APPENDIX

TABLE OF CONTENTS

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 9, 2023 Decided June 30, 2023

No. 22-1209

NORFOLK SOUTHERN RAILWAY COMPANY,
PETITIONER

v.

SURFACE TRANSPORTATION BOARD AND
UNITED STATES OF AMERICA,
RESPONDENTS

CSX TRANSPORTATION, INC.,
INTERVENOR

On Petition for Review of a Decision
of the Surface Transportation Board

Shay Dvoretzky argued the cause for petitioner. With him on the briefs were *William A. Mullins*, *Crystal M. Zorbaugh*, *Parker Rider-Longmaid*, and *Hanaa Khan*.

Laura M. Wilson, Attorney, Surface Transportation Board, argued the cause for respondent. With her on the brief were *Robert B. Nicholson*, Attorney, U.S. Department of Justice, *Robert J. Wiggers*, Attorney, *Craig M. Keats*, General Counsel, Surface Transportation Board, and *Anika Sanders Cooper*, Deputy General Counsel. *Theodore L. Hunt*, Associate General Counsel, entered an appearance.

Benjamin L. Hatch argued the cause for intervenor CSX Transportation, Inc. in support of respondent.

Before: HENDERSON, WILKINS and WALKER, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge*: Norfolk Southern Railway Company (Norfolk Southern) petitions for review of a decision of the Surface Transportation Board (STB or Board), the successor agency to the Interstate Commerce Commission (ICC) charged with authorizing certain rail carrier transactions under the Interstate Commerce Act, 49 U.S.C. §§ 10101 *et seq*. Norfolk Southern is a rail carrier that owns a 57.14 per cent share of the Norfolk & Portsmouth Belt Line Railroad Company (Belt Line), the operator of a major switching terminal in Norfolk, Virginia, known as the Norfolk International Terminal. Norfolk Southern's majority interest goes back to 1982, when its corporate family acquired and consolidated various rail carriers with smaller ownership interests in the Belt Line. Norfolk Southern's

competitor, CSX Transportation, Inc. (CSX), owns the remainder of the Belt Line's shares (42.86 per cent).

Alleging Norfolk Southern and the Belt Line conspired to impede CSX's access to the switching terminal, CSX sued both entities in the Eastern District of Virginia (Eastern District court). It pressed federal antitrust, state-law conspiracy and contractual claims. Norfolk Southern asserted immunity under 49 U.S.C. § 11321(a), which provides that a "rail carrier . . . participating in [an ICC/Board-] approved or exempted transaction is exempt from the antitrust laws and from all other law . . . as necessary to let that rail carrier . . . exercise control . . . acquired through the transaction."

The Eastern District court referred to the Board the question whether the ICC had granted control authority of the Belt Line to Norfolk Southern in the 1982 transaction. The Board answered no, reasoning that the parties to the transaction never sought ICC approval of control authority of the Belt Line. Norfolk Southern does not appeal that ruling to this or any court.

This case involves a different question raised before the Board for the first time, *viz.*, whether the ICC/Board approvals of Norfolk Southern's subsequent corporate-family consolidations in 1991 and 1998 authorized Norfolk Southern to control the Belt Line. The Board again answered no, for essentially the same reason: the Belt Line was not mentioned in the consolidation proceedings.

Norfolk Southern petitions for review, asserting that the Board's decision regarding the 1991 and 1998

consolidations was arbitrary and capricious. Respondent STB and Intervenor CSX challenge our jurisdiction because the agency decision arose from the Eastern District court's referral order. *See* 28 U.S.C. § 1336(b). As detailed below, we conclude that we have jurisdiction to review the challenged portions of the Board's decision, 28 U.S.C. §§ 2321(a), 2342(5), and deny Norfolk Southern's petition for review on the merits.

I.

A.

The Interstate Commerce Act (ICA) vests the Board—or before 1996, the ICC[1] —with "exclusive authority to examine, condition, and approve proposed mergers and consolidations of transportation carriers within its jurisdiction." *Norfolk & W. Ry. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 119– 20 (1991) (citing 49 U.S.C. § 11343(a)(1), now at 49 U.S.C. § 11323(a)). Pursuant to this authority, the Board must "approve and authorize" certain transactions involving rail carriers "when it finds the transaction is consistent with the public interest." 49 U.S.C. § 11324(c); *see id.* § 11323(a) (identifying transactions subject to section 11324(c)). One such transaction is the "[c]onsolidation or merger of the properties or franchises of at least 2 rail carriers into one corporation for the ownership, management, and operation of

[1] "The ICC Termination Act of 1995 (ICCTA) abolished the Interstate Commerce Commission (ICC) and established the STB in its stead." *United Transp. Union v. STB*, 114 F.3d 1242, 1243 n.1 (D.C. Cir. 1997) (citing Pub. L. No. 104–88, 109 Stat. 803). We refer to the ICC or the Board as appropriate.

the previously separately owned properties." *Id.* § 11323(a)(1). Another is one rail carrier's "[a]cquisition of control" of another rail carrier. *Id.* § 11323(a)(3). Control "includes actual control, legal control, and the power to exercise control" by various means, including stock ownership. *Id.* § 10102(3). In determining whether a transaction is consistent with the public interest, the Board must consider, *inter alia*, the anticompetitive effects of the transaction, *id.* § 11324(b)(5), (d), and should it authorize the transaction, the Board "may impose conditions governing the transaction," *id.* § 11324(c).

Once the Board approves a transaction, "[a] rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or [sic] franchises acquired through the transaction." *Id.* § 11321(a). Section 11321's immunity provision becomes effective at the time of the Board approval. *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 298–299 (1987) (Stevens, J., concurring).

The Board may approve a transaction in one of two ways: (1) through the ordinary, formal application process or (2) by granting an exemption from the ordinary process. In the first route, the formal application process, the Board evaluates a voluminous application from "the person seeking [Board] authority" for the transaction. 49 U.S.C. § 11324(a); see *id.* § 11325 (providing general application procedure); 49 C.F.R. § 1180.4(a)–(c) (identifying general, prefiling and

filing requirements for applications). The other route for Board approval is the exemption route, which "streamlines the regulatory process by eliminating notice and comment in some cases, by making a hearing unnecessary, and by expediting the final decision." *Vill. of Palestine v. ICC*, 936 F.2d 1335, 1337 (D.C. Cir. 1991). The Board's exemption authority flows from 49 U.S.C. § 10502(a).[2] That section also authorizes the Board to "revoke an exemption, to the extent it specifies," whenever it concludes that revocation is "necessary to carry out the transportation policy of section 10101." *Id.* § 10502(d).

The Board administers section 10502(a)'s exemption authority through a "[n]otice of exemption" process, 49 C.F.R. § 1180.4(g), for those transactions falling within one of nine "class exemptions," *id.* § 1180.2(d). For each of the nine class exemptions, *see id.* § 1180.2(d)(1)–(9), the Board has determined that "its prior review and approval of these transactions is not necessary to carry out the rail transportation

---

[2] The ICCTA renumbered various provisions of the Interstate Commerce Act, including § 10502, which was formerly codified under 49 U.S.C. § 10505. Section 10502 provides in relevant part:

> [T]he Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part—(1) is not necessary to carry out the transportation policy of section 10101 of this title; and (2) either—(A) the transaction or service is of limited scope; or (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

49 U.S.C. § 10502(a).

policy of 49 U.S.C. [§] 10101; and is of limited scope or unnecessary to protect shippers from market abuse." 49 C.F.R. § 1180.2(d). Of relevance here, section 1180.2(d)(3) contains the class exemption for corporate-family transactions, providing streamlined review for "[t]ransactions within a corporate family that do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family." *Id.* § 1180.2(d)(3).

"A notice must be filed to use one of these class exemptions" using the procedures "set out in § 1180.4(g)." 49 C.F.R. § 1180.2(d). A party must, *inter alia*, "file a verified notice of the transaction with the Board," *id.* § 1180.4(g)(1), and describe the proposed transaction for which exemption is sought, *id.* § 1180.4(g)(1) (citing 49 C.F.R. § 1180.6(a)(1)(i)–(iii), (a)(5)–(6), (a)(7)(ii)), including "[t]he purpose sought to be accomplished by the proposed transaction," *id.* § 1180.6(a)(1)(iii). Despite the streamlined nature of the exemption proceedings, the regulation cautions that "[i]f the notice contains false or misleading information . . . , the Board shall summarily revoke the exemption for that carrier and require divestiture." *Id.* § 1180.4(g)(1)(iv).

B.

The Belt Line was established in 1896 as a joint venture of eight railroads to provide switching services in Norfolk, Portsmouth and Chesapeake, Virginia. Before 1980, Belt Line's stock was held by four different rail systems. In 1980, CSX acquired two of the railroads, giving it ownership of 42.86 per cent of the Belt Line's stock. This is the same percentage

that CSX holds today. That same year, a noncarrier holding company, Norfolk Southern Corporation (NSC), applied for ICC authorization to acquire the other two railroads, Norfolk and Western Railway Company (NW) and Southern Railway Company (SR)—SR being Norfolk Southern's predecessor.[3] The application made no mention of the Belt Line "except in a chart attached as Appendix 2 to Volume 2 of the Application (Appendix 2) listing all the railroad companies in which NW and SR[] held an ownership interest" and in a discussion of the operating plan. *Norfolk Southern Railway Company—Petition for Declaratory Order*, Docket No. FD 36522, 2022 WL 2191932, at *3 & n.8 (S.T.B. June 17, 2022); *see also NWS Enterprises; Application to Control Norfolk and Western Railway Co. and Southern Railway Co.*, Fin. Dkt. No. 29430, 46 FED. REG. 173, 173–76 (Jan. 2, 1981). The ICC approved the acquisition in 1982. *Norfolk Southern*, 2022 WL 2191932, at *4. As a result of the 1982 transaction, CSX held 42.86 per cent of the Belt Line and NSC held the remaining 57.14 per cent.[4]

In 1991, the ICC, pursuant to the exemption for transactions "within a corporate family," *see* 49 C.F.R.

---

[3] The holding company's name at the time of the application was NWS Enterprises, Inc. but by the time the transaction was approved the company had changed its name to Norfolk Southern Corporation (NSC). *See Norfolk Southern Railway Company— Petition for Declaratory Order*, Docket No. FD 36522, 2022 WL 2191932, at *2 & n.2 (S.T.B. June 17, 2022). NSC is Petitioner Norfolk Southern's parent company.

[4] During that decade, CSX and NSC agreed to proportional representation on the Belt Line's board of directors; CSX had the right to appoint two members and NSC the right to appoint three.

