

BEFORE THE
SURFACE TRANSPORTATION BOARD

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STB Finance Docket No. 36500

CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION; AND DELAWARE & HUDSON RAILWAY COMPANY, INC. – CONTROL – KANSAS CITY SOUTHERN; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; GATEWAY EASTERN RAILWAY COMPANY; AND THE TEXAS MEXICAN RAILWAY COMPANY

CSX TRANSPORTATION, INC.'S RESPONSE TO APPLICANTS MOTION TO STRIKE CSXT's RESPONSE TO COMMENTS AND RESPONSIVE APPLICATIONS

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On July 20, 2022, Applicants¹ filed a letter motion (CP-55/KCS-41) (the “Motion”) to strike, among other filings, CSXT’s July 12 “Response to Comments and Responsive Applications” and supporting verified statements (CSXT-13).

The Applicants propose the largest railroad consolidation transaction in decades. They moved to strike some or all of the July 12 filings by other Class I Railroads. They asked the Board to act summarily, without even giving these railroads the right to be heard *about their right to be heard*. In so doing, Applicants seek to deprive the Board of evidence that demonstrates the need for conditions to assure competitive options for shippers. They included CSXT-13 in this broadside motion almost as an afterthought, offering no legal analysis other than to characterize CSXT-13 as “another round of evidence purporting to support CSX’s antitrust-style attacks” on the Meridian Speedway transaction (not, they say, the Proposed

¹ Unless otherwise defined in this letter, the acronyms and defined terms used in this letter are the same as those used in Applicants’ July 20, 2022, letter and CSXT’s July 12, 2022, response comments.

Transaction), and that CSXT's arguments "could have been said" in CSXT's original Comments. CP-55/KCS-41 at 8. Applicants' motion misses the point.

CSXT-13 did not respond to the *Application*. It responded properly to the comments, requests for conditions, and responsive applications of others. CSXT most extensively addressed NSR's Amended Comments and Request for Conditions ("NS-12") and NSR's Amended Responsive Application ("NS-13").² NSR there contended the Meridian Speedway agreements were and are pro-competitive, were reviewed and exempted by the Board, and NSR's rights under them should both be protected (NS-12) and expanded (NS-13). CSXT-13 directly addressed the Application only by reiterating CSXT's earlier requests for conditions and joining other commentor's similar requests.

Applicants do not demonstrate (or even argue) that CSXT-13 is an additional response to the Application, as originally filed or as amended. Nor could they, as it is apparent from the face of CSXT-13 that it is a response to NSR's defense of its exclusive rights from Dallas to Meridian, and the closed gateways that support them, which NS-12 and NS-13 seek to preserve and expand. Applicants do acknowledge that "[u]nder the Board's procedural schedule, July 12 was the date for two sets of evidentiary submissions: (a) 'Responses to comments, protests, requests for conditions, and other opposition – including responses to DOJ and USDOT filings,'

² NSR states that its Amended Comments "fully replace the previous Comments and Request for Conditions filed by NS on February 28, 2022 (NS-9) that was in response to Applicant's original operating plan." Finance Docket No. 36500, Amended Comments of Norfolk Southern Railway Company, and Request for Conditions (NS-12), at 2 (June 9, 2022). NSR also states that its Amended Responsive Application "replaces the original Responsive Application (NS-8) filed by NS in the CP-KCS Proceeding on February 28, 2022" Finance Docket No. 36500, Amended Responsive Application of Norfolk Southern Railway Company (NS-13), at 1 (June 9, 2022). The Decision accepting the NS Responsive Application was not served until July 1. That same Decision required responses by July 12, which was the first opportunity for CSXT to respond.

and (b) ‘Rebuttal in support of the Application.’” (CP-55/KCS-41 at 1-2 (citing Decision No. 11 (served November 23, 2021))). Because CSXT-13 falls squarely within the parameters of (a), Applicants’ acknowledgement shows their Motion must be denied.

I. Applicants’ Contention That CSXT-13 Should Be Stricken Because Its Arguments and Evidence Could Have Been Submitted in CSXT’s February 28 Request for Conditions Lacks Legal Support and Is Factually Incorrect.

