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November 20, 2025

VIA E-Filing

Chief of Case Administration
Office of Chief Counsel
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

ENTERED
Office of Chief Counsel
November 20, 2025
Part of
Public Record

Re: Norfolk S. Corp. & Norfolk S. Ry. Co. – Acquisition of Control – Norfolk & Portsmouth Belt Line Rr. Co., FD 36836 (Sub-No. 1)¹

Dear Chief of Case Administration,

Norfolk Southern Corporation and Norfolk Southern Railway Company (NS) collectively submit its Comments In Opposition To CSX Transportation, Inc.'s Responsive Application For Terminal Trackage Rights. There is not a Highly Confidential or Confidential version of this filing. If there are any questions about this matter, please contact me directly, either by telephone: at 202-663-7823 or by e-mail: wmullins@mullinslawgroup.net. If I am unavailable, you may contact John V. Edwards, who can be reached at (202) 663-7853 or by e-mail at jedwards@mullinslawgroup.net.

Respectfully submitted,

/s/ William A. Mullins

William A. Mullins
Attorney for Norfolk Southern Corporation and
Norfolk Southern Railway Company

Enclosure
cc: Parties of Record

¹ As a related application to an underlying control application, CSXT should have designated its responsive application as sub-docket No. 1 to the main docket. It did not do so. Nor did the Board create a sub-docket number. As a result, NS is e-filing this under the main docket, although to distinguish from the main docket, NS is designating this as a filing in Sub-No. 1. NS respectfully requests the Board to redesignate all filings related to CSXT's responsive application as sub-docket No. 1.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36836 (Sub-No. 1)

**NORFOLK SOUTHERN CORPORATION &
NORFOLK SOUTHERN RAILWAY COMPANY
– ACQUISITION OF CONTROL –
NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY**

**COMMENTS IN OPPOSITION TO CSX TRANSPORTATION, INC.'S
RESPONSIVE APPLICATION FOR TERMINAL TRACKAGE RIGHTS**

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**NORFOLK SOUTHERN CORPORATION &
NORFOLK SOUTHERN RAILWAY COMPANY
– ACQUISITION OF CONTROL –
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**COMMENTS IN OPPOSITION TO CSX TRANSPORTATION, INC.’S
RESPONSIVE APPLICATION FOR TERMINAL TRACKAGE RIGHTS**

The Board should deny the Responsive Application. CSXT¹ fails to meet the statutory standard to show that the terminal trackage rights are (1) are in the public interest; and (2) are practicable and can be operated without impairing Norfolk Southern Railway Company (NSR)’s and Norfolk and Portsmouth Belt Line (NPBL) services to their own customers.

INTRODUCTION

On September 18, 2025, CSXT filed a Responsive Application (“CSXT-23”) seeking terminal trackage rights over certain lines of NS and NPBL in Hampton Roads, Virginia. As discussed in NS-29, CSXT’s Responsive Application is so devoid of even the basic *prima facie* evidence necessary for the Board to consider a terminal trackage rights application that the Responsive Application should be dismissed or rejected outright.²

¹ In this submission, CSX Transportation, Inc. shall be referred to as “CSXT” or “CSX.” Norfolk Southern Corporation (“NSC”) and Norfolk Southern Railway Company (“NSR”) shall be referred to as “NS.” The Surface Transportation Board shall be referred to as the “Board” or the “STB.” The Norfolk and Portsmouth Belt Line Railroad shall be referred to as “NPBL.” Other abbreviated terms will be defined as well hereinafter.

² NS submitted NS-29, Motion to Summarily Reject CSX Transportation, Inc.’s Responsive Application for Terminal Trackage Rights, on November 14, 2025.

If the Board does not summarily reject CSXT's responsive application in response to NS-29, it should deny that responsive application on the merits. The Responsive Application fails to justify such an egregious government intervention – imposing trackage rights over the tracks of NS and NPBL when CSXT already has access to the Norfolk International Terminal (NIT) via switching and drayage. Granting terminal trackage rights is the legal equivalent of taking a sledgehammer to swat a fly. CSXT continues to obfuscate the truth with its failed legal strategy from the federal courts. The fundamental truth is that CSXT does not use the NPBL switch for intermodal freight because it is incentivized to dray that traffic to/from NIT by a heretofore secret subsidy paid by the Port of Virginia. CSXT's complaint stems solely from its refusal to pay NPBL's switching rate for its intermodal traffic because doing so results in less profit than what CSXT can make using the subsidized drayage.

CSXT has engaged in all kinds of legal gymnastics to force the NPBL to adopt a discriminatory lower switching fee for CSXT's intermodal traffic, *and only for CSXT's intermodal traffic*, not for any individual shipper. Yet, the current NPBL rate, per container, is essentially equivalent to the CSXT would obtain without using the Port of Virginia drayage subsidy. For almost a decade, CSXT has chosen the dubious path of litigation to force NPBL to adopt a discriminatory lower rate in violation of the NPBL's governing documents and at the expense of the NPBL shippers, who would see their rates go up. And when CSXT failed in its strategy in federal court, it decided to not only relitigate the same issues before the Board, but to respond with an all-out assault before the Board, filing numerous petitions and complaints, and arguing for every possible remedy, regardless of the merits of its claims.

Neither NS nor the NPBL have taken any steps to frustrate CSXT from using NPBL to serve all locations on the NPBL lines, both customers and NIT. In fact, the record is clear that CSXT routinely switches merchandise traffic to/from the NPBL to serve CSXT customers

located on NPBL's lines, including customers located adjacent to the NIT. The Board should not be misled by CSXT's dubious arguments and deception. There is absolutely no failure of the marketplace that requires the Board to award intrusive trackage rights to the NIT. If there is a failure, it is the failure of CSXT to negotiate in good faith and fulfill its fiduciary duties to the NPBL.

The irony of CSXT seeking access in this docket should not be lost on the Board. CSXT was one of the most voracious opponents of the Board's efforts in Ex Parte No. 711 – a proceeding by which shippers sought a similar type of remedy – access to another railroad.³ CSXT opposed a shipper's right to obtain access to a second railroad even when a shipper was suffering from high, near monopolistic, rates and/or inadequate service by its incumbent railroad. CSXT was even the lead appellant appealing the Board's proposed remedies set out in Ex Parte No. 711 (Sub-No. 1).⁴

Now, CSXT wants the Board to forget about its prior arguments and its opposition to having government-mandated access to a second railroad. It now rejects a market-based solution and fully supports government-imposed access, so long as it benefits CSXT. CSXT is asking for the federal government to intervene simply because it does not like the rate it would have to pay for NPBL to switch intermodal traffic from NIT to the CSXT yard. CSXT claims that such a rate forecloses it from serving NIT. This claim is absurd on its face.

The NPBL rate is cost-based and is nowhere near an unreasonable rate so as to foreclose CSXT's use of that rate. In fact, CSXT has no concerns with paying this switching rate for its merchandise traffic. Shippers located on the NPBL also have no problem paying the rate for the

³ See generally Opening Comments of CSX Transportation, Inc. in Reciprocal Switching (2016 NPRM), STB Ex Parte No. 711 (Sub-No. 1) (filed October 26, 2016).

⁴ Id.

delivery and pick-up of merchandise traffic and even some limited container traffic to/from their facilities. But CSXT does not want to pay it for its intermodal traffic to/from NIT. In the near decade that CSXT has engaged in litigation, it has failed to produce any evidence from a shipper that has complained about NS's NIT rate or the NPBL switch rate.

Moreover, as discussed in NS-32, NS's reply to CSXT's opposition and requests for conditions, the record in the main docket clearly demonstrates that CSXT competes vigorously and effectively against NS at the POV and at other East Coast Ports. And both CSXT and NS have to compete vigorously against trucks, the mode that actually carries the majority of the container traffic to/from POV to the Midwest. CSXT is not "foreclosed" from serving NIT or the POV, or from offering competitive service to ocean carriers. CSXT serves NIT today via drayage and can serve via an NPBL switch. As discussed in NS's reply, NS-32, if CSXT believes that the NPBL switch makes its overall through rate too high, CSXT is free to maintain its current rate levels by incorporating the NPBL switch rate and lowering its own division requirement. But CSXT chooses not to do so. CSXT's opposition is about maximizing its own profit, not creating public benefits. It is not surprising that CSXT would rather preserve its own contributions (profit) and instead seek government-imposed intervention and regulation.

CSXT's attempt to seek terminal trackage rights in this proceeding reveal that CSXT's true goal is not a narrowly-tailored remedy to address its perceived harms, but to obtain a windfall against a direct competitor. Although CSXT's entire opposition to the control transaction centers on the NPBL's cost-based switch rate purportedly being too high, CSXT is not seeking any form of a rate-related remedy. Instead, CSXT has opted for intrusive terminal

trackage rights on both NS and NPBL. As discussed in this reply to the Responsive Application, there is no basis for granting CSXT's Responsive Application.⁵

ARGUMENT

Despite its argument that NPBL's switching rate is too high, thereby "foreclosing" CSXT from using NIT, CSXT's Responsive Application does not seek a reduction in the switching rate or even adoption of changes to NPBL's switching operations. Instead, in its Responsive Application, CSXT seeks terminal trackage rights to operate over NS and NPBL's tracks to serve NIT directly.

One would think that since the switching rate is the alleged harm, CSXT would seek some sort of rate prescription remedy. But it does not. Instead, CSXT has sought a plethora of remedies⁶ in its opposition filing that have nothing to do with the switching rate, i.e., the alleged cause of CSXT's harms.

⁵ This reply is narrowly tailored, focusing solely on the legal and factual issues specific to a terminal trackage rights application. CSXT should not be allowed to use its right to file a rebuttal to the arguments contained in this reply as a means to file an unlawful reply to NS's reply on the merits. Rebuttal must focus on the narrow issues set forth in the Responsive Application and any reply to the Responsive Application. Norfolk S. Corp. and Norfolk S. Ry. Co. – Acquisition of Control – Norfolk & Portsmouth Belt Line R.R. Co., FD 36836, Decision No. 11 (STB served Sept. 4, 2025) (specifically limiting rebuttals to being in support of responsive applications but not providing any replies to the separately categorized responses to comments, protests, requests for conditions and other opposition). See, Western Fuels Association, Inc., and Basin Electric Power Cooperative v. BNSF Railway Company, STB Docket No. 42088 (STB served February 18, 2009) (explaining that "[o]ur general rules of practice limit the permissible scope of rebuttal statements 'to issues raised in the reply statements to which they are directed.'" (citing 49 C.F.R. 1112.6).

⁶ For example, in addition to this Responsive Application seeking terminal trackage rights, CSXT is also seeking the restoration of the discontinued Connecting Track and the diamond and turnout connecting to that track. Service over the Connecting Track was discontinued after NS, CSXT, and NPBL all agreed that operations over that track were no longer necessary and the track, turnout and diamond were too expensive to maintain. The Connecting Track is still intact and has not been removed. The diamond and the turnout were removed.

Moreover, CSXT's Responsive Application should be rejected as being deficient on its face as failing to put forth a *prima facie* case as discussed in NS-29. CSXT presents zero analysis to support the assertion that terminal trackage rights are necessary for CSXT to be more competitive at NIT or would benefit the public. For example, CSXT offers no analysis to support that (1) terminal trackage rights would actually result in a lower rate to the customers/shippers moving traffic through NIT than either service via the existing NPBL switching rate or the current subsidized drayage rate, (2) the total costs associated with CSXT's use of terminal trackage rights would be lower than its total costs to operate via its current drayage operations; or (3) if CSXT were to obtain terminal trackage rights, this would result in ocean carriers switching from NS to CSXT, switching from other East Coast Ports to the POV or switching from truck to rail.

In order to be successful on its Responsive Application on the merits, CSXT needs to prove (and it has the burden of proof)⁷ that the terminal trackage rights it seeks are (1) in the public interest as that standard has developed and been applied in Section 11102 cases; (2) can be operated practically and without substantial interfering with NS's and NPBL's existing operations; and (3) that compensation will be adequately secured before it begins to operate.

⁷ See 5 U.S.C. §556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."). See also, e.g., Midtec Paper Corp. v. Chi. & N. W. Transp. Co. (Use of Terminal Facilities and Reciprocal Switching Agreement), 1986 ICC LEXIS 42, *29; Mo. Pac. R.R. v. La. & Ark. Ry. & Ill. Central R.R., 332 I.C.C. 569, 583 (1968); Dardanelle & Russellville Railroad Company—Trackage Rights Compensation—Arkansas Midland Railroad Company, Finance Docket No. 32625, 1996 STB Lexis 232 (STB) (served Sept. 5, 1996) ("As the party seeking an order setting compensation in this trackage rights proceeding, DRRC/CALM has the burden of proof." [footnote omitted], citing 5 U.S.C. §556(d)); Ametek, Inc. - Petition For Declaratory Order; Ametek, Inc. v. Panther Valley Railroad Corporation, et al., Nos. 40663 and 40664, 1992 ICC Lexis 60 (ICC served March 26, 1992) ("Irrespective of what statutory section is ultimately found to govern these proceedings, complainant-petitioner has the burden of proof.").

