

BEFORE THE SURFACE TRANSPORTATION BOARD

305540

FINANCE DOCKET NO. 36500

**CANADIAN PACIFIC RAILWAY LIMITED, ET AL.
- CONTROL -
KANSAS CITY SOUTHERN, ET AL.**

ENTERED
Office of Proceedings
October 21, 2022
Part of
Public Record

FINAL BRIEF OF NORFOLK SOUTHERN RAILWAY COMPANY

Nabanita C. Nag
Jason M. Morris
Thomas E. Zoeller
Hanna M. Chouest
Norfolk Southern Corporation
650 W Peachtree St NW
Atlanta, GA 30308
Tel: (470) 463-6314

Carrie Mahan
John Scribner
Brianne Kucerik
Daniel Baquet
Charlotte McFaddin
Weil, Gotshal & Manges LLP
2001 M Street NW
Suite 600
Washington, DC 20036
Tel: (202) 682-7000

*Attorneys for Norfolk Southern Railway
Company*

October 21, 2022

I. Introduction

The proposed combination of Kansas City Southern (“KCS”)¹ and Canadian Pacific Railway (“CP”)² (the “CP-KCS Transaction”) is the first Major Merger Transaction in two decades and, if approved, will have a significant impact on the North American supply chain. Norfolk Southern (“NS”) has carefully reviewed the application filed by CP and KCS (the “CP-KCS Application”) and identified discrete, transaction-specific changes that threaten to harm shippers. Accordingly, NS requests a narrowly tailored condition to remedy this harm, protect its shippers, and preserve competition as it exists today.³

At every step in the Board’s review of the CP-KCS Transaction (the “Proceeding”), however, CP and KCS (the “Applicants”) have dismissed these legitimate concerns about the knock-on effects of the merger-specific operational changes they plan to make. NS identified a narrow, specific harm that the Applicants did not consider or address in any meaningful way. The combination of merger-specific traffic growth and merger-specific traffic mix changes the Applicants plan to make on KCS’s line between Shreveport, LA and the Wylie Intermodal Terminal⁴ (the “Shreveport-Wylie Section”)⁵ threatens to degrade the quality of haulage service that CPKC⁶ would be obligated to provide. These anticipated changes were completely unforeseeable when NS and KCS negotiated the Meridian Speedway Agreements sixteen years

¹ Kansas City Southern refers to Kansas City Southern and its U.S. rail carrier subsidiaries The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company.

² Canadian Pacific refers to Canadian Pacific Railway Limited, Canadian Pacific Railway Company, and their U.S. rail carrier subsidiaries Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc.

³ *Amended Responsive Application of Norfolk Southern Railway Company*, STB Finance Docket No. 36500 (Sub-No.5) (filed June 9, 2022) (“NS-13”). *Amended Comments of Norfolk Southern Railway Company and Request for Conditions*, STB Finance Docket No. 36500 (filed June 9, 2022) (“NS-12”)

⁴ The Wylie Intermodal Terminal is located in Wylie, TX, and is owned by KCS.

⁵ The Shreveport-Wylie Section is KCS’s line that connects to, but is not part of, the Meridian Speedway. Since 2006, the Meridian Speedway refers only to the line between Meridian and Shreveport, which is owned by the Meridian Speedway LLC. The “Meridian-Wylie Route” consists of the Meridian Speedway and the Shreveport-Wylie Section, which together connect Meridian and the Wylie Intermodal Terminal.

⁶ “CPKC” is used to refer to the combined entity that would result if the CP-KCS Transaction were approved.

ago. Accordingly, NS is asking this Board for a condition on the proposed CP-KCS Transaction and seeks *contingent* trackage rights that would allow NS to provide its own cars, crews, equipment, and other assets to move certain traffic on the Shreveport-Wylie Section *only if* CPKC's haulage service *actually deteriorates* below existing obligations (the "Contingent Trackage Rights"). Without the Contingent Trackage Rights, there is no remedy for the likely harm to the public interest and to shippers – including traffic shifting from rail to the highways – that would result if CPKC's service deteriorates as a result of merger-specific changes.

The Contingent Trackage Rights would not give Norfolk Southern access to new routes or additional categories of traffic, nor do they impose any new burden on the Applicants. They also will not result in any sort of financial windfall to NS. Quite the contrary, they are designed to maintain the overall economics of the current move on the Shreveport-Wylie Section, taking into account the shifting costs and responsibilities that would occur in converting from the current interline move to a haulage move and subsequently to trackage rights.

Despite the extremely limited nature of this request and NS's request for a condition ensuring that Applicants abide by their commitments with respect to existing gateways, CSX Transportation, Inc. ("CSXT") has inundated the Board and the parties with a raft of allegations related not to the proposed CP-KCS Transaction, but to the Meridian Speedway Joint Venture created by KCS and NS nearly two decades ago. These thinly veiled attempts to use this merger review proceeding to obtain benefits that CSXT was unable to obtain commercially must be rejected.

Despite assertions by CSXT that the Board never reviewed or scrutinized the Notices of Exemption filed for Meridian Speedway Joint Venture in 2006, the clear public record shows they were publicly noticed with the Board in 2006 and, after careful review involving numerous

industry participants – including counsel for CSXT – this Board allowed the exemptions to take effect. CSXT’s arguments that this exemption was somehow improper and the Meridian Speedway Joint Venture is void *ab initio* cannot be sustained. Indeed, counsel for CSXT could not identify a single misrepresentation or omission in the original notices and CSXT has actually relied upon the exemption in support of its own application in the years since.

Further, the broad side attacks after sixteen years of long-term investment by KCS and NS and procompetitive benefits for shippers should not even be entertained in the context of this merger review. The conditions CSXT seeks do not meet the standard set by the Board for the review of this transaction or the standard for the imposition of conditions in this Proceeding. Not only has CSXT failed to identify any legitimate theory of harm “directly and causally related to” the transaction actually under review, CSXT unabashedly ignores the Board’s determination that the pre-2001 rules apply to this merger review.

Finally, CSXT has presented no cogent theory of anticompetitive harm resulting from the Meridian Speedway Joint Venture. CSXT relies on antitrust precedent inapplicable to the facts in this matter. And despite much hand waving at the hearing of three isolated documents, NS’s internal documents prepared in connection with the formation of the Meridian Speedway Joint Venture actually demonstrate NS’s intent to make a substantial financial investment to upgrade the quality and performance of the Meridian Speedway.⁷ CSXT’s gamesmanship must be rejected.

⁷ The Meridian Speedway is the line between Meridian, MS and Shreveport, LA, which is owned by the Meridian Speedway LLC.

II. NS's Requested Contingent Trackage Rights Are Narrowly Tailored to Remedy A Specific Transaction-Related Harm And Should be Granted.⁸

The Applicants' Amended Operating Plan lays out two important changes to traffic on the Shreveport-Wylie Section of the line between Meridian, MS and the Wylie Intermodal Terminal (the "Meridian-Wylie Route") that are not organic, but instead arise directly as a result of the proposed CP-KCS Transaction. Their Amended Operating Plan shows both a dramatic growth in traffic⁹ and a significantly altered traffic mix on the Shreveport-Wylie Section.¹⁰ Further, CPKC would have a significantly different motive to favor its own traffic, equipment, and crews for the movement of new – merger-related growth traffic – over the line that carries the NS Meridian-Wylie traffic.¹¹ It is this combination of merger-specific traffic growth and merger-specific traffic mix changes, as well as merger-modified operational incentives, that give rise to a potential harm to the public interest and prompted NS's request for Contingent Trackage Rights across the affected line.

