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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

Dear Chief of Case Administration,

Norfolk Southern Corporation and Norfolk Southern Railway Company (NS) collectively submit its Response To Comments, Protests, Requests For Conditions, And Other Opposition (“Response”). NS’s Response is being submitted in three volumes. Volume I is being submitted in both a Highly Confidential Version and a Public Version. Volumes II and III are only being submitted as Highly Confidential documents. A “Confidential” version will be created upon request of a party. 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

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Enclosure
cc: Parties of Record

**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**

**RESPONSE TO COMMENTS, PROTESTS,
REQUESTS FOR CONDITIONS, AND OTHER OPPOSITION**

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November 20, 2025

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VOLUME I

TABLE OF CONTENTS

PREFACE	1
LEGAL FRAMEWORK.....	3
ARGUMENT.....	10
I. CSXT FOCUSES ON THE WRONG MARKET, UNDERMINING THE STRUCTURAL INTERGRITY OF ITS ENTIRE COMPETITIVE ANALYSIS	10
A. <u>NIT Is Not A Market In Isolation Of The Rest Of The Port Of Virginia</u>	12
B. <u>CSXT's Argument Of A Zero Share Of The NIT On-Dock Rail Movement Is Meaningless Given CSXT's Use Of Drayage With A Subsidy, The POV's Dispatching Policies With Respect To VIG And NIT, and Geographic and Infrastructure Differences</u>	16
1. <i>CSXT's Share Of The Rail Movements At NIT is Skewed Because VPA Directs Most of CSXT Shipments to VIG.</i>	18
2. <i>CSXT's Percentage Of Rail Traffic At Has Grown Significantly Indicating No Foreclosure. .</i>	20
3. <i>Drayage Has Been An Adequate And Profitable Substitute..</i>	22
4. <i>Geographical And Infrastructure Differences Affect Shares. .</i>	24
C. <u>Ocean Carriers Have Other East Coast Port Options That Constrain Rail Rates</u>	27
D. <u>Trucks Compete With Rail For The Movements Of International Intermodal Containers From POV To The Midwest</u>	35
E. <u>The Presence Of A Barge Service Alternative At POV And Port of NY/NJ Is Also Part Of The Relevant Market</u>	39
II. CSXT AVOIDS THE NPBL BECAUSE IT RECEIVES A PRIVATE SUBSIDY TO DRAY ITS CONTAINER TRAFFIC, NOT BECAUSE IT IS FORECLOSED BY THE NPBL SWITCHING FEE.....	41
III. THERE WERE VALID BUSINESS REASONS TO TABLE CSXT'S 2024 RATE AND SERVICE PROPOSAL AND NPBL IS FUNDAMENTALLY DIFFERENT THAN CRWY	45
IV. NPBL'S SWITCH RATE IS APPROPRIATE	51
A. <u>The 2010 NPBL Switch Rate Fully Comports with the Principle of the 1897 Agreement.</u> ..	51
B. <u>Differential Pricing Is Neither Required Nor Appropriate.</u>	52
C. <u>Rate Comparison to CWRV</u>	55
D. <u>The Board Should Not Be Involved In A Rate Dispute With A Minority Shareholder.</u>	57
E. <u>The NPBL Switching Rate Has Inconsequential Impact On CSXT's Movements</u>	57

V.	NS’S 44-YEAR HISTORY SHOWS NS’S COMMITMENT TO MAINTAINING NPBL’S PRINCIPLES OF NEUTRALITY	59
A.	<u>NS and CSXT’s Historically Successful Partnership</u>	59
B.	<u>NS Is Not Using Its Ownership to Effect Anticompetitive Action Against CSXT</u>	61
C.	<u>Due To This Neutrality, CSXT Is Wrong To Treat This Transaction As A 2-to-1 Transaction</u>	62
VI.	DOJ’S COMMENTS DO NOT SUPPORT DENIAL OF THE TRANSACTION	67
VII.	CSXT COMPLETELY IGNORES SERVICE TO THE CUSTOMERS THAT ARE CAPTIVE TO NPBL	70
VIII.	THE DISCONTINUANCE OF THE SO-CALLED CONNECTING TRACK WAS IN THE BEST INTERESTS OF THE NPBL AT THE TIME AND WAS NOT IN FURTHERANCE OF SOME CONSPIRACY THAT TOOK CSXT TEN YEARS TO ASSERT	74
IX.	THE TRACKAGE RIGHTS COMPENSATION PROCEEDING IS NOT PART OF AN ANTICOMPETITIVE SCHEME – IT IS A TIME TESTED REGULATORY PROCESS TO RESOLVE A CONTROVERSY THAT THE PARTIES CANNOT OTHERWISE RESOLVE ON THEIR OWN	76
X.	CSXT IS DISINGENIOUS WHEN IT RAISES CONCERNS ABOUT THE IMPACT OF DRYAGE MOVEMENTS IN THE CITY OF NORFOLK	77
XI.	CSXT SEEKS CONDITIONS AND “REMEDIES” FAR IN EXCESS OF WHAT SHOULD BE PERMITTED	79
A.	<u>CSXT’s Divestiture Proposal is Ambiguous and Ill-Conceived</u>	80
1.	<i>The STB Must Be Guided By Applicable Law, Not An Outdated And Inapposite Supreme Court Case From 1912</i>	81
2.	<i>UP/MKT Is Not Applicable to NPBL</i>	82
3.	<i>The Divestiture Proposal Is Ambiguous, Is Not Narrowly Tailored, And Does Not Consider The Risks To The Public</i>	82
4.	<i>CSXT’s Divestiture Proposal Should Have Been Presented As A Responsive Application</i>	86
B.	<u>CSXT Seeks An Order From The STB That It Can Take Advantage Of In Any Oversight Proceeding</u>	87
C.	<u>CSXT Seeks NS To Restore Service Over Discontinued Lines</u>	89
D.	<u>CSXT Seeks To Remove NS From Important NPBL Decisions</u>	91
E.	<u>CSXT Request For A Seven Year Oversight Period Is An Overreach</u>	92
	CONCLUSION	94
	CERTIFICATE OF SERVICE	96

EXHIBIT A – VERIFIED STATEMENT OF KEITH WAEHRER, PHD

EXHIBIT B – REBUTTAL VERIFIED STATEMENT OF DANIEL L. FAPP

EXHIBIT C – VERIFIED STATEMENT OF WILLIAM BRENNAN, PHD

EXHIBIT D – VERIFIED STATEMENT OF CHRISTOPHER LUEBBERS

VOLUME II
FILED ONLY AS A HIGHLY CONFIDENTIAL VERSION
TABLE OF CONTENTS

- EXHIBIT A – CHART OF CSXT’S ALLEGATIONS AND JUDGE DAVIS’ FINDINGS**
- EXHIBIT B – DEFENDANTS’ JOINT PRELIMINARY PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, DOCUMENT 590, FILED JANUARY 12, 2023**
- EXHIBIT C – MOTION FOR SUMMARY JUDGMENT BY NORFOLK SOUTHERN RAILWAY COMPANY, DOCUMENT 308, FILED APRIL 12, 2021**
- EXHIBIT D - JUDGE DAVIS’ OPINION AND ORDER, DOCUMENT 559, FILED JANUARY 3, 2023**
- EXHIBIT E - OCTOBER 30, 2025, LETTER TO THE HONORABLE W. SHEPPARD MILLER III, SECRETARY OF TRANSPORTATION, COMMONWEALTH OF VIRGINIA FROM JOSEPH H. CARPENTER**
- EXHIBIT F - CONFIDENTIAL AND HIGHLY CONFIDENTIAL CSX DOCUMENTS PRODUCED IN DISCOVERY AND CITED IN RESPONSE**

VOLUME III
FILED ONLY AS A HIGHLY CONFIDENTIAL VERSION
TABLE OF CONTENTS

EXHIBIT A – DEPOSITION OF JULIE CAREY, DATED OCTOBER 28, 2025

EXHIBIT B – DEPOSITION OF NATHAN H. MILLER, PH.D., DATED OCTOBER 30, 2025

EXHIBIT C – DEPOSITION OF MARYCLARE KENNEY, DATED NOVEMBER 3, 2025

EXHIBIT D - DEPOSITION OF STEVEN ARMBRUST, DATED NOVEMBER 3, 2025

EXHIBIT E - DEPOSITION OF WILLIAM F. HUNEKE, DATED NOVEMBER 4, 2025

**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**

**RESPONSE TO COMMENTS, PROTESTS,
REQUESTS FOR CONDITIONS, AND OTHER OPPOSITION**

PREFACE

NS filed its application for control of the NPBL as directed by the Board. This application simply addresses the oversight from the 1982 merger of Norfolk and Western and Southern Railways, in which the newly created NSC acquired a majority ownership of the NPBL. CSXT's opposition in proceeding is not only meritless—it is disingenuous. For over three decades, CSXT acquiesced to NS's majority ownership and de facto control of NPBL. In 1982, CSXT stood silent when NS acquired its controlling interest. More importantly, in 1989, CSXT went further, expressly consenting by contract to NS's majority representation on NPBL's board. In 1991 and again in 1998, during subsequent Board proceedings and merger approvals involving NS-controlled NPBL owners, CSXT raised no objection. For decades, CSXT acquiesced to this structure—until 2018, when it suddenly weaponized a routine rate dispute into a radical divestiture demand.

The truth is clear: CSXT's grievance has nothing to do with control and everything to do with money. Its real objection is NPBL's uniform, cost-based switch rate adopted in 2010 under

the 1897 governing agreements. CSXT demanded preferential treatment—a special rate for its intermodal container traffic at NIT—and even sought to rewrite century-old agreements to secure that advantage. When NPBL refused to compromise its neutrality, CSXT retaliated by manufacturing a control and antitrust controversy. This is a blatant abuse of the Board’s regulatory process and should be rejected outright.

The record obliterates CSXT’s claims. Not a single customer supports its position. The U.S. Department of Transportation (DOT), a frequent participant in control transactions, raised no concerns. The United States Department of Justice (DOJ) did not oppose the application or endorse CSXT’s requested conditions; it merely urged vigilance against anti-competitive conduct—a principle NS fully embraces. The intermodal container market at POV and NIT remains fiercely competitive, with rates driven down by rivalry among railroads, ports, trucks, and barges. Even at NIT, CSXT can pay the \$210 rate and remain profitable; it simply prefers the inflated margins afforded by POV’s subsidized drayage. Why? Because the big secret is that CSXT {{ [REDACTED] [REDACTED] }} and thus any reduction in NPBL’s rate would simply increase CSXT’s profitability and not inure to the benefit of the ocean carriers’ competitive choices. NS’s control of NPBL does not—and cannot—foreclose ocean carriers’ options. NS is committed to preserving NPBL’s 125-year tradition of neutrality and independence. Approving this application ensures NPBL remains a cost-effective, efficient, and impartial switching carrier, safeguarding competition and serving the shipping public. The Board should not allow CSXT to distort its regulatory processes for private gain. The Application must be approved.

LEGAL FRAMEWORK

Under 49 U.S.C. 11324(d), the Board shall approve the application unless it finds two conditions: (1) “as a result of the transaction, there is likely to be substantially lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States,” and (2) if, and only if, the Board makes that determination, such “anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.”¹ As set forth in the attached verified statements of Dr. Keith Waehrer, Mr. Daniel Fapp, Dr. William Brennan, and Mr. Chris Luebbbers, the international container business at POV is characterized by robust competition among ports, railroads, and trucking companies. This competitive environment will continue to exist after the transaction and will be bolstered by NS’s commitments in this proceeding.

NS’s commitments in this proceeding are comprehensive. Should the STB approve its application, NS will continue to adhere to NPBL’s century old governance principles to be an impartial terminal railroad operated on a uniform, cost-plus basis for its connecting carriers to serve customers along its lines. NS will continue to ensure that any individuals it appoints to the board of directors of NPBL understand and acts in a fiduciary manner, for the best interests of NPBL and its shareholders, including its minority shareholder, CSXT, and in line with those governing principles. NS agrees to have the NS/NPBL trackage rights compensation set by the Board using SSW cost-based principles. NS accepts a typical 5-year STB oversight. Finally,

¹ 49 U.S.C. 11324(d). *See, CSX Trans., Inc. – Acquisition – Certain Rail Lines of Indiana Hi-Rail Corp. in Henderson, KY, and Evansville, IN.,* FD 32905, 1996 STB LEXIS 349, at *4 (July 31, 1996). *See also*, CSXT-22 at 18. CSXT subtly but incorrectly recasts the test for 49 U.S.C. 11324(d) in stating that “Pursuant to the relevant statute, 49 U.S.C. § 11324(d), the Board must approve NS’s control application unless it finds that (1) there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade, and (2) that such anticompetitive effects outweigh any associated public benefits.”

provided that CSXT agrees that the NS/NPBL trackage rights compensation should be set by the Board using SSW cost-based principles, and that the NPBL switch fee should be set using NPBL costs in accordance with the uniform, cost-based principles set forth in the 1897 NPBL Agreement, the Board would, during an oversight period, have the right upon request to review any change to NPBL's rate.

In applying the statutory standard governing this transaction, the Board's focus should be on the impacts to the competitive environment of the intermodal container business.² In other words, will there be a substantial lessening of competition faced by the ocean carriers, who are the parties that contract with the trucks, barges, and rail to move international containers? The answer is no.³ At that point, the Board need go no further.⁴ Moreover, and without conceding that there would be any anticompetitive effects from the transaction, any such effects would be outweighed by the public interest of protecting significant transportation needs for customers located on the NPBL that would be adversely affected by a denial of the transaction. Therefore, the Board must approve the proposed transaction.

² The focus of CSXT's complaints revolve around the movement of containers through NIT, but NPBL moves a vast range of commodities for its connecting carriers. CSXT's opposition ignores this. Nevertheless, the concerns raised, and the remedies sought, by CSXT do directly affect the movement of traffic other than intermodal containers and that movement to and from shippers located on NPBL's routes. All of this is explored further herein.

³ The intermodal market is so competitive that the ICC exempted the transportation of intermodal containers from regulation. See NS-1 at 17 (citing American Trucking Associations v. I.C.C., 656 F.2d 1115 (5th Cir. 1981), Improvement of TOFC/COFC Regulation, 364 I.C.C. 731, 732, Ex Parte No. 230 (Sub-No. 5) (ICC served February 19, 1981)).

⁴ Consolidated R. Corp. and CSX Trans., Inc. – Acquisition and Operation – Nicholas, Fayette and Greenbrier R.R. Co., FD 32845, 1996 STB LEXIS 322 at *13 (STB served June 20, 1996) (the Board will “consider the public interest factor only if [it] find[s] significant anticompetitive effects.”).

In contrast, CSXT largely focuses its arguments on the purported competitive harms faced only by CSXT and not on any harms to customers on NPBL or intermodal competition, in general. For example, CSXT's witness, Dr. Huneke, explicitly states that, in his opinion, "[i]n evaluating this proposed transaction, the STB should ... consider whether Norfolk Southern's control of the Norfolk & Portsmouth Belt Line (NPBL) would stymy or limit CSX's ability to enter new lanes and compete for Hampton Roads traffic."⁵ This is the wrong focus. CSXT ignores the fact that the Board is charged with protecting competition for customers, not protecting and advancing the interests of rail competitors.⁶

Similarly, CSXT argues that the Board should improve CSXT's position, even if it is not being harmed by the transaction. CSXT's witness, Ms. Carey, argues that the STB has authority to impose conditions "to improve the position of a carrier" and "to protect railroads even though they will not suffer serious anticompetitive harm, and to aid railroads not likely to be harmed by the transaction."⁷ Again, this is incorrect. The Board typically only uses "its conditioning authority to ameliorate competitive harm that would result from the transaction. In doing so, the harm 'must be distinguished from pre-existing disadvantages that other railroads, shippers, or communities may have been experiencing ... i.e., pre-existing disadvantages that will neither be caused nor exacerbated' by the transaction."⁸ The Board's role is not to create new competition,

⁵ CSXT-22, VS Huneke, at 652 (emphasis added).

⁶ Canadian P. Ry. Ltd., et al. – Control – Kansas City Southern, et al., Decision No. 35, FD 36500, slip op. at 19 (STB served March 15, 2023). The Board's concern is the preservation of competition, not the survival of particular carriers.") (citing Canadian Nat'l Ry. – Control – Ill. Cent. Corp., 4 S.T.B. 122 (1999) at 140).

⁷ CSXT-22, VS Carey, at 580, n. 11 (quoting a pre-ICCTA major transaction control proceeding) (emphasis added).

⁸ CSX Trans., Inc. – Acquisition and Operation – Rail Line of Meridian & Bigbee R.R., L.L.C. ("CSXT/M&B"), FD 36727, slip op. at 5-6, 2024 STB LEXIS 208, at *6 (STB served October 17, 2024) (citing Canadian Nat'l Ry. – Control – Duluth, Missabe & Iron Range Ry., FD 34424

"[t]he Board's conditioning power is thus used to preserve competitive options (not to expand them)."⁹

When one focuses on customers and the competitive market of intermodal container traffic at the POV, rather than a single rail competitor (CSXT), the record unquestionably supports the notion that NS's existing control and future control of NPBL does not substantially lessen the customer's transportation options and that there is no need to condition the transaction, especially given NS's commitments. Indeed, in all the years since CSXT initiated its federal litigation, and up to this proceeding, it has failed to produce one customer supporting CSXT's allegations that it could not use CSXT because of the NPBL switching rate.

And while CSXT relies on comments by the Virginia Port Authority (VPA), the VPA is not a "customer" or a "shipper."¹⁰ While VPA may have expressed concerns over the control application, it noted that the historic framework of CSXT access to NIT involved costs for VPA (and thus VPA's customers) and thus urged the "comprehensive review of the transaction" that

et al., slip op. at 14 (STB served Apr. 9, 2004); Norfolk S. Ry. – Acquis. & Operation – Certain Rail Lines of the Del. & Hudson Ry, FD 35873, slip op. at 14 (STB served May 15, 2015)). See also, Canadian P. Ry. Ltd., et al. – Control – Kansas City Southern, et al., Decision No. 35, FD 36500, slip op. at 19 (STB served March 15, 2023) ("the Board recognizes the distinction between harm caused by a transaction and disadvantages that other railroads, shippers, or communities may have already been experiencing.") (citing Canadian Nat'l Ry - Control – Ill Cent. Corp., 4 S.T.B. 122 (1999) at 140).

⁹ CSXT/M&B at 5-6 (quoting Burlington N. Inc.—Control & Merger—Santa Fe Pac. Corp., 10 I.C.C.2d 661, 745 (1995)).

¹⁰ Ocean carriers are the railroad's customers, not VPA. VPA is the owner and operator of the Port of Virginia, including both NIT and VIG. VIT is a wholly owned for-profit subsidiary of VPA. VPA/VIT are actually partners with CSX through their subsidy agreement, and VIT has also suggested to CSXT that it be allowed to provide drayage services to CSXT. As such, VPA/VIT are not disinterested parties. They are direct competitors to NPBL and are in a business partnership with CSXT.

the Board is now giving.¹¹ VPA did not claim that the transaction will result in a “substantial lessening” of competition. VPA expressed a desire for “more opportunity for efficient rail access at NIT for the benefit of its [VPA’s] customers.”¹² Notably, VPA’s position acknowledges that there already is rail access at NIT for NS and for CSXT via NPBL. Additionally, just because the Board could use its conditioning power to increase operational efficiency at a port does not mean that it should if it does not otherwise meet the applicable regulatory standard for imposing conditions.

The only customer support letter CSXT submitted was from CMA CGM, an ocean carrier that connects with truck and rail carriers through NIT, as well as other port facilities at the Port of Virginia (POV) and throughout the U.S.¹³ CMA CGM expressed “concern” that the transaction “may have the effect of preventing CSX Transportation, Inc. from becoming an effective rail competitor at Norfolk International Terminals.”¹⁴ First, this letter focuses only on possible harm to CSXT, not on any harm to the customer. Second, the letter focuses solely on NIT, rather than POV (which includes its sister terminal, VIG). In fact, CMA ships a significant amount of traffic with CSXT at VIG, which is a prime example of the robust competition at POV.¹⁵ There are no other customer support letters.

¹¹ Comments of the Virginia Port Authority, submitted in Finance Docket No. 36836, March 5, 2025, at 5.

¹² *Id.* at 6 (emphasis added).

¹³ CSXT-3, submitted March 12, 2025.

¹⁴ *Id.* (emphasis added).

¹⁵ See, e.g., “Another Step Forward for Port as it Welcomes Record-Breaking Box Ship to Virginia International Gateway,” Virginia Port Authority Press Release, May 24, 2021 (noting that the “biggest container ship to ever come to the U.S. East Coast, the *CMA CGM Marco Polo*,” arrived at VIG), <https://www.portofvirginia.com/who-we-are/newsroom/another-step-forward-for-port-as-it-welcomes-record-breaking-box-ship-to-virginia-international-gateway/>, accessed on November 11, 2025.

Throughout its Opposition filing, CSXT continues to keep the focus on itself and to rehash its previously rejected antitrust arguments claiming NS's control of NPBL competitively harms CSXT. It strategically weaves throughout its Opposition little snippets of statements, misstatements, partial statements, and actions and arguments to misleadingly convey an overall tone of antitrust conspiracy between NS and NPBL. A particularly egregious example is the CSXT's reference to an April 2009 email by Chris Luebbbers stating that "[CSXT has] challenged the rate structure currently in place in order to lower the costs to serve NIT – which is where we come in." } }.¹⁶ CSXT insinuates that this statement is somehow indicative of a nefarious NS goal for the NS participants in that rate committee.¹⁷ However, CSXT conveniently omits the very next sentence in the Luebbbers email: { { [REDACTED]

[REDACTED] } }¹⁸ Far from trying to raise the switching rate to foreclose CSXT's use of NPBL, the email actually demonstrates that Mr. Luebbbers (and NS) was concerned about establishing a fair price.

CSXT had their chance to litigate its antitrust claims in court; those issues were reviewed and dismissed by the applicable Federal district court,¹⁹ the court of appeals,²⁰ and the US Supreme Court.²¹ The STB is not a court adjudicating antitrust claims of conspiracy between

¹⁶ NSR_00084753-754.

¹⁷ CSXT-22 at 37.

¹⁸ NSR_00084753-754.

¹⁹ CSX Transp., Inc. v. Norfolk S. Ry. Co., 648 F. Supp.3d 679, 2023 U.S. Dist. LEXIS 795 (E.D. Va. Jan. 3, 2023).

²⁰ CSX Transp., Inc. v. Norfolk S. Ry. Co., 114 F.4th 280, 2024 U.S. App. LEXIS 21966 (4th Cir. Va. Aug. 29, 2024).

²¹ CSX Transp., Inc. v. Norfolk S. Ry. Co., 2025 U.S. LEXIS 1619 (Apr. 21, 2025) (cert. denied).

two railroads under the Sherman Act. The court litigation involved a different focus, a different legal standard, and different precedent.²² Nevertheless, because CSXT insists on conflating the two proceedings and mischaracterizing the findings in those proceedings, NS is attaching the following materials in Volume II of these reply comments:²³ (1) a brief chart outlining CSXT's allegations and Judge Davis' findings with respect to those allegations; (2) a copy of NS's Proposed Findings of Fact which also addresses CSXT's antitrust conspiracy allegations; (3) a copy of NS's Motion for Summary Judgement from the District Court proceeding; and (4) a copy of Judge Davis' District Court order. NS urges the Board and its staff to review these documents, to the extent it finds the issues raised in the antitrust case relevant to this control proceeding.

By attempting to relitigate the alleged Sherman Act violations, CSXT is abusing the STB's regulatory process to improve its own commercial and competitive situation. As discussed above in the Preface, CSXT is seeking to overturn facts of which CSXT had long-term knowledge and to which CSXT had consented. This is not the first time CSXT has used this tactic.²⁴ As William Brennan, the former Chief Economist for the STB, notes:

²² What CSXT's numerous filings ignore is that the STB does not sit as an antitrust court. The Board's job is **not** to determine whether NS may have taken anticompetitive actions in the past to conspire with NPBL to prevent CSXT from competing. Those are antitrust allegations. They were tried and found wanting. The STB's statutory directive in this proceeding is that it "shall" approve this transaction unless NS's future control will result in the substantial lessening of competition, creation of a monopoly or restraint of trade in freight surface transportation in any region of the United States. The standard is not "did NS act anticompetitively in the past and if it did, this transaction must be denied." There is no statutory support for such a standard.

²³ Volume II consists of the relevant NS documents from the District Court proceeding and any documents gathered in discovery and cited in these reply comments.

²⁴ See Grand Elk R.R. – Acquisition of Incidental Trackage Rights Exemption – Norfolk S. Ry. Co., FD 35187 (Sub-No. 1), slip op. at 6 (STB served November 20, 2017) (noting that CSXT was abusing the regulatory process to reverse what it had for years consented to, "frustrat[ing] GDLK's ability to serve" customers and "without regard to the public interest") (emphasis added).

CSXT had a keen interest in the outcome of the merger, had every opportunity to comment on these facts and request conditions to the merger. CSXT chose not to do so. CSXT was silent. The Board should not now, more than 40 years after the fact, permit CSXT to effectively re-open the N&W-SRW merger and seek conditions it did not seek at that time.²⁵

The STB should not permit CSXT to abuse its regulatory processes in this manner. The STB should focus on its statutory obligations and focus on whether recognizing NS's long-standing control of NPBL will result in a substantial lessening of competition. It will not, and that means that the Board must approve the transaction.

ARGUMENT

I. CSXT FOCUSES ON THE WRONG MARKET, UNDERMINING THE STRUCTURAL INTEGRITY OF ITS ENTIRE COMPETITIVE ANALYSIS

CSXT's analysis in its Opposition is fatally flawed because it too narrowly defines the relevant market. In attempting to demonstrate that approval of NS's control application would result in a substantial lessening of competition, CSXT is forced to argue that the only relevant market for intermodal container traffic between the POV and the Midwest is on-dock rail access at NIT. This is an untenable position that ignores the reality of the competitive market for intermodal container traffic.²⁶ The reality of the intermodal container market requires consideration of the following competitive alternatives: (1) POV terminals other than NIT, (2) drayage at NIT, (3) other East Coast ports, and (4) truck and barge service. When the market is properly analyzed, CSXT's entire case falls apart.

These transportation alternatives provide robust competition. It was these same competitive pressures that resulted in both (1) CSXT and NS investing millions into their rail

²⁵ VS Brennan, at 4.

²⁶ Ms. Carey admitted that she did not, in preparing and presenting her evidence "define[] a relevant market." Deposition of Julie Carey, October 28, 2025, at page 19, lines 9-10.

routes so as to accommodate double stack intermodal service to the Midwest, and (2) POV itself investing millions to improve its competitiveness vis-à-vis other East Coast ports, including expanding intermodal capacity and making changes to increase the fluidity and capacity for trucks. In the competitive intermodal container market, the inability of any carrier to perform on-dock rail access at a single terminal of POV does not come close to resulting in a substantial lessening of competition. Accordingly, even if NS's control of NPBL resulted in CSXT not having on-dock rail access at NIT (which is not the case), such lack of access would not be sufficient for the Board to disapprove this transaction.

Moreover, even if rail-to-rail at NIT was the correct market definition, which it is not, CSXT still would not succeed. This is because CSXT will need to show that NS's future control of NPBL will result in a substantial lessening of competition, such as the imposition of an unreasonable switching rate²⁷ or cancellation of CSXT's switching rights to NIT. The statutory focus is on whether the future control results in a substantial lessening of competition. CSXT fails to meet that standard, nor can it because NS will not impose an unreasonable switching rate and NS will not eliminate CSXT's access to NIT via an NPBL switch. As will be discussed below and in the attached verified statements, the fact is CSXT's lack of "on dock" rail access has an infinitesimal impact on customers' transportation options and is not a determinative factor in ocean customers' decision in using either CSXT or NS at the POV.

²⁷ In fact, under STB jurisprudence, NPBL is entitled to charge any rate as long as it is not unreasonable. There is no allegation that NPBL's existing switching rate is unreasonable. As such, the Board has no authority to regulate NPBL's rate. See Cargill, Inc. v. BNSF Railway Co., NOR 42120, 2011 STB LEXIS 1 (served Jan. 3, 2011). If CSXT cannot use NPBL's reasonable rate, or chooses not to use it, that is a result of market conditions, not some anticompetitive action taken by NS.

A. NIT Is Not A Market In Isolation Of The Rest Of The Port Of Virginia

NIT is a single intermodal marine terminal in the multi-terminal POV. POV is operated by VPA, in conjunction with its subsidiary, VIT. These two entities operate the various terminals of POV in a unified manner in order to maximize the fluidity of the entire port complex.²⁸ VPA determines which of its terminals will be devoted to what operations (such as repurposing the Portsmouth Marine Terminal (“PMT”), formerly an intermodal terminal²⁹) and the type of commodity.³⁰ Importantly, for purposes of this transaction, VPA/VIT, not the ocean carrier customer, also determines which POV terminal (e.g., NIT or VIG) will receive a particular ocean carrier for berthing, a point that CSXT concedes.³¹ An ocean carrier schedules a stop at the Port of Virginia, not at NIT or VIG.³² In making the determination as to a carrier’s

²⁸ CSX-22, VS Miller, at 478-79 (“The Virginia Port Authority (“VPA”) owns or leases multiple terminals at Hampton Roads, including the two currently operating IM terminals, VIG and NIT. * * * VIT operates the terminals on behalf of VPA.”) (footnotes omitted). *See also*, Ari Ashe, “Virginia port service shuffle promises faster rail flow,” *Journal of Commerce*, published August 23, 2019 (“Ashe VA Port”) (noting that the “port will reshuffle which terminals each [ocean] vessel calls on based on the alliances between ocean carrier and either CSX Transportation or Norfolk Southern Railway”), <https://www.joc.com/article/virginia-port-service-shuffle-promises-faster-rail-flow-5235619>, accessed October 2, 2025.

²⁹ *See, e.g.*, VPA press release, “Creation of the Mid-Atlantic’s Offshore Wind Logistics Hub Moves Forward at The Port of Virginia,” issued October 27, 2023, <https://www.portofvirginia.com/who-we-are/newsroom/creation-of-the-mid-atlantics-offshore-wind-logistics-hub-moves-forward-at-the-port-of-virginia/>, accessed October 2, 2025.

³⁰ VPA press release, “The Port of Virginia Gains West Coast South America Services with Direct Calls for Dry, Refrigerated Cargo,” issued February 7, 2024, <https://www.portofvirginia.com/who-we-are/newsroom/the-port-of-virginia-gains-west-coast-south-america-services-with-direct-calls-for-dry-refrigerated-cargo/>, accessed October 2, 2025 (noting that it was “expanding its portfolio of international connections with two new services that connect directly with the Latin American market,” citing the development as permitting the Port of Virginia to compete with other U.S. East Coast ports for this service for the first time).

³¹ CSXT-22, VS Miller, at 530; Deposition of Nathan Miller, October 30, 2025, at page 63, lines 3-6.

³² CSXT-22, VS Miller, at 530 (“...ocean carriers do not ultimately control the terminal at which their vessel docks; VIT does.”).

assignment – NIT or VIG – VPA/VIT applies a number of different considerations, including the alliances between ocean carriers and railroads, and availability of open berths. VPA has historically steered CSXT-aligned ocean carriers to VIG and NS-aligned carriers to NIT.³³

VPA is not the only one who treats NIT and VIG interchangeably. So does CSXT. {{

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

Under these circumstances, any attempts by CSXT to characterize NIT as a separate market from VIG ignore the operational and competitive realities. As Dr. Waehrer points out “it makes no sense to evaluate foreclosure at a single terminal” of a multi-terminal port.³⁶ First, the two terminals are interchangeable, as evidenced by the fact that VPA/VIT directs ocean carriers to berth at one or the other. {{ [REDACTED]

[REDACTED] }} that one cannot say that the NPBL switch rate even matters to the ocean carrier’s choices. Ocean carriers negotiate for a bundle of traffic lanes across the railroad’s entire intermodal networks, not for a particular rate on a particular route.³⁸ But Ms. Carey treats NIT as a separate market, without admitting to do so. Ms. Carey narrows her market analysis at most points to traffic volumes

³³ CSXT-22, VS Miller, at 530.

³⁴ VS Waehrer, at 4. Deposition of Maryclare Kenney, page 46 at line 4 through 10.

³⁵ VS Brennan, at 25. *See also*, CSXT-22, VS Miller, at 530-31.

³⁶ VS Waehrer, at 3.

³⁷ *Id.*

³⁸ CSXT-22, VS Miller, at 508.

moving between NIT and locations in the Midwest, excluding CSXT's movements through VIG.³⁹ Even CSXT's other expert, Dr. Miller, is not so bold, describing NIT and VIG as a single location – the POV – in a broader market.⁴⁰

Perhaps knowing she is positing an untenable position, Ms. Carey raises the specter that VIG is capacity-constrained. But she is wrong. Even CSXT's internal communications indicate that she is wrong.⁴¹ To support her statements about VIG utilization, Ms. Carey undertook an analysis in which she claims demonstrates that VIG was operating at {{ [REDACTED] }} of its capacity in terms of TEU's moving through the terminal in 2023.⁴² Ms. Carey developed her VIG capacity analysis based on VIG's reported 2.2 million TEU operating capacity as reported by POV and on VIG rail and truck gate transaction and dwell time data reported by POV. As explained by Mr. Fapp, Ms. Carey misapplies her data, which leads to an overstatement in VIG utilization.⁴³ When adjusted correctly, the results of these adjustments shows that in 2023 VIG operated at approximately {{ [REDACTED] }} of its reported capacity and not the {{ [REDACTED] }} calculated by Ms. Carey.⁴⁴ Moreover, when NIT's new capacity comes o-line, VPA/VIT can shift NS-aligned carriers away from VIG to NIT, freeing up VIG capacity for CSXT-aligned carriers.

³⁹ CSXT-22, VS Carey, at 581.

⁴⁰ See, e.g., CSXT-22, VS Miller, at 490-91 (describing the fact that ports along the East Coast compete and noting the “{{ [REDACTED] }} in inland locations served by rail between POV and PONYNJ”).

⁴¹ As recently as April 22, 2024, CSXT explains in a draft rate proposal presentation intended for {{ [REDACTED] }} CSX_STB_0012902.

⁴² CSXT-22, VS Carey, at 584-585.

⁴³ Rebuttal VS Fapp, at 37-39.

⁴⁴ *Id.*

Ms. Carey further ignores that VPA has long range plans to develop even more capacity for container traffic by developing Craney Island. That terminal, slated to cover 600 acres, will substantially increase the overall capacity of the Port of Virginia when it is put into service, literally doubling the current combined capacity of NIT and VIG.⁴⁵ Although the terminal will have truck access, CWRV will provide the rail service to the planned Craney Island intermodal ocean terminal.⁴⁶ Operations at the new terminal are anticipated to begin in 2040.

In addition, should capacity become a concern in the future, VPA can always convert the Portsmouth Marine Terminal (PMT) back to a container facility. PMT has been converted to handle the needs of a planned off-shore wind project. The project is well on its way to completion, which is anticipated in the 2026-27 timeframe. When the wind project is complete, PMT can be repurposed back to handling international containers.⁴⁷ Therefore, Carey not only misconstrued the competitive realities that must be considered when determining the relevant market for intermodal traffic, she also woefully misconstrued the capacity constraints at the POV.

CSXT's attempt to characterize NIT as a "2-to-1" location similarly misses the mark, because it is based on the fiction that NIT and VIG are not operated together as a unified whole. As noted above, CSXT does not treat NIT as a location separate from VIG, {{ [REDACTED]

[REDACTED] }} even though CSXT

⁴⁵ Report of the Office of Intermodal Planning and Investment, Master Rail Plan for The Port of Virginia, (SJR 69, 2014), at 53.

⁴⁶ See "Big changes ahead on Commonwealth Railway's short line," The Virginian-Pilot, Sept. 10, 2006, <https://www.pilotonline.com/2006/09/10/big-changes-ahead-on-commonwealth-railways-short-line/>, accessed on October 28, 2025.

⁴⁷ CSXT, but not NS, has direct rail access to PMT, meaning that NS would have to either dray container traffic from PMT or rely on a rail switch. That is the same situation currently facing CSXT at NIT.

uses CWRV for on-dock rail access at VIG but chooses to use subsidized drayage (rather than NPBL for on-dock access) at NIT. This is not consistent with CSXT's claim that the NPBL rate is foreclosing CSXT from the NIT market. It is consistent with NS's position that CSXT is seeking only to cut its cost at NIT by forcing NPBL to adopt a lower switching rate but has no intention to pass those cost savings along to the customers.

Moreover, even if the Board were to treat NIT as a 2-1 customer facility⁴⁸ – which it should not⁴⁹ – CSXT ignores that the most common regulatory remedy to resolve a reduction for 2-to-1 locations is to provide another railroad with reciprocal switching rights that location.⁵⁰ Here, CSXT already has access to that remedy via the NPBL switch. CSXT simply chooses not to use NPBL switch access because it has a cheaper alternative – drayage that is subsidized by the POV and is in a business relationship with VPA/VIT in competition with NPBL.

B. CSXT's Argument Of A Zero Share Of The NIT On-Dock Rail Movement Is Meaningless Given CSXT's Use Of Drayage With A Subsidy, The POV's Dispatching Policies With Respect To VIG And NIT, and Geographic and Infrastructure Differences

CSXT's argues that because it has a zero share of the NIT on-dock rail movements that is a sign of competitive harm does not withstand scrutiny. CSXT concedes—as it must—that NPBL provides CSXT on-dock rail access to NIT. Indeed, CSXT consistently uses NPBL to move non-intermodal freight in and around NIT and pays the \$210 switch rate for this service. CSXT, however, has chosen not to utilize NPBL to move intermodal freight because, as discussed herein, the \$210 rate does not yield enough profit for this traffic, at least under CSXT's

⁴⁸ Not only is it not a 2-to-1 facility, nor a customer facility. Rather, it is an intermodal terminal.

⁴⁹ This is discussed *infra* at V(C).

⁵⁰ Union P. Corp., Union P. R.R. Co., and Missouri P. R.R. Co. – Control and Merger – Southern P. Rail Corp., Southern P. Trans. Co., St. Louis Southwestern Railway Co., and the Denver and Rio Grande Western R.R. Co., FD 32760, 1 S.T.B. 233, 1996 STB LEXIS 220 (served Aug. 6, 1996).

economics. CSXT's "zero share" of on-dock rail movements at NIT is not a sign of competitive harm. It is the natural consequence of CSXT's choices. Further, the relevant market is not rail-to-rail movements from NIT to the Midwest, but rather one must consider the competitive options provided by trucks (including drayage at NIT), barges, the Port of Virginia as a whole (including VIG), and the competitive options of the Ports of NYNJ and Baltimore. In this case, consideration also must be given to the fact, as discussed above, that VPA generally directs CSXT traffic to VIG (rather than NIT). Additionally, any understanding of the respective rail intermodal traffic shares of CSXT and NS at POV must consider the geographic and infrastructure differences between the rail service offered by these two carriers to the Midwest.

Indeed, not even CSXT really believes that a zero share of the NIT rail-to-rail market is a legitimate relevant market; it is simply a convenient argument for CSXT to make in this proceeding. CSXT witness Maryclare Kenney asserts to the Board that "CSXT would be at a competitive disadvantage if it could not assure ocean carriers that CSXT can provide transportation service from all major ports in a region."⁵¹ It is important to note that Ms. Kenney uses the word "ports" not "terminals." What is relevant is POV as a whole, not just NIT. Indeed, CSXT asserts to its own board of directors that {{ [REDACTED] [REDACTED] }}⁵² CSXT's own statements thus contradict the notion that the rate at NIT is the only relevant market.

In fact, if a rail carrier moves 100% of the rail traffic at a given location, without regard to competitive alternatives, was sufficient to qualify as "monopoly" power, the Board should prepare itself for a deluge of terminal trackage rights applications in the near future. For

⁵¹ CSXT-22, VS Kenney, at 411.

⁵² CSX Executive View: Intermodal Update, presentation dated November 18, 2024, CSX_STB_0097122, at slide 11.

example, on that theory, NS could seek terminal trackage rights to access The Newport News Marine Terminal (the POV terminal for breakbulk and roll-on/roll-off cargo). This terminal can be served by truck, drayage with a connection to NS, or CSXT direct service. NS does not have direct rail access to the facility and is not open to reciprocal switch to NS for such break-bulk traffic. CSXT moves 100% of the rail traffic at that facility.⁵³ Under CSXT's rationale, NS should qualify for terminal trackage rights. (Ironically, when the shippers requested adoption of such a policy based upon unreasonable rates or inadequate service in the Ex Parte No. 711 proceedings and sub-dockets, CSXT was one of the most outspoken opponents.) However, NS recognizes that one rail carrier moving 100% of the traffic moving by rail to or from a single location means nothing without an analysis of the proper relevant market and the reasonableness of the rate. Unfortunately, in this proceeding, CSXT suddenly is unwilling to acknowledge this basic reality.

In any event, CSXT is unable to show substantial competitive harm in any defined market – CSXT is not foreclosed from accessing NIT to serve ocean carriers. It can use the NPBL switch rate, which as discussed *infra* is reasonable and does not foreclose CSXT. It can use drayage, which it already does because the POV subsidizes that drayage. “[T]here is no ability to foreclose a rival if the rival is able to substitute away from using the input that is being foreclosed.”⁵⁴

1. *CSXT's Share of the Rail Movements at NIT is Skewed Because VPA Directs Most of CSXT Shipments to VIG.*

⁵³ See, e.g., https://www.portofvirginia.com/wp-content/uploads/2025/03/POV_2025-NNMT.pdf (noting that rail service is only provided by CSX). See also, VS Fapp work paper at STB Unmasked Waybill -- Newport News.xlsx.

⁵⁴ VS Waehrer, at 35.

As previously noted, the CSXT share of the rail movements of intermodal traffic at NIT is skewed because VPA directs virtually all of CSXT's POV traffic to VIG rather than NIT. In fact, in 2024, only 13% of CSXT's containers at POV were directed to NIT.⁵⁵ As explained by NS's expert Dr. Waehrer, even with a lower NPBL switch rate, it would be expected that VPA, for efficiency purposes, would direct more CSXT shipments to VIG and more NS shipments to NIT:

This sorting of vessels that generates the high share for NS and low share for CSX at NIT is efficient. Even absent the alleged foreclosing NPBL switch rate, CSXT would still face higher costs at NIT than VIG, and NS would have lower costs at NIT than at VIG.⁵⁶

It is not appropriate to equate the efficiency of VPA sorting CSXT vessels to VIG rather than NIT with the exercise of market power or foreclosure by NS.⁵⁷ In addition, "[t]he evidence indicates that CSX's ability to compete has not been materially impacted by the *de minimis* extra cost it faces at NIT because of the NPBL switch rate."⁵⁸ Moreover, Dr. Waehrer points out that, based on Ms. Carey's foreclosures analysis,⁵⁹ even if CSXT had what Ms. Carey describes as a competitive NPBL switching rate, CSXT still would face higher costs than NS at NIT than

⁵⁵ *Id.* at 43.

⁵⁶ *Id.* at 2 (emphasis added).

⁵⁷ *Id.* at 21-22.

⁵⁸ *Id.* at 25.

⁵⁹ Carey states that "CSXT is hindered because it cannot operate on-dock rail service to/from NIT and faces increased costs due to NPBL's \$210 switch rate and an inefficient interchange at Berkely Yard (with additional CSXT locomotives and crew costs). However, absent NS control of NPBL, CSXT and NS costs could reasonably be expected to be similar for the entire long-haul movement, along with more competition on the NIT corridors...." CSXT-22, VS Carey, at 597. It is of note that she claims that only granting CSXT terminal trackage rights will address the basics of the historic access issues that have faced CSXT and its predecessors for over a century – not only the costs associated with the level of the NPBL switch, but also the need for "additional CSXT locomotives and crew costs" as well as other costs associated with the need for an interchange with NPBL.

VIG.⁶⁰ Finally, Dr. Waehrer explains that NS's margins on its traffic also support that no foreclosure exists. He notes:

If NS is exercising market power at NIT, I would expect NS's margins to be higher for movements through POV than other East Coast ports. However, a comparison on NS's margins on movements between East Coast ports and the Midwest does not indicate systematically higher margins for movements through POV.⁶¹

Accordingly, the mere fact that CSXT has a low percentage of the rail movements at NIT is not determinative of a foreclosure. When CSXT's percentage is put in context and the relationship with VIG is considered, it is clear that CSXT is not being foreclosed access to POV.

2. CSXT's Percentage of Rail Traffic At NIT Has Grown Significantly Indicating No Foreclosure.

CSXT claims it has a zero market share of "on dock" rail traffic at NIT. But this is playing semantics. If market share at NIT is a relevant measure, which as noted cannot be given VPA's practices, then one must look at CSXT's true market share. CSXT does not have a zero share of the intermodal traffic moving through NIT. CSXT has a {{ [REDACTED] }}⁶² share of intermodal traffic at NIT and, when combined with CSXT traffic moving to and from VIG, CSXT has {{ [REDACTED] }} of all rail container movements through the Port of Virginia.⁶³ Even the {{ [REDACTED] }} demonstrates CSXT's percentage of the rail traffic is not tied to NS's control of NPBL, but

⁶⁰ *Id.* at 25-26. This is due to the fact that for over a century, NS has owned its own line into NIT, but CSXT has had to use a terminal switch to access NIT. This is a condition that existed prior to the 1980 transaction. Both NS and CSXT use CRWY to access VIG.

