

BEFORE THE
SURFACE TRANSPORTATION BOARD

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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 BRIEF

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I. INTRODUCTION.

The Board's duty here is to protect the *public interest*. 49 U.S.C. §11323-11324 and 49 CFR 1180 (2000). After considering the factors in 49 U.S.C. § 11324(b), the Board must grant conditions to alleviate any adverse effects on competition if the conditions are "...of greater benefit to the public than they are detrimental to the transaction." *See infra* n.4.

CSX has proposed several conditions (the "CSX Conditions") to prevent adverse effects on competition that meet the Board's criteria. *See infra* §VII. CSX is most concerned to preclude (through "Speedway Conditions") the adverse effects the CPKC Transaction (the "Transaction") will have on competition to, from, and over the "Meridian Speedway" between Dallas, TX and Meridian, MS via Shreveport, LA. *See* CSX Hearing Slide 9.

CSX has shown the ongoing adverse effects of the unreviewed and unsanctioned MSLLC Exclusivity Arrangements (*See infra*, Table 1) and discriminatory Speedway Gateway Restrictions (*See infra* §V.) (together, the "Speedway Restraints") harm the public interest, and that harm would be exacerbated if the Transaction incorporates the Speedway Restraints. Applicants have failed to counter that showing with more than generalized assertions.

Applicants also have not shown the public interest would be served if the Board approved the Transaction with the Speedway Restraints intact. Yet they ask the Board to allow continuation of the harms from those restraints. They urge that any consideration of the Exclusivity Arrangements (including their unapproved division of traffic between NS and KCS) take place outside this proceeding, knowing the restraints might then permanently escape review.¹

The Board should refuse to punt to an uncertain future where the burden imposed on the

¹ Applicants and NS may hope the Board will sanction the Speedway Restraints and render them perpetually immune "from the antitrust laws and from all other law," 49 U.S.C. 11321(a), foreclosing any future review except through reopening of this proceeding.

public interest by the Speedway Restraints may never be lifted. It has a full record, and its authority to act here is uncontested. The Speedway Gateway Restrictions may be beyond review, and the MSLLC Exclusivity Arrangements and their unlawful divisions may be deemed immunized if the Transaction is approved without the CSX Conditions. The time to act is now.

Having made no argument the public interest would benefit from perpetuating and exacerbating the Speedway Restraints, Applicants and NS argue² the MSLLC Exclusivity Arrangements are immunized from review and conditioning by a Notice of Exemption filed by KCS in 2006 (the “KCS Notice”).³ As we discuss in §VI.A., that suggestion is unfounded. The exemption relied on is void because the Exclusivity Arrangements were not eligible for exemption and KCS justified the exemption based on misrepresentations and omissions. To correct that, CSX seeks prospective relief in the form of elimination of the MSLLC Exclusivity Arrangements and open Gateways at Shreveport, Meridian, and Dallas. The relief sought would not upend the MSLLC Transaction. Further, as we discuss in §VI.B.-D., none of the other matters raised at hearing bar the consideration and imposition of the Speedway Conditions. The Board should honor its obligation to the public interest and adopt CSX’s Speedway Conditions to preclude adverse effects on competition that would be exacerbated by the Transaction.

II. THE STB MUST PREVENT THE TRANSACTION FROM HARMING THE PUBLIC INTEREST UNLESS THE REMEDY WOULD IMPOSE A GREATER HARM ON THE PUBLIC INTEREST.

A. Considering Effects on Competition and Imposing Conditions that Reduce Adverse Effects without Reducing Public Benefits is the STB’s Obligation.

CSX’s proposed Speedway Conditions address future competitive harms from the

² NS-15, at Section II.B. (Aug. 11, 2022); *See also* CP-53/KCS-39 at 263-64 (July 12, 2022).

³ 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), at 1-11 (January 17, 2006). Attached to the public version of the 11-page KCS Notice were 416 pages of exhibits (the “MSLLC Agreements”).

Transaction and must be considered on the merits. 49 U.S.C. § 11324(b). When a transaction “would have an adverse effect on competition among rail carriers,” 49 U.S.C. § 11324 (b)(5), the STB exercises its authority under 49 U.S.C. § 11324(c) to impose conditions to rectify adverse effects and render the transaction consistent with the public interest:

The basic consideration for determining whether a need for a public interest condition exists is whether the transaction will have anticompetitive consequences (or threaten other possible harm to the public interest)...If a transaction threatens harm to the public interest, then public interest conditions should be imposed if they are operationally feasible, ameliorate or eliminate the harm threatened by the transaction, and they are of greater benefit to the public than they are detrimental to the transaction.⁴

Applicants and NS mistakenly hope the Board will ignore that the “overriding factor governing the imposition of all conditions” is the public interest.⁵

B. The Transaction Would Exacerbate the Unsanctioned Harm to Competition Caused by the Exclusivity Arrangements.

No one has suggested that incorporating an unlawful arrangement in a Transaction would be consistent with the public interest under any circumstances, and we have found no precedent that would support that proposition. Here, however, even if there were an argument the public interest would be served by ignoring a pre-existing unlawful arrangement, there is no doubt that both the Transaction and NS’s Responsive Application Transaction would perpetuate and exacerbate the existing restraints on competition for intermodal traffic most efficiently conveyed over the Speedway. The STB should prevent that.

The principal defender of the Speedway Restraints, NS, asserts: “CSX has identified no nexus between the harm it alleges and the CPKCS Transaction.” Hearing video 9/29/2022 at 5:46:25. NS’s justification for its responsive application and conditions – that the Speedway competition will be hurt by increased congestion from the Transaction – contradicts that

⁴ *Union Pacific – Control -- Missouri Pacific, Western Pacific*, 366 I.C.C. 462, 563 (1982).

⁵ *Burlington Northern, Inc.-Control & Merger-St. L.*, 360 I.C.C. 788, at 950 (I.C.C. 1980).

assertion. *See* NS-12 at 21-27, 34, 46 (June 9, 2022). Increased congestion will exacerbate the anticompetitive effects of the Exclusivity Arrangements, which impair the ability of MSLLC and KCS to attract and secure revenues from new traffic to facilitate investment and reduce congestion.⁶

If the Transaction incorporates the Speedway Restraints, it will impose new harms on shippers to and from the Southeast. The Transaction will provide CPKC new ability and incentives to foreclose use of the most efficient intermodal routes between Mexico and the Southeast and between West Coast U.S. ports and the Southeast. *See* CSXT-13, Carey V.S., at 22-33, 37-41. This would extend the many harms imposed by the Speedway Restraints -- uncompetitive prices and service, more trucks on the highways, and lower throughput. *See* CSXT-13 at 25-27. Applicants do not rebut that fact; they ignore it.⁷

III. THE EXCLUSIVITY ARRANGEMENTS HARM THE PUBLIC INTEREST.

Under the competition law framework CSX and NS agree the STB should apply,⁸ a tribunal examines any anticompetitive effects resulting from the Exclusivity Arrangements and then

⁶ *See* CSXT-13 at 27, 78-84 (July 12, 2022). NS employs the threat of transaction-related congestion as a reason to *extend* its anticompetitive control over the Speedway. NS says the Transaction will increase congestion at the Dallas Intermodal Terminal and over the Shreveport-Wylie Section, and so will increase the chance NS will exercise its Wylie option and both its existing and proposed contingent trackage rights. That would cement NS's ability/incentive to foreclose rivals via ownership and increase the anticompetitive harm due to perpetual exclusivity. *See* NS-15 at 28-29 and NS-12, at 27, 34, and 46. *See also* CSXT Hearing Slide 85.

⁷ *E.g.*, CP-53/KCS-39 at 264 ("the merits of CSX's arguments are beside the point.") Immediately after addressing NS' concerns at the STB hearing on 10/7/22, counsel for Applicants stated, "I do not think this record needs any more words about the other eastern railroad." Hearing video 10/7/2022 at 2:26:47.

