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Case No. 2023-0783-LWW

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

NORFOLK SOUTHERN RAILWAY COMPANY, Plaintiff, v. CSX TRANSPORTATION, INC., SPRINGFIELD TERMINAL RAILWAY COMPANY, Defendants.	)	C.A. No. 2023-0783-LWW **PUBLIC VERSION** **Filed: August 15, 2023**

DEFENDANTS' OPPOSITION
TO PLAINTIFF'S MOTION FOR EXPEDITED PROCEEDINGS

Defendant CSX Transportation, Inc. ("CSX") and Springfield Terminal Railway Company ("Springfield") respectfully oppose the Motion for Expedited Proceedings (the "Motion") filed by Norfolk Southern Railway Company ("Norfolk") in support of Norfolk's Verified Complaint (the "Complaint").

INTRODUCTION

1. This case should never have been filed. Putting aside CSX's vehement disagreement with the merits of Norfolk's allegations, Norfolk's claims must ultimately be decided by an arbitrator, and no emergency requires the Court to act in advance of any such arbitration. Expedition should be denied for four independently sufficient reasons.

2. First, laches bars expedition. Norfolk and CSX corresponded about their differing interpretations of certain agreements (including the alleged breaches in the Complaint) for just shy of **a year** before this action. Norfolk's audit of CSX began in November 2022, and CSX finished producing documents in March 2023. At no point during the nearly year-long process, or the **five months** after CSX completed its audit production, did Norfolk initiate the governing agreement's dispute resolution process.

3. Second, the governing agreement requires mandatory arbitration and provides the arbitrator the right to expedite and grant injunctive relief. This Court's jurisdiction is expressly limited to pre-arbitral orders in aid of arbitration or to avoid harm *pending appointment of an arbitrator.* Norfolk, however, seeks an injunction throughout an arbitration it has not even committed to filing, and Court monitoring of compliance during the injunction's indefinite duration.

4. Third, Norfolk has shown no threat of irreparable harm—let alone irreparable harm likely to befall it between now and an arbitrator's appointment. The alleged harms relating to frequency and train lengths are concededly based on past incidents, and Norfolk acknowledged, both in correspondence and throughout its Complaint, that they can be remedied by money damages. Norfolk's stapled-on "goodwill" allegations are too speculative to support any harm, irreparable or not.

5. Further, any harm that Norfolk itself has allegedly suffered cannot support a breach of contract. The governing agreement makes clear that Norfolk cannot claim damages. Rather, Norfolk is provided with only limited and specified rights, *i.e.*, to enforce the agreement *on behalf of Pan Am Southern, LLC* ("PAS"). Norfolk cannot be harmed (let alone irreparably) by the breach of a right it does not have.

6. Finally, as Norfolk has known since at least July 28, 2023, an independent railroad is scheduled to take over operations of PAS from CSX/Springfield on September 1, 2023, thereby mooting any injunctive relief against Defendants.

BACKGROUND

A. CSX EXECUTES THE JOINT USE AGREEMENT, WHICH REQUIRES MANDATORY ARBITRATION.

7. In 2009, Pan Am Railways, Inc. ("PAR") and Norfolk entered into a joint venture to create PAS. PAR is a 50% owner (through subsidiaries) of PAS. Norfolk owns the remaining 50% interest in PAS. At its formation, PAS hired Springfield (a PAR subsidiary) to serve as PAS's contract operator.

8. In June 2022, CSX acquired PAR and its subsidiaries, including Springfield (the "Merger"). Compl. ¶18. The Merger was approved by the Surface

Transportation Board (the "STB"), a federal agency that regulates railroads. Compl. ¶13.

9. As part of the Merger, CSX agreed to several conditions, including through a settlement agreement with Norfolk. Most relevant here, CSX and Norfolk agreed that PAS would replace Springfield as its contract operator with an independent entity, Berkshire & Eastern ("B&E"). Compl. ¶¶27, 35(a); Ex. 1 at 49-50. CSX and Norfolk agreed that B&E's appointment would occur as soon as labor implementing agreements were in place, but that in the meantime Springfield would continue to operate PAS.