The standard for a response to comments, requests for conditions, and responsive applications is well-established: Argument and evidence are appropriate where they “respond to issues and arguments raised in” those comments, requests for conditions, and responsive applications. *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp.* (Decision No. 31), FD 32760, slip op. at 3 (STB, served April 19, 1996) (“*UP/SP*”). For example, parties are “entitled to respond to allegations” in others’ comments, and “a non-applicant party that believes that it would be harmed by a condition proposed by another party is entitled to submit evidence in response to the requested condition.” *Id.* As the Board explained in *UP/SP*, it “is not the case” that permitting such filings “allow[s] another round of evidentiary submissions” attacking the Application. *Id.* Rather, since the February 28 and June 9 filings of non-Applicant parties, “[n]on-applicant parties have not had any chance to respond to the arguments and proposals in those filings,” and the Board has established that “they should have the opportunity to submit filings on [July 12] responding to issues and arguments raised in relevant [February 28 and June 9] filings.” *Id.*

Applicants’ only arguments supporting their motion to strike CSXT-13 ignore this standard. Applicants argue CSXT-13 “merely echo[s] CSX’s own request for conditions” and that facts presented in that filing “could have been said” in or “pre-dated” CSXT’s initial comments in February. (CP-55/KCS-41 at 8). The determinative factor is not what CSXT might

have said or presented earlier, but the nature of the filings to which CSXT-13 responded: the February 28 and June 9 comments, requests for conditions and responsive applications of non-Applicant parties. CSXT-13 therefore complies with Decision No. 18, which set July 12 as the date for “Responses to comments, protests, requests for conditions and other opposition” or “Responses to responsive, including inconsistent applications.” Decision No. 18 at 4 (served May 27, 2022) at 4. *See also* Decision No. 11.

Applicants’ claim that CSXT could have said what it did in CSXT-13 on February 28 (CP-55/KCS-41 at 8) is not only irrelevant; it is untrue. CSXT made its February 28 filing (CSXT-8) commenting on the Application and requesting conditions. Regarding the Meridian Speedway, CSXT could only make a preliminary assessment based on documentation of the Meridian Agreements and present a preliminary analysis of the competitive effects they would have if the Transaction were approved. It did not have 1) NSR’s comments supporting the Meridian Agreements; 2) NSR’s explicit request that the Board condition the Proposed Transaction by requiring Applicants to preserve the effects of those Agreements; 3) NSR’s responsive application seeking to expand its rights under those Agreements; 4) CSXT’s later discovery regarding those filings; or 5) others’ comments (most notably from UP and BNSF) regarding gateway issues. CSXT said as much at the time. *See, e.g.*, CSXT-8 at 7, 15, 19 & n.18.

What then transpired contemporaneous with and after CSXT filed CSXT-8 included: 1) the February 28 filing of NS-9 (NSR’s original comments and requests for conditions), NS-10 (NSR’s original responsive application), and the comments of BNSF, CN, UP, and others; 2) several discovery requests to and interrogatory responses and document productions from NSR and KCS; 3) the deposition of a designated NSR witness (Mr. McClellan), who submitted a verified statement on June 9 in support of NS-12; and, 4) the amended and substituted filings of

NS-12 and NS-13 on June 9, 2022 which sought to justify the Meridian Agreements and their competitive effects, and the revised comments of others in response to the Amended Application about the need for open gateways. On July 12, CSXT-13 properly responded to those filings, not to the Application or the Amended Application.

If the authority Applicants cite supporting their Motion applies here at all, it demonstrates the propriety of CSXT-13. In *UP/SP*, the Board stated that “a non-applicant party that believes that it would be harmed by a condition proposed by another party is entitled to submit evidence in response to the requested condition.” *UP/SP* at 3. Among the conditions that NSR requested in its initial comments was that the Board “[m]ake no significant detrimental changes to current operations on the Meridian Speedway . . .” (NS-9 at 46; *See also* NS-8). NSR repeated that request for conditions in NS-12 (at 45), and much of the evidence that NSR presented in support of its requested conditions and its responsive application touted the supposed competitive benefits of the Meridian Speedway Agreements and operations (*see, e.g.*, NS-12 at 9-21), the supposed Board approval of those Agreements (NS-12 at 9-10), and the potential effect of the Transaction on those agreements and operations (NS-12 at 21-51).

