Applicants, the Board will carefully consider changed circumstances, the difference between a forecast or claim and a commitment, and the context offered by Applicants on the record. See CPKC Approval Decision, FD 36500 et al., slip op. at 143; CSX-Pan Am, FD 36472 et al., slip op. at 35-36.

Related Filings. The Board received filings in four additional dockets in connection with the Transaction. The Board will address each docket in turn, below.

CSXT Acquisition of Trackage Rights. In Docket No. FD 36730, CSXT filed a verified notice of exemption under 49 C.F.R. § 1180.2(d)(7) to acquire overhead trackage rights from KCS over approximately two miles of rail line between milepost 50.4 and milepost 48.4 on the Western Line. (CSXT Notice 3, FD 36730.) CSXT states that the trackage rights are related to its proposed acquisition of the Eastern Line between Burkeville and Myrtlewood in Docket No. FD 36727. (Id.) CSXT states that the overhead trackage rights would allow CSXT to access a point on the Western Line to interchange traffic with AGR and MNBR at Myrtlewood. (Id.) CSXT states that it intends to consummate this transaction on or shortly after the date it acquires the Eastern Line from MNBR. (Id. at 4.)

The notice of exemption will be allowed to 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—Burlington Northern, Inc., 354 I.C.C. 605 (1978), as modified in Mendocino Coast Railway—Lease & Operate—California Western Railroad, 360 I.C.C. 653 (1980).

AGR Acquisition of Trackage Rights. In Docket No. FD 36731, AGR, a Class II rail carrier, filed a verified notice of exemption under 49 C.F.R. § 1180.2(d)(7) to acquire overhead trackage rights from CPKC over approximately 8.4 miles of rail line between milepost 50.4± and milepost 42.0±. (AGR Notice 1, FD 36731.) AGR currently holds incidental operating rights from Linden to Myrtlewood over the Eastern Line for purposes of interchange with MNBR. (*Id.* at 3.) AGR intends to use the overhead trackage rights sought in Docket No. FD 36731 for continued interchange with MNBR and to interchange with CSXT at Myrtlewood following CSXT’s acquisition of the Eastern Line.²¹ (*Id.*) AGR states that it intends to consummate the agreement and commence operations either on the effective date of its notice or upon the consummation of CPKC’s acquisition of the Western Line, whichever is later. (*Id.*)

The notice of exemption will be allowed to 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, as modified in Mendocino Coast Railway—Lease & Operate, 360 I.C.C. 653.

CSXT Discontinuance of Trackage Rights. In Docket No. AB 55 (Sub-No. 814X), CSXT filed a verified notice of exemption under the class exemption at 49 C.F.R. part 1152, subpart F to discontinue overhead trackage rights over the entirety of the Western Line, including “head and tail operating room” at both ends, for a total distance of approximately 51 miles. (CSXT Notice 4, AB 55 (Sub-No. 814X).) CSXT stated that it had not moved any traffic over the line during the past two years and that it intends to consummate its discontinuance authority on the same day that CPKC consummates its proposed acquisition of the Western Line. (*Id.*)

As the Board explained in Decision No. 1, CSXT may not proceed under the Board’s two-year-out-of-service class exemption procedures because MNBR has been providing local service over the same line during the two-year period. Decision No. 1, FD 36732 et al., slip op. at 7; 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 CSXT to supplement the record in Docket No. AB 55 (Sub-No. 814X) 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 36732 et al., slip op. at 7.