⁸ *See* Hearing video 9/29/2022 at 6:52:44 (Dr. Mayo purports to apply the "roadmap offered by the antitrust agencies in their collaboration guidelines" to assess the effect of the transaction). Applicants suggest no framework for evaluating these issues but instead rely on NS. *See also*, *Burlington Northern, Inc.-Control & Merger-St. L.*, 360 I.C.C., at 932 (I.C.C. 1980) ("the policies embodied in the antitrust laws" are "[h]ighly pertinent to [the STB's] examination of the public interest" in the context of merger proceedings).

whether they were reasonably necessary to achieve any procompetitive benefits, considering the possibility of substantially less restrictive arrangements. CSXT-13, at 31 & n.88. CSX has established that the Exclusivity Arrangements harm competition. NS has failed to show they are necessary for any procompetitive purpose.

A. The Exclusivity Arrangements Foreclosed Imminent Competition Over the Speedway and Competition with NS for Transcontinental Intermodal and Dallas Intermodal Terminal Traffic to and from the Southeast.

The Exclusivity Arrangements harm competition in three ways.⁹ *First*, they eliminated competition over the Speedway. Unrebutted testimony by Mr. Girardot shows competition over the Meridian Speedway was imminent in 2005 between then-existing NS haulage and a BNSF-KCS-CSX combination under negotiation.¹⁰ The Exclusivity Arrangements eliminated this nascent competition because “BNSF could no longer connect its LA-Atlanta trains with CSX across the Meridian Speedway.” Hearing video 9/30/2022 at 5:09:15.

NS responds there was no competitive harm as a matter of law because “NS and KCS did not compete for traffic on the Meridian Speedway prior to the formation of the MSLLC.” NS-15 at 20. This argument fails under both antitrust and STB precedent. The Supreme Court has held an agreement to not compete between *potential* competitors reduces competition, and, if not

⁹ The two types of exclusivity traffic at issue are 1) “Transcontinental Intermodal” traffic which originates or terminates in the U.S. west of Fort Worth (other than on KCS) and runs overhead between Shreveport and Meridian to or from points east of Meridian and 2) “Dallas Intermodal Terminal Traffic” which originates or terminates in the U.S. at or west of Dallas-Fort Worth, has a “lift” or “drop” at KCS’s intermodal terminal in Dallas, Texas and runs overhead between Dallas and Meridian to or from points east of Meridian.

¹⁰ Hearing video 9/31/2022 at 5:04:37 (“In 2005, we at CSX were in active negotiations with KCS and BNSF to increase competition over the Meridian Speedway,” attempting to build an efficient intermodal service on ‘anchor volume’ facilitated by KCS’s freedom to interchange with CSX and other railroads.); CSX Hearing Slides 47-53; CSXT-13, Girardot V.S., at 5-6.

ancillary to an efficiency-enhancing arrangement, is unlawful *per se*.¹¹ Even when ostensibly ancillary, joint venture agreements that prohibit entry by potential competitors are routinely assessed by courts and the Antitrust Agencies as potential sources of competitive harm.¹² The STB likewise considers losses of “potential competition” associated with a transaction.¹³

Second, the Exclusivity Arrangements foreclose competition east of Meridian. All parties agree the Speedway is the most efficient route to and from the Southeast. *See, e.g.*, NS-12 at 16-19. Cutting rivals off from interchanging with this route foreclosed their ability to compete east of Meridian.¹⁴ Indeed, NS contemporaneously documented that { [REDACTED] }
[REDACTED]
[REDACTED] }¹⁵ NS counters there can be no competitive harm if CSX has “the ability” to serve southeastern markets, regardless of a competitive disadvantage.¹⁶ This contradicts established

¹¹ *See Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990). NS misrepresents *United States v. Topco Associates, Inc.*, 405 U.S. 596, (1972) by citing it for the proposition that potential competitors may freely allocate markets. NS-15 at 19-20 & n.70. *Topco* stands for the opposite proposition; as the Supreme Court explained in *Palmer*, “[t]he defendants in *Topco* had never competed in the same market,” but were still found to have agreed illegally to divide a market and rule out future competition between them. *Palmer*, at 49. A decision adopting NS’s position would rule contrary to the Supreme Court.

¹² *See, e.g., Yamaha Motor Co. v. Fed. Trade Com.*, 657 F.2d 971, 977-79 (8th Cir. 1981). The “Antitrust Agencies” are the Department of Justice and Federal Trade Commission. *E.g.*, Fed. Trade Com. and Dep’t of Justice, Antitrust Guidelines for Collaborations Among Competitors 1 (2000) (‘Competitor Collaboration Guidelines’).

¹³ *E.g., Canadian National Railway Co., et al.—Control—Illinois Central Corp., et al.*, Decision No. 37, 4 S.T.B., at 154 (1999); *Union Pacific Corp., et al.—Control and Merger—Southern Pacific Rail Corp., et al.*, Decision No. 44, 1 S.T.B., at 466 (1996).

¹⁴ *See CSXT-8* at 16-19 (Feb. 28, 2022); *CSXT-13* at 35-45. *See generally* U.S. Dep’t of Justice & Fed. Trade Comm’n, Vertical Merger Guidelines 4-10 (2020) (foreclosure and raising rivals’ costs theories of harm).

¹⁵ Proposed NS-KCS Joint Venture, Project Orion: Presentation to Norfolk Southern Corp. Board of Directors, NS00006573 at NS00006586 (July 26, 2005).

¹⁶ NS-15, Mayo Reb. V.S. ¶ 23. *Accord* NS-15 at 20.

antitrust precedent.¹⁷

Third, economic indicia show the Exclusivity Arrangements harm competition and the public interest. “NSR intermodal traffic across the MSLLC Line has {{[REDACTED]}} rates” than rates charged by CSXT or NSR for similar movements. CSXT-13, Carey V.S., at 64-66, 71-73, and figs. 18, 22; CSX Hearing Slides 102. Speedway traffic has also grown less since 2005 than NS asserts,¹⁸ and far less than it would have grown absent the Exclusivity Agreements.¹⁹ Dr. Shehadeh used two methods to show eastbound Transcontinental Intermodal traffic in Birmingham, Jacksonville, and Miami would have increased without the Exclusivity Arrangements by an average of 85% relative to actual 2013-2019 volumes.²⁰ Quantified conservatively, the Exclusivity Arrangements have caused \$50 million of harm per year to

¹⁷ See, e.g., *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 196 (3d Cir. 2005); *United States v. Microsoft Corp.*, 253 F.3d 34, 64 (D.C. Cir. 2001).

¹⁸ NS’s expert, Dr. Mayo, asserts output traversing the Meridian Speedway experienced “a remarkable {{[REDACTED]}} growth” over the 2006-2021 period. See NS-15 Mayo V.S. at page 21. But Dr. Mayo’s approach inexplicably *did not count* {{[REDACTED]}}, which was {{[REDACTED]}} of pre-2006 Speedway transcontinental traffic. Correcting for Dr. Mayo’s errors yields a paltry {{[REDACTED]}} increase in exclusivity traffic over 13 years, less than {{[REDACTED]}} per year. See CSXT-13, Carey V.S., at fig. 3, and CSX Hearing Slides, at 98. When addressing what traffic would have been without the Exclusivity Arrangements, Dr. Shehadeh’s analysis shows that eastbound Transcontinental Intermodal Traffic in Birmingham, Miami and Jacksonville has grown far below the rate in intermodal service in comparable markets during the period. See Shehadeh V.S., at 2; CSX Hearing Slides 82 and 83.

¹⁹ See CSXT-13, Shehadeh V.S., at 2; CSX Hearing Slides 82 and 83. As Dr. Shehadeh explains, Dr. Mayo’s “before-and-after” approach of comparing today’s output to 2006’s is simply incorrect; it presumes that the Exclusivity Arrangements were necessary for any growth over the Speedway, and it ignores what output might have been without the Exclusivity Agreements. CSX Hearing Slides 86 and 89.

