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September 1, 2021

302968

By E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings
September 1, 2021
Part of
Public Record

Re: Docket No. FD 36463, *The Louisville and Jefferson County
Riverport Authority – Petition for Declaratory Order*

Dear Ms. Brown:

New Albany Main Street Properties d/b/a Port of Louisville hereby requests that the attached materials, which contain information that is highly relevant to the issues before the Surface Transportation Board (“STB” or “Board”) in this proceeding but post-date the deadline for submitting evidence and argument, be accepted for the purpose of supplementing the record for decision.

As brief explanation, one of the disputed issues in the proceeding is over the attempt by petitioner the Louisville and Jefferson County Riverport Authority (“LRA”) to conflate the jurisdiction of the Federal Railroad Administration (“FRA”) over rail safety and the Board’s jurisdiction over common carrier railroads pursuant to 49 U.S.C. §10501.¹ LRA’s arguments are largely based on an August 17, 2020 non-binding determination LRA obtained from the FRA’s Office of Chief Counsel without the Port of Louisville’s knowledge or input. The attached September 1, 2021 email correspondence from the FRA attorney who authored the August 17, 2010 non-binding determination (Attachment A) and correspondence referenced in her email (Attachment B) provide additional relevant factual information that confirms the Port of Louisville’s position in this proceeding that the non-binding determination upon which LRA’s flawed allegations concerning STB jurisdiction are based was itself flawed because it was based on false information provided by LRA.

¹ This issue is discussed at pages 26-28 of the Reply of the Port of Louisville to the Petition for Declaratory Order, filed on January 6, 2021.

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Letter to Cynthia T. Brown
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Please do not hesitate to call me if you have any questions.

The undersigned counsel for the Port of Louisville certifies that copies of this letter and the attachments have been served on all parties of record in this proceeding via email.

Sincerely,



Thomas W. Wilcox
*Attorney for New Albany Main Street Properties
d/b/a Port of Louisville*

Enclosures

Cc: All parties of record

ATTACHMENT A

Tom Wilcox

From: Chittim, Veronica (FRA) <veronica.chittim@dot.gov>
Sent: Wednesday, September 1, 2021 6:01 AM
To: Tim Kizer; Jim Adams
Cc: ckeeling@portoflouisville.com; Miguel A. Zamora II; Tom Wilcox; Lisa Fleming; Ken Bohnert; Dan Elliott; doncox@lynchcox.com; Ed Busch; Gorman Chris; Wicker Kent; Kannenberg, David (FRA); Cipollini, Mikel (FRA); Cassatt, James (FRA); Welte, Amanda (FRA); Weinold, John (FRA); Stamper, Barry (FRA); Ondo, Dillon (FRA); Hawks, Lance (FRA)
Subject: FRA safety jurisdiction - Port of Louisville

Mr. Tim W. Kizer
Louisville and Jefferson County Riverport Authority
tim.kizer@louisvilleriverport.com

Mr. Jim Adams
New Albany Main Street Properties, LLC (d/b/a Port of Louisville)
jadams@portoflouisville.com

VIA E-MAIL ONLY

Dear Sirs:

As you are aware, on August 17, 2020, the Federal Railroad Administration (FRA) explained via an e-mail to Mr. Tim Kizer that New Albany Main Street Properties, LLC (d/b/a Port of Louisville) (LORJ), as contractor for the Louisville and Jefferson County Riverport Authority (LRA) in Louisville, Kentucky, was subject to FRA's safety jurisdiction. Specifically, FRA explained that LORJ is a railroad carrier that operates on the general railroad system of transportation (general system).

FRA's August 17, 2020, guidance was based, in part, on FRA's understanding that LORJ was purportedly moving rail cars for multiple tenants on approximately 13 miles of track within the Louisville and Jefferson County Riverport Complex (Riverport Complex). Those stated tenants were DHL, Lastique, Lineage Logistics, Misa Metal Processing, Russtech, HTSI, Southern States, ELG Metals, Universal Minerals, and United States Gypsum. Additionally, FRA's e-mail noted that Norfolk Southern Railway (NS), CSX Transportation (CSX), and the Paducah and Louisville Railway (PAL) service these tenants. FRA's e-mail also stated that NS and CSX operate between 2 and 3 miles with joint operations on LRA property, and PAL operates on 7 miles on the LRA property, with joint operations with LORJ.

FRA has since learned new information about LORJ's rail activities at the Riverport Complex that differ with FRA's earlier understanding of the facts. Specifically, LORJ asserts that it only operates on the double loop tracks (approximately 4 miles in length) within the larger Riverport Complex, and LORJ does not perform rail movements for the listed tenants described in FRA's August 17, 2020, e-mail. See August 5, 2021, letter from LORJ's counsel to FRA (August 5, 2021, Letter). Although LORJ admits it had occasionally moved rail cars (without compensation) for Universal Minerals, LORJ explains that Universal Minerals "ceased accepting railcars in 2019." Additionally, LORJ explains that "[o]n very rare occasions when ELG Metals has had operational difficulties on their site they have asked us to move their railcars around on their premises, which we have done for no charge as a courtesy to a customer." See August 5, 2021, Letter at 3; Tegart Statement at 8. LORJ contends this happened "less than 10 times in 11 years" and LORJ will not do any such movements in the future. Id.