CSXT's Responsive Application fails to meet any of those standards and its Responsive Application should be denied.

I. CSXT HAS FAILED TO ESTABLISH THAT ITS RESPONSIVE APPLICATION MEETS THE PUBLIC INTEREST STANDARD OF SECTION 11102

A. The Public Interest Standard As Applied In A Terminal Trackage Rights Case

As noted above, before the Board can impose a remedy of terminal trackage rights, it must make three findings. The first required finding is that the terminal trackage rights is “in the public interest.” See 49 USC 11102(a). Today, there are arguably four different possible tests for meeting the “public interest” standard in the context of a terminal trackage rights application: (1) the standard based on the Midtec decision;⁸ (2) the “bridge the gap” standard, when terminal trackage rights are needed to connect trackage rights granted in the context of a merger;⁹ (3) a significant service failure that justifies the prescription of alternative service;¹⁰ and (4) the same public interest standard used in mergers between Class I railroads.¹¹

⁸ Midtec Paper Corp., et al. v. Chicago and N.W. Transportation Co., 3 I.C.C. 2d 171 (1986), aff'd, 857 F.2d 1487 (D.C. Cir. 1988) (“Midtec”) (explaining that the public interest standard should be similar to the test found in Section 11103(a) and (c)). Effective January 1, 1996, Section 11103 was modified by an act of Congress and, as such, no longer represents the standard the Court referred to in 1986. The version of the rule that the Court referred to in 1986 supports the notion that the public interest is determined by a variety of factors such as whether an action is practicable, whether there is substantial impairment for the owning carrier, and whether such an action is necessary to provide competitive rail service. See also 49 CFR §1144.

⁹ Canadian National Ry., et al – Control – Illinois Central Corp., et al., STB Docket No. FD 33556 (Decision No. 37), slip. op. at 51-52 (STB served May 25, 1999).

¹⁰ 49 CFR §1146; 49 CFR §1147; Expedited Relief for Service Inadequacies, STB Ex Parte No. 628 (STB served December 21, 1998).

¹¹ Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, Spcsl Corp., and The Denver and Rio Grande Western Railroad Company, STB Finance Docket No. 32760 (Decision No. 44), 1 STB 233 (STB served August 12, 1996) (“UP/SP Decision No. 44”); BNSF Railway Company – Terminal Trackage Rights – Kansas City Southern Railway Company and Union Pacific Railroad Company, FD 32760 (Sub-No. 46) (STB served July 5, 2016) appeal pending DC Circuit in Kansas City S. Ry. Co. v. Surface Transp. Bd. United States, 2022 U.S. App.

The first three standards purposefully create a high bar to clear, which is wholly consistent with the Board's long-standing determination that terminal trackage rights are intended to be the "remedy of last resort." See Shenango Inc., et. al. v. Pitts., Chartiers & Youghioghenny Ry. Co., 5 I.C.C.2d 995, 1002 (1989) (as an ameliorative condition, "[t]rackage rights are a remedy of last resort for use when less intrusive remedies such as rate relief and reciprocal switching are insufficient"). Terminal trackage rights are not to be granted if there are less intrusive remedies to address identified competitive harms. Western Fuels Service Corporation v. The Burlington Northern and Santa Fe Railway Company, et al., STB Docket No. NOR 41987, et al. (STB served Jul. 28, 1997), slip op. at 7 ("[a]s we have stated on several occasions, the prescription of terminal trackage rights is an extraordinary remedy, one to be afforded only when less intrusive remedies such as rate relief, alternative through routes, or reciprocal switching are insufficient") (citations omitted).¹²

The fourth standard adopts a broader and more fluid approach to the public interest standard under 11102 and has been used by the Board (although rarely) in Class I merger cases involving major transactions. Even if the Board were to apply the application of such a standard in major transactions, that standard is not applicable here as this is a significant transaction that

LEXIS 22376 ("Lake Charles"). For a detailed discussion of the status of the law as of 1999 before the July 5, 2016 decision in Lake Charles, Exhibit A. Section 11102: Is it the Answer to Competitive Access? – Examining the Varying Standards Applied by the Surface Transportation Board When it is Determining Whether to Grant Terminal Trackage Rights Access, Journal of Transportation, Law, Logistics, and Policy Spring 1999, Vol 66, No. 3 [SPENCER MAKE SURE CITE IS RIGHT]]

¹² CSXT already has access to NIT via the lesser intrusive remedy of switching rights. NS's comments in NS-29 prove that such switching access does not foreclose CSXT from competing for NIT traffic to/from the Midwest. If the Board rejects NS's argument, the Board still cannot and should not impose the intrusive remedy of terminal trackage rights, especially if less intrusive remedies are available, such as establishing a switching rate consistent with the SSW compensation standards.

does not rely upon a broad and flexible public interest determination.¹³ CSXT's attempt to rely upon some broad public interest standard that is applicable to major merger proceedings should be rejected.

B. CSXT's Application Does Not Apply the Correct Standard

CSXT has fallen far short of meeting any of the four public interest standards. Indeed, CSXT does not argue that its requested trackage rights are appropriate under Midtec, nor could it as NS's and NPBL's actions have not risen to the type of anticompetitive behavior that Midtec was designed to remedy. Similarly, CSXT does not argue, nor could it, that the rights are appropriate under the "bridge the gap" standard or the "service inadequacy" standard.

Instead, CSXT is forced to rely wholly on the fourth public interest standard, as set forth in the UP/SP case and its related decision in the Lake Charles case, both of which arose from identical facts. However, the facts of those cases are easily distinguishable from this case. Most fundamentally, the UP/SP and Lake Charles case arose from a merger between two Class I carriers that was a "major" transaction under the statute. In contrast, this case is a control transaction involving only one Class I carrier and is treated as a "significant" transaction under the statute.¹⁴ And, the treatment of the public interest standard in a major transaction is substantially different than in a significant transaction.

¹³ Further, that standard is not applicable here as the proposed transaction does not involve a merger per se and instead proposes merely a continuation of NPBL as a separately-governed entity.

¹⁴ Although the Board has treated this transaction as "significant," it qualified as a "minor transaction" and NS maintains that under the applicable legal standard this transaction should have been treated as "minor." And, if this transaction had been treated as "minor," responsive applications, such as this one, would not even be permitted. 49 CFR 1180.4(d)(1). Indeed, this transaction could have qualified under 49 U.S.C. §10502 as regulation was not necessary to carry out the rail transportation policy, is limited in scope, and regulation is not needed to protect shippers from the abuse of market power.

In the UP/SP decision the Board stated:

Whether the ICC ever applied its relatively exacting Midtec precedent in the context of a merger is a matter of some debate. In any event, we believe that it is inappropriate to do so here, and, to the extent that ICC cases suggest otherwise, we specifically overrule them. Instead, we will apply the broad "public interest" standard that is in section 11103(a) itself. Congress gave us broad authority in both the public interest standard in section 11103 and in the public interest standard of section 11343. Thus, we believe that it is appropriate for us to retain the flexibility to use the terminal trackage rights provision to prevent carriers opposing a merger from blocking our ability to craft merger conditions that are clearly in the public interest as the ICC did in the past.

UP/SP, Decision No. 44, slip. op. at 169 (emphasis added.) Similarly, in the Lake Charles case, the Board noted that “[p]ursuant to that broad and flexible authority in the merger context, the Board concluded that terminal trackage rights are in the public interest where they are essential to effectuating merger conditions designed to ameliorate potential anticompetitive effects.”¹⁵

However, although the Board has “broad and flexible” authority to approve a major merger transaction, the Board does not have similar authority in a significant transaction, such as this one. In a major merger proceeding, as in the UP/SP and Lake Charles decisions, the statutory standard affords the STB wide latitude to consider a myriad of factors in determining whether to approve a transaction, directing the Board to consider “at least” the 5 factors noted in the statute. See 49 U.S.C. 11324(b).¹⁶ This is not the case for a significant transaction.

¹⁵ See Lake Charles, slip op. at 8 (emphasis added). Even if the Board were to determine a broad public interest standard is the applicable standard under section 11102, as discussed in Section I, infra, these terminal trackage rights are not essential.

¹⁶ These five factors include: (1) the effect of the proposed transaction on the adequacy of transportation to the public; (2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction; (3) the total fixed charges that result from the proposed transaction; (4) the interest of rail carrier employees affected by the proposed transaction; and (5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system.

Unlike a major transaction, a significant transaction does not afford the Board broad discretion in interpreting when a transaction serves the public interest.¹⁷ Instead, for a significant transaction the Board is directed that it “shall” approve such a transaction unless:

- (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and
- (2) the anticompetitive effect of the transaction outweigh the public interest in meeting significant transportation needs.

See 49 U.S.C. 11324(d) (emphasis added). So, if a significant transaction would not result in a likely substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States, the Board must approve the transaction, without even considering whether the “public interest” (meaning “public benefits”) outweighs those anticompetitive effects. Accordingly, it appears clear that when the STB adopted the rationale used in the UP/SP and Lake Charles cases – based in part on the “broad and flexible” authority afforded the Board in the section 11343 (now 11324(b)) – its intent was to apply such a standard to proposed major transactions and not to significant transactions.¹⁸ Indeed, in the

¹⁷ A “major transaction” is clearly defined as one that involves the merger or control of at least two Class I railroads. All other transactions are either significant, minor, or exempt. Only major transactions provide the Board with this type of broad discretion to define the public interest standard; indeed, the same statutory standard governs significant and minor transactions.

¹⁸ Even with respect to mergers between Class I railroads, it is unclear if the use of a broad public standard for terminal trackage rights is generally accepted. The Lake Charles case is currently under appeal. In addition, almost 3 years after the Board’s decision in the UP/SP case, the Board appeared to take a narrower view of the public interest standard in Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated--Control--Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central and Pacific Railroad Company, and Cedar River Railroad Company, STB Finance Docket No. 33556 (STB served May 25, 199), slip op. at 51-52 (citation omitted) (in the context of a merger, terminal trackage rights have only been granted “in limited circumstances where the rights were designed to bridge a gap within broader trackage rights imposed on applicants and deemed necessary to remedy or mitigate anticompetitive effects in the transaction.”). However, later in the Lake Charles case, the Board reasserted a general public interest standard for terminal trackage rights “in the context of a merger.” Lake Charles, slip. op. at 8-9. Lake Charles was not an independent case but instead was inextricably tied to the former UP/SP case. As the Board

context of discussing the scope of the Board's conditioning power in its opposition comments and requests for conditions, CSXT itself recognized that "the Section 11324(d) standard for the Board's approval of NS's 'significant' application in this case is different than the broader public interest standard applicable to 'major' transactions...."¹⁹

Nevertheless, CSXT maintains in its Responsive Application that the public interest standard in §11102(a) "is the same substantive standard that governs the Board's consideration of the NS application." CSXT-23 at 10. Therefore, although CSXT's pleading is not a model of clarity, it appears that it is CSXT's position that the standard that governs the public interest requirement under section 11102 is 49 U.S.C. 11324(d). However, as discussed above, the standard in section 11324(d) does not even require the Board to reach the issue of the public interest in some cases. In order for the Board to even reach the issue as to whether the grant of terminal trackage rights would address the "public interest" under the section 11324(d) standard, the Board first must make several findings: that (1) anticompetitive effects flowing from the transaction are "likely;" (2) those effects will result in a "substantial lessening of competition, creation of monopoly, or restraint of trade;" and (3) there are no conditions that would alleviate those effects.²⁰ Then, and only then, when all three conditions are met, does the Board move to

noted, "BNSF's current application for terminal trackage rights flows directly from the UP/SP merger, and we will therefore apply the broad and flexible public interest standard outlined in UP/SP Decision No. 44." Id. (citations and footnote omitted). Here, imposition of terminal trackage rights would not flow from a previously approved merger transaction so that imposition of such right would be "essential" to implementing a condition imposed in the earlier transaction.

¹⁹ CSXT-22 at 106 (emphasis added).

²⁰ See Canadian National Railway Company and Grand Trunk Corporation --Control-- Iowa Northern Railway Company, STB Docket No. FD 36744 (STB served January 14, 2025), slip. op. at 5-7. Recent statements from Members Fuchs and Schultz indicate that the Board should not even consider the public interest (public benefits) until the Board first finds anticompetitive effects and that no conditions would alleviate those effects. Then, and only then, should the Board weight the public benefits.

the next step that refers to “public interest” in the context of whether such interests are outweighed by the competitive harms. So, under section 11324(d), the reference to “public interest” really means “public benefits.” Even CSXT admits this in its opposition. CSXT-22 at 114. A public interest analysis under §11102 cannot be the same as a secondary (and often moot) “public benefits” analysis under §11324(d).