²⁰ CSXT-13, Shehadeh V.S., at 2; CSX Hearing Slides 82. Dr. Mayo responds by showing that if one artificially groups all southeast geographies together and aggregates such divergent geographies as Houston, Chicago, and Boston as a single “control”, the effect disappears. Mayo’s approach is doubly improper, but even if one only corrects the latter error, output has been reduced by 27% across the entire Southeast. CSX Hearing Slides 84 and 91.

shippers.²¹

NS responds this evidence must be wrong because the *joint venture* was procompetitive by virtue of its investment.²² This is misdirection: CSX has carried its burden to demonstrate the anticompetitive effects of the *Exclusivity Arrangements*. That other parts of the joint venture transaction might benefit competition would not disprove those effects. There could be a potential justification – but only if NS carries its burden to show the Exclusivity Arrangements were reasonably necessary to achieve the supposedly procompetitive benefits. *See e.g., Alston*, 141 S. Ct. at 2160. Without such proof, the MSLLC Arrangements constitute a *per se* unlawful market allocation agreement. *See, e.g., Blackburn v. Sweeney*, 53 F.3d 825, 828 (7th Cir. 1995).

B. NS Has Not Shown the Exclusivity Arrangements Were Reasonably Necessary to Facilitate its Investment in the Speedway. Less Restrictive Means Would Have Accomplished This Goal.

Given the evidence shows the Exclusivity Arrangements harmed competition, NS must show this harm was justified because those arrangements were reasonably necessary to facilitate NS's MSLLC investment. *See, e.g., NCAA v. Alston*, 141 S. Ct. 2141, 2160 (2021). NS has not carried that burden. It has not refuted record evidence that NS (1) {{ [REDACTED] [REDACTED]

[REDACTED] }} and (2) {{ [REDACTED]

²¹ See Professor Carey's econometric analysis of railroad competition, assessing roughly 400,000 2019 intermodal moves and incorporating multiple scenarios to account for varying route and carrier options and interchange competitors, at CSXT-13, Carey V.S., at 59-73 and App. E. NS did not seek to discredit Professor Carey's approach, but argued the exercise is meaningless because CSX can provide an alternative service and therefore abrogating the Exclusivity Agreements would not increase competition. This is incorrect because: 1) Intermodal service via the Speedway is competitively different from CSX's intermodal service over a less attractive route; and 2) Professor Carey's regression analysis accounts for the "alternative route [and carrier] options" NS describes. CSX Hearing Slides 105-08.

²² *See, e.g.,* Hearing video 9/29/2022 at 6:38:54. ("It cannot be the case that there is an anticompetitive outcome when the Meridian Speedway transaction created a new competitive alternative to the highway."); Hearing video 9/29/2022 at 6:40:28 ("[T]he results of the Meridian Speedway make it clear that the transaction was, remains, and will be procompetitive.").

_____ } }²³

NS’s entire argument on this point is to state *ipse dixit* that the Exclusivity Arrangements were “narrowly tailored to protect NS’s significant initial and ongoing investment in the MSLLC,” and that “[t]he agreements in their entirety and all of the terms contained therein were necessary for us and KCS to form the joint venture and bring the benefits to the consumers.” NS-15 at 19; Hearing video 9/29/2022 at 6:32:40. NS’s only support for its “narrowly tailored” claim is to assert repeatedly that the Exclusivity Arrangements cover “a narrow category of intermodal traffic,” and complain that “CSXT’s filings would have the Board believe that nearly all traffic on the Meridian Speedway is exclusive to NS.” NS-15 at 10, 19. The Exclusivity Arrangements together cover {{ [REDACTED] }} of all loaded NS moves and {{ [REDACTED] }} of all intermodal moves over the MSLLC Line for any carrier.²⁴ In no universe is a restriction on {{ [REDACTED] }} intermodal movements “narrow.”

More important, NS never explains how the Exclusivity Arrangements were *reasonably necessary* to protect its investment.²⁵ It suggests they protect against “free riding” but offers no factual support for the claim. That failure is fatal to NS’s defense: NS must prove its

²³ See NS00006573 at NS00006586 (July 26, 2005). ({ [REDACTED] } { [REDACTED] }).

²⁴ See NS-9 at 11-12 (Feb. 28, 2022). See also CSXT-13 Carey V.S. at Figure 3. See also CSX Hearing Slide 116. See also “Carey HC-WP MSLLC IM Traffic.”

²⁵ For example, NS cites *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185 (7th Cir. 1985) and says antitrust law “supports the use of an ancillary restraint in situations like the MSLLC,” without explaining why. NS-15 at 19. As CSX explains, the central requirement of the ancillary restraints doctrine is that the supposedly ancillary restriction on competition be “reasonably necessary to achieve [the] procompetitive benefits” of the arrangement they supposedly support. Competitor Collaboration Guidelines 8. *See Blackburn v. Sweeney*, 53 F.3d 825, 828 (7th Cir. 1995) (rejecting ancillary restraints argument and analogy to *Polk Bros.* where “[t]he Agreement ... was not a necessary condition for the increased competition”). NS cannot carry its burden on this question of fact by simply name-dropping the doctrine.

procompetitive justification as a matter of *fact*, not magic words,²⁶ and, as CSX shows, the Exclusivity Arrangements do nothing to solve a “free riding” problem. *See* CSXT-13 at 57-78. First, there is no free riding problem because MSLLC is paid for use of its facilities. “When payment is possible, free riding is not a problem because the ‘ride’ is not free.”²⁷ And, because customers and rivals cannot free ride on *NS’s service east of Meridian*, protecting *that* service from competition is contrary to the MSLLC’s interest in profit maximization (and NS’s interest *as an MSLLC investor*).²⁸

With no facts to show the Exclusivity Arrangements were reasonably necessary, NS argues the STB “recognized [them] to be a limited restraint that was necessary to protect NS’s substantial investment,” NS-15 at 19, because the Board once stated it had “authorized” restrictions in the Speedway proceedings “aimed at protecting that investment.”²⁹ The Board has clarified that is not true. The Board’s notice explained the exemption’s authorization was “[b]ased on the parties’ description of the intracorporate transaction” rather than a review of the Exclusivity Arrangements which KCS’s Notice of Exemption obscured. 71 Fed. Reg. 8,339. A year later, the Board explained the MSLLC Transaction had been “authorized subject only to an *after-the-fact* Board review *if objections are received*.”³⁰ Because the notices “were

²⁶ *See, e.g., Alston*, 141 S. Ct. at 2162; Competitor Collaboration Guidelines 9 (“Before accepting a claim that an agreement is reasonably necessary to achieve procompetitive benefits from an integration of economic activity, the Agencies undertake a limited factual inquiry to evaluate the claim.”).

²⁷ *Chi. Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 961 F.2d 667, 675 (7th Cir. 1992). CSX is willing to invest in the Speedway as commercially reasonable. CSX Hearing Slide 42.

²⁸ *See Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 638 F.2d 15, 16 (4th Cir. 1981); *Toys “R” Us v. FTC*, 221 F.3d 928, 937-38 (7th Cir. 2000).

²⁹ *CSX Transportation, Inc. – Joint Use – Louisville & Indiana Railroad Company, Inc.*, FD 35523 (STB served August 1, 2013), slip op. at 6.