⁶¹ VS Waehrer, at 3.

⁶² NS-13, Supplemental VS Fapp, at 77.

⁶³ NS-13, Supplemental VS Fapp, at 97.

instead results from a myriad of other factors, including CSXT's rate and service "bundle" offering.⁶⁴

Moreover, in almost 20 years, since 2007, CSXT has enjoyed significant increases in its share of NIT traffic. Clearly, CSXT was not foreclosed from serving NIT. Back in 2007, CSXT moved just {{ [REDACTED] }} containers out of a total of {{ [REDACTED] }} of the total containers moved through the Port of Virginia.⁶⁵ Between then and 2023, CSXT expanded its volumes more than {{ [REDACTED] }}.⁶⁶ In just the past 6 years, CSXT's share of the POV intermodal market has grown to be consistently over {{ [REDACTED] }}. The share of CSXT's traffic before that time was {{ [REDACTED] }}.⁶⁸ As Dr. Waehrer states: "CSX's ability to grow its share of container movements between POV and the Midwest is not consistent with the claims of significant foreclosure."⁶⁹ Moreover, CSXT's share in 2008 was {{ [REDACTED] }}, which was before the year in which NPBL adopted its current switch rate (in

⁶⁴ During that 3-year period from 2021 through 2023, when CSXT's share slightly declined, the NPBL's switch rate remained the same and there were no other changes in NPBL's operations or offerings. Accordingly, the NPBL switch rate, specifically, and NS's control of NPBL, more generally, were nonfactors in changes to CSXT's overall percentage share.

⁶⁵ NS-13, Supplemental VS Fapp, at 62.

⁶⁶ *Id.*

⁶⁷ CSXT-22, at 96. It is worth noting that in 2023, CSXT had a {{ [REDACTED] }} share of traffic moving onto and off of NIT, but it had about a {{ [REDACTED] }} share of the traffic moving into and out of VIG. This is consistent with the VPA/VIT practice of directing ocean carriers aligned with CSXT to VIG, rather than to NIT. It is not consistent with CSXT's foreclosure argument.

⁶⁸ NS-13, Supplemental VS Fapp, at 62 and Table 1.

⁶⁹ VS Waehrer, at 3.

2010).⁷⁰ Clearly, adoption of the NPBL switch rate did not “foreclose” CSXT from providing competitive service from POV to the Midwest.

3. *Drayage Has Been An Adequate And Profitable Substitute.*

CSXT is disingenuous when it argues that drayage “is not an adequate substitute for CSXT’s on-dock rail access”⁷¹ and therefore drayage does not provide a competitive check on NS.⁷² However, CSXT, in other documents, refers to drayage, and specifically inter-carrier drayage as is being performed at the Port of Virginia, as the {{ [REDACTED] [REDACTED] }}.⁷³ Even CSXT’s expert, Ms. Carey, indicates that rail and dray-to-rail are interchangeable. In her analysis of truck versus rail competition for movements to and from the Midwest, Ms. Carey lumps both rail-only and dray-to-rail movements into her “rail” movement numbers.⁷⁴ This is wholly consistent with the determination by NS’s expert, Mr. Fapp “that rail-only and dray-to-rail movements are similar, competitive, and fungible.”⁷⁵

In fact, the NPBL switch rate is nearly identical to the drayage charge.⁷⁶ What CSXT conveniently omits is that CSXT uses drayage because the POV provides a subsidy of 50% of the drayage rate, making drayage less expensive and more profitable for CSXT than using the

⁷⁰ See NS-13, Supplemental VS Fapp, at 63.

⁷¹ CSXT-22 at 71.

⁷² *Id.* at 76.

⁷³ CSX Executive View: Intermodal Update, from November 18, 2024, CSX_STB_0097122, at slide 5 (Intermodal 101).

⁷⁴ Rebuttal VS Fapp, at 45.

⁷⁵ *Id.*

⁷⁶ VS Waehrer, at 26.

NPBL switch rate.⁷⁷ CSXT does not have to use drayage. Even without CSXT reducing its own division requirement, CSXT can use the NPBL switch rate for movements from NIT to the Midwest markets at R/VC ratios that allow CSXT to ~~to~~ still make money (just not as much as they would like).⁷⁸ CSXT chooses not to use the NPBL switch because (a) it is incentivized by the POV subsidy to dray its traffic from NIT to its own yard; and (b) VIT has historically routed approximately 80% of CSXT's intermodal traffic to VIG

Moreover, CSXT's choice to dray containers from NIT to its lines rather than switching them via NPBL is nothing noteworthy. As Mr. Brennan notes, "draying containers at ports or between interchange locations in Chicago-Land is a common practice, not proof of a failure to serve or discriminatory practices."⁷⁹ Certainly, the importance of drayage also is not lost on VPA. VPA has been actively working to increase the capacity for, and the efficiency of, the drayage operations conducted at its port. As detailed in the verified statement of Mr. Fapp, VPA has expended millions in not only expanding NIT's overall capacity, but its ability to move more throughput via drayage, and in a more efficient manner.⁸⁰ To name just one example, Fapp explains that, in 2017, the Port of Virginia spent \$42 million adding 26 lanes for ingress and egress on the north side to complement the 16 gates on the south side of the NIT terminal facility, ensuring, among other things, "dramatically reduc[ed] turn and idling times for truckers" involved in drayage operations.⁸¹ Following that, the Port of Virginia introduced the PRO-PASS system to "optimize gate and yard operations, reduce trucker turn-time, eliminate trouble cases,

⁷⁷ VS Brennan, at 9, n. 14.

⁷⁸ CSX-22, VS Miller, at 604; NS-13, Supplemental VS Fapp, at 92; VS Waehrer, at 35-36.

⁷⁹ VS Brennan, at 9.

⁸⁰ Rebuttal VS Fapp, at 30-31.

⁸¹ Rebuttal VS Fapp, at 30.

and reduce congestion at the Port.”⁸² Clearly, with the expanded ability to improve the efficiency and efficacy of drayage, CSXT is not “captive” to using the NPBL switch rate. It can and does use drayage. If the drayage subsidy were eliminated, thus equalizing the NPBL switch with unsubsidized drayage rate, CSXT can use the NPBL switch rate and doing so is not unremunerative.⁸³ This shows that the drayage subsidy is not necessary for CSXT to use NIT. In effect, CSXT is duplicitous by arguing that the subsidy is somehow necessary for CSXT to compete. It is not.

4. Geographical And Infrastructure Differences Affect Market Shares.

The differences in shares are also reflective of some basic realities in geography and infrastructure between competing carriers at a particular location. NS has access to NIT on its own tracks and does not need to incur a switch fee for on-dock access; CSXT does not.⁸⁴ NS has a more efficient and advantageous route structure from POV to the Midwest, not only due to natural geographic advantages, but because NS invested in that route. NS focused on infrastructure investments between the Port of Virginia and certain Midwest locations years before CSXT, which naturally improves NS ability to compete out of the POV.⁸⁵ Mr. Fapp demonstrates that “[w]hereas trucking has a generally small distance advantage over NS’s movements between POV and the Midwest, NS has an often significant distance advantage over

⁸² Rebuttal VS Fapp, at 30-31 (quoting from https://www.propassva.com/PRO_PASS_FAQ.pdf).

⁸³ VS Brennan, at 24.

⁸⁴ CSXT has direct access to Newport News Marine Terminal; NS does not.

⁸⁵ Mr. Brennan points out that NS invested heavily in “the Heartland Corridor, a \$150 million public-private partnership that between 2007 and 2010 that raised tunnel clearances and eliminated bottlenecks to allow double-stack intermodal trains to move efficiently between the Port of Virginia and major inland markets like Columbus, Cincinnati, and Chicago” but that “CSXT did not make a similar investment until 2015 through 2018 when it raised the Virginia Avenue Tunnel in Washington, D.C permitting double-stack service from VIG to the Midwest via the old Baltimore and Ohio line. . . .” VS Brennan, at 17 and 17, n.28.

CSXT (in all but one lane).”⁸⁶ CSXT’s analysis failed to recognize that, at least prior to the recent conversion of the Howard Street Tunnel, a project that allowed CSXT a better route structure to carry double-stacked container traffic from the Port of Baltimore, CSXT routes between POV and the Midwest were generally longer and required the movement of containers north to Baltimore before heading west.⁸⁷ The Howard Street Tunnel Project now allows CSXT to double stack container movements and provides shorter routes from Baltimore than compared to NS’s routes from POV.⁸⁸ CSXT’s analysis also fails to account for the fact that, early on, NS heavily invested in upgrading its tracks between POV and the Midwest through the Heartland Corridor Project that raised tunnel clearances and eliminated bottlenecks to allow more efficient double-stack routes to the Midwest out of POV,⁸⁹ a significant route improvement that CSXT did not respond to for several years.⁹⁰

CSXT’s market share increased with the completion of the Virginia Avenue Tunnel when it was completed in Washington, DC in 2018, allowing for double-stack rail cars between the Midwest and POV.⁹¹ It had an immediate impact on CSXT’s share. Dr. Waehrer shows that CSXT share of POV container traffic to the Midwest in the short time period from 2018 to

⁸⁶ Rebuttal VS Fapp, at 47-48.

⁸⁷ VS Brennan, at 20; VS Waehrer, at 29 (“In addition, the Fapp rebuttal VS indicates that NS’s routes between POV and the Midwest are generally shorter than CSX’s routes. Despite these disadvantages, CSX has been able to grow its share in a way that is not consistent with significant foreclosure.”).

⁸⁸ See VS Brennan, at 20, 30; VS Waehrer, at 15-16.

⁸⁹ VS Brennan, at 17.

⁹⁰ *Id.* at 20 (discussing the Howard Street Tunnel and the effect that the recent CSXT investment will have on POV and Port of Baltimore CSXT operations).

⁹¹ NS-13, Supplemental VS Fapp, at 66.

2021 {{ [REDACTED] }}⁹² Similarly, the reopening of the converted Howard Street Tunnel combined with CSXT’s strategic option to shift traffic to Baltimore may cause a (perhaps intentional) decrease in CSXT’s share of POV rail traffic.

And still other factors must be considered when analyzing the respective competitive positions of CSXT and NS. As Mr. Luebbers and Dr. Waehrer discuss, CSXT presents a “bundle” of services across its intermodal network that considers numerous terminals, ports, routes, and service parameters to the Midwest markets. When presenting this “bundle” of services to an ocean carrier, not only does the route structure and port matter, but also which railroad serves the domestic origin or destination. For example, as Mr. Luebbers explains, the {{

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁹² See VS Waehrer, at 29-30, Figure 9.

⁹³ VS Luebbers, at 7 (referring to the new collaboration between BNSF and CSXT, announced on August 22, 2025, that introduces “new direct international intermodal services between the Port of New York and New Jersey, and Norfolk, Virginia, and Kansas City”, <https://www.csx.com/index.cfm/about-us/csx-bnsf-announce-new-intermodal-services-offering-seamless-coast-to-coast-rail-solutions/>, accessed on October 7, 2025).

██████████}}⁹⁴ What matters is the entire “bundle,” not just the market share at one particular terminal.

A rail carrier may have no offering from a particular port or terminal but still serve an ocean carrier customer across the railroad's network. And service bundling by ocean carriers has a direct effect on the rail share of any one rail carrier at any one port or terminal. {{ [REDACTED]

_____}}⁹⁵ The same effect is to CSXT's favor in the Northeast. {{ _____

_____}}⁹⁶

One cannot just examine any narrowly-defined share at a given terminal and claim foreclosure. There are a multitude of factors that must be considered and analyzed when determining why one competitor may have a greater share than another at a particular location. As demonstrated above, simply looking at the share of rail movements at NIT and then claiming that the NPBL switch rate at NIT is responsible for CSXT's low percentage share, is inaccurate and overly simplistic. This is especially true when that switch rate is a *de minimis* factor in the "bundle" of services and in the context of a competitively robust market.

C. Ocean Carriers Have Other East Coast Port Options That Constrain Rail Rates.

⁹⁴ VS Luebbbers, at 8-9.

⁹⁵ VS Luebbbers, at 7-8.

⁹⁶ See VS Waehrer, at 39-40, Figure 13.

Given how ocean carriers enter into contracts with railroads for a bundle of services across the rail network, it is disingenuous to argue that competition among East Coast ports is not a vital component in the international intermodal market. Dr. Waehrer notes the general interchangeability of East Coast Ports:

Ocean carriers serving the East Coast often call at multiple ports—such as the Port of New York and New Jersey (PONYNJ), the Port of Baltimore, the Port of Philadelphia, POV, and the Port of Savannah—to efficiently distribute cargo arriving from the North Atlantic before it continues inland via intermodal transportation. These ports are largely substitutable in function, as each provides access to major rail networks (especially CSX and Norfolk Southern) and they also provide easy access to interstate highways that can be used to truck containers to inland locations in the Midwest.⁹⁷

Both CSXT and NS agree that ocean carriers negotiate contracts based on a bundle of services, and CSXT has expressly acknowledged that these bundled services involve numerous ports. According to Mr. Miller:

Ocean carriers purchase bundled EC rail service across many lanes and multiple ports. During the proposal and negotiating process ocean carriers {{ [REDACTED] }}. Dozens or hundreds of rates are offered, varying across lanes connecting different ports and inland points, direction, container size, and whether loaded or empty. Ocean carriers select between the railroads based on the array of rates, service, and other aspects of the contractual relationship. The resulting contracts between the ocean carriers and the railroads include {{ [REDACTED] }}.⁹⁸

As Dr. Waehrer explains when considering between offers from railroads, “ocean carriers will tend not to focus on particular lanes but rather negotiate for international intermodal rates

⁹⁷ VS Waehrer, at 10 (citing Port Strategy, “Game Changer,” 6/25/2025, <https://www.portstrategy.com/expansion-and-development/game-changer/1503030.article>. “The North Atlantic port region is highly-populated and is the traditional location for serving US heavy industry (i.e., the “Rust Belt”) and key US Midwest markets.”).

⁹⁸ CSXT-22 VS Miller, at 508-09 (emphasis added).

through bundled, multi-lane negotiations.⁹⁹ Accordingly, “[w]hen CSX and NS compete by offering a bundle of services to ocean carriers, it makes no sense to focus the foreclosure analysis on effects at an individual container terminal.”¹⁰⁰ Indeed, CSXT’s expert, Mr. Miller, would appear to agree, noting:

{{ [REDACTED] }}

VS Miller at 477 (emphasis added).

“The fact that CSX and NS compete by offering a bundle of rail services to ocean carriers rather than at individual terminals suggests that the market should be defined as the bundle and not as a set of lanes through a single container terminal.”¹⁰¹ Indeed, Dr. Waehrer further notes that if competitors (such as NS and CSXT) compete for traffic for the provision of a bundled rail service (such as for the provision of rail services to and from East Coast U.S. ports to and from the U.S. Midwest), there is no ability of one of the rivals to effectively foreclose the other rival by raising its costs at one terminal.¹⁰² Far from the evidence demonstrating that NS is able to impose a monopolistic constraint by its direct rail access to NIT, the evidence demonstrates that NS “finds itself competitive with and constrained” by competition in the market that includes the ports of NY/NJ and Baltimore, ports dominated by CSXT.

⁹⁹ VS Waehrer, at 27.

¹⁰⁰ VS Waehrer, at 27. In fact, “[i]n such an environment, the competitive significance of a cost disadvantage of a single set of lanes, such as those between Midwest BEAs and NIT, will be of diminished importance given the overall business that CSX would gain from winning a contract.” *Id.* at 28.

¹⁰¹ VS Waehrer, at 4.

¹⁰² VS Waehrer, at 27-28.

In addition, Chris Luebbbers, in his verified statement, describes some of the operational elements that demonstrate the substitutability of the Eastern U.S. ports for one another.¹⁰³ He explains, for example, that the “natural flow of container volumes in the Northeast U.S. are such that imports heavier into NYNJ”, thus permitting a container ship to unload the vast number of containers on its vessel, “while exports and empties tend to be heavier via the Port of Virginia,” often the vessel second, third or fourth stop on its U.S. service schedule.¹⁰⁴ NS and ocean carriers have worked together to structure an incentive to route more exports through the Port of NY/NJ or more imports through the Port of Virginia in order to better balance the NS rail traffic to each.¹⁰⁵ This type of cooperation between the carrier and the ocean carrier demonstrates the inter-connectiveness of the Port of Virginia as a whole with other ports along the East Coast. It also shows that “supply chains centered on the POV and [Port of NY/NJ] cannot.”¹⁰⁶

As noted above, the Port of NY/NJ often is an ocean carrier’s first port of call along the East Coast picking up and unloading cargo and containers in line with the bundle of services that the carrier and its alliances have reached with the various ports and rail carriers serving those ports for the domestic leg of the international service.¹⁰⁷ In addition, “[n]ot only does the [Port of NY/NJ] serve a huge local market, but it also has easy truck access to Pennsylvania and to New England as well.”¹⁰⁸

¹⁰³ VS Luebbbers, at 9.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ VS Brennan, at 19.

¹⁰⁷ {{ [REDACTED] }}, CSXT April 22, 2024, draft rate proposal to COSCO and OOCL, CSXT_STB_0012902, at slide 8.

¹⁰⁸ VS Brennan, at 18.

VPA understands that the POV competes against Port of NY/NJ. On March 23, 2023, POV publicized a “vessel service that now has The Port of Virginia as the first US East Coast stop,”¹⁰⁹ recognizing that having POV first was a sign of POV’s competitiveness. Similarly, CSXT has long recognized that the Port of NY/NJ and POV are intense competitors.¹¹⁰ When the Heartland Corridor opened, providing double stacked access between to the POV and the Midwest, CSXT’s then executive vice president and chief financial officer, responded:

You hear a lot about the Heartland Corridor. My statement is, ‘Bring them on.’ We can handle them here in New Jersey and beat them head-on, straight up every day.¹¹¹

Even while trying to disclaim the fact that there is competition between POV and the Port of NY/NJ, CSXT confirms it. Dr. Miller explains that other East Coast “ports such as Savannah and Charleston do not frequently serve by rail the same inland Bureau of Economic Analysis Economic Areas (“BEAs”) as POV and the Port of New York and New Jersey. Moreover, when ocean carriers demand rail service to regions within and near the Midwest of the U.S., they make sure of rail service over both POV and PONYNJ despite differences in the relative prices of rail transportation between the ports.”¹¹²

¹⁰⁹ “Port Welcomes Newest First-In Vessel Call; Suez Service Connects with Southeast Asian Markets,” Port of Virginia press release, <https://www.portofvirginia.com/who-we-are/newsroom/port-welcomes-newest-first-in-vessel-call-suez-service-connects-with-southeast-asian-markets/>, issued May 23, 2023 (publicizing that that vessel service “now has the Port of Virginia as the first US East Coast Port Stop” (accessed on October 7, 2025).

¹¹⁰ CSXT, in a draft {{ [REDACTED] }}, CSX_STB_0012902, April 22, 2024, at slide 8.

¹¹¹ See Joseph Bonney, *CSX Raises the Roof*, Journal of Commerce, <https://www.joc.com/article/csx-raises-the-roof-5622427> (last accessed on November 16, 2025).

¹¹² CSXT-22, VS Miller, at 477. NS recognizes the competitive nature of the East Coast ports. See, e.g., NSR 0072116-17 {{ [REDACTED] }}.

CSXT's expert, Ms. Carey, implicitly acknowledges the Port of NY/NJ is a competitive option to POV, when she warns, as she did with VIG, that "the Port of NY/NJ is approaching capacity limits," in part citing that Port of NY/NJ Port's Master Plan for 2050.¹¹³ She states this in an attempt to narrow the focus on NIT. But, as with her capacity analysis at POV, her capacity analysis at the Port of NY/NJ is wrong. Even the Port of NY/NJ itself says, in that very same Port Master Plan, that "the Port Authority facilities have sufficient capacity available to promote intermodal rail share and continue to serve inland regions."¹¹⁴

The Port of Baltimore also must be considered a strong competitor in any competitive analysis of the intermodal container market at POV. With the completion of converting the Howard Street Tunnel to accommodate double stack container traffic, the Port of Baltimore is slated to become CSXT's preferred choice over the POV for the movement of that traffic.¹¹⁵ In its press release, CSXT noted it "will mark a major milestone for intermodal rail service in the Interstate 95 transportation corridor and from the Port of Baltimore to Midwest markets."¹¹⁶

¹¹³ CSXT-22, VS Carey, at 586, n. 44.

¹¹⁴ Port Master Plan 2050, p. 21, available at <https://www.panynj.gov/port/en/our-port/port-development/port-master-plan.html>.

¹¹⁵ "CSX restarts Baltimore tunnel service for double-stack in 2026," Journal of Commerce, Ari Ashe, September 26, 2025, (noting that with the tunnel reopened, the throughput of the Port of Baltimore can be doubled "and that's important for us to compete in international trade") <https://www.joc.com/article/csx-restarts-baltimore-tunnel-service-for-double-stack-in-2026-6087384>, accessed on November 19, 2025.

¹¹⁶ "Howard Street Tunnel Project to Complete Double Stack Clearance of CSX Intermodal Network," CSX Press Release, November 30, 2021, <https://www.csx.com/index.cfm/about-us/howard-street-tunnel-project-to-complete-double-stack-clearance-of-csx-intermodal-network/>, accessed on October 15, 2025 (emphasis added). CSXT also states that the project "will enhance rail's competitiveness with trucks." In this proceeding, CSXT discounts the competitive role played by trucking at POV but specifically acknowledges the competitiveness of trucking for the Port of Baltimore. CSXT cannot have it both ways. Trucking clearly plays a role at Baltimore, POV, and the Port of NYNJ.

Both CSXT and media have recognized that this project will change the competitive environment among the Ports of Baltimore, POV and NYNJ. For example, the Journal of Commerce certainly understood the impact of Howard Street Tunnel conversion for competition among the Ports:

“International intermodal service from the Port of Baltimore will also become more competitive with the Port of New York and New Jersey and Port of Virginia, which already offer double-stack service. Because Baltimore is farther inland than neighboring ports, the transit times to Chicago and the Ohio Valley are shorter.”¹¹⁷

As did the Maryland Port Administration, which submitted a report in connection with CSXT’s conversion of the Howard Street Tunnel.¹¹⁸ That report stated: “Once work is complete at all of the Maryland sites” involved in the overall project, “CSX’s double-stack service will utilize the permanent and more efficient route through the Howard Street Tunnel” from the Port of Baltimore to “access the Midwest,” enhancing the competitiveness of the Port of Baltimore as compared to that of the Port of Virginia and Port of NY/NJ.¹¹⁹

The Howard Street Tunnel portion for the improvements at the Port of Baltimore was projected to cost CSXT more than \$450 million alone.¹²⁰ Investments like that are not made

¹¹⁷ “CSX restarts Baltimore tunnel service for double-stack in 2026,” Journal of Commerce, Ari Ashe, September 26, 2025, <https://www.joc.com/article/csx-restarts-baltimore-tunnel-service-for-double-stack-in-2026-6087384>, accessed on November 19, 2025.

¹¹⁸ Status Report on the Howard Street Tunnel Project (2024 JCR, p. 85): A Report to the Maryland General Assembly Senate Budget and Taxation Committee and House Appropriations Committee, submitted by the Maryland Port Administration, January 2025.

¹¹⁹ *Id.* at 5 (emphasis added).

¹²⁰ “CSX Reopens Expanded Howard Street Tunnel Ahead of Schedule, Strengthening East Coast Freight Growth,” CSX Press Release, September 26, 2025, <https://www.csx.com/index.cfm/about-us/media/press-releases/csx-reopens-expanded-howard-street-tunnel-ahead-of-schedule-strengthening-east-coast-freight-growth/>, accessed on October 15, 2025.

without much analysis on how that investment will bolster a company's competitive position, and CSXT was no exception. CSXT engaged in numerous discussions regarding how the completion of the Port of Baltimore project would impact POV, specifically. For example, the presentation to the December 2019 CSXT Board of Directors meeting seeking approval for a capital investment in Baltimore notes that {{ [REDACTED] }}. ¹²¹ In a May 10, 2018, presentation, CSXT noted that the opening of the Howard Street Tunnel could {{ [REDACTED] }}. ¹²² And, CSXT's Rob Giardotin and email exchange with Dean Piacente on May 13, 2018 bluntly states that the Port of Baltimore upgrade is {{ [REDACTED] }}. ¹²³ It is disingenuous at best for CSXT to argue that the only relevant market is NIT to the Midwest, while CSXT, in the ordinary course of its business, treats them as alternatives for the movement of traffic to the Midwest. CSXT also knows that it competes at those ports against trucks as well.

Documents show that with the reopening of the Howard Street Tunnel, CSXT believes that movements from Baltimore will be {{ [REDACTED] }} cheaper per container than movements from POV. ¹²⁴ CSXT also believes that {{ [REDACTED] }}

¹²¹ CSX_STB_0096863, December 2019 Board of Directors Meeting: State of the Railroad, at slide 4.

¹²² CSX_STB_0091924, at slide 3; CSX_STB_0092099.

¹²³ CSX_STB_0089999 at CSX_STB_0090002. See also CSXT's view that the Port of Baltimore is the {{ [REDACTED] }}; STB-NS-0031246 {{ [REDACTED] }}

¹²⁴ CSX_STB_0096863, at slide 4.

}}¹²⁵ Importantly, CSXT's expert, Ms. Carey, completely ignores the Port of Baltimore in her analysis. CSXT provides the only intermodal on-dock service in the Baltimore market.¹²⁶ She appears unaware that CSXT has long-range plans to shift as much traffic to Baltimore as possible because doing so allows CSXT to offer ocean carriers a lower price and retain a higher contribution than at POV.

The evidence overwhelmingly indicates that the competition posed by other East Coast ports must be considered in establishing the relevant market for intermodal containers at POV. Focusing solely on rail movements between NIT and the Midwest is overly narrow and fails to satisfy well established criteria for defining the relevant markets in the antitrust context.¹²⁷ As discussed further below, the relevant market not only includes rail to rail at the Ports of NY/NJ, Baltimore, and Virginia, but trucks and barges as well.

D. Trucks Compete With Rail For The Movements Of International Intermodal Containers From POV To The Midwest

In its Application and Supplemental Application, NS showed that ocean customers have the choice to use trucks to/from the POV to the Midwest markets. CSXT's Ms. Carey attempts to rebut the notion that trucking is an effective alternative to rail at POV to the Midwest markets.¹²⁸ She begins by suggesting that NS must establish that trucking acts as a competitive constraint on rail service. But this statement is at odds with ICC and STB precedent. For nearly four decades, intermodal rail traffic has been categorically exempted from economic regulation

125 *Id.*

¹²⁶ CSX STB 0012902, at slide 30.

¹²⁷ VS Waehrer, at 38.

¹²⁸ See CSXT-22, VS Carey, at 592-595. Ms. Carey further alleges that, “trucks are not an economically feasible competitor on the NIT/POV corridors with far away Midwestern locations.” *Id.* at 592.

on the presumption that rail carriers do not have market dominance over the traffic at issue.¹²⁹ Market dominance is defined as “an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies.”¹³⁰ Intermodal traffic is exempt from regulation because the Board, and the ICC before it, recognized that a railroad cannot have market dominance over intermodal containers due to the ability to dray among different rail terminals and the ability of trucks to provide an effective competitive alternative to rail. Therefore, Ms. Carey has it exactly backwards. The STB must presume that the intermodal movement of containers from POV to the Midwest, especially for movements in the 500 to 700 mile range, provides a competitive constraint. And just because a route is longer than 700 miles does not mean trucking does not still compete against rail. As such, given these statutory and precedential exemptions, the burden is on CSXT to show that trucking companies do not act as a competitive constraint on rail intermodal traffic. CSXT has failed to make the required demonstration.¹³¹

¹²⁹ See NS-1 at 17. Citing American Trucking Associations v. I.C.C., 656 F.2d 1115 (5th Cir. 1981), Improvement of TOFC/COFC Regulation, 364 I.C.C. 731, 732, Ex Parte No. 230 (Sub-No. 5) (ICC served February 19, 1981). 49 U.S.C. § 10701(d)(1).

¹³⁰ See 49 U.S.C. § 10707(a).

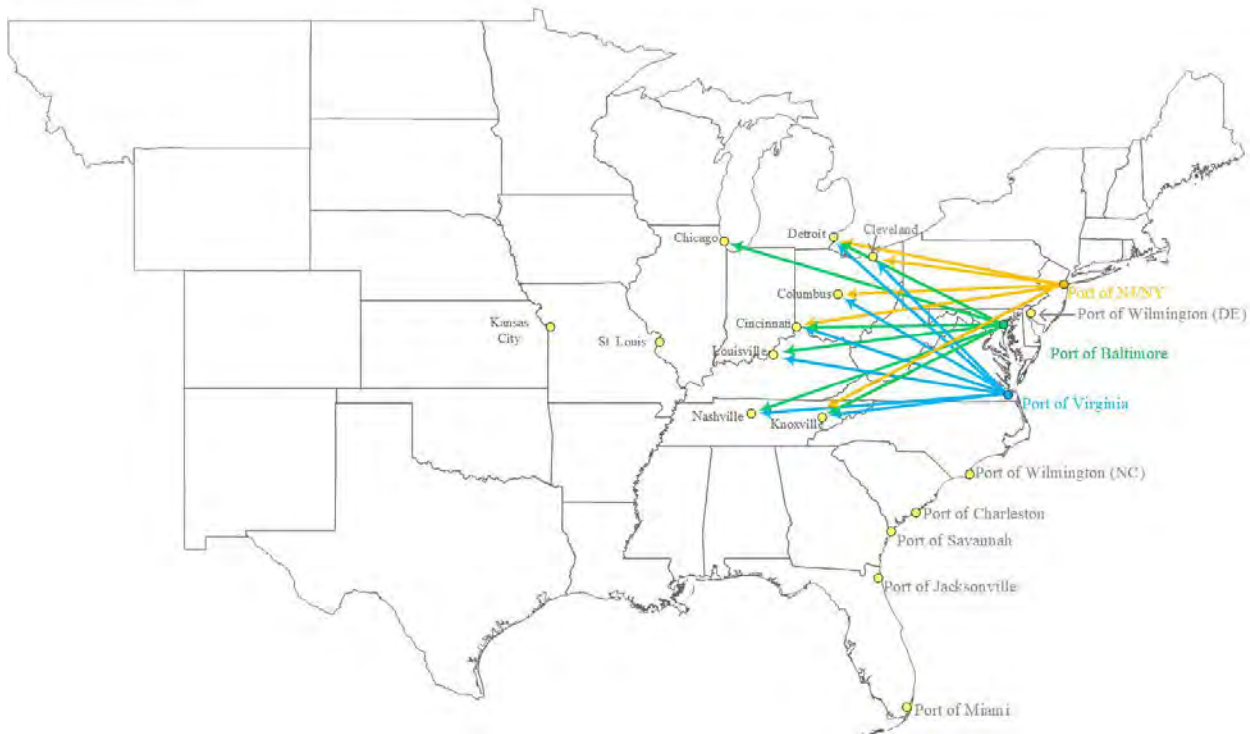
¹³¹ Indeed, having exempted intermodal containers from regulation, the Board cannot regulate, and a denial of an application involving an allegation of competitive impacts on the international container market is the epitome of regulation, without first revoking the intermodal exemption. See Consolidated Rail Corp.-- Declaratory Order -- Exemption, 1 I.C.C.2d 895 (1986) (Conrail Declaratory Order), *aff'd sub nom.* G&T Terminal Packaging Co., Inc. v. Consolidated Rail Corp., 830 F.2d 1230, 1235 (3d Cir. 1987); Pejepscot Industrial Park, Inc., d/b/a/ Grimmel Industries – Petition For Declaratory Order, FD 33989 (STB served May 15, 2003). Likewise, the Board cannot regulate a transaction based upon an allegation that a rate is too high when that rate is not unreasonable. 49 U.S.C. § 10701(d)(1)(A); Burlington Northern & Santa Fe Ry. v. STB, 453 F.3d 473 (D.C. Cir. 2006).

In fact, Ms. Carey acknowledges “the well documented 500-mile range for which trucks can most effectively compete with rail.”¹³² This statement implies that all rail intermodal movements are susceptible to truck diversion to some degree. This is consistent with the STB’s handling of rail intermodal traffic from an economic perspective because intermodal traffic lacks market dominance. Given this fact, as shown in Figure 1 in the Fapp VS, reproduced here, almost all of the major Midwest markets are within that mileage range from the POV. In fact, “a 2024 report by Oliver Wyman indicates that in medium-haul intermodal lanes (750-1,500 miles), rail had a 27 percent market share,” indicating that truck service, both domestic and international, is competitive in this market.¹³³

¹³² See CSXT-22, VS Carey, at 593. In reality, however, she is all over the map when it comes to how competitive trucks are to rail. She first claims that a destination must be 500 miles or less distant to compete with rail. She then admits that truck and rail can compete for traffic in the 500 to 700 mile range, but that trucks are not a competitive alternative for movements of greater than 700 miles. Actually, trucking is a competitive alternative for all mileage ranges.

¹³³ Rebuttal VS Fapp, at 40.

Figure 1
Map of Midwest Trucking Destinations 500 to 700 Miles From Select East Coast Ports



It should therefore be no surprise as Mr. Fapp has previously noted that trucking has the largest share of container traffic coming to/from the POV.¹³⁴ Given that these major destinations are within 500 to 700 miles, it is not accurate to assume that the majority of truck traffic to/from POV is for domestic moves less than 100 miles as she has attempted to claim.

Mr. Fapp's Rebuttal Verified Statement fully addresses all of Ms. Carey's analysis that trucking and rail do not compete. He shows that her analysis contains flawed assumptions and methodological errors that misrepresent the competitive relationship between rail and truck transportation from POV to the Midwest. He shows that her analysis ignores that rail intermodal shipments require truck drayage for first mile/last mile movements. These drayage components

¹³⁴ NS-1, VS Fapp, at 90.

are essential to intermodal transportation but are excluded from her rail rate calculations, creating an incomplete cost comparison with truck-only movements.

Mr. Fapp notes that Ms. Carey understated trucking's POV percentage share (claimed 5-7%) by improperly including shipments with missing origin/destination data in her denominator. For example, she assumed none of the 1.5 million tons with missing destination data moved to Chicago.¹³⁵ This error artificially suppressed truck volumes by approximately 27% across all studied lanes.¹³⁶

He also shows that she made several errors in the way that she calculated rail rates vs. trucking rates. The errors in her analysis were as follows:¹³⁷

- Rail rates combined both dray-to-rail and rail-only movements despite claiming these services cannot compete.
- Truck rates conflated two distinct market segments (500 to 700 mile range vs. longer hauls).
- Comparisons used rail origin/destination points rather than actual shipment origins/destinations.
- Failed to consider that intermodal traffic often requires additional drayage beyond rail terminals.

Given these errors, it is inaccurate to discount the role of trucking as a competitive alternative to rail movements out of POV. Ms. Carey also completely ignores the fact that rail intermodal movements generally involve one, if not two, or three drayage movements, where the truck movements do not.¹³⁸

Although its expert refuses in this proceeding to recognize the competitive role trucking plays at POV, CSXT has no hesitancy in recognizing that role with respect to the Port of

¹³⁵ Rebuttal VS Fapp, at 49.

¹³⁶ Rebuttal VS Fapp, at 49-50.

¹³⁷ Rebuttal VS Fapp, at 50-52.

¹³⁸ Rebuttal VS Fapp, at 43-45.

Baltimore. In its press release regarding the Howard Street Tunnel, CSXT states the upgrade would “allow CSXT to better compete against trucking from the Port of Baltimore.”¹³⁹ CSXT gives no explanation as to why trucks are a competitive alternative at Baltimore but should be ignored as a competitive option at POV.

E. The Presence Of A Barge Service Alternative At POV And Port of NY/NJ Is Also Part Of The Relevant Market

CSXT not only takes issue with the fact that trucks can compete for international intermodal freight beyond short distances, but CSXT dismisses barge service as “not a factor.”¹⁴⁰ CSXT’s Ms. Kenney, the VP Merchandise – Sales and Marketing, argues that barge service is “not a practical or attractive solution for CSXT or shippers,”¹⁴¹ and therefore completely without relevance in this proceeding. However, barge service at the Port of Virginia moves traffic from the port inland to Richmond, largely for transload to truck, thereby expanding the overall capacity of the port, and enhancing the competitiveness of the port overall. As such, transportation by barge must be considered.

The Greater Richmond Partnership notes that the presence of barge service “plays a crucial role in pushing cargo inland – closer to its destination.”¹⁴² The Hampton Roads Transportation Planning Agency notes that in 2019 the barges moved approximately 37,000

¹³⁹ “Howard Street Tunnel Project to Complete Double Stack Clearance of CSX Intermodal Network,” CSX Press Release, November 30, 2021, <https://www.csx.com/index.cfm/about-us/howard-street-tunnel-project-to-complete-double-stack-clearance-of-csx-intermodal-network/>, accessed on October 15, 2025 (emphasis added).

¹⁴⁰ CSXT-22, at 77.

¹⁴¹ CSXT-22, VS Kenney, at 418.

¹⁴² “The Port of Virginia leads in modern logistics and sustainability,” Greater Richmond Partnership, January 16, 2025, <https://www.grpva.com/news/the-port-of-virginia-leads-in-modern-logistics-and-sustainability/>, accessed on October 6, 2025.

containers from POV to the Richmond Marine Terminal.¹⁴³ That relieves the Port of Virginia from the congestion associated with that traffic to better permit it to concentrate on the remaining traffic. And Virginia views barge service as an important part of POV's offerings. In describing the available transportation options of Perdue AgriBusiness, one of NPBL's customers, the Virginia Secretary of Transportation noted the "two Class I railroads, our interstate network, inland port, and barge service to Richmond enable cargo to move effectively through the Port of Virginia."¹⁴⁴

The Port of New York/New Jersey also acknowledges the role that barges play in increasing the competitiveness of its port and has invested in barge service which contributes to the overall capacity of the ocean marine intermodal terminals of a port.

Recognizing the untapped potential and excess capacity of the coastal waterways, the Port Authority's Port Department has made regional barge service one of its strategic initiatives. The Port Authority and NYCEDC will continue to support the North Atlantic Marine Highway Alliance (NAMHA), which will seek to foster the use of barge services to offset the use of trucks and supplement rail cargo to and from the Port.¹⁴⁵

II. CSXT AVOIDS THE NPBL BECAUSE IT RECEIVES A PRIVATE SUBSIDY TO DRAY ITS CONTAINER TRAFFIC, NOT BECAUSE IT IS FORECLOSED BY THE NPBL SWITCHING FEE

At the heart of CSXT's opposition is the fact that the POV-provided private subsidy makes it economically advantageous to dray containers from NIT. CSXT continues to insist that

¹⁴³ Hampton Blvd Corridor Study, Hampton Roads Transportation Planning Organization, April 2021, at 66.

¹⁴⁴ "Governor Glenn Youngkin Announces Perdue AgriBusiness to Invest \$59.1 Million to Expand in the City of Chesapeake," Chesapeake Economic Development press release, dated March 24, 2022, <https://chesapeakeva.biz/perdue-agribusiness/>, accessed on October 13, 2025.

¹⁴⁵ "Port Authority And NYCEDC Create Advisory Group to Implement a Regional Barge Network to Transport Cargo, Reduce highway Congestion and Improve Air Quality," Port Breaking Waves, <https://www.portbreakingwaves.com/10118-2/>, accessed on November 19, 2025.

the NPBL provide only to CSXT a switching rate that is comparable for the movement of its container traffic, contrary to NPBL policies and practices. The evidence establishes that NPBL's switching rate is cost-based, has remained unchanged for fifteen years, does not even recover existing costs, aligns closely with prevailing drayage rates, and has never been deemed unreasonable.¹⁴⁶ CSXT is misleading in its assertions that it cannot use this rate because it is allegedly too expensive compared to drayage. CSXT further claims that paying NPBL's rate would yield a contribution below a {{ [REDACTED] }} threshold—a figure CSXT portrays as the minimum for container traffic viability.¹⁴⁷ On this basis, CSXT argues that NS's refusal to adopt CSXT's proposed lower rate constitutes a deliberate effort to foreclose CSXT from using the rate to compete against NS's direct service to NIT. This narrative collapses under scrutiny. The truth is simple: CSXT avoids NPBL not because the switch rate forecloses competition, but because CSXT prefers the higher margins it enjoys from subsidized drayage.

First, CSXT's own contract rates for container shipments through POV are {{ [REDACTED] [REDACTED] }}¹⁴⁸ Because the overwhelming majority of CSXT's POV traffic moves through VIG, any incremental cost at NIT has negligible impact on CSXT's overall economics.¹⁴⁹ The same dynamic applies at VIG, where lower CWRV rates similarly enhance CSXT's contribution. Critically, CSXT has never committed to passing any savings from its proposed rate reduction to customers. If its most recent 2024 rate proposal were adopted,

¹⁴⁶ In 2023, the ratio of revenue to variable cost (R/VC) for NS's international intermodal movements between the Midwest and POV or Port of NY/NJ was well below the Board's 180% threshold for market dominance. VS Waehrer, at 3.

¹⁴⁷ CSXT-22, VS Carey, at 604, n. 142.

¹⁴⁸ VS Waehrer, at 19-20.

¹⁴⁹ VS Waehrer, at 24, n. 79.

CSXT would pocket the difference—confirming that this dispute is about profit maximization, not competitive access.

Second, CSXT’s claim that NPBL’s \$210 switch renders traffic “uneconomic” rests on Ms. Carey’s flawed analysis. Her methodology inflates the baseline and misrepresents profitability. By her own criteria, {{ [REDACTED] }}¹⁵⁰ of CSXT’s VIG traffic (where no alleged foreclosure exists) would also be deemed uneconomic under her {{ [REDACTED] }} contribution requirement,¹⁵¹ and yet CSXT moves that traffic. This alone discredits her conclusions. Moreover, the record shows CSXT regularly moves traffic at contributions below its alleged {{ [REDACTED] }} floor.¹⁵² Ms. Carey ignores this fact, undermining her credibility. As Dr. Brennan explains, quoting Dr. Willig: “A railroad [such as CSXT] is always better off carrying any traffic that covers its short-run avoidable and contributes to fixed and common costs.”¹⁵³ This principle is fundamental. If NPBL’s switch rate combined with CSXT’s rail rate (which is the {{ [REDACTED] }} [REDACTED] }})) covers CSXT’s short-run avoidable costs, CSXT is economically better off moving the traffic via NPBL. And CSXT can use an NPBL/CSXT - Midwest rate and still produce an R/VC ratio that is similar to other R/VC moves used by CSXT in other lanes.¹⁵⁴ The {{ [REDACTED] }} contribution requirement may be CSXT’s goal, but CSXT moves

¹⁵⁰ This percentage includes {{ [REDACTED] }} of imports and {{ [REDACTED] }} of exports.

¹⁵¹ VS Waehrer, at 35.

¹⁵² Carey Dep. 161:3-162:6, October 28, 2025.

¹⁵³ VS Brennan, at 23. As detailed below, NPBL is distinguished from other railroads such as CSXT and CWRV insofar as NPBL is a terminal railroad that, by its governing documents, is not a for-profit shortline but instead exists for the benefit of its owners.

¹⁵⁴ Indeed, CSXT moves some lanes at R/VC ratios at less than {{ [REDACTED] }} R/VC and less than a {{ [REDACTED] }} contribution margin. VS Waehrer, at 33-34. This makes sense because it is not the individual lane that matters, but the overall bundle of service offered to ocean carriers from all of the ports. Some lanes will have higher contributions and others will have lower, but overall CSXT will contribute to its fixed costs.

traffic below this contribution level at many lanes. Assertions that the NPBL rate makes movements “uneconomic” are not only wrong—they contradict CSXT’s own operating practices, which moves traffic through VIG under conditions that Ms. Carey’s methodology deems uneconomic.

Ms. Carey’s lane-by-lane approach to profitability ignores industry reality: intermodal contracts span multiple lanes, allowing railroads to balance margins across the network. When Dr. Waehrer replicates Ms. Carey’s analysis with a more realistic structure that accounts for the efficient vessel routing at POV and the aggregation of CSXT movements across both terminals and reduces NIT costs by the alleged incremental switch markup ({{ [REDACTED] }} per container), no material change occurs in CSXT’s share of “uneconomic” traffic. The cost effect is *de minimis*. There is no meaningful impact on CSXT’s ability to compete with NS in the Midwest–POV market.¹⁵⁵ When costs are averaged across actual terminal usage, the alleged switch rate has no economically meaningful effect on CSXT’s profitability or competitive viability. CSXT’s foreclosure theory is a litigation construct, not a market reality.