The Contingent Trackage Rights are narrowly tailored to address *only the* transaction-specific harm *only* in the event the harm actually occurs, and *only* if the Applicants do not take other measures available to them to ameliorate the harm. If the service the Applicants provide after the CP-KCS Transaction meets their pre-existing service obligations, then NS would never be able to exercise the Contingent Trackage Rights. If the harm begins to manifest and Applicants take other actions (capacity improvements, service modifications, or the like – actions

⁸ NS also requests that the Board impose a condition requiring Applicants to abide by all representations made in this Proceeding regarding existing gateways, including the Applicants' commitment to keep existing gateways open on commercially reasonable terms and impose an oversight period of five years. NS's rationale for this condition was explained in NS's Amended Comments. NS-12. Because the Applicants have agreed to this condition, NS will not repeat the arguments for ensuring that the CP-KCS Transaction does not negatively impact shippers' existing options at NS-CP and NS-KCS gateways. Rather, NS merely reiterates its request that the Board impose the Applicants' gateway commitment as a condition of any approval of the CP-KCS Transaction.

⁹ NS-12, at 6-7.

¹⁰ *Id.*

¹¹ NS-12, at 10.

solely within their ability to take) that ameliorate the harm, then NS would not be able to exercise the Contingent Trackage Rights. NS views the requested contingent trackage rights as a last resort that it would exercise to guarantee shippers are not negatively impacted by the CP-KCS Transaction if the Applicants' plan for "high-quality service" on the relevant line does not materialize.¹²

During the CP-KCS Hearings,¹³ the Board asked two fundamental questions about the condition NS seeks: (1) why NS needs the Board to order Contingent Trackage Rights when NS already has haulage rights from Shreveport, LA to the Wylie Intermodal Terminal; and (2) is NS's request seeking a financial benefit or contractual protection that NS could not obtain commercially. Both of these questions are answered below.

A. NS's Contingent Trackage Rights Condition Remedies Potential Harm To Shippers In Ways Haulage Rights Do Not.

During the CP-KCS Hearings, the Board asked why NS needed trackage rights over the Shreveport-Wylie Section, when NS would already have haulage rights over that section of the KCS line if it were to exercise its option to purchase the Wylie Intermodal Terminal.¹⁴ The answer to that question is that haulage rights are not sufficient to address the merger-related harm giving rise to the service standard it is meant to address: CPKC devoting track time, crews, locomotives, and other resources to moving its own merger-related growth traffic to the detriment of NS over the Wylie-Shreveport Section of the route. The Contingent Trackage Rights would enable NS to commit its own cars, crews, and other assets over the entire

¹² *Applicants' Response to Comments and Requests for Conditions, Opposition to Responsive Applications, and Rebuttal in Support of the Application, Vol. 1*, STB Finance Docket No. 36500 (filed July 12, 2022), at 249 ("CP-53/KCS-39").

¹³ CP-KCS Hearings refers to the public hearings held by the Board on September 28-30, October 3, 4, 6, and 7.

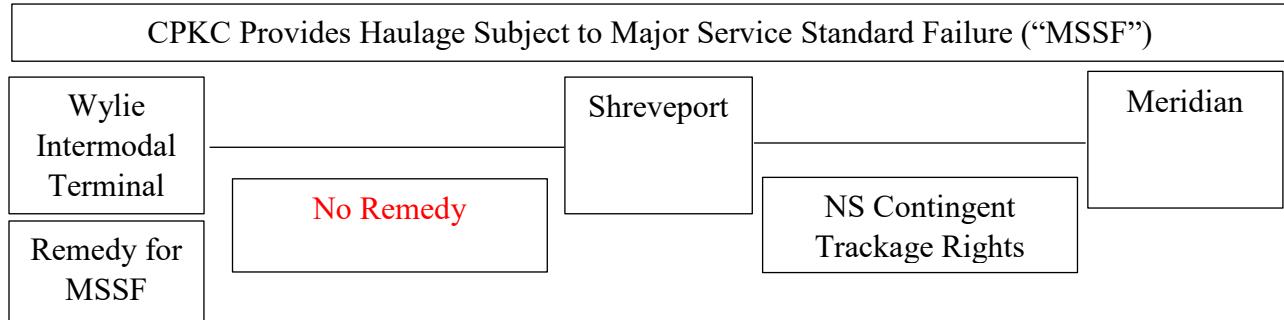
¹⁴ In the absence of an official transcript, citations to the recordings of the hearings include an approximate hour and minute reference in format 'hour:minute'. Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - 30th 2022 (Day 2)*, YouTube (Sept. 29, 2022), <https://youtu.be/EUyvM1zomYA> (6:05-06).

Meridian-Wylie Route and meet intermodal shippers' needs at a level that could not be provided by a combination of haulage and trackage rights over different segments of the line. Further, for reasons discussed in more detail below, the Contingent Trackage Rights would eliminate an interchange at Shreveport, LA, requiring additional time, space, and equipment that by definition would be inefficient and likely to lead to delays in service. In sum, the Contingent Trackage Rights blunt the potential innumerable ways that the NS service on the Meridian-Wylie Route could be disadvantaged to CPKC's benefit. Thus, the Contingent Trackage Rights enable NS to step in and provide the level of service that its customers require and that was contemplated absent the CP-KCS Transaction.

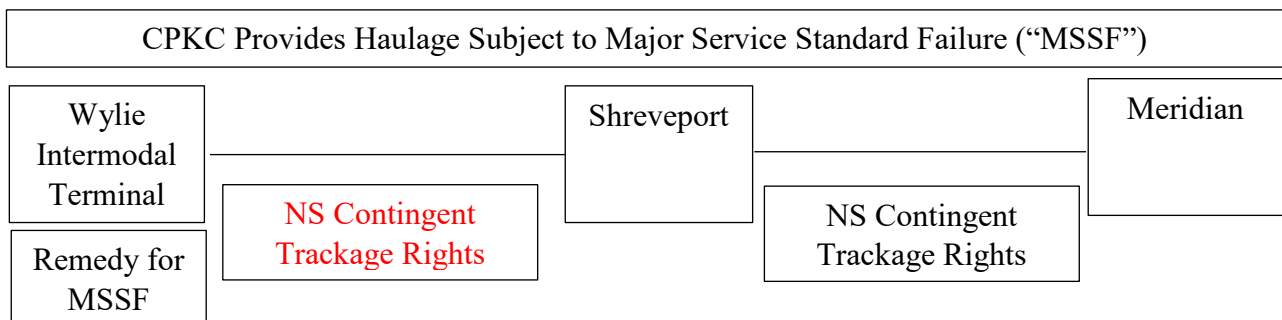
Under the NSR Joint Use Agreement¹⁵ and other applicable Meridian Speedway Agreements, a Major Service Standard Failure occurs with the failure to meet applicable transit times. If NS were to exercise its option to purchase the Wylie Intermodal Terminal after the CP-KCS Transaction occurs, CPKC must provide haulage service for NS traffic moving on the Meridian-Wylie Route. If CPKC's haulage service deteriorates as a result of the CP-KCS Transaction and a Major Service Standard Failure were to occur, NS currently can exercise trackage rights only on the Meridian Speedway (i.e., between Meridian and Shreveport). NS still would have to rely on CPKC for haulage between Shreveport and the Wylie Intermodal Terminal. As the graphic below illustrates, NS has no equivalent remedy for CP-KCS Transaction caused service degradation on the Wylie-Shreveport Section.

¹⁵ NS00002383 at NS00002411-15 ("NSR-MSLLC Joint Use Agreement").