CSXT-13 carefully responded to each argument with evidence, including the Verified Statements of Professor Carey, Dr. Shehadeh, and Mr. Girardot. While CSXT-13 is principally concerned with harm to shippers, along with harm to CSXT, it conformed to the scope defined in *UP/SP*, which was narrower than the scope defined by Decision No. 18 and Decision No. 11. It also squarely conformed to the scope defined in those decisions, which authorized responses to others’ comments and their requested conditions and responsive applications.

The other primary authority cited by Applicants, *UP/CNW-Control*, is not applicable to CSXT-13 because it involved a specific ruling in that matter about the proper scope of rebuttal

supporting a responsive application. *See UP/CNW – Control*, Finance Docket No. 32133 (ICC Decision No. 20 served Sept. 16, 1994) at 2-3. CSXT did not submit a responsive application, and it did not offer rebuttal in support of a responsive application.³

The “due process” principle that Applicants claim supports their Motion (*See CP-55/KCS-41* at 1-2 and n.1) also does not apply to CSXT-13. Applicants complain CSXT-13 would frustrate their supposed right to “close the record” and avoid “sandbagging” (*CP-55/KCS-41* at 2-4) but point to nothing in CSXT-13 to which they might offer factual rebuttal or pursue discovery.⁴ Nor could they. To the extent that CSXT-13 discussed the Application, it was only to provide context for its response to others’ comments (e.g., the anti-competitive effects of exclusivity and closed gateways within the context of the Transaction). Without that context, it would have been impossible for CSXT to respond efficiently to others’ comments regarding the

³ Moreover, what was prohibited in *UP/CNW* was “an attempt to bolster SP’s [the responsive applicants’] case-in-chief on the competitive impacts of the primary application.” *Id.* at 8 (emphasis added) (quoted in *CP-55/KCS-41* at 3). By contrast, CSXT-13 does not focus on the competitive impacts of the primary application in itself, but rather on the competitive impacts of NSR’s exclusivity over the Meridian Speedway (touted by NSR in NS-12 and NS-13) in light of evidence offered by NSR regarding the primary application (which further demonstrated the nexus between the Meridian Speedway Exclusivity Arrangements and the Proposed Transaction), as well as the need for an appropriate remedy, including abrogation of the NSR Dallas-Meridian exclusivity and open gateways at Shreveport and Meridian for CSXT to accommodate a competitive alternative.

⁴ That is not surprising. In their 314 page “Response to Comments and Requests for Conditions, Opposition to Responsive Applications, and Rebuttal in Support of the Application” submitted on July 12 (“*CP-53/KCS-39*”), Applicants devoted a total of five pages to CSXT’s requested conditions. (*Id.* at 263-68). They spent less than two pages addressing CSXT’s February 28 comments (CSXT-8) concerning the Meridian Agreements and operations, and that response was not factual, but legal. *Id.* at 263-65. With respect to the factual merits of CSXT-8, Applicants simply remarked that the merits are “beside the point” and otherwise referenced the June 9 NSR comments to which CSXT-13 responds. *See CP-53/KCS-39* at 263 n. 508 (describing and citing to NS-12 at 9-21). Likewise, Applicants took less than one page to address CSXT’s request for a gateway at Meridian, describing it as overreaching and premature. *Id.* at 266-67. Applicants chose not to address CSXT’s June 9 Amended Comments and Request for Conditions (CSXT-11), including its request for an open gateway at Shreveport, at all.

Application. And CSXT-13 used that context solely to address comments and responsive applications of others, as required by the Board’s decisions. That use did not prejudice Applicants. Applicants’ “sandbagging” argument was rejected in the case Applicants rely on, *UP/SP at 2-3*, and it should be rejected here.