10. CSX also entered into various agreements in connection with the Merger, including the Joint Use Agreement between PAS, Springfield, and CSX ("JUA," Compl. Ex. A), which governs, among other things, trackage and haulage rights. The JUA contains a regimented alternative dispute mechanism befitting the highly technical nature of railroad disputes. "Any dispute, controversy, or claim" between the parties to the JUA must first "be referred to [the Joint Operating Committee of PAS (the "JOC")] for resolution and if the parties are unable to resolve the dispute," then it must be referred "to the Management Committee (for [PAS]) to resolve." JUA §14(a). "Any Dispute not resolved within sixty (60) days" of its

submission to the Management Committee "shall be submitted … for formal dispute resolution pursuant to Section 14(c)." *Id.* §14(b).

11. Thus, before resorting to arbitration, PAS's JOC (consisting of PAS officers and member representatives from Norfolk and CSX/PAR) and Management Committee (consisting of member representatives from Norfolk and CSX/PAR) have the opportunity to resolve the dispute—particularly when, as here, PAS was the alleged victim. In invoking this Court's jurisdiction, Norfolk has leap-frogged the provisions intended to assist the railroads with solving operating issues.

12. If the pre-arbitral process fails, an independent arbitrator is selected from a ranked process consistent with the American Arbitration Association rules, *id.* §14(c)(ii)(A), and empowered to award money damages, specific performance, or other forms of injunctive relief on an expedited basis. *Id.* §§14(c)(ii)(B),(E).

13. The JUA provides for this Court's jurisdiction solely "to enforce or in aid of the agreement to arbitrate … or for provisional relief to maintain the status quo or prevent irreparable harm **pending the appointment of the arbitrator**." *Id.* §14(c)(i).

14. The JUA takes a bespoke approach to limiting Norfolk's rights as a third-party beneficiary:

> This Agreement and each and every provision hereof are **for the exclusive benefit of the Parties hereto**. Nothing herein contained shall be taken as creating or increasing any right of any third party to recover by way of damages or otherwise against any of the Parties hereto. **[Norfolk] shall have third party status solely for the purpose of enforcing this Agreement**, and not by way of recovery for damages hereunder.

Id. §18(a) (emphasis added).

15. "As a third-party beneficiary, [Norfolk] may initiate and prosecute arbitration pursuant to Section 14(b) on behalf of [PAS]." *Id.* §14(d). Thus, Norfolk may to step into the shoes of PAS when seeking various remedies related to the rights and obligations of the JUA parties, and Norfolk may sue to enforce the agreement between the parties. Nothing more.

B. NORFOLK RAISES THE SAME CONCERNS AT ISSUE IN THIS ACTION FOR A YEAR.

16. Norfolk alleges that violations began "immediately" after the Merger was consummated on June 1, 2022. Compl. ¶67. On August 18, 2022, Norfolk wrote to CSX regarding alleged violations of the JUA related to train frequency (*compare* Compl. ¶¶45-54), train length (*compare* Compl. ¶¶55-60), and use of PAS crews (*compare* Compl. ¶¶61-66). Ex. 2.[1] These are the same alleged breaches of contract at issue in this action.

[1] The Court may take judicial notice of the parties' discussions. *See* Compl. ¶¶67-74; *Schuss v. Penfield P'rs, L.P.,* 2008 WL 2433842, at *4 (Del. Ch. June 13, 2008).

17. CSX communicated with Norfolk for months, attempting to work through these issues. Ultimately, Norfolk began an audit under the JUA in November 2022. Ex. 3. CSX completed its audit-related productions by March 1, 2023. Ex. 4.

18. Yet it was not until June 8, 2023 that Norfolk alerted CSX to the audit results, which restated Norfolk's concerns from August 2022. Norfolk insisted that alleged violations of the JUA "have cost PAS millions of dollars in lost revenue and uncompensated costs for the audit period alone." Ex. 5; *see also* Ex. 6.