³⁰ *Mich. Cent. Ry., LLC – Acquisition and Operation Exemption – Lines of Norfolk S. Ry. Co.*, FD 35063 (STB served Dec. 10, 2007), slip op. at 10 (emphasis added).

unopposed,” they “became effective in due course” with no such review and no reasoned decision “recogniz[ing]” anything.³¹

NS’s failure to show its supposedly “ancillary” Exclusivity Arrangements were needed to protect its investment means that investment cannot justify their anticompetitive effects and the arrangements can be condemned as unreasonable restrictions on competition. Yet even if NS had shown the Exclusivity Arrangements facilitated its investment, they would still violate competition law principles because CSX has demonstrated that “substantially less restrictive means exist to achieve any proven procompetitive benefits.”³²

CSX outlined less restrictive arrangements commonly used to protect railroad investments, *See* CSXT-13 at 71-78, and submitted a review of haulage arrangements accompanied by collaborative investments by one railroad in a line or facility owned by another. *See* CSXT-13, Carey V.S., at 49-53. Data showing the traffic moved under these arrangements identified no instances in which the original line owner is prohibited from providing rail service in its own account over its own line in competition with its hosted carrier, nor has NS identified any.³³

NS attempts three rebuttals; none succeed. First, NS claims that without the actual agreements in the record, the presence and scope of any “exclusivity provisions” cannot be assessed. NS-15 at 23. But traffic data showing the owner-carrier provides service in competition with the hosted carrier proves that the carrier did not agree to abstain from service. Second, NS

³¹ *Id.*

³² *Alston*, 141 S. Ct. at 2162. *See* CSXT-13 at 71-78.

³³ *See id.* This includes the Board’s rejection of proposed exclusivity arrangements in *Michigan Central Railway, LLC Acquisition and Operation Exemption – Lines of Norfolk Southern Railway Company Et Al.*, FD Nos. 35063-65 (December 10, 2007). As Professor Carey noted in her Verified Statement, the Board’s decision in *MCR* sharply criticized the transaction for including extensive, perpetual restrictions placed by NS on the line, and the fact that these restrictions would “significantly reduce” the JV’s “ability to control these lines.”

argues that some arrangements between other railroads identified in the record include “restrictive elements” or less-restrictive forms of “exclusivity.” NS-15 at 23-24. This only proves CSX’s point: railroads routinely rely on far less restrictive limits on competition than KCS’s agreement never again to compete with its guest carrier NS to transport in its own account a {{ [REDACTED] }} category of traffic moving over its own line. Again, NS fails to point to any other case where an owner-carrier has agreed to do this; it appears none exist. Third, NS argues its investment in the Speedway was so large as to defy comparison with ordinary industry practice. NS-15 at 24-25. But NS does not explain why the size of its investment makes less restrictive alternatives infeasible. NS’s unsupported argument is that if a railroad invests enough money the Board must let it restrict competition in whatever way it wants with no questions asked.

CSXT demonstrated that the MSLLC Agreements did not result in vertical efficiencies, and other arguments that NS raises to support its procompetitive benefits lack validity.³⁴

Finally, CSX demonstrated that NS {{ [REDACTED] }}. *See, e.g.*, NS-MSLLC Joint Use Agreement, section 7(n)(vii). Therefore, even if the Exclusivity Arrangements could have been justified for some limited period as reasonably necessary to protect NS’s investment, *perpetual* exclusivity could not have. NS did not address this issue.

C. The Exclusivity Arrangements Are About Excluding Competition Downstream from the Speedway, Not Protecting NS’s Speedway Investment.

CSX has established what the Exclusivity Arrangements *are not* about: legitimately protecting NS’s procompetitive Speedway investment. CSX has also established what they *are* about: protecting NS’s lucrative downstream intermodal services.

Many contemporaneous documents show NS valued being the only railroad in the Southeast able to receive efficient input traffic from the west, and it entered the Exclusivity Arrangements

³⁵ NS00006606 at NS00006610 (Dec. 29, 2004).

to secure that position independent of the value of transporting traffic over the MSLLC Line:

- A December 2004 NS business document { [REDACTED] }
[REDACTED]
[REDACTED] }³⁵
- An April 2005 memorandum { [REDACTED] }
[REDACTED] It assessed that an arrangement { [REDACTED] }
but that an { [REDACTED] }
[REDACTED] }³⁶
- A May 2005 presentation to NS's Board of Directors explaining a chief benefit to NS was { [REDACTED] }³⁷
- A July 2005 Board of Directors presentation explaining that the deal { [REDACTED] }
[REDACTED] }:

{ [REDACTED] }³⁸

³⁵ NS00006606 at NS00006610 (Dec. 29, 2004).

³⁶ NS00006569 at NS00006570-71 (April 4, 2005) (Exhibit A) (emphasis added).

³⁷ NS00005474 at NS00005479 (May 12, 2005) (Exhibit B).

³⁸ NS00006573 at NS00006586 (July 26, 2005).

These documents establish {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

}} NS's documents confirm that the Exclusivity Arrangements were entered to remove KCS, BNSF, and CSX from the competitive equation in the Southeast. *See* CSXT-13, at 42, 59-63. They were not "ancillary" to anything.

IV. EXCISING THE EXCLUSIVITY ARRANGEMENTS AND PROHIBITING FUTURE EFFORTS TO RESTRAIN SPEEDWAY COMPETITION WOULD SERVE THE PUBLIC INTEREST IN THE TRANSACTION.

Presented with NS's affirmation here that the MSLLC Agreements affected the competitive balance by restraining competition, CSX's showing that the Exclusivity Arrangements created adverse competitive effects, and the evidence that such adverse effects are contrary to the representations in the KCS 2006 Exemption notice and the rules under which KCS filed for that Exemption, the Board cannot avoid reviewing the legal status of the 2006 Exemption. *See infra* §VI.C. However, the Board need not order divestiture of the MSLLC Transaction as would otherwise be required by the Board's exemption rules. By adopting CSX's requested conditions, the Board can exercise its conditioning authority to require only the removal of the elements of the MSLLC Agreements not entitled to the intracorporate exemption and determine the exemption to be otherwise valid.

Table 1 shows the narrow excisions required to remove the Exclusivity Arrangements from the MSLLC Agreements. Those few excisions would prevent the perpetuation and exacerbation of the adverse effects of those unapproved arrangements on competition. They would also allow KCS and NS to preserve the legitimate elements of the MSLLC Agreements. The provisions that

must be removed are a) the Exclusivity Arrangements themselves; and b) provisions ancillary to the Exclusivity Arrangements forbidding MSLLC from permitting KCS to provide rail carrier services that compete with NS. The MSLLC Agreements anticipated such limited excision of provisions. Their severability provisions assure that sections deemed invalid can be excised without terminating the remainder of the agreements. *See, e.g.*, NS-MSLLC Joint Use Agreement, section 7(n)(vii).

Otherwise, to protect the public interest while permitting NS to protect its legitimate minority interest in the MSLLC, the Board should preclude NS from enforcing other generally legitimate provisions of the MSLLC Agreements, including NS's rights to control the MSLLC's "Major Decisions," to restrain competition to, from, or over the Speedway.

Table I – MSLLC Exclusivity Arrangements to Excise

Citation	Bates No.	Page no. in Public Notice of Exemption
PROVISIONS ESTABLISHING EXCLUSIVITY FOR TRANSCONTINENTAL INTERMODAL TRAFFIC		
NSR Joint Use Agreement § 4(a)	KCSR-HC-00013383	PDF at 188
KCSR Joint Use Agreement §§ 2(a), 2(b), 2(c)(iii), 2(d), 4(a)	KCSR-HC-00013417 and KCSR-HC-00013418	PDF at 219, 220, 221
NSR Joint Use Agreement § 4(b)(ii)	KCSR-HC-00013383	PDF at 188
KCSR Joint Use Agreement § 4I	KCSR-HC-00013420	PDF at 221
PROVISIONS ESTABLISHING DALLAS INTERMODAL TERMINAL TRAFFIC RIGHT OF FIRST REFUSAL WITH PRICING CONTROL		
Dallas Terminal Marketing Agreement § 2(d)	KCSR-HC-00013587	PDF at 393**
Dallas Terminal Marketing Agreement § 2I	KCSR-HC-00013587	PDF at 393**
NSR Joint Use Agreement § 4(b)	KCSR-HC-00013383	PDF at 188
Dallas Terminal Marketing Agreement § 5(a)(ii)	KCSR-HC-00013590 and KCSR-HC-00013591	PDF at 396 and 397
ANCILLARY PROVISIONS TO THE EXCLUSIVITY ARRANGEMENTS		
LLC Agreement clauses (Definition of "Major Decisions") (xxi)(a)	KCSR-HC-00013262 and KCSR-HC-00013263	PDF at 97
KCS-MSLLC Master Interchange Agreement § 4(d)	KCSR-HC-00013462	PDF at 264