Indeed, because CSXT-13 responded to issues and arguments raised in February 28 and June 9 filings, Applicants’ “due process” argument has it backwards. In CSXT-8, CSXT could only speculate as to what NSR might argue in defense of the Meridian Speedway and what other parties might present in their own comments, requests for conditions, and responsive applications. *See* CSXT-8 at 7, 15, 19 & n.18. Just as the Board explained in *UP/SP*, since these comments, requests for conditions, and responsive applications were filed (and accepted on July 1), CSXT “ha[d] not had any chance to respond to the arguments and proposals in those filings” until July 12. *UP/SP at 3*. Applicants’ Motion, if granted, would strip CSXT of that opportunity. That is why the standard is not whether CSXT’s evidence or argument “predates” CSXT’s original comments, but to what filings CSXT-13 responded.

Applicants’ Motion, as it applies to CSXT-13, is no more than an out-of-time request that the Board re-write Decisions 18 and 11 to exclude the evidence the Board sought in those Decisions. The Motion also runs afoul of the Board’s mission “[t]o assure a fully developed record on the impacts of a proposed railroad consolidation.” 49 C.F.R. § 1180.1(h) (2000).⁵ Applicants’ motion to strike CSXT-13 must be denied.

⁵ The Board has recently denied motions to strike in the absence of prejudice or because of the need for a complete record. *See, e.g., Waste Management of Washington, Inc. and Waste Management Disposal Services of Oregon, Inc.--Verified Petition for Declaratory Order*, Docket No. FD 36511, served February 2, 2022, at 3 (“In the interest of compiling a complete record, the Board will deny WUTC’s motion to strike....”); *Lake Providence Port Commission--Feeder Line Application--Line of Delta Southern Railroad Located in East Carroll and Madison Parishes*,

II. CSXT's Response to Comments and Responsive Applications Properly Responded to Issues and Arguments Raised in Others' Comments, Requests for Conditions, and Responsive Applications

CSXT-13 properly addressed the “issues and arguments raised in the [February 28 and June 9] filings.” *UP/SP* at 3.

A. CSXT's Response

CSXT-13 began by addressing commenters' concerns that CPKC would close gateways, raise rivals' costs, or foreclose competition, and by explaining why CSXT agreed with these comments and why Applicants' position does not resolve these concerns. CSXT-13 at 6-9 & nn.9-10 (citing twelve comments and highlighting the comments of UP and BNSF). It then addressed NSR's Amended Comments regarding the Meridian Speedway. CSXT explained 1) “NSR's comments recognize the importance of” open gateways at Meridian and Shreveport and underscore the importance of the competition over the Speedway that the Exclusivity Arrangements eliminated, and 2) “NSR's comments demonstrate the Proposed Transaction would aggravate the *status quo* harm caused by the unlawful Exclusivity Arrangements.” *Id.* at 9-14.

CSXT then elaborated that both Applicants *and* “Responsive Applicants” should be required to protect shippers by maintaining open gateways, stressing the contradiction between NSR's Amended Comments calling for open gateways at Shreveport and Meridian and its

La., Docket No. FD 36447, served June 1, 2021, at 5 (“Given the cumulative nature of the new evidence, DSR has not shown that it is prejudiced by it.”), 6 (“In the interest of having a complete record, the Board will accept DSR's March 22 reply and deny the March 24 motion to strike.”); *Petition by the National Railroad Passenger Corporation (Amtrak) for Proceeding under 49 U.S.C. 24903(c)(2)*, Docket No. FD 36332, served April 13, 2021, at 2 (“In the interest of building a full record ...motion to strike will be denied....”).

witness's refusal to acknowledge even that Shreveport *was* a gateway or that NSR's exclusive rights effectively closed it to competition. *Id.* at 14-16.

CSXT then explained why the public interest harms caused by the Meridian Speedway Exclusivity Arrangements were related to the Proposed Transaction, with each reason relating to NSR's Amended Comments.