C. NORFOLK FILES THIS SUIT AS A NEW OPERATOR IS POISED TO BE INSTALLED.

19. One year after first raising its current concerns to CSX, Norfolk filed this suit without commencing arbitration or the JUA's pre-arbitral dispute resolution process. Although Norfolk requests an expedited preliminary injunction hearing, Norfolk did not submit a proposed schedule or otherwise push for a hearing.

20. As the Complaint concedes, a change in PAS's operator to B&E would moot this action. Compl. ¶58 ("The operational nightmare created by these breaches is made possible by CSX's control of Springfield Terminal."). CSX, Norfolk, and B&E have been diligently planning for B&E to take over as the PAS contract operator. As Norfolk has known since at least July 28, 2023, B&E is now scheduled to "take[] over operation of PAS from [Springfield]" on September 1, 2023. Ex. 7.

ARGUMENT

21. "[T]here is no automatic right to expedition." *Ortsman v. Green*, 2007 WL 702475, at *2 (Del. Ch. Feb. 28, 2007). Norfolk "must establish a sufficiently colorable claim and show a sufficient possibility of threatened irreparable injury, as would justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding." *In re 3Com S'holders Litig.*, 2009 WL 5173804, at *1 (Del. Ch. Dec. 18, 2009) (internal quotation marks omitted).

22. Although the Complaint contains a scattershot of alleged breaches, Norfolk's Motion and proposed preliminary injunction relate to three alleged breaches (Compl. ¶¶45-66). Defendants respond here only to those claims.

I. NORFOLK'S YEAR-LONG DELAY PRECLUDES EXPEDITION.

23. "[E]quity favors the vigilant, not those who slumber on their rights." *Forman v. CentrifyHealth, Inc.*, 2019 WL 1810947, at *1 (Del. Ch. Apr. 25, 2019). Laches contains three elements: "first, knowledge by the claimant; second, unreasonable delay in bringing the claim; and third, prejudice to the defendant." *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 210 (Del. 2005).

24. Laches bars expedition here. Norfolk concedes it has known about its claims, including the specific alleged breaches it seeks to enjoin, since August 2022. Ex. 2; Compl. ¶68. That delay is underscored by Norfolk's review of the requested

audit materials, which spanned over three months. Even after notifying CSX of the purported audit results, Norfolk did not initiate litigation for yet another two months (and has never initiated arbitration).

25. Waiting just days or weeks is enough to deny a claim for expedition based on laches. *See, e.g.*, *Moor Disposal Serv., Inc. v. Kent Cnty. Levy Ct.*, 2007 WL 2351070, at *1 (Del. Ch. Aug. 10, 2007) (two-week delay); *Union Pac. Corp. v. Santa Fe Pac. Corp.*, 1995 WL 54428, at *1 (Del. Ch. Jan. 30, 1995) (ten-day delay); *see also Juweel Inv'rs Ltd. v. Carlyle Roundtrip, L.P.*, C.A. No. 2020-0338-JRS, at 91 (Del. Ch. May 14, 2020) (TRANSCRIPT) (one-month delay was "hornbook laches").

26. Prejudice is self-evident. Rather than have the dispute addressed by PAS's internal decision-makers or confidentially arbitrated under the JUA, Defendants have been harmed through the public filing and dissemination of Norfolk's false allegations.

II. THIS ACTION SEEKS AN END-RUN AROUND MANDATORY ARBITRATION.

27. Norfolk asserts a single breach of contract claim, seeking expedited injunctive relief. Norfolk concedes that claim is ultimately subject to the JUA's binding, mandatory arbitration provisions. Compl. ¶2. If warranted, the arbitrator can provide the requested injunctive relief. JUA §§14(c)(ii)(B),(E).