Finally, realizing that its assertions regarding NPBL’s switch rate ring hollow, CSXT also tries to claim that it is physical foreclosed from serving NIT due to operational obstacles created by NS. Again, CSXT’s argument is based on mischaracterizations and half-truths. It is undisputed that CSXT has asked NPBL to move intermodal trains to NIT only a handful of times over the past 20 years. It is equally undisputed that NPBL has moved every single one of these intermodal trains for CSXT. NPBL moved the first of these intermodal trains in 2010, at which

¹⁵⁵ VS Waehrer, at 36.

time CSXT remarked, {{ [REDACTED]

[REDACTED] }}¹⁵⁶

CSXT chose not to utilize NPBL for its intermodal traffic until 2015, when the POV became extremely congested, causing a backlog of intermodal containers at NIT for both CSXT and NS.¹⁵⁷ NPBL timely responded to CSXT's request, and within 24 hours, NS provided NPBL with an operating window to move an intermodal train for CSXT.¹⁵⁸ NPBL delivered that train to NIT within 24 hours of receiving that operating window.¹⁵⁹ CSXT, NPBL, and NS followed a similar pattern over the next several days. In all, NPBL moved nine intermodal trains for CSXT in 2015. And unsurprisingly, most of the trains were moved during the same operating windows that NS had provided to NPBL in 2011.¹⁶⁰ The facts simply reject any claim of physical foreclosure from NIT. Rather, it shows that NPBL was able to work with NS to create an operating plan for CSXT for a train movement that had occurred only once before five years prior, all during some of the worst congestion that NIT – and the POV more generally – has ever experienced.

III. THERE WERE VALID BUSINESS REASONS TO TABLE CSXT'S 2024 RATE AND SERVICE PROPOSAL AND NPBL IS FUNDEMENTALLY DIFFERENT THAN CRWY

CSXT argues that the vote of the NS-designated members of the NPBL board of directors to table CSXT's most recent 2024 rate and service proposal for the NPBL switch rate is proof of NS's anticompetitive control of NPBL. According to CSXT and its experts, the Board should

¹⁵⁶ CSXT0082577.

¹⁵⁷ CSXT0154004.

¹⁵⁸ NPBL010906; NPBL010896.

¹⁵⁹ CSXT0001301.

¹⁶⁰ CSXT0126579.

use a framework that analyzes the competitive effects as if NPBL were an independent shortline railroad trying to maximize profits. CSXT points to CWRV, a shortline railroad owned by the nation's largest shortline holding company, Genesee & Wyoming, which serves VIG as an indicator of what NPBL would do if it were independent from NS.

There are several problems with CSXT's framework. First, there were several corporate and business reasons justifying the NPBL's Board of Director's decision to table CSXT's rate proposal that have nothing to do with competitive concerns. Indeed, the NPBL President, who is also a member of the Board of Directors for NPBL, and who CSXT admits is considered an "independent" director under CSXT's proposed definition of an independent director,¹⁶¹ raised questions that went unanswered and thus voted to table the CSXT rate proposal until such time as those questions were addressed. Second, the comparison to CWRV is flawed because NPBL was not formed to be a profit-maximizing switching railroad but to be a terminal railroad charging a uniform cost-based rates to each of its connecting carriers. As discussed in the verified statements of Mr. Fapp and Dr. Brennan, CWRV is not a good substitute for NPBL. The proper analogy is to look at other terminal railroads owned by competitors at other major terminals.¹⁶² Mr. Fapp's previous verified statement and his Rebuttal Verified Statement discusses why NPBL is different from CWRV and notes that other terminal railroads also price similar to NPBL.¹⁶³

The background leading to the tabling of CSXT's most recent rate proposal is important to understand and establishes that the vote to table was not in furtherance of some conspiracy.

¹⁶¹ NS-13, VS Zoeller, at 53-54.

¹⁶² Rebuttal VS Fapp, at 14-23.

¹⁶³ NS-1, VS Fapp, at 3-7; Rebuttal VS Fapp, at 19-24.

On November 26, 2024, CSXT’s general counsel sent a letter to NPBL and NSR outlining a rate and service proposal (the “2024 CSXT Rate and Service Proposal”).¹⁶⁴ CSXT { [REDACTED]

[REDACTED] }¹⁶⁵ The proposal was specific on what CSXT wanted (i.e. a lower switch rate for CSXT intermodal traffic to and from NIT) but was anything but specific on how it could be accomplished.¹⁶⁶ { [REDACTED]

¹⁶⁷ NS's designated members of the NPBL board of directors were upfront with the fact that {

_____ } The NPBL's independent Board Member's reaction was along the

¹⁶⁴ CSXT-22 at 425, Letter from Michael S. Burns, CSX Transportation, to Members of the NPBL Board and Norfolk Southern Railway Company (Nov. 26, 2024).

¹⁶⁵ Although CSXT {
[REDACTED]
} *Id.* at 427.

¹⁶⁶ *Id.* at 428-29.

¹⁶⁷ CSXT-22 at 436, Attachment C to Maryclare Kenney’s VS, Letter from Joseph H. Carpenter, IV, Vice President Law, Norfolk Southern Corporation, to Members of the NPBL Board and CSX Transportation, Inc. (Dec. 4, 2024).

¹⁶⁸ CSXT-22, Exhibit 29, Letter from Members of the NPBL Board of Directors, to James L. Chapman, IV, Esq., General Counsel, NPBL, Response to CSX Transportation, Inc.’s November 26, 2024 Proposals (Dec. 4, 2025), at 388 (referring to the fact that the CSXT proposal required “amendments to NPBL’s corporate governance documents”).

same lines, i.e., the proposal missed critical terms, and analysis. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }¹⁷⁰

CSXT fired back a letter on February 12, 2025, that { [REDACTED]

[REDACTED] }¹⁷¹ But it is important to understand that the NPBL Board of Directors did not reject the proposal; it simply tabled it so additional information could be obtained.¹⁷² { [REDACTED]

[REDACTED]

[REDACTED] } When CSXT eventually did respond to some of the questions posed to it, { [REDACTED]

[REDACTED] }¹⁷⁴ In response to requests that { [REDACTED]

¹⁶⁹ CSXT-22 at 443-45, Attachment E to the VS of Maryclare Kenney, Letter from R. Cannon Moss, President, NPBL, to Steven C. Armbrust, Asst. General Counsel, CSX Transportation (Feb. 24, 2025) { [REDACTED]

[REDACTED] }

¹⁷⁰ *Id.* at 445. *See also*, CSXT-22 at 383, Exhibit 28, Draft Minutes of the December 4, 2024, NPBL Board Meeting.

¹⁷¹ CSXT-22 at 439-41, Attachment D to the verified statement of Maryclare Kenney, Letter from Steven Armbrust, CSX Transportation, Inc., to Cannon Moss, President, NPBL, Members of the NPBL Board, and Norfolk Southern Railway Company (Feb. 12, 2025).

¹⁷² CSXT-22 at 390, NPBL001475, Letter from the Directors of NPBL, to James L. Chapman, IV, Esq., General Counsel, NPBL (Feb. 27, 2025).

¹⁷³ *Id.* (enunciating more than 30 specific questions that had, at that time, would go into an evaluation of the proposal).

¹⁷⁴ *See, e.g.*, CSXT-22 at 457, Attachment G to the VS of Maryclare Kenney, CSXT Letter to NPBL (March 21, 2025) (discussing NPBL in terms of an independent shortline as opposed to a terminal railroad required, in accordance with its governing agreements, to cover its costs and return a specific dividend back to its two owners).

[REDACTED]

[REDACTED]

[REDACTED] } The 2024 CSXT Rate and Service Proposal currently remains tabled, and should remain so until all cost inputs (including the NPBL trackage rights compensation fee) are determined and CSXT provides the NPBL board with { [REDACTED] [REDACTED] }. The actions of the NPBL board, and of the NPBL management, in response to the 2024 proposal are completely appropriate.

The 2024 CSXT Rate and Service Proposal was in large part just a rehash of what CSXT had proposed in 2010 and 2018. The district court was presented with the same litany of letters and board actions with regard to those proposals as the Board is presented with regard to the 2024 proposal. The district court found that NPBL's responses to those earlier proposals were not only completely justified, but in fact were a "reaffirmation [of] the continued existence and enforceability of a decades-old contract," specifically the formation documents of the NPBL itself.¹⁷⁶

The district court found it reasonable that the NPBL president was concerned that he did not have available to him the rate that NPBL would have to pay for NS trackage rights; given that the trackage rights fee is a significant component of the NPBL switch fee.¹⁷⁷ The district court thought it was a reasonable approach to want to know the trackage rights fee before adopting a new switch fee.¹⁷⁸ "The acknowledgement of such an obvious business concern in

¹⁷⁵ *Id.* at 459.

¹⁷⁶ CSX Transp., Inc. v. Norfolk S. Ry. Co., 648 F. Supp. 3d 679, 700, 2023 U.S. Dist. LEXIS 795, *34 (ED VA 2023) (internal quotations omitted).

¹⁷⁷ CSX Transp., Inc. v. Norfolk S. Ry. Co., 648 F. Supp. 3d 679 at 710-11.

¹⁷⁸ *Id.* at 713.

response to a long-term service proposal from CSX” is nothing more than evidencing “NPBL management’s view that the proposal warranted further evaluation.”¹⁷⁹ The trackage rights compensation issue remains unresolved today, entirely due to the interference of CSXT that prevents the regulatory adjudication of a reasonable trackage rights rate.

The district court found that, even if the tabling of the CSX rate and service proposal was determined to be a denial of that proposal, that would not be sufficient to show that the rejection was based on something other than “a legitimate economic analysis.”¹⁸⁰ CSXT produced “no evidence, direct or circumstantial, suggesting that the 2018 NPBL Board or its members had engaged in conspiratorial conduct in connection with the 2018 events” regarding NPBL’s consideration of the CSXT rate and service proposal.”¹⁸¹

There is no reason for the Board to view the response to CSXT’s latest rate and service proposal as anything different. The 2024 rate and service proposal was for { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

} The clear violation of the NPBL governing documents is only the beginning. When asked to produce for NPBL { [REDACTED]

[REDACTED] }¹⁸² CSXT

¹⁷⁹ *Id.* at 713-14. In addition, NPBL’s president was concerned that “if NPBL negotiated a special reduced rate specific to CSX, NPBL’s other major customer would want the same reduced rate.”

¹⁸⁰ *Id.* at 719.

¹⁸¹ *Id.*

¹⁸² CSXT-22 at 459, Attachment G to the Verified Statement of Maryclare Kenney, CSXT Letter to NPBL (March 21, 2025) (responding to the request to provide the “extensive analysis” with a statement that essentially could be read as “it exists”).

made a proposal that had little substance, with no attempt to address the many economic issues, not to mention the several operating issues involved about the operating plan proposal.¹⁸³ As Mr. Brennan posits: the tabling of the proposal by NPBL’s board of directors reflected an understanding “that abandoning a principle of neutrality that has served this railroad – and its owners – for over 128 years is not a minor adjustment; it is a fundamental shift, one that requires careful consideration.”¹⁸⁴ Based on the information available to the NPBL board, it acted reasonably and appropriately in tabling the proposal.

IV. NPBL’S SWITCH RATE IS APPROPRIATE

A. The 2010 NPBL Switch Rate Fully Comports with the Principle of the 1897 Agreement

The 2010 NPBL switch rate, which is at the heart of CSXT’s anticompetitive accusations, fully comports with the founding principles in the 1897 Agreement that the switch rate be both uniform and cost-based. In discussing the cost-based nature of the NPBL switch, the 1897 Agreement provides that the rate should “yield a net revenue sufficient to pay...a dividend of six per cent on the stock”.¹⁸⁵

From 2001 to 2009, NPBL’s operating expenses, as calculated in the ordinary course of business, demonstrated an average operating expense of {{ [REDACTED] }}.¹⁸⁶ When a {{ [REDACTED] }} profit is added, the resulting amount is {{ [REDACTED] }}. Accordingly, the resulting 2010 switch rate was neither arbitrary nor punitive. In adopting the 2010 switch rate, the NPBL Board

¹⁸³ See CSXT-22 at 444, Attachment E to the Verified Statement of Maryclare Kenney, NPBL Letter to CSXT (Feb. 24, 2025) { [REDACTED] }
[REDACTED] }

¹⁸⁴ VS Brennan, at 13.

¹⁸⁵ 1897 Agreement, Section 9.

¹⁸⁶ See NPBL008772.

responsibly relied on NPBL's average operating costs for the prior 9 years,¹⁸⁷ which methodology had been adopted and used by NPBL for years without objection by CSXT Board representatives or by CSXT as a shareholder.¹⁸⁸ The \$210 switch rate is simply a rational, mathematical calculation, wholly supported by both NPBL's historic operating expenses and the directive of the 1897 Agreement to establish a rate with a near 6% profit yield.

In fact, if anything, the NPBL Board should have established a higher rate in 2010. From 2010 to 2023, the average of NPBL's operating expense exceeded the 2010 rate by more than {{ ■■■ }}.¹⁸⁹ And that trend continued in more recent years as well. In fact, if adjusted for inflation, the NPBL rate that CSXT approved in 2008 for intermodal traffic would be more than the 2010 rate CSXT claims is so anticompetitive as to constitute a market foreclosure. The 2008 line haul switching rate for all import/export commodities (including many of the intermodal containers that would have passed through NIT) approved by CSXT was \$148.50.¹⁹⁰ If that rate is adjusted for the 3rd quarter of 2025, using the RCAF-U, that switch rate now would be \$213.25.¹⁹¹ Therefore, the 2010 switch rate that CSXT disputes today is lower than what the rate would have been if NPBL retained the 2008 rate approved by CSXT. Although CSXT, in its own self-interest, desires a lower switch rate, all objective evidence undisputably supports that the adoption of the 2010 switch rate was a well-reasoned, disciplined and justified business decision.

B. Differential Pricing Is Neither Required Nor Appropriate.

¹⁸⁷ See generally, NPBL008772.

¹⁸⁸ See NPBL008772.

¹⁸⁹ NS-1, VS Fapp, at 86.

¹⁹⁰ STB-NS-0014867.

¹⁹¹ Fapp Workpaper, CSXT 2006 Rate Escalated to 2025.

CSXT is arguing that NPBL is required to provide a special NPBL switch rate solely for CSXT's movement of intermodal traffic at NIT, rather than a "uniform" rate, applicable to all NPBL's customer and locations. Not only is such a differentiated rate inconsistent with the principles of NPBL's governing agreement (which requires that the rate be "uniform"), but, as explained by Mr. Fapp, it is also inconsistent with the typical approach used by most terminal railroads and the practice of many switching railroads, which treats all cars the same regardless of the commodities moved.¹⁹²

Mr. Fapp explains that, based on his 32-year career in aiding such railroads to set transportation, switching and ancillary rates,¹⁹³ "most short line terminal and belt railroads, like the NPBL, generally charge relatively uniform operating rates, with limited variation in rates based on specific operating costs."¹⁹⁴ Many short lines simply do not have the volumes of scale or staff to differentiate, for example, the distance the rail car is moving,¹⁹⁵ or whether the traffic moving is all domestic or involves an international market, especially when the revenue waybill for the movement would not have a clear indicator of this distinction. Indeed, some of these distinctions can be difficult for such small enterprises to handle. Revenue waybills, for example,

¹⁹² Rebuttal VS Fapp, at 6.

¹⁹³ NS-1, VS Fapp, at 102-03. In addition to his experience at L.E. Peabody & Associates, Inc., where he has been employed since December 1997, Mr. Fapp had been employed at BHP Copper, Inc., where he served as Transportation Manager -- Finance and Administration, Mr. Fapp worked at 3 short line railroads, specifically The San Manuel Arizona Railroad, the Magma Arizona Railroad (also known as the BHP Arizona Railroad), and the BHP Nevada Railroad.

¹⁹⁴ Rebuttal VS Fapp, at 3.

¹⁹⁵ In fact, the 1897 agreement specifically provides that the distance moved should not affect the rate charged. 1897 Agreement Section 9.

tag traffic moving to or from Hawaii and Alaska as being “international” even though they are not, thus { [REDACTED] }.¹⁹⁶

CSXT argues that the NPBL terminal railroad having a uniform switch rate “is inconsistent with railroad industry practices that are anchored by differential pricing.”¹⁹⁷ However, as discussed above, a uniform rate is one of the differentiating characteristics between a belt line or terminal railroad, on the one hand, and other rail carriers that have independent pricing authority and who are owned by larger shortline railroad holding companies, such as CRWY. As Dr. Brennan states, uniform pricing has several benefits: “it is transparent, predictable, and avoids duplicating the value-based pricing already performed by the Class I carriers” that could result in a skewed marketplace and problematic double marginalization.¹⁹⁸ While this uniform pricing system is simple, it is precisely that simplicity that “prevents gamesmanship, and has allowed NPBL to function effectively for over a century.”¹⁹⁹ It is also easily managed by a small railroad operating with limited staff, such as the NPBL.²⁰⁰ Mr. Brennan goes on to explain: “A belt railroad’s commitment to neutrality is not an arbitrary tradition, it is a governance solution designed for co-owned infrastructure in a competitive

¹⁹⁶ See STB-NS-0014867 (NPBL Tariff NPB 8100-H) at Item 125 { [REDACTED] } Rebuttal VS Fapp, at 7, n. 8.

¹⁹⁷ CSXT-22, VS Carey, at 579. Ms. Carey cites three examples of for-profit switching railroads, two of which are part of the Genessee and Wyoming family of railroads, and one of which is an entity operated by the South Carolina Department of Commerce that operates over 45 miles of railroad. *Id.* at 619-20. See, South Carolina Div. of Public Rys. d/b/a Palmetto Rys. – Acquisition Exemption – Hampton & Branchville R.R. Co., FD 35995 (STB served June 6, 2016).

¹⁹⁸ VS Brennan, at 11. Mr. Brennan characterizes double marginalization a “unambiguously harmful.” *Id.*

¹⁹⁹ *Id.* at 6.

²⁰⁰ *Id.* at 12. “[E]ngaging in demand-based differential pricing would (contrary to Carey’s assertions) undermine, and not promote, the social welfare.”

industry.”²⁰¹ NS’s adherence to uniform pricing recognizes NPBL’s special status as a neutral, terminal railroad.

In contrast, CSXT proposals argue that NPBL should disclaim that neutrality and act {{

■■ }}²⁰² CSXT points to CWRV and argues that since CWRV engages in differential pricing, so should NPBL.²⁰³ Both Mr. Fapp and Dr. Waehrer address CSXT’s argument and explain why NPBL is different from CWRV and demonstrate that CSXT has a remarkable misunderstanding of the fundamental difference between a shortline that has independent pricing authority and thus can differentially price to maximize profits versus a terminal railroad that is not profit-motivated.²⁰⁴

Finally, even if differential pricing were not at odds with NPBL’s 1897 operating agreement or its status as a neutral terminal carrier, CSXT has not supported its claim that differential pricing is appropriate for its international intermodal traffic at NIT. CSXT has argued that because its international intermodal traffic has lower variable costs than other types of traffic, a different NPBL switch fee is warranted.²⁰⁵ However, in making this argument, CSXT’s expert, Ms. Carey, uses the URCS variable cost to support her calculations, which in and of itself is problematic because URCS is based on costs derived from Class I railroads, not Class III terminal railroads.²⁰⁶

²⁰¹ VS Brennan, at 6.

²⁰² CSXT-22, VS Kenney, at 458.

²⁰³ CSXT-22, VS Carey, at 619.

²⁰⁴ Rebuttal VS Fapp, at 3-6. *See, e.g.*, VS Waehrer, at 22-24.

²⁰⁵ CSXT-22 VS Carey, at 627-29.

²⁰⁶ Rebuttal VS Fapp, at 7.

That problem is exacerbated by the fact that she assigns costs by rail car for non-intermodal traffic, but by container for intermodal traffic (thus ignoring the fact that multiple containers are moved on a single rail car and potentially understating the associated costs by a factor of 4.5).²⁰⁷ As described in detail in Mr. Fapp's verified statement, there are additional concerns with Ms. Carey's calculations.²⁰⁸ These concerns support NPBL's reluctance to accept the 2024 rate proposal (as discussed above) without the benefit of CSXT's supporting analysis.

C. Rate Comparison to CWRV

CSXT also argues that, at \$210 per car, the NPBL switch rate is prohibitively expensive, especially when one compares that rate to what is charged by CWRV.²⁰⁹ But CWRV and NPBL reflect two vastly different rail operations, as outlined in Mr. Fapp's verified statement.²¹⁰ In addition, there are operational differences in their respective traffic and customer bases, the number of interchange partners, and the ownership of the locomotives.²¹¹

²⁰⁷ Rebuttal VS Fapp, at 8-10.

²⁰⁸ Rebuttal VS Fapp, at 9-10. For example, Fapp found a potential mathematical calculation mistake and is unable to replicate Ms. Carey's distance moved, among other issues.

²⁰⁹ CWRV would not even exist if it were not for NS's action in spinning the line off to create the predecessor of CWRV and without imposing any paper barrier. At the time, NS was the only railroad serving the VIG location. It created the predecessor of CWRV and gave it independent pricing authority. Commonwealth Railway, Inc. (CRI) acquired both ownership and operating rights for a section of track owned by Norfolk and Western Railway Company as well as another set of operating rights for another section of track owned by Norfolk and Western Railway Company on August 31, 1989. See Commonwealth Ry., Inc. – Acquisition and Operation Exemption – Norfolk S. Ry. Co., FD 34954, slip op. at 1, n.1 (STB served December 21, 2006) (citing Commonwealth Ry. Inc. Lease, Operation, and Acquisition Exemption – Rail Lines in Portsmouth, Chesapeake, and Suffolk, VA, FD 31528 (ICC served Sept. 8, 1989)). CRI eventually became CWRV. If NS had genuinely wanted to foreclose CSXT's access to POV, NS would not have sold the line or would have put in place a paper barrier. It did not do so.

²¹⁰ Rebuttal VS Fapp, at 21-23.

²¹¹ *Id.* at 21-24.

Likewise, when comparing the switch rates of NPBL and CWRV, CSXT's expert, Ms. Carey ascribes to NPBL an artificially low number of containers per rail car. Previously, CSXT's normal-course-of-business analyses relied on the assumptions that NPBL would carry {{ [REDACTED] }} when transporting CSXT containers to and from NIT.²¹² However, Ms. Carey calculates a per container fee based on {{ [REDACTED] [REDACTED] }}, thereby inflating NPBL's cost per container.²¹³

Finally, as Dr. Waehrer explains, there are several problems associated with any argument that the \$210 rate somehow forecloses CSXT's ability to use it. He shows that, when corrected for errors, the switching rates for NPBL and CWRV are actually very comparable.²¹⁴ He notes that any alleged incremental NIT cost to CSX is exceedingly small when averaged over all of CSX's POV volumes and is unlikely to affect competitiveness. The NIT switch differential has a *de minimis* impact on CSX's profitability and competitive position. He shows that CSXT could use the NPBL switch rate and still contribute to CSXT's fixed costs. CSXT simply prefers not to because it makes a larger contribution by using subsidized drayage.

D. The Board Should Not Be Involved In A Rate Dispute With A Minority Shareholder.

At the end of the day, this is simply a dispute between shareholders about the correct structure and amount of a rate. Outside of an unreasonable rate claim (which CSXT does not and could not make), this is not an appropriate matter for the STB to resolve, especially in the context of a control transaction proceeding. The agency's "policy has long been to encourage

²¹² Rebuttal VS Fapp, at 25.

²¹³ Rebuttal VS Fapp, at 25.

²¹⁴ VS Waehrer, at 24.

private sector dispute resolution whenever possible, particularly in disputes involving compensation.”²¹⁵ As Dr. Brennan notes:

At bottom, this is a simple dispute between the majority shareholder and the minority shareholder of a firm. Such disagreements are not uncommon, and the proper venue for such disputes is state court under corporate law. The STB is not the referee of shareholder disagreements over how best to monetize shared property. The STB’s role is to protect the public interest—not to mediate internal boardroom politics dressed up as a competition complaint.²¹⁶

E. The NPBL Switching Rate Has Inconsequential Impact On CSXT’s Movements

Even if the NPBL switch rate was determined to be too high, the rate has no significant impact on CSXT’s movements at POV. CSXT’s complaint centers on the claim that it is disadvantaged for rail service at NIT in large part due to NPBL’s switching rate, which CSXT argues is too high. But Dr. Waehrer finds that the NPBL switching fee has only a “*de minimis*” effect on the cost of CSXT’s movements through POV.²¹⁷ “The claimed anticompetitive portion of the NPBL switch rate averaged over all the containers moving through POV implies only between a {{ [REDACTED] }} increase in costs. These cost effects are less than {{ [REDACTED] }} of CSX revenue on movements between POV and the Midwest.”²¹⁸ And because CSXT charges the {{ [REDACTED] }} any lowering of the NPBL switch rate would have *de minimis* if any impact on competition. Instead, CSXT would simply pocket any savings for itself.

²¹⁵ Dakota, Minn. & E. R.R.—Control—Iowa, Chi. & E. R.R., (“DME/ICE”), FD 34178 at 18-19 (served Jan. 31, 2003).

²¹⁶ VS Brennan, at 5.

²¹⁷ VS Waehrer, at 3.

²¹⁸ *Id.*

V. NS'S 44-YEAR HISTORY SHOWS NS'S COMMITMENT TO MAINTAINING NPBL'S PRINCIPLES OF NEUTRALITY

When NS became the majority owner of the NPBL as a result of the Board's approval of the 1982 transaction, NS inherited NPBL's 1897 operating agreement that set forth NPBL's foundational principle of neutrality. Rather than use its majority ownership of NPBL to alter these principles, NS has strictly adhered to them for more than 40 years. The foundational principles of the 1897 Agreement provide that NPBL's switch rate be both cost-based and uniform.²¹⁹ CSXT has dragged NS into protracted and meritless litigation for nearly for nearly a decade, based on its claims that, by adopting the 2010 switch rate, NS used its ownership of NPBL to effect anticompetitive conduct. The great irony is that the NPBL's 2010 switch rate fully complies with the neutrality principles established to govern NPBL in 1897 – roughly 85 years prior to NS's acquisition of majority ownership of NPBL. The further irony is that if the 2010 rate had not been adopted, and the rate that existed prior to that adoption had been left in place, NPBL switch rate today would be higher than the \$210 rate.²²⁰ In the end, it is CSXT, not NS, which seeks to break from the 1897 neutrality principles governing NPBL's switch rate.

A. NS and CSXT's Historically Successful Partnership

By all objective criteria, NS and CSXT successfully governed NPBL for decades following NS's acquisition of majority ownership of NPBL in 1982. In fact, a book on the history of NPBL credits NPBL's leadership in the 1980s and 90s with a much-needed resurgence of NPBL.

Since 1989, the current, forward looking administration concentrated resourceful and decisive leadership on the crisis, which reached an acute stage in 1991.

²¹⁹ 1897 Agreement.

²²⁰ Fapp Workpaper, CSXT 2006 Rate Escalated to 2025.xlsx.

The traditional company was thoroughly reconstituted through modern attitudes and procedures, innovative technology, computerization, and a 65 percent employment reduction from 1987 to 1995. This crisis was brilliantly and beneficially solved.

The Belt Line was dramatically transformed into a thoroughly modern railroad, becoming very productive, technologically oriented, and responsive to shippers, for whom individually expedited services are now offered....²²¹

So, rather than NS weaponizing its majority control of NPBL to NPBL's detriment, NPBL flourished following the 1982 merger.

Similarly, in 1989, NS agreed to amend the 1897 agreement in a manner that, if anything, gave CSXT more representation on the Board vis-à-vis NS. Under the 1897 agreement, each owner was afforded one representative on the Board.²²² After the 1982 transaction, there were three owners of NPBL: CSXT, Norfolk and Western Railway Company ("NW") and Southern Railway Company ("SR"), which would have provided a 33%/67% ratio between CSXT and NS representatives. The 1989 amendment granted CSXT the right to have two representatives on the Board and NW/SR (jointly owned by NS) to collectively have three representatives, changing the ratio between CSXT and NS representatives to a 40%/60% split.²²³ The 1989 Agreement also expressly reaffirmed that (1) CSXT clearly understood that NW and SR (and therefore NPBL) were controlled by NS, and (2) CSXT agreed to NS's majority representation of the NPBL Board of Directors.

²²¹ VS Brennan, at 6-7 (quoting W. Hugh Moomaw, *Virginia's Belt Line Railroad: The Norfolk & Portsmouth, 1898-1997*, Hallmark Publishing Company (1998), p. xiii).

²²² 1897 Agreement, Section 4.

²²³ Although not addressed in the 1989 Amendment, the sixth member of the Board is the NPBL President.

The parties also agreed that the sixth member would be the President of NPBL, who, CSXT, admits is an “independent director” under CSXT’s own definition of an independent Director.

NS and CSXT have cooperatively governed NPBL both before and after the adoption of the 2010 NPBL rate. Despite CSXT’s current claims that NS wields its control of NPBL to competitively disfavor CSXT, the NPBL Board (consisting of NS, CSXT and NPBL representatives) has a long history of unanimous agreement on the governance of NPBL’s business. In fact, from April 2007 to April 2022, the NPBL Board unanimously agreed 113 out of 124 times on business items ranging from sale of real property approval of capital expenditures approval of operating budgets, election of officers, payments of dividends, changes in rate structure, and approval of operating changes.²²⁴ In other words, over a roughly 15-year period, which included the adoption of the 2010 rate and the related initiation of litigation by CSXT, the CSXT Board representatives, exercising their fiduciary duty to NPBL, agreed with the NS Board representative over 90% of the time. These facts starkly contrast to the picture CSXT attempts to paint of NS misusing its control of the NPBL Board to disadvantage both CSXT and NPBL.

B. NS Is Not Using Its Ownership to Effect Anticompetitive Action Against CSXT

Since the 1982 transaction, NPBL has operated as a separate legal entity with a separate Board of Directors, each of whom has a fiduciary duty to act in the best interests of NPBL. In fact, NS does not control the Board because it only represents 3 out of the 6 directors. In addition to the two CSXT directors and three NS directors, there is a sixth director, the NPBL

²²⁴ NS-32, Volume II Exhibit E, Letter from Joseph H. Carpenter, IV, Vice President Law, to The Honorable W. Sheppard Miller III, Secretary of Transportation, Commonwealth of Virginia (Oct. 30, 2025), at p. 3.

President. CSXT admits that the current NPBL President and Board Member, although a former NS employee, would now be considered independent under the CSXT's proposed definition of an independent director. And when a vacancy occurs in this position, NS is committed to not appointing a former NS or CSXT employee.

In the 43 years since the 1982 transaction, NS has not sought to dilute CSXT's representation of the Board. Similarly, it has not sought to re-write NPBL's 1897 operating agreement to favor NS (as CSXT is ironically attempting to do). In fact, as discussed above; in establishing the 2010 switch rate, NS scrupulously followed the neutrality principles of that operating agreement. Similarly, NS did not seek to impose its will on NPBL when NS and NPBL negotiated a new trackage rights agreement. When NPBL and NS could not agree on the trackage rights fee, NS did not use its *de facto* economic control over NPBL to force an agreement with an NS-determined trackage rights compensation amount. Instead, NS and NPBL independently requested the Board to establish a proceeding to calculate a fair fee. Again, ironically, it is CSXT who has opposed such a proceeding. Upon the Board's approval of NS's control application, NS has committed to continue to adhere both to the 1897 operating agreement and the Board's determination of a fair trackage rights fee to be paid by NPBL. The history of NS's majority ownership of NPBL, and the commitments NS has made in this application, demonstrate that NS has not used, and will not use, its ownership to effect anticompetitive actions against CSXT.

C. Due To This Neutrality, CSXT Is Wrong To Treat This Transaction As A 2-to-1 Transaction

CSXT argues that given that NS's control of NPBL has been unlawful since 1982, the Board needs to somehow "rewind" the clock and treat this transaction as if NPBL is an

independent railroad.²²⁵ Under that theory, the Board should not grant the control application without a condition to preserve customer's options to use two independent railroads (presumably CSXT's terminal trackage rights) because doing so would violate "[o]ne of the bedrock principles of the Board's treatment of control applications is that the Board does not permit 2-to-1 transactions, where a shipper loses its access to two railroads and would thereafter have to deal with a single railroad or with two railroads that are subject to common control."²²⁶ CSXT further says that "ocean carriers seeking to have on-dock rail access at NIT have two independent options – NS and NPBL" but that if the STB grants the requested approval, "ocean carriers seeking to have on-dock rail access at NIT must now deal with two railroads (NS and NPBL) that are part of a commonly-controlled entity."²²⁷ CSXT's arguments and concerns are unjustified.

As an initial matter, in its discussion, *infra*, NS addresses this and other arguments as to CSXT's efforts to analogize this transaction to the Pan Am transaction and why CSXT's analysis is incorrect. NS discusses throughout its comments why the correct analysis is to focus on whether the customer's choices, in this case ocean carriers, are being eliminated or why the transaction does not result in a substantial lessening of competition between CSXT and NS for ocean carrier business.²²⁸ This is true whether the Board treats NPBL as an independent railroad never controlled by NS or whether the Board takes the transaction "as is" with the knowledge that NS has controlled NPBL for over 42 years now. Assuming, however, that the Board did

²²⁵ CSXT-22 at 103.

²²⁶ CSXT-22 at 109 (emphasis added).

²²⁷ *Id.*

²²⁸ It is important to note that NIT is not a shipper, but an intermodal terminal served by a variety of different ocean carriers, and operated in coordination with a second intermodal terminal, VIG, where CSXT has access via an independent switching carrier, CWRV.

treat NPBL as independent from NS (which NS has done during these last 42 years), such treatment would not justify denying the transaction or doing anything different other than preserving CSXT's ability to use an NPBL switch at a cost-based rate, a commitment NS is willing to make.

First, ocean carriers arrange to serve the Port of Virginia, and not NIT or VIG in particular. It is VPA/VIT that directs an ocean carrier to one or the other terminal. In fact, CSXT recognizes this by the fact that {{ [REDACTED] [REDACTED] }} So, the very premise of CSXT's argument that somehow NIT and VIG compete against each other is flawed.

Second, NPBL connects with the Buckingham Branch and the Chesapeake & Albermarle Railroad. It is instructive that neither of those two railroads have raised a concern about competitive access to NIT or that NPBL will lose its independence. Nor should they have any concern because NPBL in the future will be governed by its board of directors as it has in the past – with neutrality in accordance with the Operating Agreement, its corporate charter, and consistent with its duties to minority shareholders.

Third, CSXT has only ever had access to NIT via NPBL switch, even before the NS/N&W/Southern transaction back in 1980. That same access will remain.²²⁹ Prior to 1980, NPBL acted as a terminal switching railroad that provided neutral service to each of its connecting railroads. After 1980, NPBL has acted as a terminal switching railroad that provides neutral service to each of its four connecting railroads. CSXT's access to NIT does not change as a result of the granting of the STB's consent for NS control over NPBL, particularly in light of

²²⁹ NS is not merging NPBL into NS. NS will not absorb NPBL's operations into its own. NS will not be conducting the switching that NPBL currently conducts, nor will NS be setting NPBL's switch rates. NPBL will continue to do so consistent with its corporate purpose.

the conditions that NS has offered. “The Board has not historically acted to increase shippers’ competitive options. In addition, although a transaction may result in some general changes to competition for specific shippers, the Board seeks to protect competition overall, not specific competitors.”²³⁰

Fourth, even if there was a 2-to-1 concern, which there is not, the STB’s response would be to order switching service as was the solution in the NS/CSXT/Conrail transaction and the UP/SP transactions (both of which were major transactions). If the Board were to order switching service, it would do so by ordering NPBL to provide exactly the same service NPBL currently offers to CSXT.²³¹ If the Board were to instead order CSXT direct access to NIT, then there would be an expansion of competitive options, not merely preserving competitive options. There is no precedent in any previous STB or ICC minor or significant transaction where the Board has imposed a condition to enhance competition rather than simply preserve it.

CSXT seems to argue that, even though the nature of NPBL (as a neutral terminal railroad) is not going to change, the STB has a hard and fast rule against even considering a transaction that has hint of 2-to-1 concerns. “With or without any commitment regarding prices that will be charged by NPBL, if the Board authorizes NS’s control of NPBL, NS will continue to access NIT directly and the only other railroad that will access NIT will be an entity – NPBL –

²³⁰ Norfolk Southern Ry. Co. – Acquisition and Operation – Certain Rail Lines of the Delaware and Hudson Ry. Co., Inc., FD 35873, Decision No. 6, slip op. at 17-18, STB served May 15, 2015 (citing Burlington N. Inc. – Control & Merger Santa Fe Pac. Corp., 10 ICC2d 661, 57 (1995)). See, e.g., Canadian Nat’l Ry. Co.—Control—Ill. Cent. Corp., FD No. 33556, slip op. at 20 (STB served May 25, 1999); Wisc. Cent. Transp. Corp.—Continuance in Control—Fox Valley & W. Ltd., (Wisc. Cent/Fox Valley 1992) 9 I.C.C.2d 233, 239-40 (ICC served Dec. 4, 1992).

²³¹ It is doubtful that CSXT would request NS to provide the NIT switching service in NPBL’s stead.

controlled by NS. Two-to-one. The Board does not allow such transactions.”²³² Again, the Board protects shippers, not railroad competitors, and it does so in a variety of ways, including preserving customers choices to use another railroad via a switch – a choice NS is not going to take away. It will not deny a transaction just because there is a 2-to-1 concern that can otherwise be addressed.²³³

CSXT also expresses concern with the fact NS will use its control of NPBL to downgrade NPBL’s service in providing switching. NS has committed to not changing how NPBL operates and NS will not, and has not, interfered with NPBL’s operations. But even if this were a legitimate concern, which it is not, the Board has been clear that adverse impacts on service quality is not a “‘competitive’ impact” that is generally addressed “under the Board’s traditional approach to such matters,” especially when those service quality impacts are otherwise addressed as they are with the conditions that NS has offered in this control transaction proceeding.²³⁴

CSXT claims that there is a 2-to-1 problem “regardless of the potential existence of competitive alternatives.”²³⁵ That is a simple misstatement of applicable law. The competitive

²³² CSXT-22 at 110.

²³³ Norfolk Southern Ry. Co. – Acquisition and Operation – Certain Rail Lines of the Delaware and Hudson Ry. Co., Inc., FD 35873, Decision No. 6, slip op. at 18-19, STB served May 15, 2015.

²³⁴ Canadian National Ry. Co. and Grand Trunk Corp. – Control – Duluth, Missabe and Iron Range Ry. Co., et al., 2004 STB LEXIS 230 *36, 37, FD 34424, Decision No. 7, slip op. at 17 (STB served April 9, 2004) (noting as well that such concerns, if they develop, can be addressed either in oversight or otherwise before the Board). *See also*, Norfolk Southern Ry. Co. – Acquisition and Operation – Certain Rail Lines of the Delaware and Hudson Ry. Co., Inc., 2015 STB LEXIS 115 *42, FD 35873, Decision No. 6, slip op. at 18-19, STB served May 15, 2015 (specifically identifying the fact that “with the implementation of the conditions required by this decision . . . which protect shippers on the D&H South Lines and connecting short lines from potential disadvantageous modifications of service, the acquisition will not result in any 2-to-1 reductions in shippers’ routing options.”).

²³⁵ CSXT-22 at 112.

issue that is addressed by the Board's so-called "2-to-1" issue arises ONLY in situations where after the proposed transaction there will be only 1 competitive alternative at a particular location when before there were competitive options. It is absolutely impossible to logically twist the long history of STB competitive control analysis into protection for a location that will retain competitive alternatives. To convert CSXT's switching rights to terminal trackage rights would be to provide a "windfall" that is not appropriate.²³⁶

All of this is presented in the context of the fact that no shipper can by definition be losing a competitive alternative by the STB granting its consent to NS's application. By approving this application, there will be no change in CSXT access to this facility before or after given the conditions that NS has offered. None of these would be any different even if NPBL was an independent railroad that NS was seeking STB consent to control. CSXT may not like NPBL's switching rate, but that rate is not unreasonable and was set in full compliance with NPBL's governing documents. NPBL would have taken the same actions whether NS owned the majority of its shares or not. CSXT cannot create a fictional situation that has never existed due to the fundamental nature of NPBL.

VI. DOJ'S COMMENTS DO NOT SUPPORT DENIAL OF THE TRANSACTION

The U.S. DOJ submitted comments²³⁷ in this proceeding focused on two primary concerns about the control application. First, DOJ expressed concern that should the Board grant its consent for NS to control NPBL, "Norfolk Southern would likely argue that it is immunized

²³⁶ UP/SP, FD 32760, Decision No. 74, STB served August 29, 1997, slip op. at 5-6. *See also*, Canadian National Ry. Co. and Grand Trunk Corp. – Control – Duluth, Missabe and Iron Range Ry. Co., et al., FD 34424, Decision No. 7, slip op. at 17-18 (STB served April 9, 2004).

²³⁷ "Comment of the United States Department of Justice," submitted August 27, 2025, in FD 36836, Norfolk S. Corp. and Norfolk S. Ry. Co. – Acquisition and Control – Norfolk & Portsmouth Belt Line R.R. Co. ("Comments").

from antitrust enforcement relating to its ‘exercise of control’ of NPBL, including its control of NPBL’s operations at the Terminal.”²³⁸ Second, DOJ expressed concerns arising out of the STB proceeding to set the NPBL trackage rights compensation for NPBL movements over NS trackage.²³⁹ DOJ posits that, should the STB grant its consent for NS to continue in its *de facto* financial control of NPBL, NPBL and NS, rather than being “adversaries” (DOJ’s characterization) in that STB proceeding (now held in abeyance), NS will use the STB’s grant of its consent to have the proceeding dismissed, and NS and NPBL will then set the fee on their own.²⁴⁰

It is important to note at the outset that DOJ did not request that the transaction be denied. It did not comment on any of the specific anticompetitive allegations made by CSXT. It did not comment on any of the conditions put forth by CSXT. Instead, it requested that “the Board should carefully consider the current competitive dynamic” and “assure itself that granting the application will not limit rail competition to and from the Port of Virginia.”²⁴¹ It then sets out the above two concerns as issues that the Board should examine and carefully consider. DOJ’s concerns are addressed by the commitments NS has made in this proceeding. The Board need not, and should not, deny the transaction or condition the transaction beyond those already offered by NS in order to resolve DOJ’s concerns.

²³⁸ *Id.* at 4.

²³⁹ *Id.* at 5. The NS request for the Board to set the proper trackage rights compensation pursuant to the SSW Compensation formula is pending before the Board in Norfolk S. Ry. Co. – Petition to Set Trackage Rights Compensation – Norfolk & Portsmouth Belt Line R.R. Co., FD 36223, currently held in abeyance. NS has repeatedly requested the proceeding to move forward so that the parties could know the trackage rights fee, which is an essential component of the NPBL’s costs that go into the switch rate. CSXT has consistently objected to that proceeding moving forward. NS requests once again to have that proceeding removed from abeyance.

²⁴⁰ DOJ Comments at 5. NS’s commitments in this proceeding alleviates this concern.

²⁴¹ *Id.* at 2-3.

It is true that a Board grant of authority to NS to control NPBL will grant antitrust immunity. But that immunity is not limitless. The immunity grant only applies “as necessary” for NS to “carry out the transaction, hold, maintain, and operate” the property.²⁴² Courts have emphasized that antitrust exemptions, whether express or implied, must be narrowly construed.²⁴³ Immunity applies only to activities explicitly approved by the regulatory agency and does not extend to conduct outside the agency's jurisdiction or unrelated to the regulated industry.²⁴⁴

For those future actions exempt from application of the antitrust laws, an aggrieved party is not without remedies for injuries inflicted in violation of ICCTA. ICCTA permits any person to bring a complaint at any time for violations of the Act.²⁴⁵ Also, a person injured by a violation of the Act can seek damages in a civil action or in a proceeding before the STB.²⁴⁶ In addition to these private remedies, a carrier which willfully violates the Act may be subject to various penalties, fines, and civil damages, as well as other equitable relief, which may be sought by the Government.²⁴⁷

²⁴² 49 U.S.C. §11321(a).

²⁴³ Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 126 (1982) (“Accordingly, our precedents consistently hold that exemptions from the antitrust laws must be construed narrowly. This principle applies not only to implicit exemptions, but also to express statutory exemptions.” (internal citations omitted)).

²⁴⁴ See Norfolk & W. Ry. Co v. Am. Train Dispatchers Ass’n, 499 U.S. 117, 134 (1991) (“The immunity provision does not exempt carriers from all law, but rather from all law necessary to carry out an approved transaction.”); see also Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979) (holding that entities can be deemed to have forfeited explicit antitrust exemptions when acting with other entities not contemplated by the exemption).

²⁴⁵ 49 U.S.C. §11701.

²⁴⁶ 49 U.S.C. §11704.

²⁴⁷ *Id.* §§11702-11704; 11901-11908.

In addition to the statute, the commitments made by NS, which NS has requested be imposed as conditions to the control transaction and subject to STB oversight for the next five years, provide further protections that NS will not be able to use its control of NPBL to foreclose access to NIT by CSXT.²⁴⁸ In particular, these commitments fully address DOJ's concern that NS could use its control of NPBL to force NPBL to pay an unreasonable trackage rights fee (which fee then goes into NPBL's costs) or to charge an unreasonable switch rate.

