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BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Chief Counsel
August 27, 2025
Part of
Public Record

Norfolk Southern Corporation and Norfolk Southern Railway Company – Acquisition of Control – Norfolk & Portsmouth Belt Line Railroad Company	Docket No. FD 36836

COMMENT OF
THE UNITED STATES DEPARTMENT OF JUSTICE

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Dated: August 27, 2025

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The United States Department of Justice ("the Department") submits this comment on the Surface Transportation Board's consideration of the above captioned proceeding. The Department appreciates the invitation of the Surface Transportation Board ("the Board") to share the Department's views on the competitive impacts of the application on American consumers and businesses.[1]

"The heart of our national economic policy long has been faith in the value of competition." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (citation omitted). Competition "yields the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *NCAA v. Board of Regents*, 468 U.S. 85, 104 n.27 (1984) (citation omitted). A capitalist democracy best delivers prosperity and opportunity through the give and take of competition in the free markets, and the American people have therefore long rejected the false promise of centralized control.

In defense of our nation's free market structures and the many benefits that flow from them, the Department promotes competition by enforcing the antitrust laws and by advocating for the economic freedom and opportunity of American consumers and workers. The Department is committed to working collaboratively with the Board to safeguard and promote competition in the railroad industry.

[1] Scheduling Order, Surface Transportation Board Dkt. No. FD 36836, 90 Fed. Reg. 30763 (July 10, 2025).

Railroad competition benefits American consumers and businesses. Competition between railroads pushes them to deliver goods more efficiently, ensuring the flow of essential food supplies, manufacturing imports, and agricultural products. Competition drives lower prices, better quality, and more of the services consumers want at the same time that it raises wages for railroad workers. A lack of competition can drive up transportation costs for businesses, making it harder for them to offer affordable products and services to American consumers and hinders success in export markets. U.S. antitrust enforcement thus has long emphasized the significance of railroad competition, including the importance of competitive access to critical infrastructure at terminal points.[2]

The benefits of competition in rail service are reflected in the specific policies set forth by Congress in authorizing when the Board may grant a railroad "control" over a rail line (such as NPBL). In fact, under its statutory public interest framework, the Board must consider whether "there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States" if the Board were to approve the application. 49 U.S.C. § 11324(d)(1). The Board is also charged with determining whether "the anticompetitive effects of the transaction outweigh the public interest." 49 U.S.C. § 11324(d)(2). The Department thus submits these comments in support of the Board's consideration of the important competition issues raised by Norfolk Southern's application.

I. The Board Should Carefully Consider the Current Competitive Dynamics Concerning NPBL and the Norfolk International Terminal.

Norfolk Southern's application for acquisition of control of the Norfolk & Portsmouth Belt Line Railroad Company ("NPBL") should be viewed in the context of the 130 year history of NPBL. NPBL was founded in the 1890s by eight competing railroads for "the *mutual benefit of each* [of the railroads] in the interchange of business," with "all [owners] to be equally interested."[3] By connecting multiple railroads to the Norfolk International Terminal ("the Terminal"), NPBL helped ensure competition drove efficient and cost-effective transport of goods to and from the Port of Virginia.

Much has changed since the 1890s in the American railroad industry. The flow of goods through the Port of Virginia remains important to the national economy—it is now the third largest container port on the East Coast. Yet after a series of railroad acquisitions, only two of the original eight NPBL owners remain: Norfolk Southern and its rival CSX Transportation. And contrary to the NPBL's founding intention that all owners would have an equal share of the line, Norfolk Southern currently owns 57 percent of NPBL's shares and appoints three board members, while CSX has a 43 percent share of NPBL and appoints only two board members. Thus, despite the fact that NPBL was expressly designed for the mutual benefit of all of its owners, industry consolidation has led to a single firm holding a majority share of NPBL.

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[2] *See United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912); *see also* Initial Comments of the United States Department of Transportation and the United States Department of Justice, STB Docket No. Ex Parte 705 ("Competition in the Railroad Industry"), Doc. No. 2292000 (Apr. 12, 2011).
[3] NPBL Charter Agreement (July 7, 1897), at 1 (emphasis added).