CSXT supplemented its filing on November 21, 2023. CSXT states that it was granted overhead trackage rights to allow CSXT to move its own overhead traffic should MNBR not

²¹ Applicants state that CPKC would grant AGR trackage rights to Naheola Yard in order to give AGR the flexibility to interchange with MNBR at Naheola Yard instead of Myrtlewood if operating conditions warrant, e.g., if for some reason, the designated Myrtlewood yard track cannot accommodate the volume of MNBR’s and AGR’s interchange traffic. (Appl. 235, Dec. 11, 2023.)

fulfill its commitments under a haulage agreement. (CSXT Suppl. 6, AB 55 (Sub-No. 814X).) CSXT states that it has never used those operating rights. (*Id.*) According to CSXT, discontinuance of its overhead trackage rights would not affect MNBR's ability to provide service. (*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 in Docket No. AB 55 (Sub-No. 814X) under 49 U.S.C. § 10903 is not necessary to carry out the RTP. Granting an exemption here would encourage efficient management of railroads by permitting CSXT to discontinue operating rights it has never used where other railroads have or will have the right to provide service. *See* 49 U.S.C. § 10101(9). An exemption would also 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). 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.²² CSXT has never operated over the Western Line. Local shippers receive service from MNBR and would continue to receive such service from MNBR post-Transaction. CPKC would also have a residual common carrier obligation over the Western Line post-Transaction.

Therefore, 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 Western Line by CSXT. 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).

CSXT Acquisition of the Eastern Line. In Docket No. FD 36727, CSXT seeks the Board's prior review and authorization pursuant to 49 U.S.C. §§ 11323-25 and 49 C.F.R. part 1180 to acquire from MNBR and operate the Eastern Line. The Eastern Line consists of two segments totaling approximately 93.68 miles: (1) extending from milepost XXB 189.00 near

²² 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).

Burkeville to milepost XXB 222.00 at Western Junction, a distance of approximately 30.22 miles; and (2) extending from a connection with the first segment at Western Junction, milepost OOR 716.25 to milepost ORS 779.71 near Myrtlewood, a distance of approximately 63.46 miles. CSXT Appl. 1, CSX Transp., Inc.—Acquis. & Operation—Rail Line of Meridian & Bigbee R.R., FD 36727. The Eastern Line includes the Selma Yard, at Selma, Ala., and the following stations: Myrtlewood, Linden, Thomaston, Safford, Orville, Beloit, Selma, Industrial Lead, Tyler, Benton, Whitehall, and Burkeville, all in Alabama. Id. Together with the Transaction, CSXT’s proposed acquisition of the Eastern Line would create a direct CPKC-CSXT interchange at Myrtlewood. Id. at 10. While Applicants state that their acquisition of the Western Line is contingent on CSXT acquiring and resuming operations on the Eastern Line, (see Appl. 12), CSXT states in its application that its acquisition of the Eastern Line could proceed regardless of whether Applicants acquire the Western Line, see CSXT Appl. 10, CSX Transp., Inc.—Acquis. & Operation—Rail Line of Meridian & Bigbee R.R., FD 36727. The Board is addressing the CSXT acquisition of the Eastern Line in a separate decision in Docket No. FD 36727.

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.²³ See 49 C.F.R. §§ 1105.7(e)(5)(i), 1105.10(b).

²³ For expediency and efficiency, OEA determined that it was appropriate to prepare one EA to encompass both the Transaction and CSXT’s proposed acquisition of the Eastern Line

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 impacts is noise, and OEA concluded that the noise impacts on the Western Line could be appropriately minimized with four preliminary noise mitigation measures (MM-Noise-01, 02, 03, and 04) recommended in the Draft EA.²⁴ (*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.²⁵ (Final EA 2.) In the Final EA, OEA made clarifying changes to mitigation measure MM-Noise-01b.²⁶ (*Id.* at 8.) In addition, in the Final EA, mitigation measure MM-Noise-01b erroneously states that CPKC shall meet and communicate with the residents and owners of the "[five] receptors" that would experience severe noise impacts. (*Id.*) In fact, the correct number of receptors that would experience severe noise impacts is seven. In the Appendix to this decision, the Board has corrected this mitigation measure so that it applies to the seven severely impacted receptors on the Western Line and has made other minor editorial changes to OEA's final recommended mitigation. All of the final environmental mitigation for the Western Line is set forth in the Appendix to this decision.