Without the Requested Contingent Trackage Rights Condition



With the Requested Contingent Trackage Rights Condition



The Contingent Trackage Rights that NS requests in this Proceeding would allow NS to convert from CPKC haulage to NS trackage rights on the Wylie-Shreveport Section if the haulage service CPKC provides results in a Major Service Standard Failure. These trackage rights are necessary to allow NS to step in and provide the level of service that its customers require and that would exist but for the CP-KCS Transaction. Converting to trackage rights allows NS to control the entire move from terminal to destination on the Meridian-Wylie Route without relying on CPKC. This includes allowing NS to provide its own crews, equipment, and resources for the entire move to and from the Wylie Intermodal Terminal, which avoids all of the potential problems that would arise from CPKC attempting to devote its own crews, equipment, and other scarce resources to the movement of NS traffic when the merger-related growth of its own traffic demands the same. NS would be in a position to address these shortages by the Applicants that could cause significant delays. Moving via trackage for the entire route also

would avoid an otherwise-necessary crew change, equipment change, and significant time in Shreveport, allowing the NS's traffic to and from the Wylie Intermodal Traffic to move straight through Shreveport without adding to any post-merger congestion at that terminal.

B. Contingent Trackage Rights Will Not Provide A Financial Windfall To NS, Nor Could Have NS Have Foreseen The Need For These Rights In 2006.

The Board also asked the Applicants why the Applicants believed NS was seeking contingent trackage rights.¹⁶ The question appeared directed at whether NS was merely seeking a financial benefit or trying to obtain non-merger related contractual terms NS could not or did not negotiate otherwise. Not surprisingly, the Applicants took advantage of the question and unequivocally responded that NS' motivations were indeed financially motivated. Counsel for the Applicants' blithely asserted that there was "nothing to suggest that [the requested condition] is anything here other than NS's desire to get a contractual right they did not negotiate back in 2006,"¹⁷ that NS "wants to re-write the [Meridian Speedway Joint Venture Agreements],"¹⁸ and "NS sought from the Board contractual rights it could and should have negotiated as part of the Meridian Speedway negotiations, but did not."¹⁹ This is simply wrong.

After a battle for KCS among various parties resulted in the CP-KCS Transaction being reviewed by the Board in this Proceeding, NS studied the proposed CP-KCS Transaction, CP's plans and forecasts, and their implications. NS identified a very specific potential harm to customers resulting directly from the CP-KCS Transaction and the changes proposed by the Applicants post-merger. Then, as directed by the relevant statutes and Board precedent, NS

¹⁶ Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - October 4th & October 6-7th 2022 (Day 7)*, YOUTUBE (Oct. 7, 2022), <https://youtu.be/HEqEA7fuCr8> (2:23).

¹⁷ Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - October 4th & October 6-7th 2022 (Day 7)*, YOUTUBE (Oct. 7, 2022), <https://youtu.be/HEqEA7fuCr8> (2:22-23).

¹⁸ *Id.*

¹⁹ *Id.*

developed a very narrow and pointed remedy that addressed that specific merger-related harm and intentionally did not take advantage of the merger proceeding to gain a windfall.

The Applicants' Amended Operating Plan projects a 53% growth in traffic on the Shreveport-Wylie Section that would not occur absent the CP-KCS Transaction.²⁰ To put this in perspective, KCS predicts only 15% growth on the same line over the same period absent the CP-KCS Transaction.²¹ The Amended Operating Plan also shows certain operational changes that Applicants plan to make to the trains running on the Shreveport-Wylie Section.²² These changes include operating mixed trains containing CPKC manifest traffic and NS intermodal traffic, as well as adding one additional CPKC train per day from Shreveport to Wylie that would not exist in the absence of the proposed CP-KCS Transaction.²³ NS identified that problem and proposed a very narrow condition to remedy that potential merger specific harm.

The suggestion that, absent a crystal ball, NS could or should have predicted sixteen years ago that in 2022 KCS and CP would seek to merge and make these specific dramatic volume and freight mix changes on the line from Shreveport to Wylie at the time it was negotiating a joint venture with KCS is frankly absurd.²⁴ NS could not have anticipated these issues in 2006, long before CP's proposed acquisition of KCS and CP's proposed changes to the KCS network as a result of CP-KCS Transaction. At the time, NS did not seek contingent trackage rights over the Shreveport-Wylie Section because KCS had every incentive to provide adequate haulage service to NS over the line. Now, the Applicants' Amended Operating Plan

²⁰ NS-12, at 22. Applicants plan merger-specific growth of 59% and 46% on the two segments between Wylie and Shreveport, which gives an average merger-specific growth of 53%.

²¹ NS-12, at 22. The organic growth on the two segments between Wylie and Shreveport is 14% and 16%, which gives an average organic growth of 15%.

²² *Amended Operating Plan (Exhibit 13)*, STB Finance Docket No. 36500 (filed May 13, 2022), Appendix H, at 2 ("Applicants' Amended Operating Plan").

²³ *Id.*

²⁴ CP seems to suggest that NS should have been clairvoyant and able to foresee each potential transaction involving KCS and negotiate remedies for the potential merger-related harms that might result from each, years in advance.

demonstrates that the proposed CPKC would have different priorities that put service over the line at risk.

Nor will the Contingent Trackage Rights result in a financial windfall to NS. Rather, the trackage rights fee contained in the Proposed Contingent Trackage Rights Agreement is designed to maintain the overall economics of the move, taking into account the shifting costs and responsibilities that would occur in converting from a haulage move to trackage rights. Applicants' argument that the requested Contingent Trackage Rights are merely an attempt by NS to gain a financial advantage is both incorrect and disingenuous.

As previously explained by NS, the Applicants' factual basis for their claim is erroneous.²⁵ The Applicants use the current revenue-per-mile that KCS earns on its portion of the interline move for Dallas Intermodal Terminal Traffic as the baseline from which to evaluate the proposed trackage rights fee. This is incorrect. Before NS could exercise the requested Contingent Trackage Rights, the interline move would convert to a haulage move wherein CPKC would be the haulage carrier. By contract, the haulage fees are to be set at a price that does not alter the economics of the interline relationship and which takes into account the change in the identity of the party absorbing terminal charges and other charges associated with the movement of the traffic.²⁶ Applicants' simple comparison completely ignores the shifting costs associated with the conversion to haulage. Car costs and terminal costs would transfer from CPKC to NS, so CPKC's revenue-per-mile would *decrease* to reach a haulage fee that would maintain the overall economics of the move.

²⁵ See *Norfolk Southern Railway Company's Rebuttal in Support of Its Amended Responsive Application*, STB Finance Docket No. 36500 (filed Aug. 11, 2022), at 33-34 ("NS-15").

²⁶ NS00001986 at NS000019992 ("Dallas Terminal Marketing Agreement").

CPKC's costs would be reduced even further if the move then changed from haulage to trackage. Compared to a haulage move, under the requested Contingent Trackage Rights, NS would pay for all of the "above the rail" costs of operating the train. These costs include locomotives, fuel, crews, taxi costs, and other operating costs normally associated with maintaining a trackage rights operation on a foreign carrier's line. CPKC would be relieved of the costs associated with the same. The Contingent Trackage Rights would also require NS to establish a crew base, which requires creation of a reporting location and the associated IT and communication expenses. The trackage fee in the Proposed Trackage Rights Agreement is reduced to account for the shifting of these additional costs, but the stated goal is to *maintain the overall economics of the move* for both CPKC and NS.

If the Board grants NS's request for Contingent Trackage Rights, NS would work with Applicants to identify a trackage rights fee that is mutually agreeable consistent with this goal. If NS and Applicants are unable to reach an agreement, the Board has the authority to set the trackage rights compensation.