FRA now understands that the customers described in FRA's August 17, 2020, e-mail are located within the larger Riverport Complex, but outside the loop tracks, and these LRA tenants are serviced by NS, CSX, and PAL, not LORJ. LORJ explains that its rail movements only involve shuttling rail cars, with an LRA-owned locomotive, from the general system railroads that drop rail cars off to LORJ at the loop track, to the barge transloading facility on the Ohio River, or to and from trucks. See Tegart Statement at 10. Similarly, LORJ shuttles rail cars from the barge area on the loop track back to the general system railroads for pick-up and further rail transportation. LORJ explains that it "provides contract switching and transloading services pursuant to the terms of its lease" with LRA. See August 5, 2021, Letter at 4. LORJ also explains that "the bulk commodity transfer terminal and the general cargo dock" "accept barges for loading and unloading of cargo to/from rail and truck for various customers, most of whom are not located in the Riverport Complex." See Tegart Statement at 3-4. The commodities moved at the facility include "scrap metals, bauxite, finished steel slabs and coils, cement, coal, sand, coke, limestone, millscale, clay, fertilizers, feldspar, wire rod, and gypsum." See id. at 6.

A "railroad carrier" is defined as a person providing railroad transportation. See 49 U.S.C. 20102(3). The term "railroad" is defined broadly to include any form of nonhighway ground transportation that runs on rails or electromagnetic guideways. See 49 U.S.C. 20102(2). The lone exception is for certain rapid transit operations and that exception does not apply in the instant situation. See id. As the delegate of the Secretary of Transportation, FRA exercises jurisdiction over any railroad operating on the general system, which is defined as "the network of standard gage track over which goods may be transported throughout the nation." 49 CFR § 1.89; Appendix A to 49 CFR Part 209. FRA has jurisdiction over "every area of railroad safety." 49 U.S.C. 20103.

Although FRA's statutory jurisdiction extends to all railroad carriers, FRA has chosen, as a matter of policy, not to impose its regulations on certain categories of rail operations. As stated in Appendix A to Part 209, FRA's regulations exclude from their reach railroads whose entire operations are confined to an industrial installation that is not part of the general system – plant railroads. Typical examples of plant railroad operations are (1) a chemical plant that owns or leases a locomotive and operates that locomotive to move its rail cars throughout its industrial installation or (2) a third-party contract switching entity that serves the chemical company (and no other entities within the industrial installation) by operating a locomotive to move rail cars throughout the installation for that chemical company. In both examples, all of the rail operations within the industrial installation are devoted to rail deliveries to, and pickups from, a single corporate entity within the industrial installation. Such industrial rail operations move only within the confines of the industrial installation, or on immediately adjacent leased track. See Appendix A to 49 CFR Part 209 and e.g., 49 CFR § 213.3(b).

FRA has previously determined that when an entity operates a locomotive to switch rail cars in service for other entities, rather than for its own purposes or industrial processes, the services become public in nature. Such public services represent the interchange of goods, which characterizes operation on the general system. FRA has also concluded that when an entity switches rail cars for multiple tenants within an industrial installation, and for other than or that is not part of its own industrial processes, then that entity is not considered a plant railroad, but is rather considered a railroad that operates on the general system. See 49 CFR Part 209, Appendix A. Indeed, "operations by the plant railroad indicating it [i]s moving cars on . . . trackage for other than its own purposes (e.g., moving cars to neighboring industries for hire)" brings plant track into the general system. See id.; 49 CFR § 213.3(b). Cf. United States v. Brooklyn Eastern Dist. Terminal, 249 U.S. 296, 305 (1919) (holding that a navigation company (the Terminal), which conducted rail operations by transporting goods between its docks and warehouses to interstate railroads, was subject to regulation by FRA's predecessor agency because of the nature of its rail operations; the Terminal conveyed rail shipments from shippers/initial rail carriers to interstate railroads for transport throughout the country, thereby serving as the link for moving those rail cars in commerce). Consequently, FRA maintains that a railroad that serves entities other than itself cannot be considered a plant railroad excepted from FRA's safety jurisdiction. Moreover, the U.S. Court of Appeals for the Fifth Circuit upheld FRA's interpretation that when an entity moves rail cars for multiple tenants within an industrial installation, and for other than its own industrial processes, then that entity is not a plant railroad. See Port of Shreveport-Bossier v. Federal Railroad Administration, No. 10-60324 (5th Cir. 2011) (unpublished per curiam opinion).

LORJ's rail activities on the loop tracks serve as a link between the general system railroads (NS, CSX, PAL), and further transportation of those commodities by barge or truck. These rail cars contain commodities from several distinct industries and companies. Thus, while LORJ may only be moving rail cars on the loop tracks and not for other tenants within the Riverport Complex, and no other general system railroad operates on the loop tracks, FRA finds that LORJ is still moving cars for other than its own industrial purposes. In sum, the rail movement on the loop tracks is not for a single industrial purpose, but rather LORJ is moving goods in commerce, bringing LORJ's railroad operations under FRA's safety jurisdiction as a railroad carrier, and the "plant railroad" exception does not apply.