First, CSXT explained the competition and control effects of the Exclusivity Arrangements had evaded review and were thus unlawful *ab initio*, *see id.* at 21-24, thereby responding to NSR's claims they had been properly exempted and "cited approvingly by the Board," NS-12 at 9-10. Second, CSXT explained that without conditions the Proposed Transaction would exacerbate that harm for several reasons, including 1) a diversion theory NSR's Amended Comments had articulated, *see* CSXT-13 at 25-26; NS-12 at 31-32; 2) the effects of NSR's Responsive Application, *see* CSXT-13 at 26; and 3) NSR's contention in its Amended Comments that the Proposed Transaction would imperil the benefits NSR attributed to the MSLLC Transactions, *see id.* at 27. CSXT revisited the last point at the end of its Response, explaining why NSR's Amended Comments reinforced the relationship between the Meridian Speedway Exclusivity Arrangements and the Proposed Transaction. *See id.* at 78-84.

Most of CSXT's Response was directed at NSR's contention that the Exclusivity Arrangements were justified as ancillary to the supposedly "pro-growth, pro-competitive" MSLLC Transactions. *See id.* at 28-78. CSXT's extensive argument on this point "respond[ed] to issues and arguments raised" in NSR's Amended Comments. As CSXT explained, "The contention that the Meridian Speedway Transactions resulted in significant public benefits, despite or thanks to the Exclusivity Arrangements, is the focus or predicate of the entirety of

NS's Comments." *Id.* at 30 n.85.⁶ CSXT's response set out how "[a]n antitrust tribunal *faced with this argument* would assess the legality of the Exclusivity Arrangements." *Id.* at 31 (emphasis supplied).

Following that framework, CSXT examined whether there was evidence that the Exclusivity Arrangements had resulted in significant anticompetitive effects, *see id.* at 31-49, and then assessed their supposed pro-competitive justifications. Most important, CSXT-13 addressed NSR's arguments that the Exclusivity Arrangements were reasonably necessary to protect NSR's investment from "free riding" by other carriers, *see id.* at 49-78.⁷ Fifty of the seventy-eight pages of CSXT's Response were therefore directed *explicitly* at a particular "issue[] and argument[] raised" by NSR in its Amended Comments and identified as such by

⁶ For this proposition, CSXT directed the Board to NS-12 at 9-21 (arguing that the Meridian Speedway Transactions resulted in significant output, competitive, and other public interest benefits); NS-12 at 21-40 (arguing the Proposed Transaction will undermine the supposed output, competitive, and other public interest benefits NS attributes to the Meridian Speedway Transactions); and NS-12 at 40-51 (arguing conditions are needed to protect the output, competitive, and other public interest benefits NS claims resulted from the Meridian Speedway Transactions).

⁷ There can be no doubt these were the arguments NSR was advancing. NSR stated the Board had "cited" the MSLLC Transactions "approvingly," referencing cases that concerned measures to protect investment. NS-12 at 10 & n.24. NSR's Amended Comments also referred repeatedly to KCS' 2006 Notice of Exemption, both to support the MSLLC Transactions' supposedly pro-competitive character and for the proposition that this Notice "explained to the Board the innovative approach to joint investment" the MSLLC Transactions embodied. NS-12 at 9-11. That explanation purported to link the Exclusivity Arrangements to NSR's investment by referencing NSR's supposed concerns about other carriers free riding on the investment. *See* FD 34822, *The Kansas City Southern Railway Company, and Meridian Speedway, LLC – Exemption for Transactions Within a Corporate Family*, Verified Notice of Exemption Pursuant to 49 C.F.R. Sec. 1180.2(d)(3) ("Notice of Exemption") (January 17, 2006), at 5 ("[W]hile NS was willing to participate in the necessary investment, it did not want to do so unless it could be assured that other carriers would not use the capacity NS's investment would help to create."). That CSXT properly interpreted this argument is confirmed by the fact that NSR later cited this passage in its Response to Comments as having expressed an anti-freeriding justification. *See* NS-14 at 19.

CSXT – assessing the Exclusivity Arrangements as an alleged ancillary restraint purporting to protect NSR’s investment.

Each of CSXT’s arguments is properly directed to issues and arguments raised in the comments of others and therefore is well within the scope of a permitted Response. Applicants’ Motion to Strike CSXT’s Response is baseless.