****The public versions of § 2(d) and § 2I are redacted. To read the entire section please refer to the highly confidential version of the Notice of Exemption. Those with access to the highly confidential productions in this proceeding can refer to the Bates numbered documents in the third column.**

V. GATEWAY PROTECTIONS ARE REQUIRED TO ASSURE COMPETITION TO, FROM AND OVER THE SPEEDWAY.

No party disputes the desirability of open gateways or that the STB may require open gateways. At issue is which gateways should be open, to whom, and whether gateways should be protected through conditions. NS wants all existing gateways open – but only for NS on the Speedway. *See* NS-12, at 30-33, 40-46. Applicants want no fully open gateways on the Speedway, and no readily enforceable gateway conditions. *See, e.g.,* CP-53/KCS-39, Section VIII.C.2

The Board should require that all CPKC gateways be subject to open gateway conditions like those imposed by the Board on the Pan Am transaction.³⁹ Whether gateways are affected or open should be an issue for the Board, not CPKC, to decide through an expedited process open upon motion by any aggrieved party under such standards as the Board may adopt here. As in this proceeding, the ultimate question should be whether the gateway practices of CPKC and its subsidiaries are consistent with the public interest.

The Speedway Gateways – Meridian, Shreveport, and Dallas – present an unusual “open gateway” problem. They are open to some carriers for some traffic but not to others. *See* CSXT-13 at 9-10; CSXT Hearing Slide 24. They will all be affected by the Transaction.⁴⁰ The Transaction will increase CPKC’s incentives to foreclose rivals’ access to traffic that could best move over the Speedway. The Board should remove those restrictions and ensure aggrieved

³⁹ FD 36472, *CSX Corporation et al. - Control and Merger - Pan Am Systems, Inc. et al.*, Decision No. 9, at 16, 50-51 (April 14, 2022).

⁴⁰ *See* CP-47/KCS-34 (May 13, 2022); CSXT-13, Carey V.S., at 7-9.

parties can enforce this open gateway requirement as they are able to enforce the Board's general gateway conditions.⁴¹ That will assure CPKC and NS cannot continue the harms imposed by the Exclusivity Arrangements by restricting gateways.⁴² Otherwise, once the Board excises the Exclusivity Arrangements, shippers would not be assured the benefits of Speedway Competition if the Speedway Gateways that now are only partially open to some carriers and for limited types of traffic.

If Meridian is not open such that KCS must interchange of any traffic with any carrier on commercially reasonable terms, Transcon shippers can still be denied a competitive option to and from the East via KCS-CSX. *See* CSXT-13, *Girardot V.S.*, at 4-7. If Shreveport is not opened, then the much more efficient UP's route between Mexico and Shreveport will not be available to take trucks off the highway that KCS cannot attract today; and CPKC could frustrate UP competition (and potential BNSF competition) for West Coast international traffic so competitive services to and from the Southeast could not be built on a Transcon anchor train. If Dallas is not open, there will be fewer options for intermodal shippers between the Dallas area and points West and East.⁴³ CSX's request for open Speedway Gateways seeks only to assure shippers are able to receive a commercially reasonable rate or factor for Speedway movements that would permit them the option to choose CSX east of Meridian. CSX is not seeking to operate over the Speedway but only to be able to participate on commercially reasonable terms in competitive alternatives to NS's services.

VI. THERE ARE NO LEGAL OBSTACLES TO THE STB'S CONSIDERATION AND IMPOSITION OF THE CSX CONDITIONS ON THE MERITS.

⁴¹ The STB has "broad authority to impose conditions on railroad unifications...in the interest of the public...to open new gateways." *Supra* n.5.

⁴² *See, e.g.*, CSXT-13, *Girardot V.S.*, at 4-6; Hearing video 9/30/2022 at 3:34:25.

⁴³ *See* CSX Hearing Slides 35-40 and Hearing video 9/30/22 at 3:31:00. *See also* CSXT-13 at 14-16 and CSXT-13, *Carey V.S.*, at 22-41.

A. The MSLLC Agreements are Not Immunized from Review Here.

Applicants and NS claim the Board cannot impose conditions to remedy the anticompetitive effects of the MSLLC Agreements because they were immunized from scrutiny by the KCS Notice in 2006. However, the KCS Notice was not properly filed. Even if it had been, a properly filed notice of exemption does not immunize a transaction from further STB review under ICCTA, only from the application of “all other laws.” 49 USC 11321(a). The STB is not excused from its duty to evaluate the competitive effects of even a properly exempted transaction, and it can reopen any asserted approval of such a transaction at any time.⁴⁴

B. The MSLLC Exemption Relied Upon as a Defense of the Exclusivity Arrangements was Void *Ab Initio* Because the MSLLC Transaction Did Not Qualify for an Exemption, and the KCS Notice of Exemption Was False and Misleading.

1. The MSLLC Transaction did not qualify for an intracorporate exemption because it effected a change in competitive balance outside the corporate family.

Contrary to the KCS Notice, the MSLLC Transaction did not meet the threshold requirement for an intracorporate transaction exemption.⁴⁵ The KCS Notice represented that the 2006 MSLLC Transaction was entitled to an intracorporate exemption from 49 U.S.C. § 11323 review. There is now no doubt – as both Applicants and NS now admit⁴⁶ – the MSLLC

⁴⁴ See 49 U.S.C. § 1322 (c) (“The Board may, at any time on its own initiative because of material error, new evidence, or substantially changed circumstances -- (1) reopen a proceeding; (2) grant rehearing, reargument, or reconsideration of an action of the Board; or (3) change an action of the Board.”). See also 49 U.S.C. § 11327 (“When good cause exists, the Board may make appropriate orders supplemental to an order made in a proceeding under sections 11322 through 11326 of this title.”).

⁴⁵ To qualify as an exemption under 49 CFR §1180.2(d)(3), a transaction must “not result in adverse changes in service levels, significant operational changes, or **a change in the competitive balance with carriers outside the corporate family.**” (Emphasis added).

⁴⁶ NS states, “The Meridian Speedway Agreements explicitly embodied and were designed to effectuate [KCS’] prediction” that, with NS’ investment, the Speedway “should be more competitive for intermodal traffic with other rail routes, including routes via the New Orleans, Memphis, and Birmingham gateways, and other modes of transportation,” and this prediction “proved accurate.” NS-12 at 9 (quoting KCS Notice); CP-53/KCS-39 at 263 (“Applicants direct

Transaction was not just about the formation of a joint-venture railroad; it enabled the parties to operate under the MSLLC Agreements, which “change[d] the competitive balance with carriers (NS, CSX, and MNBR) outside of the corporate family.”

2. The KCS Notice contained false and misleading information.

The KCS Notice was false and misleading because it did not disclose the NS-KCS traffic divisions embodied in the MSLLC Agreements. Traffic divisions are not eligible for the intracorporate exemption. They require approval under 49 U.S.C. §11322. Because that approval was neither sought nor granted, the division of traffic was never approved as required by the statute and “may not” occur. It is therefore void and unenforceable. *See Chicago & N. W. R. Co. v. Peoria & P. U. R. Co.*, 201 F. Supp. 241, 254 (1962).