However, given the small size and relatively low safety risk of these operations, FRA will exercise its enforcement discretion regarding LORJ's rail activities. Although FRA finds that LORJ is technically subject to FRA's safety laws and regulations, FRA will exercise minimal safety oversight over LORJ's rail operations and FRA will periodically evaluate LORJ's ability to demonstrate a strong practice of safe rail operations. FRA will continue to regulate the general system railroads that service the Riverport Complex. These railroads, which are currently subject to FRA's safety laws and regulations, will continue to be subject to FRA's safety jurisdiction within the facility. In that vein, FRA reminds LRA and LORJ that the track over which the general system railroads operate (NS, CSX, PAL) within the Riverport Complex remain subject to FRA regulations, especially 49 CFR Part 213. Additionally, while FRA has determined that it will not exercise its safety jurisdiction over LORJ, FRA's emergency order authority permits it to deal with imminent hazards that are not covered by existing regulations and/or so dangerous as to require immediate, *ex parte* action on the part of the Government. FRA retains jurisdiction to inspect LORJ's operations and to take emergency action if those operations pose an imminent hazard of death or injury. See 49 U.S.C. 20104.

Please note that if the rail operations at the Riverport Complex change in any meaningful manner, FRA's determination may change as well. FRA reserves the right to alter its use of enforcement discretion in the event conditions change or safety concerns necessitate reconsideration. LRA or LORJ must immediately report to FRA's SMT-2 staff (via email, SMT-2@dot.gov), any rail or switching related accident, rail related employee injury or rail incidents. Additionally, if the scope, function, geography, or frequency of LORJ's rail operations at the Riverport Complex change in any meaningful manner, FRA expects LRA or LORJ to advise it, in the method set forth above and in a timely manner, of those changes so FRA may determine whether additional action is necessary. Finally, please be aware that FRA's determinations regarding jurisdiction are not binding, but merely advisory in nature. These determinations are an attempt to provide guidance.

Sincerely,
Veronica

Veronica Chittim
Attorney, Office of Safety Law
U.S. Department of Transportation
Federal Railroad Administration
Office of Chief Counsel

ATTACHMENT B

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August 5, 2021

VIA EMAIL

Veronica Chittim, Esq.
Attorney, Office of Safety Law
U.S. Department of Transportation
Federal Railroad Administration
Office of Chief Counsel
Room W33-411
1200 New Jersey Avenue, SE
Washington, D.C. 20590

Re: FRA Jurisdiction Over the Port of Louisville

Dear Ms. Chittim:

This letter follows our phone call of August 3, 2021 and provides you and the Federal Railroad Administration ("FRA") with information regarding the business operations of the Port of Louisville ("Port") in the Port Facility located within the Louisville and Jefferson County Riverport Complex. For the reasons set out below, the Port's operations are not of a railroad carrier that operates on the general railroad system of transportation.

This issue has arisen in recent weeks because FRA inspectors began asking the Port to comply with FRA regulations applicable to operating railroads in reliance upon a non-binding, advisory determination issued by your office on August 17, 2020 to a representative of the Louisville and Jefferson County Riverport Authority ("LRA"). This non-binding determination concluded, based on the facts presented to your office by LRA, that the Port was a rail carrier operating in the general railroad system of transportation. Starting in early July the FRA has relied on the non-binding determination to insist that the Port comply with the regulations applicable to rail carriers despite the Port's protests that it has never been and is not now a rail carrier operating in the general system of transportation.

In response to your suggestion, this letter sets out the Port's positions in greater detail. Specifically, it explains (1) how the August 17, 2020 non-binding determination was wrong because it was based on false information provided by LRA, and (2) that POL's actual business operations then and now do not make it a railroad operating in the general rail system.

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As to the first issue, the non-binding determination was “based on the information that was provided” to FRA, but 100% of that information was provided by LRA, which in early 2019 had embarked on an aggressive, bad faith campaign to remove the Port while conspiring to replace it with another operator.¹ Consistent with that campaign, LRA (1) hid from the Port that it was meeting with FRA about the Port (2) did not disclose to the Port the information that it was providing to FRA; and (3) failed to inform the Port that it had provided the information until after the non-binding determination was issued and LRA sought to use it to wrongly claim the Port was in material breach of its lease.

For its part, FRA did not contact the Port to verify the information that LRA provided. As such, the Port was not provided an opportunity rebut or clarify the “facts” on which the non-binding determination was eventually made. Had it been provided that opportunity, the Port would have demonstrated that the “facts” LRA provided were false, which according to the non-binding determination were:

1. That the Port moves rail cars for multiple customers on approximately 13 miles of track (which is all the track in the Riverport Complex);
2. That the customers the Port served included “DHL, Lastique, Lineage Logistics, Misa Metal Processing, Russtech, HTSI, Southern States, ELG Metals, Universal Minerals, and United States Gypsum,” and
3. That the Port conducts “joint operations” with the Paducah and Louisville Railway (PAL) “on 7 miles on the LRA property.”