§ 1180.2(d)(3), granted SR authority to acquire NW as a subsidiary. The exemption, as published in the *Federal Register*, noted that as a result of the transaction, SR "will obtain direct control of NW and indirect control of [NW's subsidiaries]." *Southern Railway Co.—Control Exemption—Norfolk and Western Railway Co.*, Fin. Dkt. No. 31791, 56 FED. REG. 1541, 1541 (Jan. 15, 1991). Moreover, as part of the transaction, SR changed its name to Norfolk Southern Railway Company (Norfolk Southern). *Id*. Neither SR's notice of exemption nor the *Federal Register* made any mention of SR, Norfolk Southern or any other entity acquiring control of the Belt Line as a result of the transaction;[5] instead, the transaction was "intended to effect operating efficiencies." 56 FED. REG. at 1541. The ICC found, as required by 49 C.F.R. § 1180.2(d)(3), that the transaction "will not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family." 56 FED. REG. at 1541. As a result of the 1991 transaction, Norfolk Southern assumed control of 57.14 per cent of Belt Line's stock.

In 1998, pursuant to another corporate-family transaction exemption, the Board authorized the merger of NW into its parent, Norfolk Southern (formerly SR). The *Federal Register*'s publication of the

---

[5] SR's notice stated: "The exempt transactions are (1) direct control through stock ownership of NW by SR and indirect control by SR of NW's rail carrier subsidiaries; and (2) guarantee by SR of NW's obligations in respect of certain mortgage bonds and debentures." J.A. 788–89. The "rail carrier subsidiaries" of NW were identified as Chesapeake Western Railway, the Toledo Belt Railway Company and Wabash Railroad Company. J.A. 790.

exemption stated that "[t]he transaction will simplify [Norfolk Southern]'s corporate structure and eliminate costs associated with separate accounting, tax, bookkeeping and reporting functions." *Norfolk Southern Railway Company; Merger Exemption; Norfolk and Western Railway Company.*, Fin. Dkt. No. 33648, 63 FED. REG. 46278 (Aug. 31, 1998). Again, the Board made the requisite finding under 49 C.F.R. § 1180.2(d)(3) but neither the notice of exemption nor the *Federal Register* mentioned acquisition of control of the Belt Line. Instead, the notice stated that the transaction was "designed to further the goal of corporate simplification." J.A. 809. After the 1998 transaction, the separate corporate existence of NW ceased and Norfolk Southern acquired ownership of all of NW's assets.

C.

Fast forward 20 years: in 2018, CSX sued Norfolk Southern and the Belt Line in the Eastern District of Virginia, alleging antitrust, conspiracy and contract law violations arising from Norfolk Southern's and the Belt Line's alleged actions to deprive CSX of rail access to the Norfolk International Terminal. *See* Complaint, *CSX Transp., Inc. v. Norfolk S. Ry. Co.*, No. 2:18-cv-530 (E.D. Va. filed Oct. 4, 2018), ECF No. 1. It alleged that Norfolk Southern and the Belt Line conspired to use the Belt Line "as a chess piece" to establish and maintain Norfolk Southern's "monopolistic control over intermodal transportation."[6] Compl. at 3. Norfolk Southern moved to

[6] Intermodal transportation uses two modes of freight, including ship and rail, to transport goods. *See Nat'l Customs*

dismiss, relying on its immunity from suit pursuant to 49 U.S.C. § 11321(a). *See CSX Transp., Inc. v. Norfolk S. Ry. Co.*, No. 2:18-cv-530, 2021 WL 2908649, at *2 (E.D. Va. May 18, 2021).

On May 18, 2021, the Eastern District court issued its referral order. *See id.* at *1–11. After setting out the history of the 1982 consolidation and the parties' immunity arguments, it concluded "that the STB is the proper authority to clarify the contours of the 1982 consolidation at issue in this case." *Id.* at *9. It then granted Norfolk Southern's stay motion and referred "[t]he following discrete question" to the Board:

> Did the 1982 consolidation, whereby NSC acquired an indirect 57 percent interest in Belt Line, involve the ICC/STB granting NSC "approval" to control Belt Line, and if so, did such authorized "control" render it necessary for antitrust and/or state conspiracy laws to yield, whether because Belt Line was then deemed a "franchise" of NSC, or for any other reason?

Id. at *11.

On referral, the Board concluded that "the ICC did not authorize NSC to control [the Belt Line]." *Norfolk Southern*, 2022 WL 2191932, at *7. It reasoned that, in 1980, NSC had asserted that including the names of the "non-system companies"—*i.e.*, railroad companies in which NW and SR had interests but did not control, *see id.* at *2—and submitting their

---

Brokers & Forwarders Ass'n of Am., Inc. v. United States, 883 F.2d 93, 101 n.9 (D.C. Cir. 1989).

information would "substantially burden the record" and "serve no useful purpose." *Id.* at *8 (quoting original 1980 petition). The unmentioned Belt Line was one of those non-system companies. *Id.*; *see also* 46 FED. REG.. at 174, 176 (omitting Belt Line from list of "[t]he rail carrier subsidiaries of NW and the SR consolidated system carriers" of which NSC acquired control). "The Petition did not name the non-system companies or provide any information about them except to state that NW and SRC held a 50% or less interest in these companies, did not control them, had no intention of controlling them after the transaction, and the records for these companies were maintained separately from the NW and SR[] consolidated data." *Norfolk Southern*, 2022 WL 2191932, at *8. "The only logical reading of the Petition," the Board determined, "is that petitioners were telling the Board that the non-system companies were outside the scope of the control authority being requested." *Id.* at *9.

Having concluded that the 1982 ICC approval did not grant authority to control the Belt Line, the Board turned to Norfolk Southern's other argument, not made before the Eastern District court, that the ICC/Board's subsequent decisions in 1991 and 1998 granted Norfolk Southern this authority. *See id.* at *13. Noting that the Belt Line "was not mentioned in either of these proceedings," it held that "an exemption under 49 C.F.R. § 1180.2(d)(3) could not have been used to grant authority to any member of NSC's corporate family to control NPBL unless authority had previously been granted for some other member of that corporate family to control NPBL." *Id.* The Board rejected the Belt Line's invitation to "retain this matter and allow [Norfolk Southern] to seek authority

to now control [the Belt Line]," *id.* at *14, but also noted that it "expects the parties to take appropriate steps to address the unauthorized control issue immediately following resolution of the district court proceeding, including any appeals," *id.* at *14 n.25.

On August 15, 2022, Norfolk Southern petitioned for review in this Court, challenging only that part of the Board's decision holding that the 1991 and 1998 transactions did not grant Norfolk Southern control authority over the Belt Line.[7] CSX intervened and both CSX and the STB moved to dismiss for lack of jurisdiction.

II.

All parties agree that Norfolk Southern has standing to maintain this action. Nevertheless, we "ha[ve] an 'independent obligation' to review petitioner's standing before addressing the merits." *New Jersey v. EPA*, 989 F.3d 1038, 1045 (D.C. Cir. 2021) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009); *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 174 (D.C. Cir. 2012)). After Norfolk Southern filed its petition for review in this Court, the Eastern District court entered final judgment, Judgment in a Civil Case, *CSX Transp., Inc. v. Norfolk S. Ry. Co.*, No. 2:18-cv-530 (E.D. Va. Apr. 19, 2023), ECF No. 644, having dismissed CSX's claims against Norfolk Southern—including all federal antitrust and state-law contractual claims—as either time-barred, pre-empted or unsupported. *See* Opinion and Order at 1–2, 15–17,

[7] Norfolk Southern also filed a "protective complaint under § 1336(b)" in the Eastern District court, asking it "to hold the case in abeyance pending" our review. Pet'r Br. at 22.

22–23, *CSX Transp., Inc. v. Norfolk S. Ry. Co.*, No. 2:18-cv-530 (E.D. Va. Apr. 19, 2023), ECF No. 643; *CSX Transp., Inc. v. Norfolk S. Ry. Co.*, No. 2:18-cv-530, 2023 WL 2552343, at *11 (E.D. Va. Jan. 27, 2023); *CSX Transp., Inc. v. Norfolk S. Ry. Co.*, No. 2:18-cv-530, 2023 WL 25344, at *27, 33, 35 (E.D. Va. Jan. 3, 2023). Accordingly, we first address whether the Eastern District court's disposition of CSX's lawsuit renders Norfolk Southern's petition moot. *See Chafin v. Chafin*, 568 U.S. 165, 171–72 (2013).

We are satisfied that Norfolk Southern's petition is not moot. Its injury arises from the Board's determination that the ICC/Board never authorized Norfolk Southern to control the Belt Line. Absent authorization, Norfolk Southern cannot avail itself of an immunity defense in the CSX litigation, *see* 49 U.S.C. § 11321(a), and that litigation remains pending in the U.S. Court of Appeals for the Fourth Circuit, *see CSX Transp., Inc. v. Norfolk S. Rwy. Co.*, No. 23-1537 (4th Cir. filed May 18, 2023). Reversal of the district court's dismissal "may be uncertain or even unlikely," *see Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019), but "uncertainty does not typically render cases moot," *Chafin*, 568 U.S. at 175. That Norfolk Southern may assert an immunity defense at a later stage in the CSX litigation, coupled with the Board's conclusion that an "unauthorized control issue" exists and must be resolved "immediately" lest Norfolk Southern incur regulatory penalties, *see Norfolk Southern*, 2022 WL 2191932, at *14 nn.24–25, satisfies any Article III concern that a live controversy regarding the 1991 and 1998 approvals exists.

III.

Norfolk Southern contends that the Board's decision regarding the 1991 and 1998 transactions is inconsistent with the Board's regulation, *see* 49 C.F.R. § 1180.2(d)(3), and that the Board failed to reasonably explain its decision. Respondent STB and Intervenor CSX move to dismiss the petition for lack of subject matter jurisdiction and also defend the Board's action on the merits.

A.

We resolve the jurisdictional challenge before turning to the merits of Norfolk Southern's APA challenge. *See McCarty Farms, Inc. v. STB*, 158 F.3d 1294, 1298 (D.C. Cir. 1998) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)). The issue is whether we can exercise jurisdiction over the challenged portion of the Board's decision pursuant to the Hobbs Act. Ordinarily, the Hobbs Act confers jurisdiction to review "all . . . final orders of the Surface Transportation Board made reviewable by section 2321 of this title." 28 U.S.C. § 2342(5); *see id.* § 2321(a) (vesting "the court of appeals" with jurisdiction over "proceeding[s] to enjoin or suspend, in whole or in part, . . . [an] order of the" STB). But the Congress has excepted from this type of review questions referred by a district court to the Board. *Id.* § 1336(b); *see McCarty Farms*, 158 F.3d at 1298–99. 28 U.S.C. § 1336(b) provides:

> When a district court . . . refers a question or issue to the [STB] for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil

> action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the [STB] arising out of such referral.