Ocean shippers critically rely on rail competition to and from the Port of Virginia. It serves as a key domestic and international port for a wide variety of important goods such as food products (including soybeans and other grains), inputs to manufacturing (including chemicals, auto parts, and petroleum products), and other consumer goods. Any harm to competition in the handling and transportation of the intermodal containers carrying these goods has the potential to raise prices for American consumers both directly and indirectly as well as to disadvantage farmers and other exporters.

Against this backdrop, Norfolk Southern's share of intermodal business at the Terminal is approximately 90 percent and exceeds 70 percent at the Port of Virginia as a whole. The Port of Virginia has stated that it supports "more opportunity for efficient rail access at [the Terminal] for the benefit of its customers."[4] The Board should therefore assure itself that granting the application will not limit rail competition to and from the Port of Virginia.

II. The Board Should Consider Whether Potential Foreclosure of Rivals' Access to NPBL May Harm Competition in and Around the Port of Virginia.

Norfolk Southern's application to acquire single-firm control of NPBL presents the possibility that it may lessen competition by creating or increasing the "ability and incentive to foreclose rivals from sources of supply or distribution." *See Illumina, Inc. v. FTC*, 88 F.4th 1036, 1051 (5th Cir. 2023). This widely-recognized concern arises when an acquisition creates a firm that may limit access to products or services that its rivals also use to compete. *See id.* (affirming finding of liability on the basis of incentive and ability to limit rivals' access); *FTC v. Microsoft*, 136 F.4th 954, 971-75 (9th Cir. 2024) (acknowledging theory of competitive harm from foreclosure that plaintiff failed to prove); *United States .v AT&T, Inc.* 916 F.3d 1029 (D.C. Cir. 2019) (same); *see generally* U.S. Dep't of Justice and Fed. Trade Comm'n, Merger Guidelines (Dec. 18, 2023), Section 2.5 (describing foreclosure theory);[5] U.S. Dep't of Justice and Fed. Trade Comm'n, Vertical Merger Guidelines (June 30, 2020) (same).[6]

Foreclosure concerns derive from the harm to competition that can arise when one firm limits access to a good or service its rivals use to compete. Importantly, in addition to increasing prices there are a "myriad [of] ways in which [the merged firm] could engage in foreclosing behavior . . . such as by making late deliveries or subtly reducing the level of support services." *Illumina*, 88 F.4th at 1053. And the potential impact of foreclosure tactics increases with the market share and competitive significance of the potentially foreclosed good or service. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 328-29 (1962) (among other factors, an analysis evaluating the competitive effects of a vertical arrangement includes the likelihood and size of any market foreclosure); *U.S. Steel Corp. v. FTC*, 426 F.2d 592, 599 (6th Cir. 1970) (same). Where enabled by an acquisition, foreclosure strategies can weaken rivals by making it harder or more costly to compete, leading them to charge higher prices themselves, reducing their quality,

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[4] Port of Virginia letter to Surface Transportation Board, STB Dkt. No. FD 36836, Doc. No. 309310 (March 5, 2025), at 6. Although the issues here relate primarily to intermodal (container) shipments, the Department encourages the Board to examine whether the issues presented are relevant to all shipments, including those that do not travel in containers.

[5] *Available at* https://www.justice.gov/atr/merger-guidelines.

[6] *Available at* https://www.justice.gov/atr/page/file/1290686/dl?inline. The 2020 Vertical Merger Guidelines were subsequently withdrawn and their relevant content incorporated into the 2023 Merger Guidelines.

or interfering with distribution. *See Illumina*, 88 F.4th at 1053. In short, potential foreclosure may act as a "'clog on competition,' which '[deprives] rivals of a fair opportunity to compete.'" *Brown Shoe Co*., 370 U.S. at 323-24 (quoting *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 314 (1949); H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8)); *see Ford Motor Co. v. United States*, 405 U.S. 562, 568-71 (1972).

The Department encourages the Board to consider the risk to competition from Norfolk Southern's request to acquire "control" of NPBL when evaluating whether the application is likely to result in a "substantial lessening of competition" and whether "the anticompetitive effects of the transaction outweigh the public interest,"[7] under the Board's authority pursuant to 49 U.S.C. § 11324(d). In so doing, the Board should examine the structure of the market (both the market itself and any related markets), whether there has been a trend toward vertical integration, and the nature and purpose of the transaction. *Illumina*, 88 F.4th at 1054.

III. The Board Should Consider the Follow-On Impacts of Granting the Application.

When considering the application, the Board should also consider the likely results that will flow from approval for other pending or future matters, in at least two respects.