In January 2021, the Port formally refuted these factual assertions, which LRA included (without any supporting evidence) in the Petition for Declaratory Order it filed with the STB, through sworn written testimony from Joseph P. Tegart, offered under penalty of perjury. A copy of his Verified Statement accompanies this letter. LRA did not contest Mr. Tegart’s testimony at page 9 that “the information provided to FRA was demonstrably incorrect,” and LRA has never produced any actual evidence that its assertions were true because such evidence does not exist. Accordingly, POL submits that the “facts” upon which the August 17, 2020 non-binding determination was based were false, and so the non-binding determination was not correct and should be withdrawn.

The incorrectness of the non-binding determination is borne out by the actual business operations of the Port. The Port notes initially that a detailed description of those operations is contained in Mr. Tegart’s Verified Statement. During our call, it came to light that LRA had once again submitted alleged factual information to FRA about the Port’s operations without the Port’s knowledge, even though in this case LRA’s submittal was responding directly to information that

¹ LRA’s multi-pronged, thus far highly unsuccessful campaign to replace the Port through litigation and conspiring with another potential operator is summarized at pages 15 to 17 of the Port’s Reply to Petition for Declaratory Order in STB Docket No. 36463.

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had been provided to FRA by the Port which had also been provided to LRA. The Port appreciates your disclosure of this additional clandestine effort by LRA, and your assistance in helping the Port obtain LRA's August 2, 2021 submittal.

In response to the allegations contained in that submittal, the Port notes at the outset that *none* of the alleged "operations" it discusses occurred outside of the Port Facility boundaries or on tracks other than the Port Facility tracks. This reinforces the falseness of the information provided by LRA that led to the non-binding determination, *i.e.*, that the Port conducted switching operations for multiple Riverport Complex customers over all 13 miles of the complex's tracks. Moreover, several of the allegations in the August 2 email were previously refuted by the Port in its Reply to LRA's Petition for Declaratory order and by Mr. Tegart. Specifically, the reference to Universal Minerals in the August 2 email refers to limited situations where the Port assisted Universal Minerals – without charging it - by occasionally moving rail cars placed on the loop tracks by one of the three railroads that operate in the Riverport Complex to Universal Minerals siding. Verified Statement at 9. However, Universal Minerals ceased accepting railcars in 2019, and the Port is not aware of any interest on the part of Universal Minerals to build more permanent transload facility in the Port Facility.

Similarly, the August 2 email's allegation that the Port has switched cars for ELG Metals was specifically rebutted by Mr. Tegart in his January statement, which explained "On very rare occasions when ELG Metals has had operational difficulties on their site they have asked us to move their railcars around *on their premises*, which we have done for no charge as a courtesy to a customer. To reach the ELG facility our leased locomotive traverses a few hundred feet on the LRA track. I estimate this has happened less than 10 times in 11 years." *Id.* at 8 (emphasis added).

Moreover, LRA has consistently exaggerated the alleged locomotive "accident" in its effort to discredit the Port. In reality, that minor incident involved the locomotive slowly rolling backward a grand total of around 10 feet and damaging (not dramatically "rolling through") the "Shaker House" door because a hand brake was not properly set.

In regard to the August 2 email's reference to the Norfolk Southern Railway's ("NS") movement of unit trains for U.S. Gypsum, the critical point for purposes of FRA jurisdiction over the Port is that the Port's only role in that operation was to fulfill its obligations as operator of the Port Facility by unloading river barges of gypsum and transloading it from barge to truck to onsite stockpile, and then from truck to railcar. The actual rail operations of moving the unit train onto and off of the Port Facility loop tracks were conducted by NS crews, not the Port. The Port performed its obligations as a contract switcher and moved cars in position for loading within the Port Facility, but the actual unit train operations were all conducted by NS crews.

Finally, the Port notes that the references to Valicor in the August 2 email are to an arrangement that will not involve any railroad operations by the Port in the general railroad system of transportation. Rather, as the email states, the cars will be placed on the loop tracks by the

Law Office of Thomas W. Wilcox, LLC

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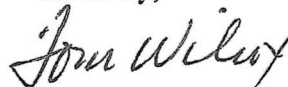
railroads that operate in the Riverport Complex, and then Valicor would utilize a tanker truck to unload them. The Port's role will be to simply move the cars to a place where Valicor's trucks can unload the cars, but it will not participate in the unloading operations. The Port would then move the cars to an appropriate location on the loop tracks where NS or CSX Transportation can pick up the empty car.

In summary, the August 17, 2020 non-binding determination was based on false information provided by LRA that Port had no opportunity to rebut or contest prior to the determination being issued. The Port has not and does not conduct any operations outside of the Port Facility loop tracks, which have never been, and are not now, part of the general railroad system of transportation. Inside the Port Facility boundaries, the Port provides contract switching and transloading services pursuant to the terms of its lease, and it therefore falls into the definition of a "plant railroad," which means the tracks inside the Port Facility could be subject to FRA safety jurisdiction, but the Port's business operations should not be regulated as a railroad operating in the general railroad system of transportation.