In addition, CSXT has implicitly conceded the standard governing the Board’s conditioning authority under §11324(c) cannot be subject to the same standard governing the Board’s ability to impose terminal trackage rights under §11102. If it were, CSXT simply could have filed for terminal trackage rights under section 11324(c). However, CSXT appears to have recognized that although section 11324(c) broadly refers to STB’s ability to impose a multitude of conditions on transactions, including trackage rights, it is section 11102 that specifically governs terminal trackage rights, whether or not they are related to a section 11324 transaction. And there is no indication in the language of either section 11324 or section 11102 that the application of section 11102 should be the same as applicable in the context of a section 11324 transaction. Given the difference between the use and context of the public interest criteria for approval of a significant transaction and the use and context of such criteria for the approval of a terminal trackage rights application, it is clear that Congress was establishing two different approval standards.²¹

²¹ See Rainey v. MSPB, 824 F.3d 1359, 1362 (Fed. Circuit 2016) (explaining that “the use of different formulations in the same paragraph of [a] statute gives rise to the natural inference that Congress meant for the two formulations to have different meanings” and “the Supreme Court has drawn the same inference of different intended meaning when Congress uses particular language in one section of a statute but omits it in another section of the same statute.”) (citations omitted); Ohio Telecom Ass’n v. FCC, 150 F.4th 694, 716 (6th Cir. 2025) (explaining “[t]he general/specific canon provides that, where a specific statute conflicts or overlaps with a general statute, the ‘specific governs the general’” and “[a]lthough courts ‘most frequently’ apply the canon to ‘statutes in which a general permission or prohibition is contradicted by a specific

Moreover, even if the Board were inclined to tie together the standard for section 11102 terminal trackage rights and the standard for a significant transaction under section 11324(d), CSXT has taken the position that its request for terminal trackage rights is not contingent upon the Board's conditioning authority under section 11324. In its opposition, CSXT makes the bold claim that it is seeking terminal trackage rights even if the Board denies NS's control transaction. CSXT-22 at 121 (noting that "any straight denial of NS's application here would presumably not be coupled with the approval of CSXT's responsive application, leaving the terminal trackage rights request to be addressed separately in FD 36859"). Under such circumstances, it makes no sense to treat the standard for terminal trackage rights the same as the standard for section 11324(d), because CSXT is seeking this remedy regardless of whether the section 11324(d) transaction is granted. CSXT's request must therefore be viewed as based solely upon section 11102.

CSXT's request for terminal trackage rights is not tethered to a prior merger, not subject to a broad "public interest" standard that is applicable only to major merger transactions, not related to a "bridge the gap" standard, and is not needed to address a significant service failure that justifies the prescription of alternative service. As such, the only applicable standard is Midtec; a standard that CSXT does not even invoke or attempt to meet. And having failed to meet that standard, the Responsive Application should be denied.

C. CSXT's Responsive Application Fails To Meet The §11102 Public Interest Standard Under the UP/SP and Lake Charles Cases

However, even if the Board were inclined to apply a broader standard, the application should still be rejected. The Board's precedents often have included differing definitions of

prohibition or permission,' the canon also applies to statutes 'in which a general authorization and a more limited, specific authorization exist side-by-side.'") (citations omitted).

“public interest” to fit the circumstances of a particular case,²² which has contributed to the confusion over the correct application of the section 11102 standard. The only judicially-affirmed standard for the definition of “public interest” under Section 11102 is that articulated in Midtec, a standard CSXT does not even attempt to meet. As discussed above, the Lake Charles standard should not apply to significant transactions under section 11324(d), because there is no broad and flexible public interest standard governing significant transactions (as opposed to major transactions), and the Responsive Application is not being filed to implement a previously imposed merger condition. However, even if the Board were to apply the Lake Charles standard to this transaction, CSXT still has failed to show that its Responsive Application would satisfy the public interest requirement.

Under the Lake Charles decision, it appears the Board will find that the “public interest” test is met if the imposition of the terminal trackage rights is “essential to effectuating merger conditions designed to ameliorate potential anticompetitive effects.”²³ As such, for the Board to find that the public interest test has been met in order to grant CSXT’s terminal trackage rights request as a condition in the context of a significant transaction under §11324(d), it must make each and every one of the following findings:

- As a result of the STB granting NS’s request for control authority, there will be a substantial lessening of competition, creation of monopoly, or a restraint of trade and such impacts are likely; and
- these anticompetitive effects outweigh the public interest [meaning public benefits] of the transaction; and
- imposition of a condition would alleviate the competitive effects; and

²² See generally Commuter Rail Division of The Regional Transportation Authority D/B/A Metra —Terminal Trackage Rights— Union Pacific Railroad Company, STB Finance Docket No. 36844 (STB served September 3, 2025). In that case, the Board also discusses the proper treatment of Metra as a local government authority.

²³ Lake Charles, slip. op., at 8.

- terminal trackage rights are essential to resolving those anticompetitive effects; and
- terminal trackage rights are the remedy of last resort and no other condition or remedy would work to resolve the anticompetitive effects.

CSXT's Responsive Application does not meet these criteria. Construing all facts and arguments in CSXT's favor, at best, CSXT has made a case that a lower NPBL switching rate may allow CSXT to be more efficient and cut its costs so as to attract additional traffic to NIT. But showing that does not satisfy any of the above elements for finding that the "public interest" test of §11102 has been met. It certainly does not show that terminal trackage rights are "essential" and are the last resort.

Even if CSXT were correct that the NPBL switching rate had caused competitive harms, which it has not, NS already has agreed to condition Board approval of its transaction on NS's commitments to ensure that NPBL retains a switch rate that comports with the uniformity and cost-based criteria set forth in NPBL's 1897 Agreement and to adopt an NS/NPBL trackage rights fee, to be set by the Board, that comports with the Board's SSW methodology. If CSXT believes those conditions are not sufficient, then it should seek (and justify) additional conditions narrowly targeted to address its concerns with the NPBL switching rate, which according to CSXT, is the primary cause of all its perceived harms. CSXT has utterly failed to demonstrate that the "extraordinary" remedy of terminal trackage rights is essential. Having failed to meet the public interest test (regardless of which one of the four tests is applied to this transaction), CSXT's Responsive Application should be denied.

II. CSXT HAS NOT SHOWN THAT ITS PROPOSED OPERATIONS ARE PRACTICABLE AND WOULD NOT IMPAIR NS'S AND NPBL'S ABILITY TO SERVE THEIR OWN SHIPPERS

Under Section 11102, not only must CSXT's request for terminal trackage rights be in the public interest as discussed above, but CSXT also must show that its proposed operation is "practicable ... without substantially impairing the ability of the rail carrier owning the facilities

or entitled to use the facilities to handle its own business.” 49 U.S.C. §11102(a). As with the public interest element, CSXT, as the party requesting relief from the Board under Section 11102(a), has the burden of proving that its proposed operations meet this test.

As such, under Section 11102(a), CSXT must show that its proposed operation is (a) “practicable,” and (b) will not “substantially impair the ability of [NS and NPBL] to handle [their] own business.” Here, CSXT has failed to meet the statute’s requirements to show that its proposed operation satisfies these elements in at least the following respects:

- (a) the proposed operation is described too vaguely to show that it will not interfere;
- (b) the description is manifestly and deliberately incomplete, particularly by offering no information on how CSXT’s operations would impact NPBL and NS’s service to other customers located either on or connecting to the NPBL tracks, not to mention Amtrak service over those lines; and
- (c) the operation described, at least to the extent it can even be defined, appears to be incompatible with current operations on the NPBL’s tracks.

The adverse impacts to NS’s and NPBL’s operations caused by CSXT’s proposed operations, at least to the extent they can be determined, are set forth in the attached verified statement of Mr. Jay Traywick, Superintendent of the Blue Ridge Division for NS, attached as Exhibit B.

A. CSXT’s Responsive Application Is Substantially Devoid Of The Required Information

As a threshold matter, no practicability and impairment findings can be made without a clear understanding of what is being requested and how those rights are permitted and anticipated to be used. CSXT has failed to provide the Board with any clear answers to these most basic questions. Instead, CSXT is decidedly ambiguous and contradictory as to what it is requesting from the Board in terms of terminal trackage rights and fails to even address whether its use of the subject lines would substantially impair NS’s and NPBL’s business or would interfere with Amtrak operations over the lines. For example, at one point, CSXT states that “CSXT is proposing to begin its operations over the subject lines within *one* six-hour window of

time each day, leaving three six-hour windows of time for NS and NPBL operations.”²⁴ At another point, CSXT states that “[s]hould NIT traffic volume increase at some future time to require a second daily CSXT train, CSXT would work with NS and NPBL to identify a *second* six-hour window for such operation.”²⁵ In its opposition comments,²⁶ CSXT also asks the Board to impose the terminal trackage rights *as requested* in a separate proceeding filed back in May 20, 2025 in which it sought a definitive *two* six-hour windows.²⁷ CSXT cannot argue that the terminal trackage rights sought in the Responsive Application are practicable and will not impair NS and NPBL if one cannot even determine whether CSXT is requesting one, two, or potentially more dedicated six-hour windows for its operations. Depending upon CSXT’s plan, which cannot be fully ascertained, such operations could actually exclude NS and NPBL during certain operating windows. Complicating operations even further, CSXT’s operations would also need to accommodate significant Amtrak operations even as NS and NPBL attempt to provide service to their own customers over the same lines.

In addition to its failure to clearly define the basic scope of terminal operations it is seeking, CSXT fails to present any analysis regarding the practicability and substantial impairment tests of imposing the requested terminal trackage rights. CSXT raises in its pleadings the specter of no less than three conflicting scenarios related to its operations over the

²⁴ CSXT-23 at 18 (emphasis added).

²⁵ CSXT-23 at 15.

²⁶ CSXT-22 at 121 (“Concurrent with these opposition comments, CSXT is submitting a responsive application in this proceeding requesting that the Board grant CSXT these terminal trackage rights as a condition of any Board approval of NS’s application”) (specifically referencing the terminal trackage rights request embraced in FD 36859).

²⁷ Application for Terminal Trackage Rights in CSX Trans., Inc. – Terminal Trackage Rights – Norfolk S. Ry. Co. and Norfolk & Portsmouth Belt Line R. Co., STB Docket No. FD 36859 (filed May 20, 2025), CSXT-1 at 30 (emphasis added).

track for which it seeks terminal trackage rights: (a) no expansion of rail-served traffic; (b) conversion of drayage traffic to rail-served traffic; and (c) expansion of rail-served traffic in addition to conversion of drayage traffic to rail-served traffic. For none of these scenarios does CSXT provide any analysis that would enable the Board to make the statutory determinations of practicability and non-impairment.

First, CSXT attempts to simplistically claim its terminal trackage rights operations should be found to be practical because “the new terminal trackage rights operations would replace other operations on the subject lines, thereby ensuring that sufficient capacity existed on the subject lines for the trackage rights operations.”²⁸ However, CSXT’s current access via the NPBL switch is not at all comparable to adding a third freight carrier (CSXT) to the lines of NS and NPBL in the terminal area and imposing one or more CSXT-dedicated operational windows. CSXT includes no analysis or even discussion of the impacts of the proposed terminal trackage rights on NPBL’s or NS’s service to its existing customers (including customers served by NPBL on behalf of CSXT and NS) within and accessed through the terminal area, despite the fact that the terminal trackage rights sought by CSXT would physically insert a third railroad over the subject lines and would impose substantial dedicated operating windows for the sole benefit of that third railroad. Again, CSXT does not even mention Amtrak operations on the line, as if those operations could be ignored for purposes of the Board’s evaluation. Accordingly, even if there were no additional traffic resulting from the requested terminal trackage rights, the Board would still be unable to determine whether the proposed terminal trackage rights are practicable and whether they would substantially interfere with NS’s and NPBL’s existing use of the subject lines to handle their own business.

²⁸ CSXT-23 at 13.

Second, CSXT concedes that projected traffic could include significant traffic that does not currently operate on the line, discussing CSXT's conversion of "its current drayage operations to on-dock rail."²⁹ CSXT claims, at one point in the Responsive Application, that CSXT's use of the lines would largely just take the place of NPBL switching operations that NS and NPBL maintain could take place (but which do not take place) today. But, again, CSXT fails to address the complexity of adding a third freight carrier (plus Amtrak) where only two freight carriers exist today, or, as noted above, analyze the impacts of CSXT's proposal on NS's and NPBL's service to its existing customers.³⁰ CSXT takes great pains to explain the route of its planned operations, but it does so as if CSXT's operations were being conducted in isolation of the other three carriers (including Amtrak) who are trying to also navigate on the line, and particularly fails to explain how one of them – NPBL – is to perform switching of its customers, especially in the tight confines of the portion of the tracks north of NIT.

Third, CSXT states, in one of its competitive access arguments set forth in its opposition comments but unaddressed in its Responsive Application,³¹ that the Port of Virginia has an expansion currently underway at NIT, to be completed in 2027. This expansion is expected to create capacity for an additional 1.4M TEUs, allowing for more than 64% growth from NIT's 2023 capacity levels. Will CSXT then perhaps demand to activate a second dedicated operating window? Despite this potential for significant growth and additional operating restrictions for NS and NPBL, CSXT once again fails to provide any analysis on the impact of such growth and restrictions on NS's and NPBL ability to serve its customers.