First, Norfolk Southern will likely argue that Board approval grants sweeping immunity. Immunizing conduct from the antitrust laws risks undermining our free market system and so must be done sparingly, carefully, and only in pursuit of legitimate—and actually attainable—benefits. Norfolk Southern's application to the Board to authorize Norfolk Southern's acquisition of control of NPBL is governed by 49 U.S.C. § 11321 *et. seq.*, which provides in relevant part that a "rail carrier . . . participating in [an STB] 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."[8] If the Board were to grant the application, Norfolk Southern would likely argue that it is immunized from antitrust enforcement relating to its "exercise of control" of NPBL, including its control of NPBL's operations at the Terminal. In fact, Norfolk Southern already has taken the position that such immunity would be exceptionally broad.[9]

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[7] *Cf. The Chicago Junction Case*, 264 U.S. 258, 262-66 (1924) (setting aside order of the Interstate Commerce Commission permitting a single railroad company to acquire control of terminal railroads to the disadvantage of competing railroad company users and previous co-owners because the ICC failed to determine whether the acquisition was in the public interest).

[8] 49 U.S.C. § 11321(a) (emphasis added).

[9] In the United States District Court of the Eastern District of Virginia, Norfolk Southern argued (erroneously) in its motion to dismiss that it already had control of NPBL and the corresponding antitrust immunity, and further that such immunity rendered Norfolk Southern "exempt from liability" from all of CSX's federal antitrust claims and state law claims. Later, in its application before the Board in this docket, Norfolk Southern asserted that "approval of NS's effective control of NPBL will result in Norfolk Southern having antitrust immunity for *any* actions related to its control of NPBL," and that only "market-based forces" or a potential breach of contract lawsuit would constrain Norfolk Southern's behavior at the Terminal and the Port of Virginia. Norfolk Southern Application, STB Docket No. FD 36836, Doc. No. 309236 (Feb. 14, 2025), at 37 (emphasis added). The Department notes that the antitrust laws are intended to act as a shield to would-be monopolists abusing their dominant position by engaging in anticompetitive behavior, which by its very nature would not be susceptible to checks merely by "market-based forces."

The Department therefore urges the Board to take into account the risk that granting Norfolk Southern's application, and the antitrust immunity that Norfolk Southern may argue comes along with it, could frustrate the Department's ability to bring an enforcement action to halt any potential unlawful anticompetitive actions taken by Norfolk Southern /NPBL at the Terminal or the Port of Virginia.[10]

Second, the Board should consider how granting Norfolk Southern control over NPBL will impact the separately pending dispute before the Board (Docket FD 36223) concerning the appropriate trackage rights fee NPBL owes Norfolk Southern relating to the tracks adjacent to the Terminal. That trackage rights fee constitutes a significant portion of NPBL's operating costs, which in turn directly affects the "switch rate" NPBL charges its customers to obtain rail access to the Terminal. Currently, Norfolk Southern and NPBL are adversaries in that separate proceeding, which empowers the Board to set the level of compensation because Norfolk Southern and NPBL's negotiations had reached an impasse. If Norfolk Southern's application in this docket is granted, there may no longer be a live dispute concerning the trackage rights fee, which could result in harm to American consumers and businesses.

* * *

The Department remains committed to offering any assistance it can provide as the Board carries out its important role of protecting competition in the railroad industry. The Department appreciates this opportunity to share its views on the competition issues raised by the pending application and looks forward to continuing to work cooperatively with the Board on this and other matters to protect competition in the railroad industry and American consumers and businesses.

Respectfully Submitted,

/s Abigail Slater

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August 27, 2025

[10] *Cf. CSX Transp., Inc. v. Norfolk S. Ry. Co.*, 2023 WL 2552343, No. 2:18-cv-530, at *7-11 (E.D. Va. Jan. 27, 2023) (dismissing private federal antitrust injunction claims, citing 15 U.S.C. § 26 ("Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . [N]othing herein contained shall be construed to entitle any person, firm, corporation, or association, *except the United States*, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board")) (emphasis added).

CERTIFICATE OF SERVICE

I certify that on August 27, 2025, I caused a copy of the forgoing Comment of the United States Department of Justice to be served via email on the parties of record in this docket.

/s/ Don Amlin

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