The Port appreciates this opportunity to provide this information to FRA, and we look forward to continuing the dialogue and ensuring that the operations inside the Port Facility continue to be safe and in compliance with applicable FRA regulations.

Please do not hesitate to call me if you have any questions or desire additional information.

Sincerely,



Thomas W. Wilcox

Attorney for the Port of Louisville

Enclosure

Cc: Counsel for the Port of Louisville
Counsel for the Louisville and
Jefferson County Riverport Authority
Ms. Amanda Welte

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36463

**THE LOUISVILLE AND JEFFERSON COUNTY RIVERPORT AUTHORITY -
PETITION FOR DECLARATORY ORDER**

VERIFIED STATEMENT OF JOSEPH P. TEGART

My name is Joseph P. Tegart. I am one of three co-owners of New Albany Main Street Properties, LLC, which does business as the Port of Louisville. My official title is President. I have been a co-owner of the Port of Louisville since 2006. I have been in the port and terminal industry for more than 40 years. A copy of my resume is attached to this statement. I have worked for American Commercial Barge Lines and its subsidiary American Commercial Terminals ("ACBL") in various capacities in sales and operations. I was sales manager for ACBL's 12 river terminals that handled a diverse range of products including coal, grain, steel, and bulk product. At Zeigler Coal Company, I was the Transportation Manager overseeing the movement of 40 million tons of coal a year to both domestic and international customers. I also worked for Cooper/T. Smith and Associated Terminals in coal and stevedoring sales, including a sales and management role at the Port Facility when Cooper/T. Smith was the lessee of the facility.

I have worked in and around the 2000+-acre Riverport Complex owned by the Louisville and Jefferson Riverport Authority ("LRA") since its initial construction and development in the early 1980s. When I worked for Cooper/T. Smith from 1996 to 2000 when that company was operating the Port Facility, they leased the 300-acre parcel within the Riverport Complex located

along the Ohio River that consists primarily of a barge bulk commodity loading and unloading dock, approximately four miles of railroad loop tracks and related equipment. I left Cooper/T. Smith in 2000 to work for Associated Terminals. In 2006, my partners and I formed the Port of Louisville. We were the only bidder that responded to an April 2008 request for proposal from LRA for entities to take over management of the Port Facility, which by that time had deteriorated and become commercially unviable, primarily because of the significant reduction in coal transportation by rail and the lack of regular maintenance of buildings, equipment, and rail lines.

For more than ten years pursuant to the lease that has been renewed and amended several times but whose terms are still is substantially the same, we have been fully engaged in making the Port Facility a success. We have personally invested \$1 to \$1.5 million in capital in redeveloping the Port Facility and continue to put all the Company's income back into company operations. With all income from operations being reinvested into the company, none of the owners of the Port of Louisville has ever taken a salary or any distribution or reimbursement for out-of-pocket travel and other expenses.

I have been asked to submit this verified statement describing the Riverport Complex, the Port Facility, and the rail operations component of our overall management and operation of the Port Facility. I am also correcting several significant misstatements found in the Petition for Declaratory order filed by LRA in this proceeding.

A. The Riverport Complex

The Riverport Complex is a 2000+-acre site owned and developed by LRA which houses more than 120 businesses who use various modes of transportation, including truck, barge, and railroad. Those businesses have both purchased and leased tracts in the Riverport Complex to operate their companies. According to the LRA's website, the Riverport Complex contains

approximately 13 miles of railroad tracks. Businesses that need rail service have also constructed their own rail tracks and spurs and/or leased tracks constructed by LRA. LRA itself functions mostly as an industrial complex real estate management entity. It has only four employees and does not conduct any actual industrial activities or operations in the Riverport Complex. Accordingly, LRA does not have actual "customers" per se. Rather, it has owners and tenants. The owners and tenants of the Riverport Complex are in the Industrial Service, Logistics and Distribution, Manufacturing, Retail, and other industries.¹

B. The Port Facility

The Port Facility is a 300-acre subset of the Riverport Complex. It consists of a barge-served bulk commodity transfer terminal and general cargo dock along the Ohio River, approximately four miles of a double loop track and related assets and rights, and a coal storage area which has been out of the coal service business for more than 15 years. It also consists of a conveyor and related loading and unloading facilities, all of which were originally designed to handle large volumes of coal delivered by unit trains for transfer to barge and delivery to utility and industrial customers. Those facilities are in a poor, unusable condition except for storage of other equipment, would require five to six million dollars of investment to rehabilitate, and have no current, long-term customer interest. The Port of Louisville has no contractual obligation to rehabilitate the equipment but continually prospects for potential customers who would make rehabilitation economically viable.