III. CSXT's Efforts To Effectively Dissolve The Meridian Speedway Joint Venture Must Be Rejected.

After sixteen years, CSXT has injected into the CP-KCS Proceeding a broad side attack on the Meridian Speedway Joint Venture with a dizzying array of arguments, none of which can be sustained.

First, CSXT shockingly asserts that exemption proceedings receive no Board scrutiny or approval and that the Notices of Exemption for the Meridian Speedway Joint Venture transaction were "never approved by this Board" and "never reviewed by this Board."²⁷ The clear public

²⁷ Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - 30th 2022 (Day 3)*, YOUTUBE (Sept. 30, 2022), https://youtu.be/_ZWhnm7gpNw (2:54; 4:52).

record of the extensive proceedings surrounding the Notices of Exemption²⁸ and the Board's decision to allow the exemption belies CSXT's suggestion.²⁹

The Notice of Exemption filed by KCS and the Meridian Speedway LLC in Finance Docket No. 34822 details the entire transaction including the very simple, unequivocal statement:

Specifically, NSR will be the sole provider, via haulage and trackage rights over the Line, of service for transcontinental intermodal container traffic moving on the Line that does not originate or terminate on KCS's current system and that both (a) originates or terminates in the United States at or east of Meridian and enters or exits the Line at Meridian, and (b) originates or terminates in the United States west of Fort Worth, Texas, and enters or exits the Line at Shreveport.³⁰

That same Notice of Exemption included the relevant Transaction Agreement, together with the draft Meridian Speedway LLC Agreement and NSR Joint Use Agreement (among others).³¹

In direct response to this submission and others, the Board itself stated that:

This transaction and the transactions described in the two related notices of exemption are part of a joint-venture between KCS and NSR to share and upgrade this portion of the Meridian Speedway, a line running between Meridian, MS, and Dallas, TX.

This is a transaction within a corporate family of the type exempted from prior review and approval under 49 CFR 1180.2(d)(3). Based on the parties' description of the intercorporate transaction, it should not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family.³²

²⁸ "Notices of Exemption" refers to the notices filed in STB Finance Docket No. 34821, 34822, and 34823.

²⁹ As the Chair observed: "[The Board has] a very professional staff here. And I can assure you, one of the reasons our cases take so long is that we have people who read and study [the contents of filings] and I have no reason to think they didn't read and study it in '06." Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - 30th 2022 (Day 3)*, YouTube (Sept. 30, 2022), https://youtu.be/_ZWhnm7gpNw (4:45).

³⁰ *Kansas City Southern, The Kansas City Southern Railway Company, and Meridian Speedway LLC – Exemption for Transactions Within a Corporate Family*, STB Finance Docket No. 34822 (filed Jan. 18, 2006), at 6.

³¹ The full set of transaction documents for the Meridian Speedway Joint Venture was filed with the Notice of Exemption in STB Finance Docket No. 34822.

³² STB Finance Docket No. 34822, *Kansas City Southern, The Kansas City Southern Railway Company, and Meridian Speedway LLC – Exemption for Transactions Within a Corporate Family*, served February 16, 2006) (referring to the associated dockets of STB Finance Docket No. 34821, *Norfolk Southern Railway Company – Trackage Rights Exemption – Meridian Speedway LLC – Between Meridian, MS and Shreveport, LA*, and STB Finance Docket No. 34823, *Kansas City Southern Railway Company – Trackage Rights Exemption – Meridian Speedway LLC*).

The Board engaged in an environmental review of the proposed Meridian Speedway Joint Venture transaction, involving a briefing of the Board's Section on Environmental Analysis, a public notice and request for comment on the proposed transaction, and consultation with other governmental agencies and involved communities.³³ The suggestion by counsel for CSXT that no one in the industry or at the Board was aware of the details of the Agreements despite these extensive proceedings and sixteen years of procompetitive conduct is disingenuous at best.

Second, CSXT blithely asserts that the Meridian Speedway Joint Venture must be declared void *ab initio* because the agreements were "clearly unlawful."³⁴ Yet, despite hours of questioning before the Board during the CP-KCS Hearings and extensive probing by the Chairman and Board Members, counsel for CSXT could never identify a single factual misrepresentation or omission in the Notices of Exemption filed by KCS and the Meridian Speedway LLC that could possibly render the exemption void *ab initio*. To the contrary, counsel for CSXT admitted that all of the relevant agreements were publicly filed with the notices.³⁵ If CSXT really wanted to seek to have the Board revoke or void the exemption, it could have done so at any time in a separate proceeding. But, for its own strategic reasons, it has not and instead attempts to shoehorn its myriad arguments into this merger proceeding.

Third, the remedy CSXT seeks belies its allegations that the Meridian Speedway Joint Venture in its entirety should be void. If the Meridian Speedway Joint Venture were such a flagrant violation of the law such that the Notice of Exemption filed by KCS and the Meridian Speedway LLC should be considered void *ab initio*, then logically the transaction that created

³³ STB Finance Docket No. 34821, Norfolk Southern Railway Company – Trackage Rights Exemption – Meridian Speedway LLC – Between Meridian, MS and Shreveport, LA, served April 6, 2006.

³⁴ Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 -September 28th - 30th 2022 (Day 3)*, YOUTUBE (Sept. 30, 2022), https://youtu.be/_ZWhnm7gpNw (2:51).

³⁵ Q (Chairman Oberman): "Are all of those arrangements that you say changed the competitive balance part of that book?" A (Mr. Cunningham): "Yes." Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 -September 28th - 30th 2022 (Day 3)*, YOUTUBE (Sept. 30, 2022), https://youtu.be/_ZWhnm7gpNw (4:43-44).

the Meridian Speedway Joint Venture upon which the exemptions were based would be void as well. CSXT, however, doesn't want that. It wants only portions of the Meridian Speedway Agreements declared void so CSXT "can get in on the deal" without the burden of the responsibilities and investments the joint venture partners have made and continue to make.³⁶ If the Board were to now embark on the road of revising complex agreements between railroads sixteen years after the fact, future collaborations by railroads to make long term investments in the public interest would be significantly deterred. The Board should not undertake such practices.³⁷

A. The Meridian Speedway Joint Venture And Its Associated Agreements Were Properly Noticed With The Board In 2006 And, After Careful Review Involving Numerous Industry Participants, This Board Allowed The Exemptions To Take Effect.

The Meridian Speedway Joint Venture and its associated agreements were properly noticed in 2006. Contrary to assertions by CSXT counsel at the CP-KCS Hearings, the proceedings surrounding that Notice of Exemption were far from perfunctory.

In 2006, NS filed a Notice of Exemption for the contingent trackage rights it received as part of the Meridian Speedway Joint Venture transaction. An exemption proceeding is available to parties in defined situations where the Board has found its review and approval of the transaction is not necessary to carry out rail transportation policy.³⁸ Trackage rights based on written agreements and not sought in responsive applications are one of the pre-defined

³⁶ Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 -September 28th - 30th 2022 (Day 3)*, YOUTUBE (Sept. 30, 2022), https://youtu.be/_ZWhnm7gpNw (3:22-23).

³⁷ At the CP-KCS Hearing, Chairman Oberman expressed his belief that, "a significant part of our problem in this country is inadequate infrastructure" and "short-term thinking" by the railroads. Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - 30th 2022 (Day 1)*, YOUTUBE (Sept. 28, 2022), https://youtu.be/_ZWhnm7gpNw (0:35). The Meridian Speedway Joint Venture transaction was the sort of long-term investment in infrastructure that should be encouraged by this Board.