28. The JUA permits this Court to, at most, enter a limited order preventing irreparable harm "pending the appointment of the arbitrator;" *i.e.,* for true emergencies. JUA §14(c)(i). Yet Norfolk seeks a preliminary injunction "pending **completion** of [an as yet unfiled] arbitration" and requiring CSX to file a written report detailing compliance. D.I. 2 ([Proposed] Preliminary Injunction Order) at 2 (emphasis added). That exceeds the scope of this Court's subject matter jurisdiction under the JUA.

29. Regardless, there is no need for this Court to wade into the highly regulated area of rail competition, including the parties' (and third-parties') web of inter-related contracts, and pre-judge merits that must end up before a different fact-finder, who the parties can select based on expertise in this specialized industry.[2]

III. NORFOLK CANNOT DEMONSTRATE IRREPARABLE HARM.

30. Norfolk must establish that, absent expedition, it will suffer some "imminent and non-speculative" harm. *Smollar v. Potarazu*, 2014 WL 6607074, at *1 (Del. Ch. Nov. 19, 2014).

[2] Courts have recognized that injunctions to enforce contracts involving rail operations must avoid unreasonable interference with interstate commerce. *See, e.g.*, *Pejepscot Indus. Park, Inc. v. Maine Cent. R.R. Co.*, 297 F.Supp.2d 326 (D. Me. 2003) (quoting *Township of Woodbridge, NJ v. Consol. Rail Corp. Inc.*, 2001 WL 283507 (S.T.B. Mar. 22, 2001)). The Court would be forced to address on an expedited basis the complex legal issues relating to the STB's exclusive jurisdiction over rail transportation. 49 U.S.C. § 10501.

A. Norfolk cannot be harmed by the breach of a right it does not have.

31. Norfolk purports to bring this action "on its own behalf and on behalf of [PAS]." Compl. ¶2. But while Norfolk may "initiate and prosecute arbitration pursuant to Section 14(b) on behalf of [PAS]," JUA §14(d), Norfolk itself "shall have third party status solely for the purpose of enforcing this Agreement." JUA §18(a). Beyond a few provisions unrelated to the alleged breaches, Norfolk has no independent rights under the JUA, the provisions of which "are for the exclusive benefit of the Parties [thereto]" and do not "creat[e] or increas[e] any right of any third party." *Id.*

32. Norfolk cannot allege a breach of rights that it does not have. Thus, any harm Norfolk (rather than PAS) alleges to have directly suffered cannot support relief, much less expedition. *See generally* Compl. ¶¶50, 54, 58, 61, 63, 64 (alleging harm in part to Norfolk); Mot. ¶13.

33. Norfolk's assertion that because it cannot seek its own damages under the JUA, it necessarily "faces the threat of irreparable harm unless Defendants are prevented from continuing their contractual violations," Mot. ¶11, is nonsensical. Interpreting the JUA's express **limitation** as **granting** Norfolk an ability to claim irreparable harm on any effort to enforce the JUA under Section 18(a) is absurd.[3]

[3] The authorities Norfolk cites to support this dubious proposition each involved actual irreparable harm. *Dickinson Medical Grp., P.A. v. Foote*, 1984 WL 8208, at

Had the sophisticated parties to the JUA wanted to include a provision stating that any breach of the agreement created irreparable harm to a third-party beneficiary, they would have done so.

B. Norfolk concedes that the alleged harm is monetary and retrospective.

34. Expedited proceedings are inappropriate "[w]here an award of money damages would be sufficient to fully compensate the plaintiff for any injury [it] might suffer[.]" *Ret. Bd. of Allegheny Cnty. v. Rothblatt*, 2009 WL 3349262, at *1 (Del. Ch. Oct. 13, 2009).