The bulk commodity transfer terminal and the general cargo dock are separated from the loop tracks by a levee.² These facilities accept barges for loading and unloading of cargo to/from

¹ <https://www.louisvilleriverportauthority.com/>

² The Lease refers to these two sections making up the Port Facility as the Port Facility Area. See Lease at Section 1.B and Exhibit A.

rail and truck for various customers, most of whom are not located in the Riverport Complex or the Port Facility. In addition to the loop tracks, the Port Facility property contains a length of rail that runs through the Port Facility property to connect the loop tracks to the mainlines of the Norfolk Southern Railway ("NS") and Paducah & Louisville Railway ("P&L") that enter the Riverport Complex from the north, and to the mainline of CSX Transportation, Inc., which enters the Riverport Complex from the south. I understand that the bulk terminal, barge dock, loop tracks and track connecting to the main line railroads were all constructed by LRA in the early 1980s with the rest of the Riverport Complex. Over time, in the absence of the Port Facility being used for its original purpose as a bulk coal rail-to-barge transfer facility, three non-coal industries have located their facilities either within the Port Facility boundaries or adjoining its boundaries.

On information and belief, starting in 1983, LRA began working with the Southern Railway (predecessor to NS), CSX, and the Illinois Central (predecessor to the P&L) to construct rail lines that connected their main lines to the existing tracks within the Riverport Complex so tenants could receive interstate rail service. These railroads were granted access to the Riverport Complex as a whole through nearly identical Operating Agreements they entered into with LRA, and the railroads dealt directly with their customers in the Riverport Complex when setting terms and conditions for rail service. All three of the Port of Louisville's leases with LRA to manage the Port Facility have expressly stated that our operations must be consistent with these "Railroad Agreements," copies of which were first provided to us by LRA when we signed the 2009 Lease. In the 2009 Lease, and each renewed version, LRA represented and warranted that the three agreements were in effect and valid, despite that by their terms, the agreements they furnished us had expired in July 2003 (CSX), 2000 (NS) and 2003 (P&L), respectively. We have not been

supplied any subsequent versions of the contracts or amendments and have relied upon LRA to inform us of any updates or material amendments since this would affect the Lease terms.

Confirmation that the Railroad Agreements have remained in effect has been supplied in part by LRA remitting to the Port of Louisville, pursuant to Section VI.G of our lease, certain “Maintenance Charge” and “Car Charge” payments the railroads make to LRA. Contrary to the assertion made in the Petition that “LRA pays to Lessee all maintenance charges . . . and 1/3 of all car charges it receives from the three railroads,” Petition at 5, LRA has not consistently and timely made either payment, particularly since 2019 when LRA launched its campaign to concoct reasons to terminate the 2016 Lease. More recently, counsel for LRA informed the Port of Louisville that the Railroad Agreements are in effect on a month-to-month basis, after a Vice President of LRA asserted that they had all expired 11 years ago.

Under the Railroad Agreements, each of the railroad carriers expressly characterized their service over most of the Riverport Complex as common carrier service. However, the rail operations and obligations of LRA – and us as its contractor - under the Rail Agreements are not characterized in that manner. Rather, the Railroad Agreements *specifically* state that the railroads’ common carrier service ends when they deliver the cars to points designated by LRA and unhook them. Pursuant to Section 6 of the Agreement entitled Switching Services, all shipments made by the three railroads in common carrier service are deemed to be “fully and completely delivered as soon as the car containing such shipment shall have been placed in the location designated by the Riverport Authority to receive it, and detached from the engine or train by which it was moved . . . ,” which in our case is the loop tracks. Once the railroad’s common carrier service is completed and the cars unhooked, LRA’s limited role under the Railroad Agreements is to perform switching services on “the Port Rail Trackage,” which is defined in the Railroad Agreements as “[a] system

of rail trackage owned by Riverport as part of the bulk commodity transfer facilities within the port area at the Riverport Complex, including a double loop track and one or more connections to the Onsite Rail Line and Lead Track.” This definition coincides with the definition of the Port Facility in the Lease. Thus, under the Rail Agreements, the switching services of first, the Port of Louisville’s predecessor Cooper/T. Smith and then the Port of Louisville since 2009 as LRA’s current contract operator of the Port Facility, are confined to the Port Facility loop track once the cars or trains are delivered to the loop track and unhooked from the railroad’s locomotives.

C. The Port of Louisville’s Operation of the Port Facility

Rail car switching on the loop track is just part of our role as manager of the Port Facility. The Port of Louisville was formed by marine terminal operators to operate the entire Port Facility, not to be a railroad. Our other responsibilities include maintaining of the US Army Corps of Engineers permitted river fleet for barges; maintaining the riverfront dock and crane loading/unloading operation and equipment; sales, operation and management of a full-service commodities transfer operation for the movement of various cargos from river barge to rail and truck and from rail and truck to river barge. These include, but are not limited to, scrap metals, bauxite, finished steel slabs and coils, cement, coal, sand, coke, limestone, millscale, clay, fertilizers, feldspar, wire rod, and gypsum.

As for the rail component of our overall management, when the Port Facility terminal and loop tracks were first opened for operation by LRA in 1987 the Port Facility was operated by Cooper/T. Smith, who filled that role until 2007. Our understanding is that starting in the early 1990's LRA received a subsidy from CSX of one million dollars a year for 10 years due to the railroad’s interest in developing the Port Facility. When the subsidy money dried up, the LRA found that it did not generate enough revenue from its rail business to support maintenance of the

track running through the Port Facility or the two loop tracks. LRA struggled along, letting the tracks in the Port Facility deteriorate.