²⁹ Id. at 15.

³⁰ Id. at 14.

³¹ CSXT-22 at 94.

For each of the three traffic scenarios raised by CSXT's pleading and discussed above, CSXT has wholly failed to provide the Board with any operational or capacity study. Without such studies, it is impossible to determine the practicality or the full extent of the impact of the CSXT terminal trackage rights, both on the lines over which CSXT proposes to operate and the lines that are accessed from, crossing, or otherwise operated in conjunction with those terminal trackage rights lines. Furthermore, without a clear understanding of the impact of CSXT's requested terminal trackage rights on all affected lines, it is similarly impossible for the Board to determine whether the standard for terminal trackage rights is satisfied – i.e., whether the requested rights would “substantially impair[] the ability of the rail carrier[s] owning the facilities or entitled to use the facilities to handle [their] own business.”³²

In addition, in its opposition comments, rather than in its Responsive Application, CSXT asks the Board to “order NS to provide *operational assent* to CSXT direct movements to NIT” without explaining what that means.³³ Indeed, the definition of such operational assent could be a critical component in determining whether the no substantial interference test is met and could mean that CSXT would be claiming *more than* one half of the capacity of the subject lines.³⁴

³² 49 U.S.C. 11102(a).

³³ CSXT-22 at 127 (emphasis added).

³⁴ If CSXT would continue to use NPBL's switching service to access customers in addition to access to NIT, which it has said it would do, by claiming two six-hour windows and retaining access to NPBL's switching service for those other customers, CSXT is actually claiming in its terminal trackage rights application rights to significantly more than half of all capacity in the terminal area, including more than half of the capacity over NS's own lines, leaving NS and NPBL to scrape through on what is left. Current Amtrak operations to and from its Norfolk station would take up much of that capacity. Maintenance and inspection of the NS track facilities and the NPBL track facilities that CSXT would operate would further erode the available capacity supposedly left for NS and NPBL. VS Traywick at 7-8. CSXT's claim for more capacity than is reserved for the owners of the track facilities is truly a remarkable and extremely “intrusive” remedy to impose on NS (as to the lines that NS owns in the terminal area) and on NPBL (as to the lines of a railroad that NPBL owns in the terminal area, with NPBL being a railroad that CSXT owns a minority interest in).

Moreover, this definition would have a further significant impact on any operational and capacity analysis (had one been performed by CSXT), thereby also directly impacting the determination of whether the requested terminal trackage rights satisfy the practicable test.

CSXT's conclusory claim that the terminal trackage rights it requests are practicable and can be implemented without substantially interfering with NS's and NPBL's own operations to their respective customers, including any NPBL operations on behalf of CSXT and NS via an NPBL switch, is meaningless without sufficient specificity as to the scope of the operations and sufficient data and analysis as to the operational and capacity impacts.³⁵ Although each competitive access case is unique, the character of the request and justification formulate the prima facie case that must be made and supported by sufficient data and analysis. Without sufficient data and analysis, the Board is unable to determine if CSXT's requested terminal trackage rights will be practicable and will not cause substantial interference with the operations of NS, NPBL, and Amtrak.

B. Based Upon The Available Information, There Is No Question That CSXT's Operations Would Substantially Interfere with NS's and NPBL's Operations To Their Existing Customers

As noted in the attached Verified Statement of Mr. Jay Traywick, adoption of CSXT's rate and operating proposal creates significant operational issues. Operations are already difficult to manage and the addition of CSXT would substantially interfere with NS's and NPBL's existing operations. Currently, NS serves NIT from Portlock Yard with four scheduled trains daily and three intermodal trips via the Sewells Point Branch. Each intermodal trip takes

³⁵ In BNSF Ry. Co. – Terminal Trackage Rights – Kansas City S. Ry. Co. and Union P. R.R. Co., FD 32760 (Sub-No. 46) (Decision No. 3) (STB served July 5, 2016), the Board detailed the extensive data and analysis that the parties submitted with regard to the practicality of the proposed terminal trackage rights and whether the requested rights would substantially impair the ability of the underlying carrier to perform service over the affected lines. That stands in stark contrast to the failure of CSXT to do the same here.

between 8 and 11 hours, and trains (8,000–10,000 feet) must be cut into smaller blocks for handling. VS Traywick at 3. VIT requires up to 8 hours between deliveries, limiting NS’s ability to make multiple trips efficiently. VS Traywick at 3.). That does not mean that NIT requires 24 hours to process each train. The tracks along Terminal Blvd heading towards the NIT “front gate” terminal tracks can handle more than one cut at a time, but NIT’s operating constraints limit the efficiency of moves to and from NIT. NS cannot make 3 round trips in 15 hours due to these limitations. Id., at 3. VIT operations also block Hampton Boulevard. Blocking of Hampton Boulevard is a daily occurrence. Id. Adding CSXT trains will only further complicate these operations.

NPBL interchanges with NS at Portlock Yard and uses trackage rights on the Sewells Point Branch to NIT. VS Traywick at 4. NPBL handles mixed freight and occasional unit trains. The Sewells Point Branch is partially signaled, and each train that is to enter an unsignaled section must obtain dispatcher authority to enter, allowing only one train at a time.

The Sewells Point Branch is effectively single-track, meaning only one train can occupy the route at a time. VS Traywick at 7. This constraint already forces NS and NPBL to carefully sequence movements to avoid delays. Infrastructure limitations and VIT processing windows further restrict flexibility. Hampton Boulevard restrictions and Amtrak priority compound these challenges.

Further, Amtrak operates four daily trains between Norfolk and Petersburg on NS tracks, the exact same NS tracks over which NPBL and (if granted terminal trackage rights) CSXT would have to travel in order to reach the Sewells Point Branch. VS Traywick at 6. Amtrak has priority over freight operations on those tracks. In order to provide preference to Amtrak operations into and out of Norfolk, NS and NPBL must clear routes for Amtrak, reducing available capacity.

Granting CSXT terminal trackage rights would severely disrupt existing operations for both NS and NPBL. VS Traywick at 7-8. Because NPBL relies on the same Sewells Point Branch for access to NIT, CSXT's dedicated windows would block NPBL's ability to serve its customers and interchange with NS. The delays caused by CSXT's operations would have several specific impacts:

- If CSXT occupies the Sewells Point Branch during its six-hour window, NPBL cannot move a cement unit train to NIT for an entire shift. This delays unloading by at least 12 hours because NPBL must wait for CSXT's window to close and then secure dispatcher authority for unsignaled territory.
- NS's intermodal train scheduled for early morning delivery could be held at Portlock Yard until late evening if CSXT's window overlaps with Amtrak's slots. This would push outbound containers past vessel cutoff times, causing missed sailings and customer penalties.
- NPBL's weekly project cargo move (e.g., transformers) would be stranded mid-route if CSXT's window begins before NPBL clears the branch. These moves require special handling and cannot be easily rescheduled, creating ripple effects for port construction projects.
- For NS, CSXT's windows would eliminate the ability to maintain current intermodal schedules and merchandise service. The branch cannot accommodate simultaneous movements, and CSXT's entitlement to priority windows would force NS and NPBL trains to wait, creating cascading delays across the network.

These disruptions would not be minor. They would compromise service reliability for existing customers, increase congestion, and reduce operational efficiency throughout the Hampton Roads region. VS Traywick at 7. The bottom line is that the Port of Virginia rail network is extraordinarily complex. Adding CSXT operations with guaranteed windows would create severe conflicts with NS and NPBL movements, harming both carriers and their customers.

III. IF THE BOARD GRANTED CSXT TERMINAL TRACKAGE RIGHTS, CSXT HAS NOT SHOWN THAT IT WILL PAY OR ADEQUATELY SECURE COMPENSATION TO NPBL AND NS BEFORE CSXT COULD BEGIN TO USE ITS TERMINAL TRACKAGE RIGHTS

The statute provides that if CSXT is granted terminal trackage rights, the compensation for the use of NS's and NPBL's terminal facilities and tracks is to be established by the carriers or, if they cannot reach an agreement, the Board would set it. 49 U.S.C. § 11102(a). It further provides that "[t]he compensation shall be paid or adequately secured before a rail carrier may begin to use the facilities of another rail carrier under this section." 49 U.S.C. 11102(a). As such, CSXT does not deny that if its Responsive Application is granted, the statute requires it to pay compensation for the use of the NS and NPBL tracks. But it asks that the Board not require the compensation be established before CSXT is able to begin using the lines and instead requests that CSXT should be permitted to commence operations over the lines while the parties negotiate the terminal trackage rights fee. CSXT-23 at 20. CSXT bases this request on the fact that the Board and its predecessor have permitted parties to commence trackage rights operations immediately upon consummation of the primary transaction. *Id.* (citations omitted).

By claiming the Board can simply grant access now and worry about compensation later – maybe years later, CXST ignores the statute, which clearly forecloses that option: "compensation shall be paid or adequately secured *before* a rail carrier may begin to use the facilities of another rail carrier under this section" (emphasis added). Likewise, a trackage rights order is a condemnation of private property, and it requires payment before a taking occurs, not after. Thus, if the Board were inclined to grant CSXT's application under § 11102, it would have to deal with compensation before any Board-ordered access takes effect. The parties would also need terms and conditions to govern service, liability, indemnity, and other important issues. CSXT cannot simply begin operating terminal trackage rights.

A. A Grant Of Terminal Trackage Rights Is A Taking Of Private Property – Which Is An Extraordinary Remedy That Requires Constitutional Compensation

There is a reason why the Board has said that the prescription of terminal trackage rights is an “extraordinary remedy” that should only be used as a “last resort”³⁶ and that is because Section 11102(a) confers an extraordinary power—the authority to conscript one railroad’s terminal facilities for the use and benefit of another, a taking of property requiring just compensation. See Mo.-Kan.-Tex. R.R. v. Kan. City Terminal Ry., 104 I.C.C. 203, 228-29 (1925). Such a remedy, which takes property for the exclusive use of CSXT during CSXT’s “operating window,” must be exercised within the strict confines of agency authority and should not be invoked except in “extraordinary” circumstances, circumstances not existing here. Indeed, President Trump recently reemphasized that government agencies should continue to be sensitive to takings issues.³⁷ Thus, the Board’s authority must be construed strictly and not exercised lightly. Indeed, this extraordinary power should never be exercised simply because CSXT is dissatisfied with the cost-based neutral rate that NPBL charges for switching. And that is crux of the matter this dispute is about money – CSXT’s unwillingness to pay the NPBL switch rate because it is cheaper for CSXT to use drayage subsidized by the POV. Obviously, CSXT hopes to secure a better deal than it currently has through a government order. But the Board should

³⁶ See Shenango Inc., et. al. v. Pitts., Chartiers & Youghioghny Ry. Co., 5 I.C.C.2d 995,1002 (1989); Western Fuels Service Corporation v. The Burlington Northern and Santa Fe Railway Company, et al., STB Docket No. NOR 41987, et al. (STB served Jul. 28, 1997), cited *supra* at 9.

³⁷ See e.g., Exec. Order No. 12630, 53 Fed. Reg. 8859, 8860 (1988); White House, Fact Sheet: President Donald J. Trump Directs Repeal of Regulations That Are Unlawful Under 10 Recent Supreme Court Decisions (Apr. 9, 2025), <https://www.whitehouse.gov/fact-sheets/2025/04/fact-sheet-president-donald-j-trump-directs-repeal-of-regulations-that-are-unlawful-under-10-recent-supreme-court-decisions/> (noting that agencies are directed under Executive Order 14219 to “repeal any regulation inconsistent with a proper understanding of the Takings Clause, which protects far more than just real estate from being taken by the government without compensation”).

not be conscripted into refereeing such commercial negotiations. The agency's "policy has long been to encourage private sector dispute resolution whenever possible, particularly in disputes involving compensation." Dakota, Minn. & E. R.R.—Control—Iowa, Chi. & E. R.R. ("DME/ICE"), STB Finance Docket No. 34178 (STB served February 3, 2003). When "the real reason for [a] terminal trackage rights application appears to be that the price [the applicant] will pay would be established by [the Board] rather than through negotiations," the Board's "involvement . . . is simply inappropriate." Id. As such, the Board should not impose the Responsive Application as a condition to the control transaction; even if the Board determines that conditions (in addition to what NS has already agreed to) are appropriate, there are other available remedies clearly "less intrusive" than terminal trackage rights.

B. This Compensation Must Be Paid Or Adequately Secured Before CSXT Could Operate Any Grant Of Terminal Trackage Rights

If notwithstanding all of the above, the Board grants the Responsive Application, the Board should reject CSXT's request to begin operating immediately. As noted, this request is directly contrary to the plain words of the statute. CSXT points to two instances, both of which were in the context of major mergers and not, as relevant here, significant transactions. In those two cases, the Board and its predecessor did permit parties to commence trackage rights operations immediately upon consummation of the primary transaction. See, e.g., UP/MP/WP, 366 I.C.C. 459, 576 n.114 (1982); S. Pac. Transp. Co. v. I.C.C., 736 F.2d at 723. See also, UP/SP Decision No. 44, at 449 ("Because the terminal trackage rights are crucial to the competitive role that BNSF will play in the Houston-Memphis and Houston-New Orleans corridors, we will make them effective on the effective date of this decision"). However, those decisions were dramatic departures from long-standing precedent.