³⁸ 49 C.F.R. § 1180.2(d).

transactions for which an exemption proceeding is appropriate.³⁹ Despite not requiring a full application and approval, the exemption proceeding provides the Board and interested parties with an opportunity to review and, if appropriate, oppose the contemplated transaction. It is not simply a pro forma filing hidden from public view or to which no one at the Board or in the industry pays attention.

As a general matter, all verified notices under § 1180.2(d) must be filed at least 30 days before the transaction is consummated. The requirements for a notice of exemption filed for trackage rights are specified in 49 C.F.R. § 1180.4(g)(i) and include a description of the transaction, purpose of the transaction, and copies of the agreement pertaining to the proposed transaction. The 30-day waiting period and information required for the notice of exemption gives the Board and interested parties the necessary time and information to review the proposed exempt transaction. The notice requirements for the Meridian Speedway Joint Venture exemption proceedings were followed. Indeed, counsel for CSXT personally was involved in the proceedings surrounding the Notices of Exemption on behalf of Canadian National Railway Company (“CN”). During the 30-day waiting period, KCS, MSLLC, NS, and CN filed a joint petition to stay the proceeding to allow the parties to address “operational impacts of the underlying transaction on CN’s line in Jackson, MS.”⁴⁰ The petition was filed by Mr. Cunningham.⁴¹ The Board granted the joint motion to stay the proceeding to allow the parties time to resolve this issue.⁴² The stay was subsequently extended a second time to allow for the resolution of environmental issues, which resulted in a total review period of approximately three

³⁹ 49 C.F.R. § 1180.2(d)(8).

⁴⁰ *Joint Petition to Stay Exemptions*, STB Finance Docket Nos. 34821, 34822, and 34823 (filed Jan. 23, 2006).

⁴¹ *Id.*

⁴² *Granting the Joint Request Filed by CN, et al., Requesting that the Board Stay the Effectiveness of the Exemptions in STB Finance Docket Nos. 34821, 34822, and 34823 Until February 23, 2006*, (served Jan. 23, 2006).

months.⁴³ At the end of this period, after numerous filings and the involvement of multiple interested parties and the Board, the Board allowed the exemption to take effect.⁴⁴

Yet CSXT suggests that the Meridian Speedway Agreements were somehow slipped past the Board and exempted under the cover of darkness without anyone noticing or fully examining the transaction at hand. The 2006 exemption proceeding makes clear that interested parties can, and did, participate in the proceeding to resolve concerns they had. The Board found at the time that the notice filing was complete and accurate, and allowed the exemption to become effective upon expiration of the petitions to stay.⁴⁵

Seven years later, in 2013, CSX actually relied on the Board's favorable characterization of the Meridian Speedway transaction.⁴⁶ The Board described the Meridian Speedway exemption and the competitive restraints therein as a transaction that the Board "authoriz[ed]...involv[ing] a significant investment by [NS] in capital improvements to a line of the [KCSR]." ⁴⁷ Despite clear references to this 2013 CSXT filing and Board decision in NS's prior filings in this matter, at the CP-KCS Hearing CSXT's counsel, Mr. Cunningham, professed ignorance as to the matter.⁴⁸ Mr. Cunningham's reaction at the CP-KCS Hearing was particularly troublesome

⁴³ *Request for Extension of Time*, STB Finance Docket Nos. 34821, 34822, and 34823 (filed Jan. 23, 2006) (seeking a 45-day extension to allow the Board's Section of Environmental Review to complete its analysis).

⁴⁴ *Granting the Joint Requests of NS, KCS, KCSR, and MSLLC For An Extension To Stay The Effective Dates of Exemption in STB Finance Docket Nos. 34821, 34822, and 34823 Until April 10, 2006*, STB Finance Docket Nos. 34821, 34822, and 34823 (served February 22, 2006) (noting that the exemptions would become effective upon expiration of the waiting period).

⁴⁵ In its approval of the initial petition to stay, the Board found that "the parties [had] included complete and redacted versions of pertinent agreements with their notices" and unredacted versions were available to parties who signed the protective order. *Decision Granting Petition to Stay*, STB Finance Docket Nos. 34821, 34822, 34823 (served Jan. 23, 2006).

⁴⁶ *CSX Transportation, Inc. – Joint Use – Louisville & Indiana Railroad Company, Inc.*, STB Finance Docket No. 35534, slip op. at 6 (served Aug. 1, 2013) ("authorizing a transaction that involved a significant investment by Norfolk Southern Railway Company (NSR) in capital improvements to a line of the Kansas City Southern Railroad...").

⁴⁷ *Id.*

⁴⁸ Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - 30th 2022 (Day 3)*, YOUTUBE (Sept. 30, 2022), https://youtu.be/_ZWhnm7gpNw (3:14).

because Mr. Cunningham's co-counsel in this proceeding, Mr. Louis Gitomer, represented CSXT in the 2013 proceeding.

CSXT could have participated in the 2006 exemption proceeding. Its decision not to do so does not undermine the legitimacy of or diligence exercised in the proceeding by the Board, its staff, and other participants. CSXT's suggestion to the contrary must be rejected.

B. CSXT's Arguments That The Exemption Was Improper And The MSLLC Is Void Ab Initio Cannot Be Sustained, And Should Not Even Be Entertained In The Context Of This Merger Review.

Exemptions may be void *ab initio* if the verified notice contains false or misleading information.⁴⁹ Yet, CSXT counsel admitted at the hearing that all relevant agreements were provided and there were no false or misleading statement made in the Notices of Exemption.⁵⁰ Redacted versions of the pertinent agreements were included in the Notice of Exemption filed by KCS and the Meridian Speedway LLC, and parties who signed the protective order had access to unredacted versions. Contrary to the position from CSXT's counsel, parties did not necessarily have to dig into the agreements to find the narrow restriction that CSXT takes issue with here.⁵¹ The restrictions in the Meridian Speedway Agreements were presented in the Notices of

⁴⁹ See, e.g., *Norfolk Southern Railway Company—Trackage Rights Exemption—Meridian Speedway LLC—Between Meridian, MS and Shreveport, LA*, STB Finance Docket No. 34821 (served Feb. 3, 2006).

⁵⁰ See, Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - 30th 2022 (Day 3)*, YOUTUBE (Sept. 30, 2022), https://youtu.be/_ZWhnm7gpNw (4:40-42).

⁵¹ Counsel for CSXT claimed the restrictions were "buried in [the] hundreds of pages" of the Meridian Speedway Agreements. Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - 30th 2022 (Day 3)*, YOUTUBE (Sept. 30, 2022), https://youtu.be/_ZWhnm7gpNw (2:45). See also, Counsel for CSXT claiming that the exemption proceeding was used to "[keep] the arrangements under the radar." Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - 30th 2022 (Day 3)*, YOUTUBE (Sept. 30, 2022), https://youtu.be/_ZWhnm7gpNw (2:51).

Exemption themselves.⁵² Parties had to read only three pages into the Notice of Exemption to find a full description of the provisions.⁵³

At any point over the past sixteen years, CSXT could have petitioned this Board to revoke any of the 2006 exemptions under 49 U.S.C. § 10502(d). Instead, despite its counsel informing the Board that his more recent “revelation” of the purported illegality of the joint venture occurred nearly a year ago,⁵⁴ CSXT made the strategic decision to instead attempt its gambit for conditions in this merger proceeding, which as discussed below undermines its own arguments. And, while not pertinent to this merger review, CSXT could not meet that standard for a revocation in any event. CSXT’s conclusory argument that the transaction within a corporate family (“intracorporate transfer”) exemption was inapplicable is not sufficient. Intracorporate transfers are considered exempt transactions when they do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family.⁵⁵ Any possible change in the competitive landscape would have been presented to the Board in the context of trackage rights or haulage rights that NS received from the Meridian Speedway LLC, for which NS filed *a separate* Notice of

⁵² *Verified Notice of Exemption, Norfolk Southern Railway Company—Trackage Rights Exemption—Meridian Speedway LLC—Between Meridian, MS and Shreveport, LA*, STB Finance Docket No. 34821 (filed Jan. 18, 2006), at 3 (“Upon consummation of the transaction, MSLLC will provide haulage services solely for NSR for certain intermodal traffic, subject to specific service standards.”).