The history of NS's conduct shows that NS has not used its control of NPBL to foreclose CSXT's ability to use NPBL. By correctly identifying NS and NPBL as adversaries in the trackage rights compensation proceeding, DOJ recognizes that NS, despite its *de facto* economic control of NPBL, did not previously impose its will on NPBL and cause NPBL to accept a specified trackage rights fee, regardless of whether one or the other party considered that trackage rights fee to be reasonable or not. Similarly, during the past 40-plus years, NS, despite its majority economic ownership of NPBL, has not done away with the uniform, cost-based approach for the NPBL switch rate, and has not changed the corporate structure to reduce CSXT's influence or to eliminate the independent Board director. NS took none of those actions and has committed not to take these actions in the future.

NS's commitments include²⁴⁹ (A) NPBL's continuing adherence to its century-old principles governing the establishment of a uniform and cost-based switch rate, (B) agreement to

²⁴⁸ As noted in these Reply Comments, even without NS's commitments, the market for the transportation of international containers is intensely competitive. The East Coast ports compete against each other for ocean carrier business. CSXT, NS, and trucks all then compete against each other for the movement of those containers to/from the East Coast ports to the Midwest. Thus, even if NS had not made its commitments and even if NS used its control of NPBL to foreclose CSXT from NIT, CSXT is not foreclosed from effectively competing for the movement of international containers to the heartland of America.

²⁴⁹ For a more fulsome discussion of commitments NS is willing make in this proceeding, see *infra* at Section XI.

have the NS/NPBL trackage rights compensation set by the Board using SSW cost-based principles, and (C) agreement to a 5-year oversight period. Should the Board condition its approval of the NS application with adherence to the NS representations set forth in this proceeding, which would be a lasting and enforceable approach to address each of DOJ's concerns. Imposition of these conditions will assure the Board that CSXT's current ability to utilize NPBL at a cost-based rate will remain and that CSXT will not be foreclosed in the future from using NPBL to serve NIT and other NPBL-served shippers.

VII. CSXT COMPLETELY IGNORES SERVICE TO THE CUSTOMERS THAT ARE CAPTIVE TO NPBL

In the application, NS described how federal, state and local governments, in addition to NS and CSXT, had found the Port of Virginia, served by NPBL, valuable and competitive enough to earn additional investments.²⁵⁰ However, one must also look to the customers who have chosen to locate there, and those customers who have found NPBL access competitive enough to reinvest and enhance their NPBL-served facilities, contrary to the anti-competitive rhetoric of CSXT. It is not appropriate for CSXT to demand access to an intermodal marine terminal "without any serious exploration by CSXT of how the remainder of NPBL's customers would be affected by the introduction of large volumes of intermodal movements[.]"²⁵¹

²⁵⁰ Dr. Miller takes issue with the argument that an investment of \$1.4 billion from federal, state, and local agencies might indicate that those agencies had faith in the competitiveness of the port. CSXT-22, VS Miller, at 541. Each of these public agencies have choices as to where to invest, and the fact that they have chosen to invest such a significant amount of money here tells the story. CSXT's Opposition endorses this: {{ [REDACTED]

}} CSXT-22, VS Kenney, at 461.

²⁵¹ VS Brennan, at 10.

Industries served by NPBL have demonstrated their faith in the competitive rail service provided by that terminal carrier. For example, Perdue AgriBusiness recently celebrated 25 years of operations at its Chesapeake, Virginia facility.²⁵² NPBL's rail service to the facility, combined with Perdue's access to barge and truck, enables NPBL to move corn, soybean oil, soybean meal and soy hull pellets to international destinations. Perdue has invested significantly in its NPBL-served facility, an investing strategy that included \$59.1 million in 2022.²⁵³

Perdue is not the only industry served by NPBL to invest in its Port of Virginia facilities. Titan America LLC, or Titan-Roanoke Cement, NPBL's second largest shipper,²⁵⁴ announced in 2022 a \$37 million investment in its NPBL-served facility to expand not only to its processing plant, but also to both its truck and rail capacities at the location.²⁵⁵ Titan America cited "the expanded logistics capacity at our import terminal and our rail network" as important to the investment.²⁵⁶ Titan America has several locations that it could have devoted its financial resources to for expansion purposes. It chose to devote significant amount to the facility served

²⁵² "Perdue AgriBusiness Marks 25 Years of Innovation, Partnership & Growth at Chesapeake, VA Facility," Perdue AgriBusiness press release, dated August 26, 2025, <https://corporate.perduefarms.com/news/press-releases/perdue-agribusiness-marks-25-years-of-innovation-partnership-growth-at-chesapeake-va-facility/>, accessed on October 13, 2025.

²⁵³ "Governor Glenn Youngkin Announces Perdue AgriBusiness to Invest \$59.1 Million to Expand in the City of Chesapeake," Chesapeake Economic Development press release, dated March 24, 2022, <https://chesapeakeva.biz/perdue-agribusiness/>, accessed on October 13, 2025.

²⁵⁴ Rebuttal VS Fapp, at 20.

²⁵⁵ "Titan America Announces Significant Investment in Norfolk Import Terminal to Meet Burgeoning Demand," Titan America LLC press release, issued April 6, 2022, <https://ir.titanamerica.com/press-releases/detail/16/titan-america-announces-significant-investment-in-norfolk-import-terminal-to-meet-burgeoning-demand>, accessed on October 13, 2025.

²⁵⁶ *Id.*

by the NPBL that gives it access not only to the Port of Virginia resources but also neutral access to two Class I railroads serving the eastern United States.

NPBL has been successful in providing balanced, competitive service to customers on its lines on behalf of its two owners. NS has not used its control of NPBL to interfere with this success. This proceeding should not be about CSXT using a regulatory proceeding to wrestle a commercial advantage for itself. The Board is charged with protecting competition for customers, not to protect and advance the interests of rail competitors.²⁵⁷

CSXT ignores the potential impact of its numerous requested conditions on these customers. This is not new for CSXT. They have previously used the STB's regulatory process in a manner that frustrated service to the existing customers of a shortline.²⁵⁸ CSXT has provided no analysis to the Board to demonstrate that the condition sought by CSXT will not adversely affect NPBL's customers²⁵⁹ or its other interchange partners, the Chesapeake & Albermarle Railroad and the Buckingham Branch Railroad Company.

²⁵⁷ Canadian P. Ry. Ltd., et al. – Control – Kansas City Southern, et al., Decision No. 35, FD 36500, slip op. at 19 (STB served March 15, 2023) (“the Board recognizes the distinction between harm caused by a transaction and disadvantages that other railroads, shippers, or communities may have already been experiencing. The Board’s concern is the preservation of competition, not the survival of particular carriers.”) (citing Canadian Nat’l Ry. – Control – Ill. Cent. Corp., 4 S.T.B. 122 (1999) at 140).

²⁵⁸ *Id.* See Grand Elk R.R. – Acquisition of Incidental Trackage Rights Exemption – Norfolk S. Ry. Co., FD 35187 (Sub-No. 1), slip op. at 5 (STB served Nov. 2017) (“Grand Elk Assigned Trackage Rights”) (in response to the 2015-16 CSXT moved to take advantage of a regulatory oversight, customers in the area had been forced to shift much of their rail traffic to truck, with other customers reporting that the CSXT regulatory game had caused their transportation costs to “skyrocket” and forced shippers to “face an uncertain future regarding rail service to their facilities.”).

²⁵⁹ This failure, in the context of CSXT’s request for terminal trackage rights, is discussed at length in NS’s Reply to CSXT’s Responsive Application NS-4.

VIII. THE DISCONTINUANCE OF THE SO-CALLED CONNECTING TRACK WAS IN THE BEST INTERESTS OF THE NPBL AT THE TIME AND WAS NOT IN FURTHERANCE OF SOME CONSPIRACY THAT TOOK CSXT TEN YEARS TO ASSERT

NPBL obtained Board authority to discontinue rail service and trackage rights over the so-called Connecting Line in 2008. CSXT was aware of the proceeding and supported it. But CSXT has now changed its mind and wants STB to grant them a “do-over” (sadly consistent with CSXT’s “do-over” request for this entire proceeding. Although CSXT tries to attach a nefarious intent to the discontinuance to align with CSXT’s lawsuit a decade later, the facts establish there were valid business reasons for undertaking the discontinuance. The NPBL board specifically found that the discontinuance was “in the best interest of the Norfolk and Portsmouth Belt Line Railroad Company.”²⁶⁰

The infrastructure, including the so-called “Connecting Line,” a double diamond, and a switch, had not handled local traffic for over 2 years and all overhead traffic could easily be rerouted over other lines. The discontinuance made sense because, at the time, NS, CSXT and NPBL were looking for ways to cut costs, and the discontinuance permitted savings from maintenance and inspection costs and permitted NPBL to repurpose the infrastructure elsewhere.²⁶¹

²⁶⁰ See Resolution of Board of Directors, Discontinuance of Trackage Rights, dated December 19, 2007, submitted as an attachment to the Notice of Exemption, April 24, 2008, Norfolk S. Ry. Co. – Discontinuance of Service Exemption – in Chesapeake, VA, AB 290 (Sub-No. 299X); Norfolk & Portsmouth Belt Line R.R. Co. – Discontinuance of Trackage Rights Exemption – in Chesapeake, VA, AB 1024X (stating that the NPBL Board of Directors resolution to discontinue the affected trackage rights found that the discontinuance was “in the best interest of the Norfolk and Portsmouth Belt Line Company”).

²⁶¹ CSXT is also incorrect in asserting that this infrastructure was “abandoned” without proper abandonment authority. The Connecting Line was not salvaged and is still in place. The double diamonds and switch at Carolina Junction were removed, and the Sewell Branch line straightened, because each of these items required consistent inspection and maintenance and there was no need to keep them in place when service over the Connecting Line was

Moreover, the Connecting Track facilities that were removed (which were only the double diamonds and the connection at Carolina Junction and not the intervening track)²⁶² are not even conducive to the movement of long double-stacked intermodal trains. Maryclare Kenney discusses the fact that a 10,000-foot CSXT export intermodal train would have to pull into NS's Portlock Yard to be disassembled so that CSXT could perform a run-around move for the trip to NIT.²⁶³ That move is only necessary if CSXT were not able to use the CSXT-described {{ [REDACTED] }}²⁶⁴ {{ [REDACTED] }} curve at Portlock Junction²⁶⁵ to make a progressive move.²⁶⁶ And if CSXT desired to use a restored route over the Connecting Track and restored double diamond, the curvature of the connection at Carolina Junction would be even tighter 12-degree curve.²⁶⁷ CSXT clearly is more interested in crying conspiracy than taking the time to analyze the feasibility of moving a 10,000-foot double stacked intermodal train through a 12-degree curve.²⁶⁸

discontinued. NS did not need "abandonment" authority to remove a connection to a line that was no longer going to be used. Additionally, the cost of inspection and maintenance for the double diamonds, the switch, and the intervening Connection Track (even though that remains in place) are no longer part of the underlying costs that would go into the base costs for the trackage rights compensation determination for NPBL's trackage rights over NS.

²⁶² See, e.g., CSX STB 0026461 through 0026468 (depicting the {{ [REDACTED] }}).

²⁶³ CSXT-22, VS Kenney, at 420.

²⁶⁴ See, e.g., CSX_STB_0026461-CSX_STB_0026462.

²⁶⁵ CSX_STB_0000233.

²⁶⁶ CSX-22, at 36. CSXT, in fact, characterizes the 15-degree curve as "marginal for double stacks." CSX_STB_0000233.

²⁶⁷ See CSX_STB_0000233; CSX_STB_0026463.

²⁶⁸ In any event, CSXT fails to analyze operations over either the 15-degree curve or the connection it seeks to be reinstalled at Carolina Junction. If the connection were to be reinstalled at Carolina Junction, it would be solely for the purpose of serving the CSXT intermodal train, and all of the infrastructure (the double diamonds, the intervening track, and the connection at Carolina Junction) would have to be reinstalled at CSXT's expense. Further, it would have to be

IX. THE TRACKAGE RIGHTS COMPENSATION PROCEEDING IS NOT PART OF AN ANTICOMPETITIVE SCHEME – IT IS A TIME TESTED REGULATORY PROCESS TO RESOLVE A CONTROVERSY THAT THE PARTIES CANNOT OTHERWISE RESOLVE ON THEIR OWN

CSXT claims that the request by NS and NPBL for the STB to determine the proper compensation rate is somehow “part of the anticompetitive scheme NS has perpetuated to manipulate and conspire with NPBL to exclude CSXT from on-dock rail access at NIT.”²⁶⁹ The DOJ and the federal district court appear to disagree. In its comments, DOJ specifically states that, as to the state of affairs before the STB’s decision in this control proceeding, “[c]urrently, Norfolk Southern and NPBL are adversaries in that separate proceeding.”²⁷⁰ In its decision, the federal district court noted the STB’s continuing jurisdiction over the appropriate trackage rights compensation.²⁷¹ Rather than exercising control over NPBL to exact a competitive advantage from CSXT, NS has commenced a proceeding before the Board to ensure the establishment of a trackage rights fee that is fair for both NS and NPBL.

DOJ expresses the concern that should the STB grant the requested control, NS and NPBL will withdraw its request for the STB to set that trackage rights fee and separately set it in installed in a manner so as to permit anticipated operations. CSXT has not determined what curvature would be required to move the proposed 10,000-foot double stack intermodal trains at Carolina Junction, or whether this curve, which lies in part under highway overpasses and in part next to residential and private property, could even be reinstalled in a compliant and operationally efficient manner.

²⁶⁹ CSXT-22, at 56, 90 (“Through its fee request, NS intends to convince the Board to use its *SSW Compensation* methodology to increase the cost the NPBL must pay to use NS’s tracks that lead to NIT”). CSXT shows little faith in the STB process, for its argument is essentially that NS will be able to fool the Board into imposing a trackage rights fee greater than what it is entitled to under the *SSW Compensation* methodology. In any event, the trackage rights fee that is determined through the *SSW* methodology may reflect an increase over what has been frozen in place for nearly a decade, but that does not make it unfair or unreasonable.

²⁷⁰ US DOJ comments, submitted on August 27, 2025, at 5.

²⁷¹ CSX Trans., Inc. v. Norfolk S. Ry. Co., et al., Civ. No. 2:18cv530, Opinion and Order filed September 9, 2019, at 24.

a collusive manner, but NS has already committed in this proceeding not to do so. In fact, it is CSXT, not NS, which has sought to obstruct STB from setting the trackage rights fee. CSXT appears to argue that the Board cannot or should not establish a fair and reasonable trackage rights fee, because such a fair and reasonable trackage rights fee may then cause the objectively-calculated, cost-based NPBL switch rate to increase, to CSXT's detriment. So, incredibly, it appears CSXT is objecting to fairness and objectivity, because the result will, in CSXT's view, disadvantage CSXT.

NS is entitled to an appropriate trackage rights fee from NPBL. Even Judge Davis noted that it was reasonable for NPBL to not move forward with the CSXT rate proposal until such time as the trackage rights fee is determined. The Board should move forward with setting that trackage rights fee. Once that fee is determined, it, along with all the other operating fees of the NPBL, will be used to calculate NPBL's cost-based switch charge, consistent with NPBL's 1897 governance agreement. The Board cannot force NS, a landlord, to grant trackage rights to NPBL, a tenant, at an unfair price, especially when the sole purpose would be to benefit a competitor.

X. CSXT IS DISINGENIOUS WHEN IT RAISES CONCERNS ABOUT THE IMPACT OF DRYAGE MOVEMENTS IN THE CITY OF NORFOLK

CSXT receives a private subsidy from the POV to dray its container traffic from the NIT, through the city of Norfolk, to CSXT's facilities located across the Elizabeth River. It is disingenuous for CSXT to argue that the congestion and truck traffic through the City of Norfolk is caused by NS and the NPBL switch rate when the traffic is a result of CSXT's own choice to dray traffic rather than use the NPBL switch. This is another example of the selectivity of

CSXT's analysis is its consistent discussions of truck traffic on Hampton Boulevard,²⁷² the constraints placed on drayage traffic,²⁷³ and the allegation that increased use of NPBL for switching CSXT traffic to and from NIT would reduce the adverse impact on Hampton Boulevard.²⁷⁴ It is this private subsidy that incentivizes CSXT to use trucks rather than the NPBL switch, which in turn results in increased trucks traveling through Hampton Roads. Given that the drayage rate (without the subsidy) and the NPBL rate are nearly the same, this truck congestion could be reduced significantly if POV simply stopped paying the subsidy or subsidized the NPBL switch rate instead. Very simply, the blame lies at the feet of CSXT and POV, not NPBL, for the numerous concerns about truck congestion.²⁷⁵

CSXT, when it discusses the conversion of drayage to direct on-dock CSXT terminal trackage rights, which proposed solution will cause of myriad of operating problems, fails to acknowledge that those rail movements also will adversely impact Hampton Boulevard traffic. Rail movements within the NIT terminal are handled by VIT. VIT trains moving across Hampton Boulevard move across Hampton Boulevard three to four times per day, blocking Hampton Boulevard for up to 15 minutes at a time.²⁷⁶ Even though CSXT notes that trucks are not allowed on Hampton Boulevard during certain times,²⁷⁷ CSXT fails to mention that the VIT

²⁷² See, e.g., CSXT-22 at 72-74.

²⁷³ See, e.g., *id.* at 73-74

²⁷⁴ See, e.g., *id.* at 72-74.

²⁷⁵ In any event, there are alternative drayage routes available.

²⁷⁶ Hampton Blvd Corridor Study, Hampton Roads Transportation Planning Organization, April 2021, at 70-71, 74. NS trains generally do not block Hampton Boulevard. *Id.* at 74.

²⁷⁷ CSXT-22, at 74.

switching moves at NIT are similarly restricted during certain times each day.²⁷⁸ CSXT's omission, when combined with its request for dedicated operating windows, demonstrates its intent to use the regulatory process only to advance its own commercial interests, not to promote the public interest.

XI. CSXT SEEKS CONDITIONS AND "REMEDIES" FAR IN EXCESS OF WHAT SHOULD BE PERMITTED

NS is confident that the STB, if it does decide to condition its authorization for NS to control NPBL, will do so within the confines of the current state of the law. CSXT does not appear to be concerned with such legal limitations. In fact, one of CSXT's primary experts attempts to explain that the Board has the right to condition its approval "to improve the position of a carrier" by "providing CSXT the unfettered on-dock rail access to NIT" over NS's lines and notwithstanding the adverse consequential effects on shippers that rely on NPBL for their rail services.²⁷⁹ But, as previously noted, the Board conditioning power is to preserve competition not to expand it.

NS has already agreed to use its Board-sanctioned control to continue NPBL's adherence to NPBL's century old governance principles to be an impartial terminal railroad operated on a uniform, cost-plus basis. NS agrees that in filling a future vacancy for a sixth director, it is committed to search for an individual that would be considered independent, that is an individual that has not been previously employed by either NS or CSXT in the past ten years. And NS accepts a typical 5-year STB oversight period. Finally, NS agrees that the NS/NPBL trackage rights compensation (a fee that is by definition a part of the NPBL cost of the provision of the

²⁷⁸ Hampton Blvd Corridor Study, Hampton Roads Transportation Planning Organization, April 2021, at 74 (restricting movements during peak traffic hours in certain defined windows).

²⁷⁹ CSXT-22, VS Carey, at 580 and n. 11.

switch) should be set by the Board using SSW cost-based principles. NS also would agree that, should NPBL desire to raise the switch rate during any prescribed oversight period above that cost-based amount, the Board could require that NPBL submit written justification to do so. These commitments target CSXT's primary concerns without giving CSXT the ability to abuse the regulatory process with broad-based conditions promoting CSXT's profit-driven self-interests, not the public interest.

The numerous other conditions and "remedies" that CSXT seek, whether those are imposed on an STB approval or denial of the requested application, are unnecessary, improper, and in some cases likely to result in harm to competition.²⁸⁰

A. CSXT's Divestiture Proposal Is Ambiguous and Ill-Conceived.

CSXT demands that the STB deny NS's control application and order NS to divest sufficient interests so it no longer has the ability to control NPBL or veto reasonable proposals and to work with CSXT to establish a new independent NPBL management.²⁸¹ The Board should reject CSXT's claim for divestiture on the following grounds: the request (1) is not grounded in applicable law, (2) is too ambiguous and not narrowly-tailored, (3) could cause competitive harms, and (4) should have been presented in a responsive application. Each of these points is discussed below.

²⁸⁰ CSXT argues that if the STB denies the NS application for control of NPBL, then the STB should take up other, supposedly related proceedings for consideration. CSXT-22 at 120-23. Those proceedings include a complaint filed by CSXT on May 20, 2025 (NOR 42183), a petition filed on June 9, 2025, to reject the Notice of Exemption in Docket Nos. AB 290 (Sub-No. 299X) and AB 1024X, and a terminal trackage rights application filed by CSXT also on May 20, 2025 (FD 36859). The terminal trackage rights application in FD 36859 was refiled as a responsive application in this proceeding. NS has previously submitted a petition to reject that responsive application as incomplete. NS-29 filed November 13, 2025. NS does not respond herein to the other two related proceedings because those dockets have not been consolidated herein and are currently subject to an abeyance issued by the Board by decision served September 25, 2025.

²⁸¹ CSXT-22 at 20, 120.

1. *The STB Must Be Guided By Applicable Law, Not An Outdated And Inapposite Supreme Court Case From 1912.*

CSXT's expert witness, Dr. Huneke, argues that the Board should be guided by an early 20th century Supreme Court case involving the TRRA.²⁸² Dr. Huneke argues that the Supreme Court treatment of the TRRA "should be the model for NPBL."²⁸³

In that case, the Terminal Railroad Association of St. Louis ("TRRA") was formed and advanced with the *explicit purpose* of creating a railroad bottleneck to extract monopoly payments from connecting railroads.²⁸⁴ That is certainly not the case here. In addition, the TRRA case involved the movement of coal, not intermodal containers; intermodal containers are so conducive to truck and barge and drayage competition, the ICC acted to largely exempt the movement from regulation.²⁸⁵

Most fundamentally, the STB (and that of its predecessor, the ICC) have a long history of using the principles of the Clayton Act to determine how to assess the competitive impact of a proposed control transaction.²⁸⁶ The Clayton Act was passed *after* the Supreme Court handed

²⁸² CSXT-22, VS Huneke, at 655-56 (arguing that the TRRA "should be the model for NPBL" and that NPBL should "be independent of control by any single railroad, and it should remain independent.").

²⁸³ *Id.*

²⁸⁴ U.S. v. Terminal R. Ass'n., 224 U.S. 383, 398 1912 U.S. LEXIS 2310.

²⁸⁵ See Union Pac. Corp., et al.—Control—Mo.-Kan.-Tex. R.R. Co, et al., 4 I.C.C.2d 409, 1988 ICC LEXIS 155, at *71 (May 13, 1988) (citing for confirmation of its continued understanding of the significant competitiveness in the intermodal transportation environment two particular decisions, namely Improvement of TOFC/COFC Regulation, 364 I.C.C. 731 (1981), Improvement of TOFC/COFC Regulation, 3 I.C.C. 2d 869, 872 (1987)).

²⁸⁶ See U. Pac. Corp. – Control – Mo. Pac. Corp., 366 I.C.C. 462, 503 (1982) ("UP/MP"); see also Bessemer and Lake Erie R.R. Co. – Acquisition and Operation – Certain Rail Lines of CSX Trans., Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence, and Franklin Counties, N.Y., FD 36347 slip op at 19, n. 12 (STB served February 25, 2021) (citing Burlington N. Inc. – Control & Merger – St. Louis, 360 I.C.C. 784, 931-33 (1980) (noting that "the agency has long acknowledged that pertinent to its examination are policies embodied in the antitrust laws, particularly Section 7 of the Clayton Act")). The STB's heavy reliance on the Clayton Act has

down its decision regarding the TRRA.²⁸⁷ The STB should be guided by the Clayton Act, not an inapposite Supreme Court case from over a hundred years ago.

2. *UP/MKT Is Not Applicable to NPBL.*

CSXT also points to the ICC decision on UP's application seeking control of the Missouri-Kansas-Texas Railroad Company ("MKT") as precedent for CSXT's divestiture proposal.²⁸⁸ In that case, the acquisition of MKT would have resulted in UP holding a majority interest in the Texas Terminal City Terminal Railway Company (TCT).²⁸⁹ The ICC permitted one of the owners to purchase an additional share of the TCT because, contrary to the argument of UP, nothing in the TCT governing agreements protected the owning carriers from discrimination.²⁹⁰ This is demonstrably not the case with the NPBL, as both NS and CSXT have discussed. The NPBL governing agreement does protect the owning carriers from rate discrimination – by providing a uniform, cost-based rate. It is CSXT, not NS, that desires to depart from these principles to favor one type of traffic over the others. Accordingly, UP/MKT is not applicable in this proceeding.

3. *The Divestiture Proposal Is Ambiguous, Is Not Narrowly Tailored, And Does Not Consider The Risks To The Public*

CSXT frames its divestiture request in a manner that precludes a competitive analysis.

CSXT states that:

historical roots in ICC case law. See Seaboard Coast Line R.R. Co., et al., Investigation of Control and Modification of Traffic Conditions, 360 I.C.C. 582 (Dec. 27, 1979).

²⁸⁷ Pub. L. 63-212, October 15, 1914, as amended throughout the years at 15 U.S.C. 12-27, 52-53.

²⁸⁸ CSXT-22 at 106 (citing Union Pac. Corp., et al.—Control—Mo.-Kan.-Tex. R.R. Co, et al., 4 I.C.C.2d 409, 1988 ICC LEXIS 155 (May 13, 1988)).

²⁸⁹ Union Pac. Corp., et al.—Control—Mo.-Kan.-Tex. R.R. Co, et al., 4 I.C.C.2d at 146.

²⁹⁰ *Id.* at 146-47.

With dismissal or denial of the application, the Board should order NS to: (1) divest a sufficient stock interest in NPBL and divest sufficient voting rights in NPBL so that NS no longer has the ability to control the decisions of NPBL, either directly or indirectly, or the ability to veto any reasonable proposal to NPBL that would benefit NS's co-owners of NPBL; and (2) work jointly with CSXT to establish new and independent NPBL management.²⁹¹

In determining whether to impose a condition, the Board must be able to determine whether the condition is narrowly tailored to address adverse effects of the proposed transaction.²⁹² Divestiture is an extreme remedy that can negatively impact competition and sound railroad operations.²⁹³ Accordingly, divestiture should only be considered when there are not more narrowly-tailored options available, which is not the case here.²⁹⁴ In addition, the divestiture described by CSXT is drafted in an ambiguous, open-ended fashion, unaccompanied by any analysis of the potential impacts to the public. Under these circumstances, a divestiture is not appropriate.

For example, CSXT refers to “independent NPBL management,” and argues that the NPBL board should be restructured in line with CSXT’s November 26, 2024 letter from CSXT’s

²⁹¹ CSXT-22 at 120.

²⁹² Canadian P. Ry. Ltd., et al. – Control – Kansas City S., et al., FD 36500, Decision No. 13, slip op. at 21 (STB served February 18, 2022); Union P. Corp., et al. – Control and Merger – Southern P. R. Corp., et al., FD 32760, Decision No. 103, slip op. at 6, 2008 STB LEXIS 233 at *13 (STB served May 1, 2008).

²⁹³ See, e.g., Canadian National Ry. Co., et al. – Control – Kansas City Southern, et al., FD 36514, Decision No. 5, slip op. at 30 (STB served August 31, 2021) (“The Board shares these concerns, and finds that the greater likelihood of divestiture in transactions subject to the new regulations is a consideration that bears on the public interest assessment under 49 C.F.R. § 1180.4(b)(4)(iv). Those public interest considerations include risks associated with the potential for divestiture to jeopardize effective competition or otherwise impede the development and continuation of a sound rail transportation system, which the Board is charged with safeguarding under 49 U.S.C. § 11324 and the RTP.”).

²⁹⁴ See generally, *id.* at 30-32.

Vice President and General Counsel to NPBL and NS.²⁹⁵ In that letter, “CSXT demands that the NPBL Board and NS (in its role as an NPBL Shareholder) take all necessary actions to provide CSXT and NS equal representation on the NPBL board of directors, and to authorize the Virginia Port Authority (‘VPA’) to designate a director.”²⁹⁶

VPA, however, is not a disinterested party.²⁹⁷ As a state entity, VPA’s allegiance is to the taxpayers of Virginia.²⁹⁸ VPA not only owns, but operates, each of the terminals at the Port of Virginia in the Norfolk harbor, coordinates activity to each of the terminals (including determining which ships are directed to which POV terminals), maintains its own fleet of motor

²⁹⁵ CSXT-22 at 68 (“CSXT believes that the ‘appropriate steps to address’ NS’s unlawful control of NPBL include the governance proposal” set forth in CSXT-22, VS Miller, Attachment B, at 431 through 434, letter from Michael Burns, Vice President, General Counsel, CSX Transportation, Inc., to the NPBL board of directors (Nov. 26, 2024) (proposing a reconstruction of the NPBL board of directors to 5 members, 2 of which were to be appointed by CSXT, 2 of which were to be appointed by NS, and one appointed by VPA). *See also*, CSXT-22, at 191-95 Letter from Steven Armbrust, CSX Transportation, Inc., to Members of the NPBL Board and Norfolk Southern Railway (April 7, 2020).

²⁹⁶ CSXT-22, VS Miller, Attachment B, at 431 (emphasis added).

²⁹⁷ To give but one example, in 2020, {{ [REDACTED] }}
 {{ [REDACTED] }} CSX STB 0041407 - 09. {{ [REDACTED] }}
 {{ [REDACTED] }}

demonstrates that VPA/VIT is not a disinterested party as to traffic moving through the Port of Virginia.

²⁹⁸ *See, e.g.*, Comments submitted by VPA on March 5, 2025 (“VPA Comments”) at 1 (VPA was established by the Commonwealth of Virginia to coordinate and promote port activities at the Port of Virginia); *Id.* at 4.

carrier chassis,²⁹⁹ and performs (through VIT) the rail operations on site at NIT.³⁰⁰ Placing a VPA representative on the board of directors of NPBL would enable VPA to effectively convert the NPBL into an asset of VPA for the economic benefit of the Port of Virginia. This means VPA's focus will be on VPA's customers – the ocean carriers – and not the rail customers of NPBL who are captive to NPBL's service. As VPA notes in its comments, it “seeks to organize its operation to optimize efficiency for its customers[,]” which it specifically identifies as the ocean carriers.³⁰¹ VPA's comments to the STB make no mention of any of NPBL's rail shipping customers. The inclusion of a VPA representative on the NPBL board would unfairly elevate POV's interest above the interests of NPBL's rail shipping customers. The CSXT proposal would effectively install a completely new governance framework for the NPBL, converting it from its century-old status as a neutral terminal railroad into a tool for VPA to have input into a carrier that it has no ownership interests in and to maximize a focus on international containers without consideration of the impacts on other NPBL customers.³⁰²

²⁹⁹ The Port of Virginia owns and operates its own pool of 17,500 road-ready chassis, available to motor carriers through the Hampton Roads Chassis Pool II, a wholly-owned subsidiary of VPA, dba Port of Virginia. <https://operations.portofvirginia.com/hampton-roads-chassis-pool-hrcp-ii/>, accessed on October 8, 2025.

³⁰⁰ VIT performs the on-dock terminal rail operations that place at NIT and pulls and sets blocks of cars delivered to the terminal. See, Hampton Blvd Corridor Study, Hampton Roads Transportation Planning Organization, April 2021, at 74.

³⁰¹ VPA Comments at 4.

³⁰² The proposal to have equal NS and CSXT board seats ignores the NS's contributions to the improvements in NPBL management and infrastructure. In addition to the other significant issues discussed, giving CSXT an equal share without CSXT having to pay replacement value for the additional ownership (by allocating a board seat to VPA) would provide a windfall to CSXT and result in an unconstitutional taking of NS's property. If CSXT is concerned about parity of business decisions at the NBPL, it is free to make an offer to NS to purchase 7% of NS's shares in NPBL so as to ensure equitable ownership and control, it has never done so.

If the CSXT proposal is to convert NPBL from a neutral terminal railroad that offers uniform, cost-based switching services into a short line that focuses on maximizing profit, that is a fundamental and concerning shift for NPBL. Certainly, that seems to be the intent of Dr. Huneke who wants to restructure NPBL into an “independent” railroad with a profit motive.³⁰³ It is highly likely that none of the NPBL captive customers would be able to, even in the aggregate, contribute more to NPBL’s bottom line than the intermodal traffic coming to and from NIT. In addition, NPBL would truly then be converted from a neutral switching carrier into a carrier with several captive shippers, made captive due to the actions of the STB. There is little doubt that, if NPBL’s focus was converted to profit maximization, the divestiture would have a significant potential to create harm to competition. CSXT’s proposal could result in effectively substituting a captive monopoly service for the current neutral access now provided to actual customers of NPBL.

4. CSXT’s Divestiture Proposal Should Have Been Presented As A Responsive Application.

CSXT’s request to require divestiture should have been presented as a responsive application, supported by the types of data expected in such an application.³⁰⁴ The NPBL was explicitly created not as a bottleneck carrier to create a monopoly, but as a terminal railroad to

³⁰³ See CSXT-22, VS Huneke, at 663.

³⁰⁴ See, Canadian National Ry. Co., et al. – Control – Illinois Central Corp., et al., FD 33556, Decision No. 7, slip op. at 4 (STB served September 18, 1998) (accepting as a responsive application the request of CP to have CN divest CN’s 50% interest in the Detroit River Tunnel Company to CP and requiring the submission of sufficient evidence to support the divestiture, including “that the conditions will be operationally feasible.” The case further notes that the requests for divestiture of a 50% share of the owner of the Detroit River Tunnel Company should be presented to the Board as a minor transaction, and that the proposed responsive application should include information, “including operational data and a public interest justification in support of the application,” but noting that additional information would be required to identify the impacts of the requested divestiture proposal.).

create an avenue of access to serve the customers on the NPBL route, and to do so under a uniform rate.³⁰⁵

Divestiture would change the very nature of the NPBL, and the valuable service that it provides by connecting customers captive to its railroad to the rest of the U.S. rail network. CSXT cannot seek such a broad and extreme condition as divestiture and then provide no analysis as to the competitive impacts such a demand could have on these captive customers. A responsive application would have required CSXT to flesh out its request for divestiture so that the STB would be in a position to perform the appropriate evaluation of such a request.

For all the foregoing reasons, CSXTs request for divestiture must be denied.

B. CSXT Seeks An Order From The STB That It Can Take Advantage Of In Any Oversight Proceeding.

CSXT asks the Board to “order NS to provide operational assent to NPBL switching movements to NIT[,]” without providing any guidance as to what this means.³⁰⁶ As written, CSXT’s request is subject to several interpretations, which likely was CSXT’s goal, thereby affording it the opportunity to argue that any future dispute must bow to this condition and placing the Board in the role of determining issues of operational efficiencies. This certainly

³⁰⁵ 1897 NPBL Agreement at paragraph ninth.

³⁰⁶ CSXT-22 at 129. *See also*, CSXT-22, VS Kenney at 413 (“I believe that, unless NS is ordered to provide operational assent to NPBL or CSXT movements to NIT, NS’s continued control of NPBL will result in further interference with those movements.”). This condition is not addressed anywhere else in the CSXT Opposition. A search on Lexis failed to reveal any case law or STB decisions that includes the term. Early on in the document, CSXT asks the Board to “order NS to ensure that an NS-controlled NPBL will provide meaningful and effective access to its owners, consistent with NPBL’s founding purpose as a terminal railroad.” CSXT-22 at 21, exhibiting another equally ambiguous term.

would not be in line with the STB's rail transportation policy of promoting expeditious handling of regulatory decisions.³⁰⁷

For example, the ambiguous request crafted by CSXT could be interpreted as seeking NPBL "on demand" access to NS's rail line whenever the NPBL access is sought to move CSXT traffic to or from NIT.³⁰⁸ Or, the request could be a request for NS to provide NPBL priority over all other traffic when the NPBL train is handling even just one CSXT loaded car to or from, NIT. Or maybe the request is meant to provide CSXT with a tool, enabling NPBL's movement of CSXT traffic to and from NIT to interfere with NS traffic being moved into and out of NIT. Putting such a tool in CSXT's hands also would permit CSXT to potentially interfere with NPBL switch traffic to and from the shippers it serves, regardless of whether those shippers are receiving service on behalf of CSXT or NS.

The Board must not impose a condition that is not narrowly tailored to address adverse effects of the proposed transaction.³⁰⁹ The imposition of such a vague condition, capable of multiple open-ended interpretations, could be wielded as a weapon by CSXT against NS and NPBL, and their respective customers. CSXT has failed to demonstrate that its broad and ambiguous requested condition is narrowly tailored to address a competitive harm and that the

³⁰⁷ See, e.g., Canadian National Ry. Co., et al. – Control – Kansas City Southern, et al., FD 36514, Decision No. 5, slip op. at 33 (STB served August 31, 2021) (declining to approve a voting trust that creates a material risk of greater regulatory intervention without a showing of demonstrated public benefits because doing so would be inconsistent with the STB's governing rail transportation policy's promotion of expeditious handling of regulatory decisions.).

³⁰⁸ As such, CSXT again displays the fact that it is elevating its own profits and access to an intermodal terminal facility over the interests of shippers to be served by the NPBL terminal railroad.

³⁰⁹ Canadian P. Ry. Ltd., et al. – Control – Kansas City S., et al., FD 36500, Decision No. 13, slip op. at 21 (STB served February 18, 2022); Union P. Corp., et al. – Control and Merger – Southern P. R. Corp., et al., FD 32760, Decision No. 103, slip op. at 6, 2008 STB LEXIS 233 at *13 (STB served May 1, 2008).

associated public benefit of this condition would outweigh the anticipated public detriment.

Accordingly, this condition must be denied.

C. CSXT Seeks NS To Restore Service Over Discontinued Lines.

In the event that the Board approves the NS Control Application, CSXT asks the Board to “condition[] its approval of NS’s control application on requiring NS to grant NPBL new trackage rights consistent with those discontinued in 2008, or otherwise revoking the 2008 discontinuance of NPBL trackage rights exemption”³¹⁰ and to restore track assets comprising the so-called “Connecting Line.”³¹¹ CSXT apparently is substituting its own determination as to what is in the “best interest” of the NPBL notwithstanding the fact that the NPBL board of directors (consisting of directors appointed by NS and CSXT, as well as the NPBL president) determined that the discontinuance of those trackage rights were in the “best interest” of the NPBL.³¹² Further, as is demonstrated *supra*, there is no evidence submitted that restoration of the extremely-tight connection at Carolina Junction and CSXT’s operations over it could even accommodate the 10,000-foot intermodal trains that CSXT claims it intends to operate without operational complexities, and no evidence submitted that a connection could be installed at Carolina Junction that would be more appropriate to the trains CSXT seeks to operate. And in

³¹⁰ CSXT-22 at 128-29.

³¹¹ CSXT-22 at 21, 124, 128. (citing the Verified Statement of Ms. Kenney at 11 to support the claim that NPBL discontinued its trackage rights over the Connecting Line “as part of its anticompetitive scheme with NS”). But Ms. Kenney simply makes that allegation, drawing a conclusion as to motive with no supporting evidence. CSXT-22 at 419-20.

³¹² See NSR’s and NPBL’s Verified Notice of Exemption, submitted April 25, 2008, in Norfolk S. Ry Co. – Discontinuance of Service, AB-290 (Sub-No. 299X) and Norfolk and Portsmouth Belt Line Railroad Company – Discontinuance of Trackage Rights – Chesapeake, Virginia, AB-1024X at 17 (NPBL board of directors resolution concerning the proposed discontinuance). See also, {{ [REDACTED]

}}.

any event there is no need to make these infrastructure improvements because NPBL can provide a switch to CSXT and operate over the existing complex to move CSXT's intermodal trains without the complexities inherent in restoring the Connecting Track, the double diamond and the connection at Carolina Junction.

As discussed, restoring service over the lines discontinued in 2008 would necessarily require restoration of the associated track facilities, and improvement of those track facilities to today's standards. CSXT does not account for the costs associated with its demands to reinstall and rehabilitate the Connecting Track, the connection, or the double diamond. That work would be done for the sole purpose of accommodating NPBL's operations and for the sole benefit of CSXT. CSXT does not say what entity (NS, CSXT or NPBL) should pay for those costs. CSXT's analysis also fails to state whether the costs for the reinstallation of the track, which would be done for the sole purpose of moving CSXT traffic to and from NIT, should be counted as a surcharge to its switching fee, or whether that cost incurred solely for the benefit of CSXT's access to the NIT intermodal facility should be shared with the NPBL customers.³¹³

CSXT's conspicuous failure to state both whether it is willing to pay for the reinstallation and rehabilitation of the Connecting Track, the connection at Carolina Junction, and the double diamond, as well as whether it is willing to pay the full costs going forward to maintain and inspect those facilities – facilities which will be installed solely for CSXT's purposes – leaves unanswered whether CSXT is asking the Board to make a decision that would impose a cost on

³¹³ If the NPBL is not to assess a differentiated rate in this particular instance and instead continued to assess a uniform rate for all traffic being switched (and it should continue to assess that uniform rate, consistent with its governing documents), then NPBL's captive customers will share in the cost of the reinstallation of these track facilities.

NS and NPBL (and their respective customers) to subsidize CSXT's operations to and from the NIT intermodal terminal.

D. CSXT Seeks To Remove NS From Important NPBL Decisions.

CSXT asks the Board to “order NS to effectively remove itself from any NPBL decisions related to CSXT’s access to NIT, and to require NS to work with CSXT to refer any such decisions to an independent decision-maker,” including, specifically, any “relating to NPBL’s trackage rights fee for moving traffic over NS’s track to NIT.”³¹⁴ NS has already tried to seek the input of an independent decision-maker – specifically the STB – on precisely that question (the NPBL trackage rights fee for moving traffic over NS’s track to NIT and elsewhere), and CSXT has repeatedly fought that effort.³¹⁵

CSXT’s invocation of a similar provision in the CSXT/Pan Am Southern proceeding is inapposite.³¹⁶ In that case, CSXT had its own route into the Boston area (a market that is quite a bit larger than a single intermodal terminal facility in a port) and was seeking to purchase a half interest in Pan Am Southern, a competitor in that market.³¹⁷ Pan Am Southern was half owned by NS, and was NS’s only access into the Boston area, where it competed for traffic with CSXT. CSXT agreed “to recuse itself from any PAS board discussion or consideration of strategic issues

³¹⁴ CSXT-22 at 129.

³¹⁵ CSXT’s Motion to Dismiss or To Continue to Hold in Abeyance, May 20, 2025, Norfolk S. Ry. Co. – Petition to Set Trackage Rights Compensation – Norfolk & Portsmouth Belt Line R.R. Co., FD 36223.

³¹⁶ CSXT-22 at 130 (citing CSX Corp. and CSX Trans., Inc. et al. – Control and Merger – Pan Am Systems, Inc., et al., FD 36472, Decision No. 9 (“CSXT/Pan Am”), slip op. at 9 (STB served April 14, 2022)).

³¹⁷ CSXT/Pan Am, slip op. at 20.

that relate to CSX's Southern route or competition between PAS and CSXT,"³¹⁸ as part of a broader, much more comprehensive settlement agreement that involved several different parties, routes and facilities.

The PAS case is not analogous to the NPBL case for several reasons. First, in that case, absent an agreement with NS, CSXT would have controlled NS's only access into Boston and would have eliminated an existing competitive option. Here, NS control of NPBL will not result in the loss of CSXT's access to NIT. CSXT will continue to have a uniform switch rate available to it. The NPBL rate will continue to be set at cost in accordance with the Operating Agreement. Second, PAS is not a terminal railroad in concept or in practice. Third, there would have been a significant number of 2-to-1 shippers from an unconditioned CSXT/PAS acquisition, whereas, as discussed *supra*, there are no 2-to-1 shippers involved in this NPBL control proposal. Fourth, in the CSXT/Pan Am Southern proceeding, NSR invested hundreds of millions of dollars into the development of hundreds of miles of track and other facilities of Pan Am Southern; CSXT has made no similar investment in NPBL. But, perhaps most importantly, that case involved a complicated, multi-faceted settlement agreement that simply does not apply to this NPBL proceeding.

E. CSXT Request For A Seven Year Oversight Period Is An Overreach.

CSXT requests oversight of the proposed transaction for a period of seven years.³¹⁹

CSXT asserts that a seven-year oversight period is "consistent with recent precedent," citing only

³¹⁸ CSXT-22 at 130 (quoting CSX Rebuttal CSXT/PAR-37-46 to -47, CSXT/PAR-37118, Oct. 18, 2021, CSX/Pan Am, FD 36472.).

³¹⁹ CSXT-22 at 14, 21, 123, 125 and 131.

CP/KCS, a major transaction.³²⁰ In the past few *decades*, only once has the STB imposed on the front end an oversight period that is more than 5 years, thus making it far from “typical” when it is even imposed at all.³²¹ The Board always has the discretion as well to extend an oversight period if necessary. For example, in CN’s acquisition of control over the EJ&E, the STB extended the originally-anticipated five-year period for additional years in part because of “substantially changed circumstances concerning recent rail congestion in Chicago, and the recent spike in the levels of reported crossing blockages on the EJ&E line.”³²²

The Board imposed a longer period for the CP/KCS control transaction for several reasons. First, that transaction was a major transaction. The proposed NPBL transaction before the Board is not. Second, full integration of the CP and the KCS rail systems was not expected to even be completed within the first three years after the Board’s approval of the transaction, and the Board wanted to cover in its oversight the implementation phase as well as four years following full implementation, including planned operational changes and capital improvements.³²³ This transaction has already been in place for over forty years, involves no operational changes, and involves no capital improvements.