B. The Carey Verified Statement

The Verified Statement of Professor Julie M. Carey (“Carey V.S.”) and its Exhibits also respond to comments, requests for conditions, and NSR’s Amended Responsive Application. Professor Carey begins by stating she is “responding to the Amended Responsive Application by [NSR] and therefore its Amended Comments to the Amended Operating Plan regarding ‘contingent trackage rights on the Shreveport-Wylie Section for intermodal traffic originating or terminating at the Wylie Intermodal Terminal.’” Carey V.S. at 2 (footnotes omitted).

Professor Carey’s analysis (Part II) begins by summarizing the claims made in NS-12 (at 3-12) concerning the Meridian Speedway, the makeup and management of the Meridian Speedway LLC (“MSLLC”), and the role that NSR claims the Meridian Speedway will play in the post-Transaction network. (Carey V.S. at 6-9). She then (Part III A.B.) describes the Meridian Speedway Agreements and their history, pointing to the documents filed with the Board in the 2006 Notice of Exemption and excerpts from the July 11, 2022, deposition of NS-designated witness Michael R. McClellan. (*Id.* at 10-12). Finally, in Parts III C. and D., she describes (relying on NS-12, the documents filed in the 2006 MSLLC exemption proceeding, recently produced NS and KCS documents, the exclusivity arrangements between Shreveport and Meridian and between Dallas and Shreveport, and the nature of the NSR intermodal and other traffic that uses the MSLLC line. (*Id.* at 13-17). Professor Carey does not cite the primary

Application in her descriptions, as the facts cited do not pertain to the primary Application, but rather to the NS filings and documents.

In Part IV of her Verified Statement (*id.* at 17-22), Professor Carey again relies on NS-12, the documents that NSR and KCS produced in discovery, and excerpts from the McClellan Deposition, to demonstrate that the perpetual Exclusivity Arrangements in the MSLLC Agreements harm competition and the public interest. She also notes that NSR has not, in its comments, requests for conditions, or Responsive Application, ever addressed the implications of continuing the Exclusivity Arrangements into perpetuity if the Board approves the Proposed CPKC Transaction or the NSR Responsive Application. Again, none of this analysis is centered on the CPKC Application. It is directed at the NSR filings, which advocate the perpetuation and augmentation of the NSR exclusivity that has been in place since 2006. Professor Carey repeatedly criticizes the NSR-proffered evidence for failing to demonstrate (or even discuss whether) an alternative mechanism would not have been adequate to secure the asserted benefits of the MSLLC Transaction with less restraint on competition. (*See, e.g., id.* at 21).

Part V of the Carey Verified Statement (*id.* at 22-41) discusses the need for open gateways (also a condition requested by CSXT regarding the Primary Application), but Professor Carey's focus remains on the Shreveport and Meridian gateways, showing that NSR has failed, in NS-12 and NS-13, to acknowledge that opening those gateways (and abrogating the exclusivity provisions of the MSLLC agreements) would ensure a more competitive railroad industry, particularly given the expected increase in the volume of Mexico traffic. (*Id.* at 22-26). She then details the advantages of the MSLLC line touted by NSR in NS-12 and 13, particularly when compared to the Memphis and New Orleans gateways open to CSXT. (*Id.* at 27-37). Regarding the latter point, Professor Carey relies on the Verified Statement of Rob Girardot to

support further the time and mileage advantages of the Meridian Speedway identified by NSR in NS-12 and NS-13 and to point out that UP's route to Shreveport from Laredo offers a much shorter transit time than KCS' route. She observes that opening the Shreveport gateway to traffic that UP could divert traffic from the highways over its route in interchange (via KCS or MSLLC) with CSXT, as well as NSR, would best promote the public interest. (*Id.* at 30-31).

Professor Carey also responds to NS-12's description of the Shreveport gateway and the MSLLC line for UP transcontinental traffic by observing that shippers should be able to use open Shreveport and Meridian gateways and a competitive MSLLC route to move their product to and from the Southeastern and Mid-Atlantic regions, and by criticizing NSR for failing to acknowledge that in its filings. (*Id.* at 37-41). Although the proposed CPKC Transaction is a factor in the need for relief, because of the opportunity to attract increased volumes to and from Mexico and the opening of alternate routes for transcontinental traffic, the response is not to the Application but to the NSR filings and the evidence adduced is based on the NSR and UP responses and information adduced in post-February 28, 2022 discovery.