⁵³ In 2013, CSXT cited the Board’s characterization of the Meridian Speedway Transaction and the restrictions contained therein in support of its own transaction and the restrictions it sought to impose. *CSX Transportation, Inc. – Joint Use – Louisville & Indiana Railroad Company, Inc.*, STB Finance Docket No. 35534 (filed Oct. 21, 2013). CSXT was aware of the restrictions in the Meridian Speedway Transaction at least as early as 2013 when it explicitly relied on those restrictions in its own filing.

⁵⁴ Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - 30th 2022 (Day 3)*, YouTube (Sept. 30, 2022), https://youtu.be/_ZWhnm7gpNw (3:01).

⁵⁵ KCS and the MSLLC, which was a wholly owned subsidiary of KCS at the time, used the intracorporate exemption for KCS’s sale of the Meridian Speedway line to Meridian Speedway LLC and subsequent grant back of operating rights to KCS to allow KCS to operate on the Line. *Verified Notice of Exemption, KCS, KCSR, and MSLLC – Exemption for Transactions Within a Corporate Family*, STB Finance Docket No. 34822 (filed Jan. 18, 2006).

Exemption.⁵⁶ Trackage rights transactions do not have the same requirement that the transaction not change the competitive balance with any carriers outside the corporate family.⁵⁷

CSXT ignores the separate standard governing the Notice of Exemption that NS filed, and accordingly, CSXT's argument that the Notice of Exemption was improper simply falls apart. NS's Notice of Exemption complied with the requirements for a trackage rights exemption and became effective upon expiration of the review period. This is only one of the more egregious errors in CSXT's arguments related to the Notices of Exemption. Should further proceedings surrounding those exemptions occur, NS will respond in full to any existing or new allegations CSXT presents. In a petition to revoke the exemption, CSXT would bear the burden of proving either material error or proffer new evidence, or substantially changed circumstances that could not have been foreseen or planned for in 2006.⁵⁸ Because the Notices of Exemption in 2006 were complete (as CSXT could not dispute in the recent hearing) and contain no false or misleading information, there are no grounds on which to re-open the 2006 proceedings.

C. CSXT's Desired Remedy Demonstrates That Its Arguments About The Meridian Speedway Being Void Are Disingenuous.

CSXT asserts that one or more of the exemptions granted in 2006 in connection with the Meridian Speedway Joint Venture transaction was void *ab initio*. However, despite this, the conditions it asks the Board to apply to any approval of the CP-KCS Transaction arguably do not call for the complete dissolution of the Joint Venture and related trackage agreements. Instead,

⁵⁶ The haulage arrangements in the Meridian Speedway Agreements were not subject to separate Board review; nonetheless, the arrangements were fully disclosed and explained in the NS and KCS filings in the exemption proceedings.

⁵⁷ 49 C.F.R. § 1180.2(d)(7) ("Acquisition of trackage rights and renewal of trackage rights by a rail carrier over lines owned or operated by any other rail carrier or carriers that are: (i) based on written agreements, and (ii) not filed or sought in responsive applications in rail consolidation proceedings.").

⁵⁸ *New York Central Lines, LLC – Abandonment Exemption—in Montgomery and Schenectady Counties, NY*, AB-565 (Sub-No. 14X) (2004), at 4 (The Board found that the petitioner failed to meet the requisite showing where the petitioner did not establish "reasonable, specific terms" and because the parties had complied with the statute and had not put forth anything that was false or misleading, so there were no established grounds on which to re-open the proceeding.).

CSXT seeks condition it characterized as “surgical,”⁵⁹ insisting that the Board could simply void parts of the complex agreements negotiated and executed by the Parties, while leaving other portions of the agreements in place. Put another way, CSXT would argue that the joint venture partners should have to keep all of the responsibilities of ownership and long-term investments, but the benefits of these investments should be shared with CSXT in the form of removing exclusivity provisions CSXT asserts are “anticompetitive.”⁶⁰ As a legal matter, CSXT’s own arguments defeat its request for conditions. If, as CSXT asserts, the exemptions that fostered the creation of the Meridian Speedway are void *ab initio*, then how could this Board as the steward of the public interest allow them to stand? It could not.

Further, the chilling effect of this Board now embarking on the road of ordering piecemeal revisions to long-term bilateral agreements executed by industry participants, reviewed and exempted by the Board, and operating and generating procompetitive benefits for nearly two decades, cannot be understated.⁶¹ The Meridian Speedway Joint Venture was and remains a pro-competitive collaboration, which spurred competition for intermodal traffic, increased output, and reduced transit times.⁶² NS and KCS formed the joint venture, because prior to 2006, the Meridian Speedway was in need of significant repair and KCS did not have the money to make the long-term investments needed to support the existing traffic.⁶³ Indeed, as part of the Meridian Speedway Joint Venture, NS invested over \$300 million (in 2006 dollars) to

⁵⁹ Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - 30th 2022 (Day 3)*, YOUTUBE (Sept. 30, 2022), https://youtu.be/_ZWhnm7gpNw (2:56).

⁶⁰ Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - 30th 2022 (Day 3)*, YOUTUBE (Sept. 30, 2022), https://youtu.be/_ZWhnm7gpNw (2:54).

⁶¹ As Mr. Michael McClellan explained at the CP-KCS Hearings, the agreements governing the Meridian Speedway Joint Venture were the result of “extensive negotiations which lasted well over a year.” Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - 30th 2022 (Day 2)*, YOUTUBE (Sept. 29, 2022), <https://youtu.be/EUyvM1zomYA> (6:22).

⁶² See, e.g., NS-15, at 9-30; Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - 30th 2022 (Day 2)*, YOUTUBE (Sept. 29, 2022), <https://youtu.be/EUyvM1zomYA> (6:20-6:40; 6:46-7:06).

⁶³ NS-15, at 18-19.

develop this intermodal route.⁶⁴ To put that investment in perspective, the Applicants testified at the hearing that their combined three-year investment projections are only \$276 million (in 2022 dollars) across their entire combined network.⁶⁵ If there had been a risk of the Board independently altering the financial and legal structure of complex business collaborations (like the Meridian Speedway Joint Venture) many years after the fact – no rational economic actor would have made long-term investments. Nor would they do so again in the future.

At bottom, CSXT decided to sit things out in 2006. At the CP-KCS Hearings, CSXT did not even attempt to dispute the fact that CSXT was not willing to make this level of investment in a deal with KCS to develop the Meridian Speedway in 2006,⁶⁶ nor did CSXT dispute that CSXT has no desire to invest that type of money today to obtain access to the Meridian Speedway.⁶⁷ As the Chair astutely pointed out, what CSXT wants is to have the Board force the joint venture partners to “just let CSXT in on the deal.”⁶⁸ The Board should reject this argument.

IV. The Conditions CSXT Seeks Do Not Meet The Standard Set By The Board For The Review Of The Transaction Or The Standard For The Imposition Of Conditions in this Proceeding.