³²⁰ *Id.* at 123 (citing Canadian Pac. Ry. – Control – Kan. City S., FD 36500, slip op. at 142 (STB served Mar. 15, 2023)).

³²¹ *See, e.g.,* Canadian Nat. Ry. Co. and Grand Trunk Corp. – Control – Iowa Northern Ry. Co., FD 36744, Decision No. 3, slip op. at 21 (STB served Jan. 14, 2025) (three years).

³²² Canadian National Ry. Co. and Grand Trunk Corp. – Control – EJ&E West Co., FD 35087, slip op. at 5 (STB served Dec. 17, 2014).

³²³ *Id.* at 1-2. *See also* Canadian National Railway & Grand Trunk Corp.—Control—EJ&E West Co. (Approval Decision), FD 35087 (STB served Dec. 24, 2008); Canadian Nat’l Ry. & Grand Trunk Corp.—Control—EJ&E W. Co., FD 35087 (STB served Dec. 21, 2010) (Decision No. 26).

The Board has continuing authority to enter supplemental orders and to modify decisions approving control proceedings.³²⁴ The absence of an on-going formal oversight proceeding is not a pre-requisite of any party from invoking the Board’s jurisdiction to address control-related concerns that arise out of a condition imposed on the Board’s approval.³²⁵ The Board does not have to follow the outlier just because it was the most recent decision served by the Board, and especially not when CSXT fails to provide any rational for its proposed deviation and extension of the proposed oversight period for longer than is typical. If the Board imposes any oversight period at all, it should be limited to five years, as is typical in proceedings before the Board.

CONCLUSION

The record before the Board leaves no room for ambiguity: this proceeding is not about preserving competition—it is about CSXT’s attempt to manipulate regulatory processes for its own commercial advantage. For over forty years, Norfolk Southern has maintained NPBL’s founding principles of neutrality and cost-based uniformity, principles that CSXT not only accepted but contractually endorsed. CSXT’s sudden reversal, after decades of acquiescence, is not grounded in law, fact, or policy. It is a tactical maneuver designed to secure preferential treatment at the expense of the public interest.

First, the statutory framework under 49 U.S.C. §11324(d) is clear: the Board “shall” approve the transaction unless it finds that the proposed control will result in a substantial lessening of competition, creation of a monopoly, or restraint of trade—and only if such harm outweighs the public interest in meeting significant transportation needs. CSXT has failed to meet this burden. Its arguments focus narrowly on its own competitive position rather than on the

³²⁴ CN/IC Oversight, slip op. at 3.

³²⁵ *Id.* (citing, among other decisions, Union Pacific Corp. – Control & Merger – Southern Pacific R. Corp., FD 32760 (Sub-No. 21), Decision No. 1 (STB served November 7, 2001)).

competitive options available to customers. The Board's mandate is to protect competition, not competitors. That distinction is fundamental and dispositive.

Second, the evidence demonstrates that the intermodal market at the Port of Virginia is intensely competitive. Ocean carriers have abundant choices among railroads, trucking, and barge services, as well as alternative East Coast ports. CSXT's foreclosure theory collapses under scrutiny:

- CSXT retains access to NPBL at a uniform, cost-based rate that has remained unchanged for fifteen years.
- CSXT can and does use drayage, which it admits is a "key" component of intermodal service.
- CSXT's own share of rail movements at the POV and NIT has grown significantly over the past decade, even while it claims it is foreclosed from serving NIT.
- CSXT's can and does use the Ports of Baltimore and NY/NJ as a competitive option to POV and even has a strategic vision to focus on the Port of Baltimore and the Port of NY/NJ as a means to {{ [REDACTED] }}

Third, CSXT's proposed remedies—including divestiture, operational vetoes, and trackage rights grants—are not narrowly tailored, lack evidentiary support, and would impose significant harm on NPBL's captive customers. These conditions would dismantle NPBL's century-old governance framework, convert a neutral terminal railroad into a profit-driven shortline, and jeopardize service to industries that have invested millions in NPBL-served facilities. The Board cannot allow CSXT to sacrifice the public interest for its own profit motive.

Fourth, CSXT's reliance on outdated precedent and mischaracterization of antitrust principles is misplaced. The Board is not an antitrust tribunal; its role is to apply the statutory standard governing control transactions. Federal courts have already rejected CSXT's conspiracy theories. The Board should not permit CSXT to relitigate those claims under the guise of a regulatory proceeding.

Norfolk Southern has demonstrated its commitment to NPBL's neutrality and offered enforceable conditions to preserve that commitment, including adherence to uniform cost-based rates, and a five-year oversight period. These commitments fully address any theoretical concerns while safeguarding competition and operational integrity. In sum, CSXT's nearly 700-page submission is heavy on rhetoric and light on substance. It misstates the law, misapplies economic principles, and ignores the competitive realities of the intermodal marketplace. The Board should reject CSXT's overreach, deny its requested conditions, and approve the application without modification beyond the commitments voluntarily offered by Norfolk Southern. Doing so will uphold the statutory mandate, protect the public interest, and ensure that NPBL continues its 125-year tradition of neutrality and efficient service.

The record compels one result: the Application must be granted.

Respectfully submitted,

/s/ William A. Mullins

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November 20, 2025

CERTIFICATE OF SERVICE

I certify that, on November 20, 20025, in accordance with Decision No. 12, I have caused to be served a copy of Norfolk Southern Corporation's and Norfolk Southern Railway Company's Response To Comments, Protests, Requests For Conditions, And Other upon the Secretary of the Department of Transportation, the Attorney General of the United States, and all Parties of Record.

/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**

**RESPONSE TO COMMENTS, PROTESTS,
REQUESTS FOR CONDITIONS, AND OTHER OPPOSITION**

EXHIBIT A

VERIFIED STATEMENT OF KEITH WAEHRER, PHD

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36836

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NORFOLK SOUTHERN RAILWAY COMPANY
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FINANCE DOCKET NO. 36836

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—ACQUISITION OF CONTROL— NORFOLK & PORTSMOUTH BELT LINE RAILROAD
COMPANY**

VERIFIED STATEMENT OF KEITH WAEHRER

19 November, 2025

Table of Contents

I. ASSIGNMENT.....	1
II. QUALIFICATIONS	1
III. INTRODUCTION AND SUMMARY OF CONCLUSIONS	2
IV. BACKGROUND	4
<i>IV.A. CSX and Norfolk Southern</i>	<i>4</i>
<i>IV.B. Norfolk & Portsmouth Belt Line Railroad</i>	<i>9</i>
<i>IV.C. East coast container terminals and container shipping</i>	<i>9</i>
<i>IV.D. Intermodal land transportation to and from East Coast intermodal terminals</i>	<i>16</i>
V. THE SHARES OF NS AND CSX AT NIT AND VIG ARE THE RESULT OF AN EFFICIENT ALLOCATION OF VESSEL TRAFFIC AT POV AND NOT FORECLOSURE.....	18
<i>V.A. The {{high}} share of NIT traffic for NS is the result of POV's sorting of vessel traffic between NIT and VIG</i>	<i>20</i>
<i>V.B. Given the cost differences for CSX and NS at NIT and VIG even absent the alleged foreclosure, it would be efficient for POV to continue directing vessels between NIT and VIG as it is doing now.....</i>	<i>22</i>
VI. CSX'S CLAIMS OF FORECLOSURE DUE TO NPBL'S RATES ARE WITHOUT SUPPORT AND IMPLAUSIBLE 25	
<i>VI.A. CSX container traffic between the Midwest and POV largely travels through VIG and not NIT</i>	<i>25</i>
<i>VI.B. CSX chooses to substitute draying for on-dock rail access at NIT</i>	<i>26</i>
<i>VI.C. When CSX and NS compete by offering a bundle of services to ocean carriers, it makes no sense to focus the foreclosure analysis on effects at an individual container terminal</i>	<i>27</i>
<i>VI.D. Averaged over CSX movements through POV, the cost increase that CSX claims as foreclosing at NIT is de minimis.....</i>	<i>28</i>
<i>VI.E. The margins on NS rail movements between POV and the Midwest do not indicate market power</i>	<i>31</i>

<i>VI.F. Ms. Carey’s foreclosure analysis is unreliable</i>	<i>33</i>
<i>VI.G. Despite claims to the contrary capacity expansion at NIT would free up capacity at VIG currently used for NS container movements.....</i>	<i>36</i>
VII. DEFINING THE MARKET AS THE LAND TRANSPORTATION OF INTERMODAL CONTAINERS BETWEEN NIT AND INLAND BEAs IS CLEARLY TOO NARROW	38
<i>VII.A. CSX and NS compete by offering ocean carriers a bundle of services across their rail networks rather than at individual terminals</i>	<i>39</i>
<i>VII.B. Ocean carrier substitute between EC ports</i>	<i>39</i>
<i>VII.C. Professor Miller’s analysis of competition between East Coast ports is flawed.....</i>	<i>40</i>
<i>VII.D. Claims by Professor Miller and Ms. Carey that VIG is an inadequate substitute for NIT ignores the reality at POV</i>	<i>43</i>
<i>VII.E. Professor Miller’s analysis improperly dismisses trucking as a competitive alternative.....</i>	<i>45</i>
APPENDIX A. CURRICULUM VITAE	A-1
APPENDIX B. MATERIALS RELIED UPON.....	B-1
APPENDIX C. EFFICIENT VESSEL TRAFFIC SORTING	C-1

Table of Figures

Figure 1: CSX System map.....	6
Figure 2: NS System map	8
Figure 3: Aerial view of POV terminals.....	14
Figure 4: Top 25 Ports by Loaded TEUs, 2022	15
Figure 5: Carey VS Figure 2	19
Figure 6: Contract rates for NIT and VIG to Chicago from 2024 contract between CSX and Maersk.....	20
Figure 7: NS variable cost comparison for intermodal traffic from NIT and VIG to Crewe, VA	23
Figure 8: NIT cost increase as a percentage of 2023 CSX mean revenue per container between POV and Midwest BEAs.....	29
Figure 9: Share of container traffic between POV and Midwest BEAs.....	30
Figure 10: Fapp VS Figure 1	31
Figure 11: NS R/VC for international intermodal movements of import and export linking PONYNJ and POV and the Midwest in 2023	33
Figure 12: CSX volume share of uneconomic movements at NIT and VIG in 2023.....	36
Figure 13: POV and PONYNJ shares for rail carried containers by ocean carrier rail alignment in 2024.....	40
Figure 14: Miller VS Figure 13	42
Figure 15: Miller VS Figure 14	45

I. Assignment

1. I have been asked to evaluate some of the conclusions and supporting analyses contained in the September 18, 2025 Verified Statements of Professor Miller (Miller VS) and Ms. Carey (Carey VS). In particular, I evaluate their claims that CSX's low share of rail movements between NIT (one of the container terminals at the Port of Virginia) and the Midwest indicates foreclosure by NS and implies that NS is exercising market power. I have also been asked to evaluate whether the claims of input foreclosure are reasonable.

II. Qualifications

2. For over 25 years, I have been working on antitrust and competition issues. In 1999 I joined the Economic Analysis Group in the Antitrust Division of the US Department of Justice (DOJ). My responsibilities at the DOJ included assisting with investigations of mergers and anticompetitive conduct. The economic analyses in these matters focused on product and geographic market definition and the evaluation of competitive effects arising from mergers or alleged anticompetitive conduct in monopolization matters.
3. In 2006 I joined Bates White LLC, an economic consulting firm focused on antitrust issues. In January of 2021, I joined Economists Inc., another consulting firm focused on antitrust issues. A few months after joining, Secretariat Advisors LLC bought Economists Inc.
4. In the last several years, I have worked on a number of high-profile antitrust issues. I was DOJ's expert witness on market definition and competitive effects in its litigation over the merger of ASSA ABLOY and Spectrum Brands. I also provided expert support in *State of New York et al. v. T-Mobile-Sprint*, and *United States v. AT&T-Time Warner*. Recent monopolization matters on which I provided similar support include the Federal Trade Commission's (FTC) litigation against Qualcomm and the American Express monopolization case brought by the DOJ.
5. My curriculum vitae in Appendix A reports my testimony in previous cases as well as my numerous papers and conference panel presentations covering a wide variety of antitrust topics.
6. During my career I have also held a number of university teaching positions. These include teaching graduate level courses at Johns Hopkins University and the University of Maryland and undergraduate courses at Rutgers University, Brigham Young University, and Georgetown University. The courses I have taught range from entry level economics courses where monopoly and perfectly competitive markets are covered to PhD level microeconomic theory where a wide-range of advanced models of competition are covered.

III. Introduction and summary of conclusions

7. Without concluding that the correct framework for analyzing this transaction is to compare a world where NS does not control NPBL with one in which it does, I nonetheless adopt this framework, following the analyses in Miller VS and Carey VS.
8. This matter involves a claim that the switch rate that NPBL charges to move containers to and from NIT is higher than it would be absent NS's control of NPBL. Furthermore, it is claimed that the increment in the switch rate that is attributable to an attempt at foreclosure has a material anticompetitive effect on CSX's ability to compete. I do not opine on whether the NPBL switch rate is higher than it would be without NS control. That is a subject that is covered by other Verified Statements in this submission.
9. However, despite adopting the framework favored by Professor Miller and Ms. Carey, I find that NS's acquisition of NPBL creates no risk of anticompetitive effects. Professor Miller and Ms. Carey's conclusions to the contrary are easily contradicted in many cases by the evidence presented in their own Verified Statements.
10. At a broad level, reasons for my opinion are as follows:
 - Central to the conclusions presented in the Miller VS and the Carey VS is that NS has a dominant share of the movements of international shipping containers between NIT and the US Midwest. They claim that this dominant share is evidence of the exercise of market power over these movements, and that market power is the result of the foreclosure of CSX at NIT through NS's control of NPBL.
 - However, the shares of NS and CSX at NIT and VIG are the result of an efficient allocation of vessel traffic at POV and not foreclosure.
 - Rail rates tend to be equal for rail movements through NIT and VIG. Thus, the lopsided shares for NS and CSX at NIT and VIG cannot be the result of CSX not being able to offer a competitive rate to customers.
 - The unequal shares are the result of POV sorting vessels between the two terminals in order to have most of the containers carried by CSX travel through VIG and most of the containers carried by NS travel through NIT.
 - This sorting of vessels, which generates a high share for NS and low share for CSX at NIT, is efficient. Even absent the alleged foreclosing NPBL switch rate, CSX would still face higher costs at NIT than VIG, and NS would have lower costs at NIT than at VIG. Basic constrained cost minimization in such situations implies that efficient sorting of containers between terminals implies potential lopsided shares at terminals even when cost differences are relatively small.

Thus, I would expect that NS would still have a high share at NIT and CSX would have a high share at VIG.

- CSX's claims of foreclosure due to NPBL's rates are without support and implausible.
 - As a result of POV's efficient sorting of vessels between NIT and VIG, CSX is able to mostly avoid the higher costs (legitimate or not) at NIT. In 2024, {{[REDACTED]}} of CSX carried containers at POV passed through NIT.
 - Furthermore, for the containers that do pass through NIT, CSX chooses to dray those containers rather than use on-dock rail service with NPBL. That should imply that whatever the advantages of on-dock access versus draying, CSX is better off draying containers than using NPBL for on-dock access.
 - As described by Professor Miller, CSX and NS compete by offering a bundle of rail services in the form of 3-to-5-year contracts with ocean carriers. In such a situation, both the railroad and ocean carrier will evaluate the profitability of the contract overall, meaning that a cost disadvantage over a small set of routes will make little difference to the entire offer. Thus, it makes no sense to evaluate foreclosure at a single terminal at a single port along the East Coast of the United States.
 - Averaged over CSX's movements through POV, the cost increase that CSX claims as foreclosing at NIT is de minimis. The claimed anticompetitive portion of the NPBL switch rate averaged over all the containers moving through POV implies only between a {{[REDACTED]}} per container increase in costs. These cost effects are less than {{[REDACTED]}} of CSX revenue on movements between POV and the Midwest.
 - CSX's ability to grow its share of container movements between POV and the Midwest is not consistent with the claims of significant foreclosure.
 - If NS is exercising market power at NIT, I would expect NS's margins to be higher for movements through POV than other East Coast ports. However, a comparison on NS's margins on movements between East Coast ports and the Midwest does not indicate systematically higher margins for movements through POV. In addition, {{[REDACTED]}} the ratios of revenue to variable cost for movements between POV and the Midwest are above 180%. The STB usually classifies lanes with a ratio of revenue to variable cost below 180% as competitive.
 - Ms. Carey's foreclosure analysis is unreliable as it does not account for CSX's reduced cost due to draying and the fact that efficient sorting of vessels by POV allows CSX to avoid higher costs at NIT.
- Contrary to Professor Miller's claims, intermodal transportation between NIT and the Midwest is not a relevant market for the analysis of this transaction. Defining the market as the land transportation of intermodal containers between NIT and inland BEAs is clearly too narrow.

- The fact that CSX and NS compete by offering a bundle of rail services to ocean carriers rather than at individual terminals suggests that the market should be defined as the bundle and not as a set of lanes through a single container terminal.
- The evidence presented in the Miller VS and the Carey VS indicates a significant ability to substitute between East Coast ports. Professor Miller’s analysis of contract rates that he uses to claim that such substitution is insufficient to prevent the exercise of market power at NIT is flawed.
 - Professor Miller’s price comparison of rail rates at POV and PONYNJ misses the fact that rates at POV include port lift charges that are not included in the contract rates for PONYNJ but invoiced by the railroad separately. Thus, the higher prices Professor Miller reports for POV are largely the result of the fact that the PONYNJ rates do not include the lift charge.
- Claims by Professor Miller and Ms. Carey that VIG is an inadequate substitute for NIT ignore the reality that POV efficiently sorts vessel traffic, and the choice between terminals are not based on differences in the rail rates offered to ocean carriers. As acknowledged by Professor Miller, CSX’s contracts with ocean carriers contain the {{[REDACTED]}} for NIT and VIG.
- Claims by Professor Miller and Ms. Carey that expansion at NIT will increase the anticompetitive effects of the alleged foreclosure ignore that VIG was itself recently expanded and could be expanded further, a new terminal at Craney Island is planned that will dwarf the capacities at NIT and VIG, and the expansion at NIT will allow more NS containers to travel through NIT freeing up capacity for CSX at VIG.

IV. Background

IV.A. CSX and Norfolk Southern

11. CSXT (“CSX”)¹ is a Class I freight railroad serving 26 states along the US East Coast, the District of Columbia, as well as the Canadian provinces of Ontario and Quebec.² CSX operates a 20,000 route-mile rail network and provides intermodal terminal services and trucking services.³ CSX’s intermodal service includes transport to Midwestern regions including Chicago, Cincinnati, Indianapolis, Northwest Ohio, and Detroit.⁴ CSX has access to over 70 ocean, river, and lake port terminals along the Atlantic and Gulf

¹ CSX Website, Company Overview, <https://www.csx.com/index.cfm/about-us/company-overview/> (accessed 10/31/2025).

² CSX Website, Company Overview, <https://www.csx.com/index.cfm/about-us/company-overview/> (accessed 10/31/2025).

³ CSX Website, Company Overview, <https://www.csx.com/index.cfm/about-us/company-overview/> (accessed 10/31/2025).

⁴ CSX, “Delivering Superior Service,” 8/2019 (CSX_STB_0001097–1120, at CSX_STB_0001105–06).

Coasts, the Mississippi River, the Great Lakes, and the St. Lawrence Seaway.⁵ The company additionally has access to Pacific ports through alliances with western railroads.⁶ In 2024, CSX generated \$2.05 billion in intermodal revenue, representing approximately 14% of its total revenue.⁷ Below is a map of CSX's major terminals, rail services, and operating agreements.

⁵ CSX Website, Company Overview, <https://www.csx.com/index.cfm/about-us/company-overview/> (accessed 10/31/2025).

⁶ CSX Website, Company Overview, <https://www.csx.com/index.cfm/about-us/company-overview/> (accessed 10/31/2025).

⁷ CSX, Form 10-K, 2024, at p. 100.
Calculation: $(2,047 / 14,540) \times 100 = 14.08\%$

Figure 1: CSX System map



Source: CSX Website, CSX System Map, <https://www.csx.com/index.cfm/customers/maps/csx-system-map/> (accessed 10/31/25).

12. Norfolk Southern (“NS”)⁸ is a Class I freight railroad covering a 19,200 mile route east of the Mississippi River in 22 states and Washington, D.C.⁹ The company supports global trade in conjunction with 24 seaports, 10 river ports, and 9 lake ports in the United States.¹⁰ NS has access to ports in Midwestern states including Illinois, Indiana, and Michigan.¹¹ In 2024, NS’s intermodal commodity group generated \$3.04

⁸ Norfolk Southern Website, Home, <https://www.norfolksouthern.com/> (accessed 10/31/2025).

⁹ Norfolk Southern Website, How Does Rail Shipping Work, <https://www.norfolksouthern.com/en/ship-by-rail/shipping-tools/how-does-rail-shipping-work/> (accessed 10/31/2025).

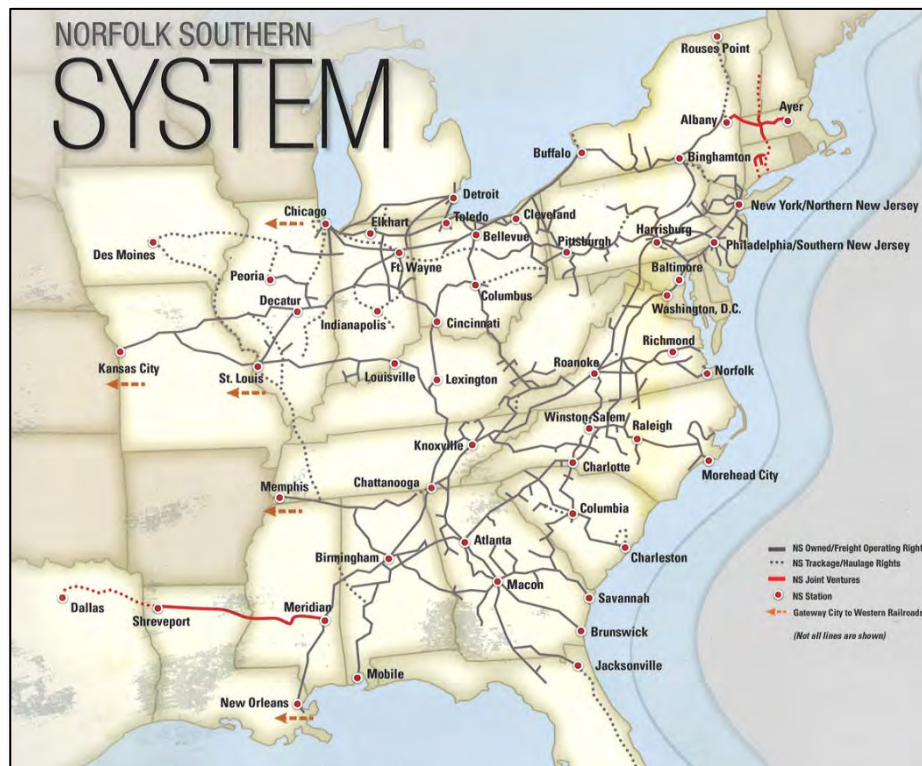
¹⁰ Norfolk Southern Website, How Does Rail Shipping Work, <https://www.norfolksouthern.com/en/ship-by-rail/shipping-tools/how-does-rail-shipping-work/> (accessed 10/31/2025).

¹¹ Norfolk Southern Website, Ports & International, <https://www.norfolksouthern.com/en/ship-by-rail/our-rail-network/ports-international/> (accessed 10/31/2025).

billion in revenue, approximately 25% of its total revenue.¹² Below is a map of NS's operating rights, trackage rights, and stations.

¹² Norfolk Southern, Annual Report 2025, c. 2025, at K28,
https://filecache.investorroom.com/mr5ir_nscorp/1157/454601%202024%20AR%20FullPages%20_Web.pdf.
Calculation: $(3,042 / 12,123) \times 100 = 25.09\%$.

Figure 2: NS System map



Source: Hawkins Rails Website, Norfolk Southern, <https://www.hawkinsrails.net/mainlines/ns2/ns2.html/> (accessed 10/31/2025).

13. CSX and NS are the only two primary Class I freight railroads operating in the US East Coast.¹³ According to the Joint Legislative Audit and Review Commission, the “two railroads control the vast majority of rail infrastructure on the East Coast. [The Port of Virginia] is served by both railroads.”¹⁴

¹³ Atlanta Regional, “Atlanta Regional Freight Mobility Plan,” undated, at p. 101, <https://cdn.atlantaregional.org/wp-content/uploads/tp-arfmp-needs-assessment-8-24-07.pdf> (“There are two primary Class I railroads operating in the Eastern United States, CSX Transportation and Norfolk Southern.”).

Metropolitan Washington Council of Governments Website, Regional Rail Freight, <https://www.mwcog.org/transportation/planning-areas/freight/rail/> (accessed 10/31/2025).

¹⁴ Joint Legislative Audit and Review Commission, “Review of the Virginia Port Authority’s Competitiveness, Funding, and Governance,” 10/2013, at p. 37, available at: <https://jlarc.virginia.gov/pdfs/reports/Rpt446.pdf/>.

IV.B. Norfolk & Portsmouth Belt Line Railroad

14. Norfolk & Portsmouth Belt Line Railroad (“NPBL”)¹⁵ is a terminal switching Class III railroad operating in Norfolk, Portsmouth, and Chesapeake, Virginia.¹⁶ NPBL was founded by a group of 8 railroad companies and ran its first train in 1898.¹⁷ Over time, changes in market structure have led to a consolidation of NPBL’s ownership such that currently NS owns 57% of the company while CSX owns 43%.¹⁸ NPBL operates 36 miles of track, with an additional 27 miles of trackage rights, connecting commerce around the deep water port from Sewell’s Point to Portsmouth Marine Terminal, including the Southern branch of the Elizabeth River.¹⁹
15. NPBL’s trackage rights provide access to the Norfolk International Terminal (“NIT”), one of the two active container terminals at the Port of Virginia (“POV”).²⁰ These rights allow other railroads, including CSX, to access NIT through a switch move with NPBL.²¹

IV.C. East coast container terminals and container shipping

IV.C.1. Ocean carriers

16. Large container ships transport international intermodal shipping containers to and from US ports or more specifically intermodal terminals. These vessels are operated by a number of large vessel-operating common carriers (ocean carriers). More than 100 ocean carriers provide international shipments on over 7,000 container ships.²²

¹⁵ American Rails, “Norfolk & Portsmouth Belt Line Railroad: Serving Tidewater,” 9/18/2024, <https://www.american-rails.com/npbl.html>.

¹⁶ Surface Transportation Board Press Release, “STB Determines Norfolk Southern’s Proposed Acquisition of NPBL is a Significant Transaction,” 3/14/2025, <https://www.stb.gov/news-communications/latest-news/pr-25-12/>.

¹⁷ NPBL Website, About Us, <https://www.npblrr.com/about-us.html/> (accessed 10/31/2025).

¹⁸ NPBL Website, About Us, <https://www.npblrr.com/about-us.html/> (accessed 10/31/2025).

¹⁹ NPBL Website, About Us, <https://www.npblrr.com/about-us.html/> (accessed 10/31/2025).

²⁰ Gov Info, “Norfolk Southern Corporation and Norfolk Southern Railway Company— Acquisition of Control—Norfolk & Portsmouth Belt Line Railroad Company,” 3/17/2025, <https://www.govinfo.gov/content/pkg/FR-2025-03-17/pdf/2025-04131.pdf>.

²¹ Gov Info, “Norfolk Southern Corporation and Norfolk Southern Railway Company— Acquisition of Control—Norfolk & Portsmouth Belt Line Railroad Company,” 3/17/2025, <https://www.govinfo.gov/content/pkg/FR-2025-03-17/pdf/2025-04131.pdf>.

²² World Shipping Council Website, A Competitive Industry, <https://www.worldshipping.org/a-competitive-industry/> (accessed 10/31/2025).

17. To attract business, ocean carriers compete to offer the lowest prices per route, greatest shipping capacity, most extensive shipping networks, and the highest quality of customer service.²³ Since the 1990s, major ocean carriers have organized themselves into “alliances,” where each ocean carrier agrees to share vessels with the other alliance members. These alliances improve carrier services through the realization of economies of scale and scope.²⁴ Until January 2025, three main alliances (2M, Ocean Alliance, and THE Alliance) operated over 50% of the global containership fleet and 82% of the TEU slots.²⁵ In January 2015 2M broke up into various pieces. MSC began working independently, and Maersk created the new Gemini alliance in partnership with former THE Alliance member Hapag-Lloyd.²⁶ The remaining members of THE Alliance – HMM, Ocean Network Express, and Yang Ming – created a new agreement which formed the Premier Alliance.²⁷

IV.C.2. East Coast intermodal ports and terminals

18. Ocean carriers typically call at multiple East Coast ports—such as the Port of New York and New Jersey (PONYNJ), the Port of Baltimore, the Port of Philadelphia, POV, the Port of Charleston, and the Port of Savannah—to efficiently unload cargo containers that then continue to inland destinations via intermodal transportation.²⁸ These ports are largely substitutable in function, as each provides access to major rail networks (especially CSX and Norfolk Southern) and they also provide easy access to interstate highways that can be used to truck containers to inland locations in the Midwest.
19. It is not uncommon to observe diversion of cargo among East Coast ports, and these can happen on a larger or smaller scale in response to market conditions and constant re-optimization. For example, the

²³ World Shipping Council Website, A Competitive Industry, <https://www.worldshipping.org/a-competitive-industry/> (accessed 10/31/2025).

²⁴ International Transport Forum, “The Impact of Alliances in Container Shipping,” c. 2018, at p. 11–12, available at: <https://www.itf-oecd.org/sites/default/files/docs/impact-alliances-container-shipping.pdf>.

²⁵ Yahoo Finance, “Ocean Carrier Alliances are Taking Shape for 2025,” 9/12/24, <https://finance.yahoo.com/news/ocean-carrier-alliances-taking-shape-175013213.html>. For global container fleet sizes, See Top 100 Website, Alphaliner, <https://alphaliner.axsmarine.com/PublicTop100/> (accessed 11/4/2025). **Note:** TEU calculation: 21.2% + 13.9% + 12.3% + 10.7% + 7.3% + 6.1% + 5.8% + 3.0% + 2.2% = 82.5%.

Fleet calculation: $(955 + 728 + 702 + 549 + 293 + 265 + 236 + 94 + 100)/7,447 = 0.53$.

²⁶ Yahoo Finance, “Ocean Carrier Alliances are Taking Shape for 2025,” 9/12/24, <https://finance.yahoo.com/news/ocean-carrier-alliances-taking-shape-175013213.html>. See also Verified Statement of Dr. Nathan Miller (“Miller VS”), 9/18/2025, Figure 3.

²⁷ Yahoo Finance, “Ocean Carrier Alliances are Taking Shape for 2025,” 9/12/24, <https://finance.yahoo.com/news/ocean-carrier-alliances-taking-shape-175013213.html>. See also Miller VS, Figure 3.

²⁸ Port Strategy, “Game Changer,” 6/25/2025, <https://www.portstrategy.com/expansion-and-development/game-changer/1503030.article>. “The North Atlantic port region is highly-populated and is the traditional location for serving US heavy industry (i.e. the “Rust Belt”) and key US Midwest markets.”

Key Bridge incident in March 2024²⁹ halted virtually all vessel traffic to the Port of Baltimore for several weeks, disrupting international intermodal freight flows. As a result, ocean carriers declared force majeure and diverted shipments to other US East Coast ports, including POV and PONYNJ.³⁰ Limited maritime operations continued only at Tradepoint Atlantic, the sole Baltimore terminal with access outside the bridge zone, until full channel clearance and vessel transit resumed later in 2024.

Utilizing trucks, barges and the East Coast's two Class I railroads, the port handled approximately 3,500,000 TEUs of import and export cargo in FY24. This includes responding to the Key Bridge collapse in Baltimore in late March which resulted in unanticipated cargo suddenly shifting to Virginia for several months in the wake of the tragedy as the Port of Baltimore was closed due to the obstructed channel. Virginia met the challenge and serviced the cargo efficiently and continued to demonstrate [its] ability to respond effectively to sudden shocks to the supply chain. In May of 2024 the Port recorded its third largest monthly volume in its history with over 328,000 TEUs processed.³¹

IV.C.2.i. Port of Virginia

20. POV is located in Norfolk, VA and is one of several important ports on the US East Coast that handle international container traffic.
21. POV has five terminals but two that handle international containers: Norfolk International Terminal (NIT) which has an annual TEU capacity of 3.6 million and Virginia International Gateway (VIG) with 2.2 million in annual TEU capacity.³² Portsmouth Marine Terminal (PMT) also operated as a container

²⁹ On March 26, 2024, the containership *Dali* struck a support pier of the Francis Scott Key Bridge in Baltimore, causing the bridge to collapse and blocking the main shipping channel to the Port of Baltimore. See National Transportation Safety Board, "Contact of Containership Dali with Francis Scott Key Bridge and Subsequent Bridge Collapse," 3/20/2025, <https://www.nts.gov/investigations/Pages/DCA24MM031.aspx/>.

³⁰ Supply Chain Dive, "East Coast Ports Say They are Ready for Baltimore Cargo," 3/28/2024, <https://www.supplychaindive.com/news/east-coast-ports-baltimore-cargo-reroutes/711584/>. ("We're not worried about the impact this will have on capacity, we have ample capacity. And we have honestly a fair amount of experience in handling surge cargo," Joe Harris from the Port of Virginia told Supply Chain Dive in an interview.)

³¹ Virginia Port Authority, 2024-26 Strategic Plan, <https://reports.dpb.virginia.gov/sp101?FirstRun=False&agency=407&version=2024-26> (accessed 11/1/2025).

³² Port of Virginia Website, Capabilities, <https://www.portofvirginia.com/gateway/capabilities/> (accessed 10/31/2025).

terminal, but it is currently closed to container traffic and instead is used as a staging area for offshore windfarm construction.³³

22. In terms of rail connections used for international container shipments, NS has on-dock access to NIT over its own rails, and NPBL has on-dock access to NIT through trackage rights agreements with NS. At VIG, the short line railroad Commonwealth Railway (CWRY) has on-dock access.³⁴ Both CSX and NS connect with CWRY. While CSX does not own tracks that have on-dock access, it can handle containers that pass-through NIT via NPBL. However, it currently moves containers from NIT to an alternate rail connection via truck.
23. The Port of Virginia has been steadily expanding its container-handling footprint across multiple terminals: Virginia International Gateway (VIG) and Norfolk International Terminals (NIT) have both seen phased investments.
24. NIT currently supports a total rail capacity of 1.1 million Twenty-Foot Equivalent Units (TEUs).³⁵ Following an ongoing expansion, NIT is estimated to have an annual terminal capacity of 3.6 million TEUs.³⁶ The expansion of NIT's Central Rail Yard was completed in August 2024, increasing the port's total annual rail capacity by more than 30%.³⁷
25. VIG currently supports an annual throughput capacity of 2.2 million TEUs.³⁸ In 2019, the terminal completed a three-year investment that doubled VIG's container and rail capacity.³⁹ According to the Fapp Rebuttal VS in this submission, in 2023, VIG was {{[REDACTED]}} utilized implying an additional {{[REDACTED]}}

³³ Port of Virginia Website, Capabilities, <https://www.portofvirginia.com/gateway/capabilities/> (accessed 10/31/2025).

³⁴ Virginia Places Website, Commonwealth Railway, <http://www.virginiaplaces.org/rail/commonwealthrailway.html> (accessed 11/4/2025). ("The Commonwealth Railway is a short-line Class III railroad servicing primarily the Virginia International Gateway (VIG) container terminal in Portsmouth.")

³⁵ Port of Virginia, "Norfolk International Terminals (NIT)," undated, https://www.portofvirginia.com/wp-content/uploads/2025/03/POV_2025-NIT-2.pdf.
Super International Shipping Website, TEU Meaning & TEU Container Guide | What Is a TEU in Shipping? <https://super-internationalshipping.com/twenty-foot-equivalent-unit-teu/> ("A TEU, or Twenty-Foot Equivalent Unit, is the standard unit of measurement in global container shipping.")

³⁶ Port of Virginia, "Norfolk International Terminals (NIT)," undated, https://www.portofvirginia.com/wp-content/uploads/2025/03/POV_2025-NIT-2.pdf.

³⁷ undated, https://www.portofvirginia.com/wp-content/uploads/2025/03/POV_2025-NIT-2.pdf.

³⁸ Port of Virginia, "Virginia International Gateway (VIG)," undated, <https://www.portofvirginia.com/wp-content/uploads/2024/03/2024-VIG-1-Pager.pdf>.

³⁹ Port of Virginia, "Virginia International Gateway (VIG)," undated, <https://www.portofvirginia.com/wp-content/uploads/2024/03/2024-VIG-1-Pager.pdf>.

container of capacity could flow through VIG annually.⁴⁰ Even following its expansion to 2.2 million TEU capacity, VIG has the ability to increase its capacity to four million TEU per year.⁴¹

26. The Craney Island container project represents the next, much larger phase of growth at POV: sited adjacent to VIG (see Figure 3 below), Craney Island is designed as a purpose-built, high-capacity container complex that will be able to accommodate a substantial amount of throughput (up to 50% of total POV capacity)⁴² via truck and rail through a connection via the CWRV, much like the operation at VIG.⁴³ According to a CSX document:

{{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] .}}⁴⁴

⁴⁰ Rebuttal Verified Statement of Daniel L. Fapp (“Fapp Rebuttal VS”), 11/12/2025, p. 39.

⁴¹ Port Strategy, “More Capacity Required,” 9/26/2024, <https://www.portstrategy.com/operations/more-capacity-required/1496979.article>.

⁴² Reports to the General Assembly, “Master Rail Plan for The Port of Virginia (SJR 69, 2014),” c. 2015, at p. 53, available at: <https://rga.lis.virginia.gov/Published/2015/SD12/PDF>. (“The future marine terminal on Craney Island is envisioned to be a state-of-the-art terminal that makes use of semi-automated stacking cranes to maximize container storage capacity, similar to the system used at VIG. The project represents a substantial increase in The Port of Virginia’s overall capacity, with the full build out capacity being on par with the combined capacity of NIT and a fully built out VIG terminal. [...] The current design objective is to provide sufficient rail capacity for up to 50% of total terminal throughput.”)

⁴³ Reports to the General Assembly, “Master Rail Plan for The Port of Virginia (SJR 69, 2014),” c. 2015, at p. ES-15, available at: <https://rga.lis.virginia.gov/Published/2015/SD12/PDF>.

⁴⁴ CSX, Port of Virginia and Savannah (CSX_STB_0090051.xlsx, at tab “**Virginia (VA)**”).

Figure 3: Aerial view of POV terminals

Source: Port of Virginia, “Portsmouth Marine Terminal,” at p. 2, <https://www.midatlanticocean.org/wp-content/uploads/2022/05/Gullickson-Economy-5-6-22.pdf>.

IV.C.2.ii. Other East Coast intermodal ports terminals

27. The Bureau of Transportation Statistics lists the Port of New York and New Jersey (PONYNJ), Port of Virginia (POV), Port of Baltimore (POB), Philadelphia Regional Port, Port of Savannah, and Port of Charleston among the top 50 US ports by shipments moved,⁴⁵ with special emphasis given on PONYNJ, POV, and POB for North Atlantic container traffic.⁴⁶ Figure 4 below shows the top 25 ports by loaded TEUs.

⁴⁵ Bureau of Transportation Statistics Website, Tonnage of Top 50 US Water Ports, Ranked by Total Tons, <https://www.bts.gov/content/tonnage-top-50-us-water-ports-ranked-total-tons> (accessed 10/31/2025).

⁴⁶ Port Strategy, “Game Changer,” 6/25/2025, <https://www.portstrategy.com/expansion-and-development/game-changer/1503030.article>. “There are a mix of different container ports in the North Atlantic region, but the largest (and primary) facilities based on volumes are Baltimore, NY/NJ and

Figure 4: Top 25 Ports by Loaded TEUs, 2022

Rank	Port	Total (thousands of TEUs)
1	New York, NY & NJ	6,660.3
2	Port of Los Angeles, CA	6,424.3
3	Port of Long Beach, CA	6,092.0
4	Port of Savannah, GA	4,329.9
5	Houston Port Authority, TX	3,252.6
6	Virginia, VA, Port of	2,861.9
7	Port of Charleston, SC	2,126.3
8	Port of Oakland, CA	1,791.2
9	Tacoma, WA	1,519.2
10	Seattle, WA	1,085.2
11	Jacksonville, FL	902.6
12	Port Miami, FL	889.0
13	San Juan, PR	832.0
14	Honolulu, O'ahu, HI	828.8
15	Baltimore, MD	790.9
16	Port Everglades, FL	758.5
17	Philadelphia Regional Port, PA	728.5
18	Mobile, AL	440.4
19	Port of Alaska, AK	419.8
20	New Orleans, LA	352.7
21	Wilmington, NC	237.2
22	Wilmington, DE	204.4
23	Oxnard Harbor District, CA	197.8
24	South Jersey Port Corp, NJ	163.1
25	Port of Gulfport, MS	152.0

Source: U.S. Department of Transportation, Bureau of Transportation Statistics, based upon 2022 data (latest available) provided by U.S. Army Corps of Engineers, Waterborne Commerce Statistics Center. Special tabulation as of July 2024.

Source: Bureau of Transportation Statistics, “Port Performance Freight Statistics: 2025 Annual Report,” c. 2025, at Table 4, available at: <https://doi.org/10.21949/z3wj-hd65>.

28. PONYNJ is the largest and busiest container port on the East Coast,⁴⁷ being made up of five container terminals including the Port Newark Container Terminal, Red Hook Container Terminal, Elizabeth APM Terminal, Bayonne Global Container Terminal, and New York Global Container Terminal.⁴⁸
29. POB is a network of terminals, companies, and infrastructure⁴⁹ that features on-dock rail. The port is made up of the Dundalk Marine Terminal and Seagirt Marine Terminal.⁵⁰ Recent large-scale investments —

Virginia, with terminals at each port offering largescale infrastructure of long quays, deep water and a high number of larger cranes.”

⁴⁷ Briefly, in 2022, PONYNJ became the busiest port in the nation by cargo volume. See Figure 4.

⁴⁸ US Department of Transportation Website, Port of New York New Jersey Profile, <https://explore.dot.gov/views/PortProfiles2024/ProfileDashboard?%3Aembed=y&%3AisGuestRedirectFromVizportal=y> (accessed 11/4/25).

⁴⁹ Maryland Port Administration, “2024 Sustainability Report,” c. 2024, at p. 6, available at: <https://mpa.maryland.gov/greenport/Documents/MPASustainabilityReportFINAL07232025.pdf>.

⁵⁰ US Department of Transportation Website, Port of Baltimore Profile, <https://explore.dot.gov/views/PortProfiles2024/ProfileDashboard?%3Aembed=y&%3AisGuestRedirectFromVizportal=y> (accessed 11/4/25).

notably the Seagirt modernization, rail-yard upgrades and the Howard Street Tunnel clearance program⁵¹ — are explicitly designed to shift more long-haul container moves to double-stack rail and to improve Baltimore’s competitiveness for Midwest intermodal flows.⁵²

The Howard St. Tunnel project consists of vertical clearance improvements along CSX’s I-95 Rail Corridor. [...] it means that the entire CSX network is doublestack compatible out of Baltimore, which includes direct access from the port to US Midwest. The project is scheduled for completion in mid-2026 and once operational, CSX out of Baltimore (Seagirt) to Chicago will offer the shortest and the quickest journey time of out of the port and railroad options for doublestack rail available at US North Atlantic gateways.⁵³

IV.D. Intermodal land transportation to and from East Coast intermodal terminals

30. Internationals shipping containers can be transported to and from a port either by truck, barge, or rail.⁵⁴ The advantage of using containers is that the contents do not need to be unloaded and loaded every time the mode of transportation is changed.⁵⁵
31. It is common for ocean carriers to enter into contracts with railroads that cover a bundle of lanes including between marine ports and inland locations.⁵⁶ In these contracts, ocean carriers agree to rail volume

⁵¹ Ports America, “2025 PIDP Grant Application Seagirt Marine Terminal Berth I/II Modernization Project Description,” c. 2025, available at: https://www.mdot.maryland.gov/OPCP/PIDP_MPA-PAC_Seagirt_Project_Description_8-4_2025.pdf. Maryland Port Administration, “Maryland’s Port of Baltimore Receives Federal Funding for Improved Rail Infrastructure,” 6/1/2022, available at: <https://mpa.maryland.gov/Press%20Releases/Port%20of%20Baltimore%20Receives%20Federal%20Funding%20To%20Improve%20Rail%20Operations.pdf>. Maryland Port Authority, “Howard Street Tunnel Project,” 6/10/2025, <https://mpa.maryland.gov/Pages/hst.aspx>.