Part VI of the Carey Verified Statement (*id.* at 42-59) discusses competitive alternatives to the Meridian Speedway Agreements that NSR could have employed but, from the descriptions in their responsive filings and the evidence adduced from NSR in discovery, it did not. Part VI also describes the return to NSR on and of its investment in MSLLC, pointing out that investment has been paid in full and does not depend on an exclusivity right in perpetuity. Again, none of the evidence in this portion of the Carey Verified Statement comes from the Application, and the arguments that Professor Carey makes are not in opposition to the Application, but to the responsive NS pleadings.

Finally, Parts VII and VIII (*id.* at 59-73) of the Carey Verified Statement respond to NS-12's primary reliance on the volumes that traverse the Meridian Speedway while ignoring the rates applicable to those volumes. She demonstrates that an important benefit to eastern shippers (ignored by NS) would be lower rates, which would not only benefit shippers economically but take trucks off the road in greater quantities than those touted by NSR in NS-12. Part VIII focuses on the incongruity of NS-12 and its verified statements playing up the NSR volume share over the Meridian Speedway while ignoring that the volume share, coupled with the rate information provided in subsequent discovery, is instead an economic indicator of competitive harm. That harm would only be exacerbated in the context of the Proposed Transaction. (*Id.* at 69-73).

Each of Professor Carey's points is directed to issues and arguments raised in comments, particularly NS-12, and the pertinent evidence that CSXT adduced after February 28, 2022. Although the Proposed Transaction would intensify the harm identified in Professor Carey's Verified Statement, the Verified Statement is not directed to the Application, but to the responses. It conforms to Decisions 11 and 18 and will cause no prejudice to Applicants. Again, Applicants' Motion must be denied.

C. The Shehadeh Verified Statement

Dr. Ramsey Shehadeh's Verified Statement (Shehadeh V.S.) also closely examines the competitive effects of the MSLLC Agreements that NSR seeks to preserve through conditions on the Proposed Transaction (in NS-12) and modify through its Responsive Application (NS-13). Dr. Shehadeh demonstrates how the Exclusivity Arrangements in the MSLLC Agreements reduce output and economic welfare. He relies on the demonstrated effect of those arrangements on the Birmingham, AL, Miami-Fort Lauderdale, FL, and Jacksonville, FL-GA regions. Dr. Shehadeh also explains why the Exclusivity Arrangements in the MSLLC agreements were not

necessary, including by way of reference to the Carey Verified Statement, to attract NSR's MSLLC investment (positing that competitive haulage agreements with sufficient tariffs would have achieved a similar return for NS).

Dr. Shehadeh begins his analysis by looking at the MSLLC agreements between KCS and NSR. (Shehadeh V.S. at 5-7). He then describes the economics of the competitive effect of mergers and joint ventures, relying primarily on the Department of Justice Vertical Merger Guidelines and academic literature (*id.* at 7-12). Dr. Shehadeh explains that NSR, as the principal horizontal competitor to CSXT in the eastern U.S. has the incentive to restrict competition by raising the costs of CSXT to service transcontinental intermodal traffic, and how the exclusivity arrangements provide NSR with the ability to act on that incentive. (*Id.* at 13-15). That analysis is not directed at anything in the Application, but as a counter to NSR's contention in NS-12 and NS-13 that the Meridian Arrangements are pro-competitive, a fundamental basis on which NSR asks the Board to protect and expand NSR's exclusivity.