The issue of when compensation can be paid for terminal trackage rights was recently fully briefed and explained by counsel for Union Pacific in its April 18, 2025 filing in the Metra case.³⁸ NS wholly endorses those arguments and incorporates them herein. UP points out that prior to those cases, the long standing precedent reaching back to 1926 was that compensation being paid was a condition precedent to the use of any grant of trackage rights, citing Hasting Commercial, 107 I.C.C. 208 (1926); Use by Erie of Niagara Junction Ry. Terminals, 269 I.C.C. 493 (1947); and CSX—Control—Chessie, 363 I.C.C. 518, 604 (1980) (“[T]he enjoyment of the use of the involved terminal facilities shall be subject to the right of Consolidated Rail Corporation to require that the compensation paid for the use shall be adequately secured to it before the use shall be commenced.”³⁹ (emphasis added)). Those cases are just as applicable to CSXT’s Responsive Application. And CSXT should be required to pay any compensation upfront before using any award trackage rights. Of course, to determine such compensation and other terms and conditions of use will first require negotiations, and then failing to agree, a Board proceeding to set the terms and conditions of the CSXT terminal trackage rights. Until those steps occur, CSXT should not be allowed to operate on the NS and NPBL tracks.

In the UP/SP cases, the Board relied upon statutory language that permits a party to “adequately secure” that compensation before it operates (rather than actual payment). This terminology generally means the posting of a bond, deposit, or pledge of other property. In the UP/SP cases, the Board determined that compensation was “adequately secured” by the Board’s commitment to “apply the principles for compensation in condemnation proceedings.” At that

³⁸ Reply of Union Pacific Railroad Company to Application for Terminal Trackage Rights in Commuter Rail Division of The Regional Transportation Authority D/B/A Metra —Terminal Trackage Rights— Union Pacific Railroad Company, STB Finance Docket No. 36844 (filed April 18, 2025) (“UP’s April 18, 2025 Filing”).

³⁹ Id. at 3-6.

time, neither the ICC nor the court required the posting of a bond, deposit or pledge of other property. See Southern Pacific Transport Co. v. ICC, 736 F.2d 708, 723 (D.C. Cir. 1984).

However, as UP's April 18, 2025, filing points out, "[t]he court did not analyze the statutory language, nor did it address the fact that that was a major departure from prior agency practice." Metra, UP's April 18, 2025, submission at 8. UP also points out that the ICC itself did not even endorse the view of the statute that a mere promise by the agency to ensure compensation was paid met the requirements of the statute. In its brief to the court, the ICC argued that the statute had in fact been met because "the new UP system offered to post a bond to secure the use of the track,"⁴⁰ which "fulfills the requirement of the term 'adequately secured' under Section 11103(a)."⁴¹ . Thus, it was not a mere promise by the STB that met the "adequately secured" requirement but the posting of a bond that met that standard.

Here, CSXT makes no commitment to post a bond, deposit, or pledge of other property to adequately secure the compensation that it would owe. Of course, since CSXT also presents no evidence as what that compensation would, or should be, CSXT would be hard-pressed to make such a commitment. Accordingly, because CSXT has not agreed to pay any compensation and has not agreed to adequately secure any such compensation, CSXT's Responsive Application fails the requirement of §11102(a) and should be rejected.

CONCLUSION

This dispute is about NPBL's switch rate that CSXT alleges is so high as to foreclose CSXT from serving NIT via an NPBL switch. CSXT makes this claim despite the fact that the

⁴⁰ ICC Br. 61, *S. Pac. Transp. Co. v. ICC*, No. 82-2253 (D.C. Cir. Mar. 28, 1983) (emphasis added).

⁴¹ *Southern Pacific Transp. Co. v. Interstate Commerce Com.*, 736 F.2d 708, 723 (D.C. Cir. 1984).

NPBL switch rate is cost-based and that CSXT has no concerns with paying this switching rate for its merchandise traffic. Rather than seeking a narrowly-tailored remedy to modify the switching rate or NPBL's switching operations, CSXT seeks (among many other suggested remedies) the extraordinary remedy of terminal trackage rights, which is only intended to be used when no lesser intrusive remedies are available. Moreover, CSXT presents no evidence, absolutely none, as to whether the costs associated with operating its own terminal trackage rights would actually result in lower costs to CSXT, as well as a lower CSXT rail rate that would be passed along to the customer/shipper, as compared to CSXT's use of existing NPBL switching or existing drayage. As such, and as discussed in NS-29, CSXT's Responsive Application is so devoid of even the basic *prima facie* evidence necessary for the Board to consider a terminal trackage rights application that the Responsive Application should be dismissed or rejected outright.

If not rejected outright, , CSXT has failed to prove (and it has the burden of proof) that the terminal trackage rights it seeks are (1) in the public interest as that standard has developed and been applied in Section 11102 cases; (2) can be operated practically and without substantial interfering with NS's and NPBL's existing operations over the NPBL; and (3) that compensation will be adequately secured before it could begin to operate.⁴² CSXT's Responsive Application fails to meet any of those standards.

Out of the potential 4 public interest standards used in Section 11102 cases, CSXT fails to meet three of the standards. The fourth standard is not even applicable in this case, as it reserved for mergers involving Class I railroads. And even if it were applicable, CSXT similarly fails to satisfy that standard. CSXT similarly fails to satisfy the practicable and non-

⁴² Should CSXT attempt, in its Rebuttal, to attempt to develop and introduce such evidence, NS should have the opportunity to perform discovery and potentially respond to the same.

interference standards of section 11102. CSXT has presented no evidence that its proposed operations (to the extent one can figure them out) can be operated practically and without substantially interfering with NS's, NPBL's, and Amtrak's existing operations. Nor can they. Finally, CSXT cannot operate without first paying compensation to NS and NPBL the constitutional value of any Board imposed takings via CSXT trackage rights. CSXT is seeking to avoid payment as a condition to exercising the terminal trackage rights it is seeking, and CSXT has not offered to adequately secure such compensation. Granting CSXT terminal trackage rights under these circumstances violates the statutory requirements under section 11102 and must be denied.

As such, CSXT's Responsive Application cannot be granted. After more than seven months, and two bites at the apple, CSXT has failed to get this responsive application right. The Board, consistent with precedent, should deny CSXT's Responsive Application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on November 20, 2025, in keeping with 49 CFR §1114.21(f), I have caused to be served a copy of the foregoing Motion to Summarily Reject CSX Transportation, Inc.'s Responsive Application for Terminal Trackage Rights upon the Secretary of Transportation, the Attorney General of the United States, Administrative Law Judge Jenifer Soulikias, and each Party of Record in these proceedings.

/s/ William A. Mullins
William A. Mullins

Attorney for Norfolk Southern Corporation and
Norfolk Southern Railway Company

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36836

**NORFOLK SOUTHERN CORPORATION
NORFOLK SOUTHERN RAILWAY COMPANY
– ACQUISITION OF CONTROL –
NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY
COMMENTS IN OPPOSITION TO CSX TRANSPORTATION, INC.’S
RESPONSIVE APPLICATION FOR TERMINAL TRACKAGE RIGHTS**

EXHIBIT A

**Section 11102: Is it the Answer to Competitive Access? – Examining the Varying Standards
Applied by the Surface Transportation Board When it is Determining Whether to Grant
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**Section 11102: Is it the Answer
to Competitive Access? - Examining
the Varying Standards Applied
by the Surface Transportation
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Whether to Grant Terminal Track-
age Rights Access**

William A. Mullins
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SECTION 11102: IS IT THE ANSWER
TO COMPETITIVE ACCESS? -
EXAMINING THE VARYING STANDARDS APPLIED BY
THE SURFACE TRANSPORTATION BOARD WHEN IT IS
DETERMINING WHETHER TO GRANT TERMINAL
TRACKAGE RIGHTS ACCESS

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Introduction

In the shadow of the need to reauthorize the Surface Transportation Board (STB or Board), there has been a lot of debate about whether additional competitive access should be available to shippers and if so, ways in particular to provide solely-served shippers, *i.e.*, captive shippers, with access to a second railroad. This access to a second carrier has taken several proposed forms. One shipper proposal to gain access is to repeal the STB's 1996 "bottleneck" decision¹ in order to require railroads to publish rates to the nearest interchange point with another carrier. These rates would then be subject to a rate reasonableness challenge.

A second method that shippers can use to attempt to gain competitive access is through imposition of reciprocal switching.² Finally, competitive access is available by forcing one railroad to grant rights to another railroad in

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¹Central Power & Light Co. v. Southern Pac. Trans. Co., STB Docket No. 41242, Pennsylvania Power & Light Co. v. Consolidated Rail Corp., STB Docket No. 41295, MidAmerican Energy Co. v. Union Pac. R.R. Co. & Chicago and North Western Ry. Co., STB Docket No. 41626 (served December 27, 1996).

²Forced reciprocal switching. The shipper could route its shipment via the other carrier utilizing the point of the reciprocal switch without paying an extra charge for the switch. The reciprocal switch can be authorized by the Board under 49 U.S.C. § 11102(c) [previously § 11103].

order for that other railroad to operate over the grantor railroad's tracks within a terminal complex. This has the effect of providing shippers located within that terminal access to more than one railroad. These terminal trackage rights can be sought by either a shipper, the second railroad, or both under 49 U.S.C. § 11102(a) [previously § 11103].

The Board's standard for determining whether to provide for terminal trackage rights or reciprocal switching has developed over the last ten to twelve years, and there has been some confusion over what particular standard should apply under section 11102. This article will examine how the standards have developed and will distinguish the standards that the Board has imposed in determining whether to grant terminal trackage rights or reciprocal switching.

Historical Background

The Interstate Commerce Act (ICA), as amended by the Interstate Commerce Commission Termination Act (ICCTA),³ empowers the STB to:

require terminal facilities, including main-line tracks for a reasonable distance outside of a terminal . . . to be used by another rail carrier if the Board finds that use to be practicable and in the public interest without substantially impairing the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business.⁴

The ICA also provides that the Board "may require rail carriers to enter into reciprocal switching agreements."⁵ The analysis under part (a) of section 11102 for terminal trackage rights and part (c) of section 11102 for reciprocal switching is similar except that ordering reciprocal switching is generally viewed as less intrusive than mandating terminal trackage rights.⁶

Prior to the mid-1980s, the ICC engaged in an inquiry into the broad public interest considerations underlying a grant of terminal trackage rights or reciprocal switching. To determine what was in the public interest in a given case, the ICC examined not only the interests of the particular shippers located at or near the terminal involved, but also the interests of the carriers and of the general public.⁷ For example, in the 1980 proceeding of *CSX/Chessie*, the

³Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803.

⁴49 U.S.C. § 11102(a).

⁵49 U.S.C. § 11102(c).

⁶See, *Philadelphia Belt Line R.R. v. Consolidated Rail Corp.*, STB Finance Docket No. 32802, Slip op. at 6 n.9 (served July 2, 1996) (*Philadelphia Belt*) and cases cited therein.

⁷*Hastings Commercial Club v. Chicago Milwaukee & St. Paul Ry. Co.*, 69 I.C.C. 489, 493 (1922); *Manufacturers Ass'n of York, PA v. Pennsylvania R.R.*, 73 I.C.C. 40, 49 (1922); *Jamestown, NY Chamber of Commerce v. Jamestown, Westfield and Northwestern R.R.*, 195 I.C.C. 289, 292 (1933) *CSX Corp. - Control - Chessie and Seaboard Coast Line Indus.*, 363 I.C.C. 521, 584-586 (continued...)

ICC looked at the various interests implicated in granting rights to a terminal facility, including the shippers, the carriers, and the citizens of the town, and engaged in a "balancing" of those interests.⁸ In a 1933 proceeding, the ICC reasoned that the appropriate public interest standard at that time was one of "actual necessity" or "compelling need" on the part of the movant.⁹

Beginning in 1985, however, the Commission undertook to alter its broad public interest analysis under section 11102(c) in the context of reciprocal switching access cases. In the *Intramodal Rail Competition* (Intramodal)¹⁰ proceeding, the Commission adopted rules to govern competitive access issues for joint rates and reciprocal switching. These rules are in effect today. As applied, the rules focus upon whether or not the owning carrier has engaged in anticompetitive conduct such as the classic categories of competitive abuse: foreclosure; refusal to deal; price squeeze; or any other recognizable forms of monopolization or predation.¹¹ The purpose of the rules is to provide guidance for the type of evidence required, and the circumstances when, the Commission would prescribe reciprocal switching.