⁵² Port Strategy, “Game Changer,” 6/25/2025, <https://www.portstrategy.com/expansion-and-development/game-changer/1503030.article>.

⁵³ Port Strategy, “Game Changer,” 6/25/2025, <https://www.portstrategy.com/expansion-and-development/game-changer/1503030.article>.

⁵⁴ Union Pacific, “What is Intermodal Shipping ...and Why Should Shippers Care?,” 8/4/2020, <https://www.up.com/news/service/tr080420-what-is-intermodal-shipping>. (“Intermodal freight shipping is a possibility for just about any shipper. With no requirement to have tracks at the origin or destination of your shipment, intermodal is highly accessible. Trucks handle the first and last mile of the shipment and you reap the benefits of using trains to handle the portion in between.”).

⁵⁵ Union Pacific, “What is Intermodal Shipping ...and Why Should Shippers Care?,” 8/4/2020, <https://www.up.com/news/service/tr080420-what-is-intermodal-shipping>. (“By loading cargo into intermodal containers, shipments can move seamlessly between trucks, trains and cargo ships. ... As international intermodal shipments travel between ocean carriers, trucks and trains, the product stays in the same container for the entirety of the trip”).

⁵⁶ Verified Statement of Dr. Nathan Miller (“Miller VS”), 9/18/2025, ¶ 42.

commitments in exchange for a commitment on the rail costs for that volume.⁵⁷ When these contracts lead to a {{[REDACTED]}} share of an ocean carrier's rail volume going to a single railroad, Professor Miller refers to that ocean carrier as being aligned with the contracting railroad.⁵⁸

32. International containers move via both truck and rail. However, containers moved by rail often use trucks to begin and finish routes so that containers can be transported to and from inland destinations that are not connected to rail.⁵⁹ Professor Miller acknowledges that most EC container traffic travels by truck.⁶⁰ The Bureau of Transportation Statistics ("BTS") describes trucking's role in freight transport in a 2024 annual report:

Trucking's substantial share in both freight weight and value underscores its critical role in the US freight system. Despite changes in overall trends, trucking remains the primary mode of freight transportation.⁶¹

33. On distances longer than 500 miles does rail effectively compete with trucks.⁶² CSX itself acknowledges trucks as exerting pressure on price on some of its operations.

CSXT's primary rail competitor is Norfolk Southern Railway, which operates throughout much of the Company's territory. Other railroads also operate in parts of the Company's territory. Depending on the specific market, competing railroads and deregulated motor carriers may exert pressure on price and service levels.⁶³

⁵⁷ Miller VS, ¶ 42.

⁵⁸ Miller VS, ¶ 42.

⁵⁹ James M. Foote, Letter to the Chairman of the United States Surface Transportation Board, 8/2/2021, <https://prod.stb.gov/wp-content/uploads/CSX-Response-to-Chairman-Oberman-Regarding-Intermodal-Supply-Chain-Issues-August-2-2021.pdf>.

⁶⁰ See Miller VS, ¶ 38.

⁶¹ Bureau of Transportation Statistics, "Transportation Statistics Annual Report 2024," 12/2024, at p. 3–6, available at: <https://rosap.ntl.bts.gov/view/dot/79039>.

⁶² Kenneth Joyner, Dep. Tr., 02/19/2020, at 18:24–19:25 ("Q: And is there essentially a limit on the effective range of trucking as an intermodal option. A: No. Unfortunately for Norfolk Southern there's not a range on the amount that a truck can move a container. [...] Q: And can I ask you to unpack that term "longer" and, you know, what kinds of distance in your assessment does rail become a more competitive option than trucking working out of the port? A: . . . Once you get over, say, 500 miles, rail is much more - - has a better chance of competing with truck.")

⁶³ CSX 2024 Form 10-K p.5

34. Even when rail delivers lower per-mile costs over long hauls, the added first/last-mile drayage, terminal handling, and occasional service unreliability on rail corridors can erode those savings for many shippers, leaving trucking as the economically preferred option on many East-Coast lanes.⁶⁴

V. The shares of NS and CSX at NIT and VIG are the result of an efficient allocation of vessel traffic at POV and not foreclosure

35. Professor Miller and Ms. Carey claim that NS's {{[REDACTED]}} at NIT is the result of exclusionary conduct. According to Ms. Carey:

Absent NS control of NPBL, CSXT would be expected to be highly competitive and achieve higher volumes at NIT than with NS control of NPBL. Thus, with the absence of economic evidence to support the high shares at the important NIT port terminal, NS' {{[REDACTED]}} shares on the NIT corridor routes to/from the inland Midwestern market areas can be substantially attributed to its exclusionary conduct.⁶⁵

36. Ms. Carey's evidence that but-for exclusionary conduct CSX would achieve {{[REDACTED]}} volumes at NIT is that its share at VIG is {{[REDACTED]}}. She claims:

In contrast to a {{[REDACTED]}} share at NIT (with drayage to rail), CSXT has a {{[REDACTED]}} share at VIG as shown below in Figure 2 which illustrates the benefits of real access to on-dock rail (from a short line terminal railroad).⁶⁶

37. I have included Figure 2 from Carey VS below.

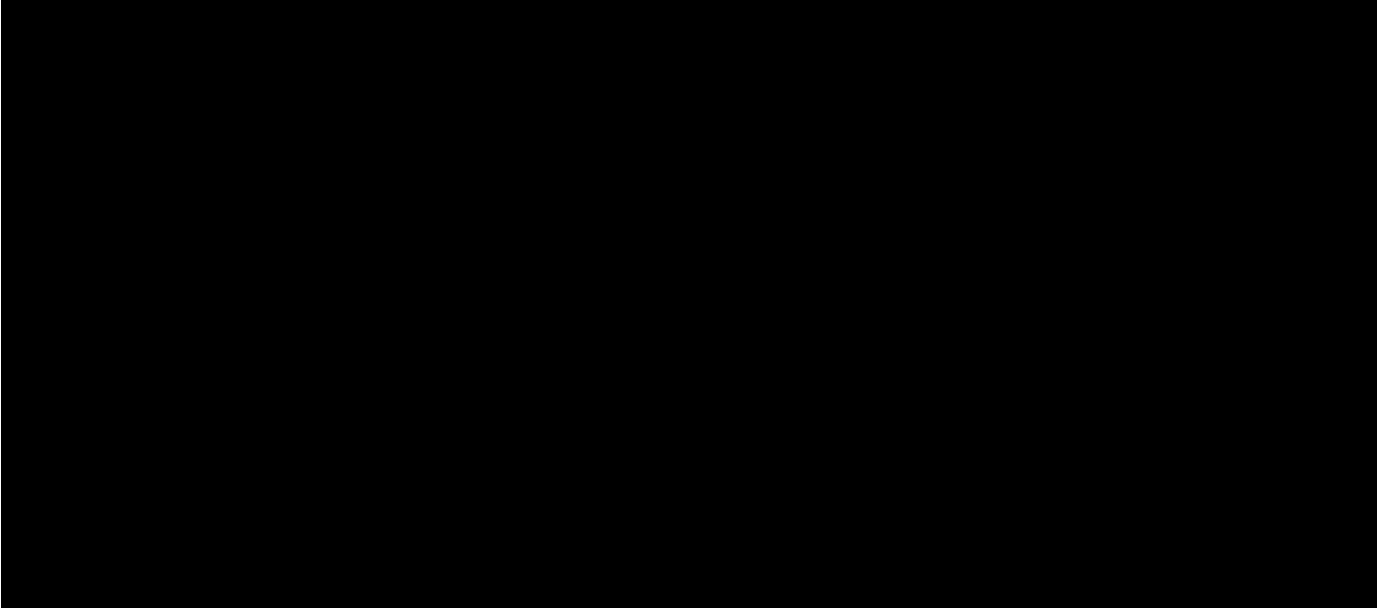
⁶⁴ Freight Waves, "Loose truckload market pressures intermodal volume in Eastern corridors," 5/2/2024, <https://www.freightwaves.com/news/loose-truckload-market-pressure-intermodal-volume-in-eastern-corridors>. ("Shorter intermodal lanes, which are primarily located in the Eastern one-third of the country, are far more competitive with the highway. Examples include Chicago to Atlanta; Newark, New Jersey, to Chicago; and Chicago to Harrisburg, Pennsylvania. Those lanes take no longer than two days on the highway, and the cost benefit of the lower rail linehaul costs is greatly diminished simply because the rail linehaul covers fewer miles and thus, a lower portion of the all-in cost."); see also a CSX presentation describes intermodal rail service as a best fit for "Moves greater than 500 miles" and "Freight that is not highly time sensitive." The same presentation lists "Truck, NS Intermodal" as competitive alternatives to CSX: CSX, Cross-Selling Initiative Enhanced Joint Sell," undated (CSX_STB_0097266) at 25, 50.

⁶⁵ Verified Statement of Julie M. Carey ("Carey VS"), 9/18/2025, p. 7.

⁶⁶ Carey VS, p. 8.

Figure 5: Carey VS Figure 2

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Source: Carey VS, p. 8.

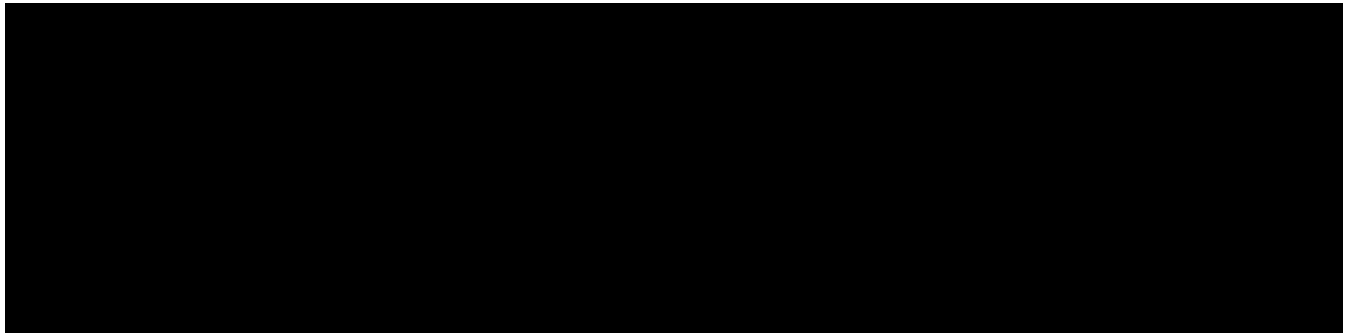
38. Professor Miller similarly claims that NS's {{[REDACTED]}} share at NIT is evidence of anticompetitive effects. Professor Miller titles the section where he reports NS and CSX's shares on movements between Midwest BEAs and NIT, "An Analysis of Market Shares Supports that Shippers Could Gain from More Competition," but in the body of the section he makes the more equivocal claim that, "[t]he market shares are consistent with there being scope for greater competition that would benefit ports and shippers."⁶⁷
39. The existence of anticompetitive foreclosure cannot be established based on shares alone as a difference in shares can simply be the result of legitimate cost or quality differences. In addition, shares are only a meaningful indicator of the exercise of market power if they are shares in a properly defined market. As discussed below in Section VII, movements between NIT and Midwest BEAs is not a properly defined market.
40. However, the claims of Professor Miller and Ms. Carey that CSX's share at NIT indicates foreclosure are particularly incomprehensible given that CSX's {{[REDACTED]}} share at NIT and {{[REDACTED]}} share at VIG is not the result of CSX not being able to offer a competitive price for rail movements through NIT. According to Professor Miller, the rates charged by CXS for movements involving NIT are {{[REDACTED]}}

⁶⁷ Miller VS, ¶ 117.

{} VIG.⁶⁸ For example, the CSX's contract rail rate to move containers from NIT to Chicago {} to move containers from VIG to Chicago. Below are two snippets from CSX's 2024 contract with Maersk. The contract refers to VIG as Portsmouth APMT.

Figure 6: Contract rates for NIT and VIG to Chicago from 2024 contract between CSX and Maersk

{{



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Source: CSX, "Amendment No .6 to Agreement for Rail Transport Services," 5/1/2024 (CSX_STB_0000805-37, at CSX_STB_0000826-7).

41. Given that CSX's share for movements between VIG and the Midwest is {} than its share through NIT, the cause of CXS's {} and NS's correspondingly {} at NIT cannot be the result of CSX not being able to offer an acceptable price to ocean carriers, which is what one might have expected from the claims that the lopsided shares at NIT are the result of foreclosure.

V.A. The {} share of NIT traffic for NS is the result of POV's sorting of vessel traffic between NIT and VIG

42. Ms. Carey states that "I observe no significant factor that would explain why the existing {} NS share [at NIT] would exist absent NS control of NPBL."⁶⁹ However, the existing shares of container traffic for CSX and NS at NIT and VIG are largely the result of how POV allocates vessels across the two container terminals.⁷⁰ Ocean carriers are not substituting between terminals. Professor Miller writes,

⁶⁸ Miller VS, ¶ 84.

⁶⁹ Carey VS, p. 3.

⁷⁰ See Luebbbers VS, Section I ("[Port of Virginia] direct any individual ocean vessel to berth at NIT or VIG. That is not a decision made by the maritime company owning that vessel, it is a decision made by the Port of Virginia.").

[O]cean carriers do not ultimately control the terminal at which their vessel docks; VIT does.[...] VIT has historically attempted to send vessels for CSXT-aligned ocean carriers to VIG and NS-aligned ocean carriers to NIT[.]⁷¹

While Professor Miller notes that the perfect sorting of vessels in this way is not always possible, the shares reported in his Figure 14 show (reproduced below in my Figure 15) that it is largely successful.

43. Therefore, the lopsided shares of NS and CSX at NIT and VIG that Ms. Carey reports in her Figure 2 (my Figure 5), reproduced above, are the result of POV's sorting of vessels between NIT and VIG. It is not because CSX is unable to effectively compete for ocean shipper business to move containers between the Midwest and NIT. As discussed in more detail below in Section VII.D, this along with other evidence indicate that it makes no sense to analyze competitive conditions at NIT separately from VIG.
44. Using the container volumes for movements between POV and the Midwest reported in Carey VS Figure 2 and her Appendix A Figure 2, I calculate the share of CSX containers at POV that go through NIT. For 2023, the percentage of CSX containers at POV that go through NIT is {{[REDACTED]}} compared to {{[REDACTED]}} for VIG.⁷² For, 2024 the percentages are {{[REDACTED]}} and {{[REDACTED]}}.⁷³ This implies that POV's direction of ship traffic between the two container terminals has been very successful in helping CSX avoid the higher costs it faces at NIT compared to VIG whether those higher costs are based on the legitimate costs of NPBL or not.
45. POV has an economic incentive to do its best to account for and thus reduce railroad costs by directing traffic between NIT and VIG. Even if there was no direct cost difference for POV, lower rail costs make the port more competitive vis-à-vis other East Coast ports as either CSX or NS would tend to pass on some of those reduced costs to ocean carriers. (In his deposition Professor Miller allowed for the possibility that railroads would pass-on these lower costs to shippers.⁷⁴) Therefore, if NS's cost of moving containers at NIT were lower than at VIG, then even if CSX's cost of moving containers at NIT were the same as at VIG, POV would still have an incentive to direct vessels the way it does now and direct vessels with containers carried by NS to NIT and vessels with containers carried by CSX to VIG.
46. In Appendix C I show that the cost minimizing sorting of vessels between terminals tends to involve lopsided shares at one if not both terminals even when cost differences are small. I show that the efficient

⁷¹ Miller VS, ¶ 109.

⁷² Carey VS, Figure 2.

⁷³ Carey VS, Appendix A, Figure 2.

⁷⁴ See Nathan Miller Dep. Tr., 10/30/2025, 62:5–63:1.

sorting of vessels is, if it can be achieved, what is referred to in the mathematics of constrained optimization problems, a corner solution. That is, there will be at least one terminal where only one railroad's containers are shipped through even when there are relatively smaller differences in costs between the railroads. Therefore, an efficient sorting of vessels involves lopsided shares at the two terminals if there are any cost differences between the two terminals and therefore it is inappropriate to interpret such lopsided shares as indicating the exercise of market power or foreclosure.

47. In the real-world optimization problem faced by POV, perfectly sorting containers may not be feasible. However, CSX's relatively {{[REDACTED]}} share at NIT suggests that POV prefers to route as many CSX-carried containers as possible through VIG rather than NIT. (This can be easily seen in Professor Miller's Figure 14.) This is an outcome consistent with the results presented in Appendix C. The simple model in Appendix C does not account for all the constraints POV faces when sorting vessels, but it does indicate that very lopsided shares at individual terminals do not necessarily arise as a result of large cost differences.

V.B. Given the cost differences for CSX and NS at NIT and VIG even absent the alleged foreclosure, it would be efficient for POV to continue directing vessels between NIT and VIG as it is doing now

48. Even if CSX were able to get on-dock rail access at the same switch fee available at VIG, the relative costs for NS and CSX to move containers through NIT and VIG imply that it still may be efficient for POV to continue routing as many NS containers through NIT and as many CSX containers through VIG as it can subject to the relative port congestion costs and thus likely continue to direct traffic between the two terminals as it is doing now. As I show below a change to equalize shares at the two terminals will simply result in higher average costs for both CSX and NS.
49. Carey claims to "observe no significant factor that would explain why the existing {{[REDACTED]}} NS shares would exist absent NS control of NPBL."⁷⁵ However, beyond NS control of NPBL, there is one obvious distinction between CSX and NS rail access at POV. NS has on-dock access at NIT through trackage rights on-dock and owned tracks to NIT whereas CSX only has on-dock access to NIT and VIG through short line connections. The cost difference to the railroads from having to pay a switch rate to a short line compared with utilizing owned track is significant. At VIG, NS must use CWRY at a cost of

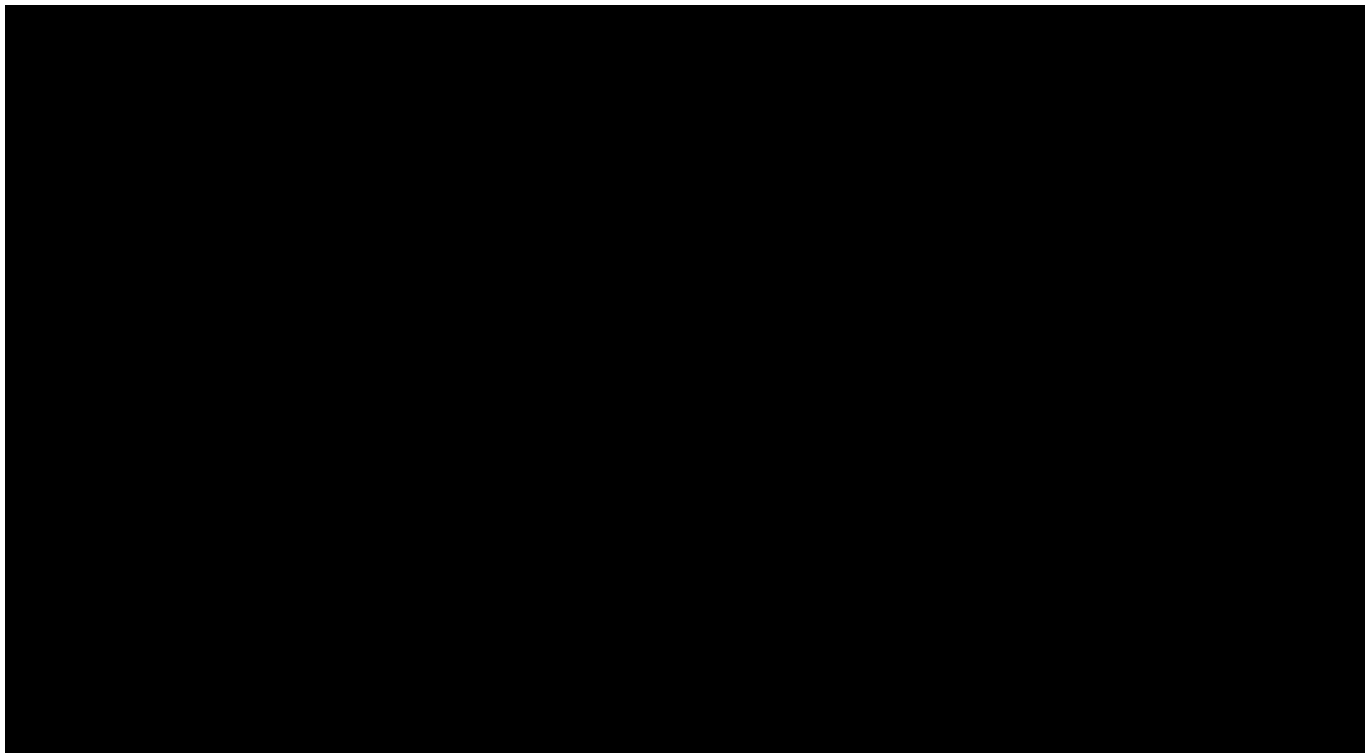
⁷⁵ Carey VS, p. 3.

{{[REDACTED]}} per container.⁷⁶ According to an NS document, displayed below in Figure 7, this results in it being {{[REDACTED]}} per container less costly for NS to move a container through NIT than VIG.

50. Figure 7 shows a breakdown of the variable cost difference for NS at NIT (labeled Norfolk, VA) and VIG (labeled Portsmouth APMT). These represent the variable costs of moving containers from the container terminals to Crewe, VA where NS's lanes converge for all containers travelling between POV and the Midwest. The category listed as "Joint Facility & Haulage" includes the fee that CWRV charges to carry containers for NS at VIG. This is the largest difference between NS's variable costs at NIT versus VIG.

Figure 7: NS variable cost comparison for intermodal traffic from NIT and VIG to Crewe, VA

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Source: 20251009 Virginia port comparison, p. 2.

51. The {{[REDACTED]}} per container difference for NS is close to the per container difference in cost for CSX between the NPBL switch rate that is claimed to be anticompetitively high and the so-called competitive

⁷⁶ Miller VS, ¶ 130.

switch rate offered by CWRV.⁷⁷ Assuming two containers per car, CSX's cost difference between the NPBL and the CWRV switch rates is {{[REDACTED]}} per container. Assuming three containers per car, it is {{[REDACTED]}} per container.⁷⁸ Thus, NS's costs are significantly lower at NIT than VIG.

52. Ms. Carey's foreclosure analysis indicates that even if CSX had what she refers to as a competitive switch rate from NPBL, CSX would still face {{[REDACTED]}} per container in higher costs at NIT than VIG.⁷⁹ Therefore, even with what Ms. Carey describes as a competitive switch rate at NIT, CSX would still face significantly higher costs at NIT than it does at VIG. Furthermore, assuming that NS and CSX costs at VIG are similar, CSX's costs at NIT would be significantly higher than NS's costs at NIT even with what Ms. Carey claims as a competitive switch rate from NPBL.
53. Even if there were no difference in the switch rate from NPBL and CWRV, it would be efficient for POV to direct vessels between NIT and VIG similarly to what it does today in order to account for the differences in the costs of CSX and NS at the two container terminals. That is, completely apart from the question of whether or not NPBL's rate to switch containers for CSX is too high, NS's high share at NIT can be explained as resulting from an efficient directing of vessels between the two container terminals at POV. Any shifting of vessel traffic by POV so that more NS containers pass through VIG and more CSX containers pass through NIT will have the effect of increasing rail costs and likely harming ocean carriers and shippers.

⁷⁷ See CSX, Letter from Steve Armbrust to Cannon Moss Re: Rate and Service Proposal, 3/21/2025 (STB-NS-0015705-5712, at STB-NS-0015709). ("NPBL has represented that the current \$210 charge only applies to loaded railcars.").

⁷⁸ CSX's cost differences are relative to the {{[REDACTED]}} per container that CWRV charges CSX for interchanges of IM traffic at VIG. {{[REDACTED]}} See: Miller VS, ¶ 130. ("The rate per container NPBL would charge CSXT to switch NIT containers {{[REDACTED]}} the rates per container that CWRV charges for interchanges of IM traffic at VIG—({{[REDACTED]}}) to CSXT and ({{[REDACTED]}}) to NS for containers that are routed over the VIG marine terminal and ({{[REDACTED]}}) for containers that CSXT drays between NIT and VIG.") In their calculations, Professor Miller and Ms. Carey assume two container per rail car, but a CSX document evaluating costs associated with the NPBL switch rate assumes 2.5 containers. See, CSX, "NPBL Costing Estimate," undated (CSXT0064610.xlsx, at tab "Summary").

⁷⁹ See Carey WP HC-WP Rate Switch Move by Move Analysis.xlsx. In the "Assumptions" tab, Ms. Carey lists the costs that she adds to the cost of CSX VIG movements to and from the Midwest to calculate the hypothetical effect of the extra costs at NIT on CSX's profitability. She calculates the incremental cost of the NPBL switch rate over what she refers to as a "competitive short line switch rate" to be {{[REDACTED]}} per container. However, Ms. Carey reports that CSX incurs other additional costs at NIT compared with VIG. One of these is labeled "loaded empty additional cost." Given that her data already seems to include the movements of empty containers, I do not understand why this cost is not already accounted for, but taking it at face value, I calculate the extra cost of NS using NIT versus VIG by multiplying Ms. Carey's share of empties {{[REDACTED]}} by the competitive switch rate and add the additional costs she reports (crew, locomotive, and trackage) to get {{[REDACTED]}} per container. If the inclusion of an additional cost associated with loaded empties is not incorrectly included, the extra cost for CSX to use NIT versus VIG would be {{[REDACTED]}} per container even with what Ms. Carey claims as a competitive switch rate.

VI. CSX's claims of foreclosure due to NPBL's rates are without support and implausible

54. In this section, I explain why the claims of foreclosure due to the NPBL switch rate are not supported by the evidence. I do not, however, address whether the NPBL switch rate would have been different with or without NS control. I will note that when it comes to NPBL, control means something altogether different from what we normally mean by corporate control. It is my understanding that NPBL is operated according to a governance structure and principles that NS has committed not to change and that affords NPBL a degree of independence from NS despite NS's majority ownership.
55. Even if one were to assume that the NPBL switch rate is higher than justified, the effects of that extra cost on CSX's ability to compete with NS are de minimis. In addition, the data show that CSX has been able to grow its share of rail movements and win business from NS between POV and the Midwest during the period of alleged foreclosure, which would tend to undercut assertions of substantial foreclosure.
56. In order to analyze the anticompetitive potential of foreclosure, the usual approach is to assess both the incentive and ability to foreclose. Here I focus on whether there is a credible claim that NS has the ability to foreclose CSX. The type of foreclosure alleged is a form of input foreclosure. The allegation is that NS's control of NPBL allows it to foreclose CSX from competing for certain movements by raising its costs for a critical input. Such an attempt to foreclose CSX will only be effective if reasonable substitutes are not available for the input in question—in this case on-dock rail access at NIT. The evidence indicates that CSX's ability to compete has not been materially impacted by the extra cost it faces at NIT because of NPBL switch rate.

VI.A. CSX container traffic between the Midwest and POV largely travels through VIG and not NIT

57. In Section V.A, I explain that POV sorts vessel traffic between NIT and VIG in part to allow for more efficient rail operations. As a result of this, POV has very effectively reduced the extra cost (justified or not) that CSX faces at NIT by trying to mostly direct ships with containers carried by CSX to VIG and ships with containers carried by NS to NIT. The effect of this efficient substitution is that in 2023 only {{[REDACTED]}} of CSX containers at POV go through NIT compared to {{[REDACTED]}} for VIG.⁸⁰ For, 2024 the percentages are {{[REDACTED]}} and {{[REDACTED]}}⁸¹ Therefore, much of the difference in cost CSX faces between

⁸⁰ Carey VS, Figure 2.

⁸¹ Carey VS, Appendix A, Figure 2.

NIT and VIG is mitigated through this substitution away from NIT, which, as I explain above in Section V.B, would likely continue even without the alleged excessive NPBL switch rate.

58. Any quantification of the effects of an alleged attempt to raise CSX's costs needs to account for the fact that relatively few containers moving between POV and the Midwest are subject to those higher costs. In an internal email from CSX executive Abby Beazley to Robert Girardot, {{ [REDACTED] }}

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁸² }}

VI.B. CSX chooses to substitute draying for on-dock rail access at NIT

59. As discussed above in Section V.B, NS has on-dock access through tracks it owns to NIT. It also has on-dock access to VIG through CWRV but needs to pay the CWRV a switch fee to move containers into and out of VIG. CSX has the disadvantage of not owning tracks that reach all the way to either NIT or VIG. At NIT if it wants to utilize on-dock rail access CSX must utilize NPBL. At VIG, CSX must use CWRV for on-dock rail access.
60. CSX chooses to dray containers from NIT to VIG where they can be loaded on rail cars rather than make use of the on-dock access of NPBL at NIT. That should imply that whatever the advantages of on-dock access versus draying, CSX has decided it is better off draying containers than using NPBL for on-dock access.⁸³ Given the relative costs to CSX of drayage and the NPBL switch rate, the disadvantage of drayage cannot be so great that CSX chooses to dray as opposed to on-dock access via switch with NPBL.

⁸² CSX, Email from Abby Beazley to Rob Girardot, 3/1/2019 (CSX_STB_0019155–160, at CSX_STB_0019156).

⁸³ There are no comparisons of the costs of draying versus the NPBL switch rate for moving CSX containers at NIT in either the Miller VS or Carey VS. According to Carey VS, fn. 60, “{{ [REDACTED] }}” Once the portion of the dray cost that POV covers is included, the total cost of draying CSX containers at NIT is {{ [REDACTED] }} per container with the CSX portion equal to {{ [REDACTED] }} per container. The NPBL switch rate on a per container basis is between {{ [REDACTED] }} and {{ [REDACTED] }} depending on how many containers per car are assumed. Given these numbers, it would be reasonable to ask if CSX would choose on-dock access at NIT via NPBL if POV's {{ [REDACTED] }} subsidy were applied for either rail or drayage costs at NIT rather than just drayage.

Any foreclosure analysis should be based on the costs of draying containers in this way, which would reasonably be expected to be less costly for CSX than using NPBL at the offered switch rate.

VI.C. When CSX and NS compete by offering a bundle of services to ocean carriers, it makes no sense to focus the foreclosure analysis on effects at an individual container terminal

61. According to the title of Section IV of Professor Miller’s Verified Statement, “CSXT and NS complete for international intermodal business by offering service and rates across a bundle of EC ports.” He describes this relationship stating:

Ocean carriers purchase bundled EC rail service across many lanes and multiple ports. During the proposal and negotiating process ocean carriers {{ [REDACTED] }}. Dozens or hundreds of rates are offered, varying across lanes connecting different ports and inland points, direction, container size, and whether loaded or empty. Ocean carriers select between the railroads based on the array of rates, service, and other aspects of the contractual relationship. The resulting contracts between the ocean carriers and the railroads include {{ [REDACTED] }}.⁸⁴

Given this dynamic, ocean carriers will tend not to focus on particular lanes but rather negotiate for international intermodal rates through bundled, multi-lane negotiations.⁸⁵

⁸⁴ Miller VS, ¶ 74.

⁸⁵ See, for example, Christopher Luebbers, Dep. Tr., 2/25/2020, at 29:20–25, 36:4–15. {{ [REDACTED] }}
 {{ [REDACTED] }} See also ONE Proposal Presented by Norfolk Southern Corporation, February 15, 2018 (STB-NS-0010589); and Amendment to No.5 to Agreement for Rail Transport Services entered between Maersk and CSX (CSX_STB_0000747). See also Luebbers VS, Section III (“Railroads and ocean carriers enter into multi-year agreements to cover the intermodal rail services. These agreements generally last from {{ [REDACTED] }} and cover linehaul rates, fuel surcharge provisions, any special accessorial charges or terms that vary from the railroad’s rules circular, and other provisions such as {{ [REDACTED] }}. While there are rate negotiations at a lane level, the overall value of the deal will determine the winner.”)

62. In such an environment, the competitive significance of a cost disadvantage of a single set of lanes, such as those between Midwest BEAs and NIT, will be of diminished importance given the overall business that CSX would gain from winning a contract. That is, when making an offer to an ocean carrier, CSX would consider the expected profitability of the overall offer rather than the profitability of specific movements that would be covered by the contract.⁸⁶ An increase in cost of between {{[REDACTED]}} per container for movements through NIT will make little difference and could not possibly result in significant foreclosure of CSX's ability to compete for ocean carrier contracts specially given that {{[REDACTED]}} of CSX's international container traffic goes through NIT.⁸⁷

VI.D. Averaged over CSX movements through POV, the cost increase that CSX claims as foreclosing at NIT is de minimis

63. As previously described above, the contract rates offered by CSX tend {{[REDACTED]}} depending on whether shipments pass through NIT or VIG at POV. Thus, when setting rates for lanes between the Midwest and POV, CSX will assess the expected profitability of movements through POV averaging over costs at the two terminals. The expected cost to CSX for movements through POV would take into account the expected share of those movements going through VIG versus NIT.
64. For example, when competing for an ocean carrier contract, if CSX expects the shares of containers routed through the two terminals will be X_{VIG} and X_{NIT} , then the effect of an increase in cost at NIT of Δc on the expected cost of offering service at POV will be $\Delta c \times X_{NIT}$. Given that CSX has a {{[REDACTED]}} share at NIT because of POV's efficient sorting of vessel traffic, the effect of even a sizeable cost disadvantage at NIT relative to VIG make little difference to CSX cost of serving container traffic at POV.
65. As reported in Section VI.A, the share of CSX container traffic between Midwest BEAs and POV that goes through NIT is {{[REDACTED]}} Using these shares for X_{NIT} in the calculation above, a cost increase at NIT of {{[REDACTED]}} per container would only increase CSX's expected costs of serving container traffic at POV by {{[REDACTED]}}⁸⁸

⁸⁶ See, for example, a document relied on by Ms. Carey in her VS that shows CSX analyzing its profitability across its network in considering what rates to offer Evergreen on particular routes. CSX, Email from Miguel Coles to Justin Gorski and Others, 6/11/2018 (CSXT0067122, at CSXT0067125-28).

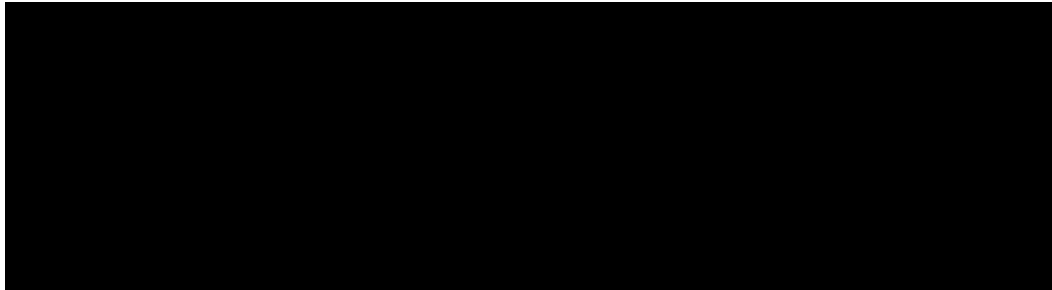
⁸⁷ While I have not tried to account for the effects of a cost increase of between {{[REDACTED]}} per container for movements through NIT on the cost of offering a {{[REDACTED]}} bundle of rail services to ocean carrier, in Section VI.D below I show that the cost increase is de minimis when considered in relation to movements between POV and the Midwest, a smaller set of lanes.

⁸⁸ {{[REDACTED]}}.

66. Figure 8 below reports the mean revenue on CSX movements between POV and the Midwest in 2023 and the impact on the expected cost of those movements from the alleged foreclosing extra cost CSX faces. As shown in the figure, on average, the extra cost is less than {{[REDACTED]}} of the mean revenue on those movements. It is implausible that such an increase in cost could materially affect CSX's ability to compete.

Figure 8: NIT cost increase as a percentage of 2023 CSX mean revenue per container between POV and Midwest BEAs

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Sources: Secretariat Data Request 1-STB Waybill Query.xlsx, BEA Decode.xlsx, SPLC BEA Crosswalk.xlsx, SPLC Crosswalk.xlsx.

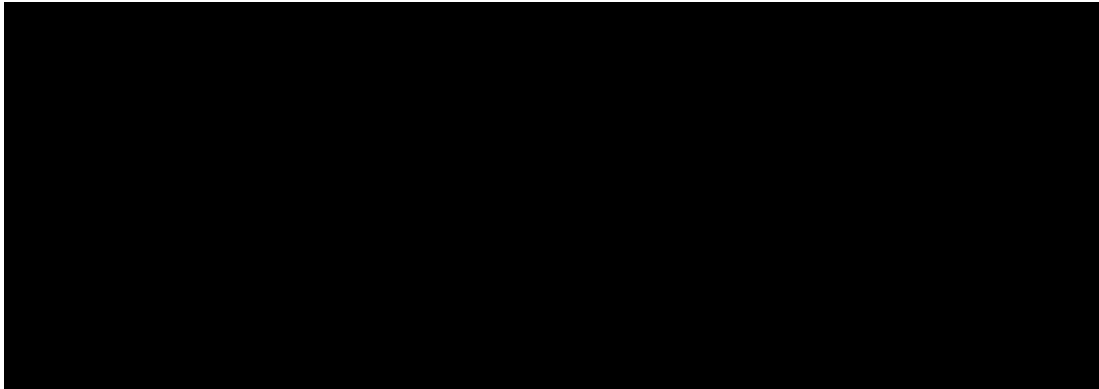
Notes: CSX mean revenue reflects total revenue divided by total containers for CSX movements between POV and Midwest BEAs in 2023.

“Secretariat Data Request 1-STB Waybill Query.xlsx” reflects a filtered sample of STB Waybill data restricted to international intermodal movements in either direction between POV or PONYNJ and the Midwest BEAs identified in Miller VS, Figures 15 and C-8. CSX's growth in its share of movements between POV and Midwest BEAs belies the assertion that CSX is being foreclosed

67. While CSX's share of container traffic tends to be higher at PONYNJ and lower at POV, the opposite is true for NS. Such a share difference across the two ports likely results from a natural advantage for CSX at PONYNJ and for NS at POV. In Section V.B, I show that even absent the alleged foreclosing markup of the NPBL switch rate, NS tends to have a cost advantage at POV due to its ownership of tracks at NIT. In addition, the Fapp rebuttal VS indicates that NS's routes between POV and the Midwest are generally shorter than CSX's routes. Despite these disadvantages, CSX has been able to grow its share in a way that is not consistent with significant foreclosure.
68. Figure 9 reports the share for CSX and NS of container traffic between POV and the Midwest from 2018 to 2024. In 2018, CSX's share was {{[REDACTED]}} but CSX was able to increase its share in 3 years to {{[REDACTED]}} in 2021. While CSX's share dropped in the next several years, the ability to grow share does not suggest significant foreclosure for movements between POV and the Midwest.

Figure 9: Share of container traffic between POV and Midwest BEAs

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Source: CSXT_NS_Summary.dta (See: HC Miller Workpapers)

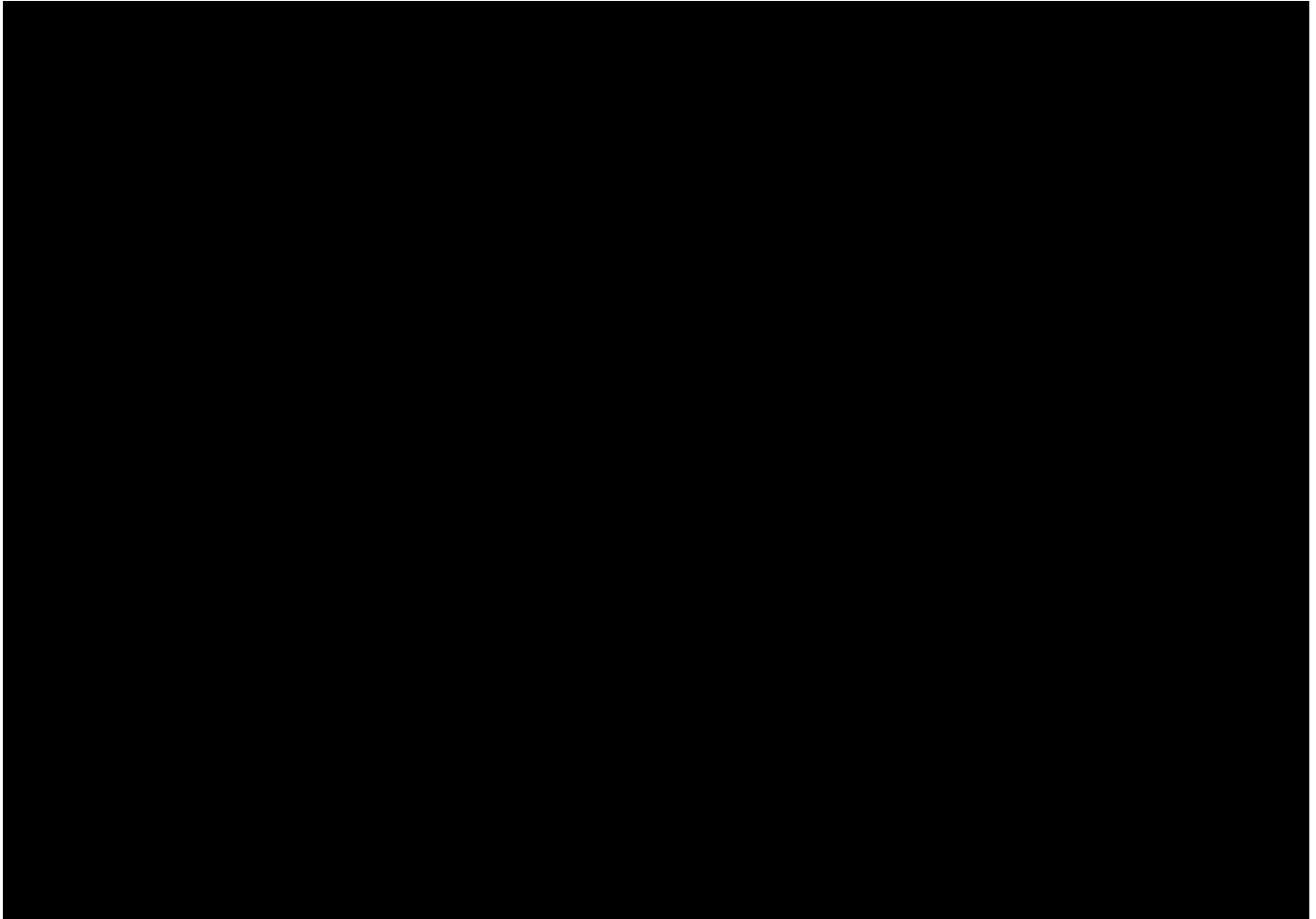
Notes: Midwest BEAs are defined as those identified in Miller VS, Figures 15 and C-8.

69. Figure 10 below is Figure 1 from the Fapp VS.⁸⁹ It shows a longer period than my figure above. CSX had a {{ [REDACTED] }} share of container traffic through POV before 2012 but was able to grow its share and related volume substantially from 2011 to 2021. The pattern of growth in CSX's share of container rail movements through POV is consistent with it overcoming disadvantages. One significant disadvantage CSX faced when moving containers between POV and the Midwest before 2018 was its inability to run double stacked container cars.⁹⁰ That disadvantage was eliminated in 2018 with the completion of the Virginia Avenue Tunnel in Washington, DC.⁹¹ Prior to the completion of the Virginia Avenue Tunnel CSX share of container traffic at POV was 26%. Three years after the completion of the project its container share of rail traffic at POV increased to 36.7%. These patterns of share growth are inconsistent with substantial foreclosure of CSX during this period.

⁸⁹ Supplemental Verified Statement of Daniel L. Fapp ("Fapp VS"), 6/13/2025.

⁹⁰ CSX, "First Train Runs Through New Virginia Avenue Tunnel," 12/23/2016, <https://www.csx.com/index.cfm/about-us/media/press-releases/first-train-runs-through-new-virginia-avenue-tunnel/>.

⁹¹ CSX, "First Train Runs Through New Virginia Avenue Tunnel," 12/23/2016, <https://www.csx.com/index.cfm/about-us/media/press-releases/first-train-runs-through-new-virginia-avenue-tunnel/>. ("CSX [...] today announced the on-time completion of the first phase of the new Virginia Avenue Tunnel project in Washington, D.C., clearing the way for trains to transport double-stacked intermodal freight between Mid-Atlantic seaports and the Midwest on CSX's railroad network. [...] The first CSX freight train passed through the new southern tunnel of the two-tunnel project at 8 a.m. today, carrying double-stacked intermodal freight containers between Portsmouth, Va., and North Baltimore, Ohio. Work on the northern tunnel has already begun, and the entire project is expected to be completed on schedule in mid-2018."); CSX Website, Virginia Avenue Tunnel, <https://www.csx.com/index.cfm/about-us/projects-and-partnerships/virginia-avenue-tunnel/> (accessed 11/10/2025). ("[T]he project was successfully completed in the Fall of 2018.")

Figure 10: Fapp VS Figure 1**{{****}}**

Source: Fapp VS, p. 4.