Dr. Shehadeh then addresses NSR's claim in the verified statement of Dr. Mayo and in its comments that shorter distances and gateway access provide a competitive advantage over other routes (*id.* at 15-16 (quoting from Mayo Report at p.29 and NS-12 at pp. 33, 36)). Dr. Shehadeh agrees with NSR that that might be the case, but demonstrating that the Meridian Exclusivity Arrangements that benefit NSR hamper CSXT in precisely the same manner, driving CSXT to carry transcontinental traffic over longer routes and shutting CSXT out of Dallas Intermodal Traffic altogether. (*Id.* at 15-17). Dr. Shehadeh performs an econometric evaluation of the competitive effects of the Exclusivity Arrangements, showing that in destination areas affected by the Exclusivity Arrangements and in which effective competition does not otherwise constrain the MSLLC JV, the JV with the Exclusivity Arrangements reduced output and

economic welfare relative to the levels that would prevail in the absence of the Exclusivity Arrangements. (*Id.* at 18-27).

Like Professor Carey, Dr. Shehadeh is responding to the claim in NS-12 and NS-13 that the Meridian Exclusivity Arrangements are pro-competitive, demonstrating conclusively that they are not. NSR may dispute this analysis, but it is directed to the comments and responsive application of NSR, rather than to the primary application. Applicant's motion to strike Dr. Shehadeh's V.S. for exceeding the scope defined by Decisions 11 and 18 is without basis.

D. The Girardot Verified Statement

Applicants attack the statement of Mr. Robert Girardot (Girardot V.S.). They object to his explanation of why CSXT chose this proceeding to ask the Board to abrogate provisions in the MSLLC Agreements and seek open Gateways at Shreveport and Meridian, complaining that explanation could have been submitted on February 28. CP-55/KCS-41 at 8. But Applicants cannot deny that the Girardot V.S. is responding to the exclusivity provisions that NS-12 and NS-13 seek to preserve and expand, and not to the Application itself. Mr. Girardot is addressing any notion that CSXT's request is untimely, should that be raised by NSR in rebuttal. Mr. Girardot's statement is plainly directed at the NSR pleadings and not the Applicants' filing.

The remainder of Mr. Girardot's statement is a recitation of the factors that affect customers' choices between rail and truck on intermodal movements, particularly from Mexico. Mr. Girardot agrees with NS-12 that shippers would prefer rail to truck if the moves were comparable, but he explains (again in accord with NS-12) that CSXT has had a difficult time competing with the Meridian Speedway for intermodal and Dallas traffic notwithstanding its efforts with BNSF. He details how the Meridian Exclusivity Arrangements have hampered competition and increased the volume of trucks on the road, rather than reduce them and opines

that the only solution for CSXT and southeastern shippers is the abrogation of the Meridian Exclusivity Arrangements and open gateways at Shreveport and Meridian. Mr. Girardot also explains that, in his experience, the Meridian Exclusivity Arrangements are seldom, if ever, replicated in the railroad industry.

Whatever Applicant's may think of Mr. Girardot's statement, it is directed at responding to the statements in NS-12 and NS-13 that the Meridian Exclusivity Arrangements are so vital to competition that they must be preserved, defended, and expanded if the Proposed Transaction is approved. Thus, it is "a response to comments, requests for conditions and Responsive Applications" and proper under Decisions 11 and 18.

III. Conclusion

Applicant's Motion to Strike CSXT-13 and its supporting verified statements must be denied.

Respectfully submitted,

/s/ Paul A Cunningham

Paul A. Cunningham

*Attorney for CSX Corporation
and CSX Transportation, Inc.*

cc: All Parties of Record

CERTIFICATE OF SERVICE

I certify that I have caused this CSX Transportation, Inc.'s Response to Applicant's Motion to Strike in FD 36500, *Canadian Pacific Railway Limited; Canadian Pacific Railway Company; Soo Line Railroad Company; Central Maine & Quebec Railway US Inc.; Dakota, Minnesota & Eastern Railroad Corporation; and Delaware & Hudson Railway Company, Inc. – Control – Kansas City Southern, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company*, to be served by email or by first-class mail, postage prepaid, on the Secretary of Transportation, the Attorney General of the United States, Applicants' representatives, Administrative Law Judge Thomas McCarthy, and all other parties of record.

/s/ Paul A. Cunningham
Paul A. Cunningham

*Attorney for CSX Corporation
and CSX Transportation, Inc.*

August 1, 2022