In 2008 LRA issued a public request for proposal for entities to lease the Port Facility for a qualified entity to take over operating the Port Facility, including a locomotive owned by LRA and used by Cooper/T. Smith to perform the limited switching on the loop tracks called for by the Railroad Agreements. We were the only and successful bidder and in September 2009 executed our first Port Facility Lease ("2009 Lease") whereby we undertook all of the duties previously provided by LRA and Cooper/ T. Smith. The 2009 Lease was renewed in substantially its same form in 2012, and again in 2016 after the public bidding processes; in each of the bid processes resulting in a Port Facility Lease, the Port of Louisville was the only bidder and was awarded the new lease based largely on its satisfactory operational performance under the preceding lease(s).

When the Port of Louisville took over management of the Port Facility, the railroad tracks were in such bad condition that they were barely operable. The two loop tracks were in such bad condition that they could not be utilized for seven years. The company spent approximately \$20,000 of its own money the first two months to rehabilitate the track, and over \$300,000 in total to put the loop tracks back into service. In addition, in the absence of coal customers or a large rail tenant or customer we have focused our efforts on developing new river cargoes to and from the Port Facility. This business has consisted of 90% inbound cargoes which are loaded primarily into trucks, and 10% outbound cargoes which also primarily arrive by truck. More recently, we have received some commodities by railcar which are then transloaded into barges. We started with nothing in 2009 and have grown the tonnage every year. We have constantly prospected and marketed for large bulk commodity customers who could use the "shaker house" complex and transfer conveyor, which have been out of operation since well before the inception of our Lease.

However, no such customer has emerged, so our transloading operations are conducted using portable conveyors and other handling equipment that is less efficient. Most of our customers are entities who do not have facilities in either the Riverport Complex or the Port Facility. Rather, they ship bulk commodities by either rail or truck to be transferred into barges, or by barge to be transferred and loaded into railcars or trucks. We believe the outlook for new, diverse cargoes and customers is very bright.

The rail service aspect of the Port of Louisville's management and operation of the Port Facility has not changed in any material way from how it occurred prior to 2009 and since the opening of the Port Facility. Most importantly for purposes of LRA's Petition, it is absolutely and unequivocally false for LRA or any other party to state that the Port of Louisville conducts any switching operations or any other rail service to any tenant of the Riverport Complex on any of the tracks of the Riverport Complex other than the loop tracks. All of our rail switching operations are confined to the two loop tracks.

Specifically, we have never "utilized [our] employees and locomotives to switch cars in and out of" ELG Metals' facility on "the mainline," as LRA's Petition inaccurately states at page 8. ELG Metals' facility is on property that adjoins the Port Facility boundaries that is connected to the track constructed by LRA that runs through the Port Facility. On very rare occasions when ELG Metals has had operational difficulties on their site they have asked us to move their railcars around on their premises, which we have done for no charge as a courtesy to a customer. To reach the ELG facility our leased locomotive traverses a few hundred feet on the LRA track. I estimate this has happened less than 10 times in over 11 years.

Similarly, we have never "moved cars for RussTech to [its] facility located on the mainline and spotted them for CSX." *Id.* RussTech's facility is also adjacent to the Port Facility boundaries

and connected to the LRA track. We have occasionally stored their rail cars on the loop track for a daily storage fee. However, in all cases the cars were moved on and off the loop track by CSX. We have never moved cars to or from RussTech's facility. Finally, Universal Minerals has a facility leased directly from with a short track that is connected to the loop track. Occasionally, one of the three railroads railroad will place a rail car on the loop track for Universal Minerals. In such cases we have moved the car to their siding connected to the loop track, but we do not charge Universal for doing so.

Recently, LRA apparently told the Federal Railroad Administration ("FRA"), without consulting Port of Louisville and without our prior knowledge, that the Port of Louisville regularly moves multiple railcars for the companies above at least seven other Riverport Complex tenants over the approximately 13 miles of tracks that are in the entire Riverport Complex. LRA's provision of this false information to FRA came to light in an email from the FRA to LRA dated August 17, 2020, which LRA eventually shared with us in September. This information provided to the FRA is demonstrably incorrect and we have vigorously objected to LRA for making these representations.

Contrary to the allegations made by LRA in the Petition, and subject to the very limited exceptions discussed above, our operations are, and have always been, as follows: CSX comes into the Riverport Complex from the South Monday thru Friday during the day. It exclusively uses the 6.7-mile track that it and LRA jointly constructed in 1987, 2.2 miles of which are located in the Riverport Complex. This track connects to the LRA track in the Port Facility. P&L and NS come into the Riverport Complex from the North at night Monday thru Friday. All of the Riverport Complex tenants and owners located outside of the Port Facility receive their daily railcars from CSX, NS and/or P&L without any knowledge of, involvement with or interference from the Port

of Louisville; these tenants are not Port Facility customers. Consistent with the Railroad Agreements, the Port of Louisville's rail operations are confined solely to the two loop tracks except on very rare occasions when we have had to temporarily move cars onto the tracks adjacent to the loop tracks.