28 U.S.C. § 1336(b). Put simply, "review of orders of the STB that 'arise' out of a referral from a district court are within that court's exclusive jurisdiction." *McCarty Farms*, 158 F.3d at 1298.

CSX and the STB submit that the Board decision in its entirety arose out of the referral order. *See* Intervenor Br. at 1; Resp. Br. at 2. As a result, they contend, the Eastern District of Virginia retains jurisdiction over the Board's rulings regarding the 1991 and 1998 transactions. Norfolk Southern claims that only the Board's holdings regarding the 1982 transaction arose from the referral order and thus we can review the issues surrounding the later transactions. *See* Pet'r Br. at 31. The question, then, is how we determine the extent to which the Board order is encompassed in the referral.

We believe our holding in *McCarty Farms* provides the answer. 158 F.3d 1294.[8] There, we gave a "strict construction" to section 1336(b), establishing a "bright line rule" for parties "seeking review of an STB decision." *Id.* at 1300. We held that "issues expressly

---

[8] The STB maintains the approaches taken by the Third, Seventh and Eighth Circuits are superior to ours. *See* Resp. Br. at 15– 18 (citing *Ry. Lab. Execs.' Ass'n v. ICC*, 894 F.2d 915, 917 (7th Cir. 1990); *United Pac. R.R. Co. v. Ametek, Inc.*, 104 F.3d 558, 559, 562 (3d Cir. 1997); *R.R. Salvage & Restoration, Inc. v. STB*, 648 F.3d 915, 917–18 (8th Cir. 2011)). But *McCarty Farms* itself noted that our reading of section 1336(b) put us in the minority of circuits that had considered the issue. *See* 158 F.3d at 1299.

set out in the district court's referral order" fall under section 1336(b) but "[t]he court of appeals reviews all other issues" under sections 2321(a) and 2342(5). *Id*.

Because the Eastern District court referred only the "discrete question" whether "the 1982 consolidation" authorized control of the Belt Line, *CSX Transp.*, 2021 WL 2908649, at *11, we are free to decide the effect, if any, of the 1991 and 1998 transactions on the Belt Line control issue. CSX contends that *McCarty Farms* supports its position because whether the later transactions conferred antitrust immunity on Norfolk Southern is "inextricably intertwined" with the referred question regarding the 1982 merger. *See* Intervenor Br. at 6. But whether control of the Belt Line was authorized in 1982 versus whether such control was authorized in 1991 or 1998 can be analyzed separately, as the Board did in its order. *See Norfolk Southern*, 2022 WL 2191932, at *13–14.

We reject CSX's and the STB's additional challenges to our jurisdiction. First, they claim that *McCarty Farms* equated "issues" with "broad claims for relief." *See* Resp. Br. at 20; Intervenor Br. at 18. But we conclude that *McCarty Farms* means what it said: "*issues*" not "expressly set out in the district court's referral order" are to be reviewed by the court of appeals. 158 F.3d at 1300 (emphasis added). CSX also argues the "bright line rule" language is dicta. *See* Intervenor Br. at 18–19. In applying a "strict construction of Section 1336(b)," however, *McCarty Farms* intended a bright line rule for parties to follow in seeking review of a Board decision. 158 F.3d at 1300. We decline CSX's invitation to undercut precedent and undermine the reliance expectations of those

parties. CSX next argues that it is "implausible to suggest that the referring district court was not seeking to have the STB resolve [Norfolk Southern]'s immunity arguments in toto." Intervenor Br. at 20. Yet the rule from *McCarty Farms* examines only "the language of the district court's referral." 158 F.3d at 1300 (quoting *United Pac. R.R. Co. v. Ametek, Inc.*, 104 F.3d 558, 566 (3d Cir. 1997) (Roth, J., dissenting)), and the Eastern District court referred *only* the issue of the "1982 consolidation," *see CSX Transp.*, 2021 WL 2908649, at *11. Finally, CSX and the STB make a judicial-efficiency argument. *See* Intervenor Br. at 20–21; Resp. Br. at 15. But *McCarty Farms* weighed—and found wanting—the judicial economy objection. 158 F.3d at 1300.[9]

In short, we conclude that we have jurisdiction pursuant to the Hobbs Act, 28 U.S.C. §§ 2321(a), 2342(5), and, accordingly, proceed to the merits of Norfolk Southern's petition.

B.

On the merits, Norfolk Southern mounts an APA challenge, *see* 5 U.S.C. § 706(2)(A), arguing, first, the Board's holding as to the 1991 and 1998 transactions is inconsistent with the regulatory text and structure,

---

[9] "Although members of Congress may have expressed an intent to further judicial economy, that laudable goal will not compel a construction whereby claims that are only tangentially related to those referred by the district court arise out of that referral along with those specifically referenced by the district court. Further, there is little danger of 'piecemeal appeals' where the disputed claims are not raised with the district court, but rather are brought before the STB in the first instance." *McCarty Farms*, 158 F.3d at 1300.

see Pet'r Br. at 49–55; and second, the Board failed to explain its reasoning, *see id.* at 59–60. We reject both arguments.

To determine whether an agency's action or interpretation comports with its regulations, a court "must apply all traditional methods of interpretation" to the regulations. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2419 (2019) (plurality opinion); *see Green v. Brennan*, 578 U.S. 547, 553 (2016). Text comes first. *See Kisor*, 139 S. Ct. at 2419. If the agency's interpretation "would contravene the plain text of its own regulations," we reject it. *See Hispanic Affs. Project v. Acosta*, 901 F.3d 378, 387 (D.C. Cir. 2018).

The corporate-family exemption provides a class exemption for "[t]ransactions within a corporate family" that meet three requirements. *See* 49 C.F.R. § 1180.2(d)(3). The transaction cannot result in "adverse changes in service levels," *id.*, it cannot result in "significant operational changes," *id.*, and it cannot result in "a change in the competitive balance with carriers outside the corporate family," *id.* But it is (understandably) silent regarding whether previously unauthorized control can become authorized *via* the corporate family exemption. The Board reasoned that "49 C.F.R. § 1180.2(d)(3)'s requirement that the transaction be 'within a corporate family'" demands "that the member of the corporate family whose ownership is changing as a result of the transaction was previously authorized to be controlled by a member of the corporate family." *Norfolk Southern*, 2022 WL 2191932, at *14. In other words, the carrier of which control authority is sought must be "lawfully within" or already authorized within the corporate family. *Cf.*

Resp. Br. at 26. Norfolk Southern contends there is no room for such an implicit requirement, relying on the *expressio unius est exclusio alterius* interpretive tool. *See, e.g., NLRB v. SW Gen., Inc.*, 580 U.S. 288, 302 (2017); *see* Pet'r Br. at 45 ("[W]hen a regulation sets out a series of precise requirements, it is unlikely that the regulation intended further requirements."). Norfolk Southern's point is fair in theory but the reading its construction would compel—that the corporate-family exemption can cure a previously unauthorized acquisition of control—would effectively override the specific Board approval procedures for control acquisitions. *See* 49 U.S.C. § 11325; 49 C.F.R. § 1180.4(a)–(c); *see also* 49 U.S.C. § 10502(a); 49 C.F.R. § 1180.4(g).

Although Norfolk Southern characterizes the Board's position as a "policy concern," *see* Pet'r Br. at 56, the Board's previous-authorization rule is compelled by the ICA's regulatory framework. As the Board noted, Norfolk Southern's alternate reading "would allow the corporate family exemption to effectively nullify other Board requirements since parties could acquire control of a carrier without informing the Board in a transaction that would normally require an application or another type of exemption under the Board's rules and then cure that unauthorized acquisition by reorganizing the corporate family and seeking a corporate family transaction exemption." *Norfolk Southern*, 2022 WL 2191932, at *14. And as the Board reasonably emphasized, "[t]he Board and the public must be able to clearly understand the control authority sought and granted, particularly given the significance of the immunity from antitrust laws and other laws that comes with

control authority." *Id*. at *9; *see also id*. at *11 (similar).

The APA challenge also includes the claim that the Board failed to explain its reasoning. *See* Pet'r Br. at 59–60. Norfolk Southern contends that "the Board made no effort to explain why its newly announced rule and the regulatory text were consistent," *id*. at 59, and, instead, rested purely on "conclusory policy rationales," *id*. at 60. Both assertions fail. The Board supported its commonsense reading of the regulation, first, with the text itself and, second, with the structure of the Board's and ICA's requirements. The Board reasonably explained that the corporate-family exemption cannot constitute an independent basis for control authority without a corporate family member "ha[ving] previously been granted" control authority of the carrier. *Norfolk Southern*, 2022 WL 2191932, at *13. As the Board concluded, 49 C.F.R. § 1180.2(d)(3)'s exemption cannot authorize—after the fact— a new control acquisition (*i.e.*, of an entity outside the corporate family) that alters the competitive landscape, contradicts the regulation's language ("within the corporate family") and undermines the regulatory framework. *See Norfolk Southern*, 2022 WL 2191932, at *14.

For the foregoing reasons, we conclude that the Board's decision regarding the 1991 and 1998 transactions is neither arbitrary nor capricious. The Board reasonably sought to avoid an absurd interpretation of 49 C.F.R. § 1180.2(d)(3)'s corporate-family exemption that would allow a carrier to gain control of a new entity without following the Board's review requirements and then "cure that unauthorized acquisition

by reorganizing the corporate family." *Norfolk Southern*, 2022 WL 2191932, at *14. The Board reasonably rejected Norfolk Southern's claim that, by reshuffling the pieces of its corporate family, it acquired control authority of the Belt Line *sub silentio*.

Accordingly, we deny Norfolk Southern's petition for review.

So ordered.

APPENDIX B

51101 SERVICE DATE – JUNE 17, 2022
EB

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36522

NORFOLK SOUTHERN RAILWAY COMPANY—
PETITION FOR DECLARATORY ORDER

Digest:[1] In response to questions referred to the Board from the U.S. District Court for the Eastern District of Virginia, the Board finds that the Interstate Commerce Commission did not authorize Norfolk Southern Corporation to control Norfolk & Portsmouth Belt Line Railroad Company.

Decided: June 17, 2022

On June 21, 2021, Norfolk Southern Railway Company (NSR) filed a petition for declaratory order requesting that the Board institute a proceeding to address the issues referred to the Board by the U.S. District Court for the Eastern District of Virginia in CSX Transportation, Inc. v. Norfolk Southern Railway, No. 2:18-cv-00530 (E.D. Va. May 18, 2021). The

[1] 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).