The KCS Notice was also false and misleading because it represented that the MSLLC Agreements **would not change existing haulage arrangements** in at least three ways:⁴⁷

1. It stated “[o]nce implemented, this transaction will **perpetuate the haulage arrangements that NSR and KCSR have had** over the Line while significantly expanding capacity.” KCS Notice at 8 (emphasis added). KCS did not say this “perpetuat[ion]” made the prior haulage arrangement exclusive (banning even KCS interline service)⁴⁸ or irrevocable. Yet before the transaction, KCS had been free to compete with the service NS provided under these haulage

the Board’s attention to the discussion in NS’s amended comments of the procompetitive traffic growth generated by the joint investments in this high-service route. *See* NS-12 at 9-21.”).

⁴⁷ There is certainly a fourth. The KCS Notice also did not mention that whereas the prior haulage arrangement (KCSR-HC-00027738 – KCSR-HC-0002775) gave NS overhead haulage rights for transcontinental intermodal traffic only between Meridian and Dallas, the MSLLC haulage arrangement gave NS overhead haulage rights for that traffic between Meridian and Shreveport (where NS could interchange with UP) in addition to Dallas.

⁴⁸ The prior haulage arrangement was not made available to other parties until revealed in discovery by KCS *in this proceeding*. It was only alluded to in the public MSLLC Agreements attached to the KCS Notice (Appendix B to Exhibit E - the Western Haulage Agreement). KCS Notice, Exhibit E, at 244.

arrangements and after the transaction KCS was perpetually and irrevocably precluded from offering such competition.

2. It implied KCS could continue to act as a linehaul carrier for relevant traffic, stating “KCSR participates today as a line-haul carrier in a small volume of intermodal trailer traffic that originates on BNSF in California [and is transferred by road and rebilled at Dallas]... This trailer traffic will continue to move in the same manner following consummation of the proposed transaction.”⁴⁹ This passage suggests a) this traffic falls within the category of transcontinental intermodal traffic and KCS could continue to participate in movements of that traffic; and thus b) like every other “exclusive” haulage arrangement of which CSX is aware, NS’s “exclusivity” forbade KCS *granting other carriers haulage rights* but did not forbid KCS from transporting traffic over its own line (i.e., in its own account) for *interchange with* other carriers.

3. It used identical language to describe NS’s pre- and post-transaction rights, stating NS was “the sole provider of... transcontinental container traffic over the Line.” KCS Notice at 4. Critically, Applicants argue it was this “sole provider language that put the STB and public on notice of the Exclusivity Provisions, saying the Notice, “could not have been clearer” that exclusivity was being conveyed. CP-53/KCS-39 at 263, 264 n. 509. That cannot be true, or else KCS’s use of identical language to describe the pre-existing arrangement would have “clear[ly]” represented that NS *already* had exclusivity, and nothing would change. Of course, as a result of discovery in this proceeding, we now know that NS *did not have exclusivity pre-transaction*.

The KCS Notice also misled by not mentioning NS’s right of first refusal to carry Dallas Intermodal Terminal Traffic at Meridian or NS’s right to coordinate pricing for all such traffic, for which NS must agree to the specific rate. Both elements changed the competitive balance

⁴⁹ *Id.* at 4-5 n.2.

with carriers outside the corporate family by eliminating any competition over the Speedway and foreclosing competition at Meridian.

While KCS attached hundreds of pages of MSLLC Agreements to the KCS Notice, the Notice identified *none of the elements of those agreements that were ineligible for exemption*. The KCS Notice did not mention that the MSLLC Agreements changed the competitive balance with carriers outside the corporate family by 1) reducing the carriers competing over the Speedway for Transcon Intermodal traffic from 2-1, and foreclosing KCS from competing for that traffic in perpetuity, 2) foreclosing competition at Meridian for both Transcon Intermodal and Dallas Intermodal Terminal traffic to and from the East, 3) giving NS the power to unilaterally maintain the perpetual nature of these restraints on competition, even though KCS was nominally the 70% owner of MSLLC, or 4) arranging a division of traffic between NS and KCS. Nor did the KCS Notice provide the factual information from which these points could be inferred. Most important, KCS and NS did not apply under 49 U.S.C. 11322, which provides that “[a] rail carrier ... may not agree or combine with another of those rail carriers to pool or divide traffic or services or any part of their earnings without approval of the Board.” NS and KCS divided traffic and did not request or obtain approval to do so.

The STB’s Federal Register Notice of the KCS Notice and its premise that the MSLLC Transaction “should not result in ... a change in the competitive balance” was “[b]ased on the *parties’ description* of the... transaction,” rather than on a review of the underlying agreements. 71 FR 8339, (February 16, 2006). The STB confirmed this a year later, explaining that the Exemption was “authorized subject only to an after-the-fact Board review if objections are received.” Neither objections nor such a review occurred. *See supra* n.31. Given that the MSLLC Transaction was not eligible for an exemption and the KCS Notice contained false and

misleading information, the exemption, as a matter of law, is void.

C. The Exemption is “Void Ab Initio” because the STB’s Rules do not Permit Exemptions for Transactions that Change Competitive Balance Outside the Corporate Family or Constitute a Division of Traffic, or Notices that Contain False and Misleading Information.

Chairman Oberman asked CSX to outline the “facts that render the exemption void *ab initio*.” Hearing video 9/30/22 at 4:36:00. As we explain above, there are at least four facts: (1) KCS claimed that the MSLLC Transaction would effect no change in the competitive balance with carriers outside the corporate family when it noticed an exemption only available if that were the case; (2) the Exclusivity Arrangements eliminated both CSX and MNBR as competitors for Speedway intermodal traffic moving to and from points east of Meridian; (3) KCS and NS sought an intracorporate transaction exemption when they also needed to seek approval for the KCS-NS division of traffic under 49 U.S.C. 11322; and (4) to obscure these shortcomings in the KCS Notice, KCS provided false and misleading information to the STB.

Understanding why these facts are fatal to the exemption requires an explanation of the class exemption claimed by the KCS Notice. Certain classes of regulated activity were exempted because the ICC wanted to reduce regulation “not required to effectuate the national transportation policy or where the removal of the regulation would be no undue burden on persons or class of persons in interstate or foreign commerce, or where such regulation would serve little or no useful public purpose.”⁵⁰⁵¹ It justified the narrowly circumscribed class exemptions because, “[R]egulation is unnecessary when *minor refinements in corporate structure* must be made. Finally, our regulation of these transactions or class of persons, where

⁵⁰ Congress first authorized exemptions for classes of transactions in 1976. Railroad Revitalization and Regulatory Reform Act of 1976, S.2718, PL 94-210, 94th Cong. Title II, § 207 (1976). In 1980, the ICC adopted procedural rules for 6 class exemptions.

⁵¹ *Railroad Consolidation Procedures*, 363 I.C.C., at 203 (Aug. 8, 1980) (promulgated as 49 CFR § 1111.5(c)).

no operational, competitive, or service functions will change, serves little or no useful public purpose.”⁵² The MSLLC Transaction was not a “minor refinement in corporate structure.”

The intracorporate exemption is for “[t]ransactions within a corporate family that 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.”⁵³ Intracorporate transactions that *would* affect the competitive balance with carriers outside the corporate family were not exempted; they required an application and comprehensive review under 49 U.S.C. § 11323. This assured “transactions within a corporate family do not result in adverse changes in the competitive balance with carriers outside the corporate family.” *See supra* n.51 at 205.

The procedures governing the KCS Notice were set in 1982, requiring the Notice to be filed one week or more before consummation of the MSLLC Transaction. *See supra* n.53 at 99. KCS did not have to serve other parties. The ICC was to publish a notice in the Federal Register within 30 days after KCS filed its notice of exemption, i.e., after the MSLLC Transaction was expected to be consummated. To assure the integrity of the no-review exemption process, the ICC relied on the sworn verification of the exemption notice: “[w]e will not shift the burden of proving that false or misleading information has been used to obtain an exemption, since we are requiring the notice to be a sworn statement.”⁵⁴

In 1982, the ICC reiterated the rule promulgated in 1980: “If the notice of exemption contains false or misleading information *which is brought to the Commission’s attention*, the

⁵² *Id.* at 206 (citations omitted) (emphasis added).