(including the Burkeville-to-Montgomery segment). See Decision No. 1, FD 36732 et al., slip op. at 13.

²⁴ First, in mitigation measure MM-Noise-01b, OEA recommended that CPKC install appropriate building sound insulation (upgraded acoustical windows and doors) on seven receptors that would experience severe noise impacts. (Draft EA 4-3 to 4-4.) Second, to minimize noise and vibration, OEA recommended in mitigation measure MM-Noise-02 that CPKC and CSXT 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 CPKC and CSXT comply with Federal Railroad Administration regulations establishing decibel limits for train operations. (*Id.*) Fourth, OEA recommended in mitigation measure MM-Noise-04 that CPKC and CSXT 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.*) Because the Board is issuing separate decisions for the Eastern and Western Lines, all of the final environmental mitigation set forth in Appendix A for this Transaction specifically refers to CPKC.

²⁵ 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.

²⁶ The Final EA also made changes to the recommended mitigation for the Eastern Line based on the new traffic information provided in CSXT's environmental comment. (Final EA 2.)

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 Western Line, as modified by the Board, 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-01b, 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 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 here. See Decision No. 1, FD 36732 et al., slip op. at 13.

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

It is ordered:

1. The application seeking Board approval for KCS to acquire and operate the Western 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-01b, 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. Applicants are required to adhere to any and all of the representations they made on the record during the course of this proceeding, whether or not such representations are specifically referenced in this decision.
5. Any condition requested by any party in this proceeding that has not been specifically approved in this decision is denied.
6. In Docket No. FD 36730, CSXT’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—Burlington Northern, Inc., 354 I.C.C. 605 (1978), as

modified in Mendocino Coast Railway—Lease & Operate—California Western Railroad, 360 I.C.C. 653 (1980).

7. In Docket No. FD 36731, 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, as modified in Mendocino Coast Railway—Lease & Operate, 360 I.C.C. 653.

8. In Docket No. AB 55 (Sub-No. 814X), pursuant to 49 U.S.C. § 10502, the Board exempts from the prior approval requirements of 49 U.S.C. § 10903 the discontinuance of overhead trackage rights by CSXT, 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).

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

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. 77,409. 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.

interest in meeting significant transportation needs.² 49 U.S.C. § 11324(d). Based on Applicants’ 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 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 11-12.

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 20, 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 Applicants’ position on the matter.⁵ However, going forward, the agency should follow best practices and impose any

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.”

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

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 Applicants to their representations in this proceeding fails on both counts.

Preliminarily, I note that although Applicants “generally do not object to a condition requiring CPKC to adhere to the formal representations made in this proceeding,” (Rebuttal 43; see also *id.* at 38), that does not mean that Applicants have “indicated their agreement” with such a condition, Decision at 15. Without such an affirmative request or agreement from an applicant, the Board’s authority to impose conditions is restricted—Applicants’ 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.

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 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 Applicants do 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).

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, 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 (not to mention 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

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 7. 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).

for Board action.² Further, the complete lack of reasoning as to the purpose and scope of the condition provides no guidance to Applicants, commenting parties, other stakeholders, or a future Board tasked with deciding whether to enforce a “representation” made by Applicants 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 Applicants 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.

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—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-01b. CPKC shall install appropriate building sound insulation (upgraded acoustical windows and doors) on the 7 receptors OEA identified that would experience severe noise impacts. See receptors 3, 6, 8, 9, 10, 14, and 19 in Attachment 1 to Appendix E of the Draft EA. CPKC should begin implementing the required building sound insulation mitigation within one month of the Board's authorization of the CPKC transaction. Specifically, CPKC shall do the following:

- CPKC shall meet with and communicate with the residents and owners of the 7 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 CPKC 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. CPKC 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. CPKC shall also provide written documentation to OEA in the event that a homeowner declines any mitigation.

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

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

MM-Noise-04. CPKC 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.