VI.E. The margins on NS rail movements between POV and the Midwest do not indicate market power

70. Implicit in the claims of foreclosure of CSX as a result of NS's control of NPBL is that NS is able to exercise a degree of market power. Any attempt to foreclose CSX can only be considered successful if it allows NS to exercise market power. Thus far in this section I have described why CSX's claims of foreclosure are implausible. Here I report on NS's margins to show that NS does not appear to be earning margins that in the railroad industry would indicate the exercise of market power.

71. Figure 11 reports the ratio of revenue to variable cost (R/VC) for 2023, a measure of profitability that is commonly used by the STB.⁹² These are based on freight revenue and variable costs calculated in STB's Phase III Uniform Rail Costing System ("URCS").⁹³ Freight revenue is calculated from the carload waybill sample.⁹⁴ The STB calculates variable costs using its URCS model by allocating railroad operating expenses among cost categories based on financial data from carriers' R-1 annual reports.⁹⁵
72. Note that, comparing R/VC on NS movements through POV to movement through PONYNJ, it is not the case that POV margins are {{ [REDACTED] }} than PONYNJ margins. STB classifies routes as market dominant if the R/VC is above 180%.⁹⁶ {{ [REDACTED] }}
{{ [REDACTED] }}
73. Neither Professor Miller nor Ms. Carey support their claim that NS has market power at NIT with evidence on margins. Professor Miller does compare prices for rail movements between POV and the Midwest and PONYNJ and the Midwest in his Figure 13, which reports materially higher prices for movements involving POV. However, as I discuss in Section VII.C, below, this comparison is flawed as the rates quoted for movements through PONYNJ do not include certain port charges that are included in the POV rates.

⁹² Surface Transportation Board, "Simplified Standards for Rail Rate Cases — 2023 RSAM and R/VC>180 Calculations," 5/23/2025, available at: <https://www.stb.gov/reports-data/economic-data/>.

LE Peabody, "STB's Three-Benchmark Rate-Case Approach," 3/28/2025, <https://www.lepeabody.com/post/stb-s-three-benchmark-rate-case-approach/>.

⁹³ Surface Transportation Board, "The Railroad Cost Program (Microsoft Excel Version)," c. 2021, at p. 40, available at: https://www.stb.gov/wp-content/uploads/STBRailroadCostProgram_ManualForExcel.pdf/.

⁹⁴ Surface Transportation Board Website, Carload Waybill Sample, [https://www.stb.gov/reports-data/waybill/\(10/31/2025\)](https://www.stb.gov/reports-data/waybill/(10/31/2025)).

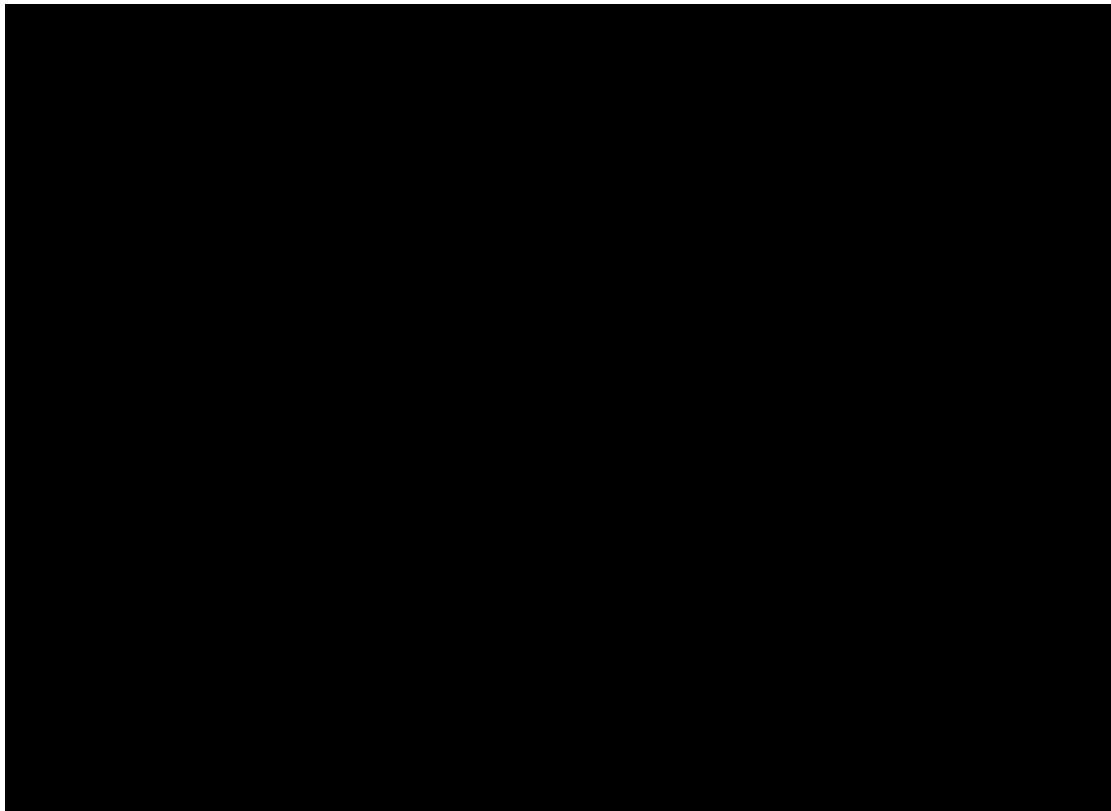
Note that "revenue reported in the freight revenue field may be masked and not equal to the actual revenue on the freight waybill."

⁹⁵ Surface Transportation Board Website, Uniform Rail Costing System (URCS), [https://www.stb.gov/reports-data/uniform-rail-costing-system/\(10/31/2025\)](https://www.stb.gov/reports-data/uniform-rail-costing-system/(10/31/2025)).

⁹⁶ Surface Transportation Board, "An Examination of the STB's Approach to Freight Rail Rate Regulation and Options for Simplification," 9/14/2016, at p. V, available at: <https://www.stb.gov/wp-content/uploads/STB-Rate-Regulation-Final-Report.pdf>. ("Moreover, by statute, a railroad is not considered to have market dominance unless the revenue produced by the rate is greater than 180% of its variable cost of providing the service (R/VC Ratio, or R/VC>180) as determined under the STB's Uniform Rail Costing System, known as 'URCS.'").

Figure 11: NS R/VC for international intermodal movements of import and export linking PONYNJ and POV and the Midwest in 2023

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Sources: Secretariat Data Request 1-STB Waybill Query.xlsx, BEA Decode.xlsx, SPLC BEA Crosswalk.xlsx, SPLC Crosswalk.xlsx.

Notes: R/VC is calculated as the total revenue divided by the total variable cost for a given BEA area and port combination. Total revenue is inclusive of fuel surcharges. “Secretariat Data Request 1-STB Waybill Query.xlsx” reflects a filtered sample of STB Waybill data restricted to international intermodal movements in either direction between POV or PONYNJ and the Midwest BEAs identified in Miller VS, Figures 15 and C-8.

VI.F. Ms. Carey’s foreclosure analysis is unreliable

74. Ms. Carey does what she refers to as a foreclosure analysis. In it Ms. Carey calculates the contribution margins on CSX movements between VIG and the Midwest with additional costs added. Those additional costs include what she refers to as the “Incremental Switch Rate,” which is the difference between the per container NPBL switch rate assuming two containers per railcar and “Competitive short line switch rate,” which appears largely based on the CWRV switch rate for movements through VIG.⁹⁷ Some of the additional costs that Ms. Carey adds appear to me unrelated to the alleged anticompetitive foreclosure. These include “Loaded empty additional cost,” “Crew additional cost,” “Locomotive additional cost,” and

⁹⁷ See Carey HC-WP Rate Switch Move by Move.xlsx

“Trackage Charge.”⁹⁸ These presumably are additional costs that CSX would face had those movements gone through NIT rather than VIG. After adding these additional costs Ms. Carey calculates the contribution margin and reports the share of those movements with a contribution margin below 5 percent.

75. She reports the results of this analysis as:

[I]f [CSX] used NPBL to access NIT on dock rail, approximately {{[REDACTED]}} of the international intermodal traffic volumes on the corridors from NIT to Midwestern locations and {{[REDACTED]}} of the international intermodal traffic volumes moving to the NIT terminal from Midwestern locations would be deemed uneconomic to CSXT due to substantial elimination of the contribution margin. . . . [S]o the \$210 rate effectively blocks CSXT from competing for on-dock rail at NIT.⁹⁹

76. Discussed below are two issues with Ms. Carey’s foreclosure analysis that make it uninformative for the question at hand. First, a substantial share of CSX’s movements between VIG and Midwestern locations were already “uneconomic” according to Ms. Carey’s criterion even before adding costs associated with on-dock service at NIT. Thus, the percentages reported by Ms. Carey are misleading as a measure of the degree of foreclosure hypothetically caused by increased costs at NIT. The fact that many movements through VIG at actual costs would be flagged as uneconomic also raises questions about the metric that Ms. Carey uses to label movements uneconomic. However, more importantly, Ms. Carey’s foreclosure analysis does not address the issue that CSX has avoided much of the alleged foreclosing increase in costs through draying and POV’s efficient directing of CSX container traffic to VIG.

VI.F.1. Ms. Carey’s threshold for uneconomic movements is uninformative

77. Ms. Carey’s emphasis on individual lane profitability misses the point that rates aren’t being negotiated for each route individually. Rather, carriers and railroads typically discuss multiple inland lanes simultaneously, allowing them to balance high-volume, high-margin routes with less profitable ones.¹⁰⁰ However, even if individual lane profitability were the focus of railroads in their maximization process, her analysis fails to provide a baseline for CSX’s current uneconomic movements, and therefore it is not

⁹⁸ See Carey HC-WP Rate Switch Move by Move.xlsx

⁹⁹ Carey VS, p. 29.

¹⁰⁰ See Luebbbers VS, Section IV (“the railroad often will work with other alternative approaches such as {{[REDACTED]}}”); Carey Dep. Tr., 10/28/2025, at 164:18–165:2. (agreeing that when railroads assess how to set rates for ocean carriers, they consider their profitability across the full bundle of services they provide, not just a single lane).

immediately clear what portion of the shares listed in her report¹⁰¹ is due to any allegedly high switch rates and which portion is the result of CSX's normal course of business at VIG.

78. Many of the movements through VIG, where there is no allegation of foreclosure, are uneconomic according to Ms. Carey's classification even without the additional costs associated with NPBL that Ms. Carey calculates. I re-ran Ms. Carey's analysis without adding any additional costs while keeping her assumptions regarding the necessary profitability threshold. The results imply that {{[REDACTED]}} of international containers moved through VIG by CSX to or from the inland destinations selected by Ms. Carey are uneconomic, {{[REDACTED]}} This alone makes Ms. Carey's calculations uninformative.

VI.F.2. Correcting Ms. Carey's foreclosure analysis indicates a de minimis effect on profitability from the cost increase that CSX claims as foreclosing

79. Ms. Carey's foreclosure analysis fails to address the question of whether NPBL's allegedly high switch rate results in anticompetitive effects. As I have already explained, there is no ability to foreclose a rival if the rival is able to substitute away from using the input that is being foreclosed. Ms. Carey's analysis does not analyze the actual effects of the alleged foreclosure on CSX costs, account for the lower costs CSX faces by substituting drayage for rail service by NPBL, or consider the effects of POV's efficient sorting of vessels.
80. Ms. Carey's analysis goes wrong by its excessively narrow focus on CSX's ability to compete for "on-dock rail at NIT"¹⁰² and thus not on whether the higher costs that CSX faces at NIT really have a material impact on CSX's ability to compete with NS. In order to address this deficiency in Ms. Carey's analysis, in part, I redo Ms. Carey's analysis to show the effects of the alleged foreclosure on CSX while accounting for the fact that the efficient routing of vessels at POV allows CSX to largely avoid the higher costs it faces at NIT, but even this analysis likely analyzes the cost effects on CSX too narrowly.
81. As I describe in Section V.A above, POV sorts vessel traffic between NIT and VIG such that most containers carried by CSX travel through VIG and railroads generally set the same rates for movements through the two container terminals. Hence, simultaneously analyzing the movements of CSX at POV, irrespective of terminal, is a more accurate portrayal of the potential effects of changes in cost structure for a railroad when it comes to the existence of uneconomic movements. Therefore, I compare the share of uneconomic movements (as defined by Ms. Carey) for CSX across both NIT and VIG before and after

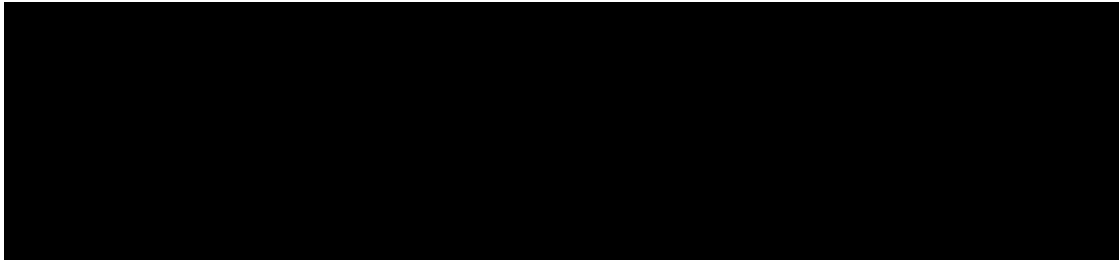
¹⁰¹ Ms. Carey outlines the share of container movements between VIG and eight inland BEAs that she would consider to be uneconomic movements with NIT costs at "HC-WP-Switch Rate Move by Move".

¹⁰² Carey VS, p. 29.

reducing NIT costs by the “incremental switch cost” that Ms. Carey alleges is associated with CSX movements through NPBL.¹⁰³ The resulting shares are summarized below in Figure 12. It is clear that changes in the switch rate, as estimated by the Carey VS, do not meaningfully change the share of CSX uneconomic movements at POV. Even if the NPBL switch rate was the same as the CWRY rate at VIG, significant volumes of CSX moves would be “uneconomic,” suggesting that factors other than the switch rate explain the contribution margins.

Figure 12: CSX volume share of uneconomic movements at NIT and VIG in 2023

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Sources: 202301 to 202304.csv, 202305 to 202308.csv, 202309 to 202312.csv, Centralized Station Master.xlsx.

Notes: Calculations reflect modifications to the analysis performed in Carey HC-WP Rate Switch Move by Move. Volume shares reflect the percentage of total container movements with margins less than 5%. The additional costs described by Ms. Carey in this analysis are not included in the calculation of volume shares. In the “Costs decreased by alleged switch rate markup” column, CSX costs on movements through the NIT terminal are decreased by Ms. Carey’s estimation of the incremental switch cost (\$105-\$58.13 = \$46.87).

VI.G. Despite claims to the contrary capacity expansion at NIT would free up capacity at VIG currently used for NS container movements

82. Professor Miller and Ms. Carey claim that the expansion of NIT’s capacity will increase the anticompetitive effects of the foreclosure at NIT. Professor Miller writes,

NIT is undergoing a large expansion. VIG, however, has already expanded as much as possible. This means that CSXT’s competitive disadvantage due to lack of NIT on-dock rail access will only get worse in the future. Figure 14 shows that NIT handled {{[REDACTED]}} of rail containers at POV in 2024.¹⁰⁴

Similarly, Ms. Carey states,

¹⁰³ This “incremental switch cost” is calculated as the difference between the NPBL switch rate assuming 2 containers per car {{[REDACTED]}} and Ms. Carey’s estimate of a competitive short line switch rate {{[REDACTED]}}. See: Carey HC-WP Rate Switch Move by Move.xlsx

¹⁰⁴ Miller VS, ¶ 115.

The concerning NS exclusivity and shares at NIT observed today is set to profoundly increase in the near future because NIT is in the process of substantially expanding its capacity and capability.¹⁰⁵

83. While the capacity at VIG was recently expanded, contrary to Professor Miller's claim, the evidence indicates that there is room for further expansion at VIG. For example, a Port Strategy article states that "[VIG] recently expanded to 2.2 million TEU capacity and has scope to increase further to four million TEU per annum, if required."¹⁰⁶
84. Neither Professor Miller nor Ms. Carey provide an economic analysis to support their conclusions other than the simplistic argument that expanding NIT increases the importance of NIT and by implication any cost disadvantage the CSX suffers at NIT. However, as I show in Appendix C, this logic is overly simplistic. Expanding capacity at one terminal allows for a reallocation of traffic that would tend to lower congestion costs at both terminals. An expansion at NIT would allow more NS carried containers to travel through NIT freeing up capacity for CSX at VIG and lowering congestion at both terminals.
85. A more complete analysis would need to look at a forecast of volume increases at POV and an analysis of which terminals are projected to handle that increase.¹⁰⁷ If all future volume increases were planned to be handled by future expansions at NIT, then it could be the case that the effects of CSX's cost disadvantage might become more important. However, that is not supported by the evidence. As noted above, there is room for further expansion at VIG.¹⁰⁸ In addition, a new container terminal at Craney Island, which is adjacent to VIG, is planned to double the container capacity of the port and dwarf the capacity at NIT and VIG.¹⁰⁹

¹⁰⁵ Carey VS, p. 8.

¹⁰⁶ Port Strategy, "More Capacity Required," 9/26/2024, <https://www.portstrategy.com/operations/more-capacity-required/1496979.article>.

¹⁰⁷ Ms. Carey did not analyze the extent to which the NIT expansion would increase NIT demand for rail or for truck service, nor did she analyze whether CSX would have capacity to handle increased volumes at NIT on dock after the expansion. Carey Dep. Tr. 10/28/2025, at 33:19–35:8.

¹⁰⁸ Port Strategy, "More Capacity Required," 9/26/2024, <https://www.portstrategy.com/operations/more-capacity-required/1496979.article>.

¹⁰⁹ Virginia Maritime Association Website, VA Port Priority Projects, <https://vamaritime.com/Web/Advocacy/VA-Port-Priority-Projects.aspx> (accessed 11/4/2025). See also Port of Virginia, "FY2022-2065 2065 Master Plan," 10/31/2021, at 10, available at: <https://www.portofvirginia.com/wp-content/uploads/2023/09/2021-Master-Plan-Executive-Summary-2.pdf>.

VII. Defining the market as the land transportation of intermodal containers between NIT and inland BEAs is clearly too narrow

86. As I discuss above in VI.A both Professor Miller and Ms. Carey make the claim that the high NS share of international container rail traffic between NIT and Midwest BEAs indicates that NS has market power. However, market shares provide indirect evidence of market power only if they are calculated over a properly defined relevant antitrust market. In the context of using shares to predict a concerning increase in concentration from a merger, the 2023 Merger Guidelines state, “An analysis of concentration involves calculating pre-merger market shares of products *within a relevant market*” (emphasis added).¹¹⁰

87. With regard to defining a market, Professor Miller writes,

Market shares in a relevant market can inform the competitive conditions in the market. For the purposes of this control proceeding, the provision of land transportation for IM containers between NIT and the inland BEAs located in or near the Midwest of the US constitute a relevant market.¹¹¹

In her deposition, Ms. Carey stated that she had not defined a relevant market,¹¹² and yet she draws conclusions from shares at NIT that would usually require they be shares calculated over a properly defined market.

88. In the previous two sections, I showed that Professor Miller and Ms. Carey’s assertions regarding the foreclosing effects of the NPBL switch rate at NIT are not supported by direct evidence relating to the claimed size of the foreclosing cost increase and the ability of CSX to substitute away from the use of the allegedly foreclosed input. In this section, I directly address the market definition question. One obvious conclusion from the analyses presented in Figure 8 and Figure 12 above is that if the market is defined at least as broadly as involving movements between POV and the Midwest rather than NIT and the Midwest, claims of foreclosure are implausible because the increase in CSX’s cost attributable to the alleged foreclosure is too small to make a material difference. While it should be obvious from the previous

¹¹⁰ US Department of Justice and the Federal Trade Commission, “Merger Guidelines,” c. 2023, at §2.1, available at: <https://www.justice.gov/atr/media/1329301/dl?inline>.

¹¹¹ Miller VS, ¶ 116.

¹¹² Carey Dep. Tr., 10/29/2025 at 19:3–12. (“Q. Okay. But I just want to understand. You’ve used the word ‘market share’ in your response -- A. I meant to say ‘share.’ Q. And what’s the difference between ‘market share’ and ‘share’? A. I’m calculating the shares. I’ve not defined a relevant market. I’m looking at corridors and stations and shares as is common at the STB.”)

discussion that defining a market that is limited to NIT is overly narrow, I discuss the evidence that the relevant market is likely better defined even more broadly.

VII.A. CSX and NS compete by offering ocean carriers a bundle of services across their rail networks rather than at individual terminals

89. As described above in Section VI.C, CSX and NS compete by offering ocean carriers a bundle of rail services between ports and inland origins and destinations. This means that while one railroad or another may have advantages on a particular route, ocean carriers choose between railroads to align with based on the overall competitiveness of the bundle. Thus, a higher price at one of many international container terminals used to reach a particular set of inland locations will tend to have a relatively small effect on the overall competitiveness of the bundle.
90. In addition, from a market definition standpoint, if international intermodal rail services are contracted for as a bundle and competed for as a bundle—as Professor Miller claims—it does not make sense to define a market that involves movements through a single container terminal at a single East Coast port. Defining the market as Professor Miller does is like defining a market for left-shoes and ignoring the fact that left- and right-shoes are sold as a bundle.

VII.B. Ocean carrier substitute between EC ports

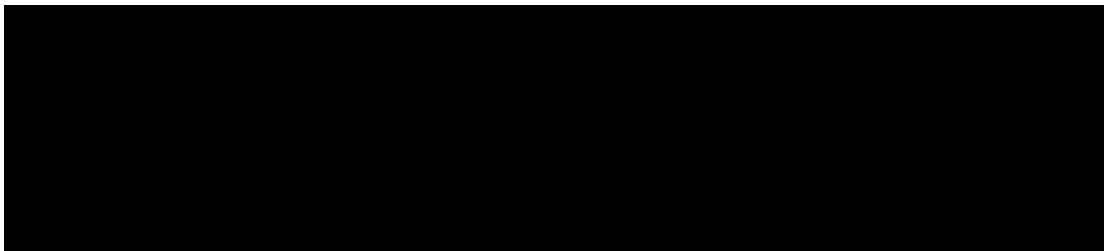
91. In addition to the fact that railroads compete over a bundle involving many ports and destinations, the evidence indicates that ocean carriers can shift traffic between ports, which would further undermine reasonableness of defining a market that involves a single terminal such as NIT. Professor Miller acknowledges that ocean carriers substitute between ports but claims that the substitution is “inadequate . . . to constrain the exercise of market power by NS at NIT.”¹¹³
92. Ocean carriers seem to be able to substitute between POV and PONYNJ depending on which railroad the container will be carrier to the Midwest. For example, see Miller VS Figure 10. Note that for shipments involving Midwest locations 76% of NS carried containers go through POV and 66% of CSX carried containers go through PONYNJ. While Miller VS claims that the data “shows that {{ [REDACTED] }} of containers that are routed over POV and PONYNJ are going to and from inland stations where shippers choose to {{ [REDACTED] }},” the proper conclusion is that ocean carriers seem to substitute between POV and PONYNJ depending on which railroad the container will be carried on and the natural advantages of each railroad at the two ports.

¹¹³ Miller VS, § IV.B.

93. Container counts of aligned ocean carriers summarized by Professor Miller support this conclusion. Figure 13 below reflects the total container traffic at POV and PONYNJ for major CSX and NS aligned ocean carriers as calculated in Miller VS Figure 9. In 2024, 65.1% of total POV and PONYNJ rail-carried traffic by CSX aligned major ocean carriers traveled through PONYNJ. Similarly, 61.8% of total POV and PONYNJ rail-carried traffic by NS aligned major ocean carriers traveled through POV.
94. Moreover, CSX believes it is able to get ocean shippers to move their traffic between ports. According to an internal CSX email from Wesley Ann Barton to Maryclare Kenney, Jay Strongosky and Rob Girardot, {{ [REDACTED] }}
 [REDACTED]
 [REDACTED] }}¹¹⁴

Figure 13: POV and PONYNJ shares for rail carried containers by ocean carrier rail alignment in 2024

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Source: Miller VS, Figure 9.

Notes: Port containers reflect the sum of “Port Containers” for all “CSXT Aligned Carriers” and “NS Aligned Carriers” for POV and PONYNJ. Port share represents the port containers for a given port and alignment divided by total POV and PONYNJ containers.

VII.C. Professor Miller’s analysis of competition between East Coast ports is flawed

95. While acknowledging that ocean carriers substitute between ports, Professor Miller argues that competition between ports has not led to equal rail rates at POV and PONYNJ. He writes

Base line haul rates for rail service to the same inland location from POV and PONYNJ have not equalized in response to competitive forces. Additionally, despite the differences in base line haul rates for a rail movement to the same inland location from POV and

¹¹⁴ CSX, Email from Wesley Ann Barton to Maryclare Kenney, Jay Strongosky and Rob Girardot, 11/15/2018 (CSX_STB_0048655).

PONYNJ, ocean carriers still use rail services over multiple ports for movements to the same inland location.¹¹⁵

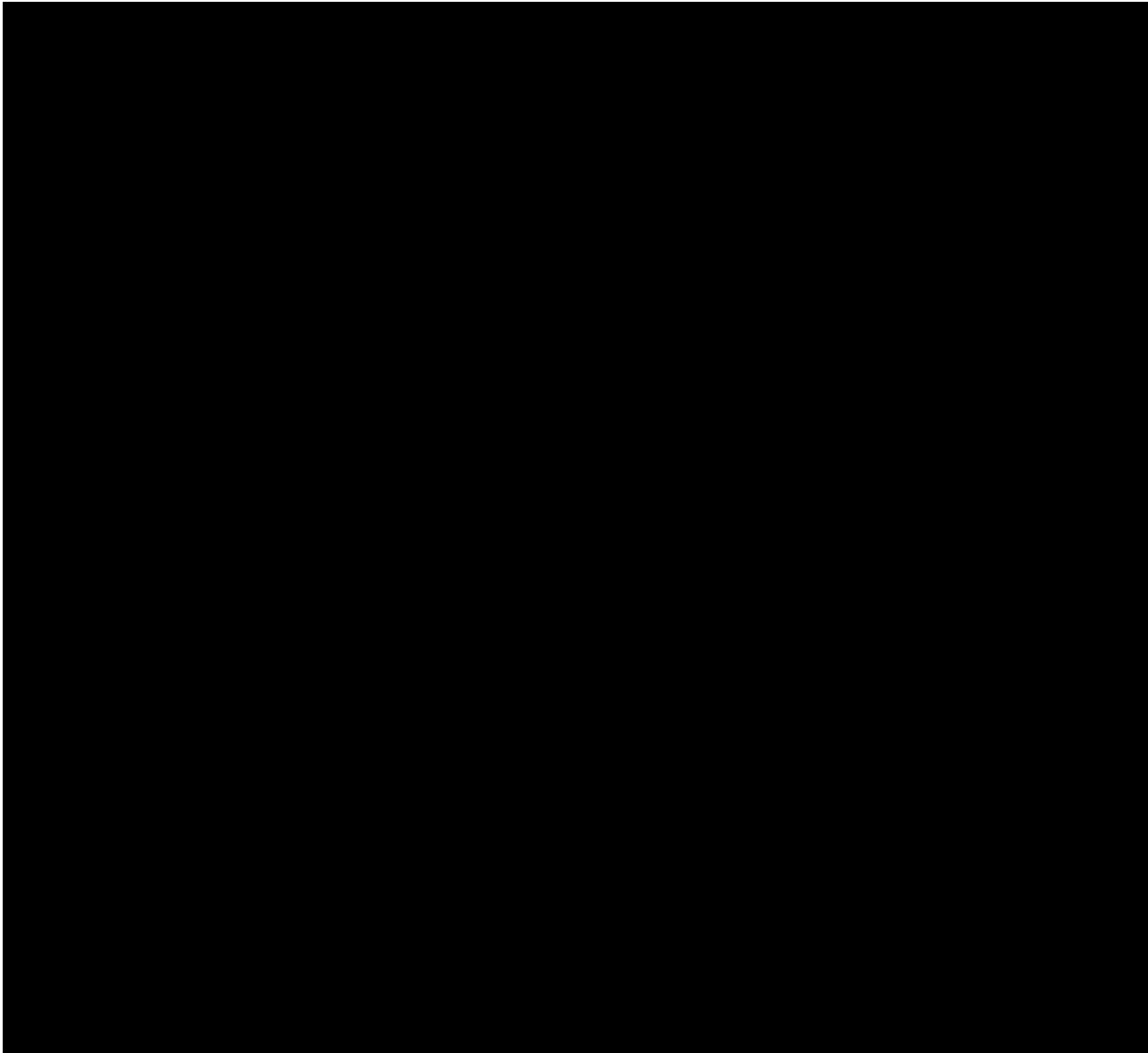
With this, he concludes that competition between ports is insufficient to prevent the exercise of market power by NS at NIT for movements to and from the Midwest.

96. The evidence that Professor Miller relies on for the conclusion that rates for rail service have not “equalized” for movements through POV and PONYNJ is presented in his Figure 13, where he reports base line-haul rates for imported containers from contracts with various ocean shippers going to Midwest destinations. I have reproduced the figure below.

¹¹⁵ Miller VS, ¶ 81.

Figure 14: Miller VS Figure 13

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Source: Miller VS, p. 44.

Notes: Ocean carriers shows are two largest aligned carriers for CSXT and NS. The three metropolitan areas are the Midwest BEAs with the most rail containers moved through POV and PONYNJ. Includes all loaded and empty 20 and 40 foot import rail containers. Rates shown are for 40/45 foot loaded containers. Base line haul rates are stated in the cited contracts, which typically excluded add on charges (e.g. fuel-surcharges and annual escalations. Line haul rates shown are not directly comparable between shippers because contracts are from different years.

97. However, as many sources in the record of this proceeding indicate, a simple comparison of contract rates for movements involving POV and PONYNJ does not account for the fact that the contract rate for POV

includes port lift charges while PONYNJ does not.¹¹⁶ For example, the 2019 NS contract with ocean carrier ONE rate sheet contains the following note:

{{ [REDACTED] }
[REDACTED]
[REDACTED] }}¹¹⁷

98. There is {{ [REDACTED] }
[REDACTED] }}¹¹⁸

99. Additionally, there is nothing to suggest that container movements included in Figure 14 (Miller VS Figure 13) are related to the rates listed in the same figure, therefore whatever inference Professor Miller makes with regard to the relationship between the rates and container movements is questionable.

VII.D. Claims by Professor Miller and Ms. Carey that VIG is an inadequate substitute for NIT ignores the reality at POV

100. In Section V.A, I describe that POV's sorting of CSX container traffic away from NIT and to VIG has succeeded in allowing CSX to largely avoid the extra cost it faces at NIT relative to VIG. In 2024, of containers carried by CSX between POV and the Midwest 13% pass through NIT and 87% pass through VIG.¹¹⁹ In Section VI.D, I show that because of this sorting of traffic between terminals, the alleged foreclosing additional costs that CSX faces at NIT has a de minimis effect on CSX's overall cost of moving containers between POV and the Midwest. The alleged extra cost to CSX due to foreclosure amounts to an extra cost of between \$6.75 and \$1.30 per container, before accounting for the fact that CSX's choice to dray containers at NIT reduce costs further.¹²⁰ Thus, Professor Miller's claim in a section heading that "On-Dock Rail Service at VIG is not an Adequate Competitive Alternative to On-Dock Rail Service at NIT"¹²¹ is disconnected from the reality that CSX largely avoids the added costs at NIT through the use of VIG.

¹¹⁶ Kenneth Joyner, Dep. Tr., 2/19/2020, at 172:11–13.

¹¹⁷ Norfolk Southern, "Intermodal Transportation Agreement," 2/7/2019 (STB-NS-0010607–628, at STB-NS-0010626).

¹¹⁸ Luebbers VS, fn 4.

¹¹⁹ Carey VS, Appendix A, Figure 2. **Note:** $26,329 / (26,329 + 176,768) = 0.13$

¹²⁰ See the discussion in ¶65 above.

¹²¹ Miller VS, § V.D.

101. It is not clear from his Verified Statement what level of sorting of container traffic at POV would make VIG an adequate alternative in Professor Miller's view. However, the following quote seems to suggest that he would need to see a perfect sorting of container traffic:

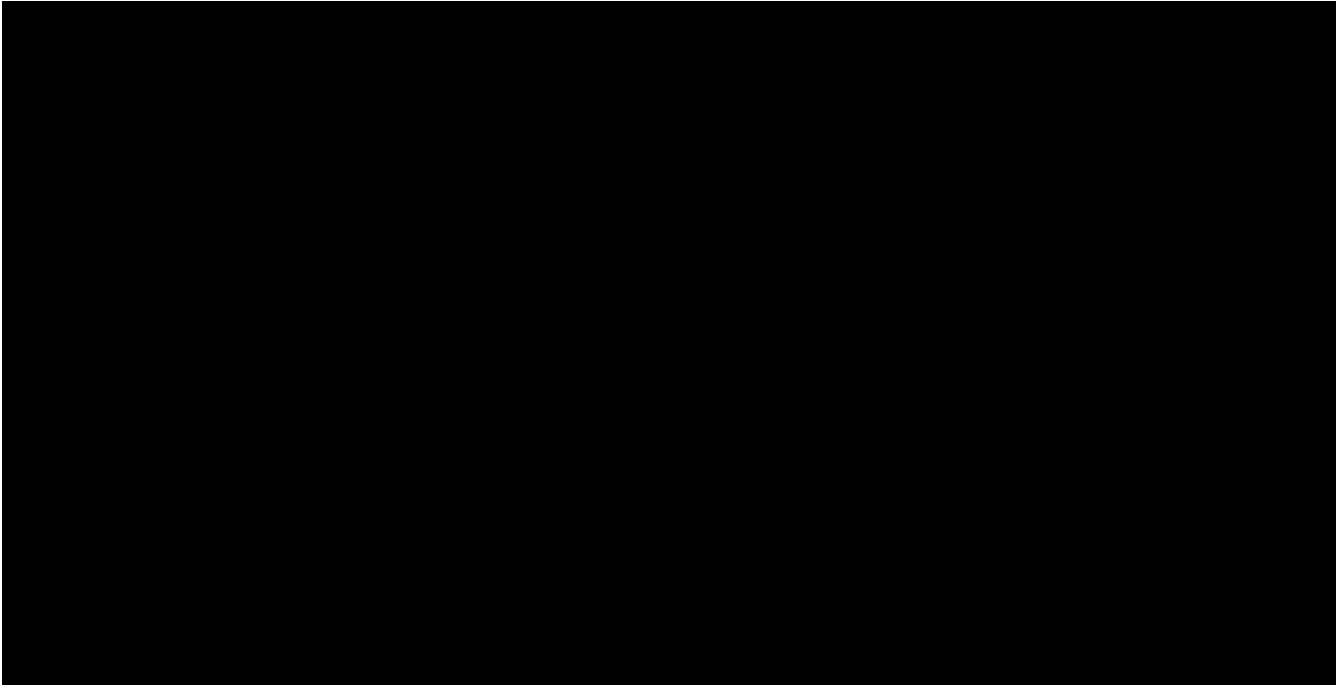
Given the differentiated rail access for CSXT and NS at VIG and NIT, POV has generally tried accommodating ocean carriers' preferred rail carrier and corresponding berthing. This accommodation is far from perfect. Figure 14 shows the volumes and shares of rail moved containers that each ocean carrier using POV moves through NIT and VIG, and on which railroad. {{ [REDACTED] } }¹²²

The figure referred to in the quote above is reproduced below and shows that POV is largely successful in sorting container traffic between NIT and VIG in such a way that CSX can avoid the disadvantages it faces at NIT. It is not clear what an "adequate alternative" would look like to Professor Miller.

¹²² Miller VS, ¶ 108.

Figure 15: Miller VS Figure 14

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Source: Miller VS, p. 57

Notes: Limited to major VOCCs moving traffic over POV. Totals include containers moved for entities not shown in figure (i.e., NVOCCs, Freight Forwarders, and Ports). VOCCs included in figure make up {{[REDACTED]}} of POV traffic in 2024. “On-Dock” and “Via Drayage” describes the railroads’ predominant methods of access to the terminal.

102. In addition, Professor Miller concludes that East Coast ports are not sufficient substitutes to prevent the exercise of market power because the rail rates at POV and PONYNJ had not “equalized.” He also points out that rail rates {{[REDACTED]}}¹²³ However, Professor fails to explain why the fact that rates {{[REDACTED]}} does not imply that substitution between the two terminals does in fact prevent the exercise of market power at NIT.

VII.E. Professor Miller’s analysis improperly dismisses trucking as a competitive alternative

103. Trucking acts as a competitive constraint on international intermodal rail along the U.S. East Coast¹²⁴ because trucks generally offer faster door-to-door transit times, greater routing and schedule flexibility,

¹²³ Miller VS, ¶¶ 81, 84.

¹²⁴ Freight Waves, “Intermodal freight continues to shift to East Coast, benefiting trucking,” 10/07/2019, <https://www.freightwaves.com/news/intermodal-freight-continues-shift-to-east-coast-benefiting-trucking>

and simpler single-mode logistics that avoid the drayage and terminal dwell steps required for rail. Trucking competitively dominates rail at distances shorter than 500 miles,¹²⁵ trucks and rail compete at longer distances and trucks have a sizeable share of domestic intermodal movements between 750 and 1,500 miles. A 2024 report by Oliver Wyman indicates that in medium-haul domestic intermodal lanes (750-1,500 miles), rail had a 27 percent share.¹²⁶

104. Professor Miller minimizes the importance of competition from trucking by claiming that trucking has a {{[REDACTED]}} of intermodal movements between POV and the Midwest BEAs he considers.¹²⁷ Ms. Carey reports a {{[REDACTED]}} share for truck movements, The issue of the competitive constraint imposed by trucking for movements between East Coast ports and the Midwest is addressed at length in the Fapp Rebuttal VS. Mr. Fapp’s review of the data indicates Ms. Carey’s share calculation understate the actual share of truck for these movements.¹²⁸

(“[W]eak trucking spot prices (DATVF.VNU), down 16.4% year-to-date, have pulled intermodal rates down with them.”)

¹²⁵ See supra note 62.

¹²⁶ See, Oliver Wyman, “Following The Freight — Where To Find Rail Intermodal Growth,” available at <https://www.oliverwyman.com/our-expertise/insights/2024/jun/where-to-find-rail-intermodal-growth.html>.

¹²⁷ Miller VS, ¶ 90.

¹²⁸ Fapp Rebuttal VS, pp. 49, 50.

VERIFICATION

I, Keith Waehrer, 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 19, 2025.

A handwritten signature in black ink, appearing to read 'Keith Waehrer', with a long horizontal flourish extending to the right.

Appendix A. Curriculum Vitae

**Keith Waehrer, PhD**

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Keith Waehrer has testified at deposition and trial on mergers, monopolization claims, and calculations of reasonable royalties. He has worked on some of the highest profile antitrust litigations in recent years—United States v. Google, United States v. ASSA ABLOY, State of New York et al. v. T-Mobile-Sprint, FTC v. Qualcomm, United States v. AT&T-Time Warner, and United States of America et al. v. American Express Co. et al.—and on significant mergers—E.I. DuPont de Nemours & Co. and Dow Chemical Company, United Technologies Corp. and Rockwell Collins, and Comcast and Time Warner Cable (abandoned).

As a visiting partner at ESMT Competition Analysis (now known as E.CA Economics) in Berlin, Germany, Dr. Waehrer worked on a number of significant matters before the European Commission and national competition authorities in Europe. Dr. Waehrer's international experience also includes work on a significant merger matter before the South African competition authorities.

Dr. Waehrer has authored highly regarded papers on the competitive effects in auction markets and the impact of overlapping minority shareholdings on competition. He has worked on matters involving a wide range of industries, including consumer products, telecommunications, aerospace, music licensing, Internet services, pharmaceuticals, financial services, e-commerce, agricultural inputs, industrial parts, and chemicals. Dr. Waehrer has been named to Global Competition Review's list of International Who's Who of Competition Economists in 2012 and yearly since 2018.

EDUCATION

- Ph.D., Economics, Rutgers University
- M.A., Economics, Rutgers University
- B.A., Economics, Trinity College

ASSOCIATIONS

- American Bar Association, Antitrust Section
- American Economic Association
- CRESSE Associate (Law, Policy, and Practice)

REPRESENTATIVE EXPERIENCE

Mergers

- US v. ASSA ABLOY and Spectrum Brands: On behalf of the US Department of Justice testified on the effects of ASSA ABLOY's acquisition of Spectrum Brand's Hardware and Home Improvements division with and without the proposed remedy divestiture. (Trial Testimony: May 1, 2023; Deposition testimony: April 13, 2023; Reply Report: March 24, 2023; Expert Report: February 10, 2023.)
- Canadian Pacific's acquisition of Kansas City Southern: On behalf of Union Pacific (UP) led the support team preparing Professor Steve Salop's submissions to the Surface Transportation Board. Our work involved extensive analysis of rail traffic data from the merging parties and UP.
- NVA/SAGE and NVA/Ethos: Working for NVA, provided analyses and data to assist with the FTC's review of the acquisition of SAGE and Ethos. The primary data involved customer data from the parties' veterinary clients. We used those data to generate maps comparing customer locations for clinics, overlap percentages for clinic draw areas, and an econometric analysis to estimate diversion ratios for GUPPI analyses.
- Aon/Willis Towers Watson: On behalf of Willis Towers Watson, provided counsel with input and on analyses presented to the DOJ involving unilateral effects simulations and employee movements.
- UTC/Raytheon merger: On behalf of United Technologies, provided advice to counsel on potential vertical and horizontal issues in various product areas, and provided significant assistance to United Technologies responding to requests from the DOJ and other regulators.
- State of New York et al. v. Deutsche Telekom et al.: On behalf of a group of State Attorneys General litigating to block the merger of Sprint and T-Mobile, led the team supporting the testimonies of Professors Carl Shapiro and Fiona Scott Morton.
- UTC/Rockwell Collins merger: On behalf of United Technologies, assisted counsel seeking antitrust regulatory approval for the acquisition of Rockwell Collins. Provided significant assistance to United Technologies responding to requests from the DOJ and other regulators. Submitted a white paper to Chinese regulators.
- United States v. AT&T/Time Warner: Led the team supporting Professor Carl Shapiro's testimony on behalf of DOJ in its litigation over the proposed merger of AT&T and Time Warner.
- Dow/DuPont merger: On behalf of DuPont, analyzed likely competitive effects of its proposed merger with Dow Chemical in a wide range of markets, including seeds and transgenic traits, agricultural chemicals, and specialty polymers.
- Nelnet/Great Lakes merger: Contributed analyses and advice to counsel for Nelnet in connection with its acquisition of Great Lakes' student loan business. Submitted a white paper and participated in meetings with the DOJ staff and front office. DOJ approved the merger without remedies.
- International Paper/Weyerhaeuser merger: Assisted counsel for International Paper Company by performing merger analyses, including a merger simulation, of International Paper's proposed acquisition of Weyerhaeuser's pulp business. DOJ approved the merger without remedies.

- Iron Mountain/Recall merger: Assisted the Competition Bureau of Canada in its review of the Iron Mountain/Recall merger. Iron Mountain and Recall are suppliers of records management services in Canada and a number of other countries. The merger was not challenged by the Competition Bureau after the merging parties agreed to divest assets in six Canadian cities.
- Stamps.com/Endicia merger: Prepared as testifying expert for the Department of Justice's potential challenge of the Stamps.com/Endicia merger. Both companies provide computer-based systems for buying printable United States electronic postage. The Department of Justice did not seek to challenge the merger.
- Comcast/TimeWarnerCable merger: Led the Bates White team providing support for Dr. Joseph Farrell, who provided expert analysis to the FCC on behalf of Cogent Communications regarding the proposed merger of Comcast and TimeWarnerCable. The submission included an analysis of the declarations submitted by the merging parties' economic experts and an assessment of the competitive effects of the merger on the provision of Internet access for both the consumer and Internet content provider sides of the market.
- Caraustar/Newark merger: Prepared as testifying expert for the Department of Justice's potential challenge of the Caraustar/Newark merger. Caraustar and Newark both manufacture uncoated recycled boxboard along with a number of downstream products. The Department of Justice did not seek to challenge the merger.
- Flakeboard/Sierra Pine merger: Prepared as testifying expert for the Department of Justice's challenge of the merger of Flakeboard and Sierra Pine. Flakeboard and Sierra Pine both manufacture medium density fiberboard and particleboard. The parties abandoned the merger after the Department of Justice indicated their intention to file in court to enjoin the merger.
- ViroPharma/Shire merger: Provided expert support to an interested party regarding the merger of ViroPharma and Shire. Participated in and helped prepare corporate executives for meeting with the FTC.
- Express Scripts/Medco merger: On behalf of Express Scripts in connection with its \$29 billion acquisition of Medco Health Solutions, conducted both an upward pricing pressure analysis and a merger simulation to predict the competitive effect of the merger in order to demonstrate that the proposed transaction would not have an anticompetitive effect. Assisted with the presentation of these analyses to the FTC.
- Pioneer Hi-Bred/Pannar Seed merger: As an expert for the merging parties, testified before the South African Competition Tribunal on the unilateral and coordinated effects of Pioneer Hi-Bred's proposed acquisition of Pannar Seed, along with the results of a simulation to quantify the effects of efficiencies on post-merger pricing. (Trial Testimony: September 27–28, 2011; Supplementary Report: August 11, 2011; Expert Report: June 24, 2011.)
- Oracle/Sun merger: Worked on behalf of SAP to provide input to the EC on its review of Oracle's acquisition of Sun Microsystems. Reviewed evidence of database switching.
- Comcast/NBCU merger: Supported Bloomberg's expert in the drafting of comments on the Comcast/NBC transaction before the FCC. The analysis included an assessment of foreclosure strategies available to Comcast to competitively weaken independent cable content suppliers.
- Monsanto/Delta Pine Land merger: Led the team that presented before DOJ in connection with its investigation of the acquisition of Delta and Pine Land by Monsanto. The proposed transaction raised both horizontal and vertical concerns.
- Reed Elsevier/ChoicePoint merger: On behalf of Reed Elsevier, identified potential areas of competitive concern associated with its acquisition of ChoicePoint Asset Company. Conducted an analysis to assess the likelihood of entry in the event of an attempted post-merger price increase.