District Court referred to Board the following questions:

> Did the 1982 consolidation, whereby [Norfolk Southern Corporation (NSC)] acquired an indirect 57 percent interest in [Norfolk & Portsmouth Belt Line Railroad Company (NPBL)], involve the [Interstate Commerce Commission (ICC)]/STB granting NSC "approval" to control [NPBL], and if so, did such authorized "control" render it necessary for antitrust and/or state conspiracy laws to yield, whether because [NPBL] was then deemed a "franchise" of NSC, or for any other reason?

CSX Transp., Inc., No. 2:18-cv-00530, slip op. at 29.

For the reasons explained below, the Board finds that the Board's predecessor, the ICC, did not authorize NSC to control NPBL. Because control authority was never granted, the question of whether authorized control rendered it necessary for antitrust and/or state conspiracy laws to yield is moot.

BACKGROUND

Prior Related Board and Court Proceedings. This proceeding arises from a broader dispute between NSR and CSX Transportation, Inc. (CSXT), concerning issues related to NPBL. CSXT filed the complaint from which the District Court referral arose on October 4, 2018, alleging that NSR and NPBL have taken actions to effectively prevent CSXT from using NPBL's switching services to access customers at the Norfolk International Terminals, a container terminal facility in Norfolk, Va., and that these actions constitute a violation of federal antitrust laws, a breach of contract, and a violation of state law in several respects. A few weeks before CSXT filed its court complaint, NSR had filed a petition with the Board asking it to set trackage rights compensation for NPBL's use of NSR rail lines; after CSXT was permitted to intervene, that proceeding was held in abeyance pending the resolution of the federal court litigation. See Norfolk S. Ry.—Pet. to Set Trackage Rts. Comp.—Norfolk & Portsmouth Belt Line R.R., FD 36223 (STB served Dec. 19, 2019). In a decision issued on May 18, 2021, the District Court referred to the Board the questions described above regarding the 1982 consolidation involving NSC and NPBL. CSX Transp., Inc., No. 2:18-cv-00530, slip op. at 29. On June 21, 2021, NSR filed a petition for declaratory order requesting that the Board institute a proceeding to address the issues referred to the Board by the District Court. The Board instituted this declaratory order proceeding on August 9, 2021.

History of the Consolidation. The 1982 railroad consolidation at issue here involved the ICC

granting authority for NWS Enterprises, Inc. (NWS),[2] a noncarrier holding company, to acquire control of Norfolk and Western Railway Company (NW) and Southern Railway Company (SRC). As part of that proceeding on July 24, 1980, NW and SRC filed a petition (Petition) with the ICC seeking waiver and clarification of the ICC's railroad consolidation procedures in anticipation of a forthcoming application (Application) by NWS to acquire control of NW and SRC. NW & SRC Pet., July 24, 1980, NWS Enters., Inc.—Control—Norfolk & W. Ry., FD 29430. The Petition explained that SRC was a Class I railroad that controlled three Class III railroads and numerous terminal and other railroad companies, including Norfolk Southern Railway Company (Norfolk Southern),[3] and that NW was a Class I railroad that controlled five Class III railroads, one terminal company, and other non-operating railroad companies. Id. at 4, 6. The Petition sought a waiver for SRC to report the information required by the ICC's regulations on a consolidated system basis rather than reporting the information separately for SRC and for each individual carrier controlled by SRC. Id. at 7-10. Similarly, the Petition sought a waiver to exclude information regarding NW's subsidiaries except to the extent that such information was maintained by NW on a

---

[2] In 1981, NWS changed its name to Norfolk Southern Corporation (NSC). Norfolk S. Corp.—Control—Norfolk & W. Ry. (NSC Control), 366 I.C.C. 173, 173 n.2 (1982).

[3] In this decision, "Norfolk Southern" refers to the entity that was in existence at the time of the Petition and the Application and was a Class II subsidiary of SRC. "NSR" refers to the entity that has been in existence since December 31, 1990, when SRC merged Norfolk Southern into SRC and SRC changed its name to Norfolk Southern Railway Company.

consolidated system basis.[4] Id. The Petition claimed that with respect to SRC, the ICC had a long history of accepting consolidated system reporting as valid and accurate. Id. at 5. With respect to NW, the Petition asserted that excluding data from the NW subsidiaries, except to the extent that such data were maintained on a consolidated system basis, would not inhibit the ICC's analysis of the proposal because the operations of the subsidiaries of NW represented a very small part of the overall NW system. Id. at 6-7.

The Petition also sought clarification regarding the term "applicant." The Petition stated that the definition of "applicant" in the regulations referred to "all carriers with properties directly involved" in the transaction but that this definition also indicated that "applicant" was intended to apply only to the parties initiating the transaction and not subsidiaries of initiating parties. Id. at 11. The Petition asked the ICC to clarify that the term "applicant" applied only to NW, SRC, and the new holding company, which were the initiating parties, and to Delaware & Hudson Railway Company (D&H), whose stock was held by a wholly owned subsidiary of NW but was operated separately from NW. Id. The Petition also explained that in addition to the consolidated system companies, NW

[4] The carriers that comprised the NW system were listed in Appendix A to the Petition and the carriers that comprised the SRC system were listed in Appendix B to the Petition. The pleadings and decisions in the consolidation proceeding generally refer to the subsidiaries within the SRC system as SRC's "consolidated system companies" but generally refer to the subsidiaries within NW's system as NW's "subsidiary companies." This decision will refer to the combination of the subsidiaries within the NW system and the SRC system as "the consolidated system companies."

and SRC had interests in certain other railroad companies that they did not control (non-system companies). Id. at 11-12. According to the Petition, NW and SRC held 50 percent or less of the stock of the non-system companies, did not exercise control over such companies, and had no intention of exercising control over such companies if the proposed transaction were approved.[5] Id. at 12. The Petition stated that the records for the non-system companies were maintained separately from the NW and SRC consolidated system data. Id. The Petition argued that requiring data to be reported for the non-system companies would serve no useful purpose and would burden the record and therefore requested that the ICC clarify that the non-system companies would not be considered "applicants" under the ICC's regulations. Id. However, the Petition indicated that it would provide the information required by 49 C.F.R. § 1111.1(c)(8)[6] for these companies.

On August 25, 1980, the ICC issued revised procedural regulations governing railroad consolidation proceedings. On September 10, 1980, NW and SRC filed a supplement to the Petition requesting that the

---

[5] At that time, NW and SRC each owned a minority interest in NPBL. However, the Petition did not refer to NPBL, or any of the other non-system companies, by name nor did it provide any information regarding the size or significance of their operations.

[6] That regulation required applicants to provide information regarding "[t]he measure of control of ownership if any, now exercised by applicant over any carrier subject to the act, or over the properties of such carrier." 49 C.F.R. § 1111.1(c)(8) (1979). Thus, it required applicants to provide information regarding all carriers subject to the ICC's jurisdiction in which they held an ownership interest regardless of whether applicants would control those carriers.

forthcoming application be considered under the revised regulations. See NWS Enters., Inc.—Control—Norfolk & W. Ry., 45 Fed. Reg. 66,911, 66,911 (Oct. 8, 1980).

In a decision served on October 1, 1980, the ICC granted the Petition. The decision explained that the Application would be considered under the revised regulations, and the revisions to the regulations included revising the definition of "applicant" from "all carriers with properties directly involved" to "the parties initiating the transaction." Id. at 66,911-912. In addition, the ICC stated that it had long accepted system reporting and accounting by SRC and its consolidated companies and that practice would continue in the consolidation proceeding. Id. at 66,912. With respect to NW, the ICC noted that the revenues, expenses, income, and assets of NW's subsidiary companies represented a very small fraction of the NW system totals. Id. The ICC concluded that the benefit, if any, of separately reporting information for these companies would be outweighed by the difficulty in obtaining such information and that NW could report information individually or on a consolidated basis, where available.[7] Id. With respect to the railroad companies that were not part of the consolidated system, the ICC noted that NW and SRC did not hold a majority interest in these companies, had no intention of controlling these companies after the transaction, and that the records for these companies were maintained separately from the NW and SRC consolidated system

[7] The decision also stated that information for D&H could be reported on an individual basis or on a consolidated basis, if available. NWS Enters., Inc.—Control—Norfolk & W. Ry., 45 Fed. Reg. 66,911, 66,911 (Oct. 8, 1980).

data. Id. The ICC concluded that it would serve no useful purpose to require these companies to provide detailed information, other than providing the information required by 49 C.F.R. § 1111.1(c)(8). The ICC also stated that it agreed with the petitioners that the subsidiaries of NW and SRC did not fall within the definition of the term "applicant" in its regulations. Id.

On December 4, 1980, NWS, NW, SRC, and D&H filed their Application, which sought authorization for NWS to acquire "control through stock ownership of [NW] and its subsidiary carrier companies, and of [SRC] and its consolidated system companies. . ." Application Vol. 2 at 1, Dec. 4, 1980, Norfolk S. Corp.—Control—Norfolk & W. Ry., FD 29430. The Application made no mention of NPBL except in a chart attached as Appendix 2 to Volume 2 of the Application (Appendix 2) listing all the railroad companies in which NW and SRC held an ownership interest[8] and in a discussion of applicants' operating plan. The operating plan explained where NW and SRC interchanged with NPBL prior to the transaction and stated that after the transaction, interchange with NPBL would be performed by consolidated crews of the consolidated carriers in the same manner as NW

[8] Appendix 2 indicated that NW owned 28.57% of NPBL, SRC owned 14.29% of NPBL, and Norfolk Southern, a wholly owned SRC subsidiary, owned 14.28% of NPBL, for a total of 57.14%. It appears that NPBL is the only carrier listed in this Appendix in which either NW or SRC did not have a controlling interest prior to the transaction but which, after the transaction, would be indirectly controlled by NSC as a result of the combined ownership interests of NW and SRC.

and NPBL did prior to the transaction. Id. at Vol. 4 at 184-187.

On January 2, 1981, the ICC accepted the Application for consideration. NWS Enters.; Application to Control Norfolk & W. Ry. & S. Ry., 46 Fed. Reg. 173 (Jan. 2, 1981). The decision stated that the "proposed transaction involves the acquisition of control, through stock ownership of NW and its subsidiary companies and of [SRC] and its consolidated system companies, by NWS . . ." Id. at 174. An appendix to the decision listed the "rail carrier subsidiaries of NW and the [SRC] consolidated system carriers." Id. NPBL was not listed in that appendix, id. at 176, and was not referenced anywhere else in the decision.

The ICC granted the Application on March 19, 1982. The decision explained that the Application sought authority "for [NSC] to acquire control through stock ownership of NW and its subsidiary companies, and of [SRC] and its consolidated companies." NSC Control, 366 I.C.C. at 177. Again, a list of the NW subsidiary companies and SRC consolidated companies was included in an appendix to the decision. Id. at 177 n.3. NPBL was not listed in that appendix, id. at 255-57, and was not referenced anywhere else in the decision.