A. CSXT has Failed to Identify Any Legitimate Theory Of Harm “Directly and Causally Related To” The CP-KCS Transaction.

Board precedent is clear that conditions may only be imposed if they bear a sufficient nexus to the transaction that is the subject of the proceeding. As the Board has stated:

In evaluating whether a merger is in the public interest, we seek to determine what competitive harm is *directly and causally related to the merger and to distinguish that harm from any pre-existing, anticompetitive condition or disadvantage* that other

⁶⁴ *Id.*

⁶⁵ Applicants’ Amended Operating Plan, at 120.

⁶⁶ Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - 30th 2022 (Day 3)*, YOUTUBE (Sept. 30, 2022), https://youtu.be/_ZWhnm7gpNw (3:02-03).

⁶⁷ Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - 30th 2022 (Day 3)*, YOUTUBE (Sept. 30, 2022), https://youtu.be/_ZWhnm7gpNw (3:22-23).

⁶⁸ Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - 30th 2022 (Day 3)*, YOUTUBE (Sept. 30, 2022), https://youtu.be/_ZWhnm7gpNw (3:22).

railroads, shippers, or communities may have been experiencing. We attempt to ameliorate *harm that is caused by the merger* with conditions.⁶⁹

Not only has CSXT failed to show any actual harm caused by the CP-KCS Transaction, CSXT has identified no nexus between the harm it alleges and the CP-KCS Transaction.⁷⁰ Instead, CSXT relies on what its counsel described as the “exacerbation theory.”⁷¹ The CP-KCS Transaction, however, exacerbates none of the harm CSXT alleges.

CSXT’s claims relate to three categories of traffic moving on the Meridian Speedway: NS Transcontinental Intermodal Traffic (“NS Traffic”), Dallas Intermodal Terminal Traffic (“DITT”), and Mexico Traffic. NS Traffic is intermodal traffic that originates or terminates west of Dallas and at or east of Meridian that does not originate or terminate on the KCS system. DITT is intermodal traffic with a lift or drop at the Wylie Intermodal Terminal. Mexico Traffic originates or terminates in Mexico.

As detailed in NS’s prior filings, in order to facilitate the Meridian Speedway Joint Venture, including NS’s significant investment in the Meridian Speedway, NS received certain protections for NS Traffic. As the Board rightly recognized, those protections were part of the Meridian Speedway Joint Venture transaction *in 2006*, not rights or benefits created by the CP-KCS Transaction currently under review. As an initial matter, the Meridian Speedway Joint Venture was, and remains, a pro-competitive collaboration between NS and KCS that improved service and increased competition.⁷² Despite the clear pro-competitive results from the Meridian Speedway transaction,⁷³ CSXT now alleges it has suffered harm for the last 16 years. On its

⁶⁹ *Union Pacific Corp., et al. – Control and Merger – Southern Pacific Rail Corp., et al.*, STB Docket No. FD 32760 (served August 6, 1996), at 364 (emphasis added).

⁷⁰ NS-14, at 5-7.

⁷¹ Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - 30th 2022 (Day 3)*, YOUTUBE (Sept. 30, 2022), https://youtu.be/_ZWhnm7gpNw (2:55).

⁷² *See, e.g.*, NS-12, Verified Statement of Professor John Mayo; NS-14, at 9-11; NS-15, at 18-20.

⁷³ *See, e.g.*, NS-15, Verified Statement of Dr. John W. Mayo, at 13-16.

face, this claim makes clear that CSXT's alleged harm was in no way caused by the CP-KCS Transaction.

CSXT also has failed to identify any change in any category of traffic for which the imposition of conditions would be justified.⁷⁴ To the extent CSXT has suffered any anticompetitive harm from the Meridian Speedway joint venture, which it has not, that harm would not be exacerbated by the CP-KCS Transaction or NS's requested Contingent Trackage Rights.

For NS Traffic, KCS is merely the haulage carrier. KCS has no role in the marketing or promotion of this traffic. The CP-KCS Transaction, if approved, would have no effect on this traffic other than substituting CPKC for KCS as the haulage carrier. In fact, the Applicants' Amended Operating Plan *excludes* this traffic.⁷⁵

The Amended Operating Plan similarly shows no change in DITT. CSXT mistakenly relies on the Applicants' growth projections at the Wylie Intermodal Terminal as evidence that the CP-KCS Transaction will increase the amount of DITT on the Meridian Speedway. As NS explained in its July response filing, the Applicants' work paper underlying the terminal growth does not include any terminals in the NS network.⁷⁶ As such, any growth that the Applicants plan at the Wylie Intermodal Terminal cannot be DITT. Nor do the Contingent Trackage Rights that NS seeks increase the amount of DITT on the Meridian Speedway. Rather, the only effect of the Contingent Trackage Rights is to convert a haulage move into movement under trackage rights.

⁷⁴ CSX Corporation – Control – Pan Am Systems, Inc., FD 36472, slip op. at 10-11 (served April 14, 2022).

⁷⁵ *Norfolk Southern Railway Company's Response to Comments and Request for Conditions*, STB Finance Docket No. 36500 (filed July 12, 2022), at 28 ("NS-14").

⁷⁶ *Id.*

Finally, CSXT's claim that it is prevented from partnering with KCS to move Mexico Traffic is simply wrong. The Meridian Speedway Agreements do not prohibit CSXT from Mexico Traffic on the Meridian Speedway, and the CP-KCS Transaction will not change that.

B. CSXT Ignores The Board's Determination That The Pre-2001 Rules Apply To Its Review Of The CP-KCS Transaction.

The Board determined that the pre-2001 rules apply to its review of the CP-KCS Transaction.⁷⁷ Under those rules, the Board must consider whether a requested condition would *preserve* competition lost as a result of the CP-KCS Transaction, not whether a requested condition would *enhance* competition. The Board's conditioning power is "to preserve competitive options (not to expand them)."⁷⁸

CSXT has repeatedly and unequivocally rejected this standard. In February, CSXT stated its goal was to "re-establish the competitive *status quo* before 2006."⁷⁹ Again in September, CSXT stated its requested conditions would result in "new competition."⁸⁰ CSXT reaffirmed its position during the public hearing.⁸¹

As NS explained in its July response filing, CSXT's requests related to the Meridian Speedway are inconsistent with the Board's standard of review for the CP-KCS Transaction.⁸² CSXT's requests on their face run afoul of the standard adopted by the Board by seeking to establish new gateways and connections that do not exist today and should be rejected.

⁷⁷ Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al., STB Docket No. 36500 (served April 23, 2021).

⁷⁸ CSX Corp. et al. – Control and Merger – Pan AM Systems, Inc., et al., STB Docket No. 36472 (served April 14, 2022) ("CSX-PAS") quoting *Burlington N. Inc. – Control & Merger – Santa Fe Pac. Corp.*, 10 I.C.C. 2d 661, 745 (1995); See BN-SF, at 78; See Conrail, at 283; CN-IC, at 55-56.

⁷⁹ CSX Transportation, Inc.'s Comments and Request for Conditions, STB Finance Docket No. 36500 (filed Feb. 28, 2022), at 20 ("CSXT-8").

⁸⁰ CSX Transportation, Inc.'s Notice of Intent to Participate in the September 28, 29 and 30 Hearing, STB Finance Docket No. 36500 (filed Sept. 14, 2022), at 5 ("CSXT-17").

⁸¹ Surface Transportation Board, STB Hearing - CP/KCS, FD 36500 -September 28th - 30th 2022 (Day 3), YOUTUBE (Sept. 30, 2022), https://youtu.be/_ZWhnm7gpNw (2:41).

⁸² NS-14, at 5-7.