The Midtec - Anticompetitive Conduct Standard

The *Intramodal* decision, by design, applied only to reciprocal switching. The broad public interest test continued to apply to terminal trackage rights cases. However, in the historic *Midtec*¹² case, the Commission extended the *intramodal* rules to apply to applications for terminal trackage rights under 49 U.S.C. § 11102(a). Specifically, in *Midtec*, the Commission expressly stated:

Although the rules in *Intramodal* do not specifically cover terminal trackage rights, the underlying public interest test in §§ 11103(a) and 11103(c) is the same and, given the relationship between the issues and the remedies, we believe that the public interest analysis should be similar.¹³

The rules outlined in *Intramodal* and *Midtec* set a very high threshold for meeting the "public interest" test of a terminal trackage rights application.

⁷(...continued)

(1980), *aff'd*, *Brotherhood of Maintenance of Way Employees v. ICC*, 698 F.2d 315 (7th Cir. 1983) (CSX/Chessie); *Union Pac. Corp., et al. — Control — Missouri Pac. Corp.*, 366 I.C.C. 459, 574-76 (1982) (UP/MP/WP).

⁸See, CSX/Chessie at 584.

⁹*Jamestown, NY Chamber of Commerce v. Jamestown, Westfield and Northwestern R.R.*, 195 I.C.C. 289, 292 (1933).

¹⁰*Intramodal Rail Competition, Ex Parte No. 445 (Sub-No. 1)*, 1 I.C.C.2d 822 (1985), *aff'd* sub nom, *Baltimore Gas and Electric v. United States*, 817 F.2d 108 (D.C. Cir. 1987).

¹¹*Midtec Paper Corp., et al. v. Chicago and N.W. Transp. Co.*, 3 I.C.C.2d 171, 173-174 (1986), *aff'd*, 857 F.2d 1487 (D.C. Cir. 1988) (*Midtec*).

¹²*Midtec*, 3 I.C.C.2d 171 (1986), *aff'd*, 857 F.2d 1487 (D.C. Cir. 1988).

¹³*Midtec* at 178.

The competitive access rules, now codified at 49 C.F.R. § 1144, require that the conduct of the line owner be scrutinized from a competitive standpoint. Under the *Midtec* public interest test, the burden of proof is on the movant to show that the line owner has engaged in or is likely to engage in anti-competitive conduct.¹⁴ The essential questions on this point are: (1) whether the railroad has used its market power to extract unreasonable terms on through movements; or (2) whether because of its monopoly position, the carrier has shown a disregard for the shipper's needs by rendering inadequate service.¹⁵ Since its adoption, the *Midtec* anticompetitive conduct standard has been applied consistently to section 11102(a) and section 11102 (c) applications.¹⁶

Of course, the "public interest" analysis is only one element of the statutory analysis. In analyzing a terminal trackage application, the Board is authorized to compel the use of a terminal facility under § 11102(a) only if the Board first determines: (1) the facility is a "terminal facility;" (2) the proposed use is in the public interest; (3) the proposed use is practicable; and (4) the proposed use will not result in substantial impairment of the current user's ability to use the facility for its own business.¹⁷ The threshold jurisdictional issue under section 11102(a) is whether the trackage in question is a "terminal facility." The most important factor in determining whether a rail facility is a "terminal facility" is the function of the facility.¹⁸ In this regard, terminal functions are defined by the Commission as those involving the "transfer, collection or delivery of freight."¹⁹ Also in this regard, section 11102(a) gives the Board authority to require the use of "main-line tracks for a reasonable distance outside of a terminal."

Nevertheless, even if the shipper met the threshold question that the trackage was a terminal facility, the shipper has to make it past the second

¹⁴Id. at 181-82.

¹⁵Id.

¹⁶See, *Rio Grande Indus., et al. — Purchase and Related Trackage Rights — Soo Line R.R. Line Between Kansas City and Chicago, IL*, ICC Finance Docket No. 31505, Decision No. 6, Slip op. at 12 (served November 13, 1989) (*Rio Grande/Soo*) (stating that *Midtec* governs the terminal trackage rights application under then section 11103(a)); accord *Shenango Inc. v. Pitts., Chartiers & Yough. Ry. Co.*, 5 I.C.C.2d 995, 1000 (1989), *aff'd sub nom.*, *Shenango Inc. v. ICC*, 904 F.2d 696 (3rd Cir. 1990); *Golden Cat Division of Ralston Purina Co. v. St. Louis Southwestern Ry. Co.*, STB Docket No. 41550, Slip op. (April 25, 1996) (*Golden Cat*); *Philadelphia Belt*.

¹⁷See, *Rio Grande/Soo*; *UP/MP/WP*.

¹⁸*Midtec* at 179; *Rio Grande/Soo* at 11.

¹⁹*Rio Grande/Soo* at 10; Cf. 49 U.S.C. § 13503 (the "transfer, collection, or delivery" by motor vehicle transportation in terminal areas is exempt from STB jurisdiction). Other factors bearing on the question of what constitutes a "terminal facility" include: (1) whether the property assists in the performance of the functions of a terminal; (2) whether operations occur within railroad yard limits; (3) whether service is performed within a cohesive commercial area immediately served by a terminal facility; and (4) whether team tracks, freight houses, or assembly facilities exist in the underlying area. See, *Rio Grande/Soo* at 10-11.

step; namely, the public interest test under the anticompetitive conduct standard. Although the public interest test as developed under *Intramodal* and *Midtec* was clear, the movant, usually a shipper has rarely met the standard. Few shippers would win because they could not meet the burden of proof that is on the movant, in order to receive relief in a terminal trackage rights application, to show that the line owner has engaged in, or is likely to engage in, anticompetitive conduct.

The Public Interest Standard in Merger and Acquisition Cases

The *Midtec* standard has been consistently applied to section 11102(a) applications with few exceptions.²⁰ Two exceptions addressing the public interest requirement of a terminal trackage rights request without applying the anticompetitive conduct standard set out in *Midtec* were *Rio Grande Indus., Inc. et al — Purchase and Trackage Rights — Chicago, Missouri & Western Railway Company Line between St. Louis, MO and Chicago, IL, (RGI/CMW)*²¹ and *Denver and Rio Grande Western Railroad Co. and Missouri-Kansas-Texas Railroad Co. v. St. Louis Southwestern Railroad Co., (Denver and Rio Grande)*.²² In *RGI/CMW*, the Commission's grant of terminal trackage rights merely substituted one carrier in place of another carrier who already had access over the tracks in question, but who faced imminent bankruptcy. The Commission sought to replace the bankrupt carrier in order to maintain the competitive status quo and preserve service to shippers. In *RGI/CMW*, the Commission granted the rights and specifically refused to apply the *Midtec* standard (as embodied in the *Intramodal* Rail Competition rules) stating:

In analyzing the various trackage rights sought here, we will not apply the competitive access rules adopted in *Intramodal*. Those rules address the addition of another carrier to the market outside the context of acquisition or merger proceedings.²³

In doing so, the Commission emphasized that its findings on terminal trackage rights issues were "limited to the unique circumstances of [the] case."²⁴

In *Denver and Rio Grande*, the Commission granted terminal trackage rights to a carrier to implement a condition which the Commission had imposed in the 1982 consolidation of the Missouri Pacific Railroad Company

²⁰See footnote (16).

²¹*Rio Grande Indus., Inc. et al — Purchase and Trackage Rights — Chicago, Missouri & W. Ry. Co. Line between St. Louis, MO and Chicago, IL*, 5 I.C.C.2d 952 (1989).

²²*Denver and Rio Grande W. R.R., et al. v. St. Louis Southwestern R.R.*, ICC Finance Docket No. 30759, 1987 ICC LEXIS 488 (decided January 5, 1987).

²³*RGI/CMW* at 980 n.30.

²⁴*Id.*

and the Union Pacific Railroad. In doing so, however, the Commission acknowledged that the *Midtec* standard governed applications for terminal trackage rights under then section 11103(a), but because the Commission considered its action as merely implementing a condition imposed in a 1982 merger (over four years prior to the *Midtec* decision and during the time when the broad public interest test applied), it found no need to apply the *Midtec* public interest standard.²⁵

The post-*Midtec* decisions cited above appear at first blush to have little impact on determining the standard applied in terminal trackage rights applications because of their unique circumstances. However, combined with some other pre-*Midtec* and post-*Midtec* cases dealing with mergers or acquisitions, the ICC appears to have created an exception to *Midtec*. In *Rio Grande/Soo*, the ICC held that it would resort to section 11103 [now section 11102] to "supply short missing links in creating a competitive route necessary to ameliorate the adverse competitive impact of, and thus permit approval of a merger shown to have substantial public benefits."²⁶ In *UP/MP/WP*, the ICC held that it would resort to section 11103 to mitigate the competitive harm that the consolidation would cause.²⁷ In *CSX/Chessie*, the ICC granted a terminal trackage agreement to implement the terms of a privately negotiated settlement agreement.²⁸

Because of these exceptions, it was unclear, prior to the STB's 1996 decision in the *Union Pacific Corp. et al - Control and Merger - Southern Pacific Rail Corp. et al*, (*UP/SP*)²⁹ proceeding, whether a party in the context of a merger situation could avoid the *Midtec* standards when it sought terminal trackage rights authority. In the *UP/SP* merger, the Board had to decide on a terminal trackage rights application UP sought for itself and rights it sought for BNSF over two different KCS track segments located in Shreveport, LA and in Beaumont, TX, and owned by The Kansas City Southern Railway Company (KCS) including the KCS Neches River Bridge. UP/SP sought such rights to

²⁵Denver and Rio Grande at *12 n.5.

²⁶Rio Grande/Soo at 11, n.12.

²⁷UP/MP/WP at 575-77.

²⁸CSX/Chessie at 582-584. In *CSX/Chessie*, the primary applicants, CSX Corporation (CSX) and Chessie System, Inc. entered into a private settlement agreement with Norfolk and Western Railway Company (NW) to allow trackage rights over their lines. As part of NW's settlement with CSX, NW sought authority from the ICC to operate over 1.1 miles of terminal trackage owned by Consolidated Rail Corporation (Conrail) in Cincinnati. CSX/Chessie at 544. The ICC held that the terminal trackage rights request was in the public interest because it would improve NW's service capabilities and its interchange with Southern Railway Company. It would also alleviate safety and environmental problems caused by NW's existing operations. CSX/Chessie at 530, 583-584. In determining the public interest pursuant to section 11103, the ICC stated that it was required to take into consideration not only the interests of shippers using the service involved, and the interests of carriers, but also the interests of the residents of Cincinnati. CSX/Chessie at 584.

²⁹Union Pac. Corp., et al. - Control and Merger - Southern Pac. Rail Corp., et al., STB Finance Docket No. 32760, Decision No. 44, Slip op. (served August 12, 1996).

implement the settlement agreement with BNSF whereby BNSF would be given trackage rights to operate over these KCS segments. UP/SP did not attempt to comply with the *Midtec* standards, but instead cited to the *RGI/CMW*, *Denver and Rio Grande*, and *Rio Grande/Soo* decisions as allowing the pre-*Midtec* public interest standard to apply when the terminal trackage rights were being sought to implement a condition of a merger. KCS argued that UP/SP must meet the *Midtec* standards. Although the Board acknowledged that there was some language in previous decisions indicating that *Midtec* was the appropriate standard, it stated:

Whether the ICC ever applied its relatively exacting *Midtec* precedent in the context of a merger is a matter of some debate. In any event, we believe that it is inappropriate to do so here, and to the extent that ICC cases suggest otherwise, we specifically overrule them. Instead, we will apply the "broad public interest" standard that is in section 11103(a) itself.³⁰

Of curious note, however, is that four months prior to the Board's decision in *UP/SP*, the Board had issued two decisions upholding the use of the *Midtec* standards, although not in the context of a merger proceeding.³¹ Reconciling these contemporary cases with what the Board did in *UP/SP* makes it clear that in the merger context, and only in the merger context, the Board will apply the broad "public interest" standard to applications under section 11102 and not the *Midtec* anticompetitive conduct standard.

As shown above, the ICC and Board have found in the context of merger cases that the grant of terminal trackage rights under section 11102 will be in the public interest in a number of different circumstances. These circumstances include granting terminal trackage rights in order to: (1) ameliorate a harm or anticompetitive effect created by the merger; (2) implement a condition imposed by the Board; (3) supply short missing links between merging carriers; or (4) implement privately negotiated settlement agreements as part of a merger proceeding. Although the grant of terminal trackage rights in these four circumstances in the merger context will not require the *Midtec* standard, they each require the actual filing of a terminal trackage rights application and sufficient evidence to establish that the requirements of the statute have been met.

Balancing The Merger Contract Override Power with Section 11102

Although it is now clear that the Board will not apply *Midtec* in analyzing the public interest factor of a terminal trackage rights application filed in a merger context, there remains the issue whether a terminal trackage rights

³⁰UP/SP, Decision No. 44 at 169.

³¹See, *Golden Cat* and *Philadelphia Belt*.

application should even be required in the first instance. A plausible argument can be made that the Board, in a merger context, can simply use its authority under sections 11321(a) and 11323(c) to impose a condition granting terminal trackage rights over another carrier even over that carrier's objection. Of course, simply resorting to sections 11321(a) and 11323(c) would basically write section 11102 out of the statute.

