

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

M&G POLYMERS USA, LLC v. CSX TRANSPORTATION, INC.

DOCKET NO. NOR 42123

**MOTION TO PARTICIPATE AS AMICUS CURIAE OF
NORFOLK SOUTHERN RAILWAY COMPANY**

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**James A. Hixon
John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510**

*Counsel to Norfolk Southern
Railway Co.*

Dated: November 28, 2012

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Norfolk Southern Railway (“NS”) hereby moves to participate as amicus curiae in *M&G Polymers USA, LLC v. CSX Transp., Inc.*, STB Docket No. NOR 42123. In a decision in that matter issued on September 27, 2012, the Board decided that “[o]ther interested parties may submit their comments along with a motion to participate as amicus curiae, but will not be permitted to intervene as parties to this private rate dispute.” *M&G Polymers USA, LLC v. CSX Transp., Inc.*, STB Docket No. NOR 42123, at n.10 (Sept. 27, 2012) (“*M&G*”). Based on its interest described below, NS seeks to participate in the limited capacity as amicus curiae only.

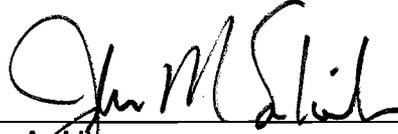
In this case, the Board concluded that M&G Polymers had viable motor carrier alternatives for most of the challenged movements. Specifically, the Board rejected the complainant's arguments that customer preference, product integrity concerns, and infrastructure constraints created market dominance. See *Id.* at 12-13. Having found that transportation alternatives were feasible, the Board manufactured a new test, which it called the “limit price” test.

NS has an interest in the development of market dominance rules and in the adherence to the proper legal process to adopt such rules. NS has been a defendant in rate reasonableness proceedings in the past, is presently, and may be in the future. Presently, NS is the defendant in *E.I. DuPont v. Norfolk Southern Ry. Co.*, STB Docket No. NOR 42125, a rate case challenging NS rates in 138 different lanes and involving 28 different commodities. Norfolk Southern will provide extensive evidence that there are feasible transportation alternatives for 96 of the challenged lanes. In addition, NS will show that these alternatives are effective, including showing that in most of these lanes the rail rate and the truck rates are within ten percent or less of one another. NS demonstrates this largely by using the actual contracts DuPont has entered into with the transportation alternative. This evidence is highly consistent with the evidentiary rules the agency long ago adopted regarding market dominance.¹

NS recognizes that, as an amicus curiae, it has limited rights to participate. NS also recognizes that a decision in this case cannot bind non-parties to the case, such as NS, and accordingly, NS will litigate the use of this test in the future if applied in a case to which NS is a party. Nevertheless, NS has a legitimate interest in ensuring that the Board at all times follows the law and sound economics generally.

¹ *Market Dominance Determinations*, 365 I.C.C. 118, 133 (1981).

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "John M. Scheib", is written over a solid horizontal line.

James A. Hixon
John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

Counsel to Norfolk Southern Railway Co