In 1991, the ICC, pursuant to an exemption under 49 C.F.R. § 1180.2(d)(3) for transactions within a corporate family, granted SRC authority to directly control NW. S. Ry.— Control Exemption—Norfolk & W. Ry., FD 31791 (ICC served Jan. 14, 1991). At that time, SRC changed its name to Norfolk Southern Railway Company (i.e., "NSR"). (NSR Opening 13.) In 1998, pursuant to another corporate family

transaction exemption, the Board authorized the merger of NW into its parent, NSR (formerly SRC). Norfolk S. Ry.— Exemption—Norfolk & W. Ry., FD 33648 (STB served Aug. 31, 1998).

The Parties' Arguments: CSXT. CSXT asserts that the ICC did not grant approval for NSC to control NPBL as part of the 1982 NSC Control transaction. CSXT argues that the relevant statute requires an entity to explicitly seek control authority and that NSC's[9] statements and actions in the application process demonstrated that it did not request authority to control NPBL. (CSXT Opening at 4, 23, 31.) CSXT points out that, in the Petition, NSC stated that its application for control authority would be limited to railroad companies within the NW and SRC systems and that the appendices to the Petition listing such carriers did not include NPBL. (Id. at 13.) In addition, according to CSXT, the Petition sought clarification that carriers, such as NPBL, in which NW and SRC did not hold a majority interest would not be considered "applicants" by the ICC because NW and SRC did not seek to control those carriers, and thus data submitted about them would "serve no useful purpose." (CSXT Reply 11.) CSXT contends that the fact that an appendix to the Application indicated that NSC would indirectly own 57.14% of the stock of NPBL after the transaction was not sufficient to put the ICC or the public on notice that it was seeking authority to control NPBL, particularly given that the Petition stated

[9] As noted above, the entity that filed the Petition and the Application was NWS but that entity changed its name to Norfolk Southern Corp. before the ICC issued NSC Control. To avoid confusion, the discussion below will refer to this entity only as NSC.

that NSC was not going to control NPBL and given that the amount ownership interest is not dispositive on the issue of control. (Id. at 12-14.) CSXT further states that the Application did not provide any of the information that would have been required for the ICC to evaluate an NSC acquisition of control of NPBL under the applicable statutory standards, such as information regarding the potential impact on competition and operations. (CSXT Opening 19, 25.)

CSXT argues that the ICC decisions regarding the control transaction demonstrate that the agency did not apply the relevant statutory standards with respect to control of NPBL and never authorized NSC to control NPBL. (Id. at 20-21.) CSXT states that in granting the Petition, the ICC explained that petitioners did not need to provide information regarding carriers such as NPBL that were not already controlled by NW or SRC because the petitioners had stated that they did not intend to control such carriers. (Id. at 14-15; CSXT Reply 3.) In addition, according to CSXT, the appendices in the ICC decisions accepting the Application and granting the Application that listed the companies over which NSC sought control did not include NPBL and the decision granting the Application does not contain a single reference to NPBL.[10] (CSXT Opening 20-21.) CSXT further argues that subsequent ICC decisions approving reorganizations within the NSC corporate family could not have authorized control of NPBL since these decisions never mention NPBL and involved class

[10] CSXT states that the decision approving the Application contains a detailed discussion of the impact of the transaction in the Norfolk area that does not mention NPBL, much less the potential change in control over NPBL. (CSXT Opening 26.)

exemptions which can only be invoked for transactions that have no competitive effect.[11] (CSXT Opening 26; CSXT Reply 18.) CSXT also argues that any actions by CSXT and NPBL's other owners since NSC Control that may suggest that the parties acknowledged NSC's right to control NPBL are not relevant to the question of whether the ICC granted NSC legal authority to control NPBL. (CSXT Reply 19.)

CSXT argues that because NSC was not granted authority to control NPBL, NSR does not have immunity under 49 U.S.C. § 11321 from CSXT's antitrust claims regarding NPBL. (CSXT Opening 29-31; CSXT Reply 20-21.) CSXT asserts that accepting NSR's arguments here would encourage applicants to abuse the Board's change in control processes by not accurately describing the transaction, requesting the necessary authority, or providing other relevant information but later attempting to claim immunity that the Board never intended or granted. (CSXT Reply 21-22.)

NSR. According to NSR, the waiver to submit the information required by the ICC's regulations on a system basis was sought to reduce the informational burden of the Application and was not intended to limit the scope of any subsequent ICC approval to cover only those specific railroads who were named

---

[11] CSXT also notes that at the time of the Application, SRC and Norfolk Southern sought authority to construct and operate over a new connection track in the Norfolk area but did not suggest that NSC would assert control over NPBL, or that the consolidated NW/SRC system would interact with NPBL in any way different from before. (CSXT Reply 16-17.)

applicants or whose systems were consolidated with the applicants. (NSR Reply 14-15.) NSR argues that the Petition's request for clarification regarding the term "applicant"—both with respect to excluding SRC's and NW's subsidiaries and with respect to excluding companies not controlled by SRC and NW—was also intended only to limit the informational requirements of the Application and not to limit the scope of the ICC's overall approval. (Id. 15-16.) NSR asserts that the statement that SRC and NW would not control the non-system companies after the transaction was simply a statement of fact because neither SRC standing alone nor NW standing alone would control the non-system companies, such as NPBL, in a post-transaction environment and the Petition never stated that NSC would not obtain control over the non-system companies.[12] (Id. at 16 n.13.) NSR argues that when read in context, the statement regarding the current and future lack of control over the nonsystem companies was meant to emphasize how burdensome it would be to provide detailed information for these companies if they were considered "applicants." (Id. at 16-17.) According to NSR, the ICC recognized that the request to clarify the term "applicant" with respect to the non-system companies was about reducing the informational burden rather than excluding these companies from any ICC authority granted. (Id. at 17-18.)

---

[12] According to NSR, following the ICC's approval of the transaction, NPBL's operations were not consolidated into SRC's or NW's and NSC did not exercise control over or change NPBL's operations. (NSR Reply 36.) However, NSR indicates that NSC did control NPBL's management after the transaction. (Id.)

NSR argues that information and discussion regarding NPBL was absent from the Application and the ICC decisions accepting and granting the Application because the waivers granted by the ICC allowed NSR to exclude information regarding NPBL from its Application. (NSR Reply 23-24.) However, according to NSR, the fact that information regarding NPBL was absent from the Application did not mean that NPBL was not included in the scope of the Application. (NSR Opening 5; NSR Reply at 24.) NSR states that the ICC was fully aware that NSC would control 57.14% of NPBL after the transaction because this fact was disclosed in Appendix 2 that listed the ownership shares applicants held in other companies. (NSR Opening 5.) NSR contends that the Application generally speaks in terms of "systems" because that is how SRC and NW operated at the time but that the Application made clear that the proposed transaction included all subsidiaries and affiliates, whether owned in whole or in part, when it stated that NSC would "acquire indirect control through stock ownership of all subsidiaries of [NW] and [SRC]." (NSR Reply 22-23.)

According to NSR, the ICC did not need to explicitly approve or announce the authorization for control of NPBL because authorizing NSC to indirectly control NPBL was a byproduct of the ICC's authorization for NSC to control SRC and NW. (NSR Opening 10.) NSR points to other decisions that it asserts granted control or merger approval that do not list every single entity that, absent a waiver, would have to be treated as an applicant or applicant carrier. (NSR Opening 10-11.) Moreover, according to NSR, in the decision approving the Application, the ICC granted authority

for NSC to control NW, SRC "and their affiliated carriers." (Id. at 12.) NSR argues that the term "affiliated carrier" is generally understood to mean a carrier that was partially owned, as opposed to wholly owned and that this term therefore encompassed NPBL. (Id.)

NSR further contends that in other cases where waivers have been granted to exclude subsidiaries from the definition of "applicant"—including cases where neither applicant had a controlling interest but would have a majority interest following the transaction—it was understood that these carriers were not excluded from the scope of the control authority granted. (NSR Reply 18-21.) In addition, NSR asserts that there is no precedent supporting the proposition that an applicant must specifically request control authority for a particular subsidiary, whether owned in whole or in part, in order for that subsidiary to be included in the scope of the control authority granted.[13] (NSR Reply 20 n.20.)

In addition, NSR argues that even if NSC Control did not authorize control of NPBL, subsequent ICC decisions resolved this issue. (NSR Opening 14; NSR Reply 37.) NSR states that a 1991 transaction approved by the ICC, pursuant to an exemption for transactions within a corporate family, granted SRC

---

[13] NSR claims that other consolidations around the same time as NSC Control indicate that there was no requirement for in-depth competitive analysis of minor subsidiaries over which the consolidated holding company would gain a majority interest and that reporting on a system basis was an accepted practice. Moreover, NSR suggests, excluding carriers outside the system from reporting requirements was also an accepted practice under which it was understood that those carriers were still part of the transaction approved by the ICC. (NSR Reply 31-32.)

authority to directly control NW. (NSR Reply 38.) NSR explains that, at the time, SRC changed its name to Norfolk Southern Railroad Company (i.e., "NSR"). (Id.) According to NSR, SRC directly owned a 14.29% interest in NPBL, SRC's subsidiary, Norfolk Southern, owned a 14.29% interest in NPBL, and NW owned a 28.57% interest in NPBL. (Id.) NSR therefore asserts that the 1991 transaction gave NSR (the renamed SRC) indirect majority ownership of NPBL and that the transaction authorized NSC to control NPBL. (NSR Opening 14; NSR Reply 38.) NSR further states that in 1998, pursuant to another corporate family transaction exemption, the Board authorized the merger of NW into its parent, NSR, giving NSR direct ownership of 57.14% of NPBL, thereby reaffirming NSR's authority to control NPBL. (NSR Reply 39.)

NSR argues that because control over NPBL was granted to NSC by the ICC in 1982 and by the ICC and the Board in subsequent transactions, the exercise of such control is free from the confines of antitrust law pursuant to 49 U.S.C. § 11321(a). (NSR Opening 15-16.)