Under the rules of statutory construction, section 11321(a) should not be read to exempt a merger applicant from the requirements of § 11102, just as § 11321(a) should not be read to exempt a merger transaction from any other provision of the ICA such as labor protection under § 11347. In reading section 11321 and section 11102, the Board must interpret these sections as being consistent with one another when possible.³² In resolving this apparent conflict between § 11321 and § 11102, the Board's discussion of the section 11321(a) issue in the context of the terminal trackage rights application in *UP/SP*, makes it clear that § 11102 and § 11321 should be harmoniously applied in the context of a merger.³³

In *UP/SP*, the applicants, as part of their request to implement a settlement agreement with the Chemical Manufacturers Association (CMA), sought to grant BNSF terminal trackage rights over terminal track jointly owned and operated by KCS, SP, and UP without first filing a terminal trackage rights application. This jointly operated track was governed by a series of agreements that prevented one carrier from granting access to another carrier without the consent of the other carriers. The Board, in imposing the CMA Settlement Agreement, approved the applicants' request to grant BNSF access to these terminal tracks without addressing the terminal trackage rights issue.

KCS argued in a petition to reopen that *UP/SP* could not unilaterally provide BNSF access to the Lake Charles area without first bringing a terminal trackage rights application under 49 U.S.C. § 11103. BNSF and UP responded that the Board could utilize its authority via sections 11323(c) and 11321(a) to override the contracts and impose the terminal trackage rights without filing a terminal trackage rights application. While denying the petition to reopen, the Board agreed with KCS's position and held that KCS's contract rights could not be preempted until after BNSF filed a terminal trackage rights application. The Board did indicate, however, that if the terminal trackage rights application were denied, it would be prepared to consider overriding the provisions of any agreements that prevented access by BNSF to the Lake Charles area if the necessity test was met.³⁴ In other words, resort to the Board's authority over sections 11323(c) and 11321(a).

Indeed, in a separate issue in the *UP/SP* case, the Board held that an

³²*Local 478 Trucking and Allied Indus. Pension Fund v. Jayne*, 778 F. Supp. 1289 (D. N.J. 1991).

³³*UP/SP*, Decision No. 44 at 168-169.

³⁴*UP/SP*, Decision No. 63 at 9.

override of the consent requirements in an applicable joint facility agreement was necessary to fulfill the conditions it had imposed on the UP/SP merger because a terminal trackage rights remedy was unavailable.³⁵ In that decision, the Board was faced with a request for terminal trackage rights over a seventy-three-mile line formerly belonging to SP between Provo and Utah Railway Junction. After concluding that a terminal trackage rights remedy was not available, the Board decided that the override of the joint facility agreements was necessary to grant the request.³⁶

Conversely, in *CSX Corp. et al. Norfolk Southern Corp. et al. – Control and Operating Leases/Agreements – Conrail Inc. et al.*, (CSX/NS/CR), Gateway Western Railway Company (GWR) opposed the assignment of Conrail's terminal trackage rights over GWR (and its subsidiary, Gateway Eastern Railway Company) to CSX.³⁷ CSX had sought such an assignment pursuant to 49 U.S.C. § 11321. GWR argued that because the trackage involved was in the nature of terminal tracks and the effect of the override would be to grant CSX terminal trackage rights over the GWR, CSX could not simply rely upon section 11321(a), but must first file a terminal trackage rights application. The Board agreed with GWR and denied CSX's request. It held that the exercise of its override authority under 49 U.S.C. § 11321(a) was not necessary in view of the availability of relief under 49 U.S.C. § 11102.³⁸

It should not go without saying that the reason that a § 11102 terminal trackage rights application must be filed before a contract governing the operations of terminal trackage can be overridden or before terminal trackage rights are granted as a condition to a merger is to ensure that an owner of the facilities is afforded constitutional due process before its property is taken for another carrier's use. The application procedure provides the owner with an opportunity to demonstrate that the proposed usage is not practicable and not in the public interest; it allows the owner to show that the proposed usage would substantially impair its ability to handle its own business over the trackage and that the relief is not operationally feasible; and it allows the owner to prove that such access is not in the "public interest." A section 11102 proceeding also allows the owner a forum in which to pursue appropriate conditions and compensation for the use of its facilities. Since many of these issues could be privately negotiated among the parties, this is also in line with the Board's long-standing preference for trackage right provisions to be privately negotiated by the parties.³⁹ Then, if the parties are unable mutually

³⁵UP/SP, Decision No. 66, Slip op. (served December 31, 1996).

³⁶UP/SP, Decision No. 66 at 11 n. 25.

³⁷CSX Corp. et al. – Control and Operating Leases/Agreements – Conrail Inc. et al., STB Finance Docket No. 33388 (CSX/NS/CR).

³⁸CSX/NS/CR, Decision No. 89, Slip op. at 100 (served July 23, 1998) citing UP/SP, Decision No. 44, Slip op. at 170.

³⁹Burlington N. Inc. et al., – Control – Santa Fe Pac. Corp., ICC Finance Docket No. 32549, Slip op. at 88 (served August 23, 1995).

to agree upon the terms of conditions of the terminal trackage rights, the parties may submit them to the Board for resolution.⁴⁰

In addition, if Congress did not intend section 11102 to apply in the context of a section 11323 proceeding, it would have expressed that intent in the language of the statute. Inasmuch as Congress only recently rewrote the ICA, Congress had the full opportunity to change the terminal trackage rights statute. Congress, however, did not modify, repeal, or otherwise substantively change former section 11103.⁴¹ Therefore, a terminal trackage rights application is an essential prerequisite for a merging carrier to override the contractual obligations governing terminal trackage or to impose terminal trackage rights as a condition to a merger.

Following the lead of the cases discussed herein, the Canadian National Railway Illinois Central Corporation (CN/IC), together with KCS/GWWR, have filed a terminal trackage rights application in the CN/IC merger proceeding. The terminal trackage rights request has arisen as the result of a privately negotiated settlement agreement reached between CN/IC and KCS/GWWR and the need to implement the merger. The terminal trackage rights application seeks unrestricted access in Springfield, IL over track jointly owned by UP and NS in order to facilitate the connection between IC and GWWR. The Board's decision is scheduled to be released on May 11, 1999, and will include a ruling on the pending terminal trackage rights application filed as part of a merger application. It is unclear at this time how the Board is going to apply the public interest test in the context of the pending merger proceeding. KCS/GWWR have also sought the terminal trackage rights based on the necessity test under section 11321 if the Board denies the terminal trackage rights application.

The Necessity Standard

As noted, if the tracks for which access is sought do not involve terminal facilities or a terminal trackage rights application is unavailable for other reasons, the Board can resort to its authority under sections 11323(c) and 11321(a) to impose a condition and override any contractual problems standing in the way of implementing that condition, but in utilizing its authority under these sections, the Board may only do so if it is "necessary" to carry out the merger. This approach was clearly evident in *UP/SP*, where the Board stated that if a terminal trackage rights application under section 11103 [now 11102] were unavailable for any reason, then it would simply override any contractual or other legal restrictions pursuant to 49 U.S.C. § 11341(a) [now 11321(a)] if

⁴⁰See, *UP/SP*, Decision 44, Slip op. at 169 and Decision 63, Slip op. at 9.

⁴¹See, ICCTA, Pub. L. No. 104-88, 109 Stat. 803, enacted December 29, 1995, effective January 1, 1996, section 11102.

necessary to carry out the merger.⁴² The Supreme Court has clearly stated that “[t]he immunity provision does not exempt carriers from all law, but rather [only] from [a] law necessary to carry out an approved transaction.”⁴³ Furthermore, the Board’s *UP/SP* Decision No. 63, determined that a § 11321(a) override is, by definition, not “necessary” when a terminal trackage rights remedy is available. As noted, the statutory exemption under § 11321(a) only applies when abrogating a law or overriding a contract is “necessary” to carry out the Board’s approved transaction. A determination by the Board that a railroad is exempted from certain laws, without finding that the exemption is necessary in order to carry out the transaction, has no legal force.⁴⁴

The instances where the Board has undertaken to define what is “necessary” under § 11321(a) generally embrace disputes over labor issues. The cases that address the necessity standard indicate that there must be some “impediment to the approved transaction that needs to be pre-empted in order to implement the merger.”⁴⁵ In addition, if contract rights are to be overridden, the override must yield a transportation benefit such as enhanced efficiency, greater safety, or some other gain whose realization necessitates the abrogation of the contract.⁴⁶ In *CSX/Chessie (Arbitration Review)*, the Board stated that the standard of necessity under section 11341 requires a nexus between the modification sought and the effectuation of the approved merger. Under this scheme, the public interest in effectuating approved consolidations would be ensured without any undue sacrifice of competing interests.⁴⁷ It is clear, however, that the Board does not even resort to its authority under section 11321(a) – and the corresponding “necessary” analysis – unless, and only if, a terminal trackage rights remedy under section 11102 is unavailable.

Conclusion

The lessons that can be learned from the precedent established for section 11102 competitive access cases are: (1) the Board will apply *Midtec* to a request for reciprocal switching or terminal trackage rights outside the merger context; (2) the Board will not apply the *Midtec* standard in merger cases, but instead will apply a broad public interest test, although it is unclear whether the Board will grant such rights only to fix an anticompetitive problem or whether the Board will also grant such rights to facilitate a merger or a settlement; and (3)

⁴²UP/SP, Decision No. 44 at 170.

⁴³Norfolk & W. Ry. Co. v. American Train Dispatchers’ Assn., 111 S. Ct. 1156, 1166 (1991).

⁴⁴See, *Railway Labor Executives v. ICC*, 883 F.2d 1079, 1082 (D.C. Cir. 1989).

⁴⁵CSX Corp.- Control - Chessie Sys., et al., 8 I.C.C.2d 715, 721 (1992).

⁴⁶*Railway Labor Executives’ Assoc. v. United States*, 987 F.2d 806, 815 (1993); see also, *American Train Dispatchers Assoc. v. ICC*, 26 F.3d 1157 (D.C. Cir. 1994).

⁴⁷CSX Corp. - Control - Chessie System, Inc., et al. (*Arbitration Review*), STB Finance Docket No. 28905 (Sub-No. 22), Slip op. at 36-37 (served September 25, 1988).

if terminal tracks are involved, no party can use section 11321's (previously 11341) broad preemption authority to get access over such tracks, or to have a trackage rights agreement covering such tracks assigned to them, without first filing a terminal trackage rights application and meeting either *Midtec* or the merger standard depending upon the context of the filing of the application.

There is currently a legislative proposal by various shipper organizations to, among other things, change the terminal trackage rights standards. For example, a shipper organization called the Rail Customer Coalition (RCC) testified in a Senate hearing on March 2, 1999 that the STB and its predecessor, the ICC, has imposed the wrong standard when re-viewing terminal trackage rights applications. RCC complained that the Staggers Act of 1980 allowed competition to occur within terminal areas either by means of "terminal trackage rights" or "reciprocal switching." RCC pointed out that the "Use of Terminal Facilities" statute found at 49 U.S.C. § 11102 states that the Board may require terminal facility to be used by another carrier if it is "practicable" and "in the public interest" so long as it does not "substantially" impair the ability of the owner of the facilities to handle its own business. RCC complained that the "public interest" factor as articulated under the *Midtec* case, which required the rail customer to prove that the railroad was undertaking "anti-competitive abuse," is an impossible burden for any shipper to meet and is an improper standard. As a result, Senator Rockefeller recently introduced a bill that would, among other things, eliminate the anticompetitive conduct standard from the STB's determination in section 11102 proceedings. It remains to be seen whether any changes in the terminal trackage rights statute will occur during the reauthorization of the STB.

In conclusion, while the Board does have existing authority to order competitive access in the form of reciprocal switching or terminal trackage rights, it will not do so absent a finding of anticompetitive effects. The only exception to that rule is the Board's use of section 11102 in the context of merger and line acquisition cases.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36836

**NORFOLK SOUTHERN CORPORATION
NORFOLK SOUTHERN RAILWAY COMPANY
– ACQUISITION OF CONTROL –
NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY**

**COMMENTS IN OPPOSITION TO CSX TRANSPORTATION, INC.'S
RESPONSIVE APPLICATION FOR TERMINAL TRACKAGE RIGHTS**

EXHIBIT B

VERIFIED STATEMENT OF JAY TRAYWICK

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36836

NORFOLK SOUTHERN CORPORATION &
NORFOLK SOUTHERN RAILWAY COMPANY
—ACQUISITION OF CONTROL—
NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY

VERIFIED STATEMENT OF JAY TRAYWICK

My name is Jay Traywick. I am currently Superintendent of the Blue Ridge Division for Norfolk Southern (“NS”). I have over 30 years of railroad experience. I began my railroad career with Burlington Northern in Seattle, WA in 1995. I joined Norfolk Southern in the Transportation department in 1998. I have served as the Division Superintendent in Birmingham, AL. At one point, in 2014, I became Chief of Staff to the then-Chairman, President, and CEO. I moved into Marketing in 2017 as AVP Short Line Marketing. I returned to Operations in 2024. In my role as Division Superintendent, I have responsibility for Norfolk Southern railroad operations in Virginia, North Carolina, West Virginia, and parts of Ohio.