V. CSXT Has Presented No Cogent Theory of Anticompetitive Harm Resulting From the Meridian Speedway Joint Venture.

Throughout the CP-KCS Proceeding, CSXT has failed to present a consistent theory of harm and has repeatedly advanced a misleading interpretation of antitrust precedent in support of its arguments against the Meridian Speedway Joint Venture.⁸³ As NS has detailed extensively in its previous filings, and at the CP-KCS Hearing, CSXT is wrong on the facts, law, and economics.⁸⁴ Because much has already been said on these issues, here NS will only briefly address certain claims raised by CSXT at the CP-KCS Hearings.⁸⁵

A. CSXT Relies On Antitrust Precedent Which Is Inapplicable To The Facts In This Matter.

As previously detailed, CSXT has failed to allege any clear harm to competition. Yet, at the CP-KCS Hearings, CSXT resurfaced its flawed arguments that NS and KCS established an unlawful market allocation scheme.⁸⁶ Again, KCS and NS simply are not competitors and did not compete for traffic in the years leading up to the creation of the Meridian Speedway Joint Venture.⁸⁷ Despite that, CSXT purports to rely on *Palmer v. BRG*, a case whose facts are directly

⁸³ See Testimony of Dr. John Mayo, Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - 30th 2022 (Day 2)*, YOUTUBE (Sept. 29, 2022), <https://youtu.be/EUyvM1zomYA> (6:46-7:06) (rebutting CSXT's inconsistent theories of harm and demonstrating the pro-competitive nature of the Meridian Speedway Joint Venture).

⁸⁴ See NS Response; NS Rebuttal; Testimony of Dr. John Mayo, Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - 30th 2022 (Day 2)*, YOUTUBE (Sept. 29, 2022), <https://youtu.be/EUyvM1zomYA> (6:46-7:06); Testimony of Carrie Mahan, Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - 30th 2022 (Day 2)*, YOUTUBE (Sept. 29, 2022), <https://youtu.be/EUyvM1zomYA> (5:41-5:50).

⁸⁵ For a fulsome discussion of these issues, see NS-14, at 9-23; NS-15, at 19-26.

⁸⁶ Citing DOJ-FTC guidelines and precedent on the illegality of market divisions between competitors, CSXT argues that NS and KCS were competitors and unlawfully divided the market for transcon service on the Speedway in establishing the Meridian Speedway Joint Venture. Day 3 (Sept. 30), at 5:28. FTC-DOJ Guidelines for Collaborations Among Competitors, at 8-9 (2000); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990).

⁸⁷ *United States v. Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 1133-34 (1972) (“One of the classic examples of a per se violation of §1 is an **agreement between competitors** at the same level of the market structure to allocate territories in order to minimize competition....This Court has reiterated time and time again that ‘[h]orizontal territorial limitationsare naked restraints of trade with no purpose except stifling of competition.’ Such limitations are per se violations of the Sherman Act.”)(emphasis added). See STB Finance Docket No. 34822, *Kansas City Southern, et al. – Exemption for Transactions within a Corporate Family*, Verified Notice of Exemption filed January 17, 2006 at 4 (“KCSR does not provide haulage service for intermodal traffic over the Speedway to any other railroad and NS is the sole provider of such transcontinental container traffic over the Line”).

at odds with the record here. In *Palmer*, the defendants were direct competitors prior to entering into the challenged joint venture. NS and KCS, on the other hand, were not competitors for IM traffic over the Speedway prior to formation of the Meridian Speedway joint venture. For this reason, *Palmer* should have no bearing on the Board's assessment of the merits of CSXT's allegations.

B. NS's Internal Documents Prepared In Connection With The Formation Of The Meridian Speedway Joint Venture Clearly Demonstrate NS's Intent To Make A Substantial Financial Investment To Upgrade The Quality And Performance Of The Meridian Speedway.

CSXT purports to have identified NS documents from 2004-05 which it claims demonstrate NS's anticompetitive motive in establishing the MSLLC. However, CSXT's effort to hoodwink the Board by quoting snippets from NS documents must fail. Indeed, these documents clearly demonstrate NS's pro-competitive, pro-growth intent in forming the Meridian Speedway Joint Venture. NS senior management presented to the NS Board of Directors on July 26, 2005 that the {{ [REDACTED] }}⁸⁸ In addition, contrary to CSXT counsel's assertion to the Board that NS's primary motive in creating the Meridian Speedway Joint Venture was to forestall a competitive threat from CSXT, NS's contemporaneous business documents make clear that {{ [REDACTED] }}⁸⁹ In sum, these documents fully support Dr. John Mayo's conclusions that the Meridian Speedway Joint Venture was both efficiency-enhancing and pro-competitive.⁹⁰

⁸⁸ See Proposed NS-KCS Joint Venture, Project Orion: Presentation to Norfolk Southern Board Corp. Board of Directors, NS00006573 at NS00006576.

⁸⁹ NS00006569 at NS00006571.

⁹⁰ Surface Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - 30th 2022 (Day 2)*, YOUTUBE (Sept. 29, 2022), <https://youtu.be/EUyvM1zomYA> (6:46-7:06). See also, Testimony of Mr. Ed Elkins, Surface

VI. Conclusion

The Board is tasked with ensuring that the CP-KCS Transaction, if approved, is consistent with the public interest. The Contingent Trackage Rights that NS seeks would give NS the ability to remedy the narrow harm the CP-KCS Transaction may cause to shippers on the Shreveport-Wylie Section only in the event that harm actually materializes. Further, the mechanism for triggering the Contingent Trackage Rights is entirely within Applicants' control. This is exactly the sort of condition that ensures potential harm to the public interest is avoided, and as such, should be imposed on any approval of the CP-KCS Transaction.

CSXT's requested conditions, on the other hand, are entirely inconsistent with the Board's precedent and with the standard of review established for this Proceeding and are factually and legally untenable. CSXT seeks to void the Board's exemption of the Meridian Speedway Joint Venture in 2006 despite failing to identify any factual defect with the Notices of Exemption filed by KCS, NS, and the Meridian Speedway LLC. CSXT's requests are also inconsistent with how competition actually developed over the last 16 years. The Meridian Speedway Joint Venture facilitated \$300 million investment by NS that resulted in a significantly improved option for shippers. CSXT's requests simply cannot be sustained.

For the reasons above, as well as those in NS's prior filings with the Board in this matter, NS respectfully requests that the Board grant its Responsive Application and requested conditions, and deny CSXT's requested conditions related to the Meridian Speedway Joint Venture.

Transportation Board, *STB Hearing - CP/KCS, FD 36500 - September 28th - 30th 2022 (Day 2)*, YOUTUBE (Sept. 29, 2022), <https://youtu.be/EUyvM1zomYA> (5:53-5:55).

Respectfully submitted,

/s/ Carrie C. Mahan

October 21, 2022

Nabanita C. Nag
Jason M. Morris
Thomas E. Zoeller
Hanna M. Chouest
Norfolk Southern Corporation
650 W Peachtree St NW
Atlanta, GA 30308
Tel: (470) 463-6314

Carrie Mahan
John Scribner
Brianne Kucerik
Daniel Baquet
Charlotte McFaddin
Weil, Gotshal & Manges LLP
2001 M Street NW
Suite 600
Washington, DC 20036
Tel: (202) 682-7000

*Attorneys for Norfolk Southern Railway
Company*

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October 2022 the above Final Brief of Norfolk Southern Railway Company has been e-filed via the STB's e-filing system and served via email or regular postage pre-paid mail on all parties of record in this proceeding.

/s/ Daniel Baquet

Daniel Baquet

October 21, 2022