NPBL. NPBL argues that since the NSC Control decision, it has been under the control of NSC, and that such control was always mutually understood and accepted by all the parties in this proceeding.[14] (NPBL Opening 1; NPBL Reply 2.) In addition, NPBL states that on March 1, 1989, CSXT, NW and SRC

[14] NSR similarly argues that since the NSC Control, CSXT has understood that NPBL was under the control of NSC and took actions indicating its acceptance of this control. (NSR Reply 3-4.)

entered into an agreement reciting each party's ownership of NPBL and agreed that, going forward and regardless of the number of railroad subsidiaries holding NPBL stock, NSC would be entitled to appoint three members of NPBL's board and CSXT would be entitled to appoint two. (NPBL Opening at 3-4.) NPBL also states that its owners took other actions confirming the common understanding that NSC obtained control of NPBL as a result of the NSC Control decision, such as consolidating its financial statements with those of NSC. (Id. at 4.) According to NPBL, if formal ICC authority for NSC to control NPBL was not granted, the lack of authorization appears to be no more than a technical, administrative matter and the Board "should retain this matter until such time as any required remedial control proceeding is completed, and, at which point, a full response to the matters referred by the District Court can be provided." (NPBL Reply 4-5.)

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Ord. Procs., 5 I.C.C.2d 675 (1989). It is appropriate here to issue a declaratory order to resolve the controversy concerning the questions referred to us by the District Court. For the reasons explained below, the Board finds that the ICC did not authorize NSC to control NPBL. Because the ICC did not authorize NSC to control NPBL, the District Court's question as to whether authorized control of NPBL rendered it necessary for antitrust and/or state conspiracy laws to yield is moot.

NSR does not claim here that explicit approval for its control of NPBL was ever sought, that either the ICC or the Board ever specifically considered the implications of such control, or that either agency issued a decision that expressly approved NSR control of NPBL. Instead, NSR presents a series of arguments in an effort to establish that approval was either granted sub silentio or that the collective conduct of NPBL and its owners in the years following 1980 should be deemed sufficient to legally ratify a control transaction—and to retroactively confer antitrust immunity—even in the absence of ICC or Board action. The Board is not persuaded.

As discussed above, the fact that the Petition sought a waiver to exclude the non-system companies from the definition of "applicants" so that information

on these non-system companies would not need to be submitted to the ICC strongly supports the conclusion that NSR did not seek or obtain approval for control of NPBL. The Petition did not name the non-system companies or provide any information about them except to state that NW and SRC held a 50% or less interest in these companies, did not control them, had no intention of controlling them after the transaction, and the records for these companies were maintained separately from the NW and SRC consolidated data. NW & SRC Pet. 12, July 24, 1980, NWS Enters., Inc.— Control—Norfolk & W. Ry., FD 29430. The Petition then went on to assert that "bringing into this proceeding data concerning these carriers (other than identifying them in the response required by Section 1111.1(c)(8)) would serve no useful purpose and would substantially burden the record." Id. Indeed, the subsequently filed Application itself also described the transaction as seeking control of only the consolidated system companies.[15] Taken together, these statements clearly demonstrate that NSR was not asking the ICC to review and approve its acquisition of control of the non-system companies (a group that included the unmentioned NPBL), but was arguing that submission of information should not be required because no review was, in fact, required or sought.

NSR claims that the statement in the Petition about NW and SRC lacking control over the non-system companies in the present and the future was

[15] Application Vol. 2 at 1, 16, Dec. 4, 1980, Norfolk S. Corp.—Control—Norfolk & W. Ry., FD 29430 (stating that the Application was seeking authorization for NSC to control NW and its subsidiary carrier companies and of SRC and its consolidated system companies).

made only to support an argument that obtaining information from these companies would be burdensome and was not intended to indicate that control authority was not being sought for these companies.[16] (NSR Reply 16-17.) In addition, NSR claims that this statement indicates only that neither NW standing alone nor SRC standing alone would control the non-system companies after the transaction and that petitioners never stated that NSC would lack control of the non-system companies after the transaction. (Id. at 16 n.13.) NSR's interpretations, developed more than 40 years after the event, are implausible. The Petition never explicitly stated that it would be difficult or burdensome for the applicants to obtain information from the non-system companies, just that the inclusion of this information would "burden the record."[17] Moreover, if NSR were correct that the primary issue was burden, there would have been no reason for petitioners to state that NW and SRC would not control the non-system companies *after* the transaction. The lack of *future* control by NW standing

---

[16] NSC further states that the impetus for the statement about control was that smaller subsidiaries that do not greatly impact the overall operation or analysis of the initiating parties need not submit detailed information. (NSR Reply 17 n.16.) However, if this was the rationale for the waiver request, it was never communicated to the ICC. The Petition does not name the non-system companies, nor does it provide any information about the nature or scope of their operations, much less claim that their operations were not significant enough to merit consideration by the ICC.

[17] In any event, even if the Petition implied such a burden, it also clearly (and more importantly) conveyed to the ICC that petitioners would not control the non-system companies after the transaction and that, as explained below, those companies were outside the scope of the control authority being requested.

alone or SRC standing alone would have been irrelevant to the burden of producing information in the present. In addition, if the statement about NW's and SRC's lack of control was meant only to emphasize how burdensome it would be to obtain information from the non-system companies, as NSR claims, there also would have been no reason for petitioners to argue that information regarding the non-system companies would "serve no useful purpose." Lack of usefulness (or irrelevance) can be a reason for not imposing a burden, but has nothing to do with whether a burden exists in the first place or how extensive that burden is. It appears that the Petition was arguing that detailed information on non-system companies would serve no useful purpose—and for that reason would burden *the record*— because petitioners would not control those companies.

Essentially, NSR would have the Board interpret the pleadings from 1980 to show that it asked the ICC—and the ICC agreed—to approve NSR's control of NPBL while at the same time relieving NSR of the burden of submitting evidence or otherwise presenting any case for the acquisition of control. But the statements about NW and SRC lacking future control over the non-system companies and there being "no useful purpose" in providing information on the non-system companies make much more sense if read as an explanation that the post-transaction consolidated companies (i.e., NW and SRC combined) would lack control over the non-system companies following the transaction and information regarding these companies would therefore serve "no useful purpose" in the ICC's decision regarding control authority. The only logical reading of the Petition is that petitioners were

telling the Board that the non-system companies were outside the scope of the control authority being requested. It is therefore not surprising that in the decisions accepting and granting the Application, the ICC defined the Application as seeking authority to control only the consolidated system companies.[18]

Given this context, whether NSC's Application was required to explicitly request authority to control each individual subsidiary, or to provide information related to the potential competitive effects of acquiring each individual subsidiary, is not determinative of the outcome of this case. Nor is whether the ICC was required to explicitly analyze and announce control authority with respect to each individual subsidiary. Rather, the essential issues in this case are that petitioners/applicants told the ICC and the public that they had no intention of controlling the non-system companies post-transaction and the subsequent ICC decisions demonstrate the ICC's understanding that the control authority sought and granted was limited to the consolidated system companies. The Board and the public must be able to clearly understand the control authority sought and granted, particularly given the significance of the immunity from antitrust laws

---

[18] NWS Enters., 46 Fed. Reg. at 174, 176 (stating that the "proposed transaction involves the acquisition of control, through stock ownership of NW and its subsidiary companies and of [SRC] and its consolidated system companies, by NWS" and listing those companies in an Appendix to the decision that did not include the non-system companies); NSC Control, 366 I.C.C. at 177, 255-257 (explaining that the Application sought authority "for [NSC] to acquire control through stock ownership of NW and its subsidiary companies, and of [SRC] and its consolidated companies" and listing those companies in appendices that did not include the non-system companies).

and other laws that comes with control authority. The Board's regulations at 49 C.F.R. § 1182.2(d) recognize this, in providing that if an application or supplemental pleading includes false or misleading information, the granted application is void ab initio.

NSR makes various additional arguments claiming that statements in the Application and the ICC's decisions indicate that, despite the control statements and failure to expressly discuss NPBL discussed above, it was understood that the non-system companies were within the scope of the authority sought and granted. As explained below, the Board finds these arguments unpersuasive.

NSR argues that its interpretation of the Petition is supported by the ICC's statements in response to the Petition. In particular, NSR quotes the following language from the decision granting the Petition:

> We believe it would serve no useful purpose to produce *detailed information* for these companies (other than identifying them as required by 49 CFR 1111.1(c)(8), which may be done on the corporate charts). We agree with petitioners that the term 'applicant,' as used in our regulations, does not encompass such non-controlled carriers.

(NSR Reply 18 (quoting NWS Enters., Inc., 45 Fed. Reg. at 66,912) (emphasis added by NSR).)

According to NSR, this language was an explicit statement by the ICC that the waiver decision was about the burden on petitioners and not about excluding any entities from the scope of the ICC's control

decision. (NSR Reply 18.) However, nothing in this language indicates that the ICC understood the Petition to be stating that the non-system companies were included in the scope of the control authority sought.[19] The quoted language specifically references the exclusion of "non-controlled carriers." Moreover, language in subsequent ICC decisions in the consolidation proceeding demonstrates that the ICC believed that the scope of the requested control authority did not include the non-system companies. In the ICC decision accepting the Application, under the heading "Description of the Transaction," the ICC stated, "The proposed transaction involves the acquisition of

[19] It is not clear why NSR believes that the ICC's statement that it would serve no useful purpose to provide detailed information for the non-system companies is a statement about the burden of providing that information. NSR seems to be suggesting that the ICC's reference to not providing "detailed information" rather than "information" suggests it was focused on the burden of providing details. However, as noted above, the Petition sought an exclusion from the requirement to provide detailed information while indicating that applicants would provide certain limited information required by 49 C.F.R. § 1111.1(c)(8). Thus, the reference to not providing "detailed information" was simply an accurate description of what the Petition requested and does not suggest that the ICC was focused on the burden of providing such information. This conclusion is supported by the fact that the ICC explained that there would be "no useful purpose" in providing detailed information. As noted above, the burden of obtaining information has no relationship to its usefulness. In addition, the fact that the ICC explained that the term "applicant" in the ICC's regulations did not encompass the non-system companies does not suggest that the ICC viewed the Petition as discussing only the burden of producing information. It appears that it was merely a statement by the ICC that, in addition to there being no purpose in providing detailed information on the non-system companies, the ICC's regulations did not require such information.

control, through stock ownership of NW and its subsidiary companies and of SR[C] and its consolidated system companies, by [NSC]." NWS Enters., 46 Fed. Reg. at 174. The decision went on to state, "The rail carrier subsidiaries of NW and the [SRC] consolidated system carriers are set forth in the appendix." Id. The appendix did not include NPBL or other non-system companies. Id. at 176. Similarly, in the ICC decision granting the Application, the ICC stated that the Application sought authority for "[NSC] to acquire control through stock ownership of NW and its subsidiary carrier companies, and of [SRC] and its consolidated system companies." NSC Control, 366 I.C.C. at 177. The footnote to that sentence stated, "The affiliated companies of NW and [SRC] are set forth in appendix A." Id. at 177 n.3. Appendix A did not list NPBL or other non-system companies. See id. at 255-57. Thus, when the ICC explicitly defined what it understood to be the control authority sought by the Application, its definition excluded the non-system companies.[20]