⁵³ *Railroad Consolidation Procedures*, 366 I.C.C., at 94 (1982) (promulgated as 49 CFR § 1111.2(d)(3)).

⁵⁴ *Id.* at 211. The teeth supporting the requirement that notice be a sworn statement are found in 49 CFR § 1104.5(c). “Knowing and willful misstatements or omissions of material facts constitute federal criminal violations punishable under 18 U.S.C. 1001. These misstatements are also punishable as perjury under 18 U.S.C. 1621.”

Commission shall summarily revoke the exemption to that carrier and require divestiture.” (Emphasis added).⁵⁵ That rule continues to this day. 49 CFR 1180.4(g)(ii) (Oct. 1, 2020). While the regulations provide a formal exemption revocation process, they do not restrict how false and misleading information can be brought to the Board’s attention.

In 2006, KCS filed the KCS Notice. Under the governing statute⁵⁶ and the regulations,⁵⁷ the KCS Notice was a representation that the MSLLC Transaction and related Agreements complied with the STB’s requirements and did not require review or approval. While the STB granted a stay to permit CN, KCS, and NS to resolve a limited issue as to whether KCS could transfer its right to operate over CN to MSLLC, no party opposed the MSLLC Transaction. FD 34822, Decision (Jan. 23, 2006). The MSLLC Transaction “became effective in due course” and escaped the comprehensive review of competition effects on the public interest required for a transaction with competitive effects outside a corporate family.

D. The STB should not interpose laches to avoid consideration of CSX’s requested Speedway Conditions.

At the hearing, Chairman Oberman asked CSX to address whether a laches argument might prevent CSX from seeking conditions to remedy the Exclusivity Arrangements.⁵⁸ “The equitable doctrine of laches bars the plaintiff whose unreasonable delay in prosecuting a claim or

⁵⁵ *Supra* n.45 at 100.

⁵⁶ “The Board... shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part is...***not needed to protect shippers from the abuse of market power.***” U.S.C. § 10502(a). (Emphasis added).

⁵⁷ A transaction within a corporate family is exempt if it does, “not result in adverse changes in service levels, significant operational changes, or a ***change in the competitive balance*** with carriers outside the corporate family.” 49 CFR §1180.2(d) (emphasis added).

⁵⁸ See Hearing video 9/30/2022 at 3:04:13. Neither of the interested parties (Applicants and NSR) has yet raised such a defense but might be expected to do so on brief.

protecting a right has worked a prejudice to defendant.”⁵⁹ Laches does not preclude consideration of CSX’s challenge to the perpetual effects of the Exclusivity Arrangements.

CSX’s Speedway Conditions are premised on harm to competition that would be exacerbated by the Transaction and can be corrected here. *See supra* at II.B. CSX filed timely requests for conditions on February 28, 2022, and July 12, 2022. Regardless of when the competitive harm began, this proceeding is the appropriate forum for assuring those harms are not enshrined and exacerbated.

Even if the CSX Conditions involve the Board’s revisiting the 2006 Exemption, laches should not bar the Board’s review of the merits of CSX’s requests. When entertaining a laches argument, this Board has held: “. . . the time elapsed is relevant, and, depending on the facts of the case, concerns for administrative finality, repose, and detrimental reliance must be balanced with those factors that support reopening and revocation, particularly when the challenged exemption pertains to a transaction that cannot readily be undone . . .”⁶⁰ The timing of CSX’s request is not a bar to consideration of the merits, but a factor in the consideration of the merits, and CSX is not seeking to unwind the 2006 transaction but only to end NS’s perpetual exclusivity.

1. The absence of challenges to the Exemption until this proceeding was not unreasonable.

Because the KCS Notice was false, misleading, and improperly filed, it is understandable that before it became effective, no party raised concern that the competitive effects of the MSLLC Arrangements could not be exempted. It was also reasonable that no one before this proceeding

⁵⁹ 1 D. Dobbs, *Law of Remedies* §2.3(5), p. 89 (2d Ed. 1993) (quoted in *SCA Hygiene Products Aktiebolag, et al. v. First Quality Baby Products, LLC, et al.*, 580 U.S. 328, 137 S.Ct. 954, 960 (2017)).

⁶⁰ *Mountain Laurel Railroad Company – Acquisition and Operation Exemption – Consolidated Rail Corporation*, FD 31974 (served May 15, 1998), slip op. at 8 (citations omitted).

had conducted the rigorous legal analysis required to understand that the KCS Notice was defective and what KCS failed to disclose in its Notice of Exemption was unlawful.

Although the CSX businesspeople knew they did not win the KCS-CSX interline business in 2006, the transaction was apparently exempted under the KCS Notice. They had no reason to question that exemption.

However, on January 12, 2022, NS filed its Notice of Intent to file a responsive application that would *expand its exclusivity rights under the MSLLC Agreements to a broader range of intermodal traffic and to automotive and premium boxcar traffic*. NS-6 at 5 (Jan 12, 2022).

This prompted CSX's rigorous legal review of the MSLLC Agreements because the Transaction and the proposed NS Responsive Application, if approved, would incorporate the MSLLC Agreements. ICCTA could immunize the anticompetitive elements of those transactions from all other law, including the antitrust laws, and STB approval of those Transactions might sanctify the MSLLC Agreements against further STB scrutiny. If any competitive effects were not raised and considered here, there might be no grounds for later re-opening these issues. CSX was compelled to explore what became the CSX Speedway Conditions in this proceeding.⁶¹

⁶¹ Member Fuchs quoted a passage in one of CSX's filings in *Louisville & Indiana* referencing the *Meridian Speedway* Exemption, suggesting CSX understood the Exclusivity Arrangements and drew from them. Hearing video at 3:15:05. This was not the case.

Louisville & Indiana, unlike *Meridian Speedway*, was a minor transaction proceeding where the Board conducted a careful competition analysis. Its initial decision accepting CSX's application for review referenced the 2006 exemption in *Meridian Speedway* (FD 34822) in a paragraph stating the L&I transaction was "minor" and outlining possible competitive concerns. *CSX Transp., Inc. – Joint Use – Louisville & Ind. R.R. Co.*, FD 35523 Decision No. 3, slip op. at 5 (STB August 1, 2013) ("Decision 3"). The L&I restrictions did not prevent operation or haulage over the jointly used line but, as the paragraph explained, required L&I to pay CSX for overhead movement of cars of a certain height and weight over the improved line (car types L&I had not previously handled) and precluded L&I from granting operating rights to other Class I railroads without CSX's permission. The Board then cited *Meridian Speedway* as approving "certain restrictions from other railroads operating over [an improved line]." In a subsequent

This rigorous legal analysis of over 400 pages of Exhibits to the KCS Notice had to determine a) what the provisions of the many separate but interrelated MSLLC Agreements did; b) which were normal provisions of JV agreements intended to protect the legitimate interests of minority members and which were not; and c) which of the latter restrained competition.

During CSX's initial, painstaking review, it did not yet have access to any documents or data except the misleading 2006 KCS Notice and its redacted public exhibits to confirm its January 2022 findings. Document production by KCS, NS, and other railroads only concluded on July 7, 2022. CSX was able to use traffic tapes to bolster its conclusion that the Exclusivity Provisions were anticompetitive and unsanctioned only after its economists gained access to that data in the Spring of 2022. The economists depended on those tapes in evaluating the competitive harms, and many would likely not have been available outside this proceeding. Further, CSX could not compare the original 2000 NS haulage agreement to the KCS Notice to identify changes until it was produced in discovery. *See supra* §VI. B. Finally, CSX did not have the contemporaneous business documents that revealed NS's motivations. *See supra* §III.C.