In this Verified Statement I provide details with regard to the operations of NS and the Norfolk and Portsmouth Belt Line (“NPBL”), as well as Amtrak, in and about the Port of Virginia (“POV”) and more particularly with regard to service to and from Norfolk International Terminal (“NIT”). My role as a Division Superintendent and my prior role as AVP Field Sales & Short Line Marketing provide me with the knowledge and experience to provide this particular verified statement.

1. Overview of the Port of Virginia

The Port of Virginia is an expansive terminal area located in the Hampton Roads area of Virginia. It currently consists of both port facilities and industrial facilities.

It is an interesting facility, as it is both owned and operated by a branch of the Commonwealth of Virginia. In fact, the Port of Virginia, operated by the Virginia Port Authority (“VPA”) through its subsidiary, Virginia International Terminals (“VIT”), also manages its own chassis fleet. VIT operates the rail yard at Norfolk International Terminal (“NIT”), which I will discuss later in my statement. VPA and VIT manage the flow of ocean carriers and make the decision as to whether any particular ocean vessel will berth at NIT, VIG, or one of the other terminals on the Port of Virginia property.

NIT is the port’s largest terminal by throughput capacity.¹ NS and NPBL serve it by rail, and CSXT also has access through drayage. Truckers have direct access to NIT, and from NIT those truckers have direct access to Interstate 64, the major interstate in the Hampton Roads region. NIT is not only a container terminal. It also has facilities, for example, to handle “reefers” or refrigerated cargoes. PRO-PASS, which is a trucker reservation system operated by the VIT, operates for entry and exit to the terminal.

VIG is a large terminal as well. It has 2.2M TEU capacity, and over 290 acres of operating facilities.² It is served directly by the Commonwealth Railway (CWRY), which

¹ Attachment A is a one-page description of NIT published by the Port of Virginia. Although the Port of Virginia states that NIT has rail service access by both Norfolk Southern and CSX, that is a reference to NS direct rail access and CSXT access either through NPBL switch or drayage. A reference to “TEU” is a reference to “Twenty-foot Equivalent Unit” which is a standard unit of measure for cargo capacity.

² Attachment B is a one-page description of VIG published by the Port of Virginia.

interchanges with both NS and CSXT.³ It is also served by truck via Route 164, a four-laned highway that feeds into I 64. PRO-PASS is operational on VIG as well as on NIT. POV recently spent a great deal of money expanding the terminal's container and rail capacity.

The Port also operates the Newport News Marine Terminal ("NNMT") and the Portsmouth Marine Terminal ("PMT"). NNMT is a breakbulk and a roll-on/roll-off terminal with truck and CSXT direct access. NS does not have direct access to NNMT.

2. NS Operations at Norfolk International Terminals (NIT)

NS serves NIT out of Portlock Yard. NS has four scheduled trains per day that terminate at Portlock Yard. All of these trains have traffic for NIT. These trains also have mixed freight destined for various locations in the area, including those served by NPBL switch. The interchange between NS and NPBL takes place daily at Portlock Yard.

We coordinate our day-to-day operations in Portlock Yard with the Port of Virginia employees that run NIT. So, there will be times in this Verified Statement that I will use the terms "NIT" and "VIT" interchangeably, but hopefully the context will make it clear whether I am just referring to the location rather than the persons that are operating that location.

NS performs switching in Portlock Yard before moving traffic to NIT or interchanging traffic to NPBL or serving other customers in the area. When a freight train arrives at Portlock Yard, railroad crews inspect the cars and verify documentation before sorting them based on destination. Cars for nearby customers are grouped into local switch jobs, which are planned to allow efficient delivery along designated routes. Crews then move these cars to customer sidings, spot them for loading or unloading, and pull any empties. After each move, the railroad updates

³ The Port of Virginia characterizes this as "on dock connections to both Norfolk Southern and CSX." See Attachment B.

its tracking systems to reflect car status and location. Empties and outbound loads return to the yard for reclassification and further routing.

With regard to the intermodal traffic, NS usually makes 3 trips per day to NIT via the Sewell's Point Branch. NS will operate its trains past QM Junction and shove the cars for NIT into track along Terminal Blvd. NS will then take light locomotives up towards the north end of the facility to pick up traffic (the "back gate" of the facility) that has been staged for pick up by NS. Each of these 3 trips can take between 8 and 11 hours per trip, so much of the capacity of the NS line is occupied by NS operations to and from NIT. There is not a lot of excess capacity on our line.

Each train run by NS to NIT delivers 8,000–10,000 feet of traffic (totaling 25,000–30,000 feet daily). The NIT operation run by VPA/VIT does not have capacity to move an entire 8,000 – 10,000-foot train in one move. Instead, it will cut the train into smaller blocks for movement into and around the NIT facility. Additionally, I understand that NIT requires 8 hours between deliveries to process each cut. That does not mean that NIT requires 24 hours to process each train. The tracks along Terminal Blvd heading towards the NIT "front gate" terminal tracks can handle more than one cut at a time, but NIT's operating constraints limit the efficiency of moves to and from NIT. NS cannot make 3 round trips in 15 hours due to these limitations.

NS also handles unit train traffic for Vulcan Materials seven days a week from Petersburg, Virginia to Norfolk, Virginia. NS runs this unit train via the Sewell's Point Branch through Portlock Yard, delivering unit trains of around 60 railcars to Vulcan Materials via the Sewell's Point branch. This traffic operates in the mid-late second shift window in between intermodal deliveries.

3. NPBL Operations

NPBL is a terminal carrier with lines in Portsmouth and South Norfolk. NPBL connects with NS just north of Portlock Yard at NS Junction. NPBL comes into Portlock Yard to interchange with NS for merchandise traffic. Occasionally, it will handle unit trains. For example, NPBL will handle seasonal unit trains of grain to the Perdue export facility. By far, the majority of NPBL's work with NS involves interchanging mixed trains for delivery to customers on NPBL's network.

NPBL has trackage rights to operate over NS's Sewell's Point Branch from Portlock Yard north towards NIT, past QM Junction towards the back (north) entrance to NIT. There are a few different shippers up north. For example, NPBL serves a cement customer near the back belt of NIT. NPBL handles a wide variety of traffic. Lately it has been handling large project cargo (e.g., generators, transformers) once or twice a week.

As I mentioned, NPBL accesses the Sewell's Point Branch via a signal at the north end of Portlock Yard. The Sewell's Point Branch is only partially signaled today. The first half (that nearest to Portlock Yard) is signaled and can be dispatched remotely. The second half, however, is unsignaled track that requires a track authority from the territory's dispatcher. This generally is received through radio communications between each individual train and the dispatcher just prior to the entry of the train into the unsignaled territory. The "authority" that a train will get will be over any track where only one train can operate – that is to the next siding or turnout. Much of the Sewell's Point Branch is configured so that only one train can operate over the branch at a time because there are no tracks to permit one train to pass another.

4. VIT Operations

NS and NPBL are not the only rail operators in and around NIT. As I mentioned above, VIT operates the rail yard at NIT for VPA. When NS brings in a 9,000-foot train, we deliver it to VIT at designated tracks along Terminal Boulevard. VIT will split that train into smaller sections for movement into the NIT yard area. VIT actually operates within the NIT terminal to retrieve and deliver cuts of cars (generally about a maximum 3,000 feet) moving between the NIT central yard and the Sewell's Point Branch and moving rail cars within the central yard. When VIT exchanges traffic with NS, it does so through QM Junction.

When it does that, and at times when it is switching within NIT, VIT blocks Hampton Boulevard. Blocking of Hampton Boulevard is a daily occurrence. I am aware that this is problematic for the local community because Hampton Boulevard is an important commuting route. The City of Norfolk has placed time restrictions on VIT, prohibiting it from blocking Hampton Boulevard during some high traffic commuting times during the day.

5. Amtrak Operations

Another rail carrier operating in the area is Amtrak. Amtrak's station is in downtown Norfolk, across the Eastern Branch of the Elizabeth River from the Port of Virginia. It crosses the Elizabeth River on what is called Norfolk Southern Railroad Bridge #5. Norfolk Southern is required by Federal regulation to keep that bridge #5 in an open position except to allow Amtrak and freight trains to cross.⁴ Even then, we are not allowed to push the envelope. We are not

⁴ The Coast Guard regulates the operations of a variety of different rail drawbridges on lines that operate about and through the Port of Virginia. Those are found in Title 33 of the Code of Federal Regulations, Chapter I, Subchapter J, Part 117, Subpart B. These affect the overall capacity of all of the operations in and about the terminal area. I mention this particular bridge and its effect on Amtrak specifically because Amtrak has priority over all other rail traffic. The particular bridge I am referring to here (Bridge #5) is not located along the NPBL route to or

supposed to open it too early or to permit it to remain in a down position for too long because of the importance of the Navy and other maritime traffic through the area. The bridge operator only closes the bridge after a visual inspection confirms the absence of marine vessels.

Amtrak's operations between Norfolk and Petersburg, Virginia are entirely on Norfolk Southern. From the Amtrak station in Norfolk, an Amtrak train will head south, past NS Junction (where the double diamonds were removed about fifteen years ago) and on down to and through Portlock Yard. Amtrak has four daily trains during the week, with fewer frequencies on the weekend.

Obviously, Amtrak has priority over freight traffic, so NS clears the route of both NS and NPBL trains for Amtrak operations. We hold NS and NPBL trains off the route before Amtrak is expected, so that there are no hiccups and blockage of Amtrak service. This includes trains heading from the area of NIT (both NPBL and NS trains). We hold any trains that may use a part of the Amtrak route. And we hold trains that need to enter the area through NS Junction. That means that Amtrak takes up a good portion of the overall capacity of the line, with the remainder to be allocated to NS and NPBL (and NPBL's service to its customers), as well as for maintenance and inspection of the line.

6. Operational Constraints & Complexity

As is evident from my discussion above, there are aspects to the Port of Virginia terminal region that constrain operations and add complexity to the management of the NS tracks, the NPBL tracks, and especially the tracks shared by NS and NPBL and the tracks shared by NS,

from NIT, but it directly affects the operations along the line between NS Junction (where NPBL enters the NS lines on trackage rights) and NS's Portlock Yard (on the NPBL route to and from NIT). Therefore, when Amtrak, which has priority operating rights over freight rail, gets delayed due to Bridge #5 being in a raised position, that delay has an especially harsh cascading effect on all freight rail going to and from NIT.

NPBL and Amtrak. The area's rail network is already complex, and operations have been optimized to handle the traffic given the many constraints described herein. Introducing additional movements there would create significant ripple effects, disrupting established traffic flows and increasing congestion. These changes would negatively impact service reliability for existing customers and compromise operational efficiency across the region.

For one thing, the Sewell's Point Branch is the route taken by all traffic to and from NIT (and it was the only route taken by all traffic to and from NIT even before the removal of the so-called "Double Diamonds" and the connection at Carolina Junction). It is effectively a single-lane route, meaning that only one train can operate over the Sewell's Point Branch at any one time. If there is a train on the Sewell's Point Branch, all other trains must be held out.

For another thing, the rail infrastructure was laid out decades ago, and so often time connections and turnouts are not optimal for longer trains. I understand that CSXT keeps discussing the desire to operate 10,000-foot intermodal trains. Given the limitations in the area, trains that long present operational challenges that compound the capacity constraints in the terminal area, due to track length and maneuverability. Not only are curves and turnouts difficult to navigate, but VIT also cannot handle them at NIT. VIT generally cuts NS intermodal trains into smaller blocks.

NS runs service across the Eastern Branch of the Elizabeth River, including Lamberts Point Docks. (Both of these receive trains moving through Portlock Yard, and thus travel on some of the same line segments that Amtrak, and NPBL moves (including NPBL moves to and from NIT for CSXT, should that occur). NS is able to separate this traffic from NS's service to NIT, because they diverge at Portlock. That is not the case for Amtrak, NPBL, or CSXT, should it get the terminal trackage rights that it seeks to NIT.

I understand that CSXT's proposal for terminal trackage rights includes 2 6-hour daily windows for its rail service to and from NIT. While the CSXT filing lacks sufficient information about the proposed operations, the service windows in and of themselves would severely disrupt existing operations, not only for NS but for Amtrak and NPBL. I have discussed already the fact that Amtrak can operate up to 8 trains per day over the terminal facilities. NPBL serves a number of customers, including a bulk transfer facility and a major aggregates facility. And just as NPBL has to do on its lines, NS must regularly perform maintenance and inspection on the involved track and signal complex that each of the railroads operate over. Operations in the area are already complicated. Adding another carrier into the mix, particularly one with entitlement to dedicated operating hours and operating preferences, would severely constrain any other rail service in the terminal area.

VERIFICATION

I, Jay Traywick, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on November 18, 2025.

/s/ Jay Traywick

Jay Traywick