NSR further argues that the Application made clear that NSC would obtain control over NPBL when it stated on page 2, "As a result of the proposed transaction, [NSC] will also acquire indirect control

[20] NSR also suggests that the fact that the ICC's decision granting the Petition stated that the Application should list all of the carriers in which applicants had an ownership interest indicates that the ICC understood that the scope of the Application included non-system companies. (NSR Reply 33, 35.) However, as noted above, 49 C.F.R. § 1111.1(c)(8) separately required disclosure in the application of any ownership interest in a carrier subject to the ICC's jurisdiction regardless of whether the carriers would be controlled by applicants. The Petition noted that it was not seeking to have this requirement waived.

through stock ownership of all subsidiaries of [NW] and [SRC]." (NSR Reply 23.) NSR claims that this statement about indirect control encompassed all subsidiaries, whether owned in whole or in part, including the non-system companies. (Id.) However, this statement could not have been intended to mean that NSC was obtaining indirect control over the non-system companies because Appendix 2 lists numerous railroad companies in which either NW or SRC (not both), directly or indirectly, held only a small ownership share (as low as 1.78%) and NSC would not be obtaining indirect control over those companies. (Id. at 16 n.13.) Rather, the term "subsidiaries" in that sentence appears to be a shorthand reference to NW and its subsidiary companies and SRC and its consolidated system companies. Indeed, one page prior on page 1 of Volume 2 of the Application and again on page 16, applicants stated that the proposed transaction involves ICC authorization for NSC to acquire control of NW and its subsidiary carrier companies and of SRC and its consolidated system companies. Application Volume 2 at 1, 16, Dec. 4, 1980, Norfolk S. Corp.—Control—Norfolk & W. Ry., FD 29430. Moreover, the Petition, the decision granting the Petition, and the decisions accepting and granting the Application all list the "subsidiaries" of NW, and these lists do not include the non-system companies.[21] This is further evidence that the use of the term "subsidiaries" on page 2 of the Application was not intended to encompass the non-system companies but to refer to

[21] 1 NW and SRC Pet. at Appendix A, July 24, 1980, NWS Enters., Inc.—Control— Norfolk & W. Ry., FD 29430; NWS Enters., Inc., 45 Fed. Reg. at 66,915; NWS Enters.; Application to Control Norfolk & W. Ry. & S. Ry., 46 Fed. Reg. at 176; NSC Control 366 I.C.C. at 255-57.

the subsidiaries within the NW and SRC consolidated systems.

NSR also claims that, despite the many instances in which NSR disavowed any intention of acquiring control of non-system companies, the Application nevertheless put the ICC and the public on notice that NSC would be acquiring control of NPBL because the corporate chart in Appendix 2 showed that the combined ownership interest, direct and indirect, of NW and SRC in NPBL was 57.14%. (NSR Opening 10.) NSR thus relies on a few lines in a lengthy chart in an appendix to an application spanning thousands of pages to contend that the ICC and the public should have known that NSC would control NPBL after the transaction. This is despite the narrative portion of the Application describing the transaction in a manner that did not include the non-system companies such as NPBL and the previously-filed Petition plainly stating that the non-system companies would not be controlled by applicants. If applicants did in fact believe they were seeking authority to control NPBL, the statements made in the Petition and the narrative portion of the Application were, at best, misleading. Regardless, the Board does not agree that a single reference to NPBL in an appendix listing numerous companies that would not be controlled after the transaction was sufficient to put the ICC and public on notice of an applicant's intent to control a carrier on that list or that this single reference should be given more weight in interpreting the 1980 proceedings than the numerous statements that NSR did not intend to acquire control. The agency will not permit an applicant to give assurances that control will not be obtained in a transaction but then seek to achieve

that control in any case through a passing reference concealed in the minutiae of the exhibits. Given the significance of the antitrust immunity and other immunity that comes with control authority, the Board and the public must be able to have a clear understanding of the scope of the authority being sought.

NSR also points to language in the ICC decision granting the Application stating that the ICC was granting authority to control NW and SRC "and their affiliated carriers." (NSR Opening 12.) According to NSR, the term "affiliated carrier" is generally understood to mean a carrier that is partially, as opposed to wholly, owned and the ICC's use of this term is undeniable evidence that the non-system companies were included within the scope of the control authority granted. (Id.) "General understanding" of a term does not control, however, when a narrower specific definition of the term has been provided in the decision. As noted above, the footnote to an earlier sentence defining the transaction states that the "affiliated companies" of NW and SRC are listed in appendix A to the decision, which does not include the non-system companies. NSC Control, 366 I.C.C. at 177 n.3, 255-57. Thus, the ICC was using "affiliated carriers" as a shorthand for NW's subsidiary carrier companies and SRC's consolidated system companies. This conclusion is reinforced by the very sentence quoted by NSR. The sentence referred to the granting of authority to control NW and SRC and "their affiliated carriers, the granting of related trackage rights among these carriers, and the acquisition of part of the main line of the Norfolk, Franklin and Danville Railway Company by [SRC], *all as discussed above*." (emphasis added). Id. at 249. Earlier in the decision, in multiple instances,

the ICC had referred to the Application as seeking authority to control NW and its subsidiary carrier companies and SRC and its consolidated system companies, id. at 175, 177, 179, and had also defined the "affiliated companies" as those listed in Appendix A, id. at 177 n.3. Thus, the "affiliated carriers . . . as discussed above" did not include the non-system companies.[22]

NSR further argues that precedent establishes that a waiver to exclude a subsidiary from the definition of "applicant"—including a subsidiary in which no applicant presently owns more than a 50% interest but where applicants together would own more than a 50% interest after the transaction—does not exclude that subsidiary from the control authority granted. (NSR Reply 19-20.) In addition, NSR claims that there is no precedent supporting the proposition that unless an applicant specifically requests control authority for a particular subsidiary, whether owned in whole or in part, that subsidiary is therefore excluded from the scope of the approval. (Id. at 20 n.20.) However, in this case, the applicants did not simply seek a waiver to exclude NPBL from the definition of "applicant" or

[22] NSR's argument is unpersuasive for other reasons as well. As explained above, Appendix 2 lists numerous railroad companies in which either NW or SRC held only a small ownership share (as low as 1.78%) and did not control and would not control after the transaction. If "affiliated carrier" is understood to refer only to carriers that are partially owned, then the ICC's reference to "affiliated carriers" would exclude from the scope of control authority the carriers within the NW and SRC systems that were wholly owned—i.e., those undoubtably under the control of NW and SRC—while at the same time including many companies which neither NW nor SRC had the ability to control before or after the transaction. That is an implausible interpretation.

merely fail to explicitly request authority to control NPBL. Rather, the applicants specifically told the ICC that the non-system companies would not be controlled by petitioners after the transaction and the subsequent ICC decisions defined the control authority sought as being limited to the companies within the NW and SRC systems. NSR has cited no precedent in which an applicant informed the ICC or the Board that it would not control a particular carrier as a result of the transaction, and the ICC or the Board repeatedly described the authority sought in a manner that excluded that carrier, but where it was nonetheless understood that such a carrier was within the scope of the control authority that was granted.

Indeed, in the cases cited by NSR, the applicants make clear in their waiver requests which subsidiaries would and would not be controlled by applicants after the transaction. For example, in Burlington Northern, Inc.—Control & Merger—Santa Fe Pacific Corp., Docket No. 32549, applicants sought a waiver or clarification that carriers in which they had non-controlling ownership interests of 50% or less, a list of which was provided, would not be considered "applicant carriers." Burlington N., Inc.—Control & Merger—Santa Fe Pac. Corp., FD 32549 (ICC served Oct. 3, 1994). Applicants separately requested a waiver or clarification that the Wichita Union Terminal Railway (WUTR) would not be considered an "applicant carrier." Id. The applicants explained that they each owned a 33.33% interest in WUTR and that, following the transaction, Burlington Northern, Inc. would own 66.66% of WUTR's stock and stated that the primary application would seek ICC approval for control of WUTR as a result of the primary

transaction. Id. Similarly, in each of the other cases cited by NSR, applicants identified which of the carriers that were part of a petition for waiver would be and would not be controlled by applicants.[23] Certainly,

---

[23] In Santa Fe Southern Pacific Corp.—Control—Southern Pacific Transportation Co., Docket No. FD 30400, applicants sought a clarification that railroads in which the applicants would not have a controlling interest would not be considered "applicant carriers" and separately sought clarification that two other specifically identified railroads, in which applicants combined would have a controlling interest if the transaction were approved, would not be considered "applicant carriers." Santa Fe S. Pac. Corp.—Control—S. Pac. Transp. Co., FD 30400, slip op. at 1 (ICC served Feb. 3, 1984). In Union Pacific Corp.—Control & Merger—Southern Pacific Rail Corp., Docket No. FD 32760, applicants sought a waiver or clarification that the term "applicant carriers" did not include railroads in which they had interests of 50% or less Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., FD 32760 (ICC served Sept. 5, 1995). Applicants separately sought a waiver or clarification that the term "applicant carriers" did not include five specifically identified carriers in which the applicants each held a 50% or less ownership interest but would hold a 50% or greater combined ownership interest following the transaction. Id. In Union Pacific Corp.—Control—Missouri Pacific Corp., Docket No. FD 30000 et al., the applicants requested clarification that the term "applicant" did not apply to carriers that were operated independently and not as part of the applicants' systems. In doing so, they identified all of these carriers, provided a brief statement about the nature of their operations, and indicated the ownership interest of the applicants. Union Pac. Corp. Pet. 11, Appendix B, May 2, 1980, Union Pac. Corp.—Control—Mo. Pac. Corp., FD 30000. In Canadian National Railway—Control—Illinois Central Corp., Docket No. FD 33556, CSXT sought a waiver or clarification with respect to a responsive trackage rights application that the definition of "applicant carrier" was limited to Board-regulated rail carriers in which CSXT currently held an interest greater than 50%. Canadian Nat'l Ry.—Control—Ill. Cent. Corp., FD 33556, slip op. at 3 (STB served Sept. 18, 1998). This waiver would have excluded the Lakefront Dock and Railroad Terminal Company

none of the cases cited by NSR support the proposition that an applicant can tell the ICC or the Board and the public that it will not control a carrier after a transaction but nonetheless expect that carrier to be within the scope of the control authority granted.