When any of the railroads require our service to switch cars in and out of the Port Facility, as required by the Rail Agreements they place their empty or loaded rail cars directly on the loop tracks at the point it connects to their tracks and unhook them. This is typically accomplished by the railroad backing the train onto the loop tracks and unhooking the cars, as opposed to the railroad locomotive coming on to the loop track. Consequently, the Port of Louisville is conceptually the same as a rail customer, as opposed to being part of the overall line haul movement. The Port of Louisville then picks up the cars with the LRA locomotive that is included in the Port Facility assets we have leased from LRA and we take the railcars to be loaded (from barges) or unloaded (to barges or trucks). Similarly, when the railcars are to be returned to those railroads, we place them in position on the loop track to be picked up by the applicable railroad. We do not physically exchange railcars with any of the railroads. They drop the railcars and unhook them before we ever touch them. Over the past year the railroads have placed railcars in units from 1 railcar up to 90 railcar unit trains, all of which we process for cargo transfers to and from barges at our river dock by moving them on the loop track. We do not hold out to provide any switching for other industries or entities located at the Riverport Complex outside of our leased Port Facility. This is how the LRA and its first contract operator conducted rail operations in the Port Facility from the beginning, and the Port of Louisville did not change these operations when we took over operation of these facilities in 2009.

Under our Lease with LRA, we are required to maintain some of the tracks located beyond the Port Facility and into the Riverport Complex. Under the current system, CSX and NS inspect the Riverport Complex tracks on behalf of the three railroads, and if they find a problem, they call us and we have it repaired immediately by our rail contractor, Associated Rail. I believe in the 11 years we have maintained the tracks required by our Lease these tracks have only been closed because of a maintenance issue once for three days. Notwithstanding its overblown rhetoric, LRA's attempt to characterize the Port of Louisville operations as unsafe is categorically false. Our contractor also performs routine maintenance such as tie replacement, switch work, track weed spraying, clearing debris³, and tree trimming along the tracks. These people perform their work on the entire length of the tracks in the Riverport Complex. On occasion we have had to utilize the leased LRA switching locomotive to ferry tools and personnel to track locations in the Riverport Complex that are distant from the Port Facility. In all cases the Port of Louisville coordinates with the three rail carriers to ensure that they are not operating on the tracks while this work is being performed. But we are not moving rail cars for the shippers when these "ferry" operations are conducted.

The Port of Louisville does not receive any direct payments from any of the railroads, and we assume they directly determine and assess the rates and charges for common carrier service paid by their customers located in the Riverport Complex and their customers who deliver cars to the Port Facility from outside the Riverport Complex. We have direct contracts with customers of the Port Facility for physically loading or unloading a railcar that is located on the loop tracks on which we operate. As stated previously, most of these customers are located outside the Riverport

³ There is a creek running under the CSX mainline track that overflows regularly after storms and leaves lots of debris on the tracks that must be cleared off quickly. This sometimes requires the use of the locomotive to rapidly move tools and personnel to the location.

Complex grounds. These charges are individually negotiated and paid on a case-by-case basis. However, we do not charge a separate fee for switching their cars on and off the loop track as the line haul railroads place the cars on the loop tracks pursuant to their arrangements with their customers. We also do not receive any payments from other tenants of the Riverport Complex for performing our maintenance responsibilities under the Lease. It is our understanding that the railroads make direct payments to LRA in conjunction with their operating access and common carrier service to Riverport Complex owners and tenants. This understanding derives from Section 3 of the three Railroad Agreements. Pursuant to this provision the railroads pay a "Maintenance Charge" and a "Car Charge" to LRA. Section VI.G of our Lease in turn obligates LRA to pay us all the "Maintenance Charges," and one third of the "Car Charges."

Over the years the Port of Louisville has considered operating the tracks in the Port Facility as a Class III short line railroad and seeking appropriate authority from the Board to do so. We have been approached by companies such as R.J. Corman and Respondek Railroad about taking this step. However, the former president of LRA, Mr. Larry McFall, who retired in 2016, was strongly opposed to a Class III short line operating in the Port Facility. I recall his view was that having three railroads serving his potential customers in the Riverport Complex and serving the Port Facility was a strong selling point for economic development of the Riverport Complex as a whole. His fear was that the creation of a Class III shortline in the Port Facility would result in higher rail rates for Port Facility customers that would retard economic development. In my opinion selling real estate was more important to Mr. McFall than developing and operating a short line railroad within the Riverport Complex. Also, becoming a short line railroad would be contrary to the Railroad Agreements, which create a clear line of demarcation between the common carrier

service provided by the railroads and the contract switching operations provided by LRA and its contract operators of the Port Trackage. So, we let the matter drop.

VERIFICATION

I, Joseph P. Tegart, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to sponsor this testimony.

Executed: January 5, 2021

Joseph P. Tegart
Title *January 5, 2021*