35. The Complaint and the parties' prior correspondence concede that each of Norfolk's claims are *past* harms remediable by money damages, which the JUA permits Norfolk to seek to recover on behalf of PAS. JUA §14(d); Compl. ¶¶54 (alleging "at least 58 instances … equate to approximately $3.5 million in lost revenue for [PAS]"), 57 (alleging "at least 274" past instances "where CSX has used excessive length trains"), 61 (alleging "extensive self-dealing, to the financial and competitive detriment of" PAS and Norfolk), 62 (alleging that PAS "is paying crews

*3 (Del. Ch. 1984) (finding a threat of irreparable harm because of potential for misuse of customer lists of patients); *Bionpharma Inc. v. CoreRx, Inc.*, 582 F. Supp. 3d 167, 175 (S.D.N.Y. 2022) (noting limitation on damages in dicta after finding threat of irreparable harm to "reputation and goodwill in the small generic pharmaceutical industry in which relationships and reputation are paramount").

to do work for CSX"), 64 (alleging that "congestion and delays … impose[] a direct financial loss for [PAS]"); Ex. 5 (asserting that the results of Norfolk's audit revealed "severe" contractual violations that "have cost PAS millions of dollars in lost revenue").

36. Moreover, "injunctions are meant to provide prospective, rather than retrospective, relief." *Joyland Daycare Ctr. v. Dir. of Dept. of Servs. for Child., Youth and Their Families*, 1996 WL 74713, at *6 (Del. Ch. Jan. 22, 1996). Norfolk has not shown any reason to believe going-forward breaches will take place, let alone breaches that would cause irreparable harm prior to the takeover by B&E or appointment of an arbitrator.

C. The alleged harm to goodwill is speculative.

37. Lastly, Norfolk alleges harm to goodwill: two unnamed customers which, at unspecified times, had their operations allegedly disrupted. Compl. ¶65; Mot. ¶14. But "[m]ere apprehension of uncertain damage" regarding "the lost buyer and potential loss of prospective buyers in the future" does not constitute irreparable harm. *Alpha Builders, Inc. v. Sullivan*, 2004 WL 2694917, at *5 (Del. Ch. Nov. 5, 2004).

38. Nor should the Court be willing to deploy the burden and expense of expedition based upon scant allegations that fail to make clear why or how the

alleged disruptions relate to Defendants' conduct and—critically—why there is a threat of irreparable harm to follow.

39. Finally, none of the cases that Norfolk cites for this issue involve the significant delays and stale harm here. In all four, the plaintiffs launched their litigation within two months of the alleged harm. Mot. ¶12.

IV. B&E'S OPERATIONAL CONTROL WILL SOON MOOT NORFOLK'S CLAIMS.[4]

40. Finally, B&E is currently poised to take control of PAS's operations in less than a month (as Norfolk knows and has planned for). Ex. 7. That operational change will moot Norfolk's claims, making any motion for a preliminary injunction pointless.[5]

[4] Although Defendants do not contest colorability for purposes of the Motion, Norfolk's claims lack merit and Defendants intend to dispute them in any arbitration, if filed. *See* Ex. 6 (refuting allegations, setting forth differing contractual interpretations, and documenting CSX's operational changes to address Norfolk's concerns).

[5] Norfolk's Complaint includes direct allegations on the supposed delay in operational transfer to B&E, Compl. ¶¶40-41, and otherwise alleges that each of the core claims is tied to Defendants' current operational control of PAS. Compl. ¶¶31, 39, 45, 58, 62. The term sheet governing B&E's control, to which Norfolk is a party, notes that B&E will honor the Joint Use Agreement.

41. Defendants suspect that Norfolk's true purpose in filing this action was to generate press in advance of B&E's appointment as the operator of the relevant PAS lines. Norfolk succeeded, at the cost of Defendants' and the Court's time and resources.

CONCLUSION

42. Defendants request that the Court deny the Motion.

/s/ Rudolf Koch
Rudolf Koch (#4947)
Susan Hannigan Cohen (#5342)
Alexander M. Krischik (#6233)
Elizabeth J. Freud (#6803)
RICHARDS, LAYTON & FINGER, P.A.
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

Attorneys for Defendants CSX Transportation, Inc. and Springfield Terminal Railway Company

OF COUNSEL:

Peter W. Denton
Anthony J. LaRocca
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
(202) 429-3000

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