NSR asserts that even if NSC Control did not grant authority for NSC to control NPBL, subsequent decisions in 1991 and 1998 granted this authority. (NSR Reply 38-39.) In 1991, the ICC granted a corporate family transaction exemption pursuant to 49 C.F.R. § 1180.2(d)(3) for SRC to directly control NW through a corporate family exemption. S. Ry.—Control Exemption—Norfolk & W. Ry., FD 31791 (ICC served Jan. 14, 1991). In 1998, the Board granted a corporate family transaction exemption for NW to be merged into the former SRC, which at that point had been renamed NSR. Norfolk S. Ry.—Exemption—Norfolk & W. Ry., FD 33648 (STB served Aug. 31, 1998). NPBL was not mentioned in either of these proceedings. According to NSR, these decisions constituted grants of authority for NSC to control NPBL. (NSR Reply 38-39.) However, an exemption under 49 C.F.R. § 1180.2(d)(3) could not have been used to grant authority to any member of NSC's corporate family to control NPBL unless authority had previously been granted for some other member of that corporate family to control NPBL.

(Lakefront), a carrier in which CSXT, at the time of its waiver request, held a 50% interest. Id. at 3 n.3. However, CSXT explained to the Board that Conrail was about to allocate its 50% interest in Lakefront to CSXT, which would give CSXT 100% ownership. Id.

Exemptions for "[t]ransactions within a corporate family that do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family" are permitted under 49 C.F.R. § 1180.2(d)(3). NSR argues that at the time of the 1991 and 1998 transactions, NPBL was unquestionably part of the corporate family, whether authorized or not. (Id.) NSR also states that there was no requirement in the notice of exemption rules that NSC or SRC specifically "declare" that NPBL would come under the direct control of SRC. (Id.) NSR's interpretation would allow the corporate family exemption to effectively nullify other Board requirements since parties could acquire control of a carrier without informing the Board in a transaction that would normally require an application or another type of exemption under the Board's rules and then cure that unauthorized acquisition by reorganizing the corporate family and seeking a corporate family transaction exemption. Moreover, under NSR's interpretation, the Board and the public might never even know that control authority was granted since, according to NSR, the party seeking the exemption is not required to name the entities over which the exemption would provide the new control authority. It is implicit in 49 C.F.R. § 1180.2(d)(3)'s requirement that the transaction be "within a corporate family" that the member of the corporate family whose ownership is changing as a result of the transaction was previously authorized to be controlled by a member of the corporate family. Accordingly, neither the ICC's 1991 decision nor the Board's 1998 decision could have provided authority for NSC to control NPBL.

Both NSR and NPBL argue that since NSC Control, CSXT has understood that NPBL was under the control of NSC, and CSXT raised no objections until now. (NSR Reply 3-4; NPBL Reply 2.) In fact, according to NSR and NPBL, CSXT has taken various actions acknowledging and accepting NSC's majority ownership and control of NPBL. (NSR Reply 3- 4; NPBL Opening 2-4.) However, parties cannot create control authority through their actions and beliefs. Control authority can only come from the Board, or previously from the ICC. See 49 U.S.C. § 11323(a). Thus, whether CSXT has acknowledged or accepted that NSC has a right to control NPBL is irrelevant to whether the ICC granted NSC authority to control NPBL.[24]

NPBL asserts that if the Board were to hold that NSC did not obtain authority to control NPBL, the Board should retain this matter and allow NSR to seek authority to now control NPBL. (NPBL Reply 4-5.) Addressing a new request for control authority would be beyond the scope of this proceeding and the District Court's referral. Moreover, any future

[24] The Board is concerned, however, about the possibility that the parties may have been aware of a potential defect regarding NSR's control of NPBL for some time and did not seek to remedy it or otherwise bring it to the Board's attention. The Board expects stakeholders to bring such matters before the Board expeditiously and reminds the parties that a knowing violation of the Board's requirements can result in the imposition of civil penalties, and that, for certain violations, such penalties may be imposed for each day that the violation continues. See 49 U.S.C. § 11901(a).

decision concerning control would benefit from the findings of the District Court.[25]

For the reasons explained above, the Board finds that NSC was never granted authority to control NPBL.

It is ordered:

1. The issues in this declaratory order proceeding are resolved as described above.

2. This decision is effective on its service date.

By the Board, Board Members Fucks, Hedlund, Oberman, Primus, and Schultz.

[25] Given this decision, the Board expects the parties to take appropriate steps to address the unauthorized control issue immediately following resolution of the district court proceeding, including any appeals.

APPENDIX C

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

…

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

…

APPENDIX D

28 U.S.C. § 1336. Surface Transportation Board's orders

…

(b) When a district court or the United States Court of Federal Claims refers a question or issue to the Surface Transportation Board for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in

part, any order of the Surface Transportation Board arising out of such referral.

…

APPENDIX E

28 U.S.C. § 2321. Judicial review of Board's orders and decisions; procedure generally; process

(a) Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Surface Transportation Board shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title.

…

APPENDIX F

28 U.S.C. § 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

…

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

…

APPENDIX G

49 U.S.C. § 10502. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part—

(1) is not necessary to carry out the transportation policy of section 10101 of this title; and

(2) either—

(A) the transaction or service is of limited scope; or

(B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

…

APPENDIX H

49 U.S.C. § 11321. Scope of authority

(a) The authority of the Board under this subchapter is exclusive. A rail carrier or corporation participating in or resulting from a transaction

approved by or exempted by the Board under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

…

APPENDIX I

49 C.F.R. § 1180.2. Types of transactions.

Transactions proposed under 49 U.S.C. 11323 involving more than one common carrier by railroad are of four types: *Major*, *significant*, *minor*, and *exempt*.

…

(d) A transaction is exempt if it is within one of the nine categories described in paragraphs (d)(1) through (9) of this section. The Board has found that its prior review and approval of these transactions is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and is of limited scope or unnecessary to protect shippers from market abuse. See 49 U.S.C. 10502. A notice must be filed to use one of these class exemptions. The procedures are set out in § 1180.4(g). These class exemptions do not relieve a carrier of its statutory obligation to protect the interests of employees. See 49 U.S.C. 10502(g) and 11326. The enumeration of the following categories of transactions as exempt does not preclude a carrier from seeking an exemption of specific transactions not falling into these categories.

…

(3) Transactions within a corporate family that do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family.

…

APPENDIX J

49 C.F.R. § 1180.4. Procedures.

…

(g) ***Notice of exemption.***

(1) To qualify for an exemption under § 1180.2(d), a railroad must file a verified

notice of the transaction with the Board. Except for verified notices filed under § 1180.2(d)(9), all verified notices under § 1180.2(d) must be filed at least 30 days before the transaction is consummated, indicating the proposed consummation date. Verified notices filed under § 1180.2(d)(9) will become effective upon service of notice of the transaction by the Board. Before a verified notice is filed, the railroad shall obtain a docket number from the Board's Section of Administration, Office of Proceedings.

(i) All notices filed under § 1180.2(d) shall contain the information required in § 1180.6(a)(1)(i) through (iii), (a)(5) and (6), and (a)(7)(ii), and indicate the level of labor protection to be imposed.

(ii) Notices filed under §§ 1180.2(d)(7), 1180.2(d)(8), or 1180.2(d)(9) shall also contain the following information:

(A) The name of the tenant railroad;

(B) The name of the landlord railroad;

(C) A description of the trackage rights, including a description of the track. For notices under § 1180.2(d)(8) and (9), the notice must state that the trackage rights are overhead rights. For notices under § 1180.2(d)(7), the notice must state whether the trackage rights are local or overhead;

(D) The date the trackage rights transaction is proposed to be consummated;

(E) The date temporary trackage rights will expire, if applicable; and

(F) For notices under § 1180.2(d)(9), a description of the situation resulting in the outage in sufficient detail to allow the Board to determine an emergency exits, including, to the extent possible, the nature of the event that caused the unforeseen outage, the location of the outage, the date that the emergency situation occurred, the date the outage was discovered, and the expected duration of the outage.

(iii) Except for notices filed under § 1180.2(d)(9), the Board shall publish a notice of exemption in the Federal Register within 16 days of the filing of the notice. For notices filed under § 1180.2(d)(9), the Board shall serve a notice of exemption on parties of record within 5 days after the verified notice of exemption is filed and shall publish that notice in the Federal Register. The publication of notices under § 1180.2(d) will indicate the labor protection required.

(iv) If the notice contains false or misleading information that is brought to the Board's attention, the Board shall summarily revoke the exemption for that carrier and require divestiture.

(v) The filing of a petition to revoke under 49 U.S.C. 10502(d) does not stay the effectiveness of an exemption. Except for notices filed under § 1180.2(d)(9), stay petitions must be filed at least 7 days before the exemption becomes effective. For notices filed under § 1180.2(d)(9), stay petitions should be filed as soon as possible before the exemption becomes effective.

(vi) Other exemptions that may be relevant to a proposal under this provision are codified at 49 CFR part 1150, subpart D, which governs transactions under 49 U.S.C. 10901.

(2) Some transactions may be subject to environmental review pursuant to the Board's environmental rules at 49 CFR part 1105.

(3)(i) Except for notices filed under §§ 1180.2(d)(7), 1180.2(d)(8), or 1180.2(d)(9), the filing party must certify whether a proposed acquisition or operation of a rail line involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means ("interchange commitment"). If such a provision or agreement exists, the following additional information must be provided (the information in paragraphs (g)(4)(i)(B), (D), and (G) of this section may be filed with the Board under 49 CFR 1104.14(a) and will be kept confidential without need for the filing of an accompanying

motion for a protective order under 49 CFR 1104.14(b)):

(A) The existence of that provision or agreement and identification of the affected interchange points; and

(B) A confidential, complete version of the document(s) containing or addressing that provision or agreement;

(C) A list of shippers that currently use or have used the line in question within the last two years;

(D) The aggregate number of carloads those shippers specified in paragraph (g)(4)(i)(C) of this section originated or terminated (confidential);

(E) A certification that the filing party has provided notice of the proposed transaction and interchange commitment to the shippers identified in paragraph (g)(4)(i)(C) of this section;

(F) A list of third party railroads that could physically interchange with the line sought to be acquired or leased;

(G) An estimate of the difference between the sale or lease price with and without the interchange commitment (confidential);

(H) A change in the case caption so that the existence of an interchange commitment is apparent from the case title.

(ii) To obtain information about an interchange commitment for use in a proceeding before the Board, a shipper or other affected party may be granted access to the confidential documents filed pursuant to § 1180.4(g)(4)(i) of this section by filing, and serving upon the petitioner, a "Motion for Access to Confidential Documents," containing:

(A) An explanation of the party's need for the information; and

(B) An appropriate draft protective order and confidentiality undertaking(s) that will ensure that the documents are kept confidential.

(iii) ***Deadlines.***

(A) Replies to a Motion for Access are due within 5 days after the motion is filed.

(B) The Board will rule on a Motion for Access within 30 days after the motion is filed.

(C) Parties must produce the relevant documents within 5 days of receipt of a Board approved, signed confidentiality agreement.

…