2. Only the public interest has suffered because the Exclusivity Arrangements were not earlier reviewed by the STB.

Revisiting and remedying the 2006 exemption now do not deprive the STB, NS, or the Applicants of evidence about or witnesses to the Meridian Speedway arrangements that could

paragraph, the Board stated it would carefully consider the competitive concerns. CSX subsequently block-quoted those several paragraphs, including that containing the *Meridian Speedway* reference, back to the STB, not for a particular proposition, but because CSX was responding to how the Board – *in the Louisville and Indiana case* – articulated the issues. Resp. of CSX Transp., Inc. and Louisville & Ind. R.R. Co. 7-8, FD 35523 (Oct. 21, 2013). The Board's final decision, *CSX Transp., Inc. – Joint Use – Louisville & Ind. R.R. Co.*, FD 35523 Decision No. 7 slip op. at 4 (STB April 10, 2015), cited the language of Decision 3 and determined after careful consideration that the public benefits of the line improvements outweighed any potential anticompetitive effects of the restrictions. There is no indication CSX read the MSLLC Agreements or “drew from those contracts” to design its joint use arrangement with L&I or relied in any meaningful sense on their legality to support its application.

prejudice a defense. NS's Amended Comments dedicated eleven pages to the MSLLC transactions. NS-12 at 9-21. NS produced many contemporaneous documents in discovery regarding the 2006 transactions and their negotiation. *See, e.g., supra* n.35-38. NS's Verified Statement author, corporate deponent, and STB hearing witness Michael McClellan is a self-described architect of the Meridian Speedway arrangements.⁶²

As to the need for administrative finality and repose, while CSX's evidence would render the 2006 Exemption void *ab initio*, the CSX Conditions do not threaten administrative finality because they do not seek to void the MSLLC Transaction. They seek only to excise Exclusivity Arrangements neither presented to the STB nor properly reviewed and adjudicated.

Similarly, neither NS nor Applicants can assert that foreclosing future harm to competition after it has been inflicted on the public for sixteen years is prejudicial. NS stresses repeatedly that significant investment was necessary in 2006 for the line to be functional and that NS's business success using the Speedway is attributable to that investment. *See, e.g.,* NS-12 at 11-12; NS-14 at 12-13. But the relief CSX seeks is not to unwind the MSLLC Transaction, nor to terminate NS' or Applicants' business over the Speedway, nor to obtain relief for past practices. The CSX Conditions would only to eliminate NS's *continuing perpetual anticompetitive exclusivity*. CSX's uncontradicted evidence shows this exclusivity was not and is not now reasonably necessary for these investments to be highly profitable. *See* CSX-13 at 55-78; CSXT-13, Carey V.S., at 42-59. If the CSX Conditions were granted, NS would lose none of its initial investment premised on the Exclusivity Arrangements because, as CSX has shown, { [REDACTED] }

⁶² *See* NS-12, Ex. B, at 1 ("I wrote the business plan for NS's investment in the Meridian Speedway and was one of the chief negotiators of this transaction").

██████████.}}⁶³ NS would continue to recoup any additional investments in the MSLLC, only now in an environment of lawful competition rather than anticompetitive exclusivity. The only suggestion otherwise is NS's *ipse dixit* "free-riding" argument that CSX has refuted at length on factual, legal, and economic grounds. *See supra* at 9-10. Without review of CSX's requested conditions, the public interest will continue to suffer from the continuation and exacerbation of the Exclusivity Arrangements and face the risk that those arrangements will be afforded protection if the Board approves the Transaction.

3. Strict application of laches would not bar the CSX Conditions.

Even if the STB considered laches a potential bar against review of CSX's requested conditions, the doctrine would not apply. We have explained why CSX reasonably assumed the KCS Notice was legitimate, and why this proceeding is the right place to address the 2006 Exemption. CSX's showing that NS and Applicants have suffered no prejudice from having the benefits of the Exclusivity Arrangements for over 16 years applies under the laches doctrine. Laches requires proof of both (1) lack of diligence and (2) prejudice to the party asserting the defense.⁶⁴ The ICC explained: [D]etriment to the party asserting laches is an essential ingredient."⁶⁵ Prejudice can ordinarily be shown as "trial" or evidentiary prejudice, or as

⁶³ CSXT-13, Carey V.S., at 57-59. Lacking significant later investments in the Speedway, NS seeks to muddy this distinction claiming that *all* its Southeastern intermodal terminal investments are tied to its Speedway exclusivity. The facts do not support this contention: {██████████} of the traffic volumes to and from the terminals it identifies are associated with routes other than the Speedway. *See* Carey HC-WP "NS IM Terminal Meridian Share.xlsx" *See also* CSXT-13, Ex. A at 16-17. These investments are "business decision[s] to capitalize on ... market opportunit[ies]" profitable without exclusive Speedway service. *See Gasser Chair Co. v. Infanti Chair Mfg. Corp.*, 60 F.3d 770, 774 (Fed. Cir. 1995) (to constitute economic prejudice, investments must occur "because of and as a result of the delay, not simply a business decision to capitalize on a market opportunity.")

⁶⁴ *E.g., Kansas v. Colorado*, 514 U.S. 673, 687 (1995).

⁶⁵ *Home Transportation Co., Inc. Modification of Certificate*, 129 M.C.C. 842, 859 (I.C.C. 1978).

“economic” prejudice.⁶⁶ Here, there is no “loss of evidence or witnesses supporting [NS’s or Applicants’] position,” and no trial prejudice.⁶⁷ The CSX Conditions would not deprive NS or Applicants of benefits from investments made “because of and as a result of the delay,” and cause no economic prejudice.⁶⁸ “[L]aches is not[,] like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced.”⁶⁹ NS and Applicants may argue, despite KCS’s misleading Notice of Exemption, CSX still knew about NS’ exclusivity; they cannot show the passage of time made facing the issue now prejudicial.

VII. CONCLUSION

CSX requests the Board impose conditions to remedy potential harms to the public interest that would result from the Transaction if it were approved without them. The first three conditions relate to the Speedway Restraints discussed above. The last three relate to other gateways across the CPKC network. We discussed these last three conditions in our initial Request for Conditions of February 28, 2022 (CSXT-8), and, except as discussed above, refer the Board to those discussions for further detail. CSX requests that the STB:

- 1) Remedy the Transaction’s exacerbation and enshrinement of the anticompetitive effects of the MSLLC Arrangements by the Exclusivity Arrangements.
- 2) Remove barriers to competition on the Speedway Gateways –Meridian, Shreveport, and Dallas – and ensure shippers can enforce this requirement as well as a general STB enforceable condition requiring all affected CPKC gateways be open on commercially reasonable terms.
- 3) Deny any NS Responsive Application seeking to expand its rights under the Exclusivity Arrangements.
- 4) Impose conditions to assure the continued competitiveness of the New Orleans Gateway.
- 5) CSX requests the STB impose conditions to obviate any risk the Transaction might harm efficient competition for East-West traffic through the gateway at East St. Louis, IL.
- 6) Impose conditions to protect competition for traffic to and from Mexico from anticompetitive activity and preclude inefficient traffic diversions.

⁶⁶ See, e.g., *Pro Football, Inc. v. Harjo*, 565 F.3d 880, 882 (D.C. Cir. 2009).

⁶⁷ *Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 844 (D.C. Cir. 1982).

⁶⁸ *Gasser Chair Co. v. Infanti Chair Mfg. Corp.*, 60 F.3d 770, 774 (Fed. Cir. 1995).

⁶⁹ *Galliher v. Cadwell*, 145 U.S. 368, 373 (1892).

Respectfully Submitted,

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Dated: October 21, 2022

CERTIFICATE OF SERVICE

I certify that I have caused the foregoing CSX Transportation, Inc. Brief to be served electronically or by first-class mail, postage pre-paid, on the Secretary of Transportation, the Attorney General of the United States, Applicants' representatives, Administrative Law Judge Thomas McCarthy, and all parties of record in this proceeding.

/s/ Paul A. Cunningham

Dated: October 21, 2022

REDACTED

EXHIBIT

A

REDACTED

EXHIBIT

B