- Lubrizol/Dow acquisition: On behalf of Lubrizol, evaluated the competitive effects of its acquisition of Dow's thermoplastic elastomers business, and prepared materials for presentation to the FTC. Responsibilities included analyzing win-loss data and market shares and developing an initial assessment of market definition.
- CME/CBOT merger: Provided expert support in connection with DOJ's investigation of the CME/CBOT merger, including empirical analyses of candidate competitive effects theories.
- Financial services merger: Identified antitrust risks and analyzed competitive overlaps in connection with a major acquisition in the consumer and business financial services industry.
- Online music streaming joint ventures: Assisted in civil investigations of joint ventures and anticompetitive practices of e-commerce platforms and online music streaming services.
- Financial services mergers and joint ventures: Provided economic analysis for DOJ of the competitive practices in financial markets in connection with mergers and civil (non-merger) investigations.
- Analyzed likely competitive effects of the NYSE/Archipelago and NASDAQ/Instinet mergers.
- Supported the testifying expert in the ICAP/BrokerTec merger.
- Participated in civil investigations of the conduct in the foreign exchange, treasury, and futures markets.
- United States v. Northwest Airlines: Helped develop the competitive effects analysis and supported the testifying expert.

Monopolization/Monopoly Maintenance

- United States v. Google: Supported DOJ's expert on digital advertising and marketing.
- SS Management LLC v. Harveys Tahoe Management Company LLC: On behalf of Harveys, evaluated SS Management's expert report on the monopolization claims in the case. Analyzed public data to test the claims of monopoly power and anticompetitive effects. (Rebuttal Expert Report: April 4, 2022.)
- Licensing of genetically modified seeds: Assisted with settlement negotiations over claims that a licensing agreement for genetically modified seeds and traits was anticompetitive.
- FTC v. Qualcomm: On behalf of the Federal Trade Commission (FTC), led the team supporting Professor Carl Shapiro's reports and testimony in litigation against Qualcomm, the world's dominant supplier of baseband modem chips, which enable cellular communication for mobile devices. The FTC alleged that Qualcomm used its dominant position as a supplier of these modem chips to impose anticompetitive supply and licensing terms on cell phone manufacturers and to weaken competitors.
- United States v. American Express: Provided support for expert testimony on behalf of American Express in its litigation with DOJ.
- Songkick v. Ticketmaster: Provided support for Dr. Joseph Farrell with expert reports and deposition testimony on behalf of Songkick in connection with Complete Entertainment Resources LLC d/b/a/ Songkick v. Live Nation Entertainment, Inc., Ticketmaster LLC.
- Generic drug industry: On behalf of a generic drug manufacturer, analyzed the effects of joint purchasing arrangements on the supply of generic drugs including the frequency and severity of shortages. The results of the analysis were presented to the FTC.
- Monsanto v. DuPont: Led the Bates White team providing support in the matter Monsanto v. DuPont. Provided liability and damages analysis for DuPont in its litigation against Monsanto.

regarding alleged antitrust and intellectual property violations. Monsanto originally sued DuPont and its Pioneer subsidiary for infringing Monsanto's Roundup Ready soybean patent. DuPont countersued, accusing Monsanto of antitrust violations and of fraudulently obtaining the patent.

- Allflex v. Avid: Served as testifying expert on behalf of Allflex in its litigation with Avid Identification Systems. Allegations in the case involved patent infringement and antitrust claims in the market for radio frequency identification microchips used for the identification of pets. Submitted a declaration and expert report on monopoly power, market definition, and antitrust harm. (Declaration: December 20, 2010; Expert Report: June 15, 2011.)
- AA v. Sabre: Provided support for expert testimony on damages on behalf of American Airlines in a suit filed in Texas state court. The suit alleged anticompetitive conduct by Sabre in markets for airline ticket booking services.
- Crystal Imports v. Avid: Served as testifying expert in Crystal Import Corporation v. Avid Identification Systems in an exclusionary conduct matter regarding radio frequency identification microchips. Performed economic analysis to define markets, assess market power, and evaluate the impact of the conduct at issue. (Expert Report: June 2, 2008; Deposition: August 12, 2008.)
- Commercial aircraft matter: Advised a client on possible monopolization claims related to aftermarket conduct in the commercial aircraft industry in both Europe and the United States. Reviewed evidence to analyze potential anticompetitive conduct and assess the validity of efficiency arguments.
- Credit card payment systems matter: Advised Heartland Payment Systems on liability issues such as market definition, market power, and competitive effects related to the tying of the processing of credit card authorizations.
- ZF Meritor v. Eaton: Advised attorneys on case strategy related to an antitrust lawsuit on behalf of ZF Meritor. Advised on the legal complaint and supported attorneys in mediation. Work included economic analyses of market definition, bundling, and exclusive dealing.

Intellectual Property

- Strategic consulting on copyright licensing for use with AI: Worked with a copyright licensing organization to plan how to compensate copyright owners for the use of works by AI.
- Copyright Royalty Board—Webcasters V proceeding: Prepared testimony to the Copyright Royalty Board on behalf of a webcaster relating to its royalties for the digital performance rights in sound recordings and ephemeral recordings.
- Copyright Royalty Board—SDARS III proceeding: Provided support for Dr. Joseph Farrell with testimony before the Copyright Royalty Board in the SDARS III proceeding on behalf of Sirius XM.
- ASCAP and BMI consent decree review: On behalf of Pandora, provided analysis regarding DOJ's review of the consent decrees issued in *United States v. BMI* and *United States v. ASCAP*.
- BMI v. Pandora: Provided expert testimony on behalf of Pandora in its litigation with Broadcast Music, Inc. (BMI) regarding the royalty rate for Pandora's use of music licensed by BMI (*Broad. Music, Inc. v. Pandora Media, Inc.*, No. 13-cv-4037 (S.D.N.Y. filed 2013)). Opined on what range of rates would be reasonable for Pandora's blanket license to perform works in the BMI repertory; assessed an appropriate advertising sales cost deduction for a Pandora-BMI

license; and proposed a method to adjust the royalties that Pandora would pay to BMI when compositions are either directly licensed or withdrawn from BMI. (Trial Testimony: March 10–11, 2015; Affidavit: January 26, 2015; Deposition testimony: October 30, 2014; Rebuttal Report: October 3, 2014; Expert Report: August 22, 2014.)

- Copyright Royalty Board—Webcasters IV proceeding: Submitted testimony to the Copyright Royalty Board on behalf of National Public Radio, Inc. and the Corporation for Public Broadcasting as part of the Webcasters IV proceeding (Docket No. 2014-CRB-0001-WR) to determine webcaster royalties for the digital performance rights in sound recordings and ephemeral recordings. (Written Testimony: October 7, 2014.)
- Pandora v. ASCAP: In the matter *In re Petition of Pandora Media, Inc.*, led the Bates White team providing support for the expert analyses, reports, and testimony of Dr. Leslie Marx on behalf of Pandora in its litigation with the American Society of Composers, Authors, and Publishers (ASCAP) over royalty rates for musical compositions. Assisted the trial team with the cross-examination of ASCAP's expert and other witnesses.

Public Policy

- FCC rulemaking—Business data services: Provided support for Dr. Joseph Farrell, who submitted two declarations on behalf of Comcast in an FCC proceeding on business data services. The FCC is seeking comment on a new regulatory framework for the provision of business data services.
- FCC spectrum auction: On behalf of Verizon Wireless, assisted with an analysis of possible bid-rigging during Auction 97. The analysis involved an examination of bidding data to look for patterns that would not be likely to arise in the absence of collusion. This analysis was presented to key FCC staff.
- FCC incentive auction: Served as the Bates White lead to support the expert work of Dr. Leslie Marx who filed a report with the Federal Communications Commission (FCC). The report, written on behalf of Verizon, provides evidence that the FCC could not impose significant bidding restrictions without materially reducing auction revenues and risking outright auction failure in the FCC incentive auction meant to encourage the transfer of spectrum between uses.
- Timber leasing: Wrote a report assessing the timber leasing policies and possible improvements in those policies on behalf of a foreign government leasing authority.
- SEC regulations: Drafted position letters to the SEC in response to requests for comments and on CFTC changes in regulations.

Price-Fixing and Bid Rigging

- Bid rigging overcharge matter: Assessed potential overcharges associated with the alleged rigging of bids over sports broadcast rights.
- Cartel overcharge matter: Provided detailed analysis of the Bundeskartellamt's overcharge calculation used to assess the fine on participants of an alleged cartel in a market related to the design and construction of large-scale engineering projects.
- Parcel tanker cartel: Assessed potential damages as part of the DOJ team investigating the parcel tanker cartel.
- Bid rigging in agricultural market: Assessed liability issues as part of the DOJ team investigating bid rigging in an agricultural market publications

Other disputes

- Talisman v. LNW Gaming: Submitted an expert report on whether certain gaming products compete. (Deposition testimony: July 18, 2025, Expert Report: March 18, 2025)

PUBLICATIONS

- Xiaowei Yu and Keith Waehrer. "Recursive Nash-in-Nash Bargain Solution." *Economics Bulletin* 44 no. 1 (2024): 11–24.
- Carl Shapiro and Keith Waehrer. "Using and Misusing Microeconomics: Federal Trade Commission vs. Qualcomm." *Antitrust Economics at a Time of Upheaval: Competition Policy Cases on Two Continents*, John Kwoka, Tommaso Valletti, and Lawrence White, eds, August 2023.
- Keith Waehrer. "Is Loss of Privacy the Price that Consumers Pay for Otherwise Free Online Services?" *CPI Antitrust Chronicle Special Edition*, January 2022.
- Nitin Dua and Keith Waehrer. "Three Things You Might Not Have Known About the SPRINT/T-MOBILE Merger Litigation." *Antitrust Chronicle*, vol. 1(2) (2021): 24–31.
- Nicholas Hill and Keith Waehrer. "Is 5-to-4 the New 4-to-3? A View from the United States." *Competition Law and Policy Debate* 5, no. 2 (2019): 50–54.
- Leslie M. Marx and Keith Waehrer. "A Tussle over Royalties: Pandora v. ASCAP, Pandora v. BMI, and the DOJ's Consent Decree Review, 7th ed. (2016)." In *The Antitrust Revolution*, eds. John E. Kwoka, Jr., and Lawrence J. White. New York: Oxford University Press, 2018.
- Daniel P. O'Brien and Keith Waehrer. "The Competitive Effects of Common Ownership: We Know Less Than We Think." *Antitrust Law Journal* 81, no. 3 (2017).
- Keith Waehrer. "A Primer on Competitive Effects of Mergers in Auction and Bidding Markets." ABA Antitrust Section Economics Committee Newsletter, Spring 2007.
- Keith Waehrer. "Mechanisms for Dividing Labor and Sharing Revenue in Joint Ventures." *Review of Economic Design* 8, no. 4 (2004): 465–77.
- Keith Waehrer and Martin K. Perry. "The Effects of Mergers in Open Auction Markets." *Rand Journal of Economics* 34, no. 2 (2003): 287–304.
- Keith Waehrer. "Hazardous Facility Siting when Cost Information is Private: An Application of Multidimensional Mechanism Design." *Journal of Public Economic Theory* 5, no. 4 (2003): 605–22.
- Keith Waehrer. "The Ratchet Effect and Bargaining Power in a Two-Stage Model of Competitive Bidding." *Economic Theory* 13 (1999): 171–81.
- Keith Waehrer. "Asymmetric Auctions with Application to Joint Bidding and Mergers." *International Journal of Industrial Organization* 17 (1999): 437–52.
- Keith Waehrer, Ronald M. Harstad, and Michael H. Rothkopf. "Auction Form Preferences of Risk-Averse Bidders." *Rand Journal of Economics* 29 (1998): 179–92.
- Ronald M. Harstad, Michael H. Rothkopf, and Keith Waehrer. "Efficiency in Auctions When Bidders Have Private Information about Competitors." In *Advances in Applied Microeconomics*, vol. 6, ed. Michael R. Baye, 1–13. Greenwich: Jai Press, 1996.
- Stephen Crystal and Keith Waehrer. "Later Life Economic Inequality in Longitudinal Perspective." *Journal of Gerontology: Social Sciences* 51B (1996): S307–18.

- Keith Waehrer. “A Model of Auction Contracts with Liquidated Damages.” *Journal of Economic Theory* 67 (1995): 531–55.
- Keith Waehrer and Stephen Crystal. “The Impact of Coresidence on the Economic Well-Being of Elderly Widows.” *Journal of Gerontology: Social Sciences* 50B (1995): S250–58.

UNPUBLISHED PAPERS, PAPERS IN PROGRESS, AND OTHER PAPERS

- Steve Salop and Keith Waehrer. “A Simple Pedagogical Model of the Impact of Foreclosure on Investment.” April 2025
- Jason Albert, Jéssica Dutra, Richard Manning, Steven Schwartz, Anushree Subramaniam, Wei Tan, Pablo Varas, and Keith Waehrer “An Overview of Market Definition in the Draft Merger Guidelines.” July 2023
- Keith Waehrer. “Modeling the effects of mergers in procurement: Comment.” 2020.
- Keith Waehrer. “Pass-Through of Cost Reductions in Open Auction Markets with Application to Merger Effects.” 2019.
- Pauline Kennedy, Daniel P. O’Brien, Minjae Song, and Keith Waehrer. “The Competitive Effects of Common Ownership: Economic Foundations and Empirical Evidence.” 2017.
- Keith Waehrer. “Online Services and the Analysis of Competitive Merger Effects in Privacy Protections and Other Quality Dimensions.” 2016.
- Gregory S. Crawford, Nicola Tosini, and Keith Waehrer. “The Impact of ‘Rollover’ Contracts on Switching in the UK Voice Market: Evidence from Disaggregate Customer Billing Data.” 2011.
- Keith Waehrer and Charles J. Thomas. “Horizontal Mergers in Negotiation Markets with Differentiated Products.” 2006.
- Keith Waehrer and Patrick Greenlee. “The Effect of Profit Sharing on Auction Markets.” Discussion Paper 04-3, Economic Analysis Group, US Department of Justice, 2004.
- Keith Waehrer and Martin Perry. “Vertical Integration in Open Auction Markets.” 2004.
- Keith Waehrer and Patrick Greenlee. “Profit Sharing Among Asymmetric Bidders.” 2004.
- Keith Waehrer “A Comparison of the Substitution Effects for Input and Output Price Indexes.” Working Paper 327, US Bureau of Labor Statistics, 2000.
- Keith Waehrer, Mary Kokoski, and Patricia Rozaklis. “Using Hedonic Methods for Quality Adjustment in the CPI: The Consumer Audio Products Component.” Working Paper 344, US Bureau of Labor Statistics, 2000. Presented at the NBER, Summer Institute, 2000.
- Keith Waehrer, and Mary Kokoski. “Hedonics and Quality Adjustment of Price Indices for Consumer Electronics Products.” 1998. Presented at the NBER, Summer Institute, 1998.
- Keith Waehrer. “Wasteful Capital Expenditures Resulting from Rate-of-Return and Used-and-Useful Regulation.” 1996.
- Keith Waehrer. “Coase and Ethics.” Letter to the Editor, *Journal of Applied Philosophy* 11 (1993): 129–30.

SPEAKING ENGAGEMENTS

- “Litigating and Legislating Against Algorithmic Collusion.” Panelist, The Capitol Forum’s 2025 Tech Conference, Washington, DC, October 1, 2025.

- “Competition Law Enforcement in Hi-tech Digital Markets: Important Lessons from Recent Decisions in EU and US.” Panelist, CRESSE Conference, Chania, Greece, July 4 – 6, 2025.
- “Big tech cases update pane.l” Panelist, Comp Law Antitrust West Coast, San Francisco, May 7-8, 2025
- “Regression analysis for lawyers.” Presentation
 - o Baker McKenzie, Washington, DC, April 22, 2025.
 - o Paul Hastings, Washington, DC, February 19, 2025.
- “Ecosystem competition: access charges, fairness, interoperability.” Panelist, CRESSE Conference, Chania, Greece, July 4 – 6, 2024.
- “AI and Antitrust.” Presentation at Antitrust Hot Topic 360 Manatt Panel, April 10, 2024.
- “Vertical Mergers: New Enforcement Perspectives and the US Guidelines.” Panelist, CRESSE Conference, Rhodes, Greece, June 30 – July 2, 2023.
- “Common Ownership and Competition Policy.” The 3rd CRESSE-Jiangxi University of Finance and Economics Series of Lectures on Competition Policy, Oct. 20, 2022.
- “Legal Standards: should enforcement in the high-tech digital markets become more presumption (than effects) based?” Panelist, CRESSE Conference, Heraklion, Crete, Greece, July 1-3, 2022.
- “Lessons from the Sprint/T-Mobile Merger Investigations, Litigation, and Remedy.” Presentation via live webinar to the Mannheim Competition Policy Forum seminar series organized by the Mannheim Centre for Competition and Innovation, September 16, 2021.
- “What to Expect from Biden Antitrust?” Panelist, live webinar, Georgetown Law's 15th Annual Global Antitrust Enforcement Symposium, September 14, 2021.
- “Digital Markets: Big Data, Privacy Protection and AI.” Panelist, CRESSE Conference, Heraklion, Crete, Greece, September 3-5, 2021.
- “Merger Enforcement.” Panelist, live webinar, Georgetown Law's 14th Annual Global Antitrust Enforcement Symposium, October 6, 2020.
- “Update on State Antitrust Enforcement: A Panel Discussion with State Attorneys General.” Moderator, live webinar, May 14, 2020.
- CRESSE Conference, Rhodes, Greece, July 5–7, 2019.
 - o “Pass-Through of Cost Reductions in Open Auction Markets with Application to Merger Effects.” Presentation.
 - o “Developments in Vertical Merger Enforcement.” Panel chair and participant.
- “Lessons from the EU and US Google and Qualcomm Cases.” Panel discussion.
- “Case Study: Federal Trade Commission v. Qualcomm Inc.” Hal White Antitrust Conference, Washington, DC, June 10, 2019.
- Economist Roundtable with the Competition Bureau, Canadian Bar Association, May 30, 2019.
- Keynote address, “3 Mildly Interesting Aspects of the ‘Antitrust Trial of the Century.’”
- “Competition Analysis Involving Vertical Merger.” Panel discussion.
- E.CA Competition Law & Economics Expert Forum, Berlin, Germany, October 1, 2018.
- “Digital Markets—Key Issues.” Panel discussion.

- “Data-Driven Services, Online Advertisement, and Privacy.” Research presentation.
- “Merger Enforcement.” Panelist, 12th Annual Global Antitrust Enforcement Symposium, Georgetown Law, Washington, DC, September 25, 2018.
- CRESSE Conference, Crete, Greece, June 29–30, 2018.
 - o “The AT&T-TW Case.” Panel discussion.
 - o “Conglomerate Mergers: Is There an Economic Theory of Harm?” Panel discussion.
- “The Use of Bargaining Models in Merger Analysis.” Panel moderator, 15th Annual Hal White Antitrust Conference, Washington, DC, June 12, 2018.
- “Introduction to Regression Analysis.” Presentation to Crowell & Moring, December 12, 2017.
- “Anticompetitive Effects of Horizontal Shareholding.” Panel tele-discussion, Canadian Bar Association Economic and Law Committee, December 5, 2017.
- “When the Crystal Ball Cracks: Why Are Divestitures Failing?” Panel discussion, 5th Annual GCR Live, New York, September 28, 2017.
- “Quantifying Merger Effects.” Presentation, WilmerHale, Washington, DC, March 6, 2017.
- “Economics 101: Theory” and “Quantifying Merger Effects.” Presentation, Competition Bureau Canada, Ottawa, ON, Canada, January 19, 2017.
- “Online Services and the Analysis of Competitive Merger Effects in Privacy Protections and Other Quality Dimensions.”
- CRESSE Conference, Rhodes, Greece, July 1, 2016.
 - o Antitrust Enforcement Symposium, Oxford, United Kingdom, June 25, 2016.
 - o “Antitrust Lessons for Privacy Regulators.” Panel discussion, 19th Annual Antitrust Symposium, George Mason Law Review, Arlington, VA, February 18, 2016. The panel explored the intersection of privacy protection and antitrust.
- “Empirical Methods in Merger Analysis.” This presentation reviews methods for quantifying merger effects including natural experiments, simulation methods, and upward pricing pressure calculations.
 - o New York Women’s Antitrust Bar Association, New York, NY, October 22, 2015.
 - o Hunton & Williams LLP, Washington, DC, June 25, 2014.
- “The Economics of Unilateral Effects from Mergers.” Presentation, Hunton & Williams LLP, Washington, DC, August 13, 2015. This training session included the economics of unilateral effects in differentiated goods markets with price setting, auction markets, and markets where price is determined through bargaining.
- “Theory of the Firm and Oligopoly.” Presentation, Hunton & Williams LLP, Washington, DC, March 18, 2015. This training session included basic demand faced by firms in perfectly and imperfectly competitive markets, profit maximization in both types of markets, and oligopoly theory including by quantity and prices setting models.
- “Economics 101: Theory and Merger Application.” Presentation, Crowell & Moring LLP, Washington, DC, November 7, 2013. This presentation included basic microeconomic theory of the firm with application to unilateral effects in mergers.
- “Antitrust Economics 101.” Presentation, Paul Hastings LLP, Washington, DC, September 10, 2013. This presentation included modules unilateral effects from mergers and an introduction to regression analysis.

- “Vertical Foreclosure in Front of the Agencies and the Courts.” Panel discussion, 2013 Hal White Antitrust Conference, Bates White Economic Consulting, Washington, DC, June 3, 2013.
- “Cost Reductions and Pass-Through in Open Auction Markets with Application to Vertical Integration and Merger Analysis.” Presenter and discussant, 11th International Industrial Organization Conference, Industrial Organization Society, Boston, MA, May 18, 2013.
- “Methods for Quantifying Merger Effects: What Are They and How Do They Work?” Panel discussion, Ninth Annual Antitrust Conference, Bates White Economic Consulting, Washington, DC, June 7, 2012.
- “Introduction to Upward Pricing Pressure Analysis.” This presentation explains how UPP analysis can be useful to defend a merger in concentrated industries with low margins and how UPP brings efficiencies and margins directly into the competitive effects analysis.
 - Crowell & Moring LLP, Washington, DC, November 2010.
 - Proskauer Rose LLP, Washington, DC, November 2010.
 - Crowell & Moring LLP, Brussels, Belgium, June 2010.
 - Cleary Gottlieb Steen & Hamilton LLP, Brussels, Belgium, June 2010.
 - Skadden, Arps, Slate, Meagher & Flom LLP, Brussels, Belgium, June 2010.
- “The Use of Economic Evidence in Litigation.” Panel moderator, Fifth Annual Antitrust Conference, Bates White Economic Consulting, Washington, DC, June 2, 2008.
- “DeltaPineland Case Presentation.” Fifth Annual Antitrust Conference, Bates White Economic Consulting, Washington, DC, June 3, 2008.
- “The Effect of Profit Sharing on Auction Markets.”
 - Securities and Exchange Commission, Washington, DC, April 2006.
 - Charles River Associates, Washington, DC, March 2004.
 - University of Maryland, College Park, MD, February 2004.
 - North American Winter Meetings of the Econometric Society, Philadelphia, PA, January 2004.
- “Changing Market Institutions and the Role of Competition Authorities.” Asia-Pacific Economic Cooperation (APEC) Workshop on Regulation and Competition in the Financial Services Sector, Mexico City, November 2003.
- “Assessing Competitive Effects in Auction and Bid Markets.” Training session for US Department of Justice, Antitrust Division’s legal staff, Washington, DC, March 2002 and November 2003.
- “The Effects of Mergers in Open Auction Markets.”
 - Southern Economic Association Meetings, Tampa, FL, November 2001.
 - North American Summer Meetings of the Econometric Society, College Park, MD, June 2001.
 - Department of Justice, Washington, DC, January 1999.
 - Georgetown University, Washington, DC, October 1998.
 - INFORMS Seattle National Meeting, October 1998.

- “An Introduction to Auction Theory.” Economics Working Group, Department of Energy, Washington, DC, October 2000.
- “The Division of Labor and Revenue Sharing in Joint Ventures.” Indiana University–Purdue University at Indianapolis, February 1998.
- “Hazardous Facility Siting when Cost Information is Private: An Application of Multidimensional Mechanism Design.”
 - North American Summer Meeting of the Econometric Society, Quebec City, Canada, June 1997.
 - University of Maryland, College Park, MD, March 1997.
 - Rutgers University, New Jersey, April 1997.
- “Auction Contract Enforcement When Bidders Have Different Levels of Limited Liability.” Operations Research and the Management Sciences, meetings, Los Angeles, CA, April 1995.

DISTINCTIONS AND HONORS

- Global Competition Review, International Who's Who of Competition Economists, 2012, 2018–2024.
- Best Academic Economics Article, Antitrust Writing Awards, for “The Competitive Effects of Common Ownership: We Know Less than We Think,” 2018.
- The Commissioner's Award for Eminent Achievement, Bureau of Labor Statistics, May 1997 and July 1996.
- Peter Asch Memorial Scholarship (dissertation award), Rutgers University, May 1991.
- Faculty Honors, Trinity College, May 1985.

REFeree

- ACM Conference on Electronic Commerce
- American Economic Review
- The Economic and Social Review
- The Economic Journal
- Economic Inquiry
- Economic Theory
- Electronic Commerce Research
- Economics Bulletin
- Games and Economic Behavior
- The Gerontologist
- International Journal of Industrial Organization
- Journal of Business
- Journal of Economics and Management Strategy
- Journal of Economic Theory

- Journal of Gerontology: Social Sciences
- Journal of Industrial Economics
- Journal of Law and Economics
- Management Science
- Mathematical Social Sciences
- Quarterly Review of Economics and Finance
- RAND Journal of Economics
- Southern Economic Journal

PROFESSIONAL EXPERIENCE

- In January 2021, Dr. Waehrer joined Economist Incorporated, which after being acquired became Secretariat Advisors. Prior to joining Economists Incorporated he was a Partner at Bates White, LLC. Previously, Dr. Waehrer was also a Research Economist with the Antitrust Division of DOJ, where he provided economic analysis in connection with numerous merger investigations and civil and criminal antitrust matters. Dr. Waehrer took a 12-month leave of absence from Bates White in 2009–2010 to work on competition issues in Europe with Bates White’s partner ESMT Competition Analysis (now known as E.CA Economics). Dr. Waehrer served as an economist with the Bureau of Labor Statistics, focusing on measurement of living standards and the construction and interpretation of various price indexes. He also worked for Economist Insight, where he developed models to analyze the West Coast oil and electric power markets; and for Bonneville Power Administration, where his analyses supported long-term contract negotiations and a major rate case. His academic career includes teaching posts at the University of Maryland, Georgetown University, Johns Hopkins University, Brigham Young University, and Rutgers University.

WORK HISTORY

- Secretariat Advisors LLC
- Bates White LLC
- Johns Hopkins University
- US Department of Justice
- Georgetown University
- University of Maryland
- US Bureau of Labor Statistics
- Brigham Young University
- Rutgers University

Appendix B. Materials relied upon

Academic Sources

Beavis, Brian and Ian Dobbs (1990), *Optimization and Stability Theory for Economic Analysis*, Cambridge, United Kingdom: Cambridge University Press.

Bates Numbered Documents

CSXT0064610

CSXT0067122

CSX_STB_0000747

CSX_STB_0000805

CSX_STB_0000856

CSX_STB_0001097

CSX_STB_0002448

CSX_STB_0019155

CSX_STB_0048655

CSX_STB_0090051

CSX_STB_0097266

STB-NS-0010589

STB-NS-0010607

STB-NS-0015705

VIT-VPA_00000124

VIT-VPA_00000326

Depositions and Declarations

Deposition of Kenneth Joyner, 2/19/2020

Deposition of Christopher Luebbbers, 2/25/2020

Deposition of Julie M. Carey, 10/29/2025

Deposition of Nathan Miller, 10/30/2025

Supplemental Verified Statement of Daniel L. Fapp, 6/13/2025.

Verified Statement of Dr. Nathan Miller, 9/18/2025.

Verified Statement of Julie M. Carey, 9/18/2025.

Verified Statement of Christopher Luebbbers, 11/14/2025.

Rebuttal Verified Statement of Daniel L. Fapp, 11/14/2025.

Legal Filings

Comment of the United States Department of Justice, Docket No. FD 36836, August 27, 2025.

CSX Transportation, Inc.'s Evidence and Argument in Opposition to the NS Control Application, Docket No. FD 36836, September 18, 2025.

CSX Transportation, Inc.'s Petition to Reject Norfolk Southern's Minor Application, Docket No. FD 36836, February 27, 2025.

Letter Re: STB Docket No. FD 36836 – Norfolk Southern Railway Company – Control Acquisition – Norfolk & Portsmouth Belt Railroad Company from Virginia Port Authority to Ms. Brown and Board Members, March 5, 2025.

Letter Re: STB Docket No. FD 36836 from Djordje Tubic to Cynthia T. Brown, March 12, 2025.

NSR Minor Application for Acquisition of NPBL, Docket No. FD 36836, February 14, 2025.

NSR Supplement and Perfection of Application for Acquisition of NPBL, Docket No. FD 36836, June 13, 2025.

Reports

American Journal of Transportation, “The Tripartite of Ocean Carrier Alliances Face Multitude of Challenges,” 4/18/2022, <https://ajot.com/premium/ajot-the-tripartite-of-ocean-carrier-alliances-face-multitude-of-challenges/>.

Bureau of Transportation Statistics, “Transportation Statistics Annual Report 2024,” 12/2024, available at: <https://rosap.ntl.bts.gov/view/dot/79039>.

Bureau of Transportation Statistics, “Port Performance Freight Statistics: 2025 Annual Report,” c. 2025, available at: <https://doi.org/10.21949/z3wj-hd65>.

CSX, Form 10-K, 2024.

International Transport Forum, “The Impact of Alliances in Container Shipping,” c. 2018, available at: <https://www.itf-oecd.org/sites/default/files/docs/impact-alliances-container-shipping.pdf>.

Joint Legislative Audit and Review Commission, “Review of the Virginia Port Authority’s Competitiveness, Funding, and Governance,” 10/2013, available at: <https://jlarc.virginia.gov/pdfs/reports/Rpt446.pdf>.

Maryland Port Administration, “2024 Sustainability Report,” c. 2024, available at: <https://mpa.maryland.gov/greenport/Documents/MPASustainabilityReportFINAL07232025.pdf>.

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Appendix C. Efficient vessel traffic sorting

105. In this appendix section, I show that in a simple model of efficiently allocating containers to container terminals to minimize congestion costs plus railroad costs at the two terminals, the cost minimizing solution tends to result in a large share at one terminal for one of the railroads.
106. Label the two container terminals A and B and the two railroads C and N . (You can think of terminals A and B as representing NIT and VIG respectively and C and N are CSX and NS respectively.) The cost for railroad $i \in \{C, N\}$ to move a container through terminal $j \in \{A, B\}$ is w_i^j . Thus, for example, the cost for railroad C of moving a container through A is w_C^A . Let x_i^j denote the number of containers carried by railroad i that travel through terminal j . Thus, the total number of containers carried by railroad $i \in \{C, N\}$ is $x_i = x_i^A + x_i^B$. Furthermore, for terminal $j \in \{A, B\}$, let $x^j = x_C^j + x_N^j$.
107. Define the convex function $f^A: \mathbb{R}_+ \rightarrow \mathbb{R}_+$ where $f^A(x^A)$ measures the congestion and other costs of the port at terminal A not associated with the railroad operations. I would expect that as the number of containers that travel through the two terminals increases the congestion costs rise. f^A should be a nondecreasing function. There will be a similarly defined function, f^B , associated port costs at terminal B . Notice that this formulation assumes that in terms of the costs to the port it does not matter which railroad carries the containers only the total number of containers at each terminal.
108. The question is how to allocate the containers carried by the two railroads (x_C, x_N) across the two terminals in order to minimize the rail and port costs. Therefore, we can write the cost minimization problem as follows:

$$\min_{x_C^A, x_C^B, x_N^A, x_N^B} w_C^A x_C^A + w_C^B x_C^B + w_N^A x_N^A + w_N^B x_N^B + f^A(x_C^A + x_N^A) + f^B(x_C^B + x_N^B)$$

subject to

$$x_i = x_i^A + x_i^B, \text{ for } i \in \{C, N\}$$

$$x_i^j \geq 0, \text{ for } i \in \{C, N\} \text{ and } j \in \{A, B\}.$$

109. This is what is referred to as a nonlinear programming problem.¹²⁹

¹²⁹ Beavis, Brian and Ian Dobbs (1990), *Optimization and Stability Theory for Economic Analysis*, Cambridge, United Kingdom: Cambridge University Press, at §2.3.

110. **Result:** Suppose that $w_C^A - w_C^B > w_N^A - w_N^B$.¹³⁰ Then there is no solution such that $x_C^A, x_C^B, x_N^A, x_N^B$ are all strictly positive. In other words, it is optimal to try to place as much traffic as possible for one of the railroads at one of the terminals. In this case either railroad C at terminal B or railroad N at terminal A .

Proof: Suppose that $x_C^A, x_C^B, x_N^A, x_N^B$ are all strictly positive. I show this cannot be cost minimizing. Define Δ such that $\min\{x_C^A, x_C^B, x_N^A, x_N^B\} > \Delta > 0$. It is possible to lower costs by shifting Δ containers carried by C from terminal A to B and shifting Δ containers carried by N from terminal B to A . Given the definition of Δ , after these shifts none of the container terminal allocations are nonpositive. Notice that this rearrangement of containers does not change the total number of containers at each terminal and thus there is no change in the port costs, but it will reduce railroad costs. To see this note that

$$\begin{aligned} w_C^A x_C^A + w_C^B x_C^B + w_N^A x_N^A + w_N^B x_N^B - w_C^A (x_C^A - \Delta) - w_C^B (x_C^B + \Delta) - w_N^A (x_N^A + \Delta) - w_N^B (x_N^B - \Delta) \\ = w_C^A \Delta - w_C^B \Delta - w_N^A \Delta + w_N^B \Delta \\ = [w_C^A - w_C^B - (w_N^A - w_N^B)] \Delta > 0, \end{aligned}$$

where the strict inequality follows from the assumption that $w_C^A - w_C^B > w_N^A - w_N^B$ and the fact that $\Delta > 0$. QED

111. The previous result implies that the efficient allocation of container traffic between terminals is a corner solution unless you have the unlikely situation where $w_C^A - w_C^B = w_N^A - w_N^B$.
112. For the remainder of this technical appendix, I assume that $x_C^A = 0$ and $x_N^B > 0$, which appears to be the current outcome with the allocation of containers at NIT and VIG where A is taken to be NIT and B is taken to be VIG. However, $x_C^A = 0$ and $x_N^B = 0$ could be the cost minimizing solution depending on the data of the problem. (That is, depending on $w_C^A, w_C^B, w_N^A, w_N^B, x_C$, and x_N .)
113. Now I show that at the efficient solution if $x_C^A = 0$ and $x_N^B > 0$, then port congestion costs would be higher at terminal A than B . With $x_C^A = 0$ and $x_N^B > 0$, the cost minimization problem will satisfy the first-order condition

$$w_N^A - w_N^B + \frac{\partial f^A(x_N^A)}{\partial x^A} - \frac{\partial f^B(x_C + (x_N - x_N^A))}{\partial x^B} = 0. \quad (1)$$

¹³⁰ Note that it will be the case that $w_C^A - w_C^B > w_N^A - w_N^B$, if $w_C^A > w_C^B$ and $w_N^A < w_N^B$.

This implies that if $w_N^A < w_N^B$, then the marginal port cost, including congestion, are higher at terminal A than at terminal B .

114. I now turn to the question of how an increase in capacity at one terminal impacts the efficient distribution of containers across the two terminals and its impact on congestion costs. As I show, an increase in capacity at one terminal results in a shift in container traffic that lowers costs at the other terminal. Suppose that the capacity is expanded at terminal A such that its costs are now represented by $\hat{f}^A$ such that for all $x^A > 0$, $\hat{f}^A(x^A) < f^A(x^A)$. Suppose that after this capacity expansion the new efficient allocation is $\hat{x}_C^A, \hat{x}_C^B, \hat{x}_N^A, \hat{x}_N^B$ and before the expansion is $x_C^A, x_C^B, x_N^A, x_N^B$. If $\hat{x}_C^A = 0, x_C^A = 0, \hat{x}_N^B > 0$, and $x_N^B > 0$, then holding railroad costs constant Equality 1 above implies

$$\frac{\partial f^A(x_N^A)}{\partial x^A} - \frac{\partial \hat{f}^A(\hat{x}_N^A)}{\partial x^A} = \frac{\partial f^B(x_C + (x_N - x_N^A))}{\partial x^B} - \frac{\partial \hat{f}^B(\hat{x}_C + (\hat{x}_N - \hat{x}_N^A))}{\partial x^B}.$$

115. Thus, at the new efficient allocation any decrease in marginal cost at terminal A would be equal to the decrease in marginal cost at terminal B holding railroad costs constant.

**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**

**RESPONSE TO COMMENTS, PROTESTS,
REQUESTS FOR CONDITIONS, AND OTHER OPPOSITION**

EXHIBIT B

REBUTTAL VERIFIED STATEMENT OF DANIEL L. FAPP

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**
)
)

Rebuttal
Verified Statement

of

Daniel L. Fapp
Senior Vice President

L. E. Peabody & Associates, Inc.
ECONOMIC CONSULTANTS

On Behalf Of

Norfolk Southern Railway Company

Date: November 14, 2025

<u>TABLE OF CONTENTS</u>	<u>PAGE</u>
I. Introduction.....	1
II. Railroad Pricing and Costs.....	3
A. Differential Pricing	3
1. Shortline Railroad and Differential Pricing	4
2. Ms. Carey’s Analysis of NPBL URCS Variable Costs is Flawed.....	7
3. Ms. Carey’s Analysis of CSXT and NS URCS Variable Costs is Flawed	12
B. Switching Rate Comparisons.....	14
1. Terminal Railroad Rate Comparisons.....	14
2. Ms. Carey’s Rate Comparison is Inaccurate	18
C. Historic NPBL Rates.....	27
III. Dray Movements.....	29
A. The POV Can Scale Its Dray Operations.....	30
1. POV Investments Have Increased Trucking Capacity.....	30
2. POV Can Adjust NIT Operations to Increase Truck Capacity	31
3. Local Access Roads Should Not Limit Increased NIT Truck Movements	32
B. Ms. Carey’s Claim of Yard Congestion and Waittimes is Overstated and Based on Outdated Support	33
C. Ms. Carey’s Truck Dispatch Analysis is Flawed.....	35
D. Ms. Carey Overstates VIG Utilization.....	37
IV. Truck Competition.....	40
A. Rail and Truck Competition.....	42
1. Ms. Carey Ignores Costs for First Mile/Last Mile Movements	43
2. Short Trucking Movements	44
3. Ms. Carey’s Truck and Rail Rate Comparison Contains Numerous Flaws.....	45
4. Ms. Carey’s Market Share For Truck Traffic is Understated	49
5. Ms. Carey’s Truck Rate Analysis Conflates Rates From Two Different Markets	50
V. Financial Impact on NPBL	53
A. NPBL Variable Costs of Service	53
1. NPBL Specific Variable Costs.....	54
2. Ms. Carey’s Variable Cost Analysis Incorrectly Mixes Data From Different Operating Years and Different Sources	55
3. Ms. Carey’s Variable Cost Analysis Uses Incorrect URCS Variability Factors	56
4. Corrected Variable Costs Using Ms. Carey’s Approach	57
B. NPBL’s Costs are Different than CWRY’s Rates	58
C. Ms. Carey Incremental Cost Analysis is Unsupported and Incomplete	59
1. Locomotive Requirements	60
2. Incremental Fuel Expenses	61
3. Incremental Maintenance of Way Expenses.....	62
4. Missing Incremental Costs.....	63

I. INTRODUCTION

My name is Daniel L. Fapp, and I am a consultant and Senior Vice President of L. E. Peabody & Associates, Inc., an economic consulting firm that specializes in solving economic, transportation, marketing, financial, accounting and fuel supply problems. I am the same Daniel L. Fapp that submitted an Opening Verified Statement in Surface Transportation Board (“STB” or “Board”) Docket No. FD 36836, *Norfolk S. Corp. and Norfolk S. Ry. Co. – Acquisition of Control – Norfolk & Portsmouth Belt Line R. Co.* on February 14, 2025 (“Opening VS”), a Supplemental Verified Statement on June 13, 2025 (“Supplemental VS”), included in Norfolk Southern Corporation and Norfolk Southern Railway Company¹ (collectively “NS”) Supplement and Perfection of Application (“Supplemental Application”), and a Reply Verified Statement on June 25, 2025 in Norfolk Southern Corporation’s and Norfolk Southern Railway Company’s Reply to CSXT’s Petition to Reject Norfolk Southern’s Revised Application. A copy of my credentials was included as Exhibit No. 1 to my Opening VS.

I was requested by Counsel for NS to respond to CSX Transportation, Inc.’s (“CSXT”) Evidence and Argument in Opposition to the NS Control Application (“CSXT Opposition Argument”) filed September 18, 2025 in the instant proceeding, including responding to the Verified Statement of Ms. Julie M. Carey (“Carey VS”) included with the CSXT Opposition Argument.

The results of my review are summarized in the remainder of this Rebuttal Verified Statement (“Rebuttal VS”) under the following topical headings:

¹ Norfolk Southern Railway Company is a wholly owned subsidiary of Norfolk Southern Corporation, a non-carrier holding company.

- II. Railroad Pricing and Costs
- III. Dray Movements
- IV. Truck Competition
- V. Financial Impact on NPBL

II. RAILROAD PRICING AND COSTS

Ms. Carey made numerous rate comparisons in her VS in which she attempted to compare transportation and switching rates for service to/from the Norfolk International Terminal (“NIT”) and the Virginia International Gateway Terminal (“VIG”). She also theorizes about how switching and terminal railroads establish rates for movements over their systems, including setting rates based upon elasticity of demand under the idea of differential pricing.

Ms. Carey’s theories on how terminal and switching carriers establish their rates do not comport with how these types of railroads generally set their pricing for switching services. Contrary to Ms. Carey’s views that these terminal switching railroads set their prices using differential pricing based on elasticities of demand similar to large, sophisticated Class I railroads, short line terminal carriers such as the Norfolk & Portsmouth Belt Line (“NPBL”) establish their prices using much simpler heuristics. Specifically, most short line terminal and belt railroads, like the NPBL, generally charge relatively uniform operating rates, with limited variation in rates based on specific operating costs.

In addition, Ms. Carey’s rate analyses and comparisons are flawed because she made inaccurate comparisons based on certain operating assumptions that are contrary to real world operations (and/or are internally inconsistent) and based on CSXT statements and analyses produced in this and prior proceedings.

A. DIFFERENTIAL PRICING

Ms. Carey states that NPBL’s cost-based switching rate of \$210 per railcar is exclusionary and inconsistent with standard railroad industry practice of differential pricing.² She further claims that NPBL’s cost to transport intermodal traffic is substantially lower than other traffic moving

² See, Carey VS at page 26.

over the NPBL network, and that, because of this, CSXT would be forced to cover an inappropriate share of NPBL's fixed costs if it were charged the same rate as other NPBL shippers.³

Ms. Carey's claim that NPBL's charging a single switching rate to all customers is contrary to how most small terminal and switching operations is inaccurate. Rail rates are set to cover a railroad's variable cost of service and any amount included in the rate above the railroad's variable costs is a function of market conditions and contributes to the railroad's fixed costs and profits. By definition, fixed costs do not vary with individual movements. Ms. Carey's suggestion that the NPBL rate assigns too much fixed costs to intermodal containers is illogical. In addition, her claim that CSXT is required to absorb an inappropriate level of NPBL's fixed costs is also inaccurate as her analysis of NPBL's alleged variable costs is fatally flawed. When her cost calculations are corrected, it is obvious why NPBL is charging of a single switching rate to all traffic moving on its system. It is also obvious that the NPBL cost-based switching rate of \$210 per railcar is appropriate and justified.

1. Shortline Railroad and Differential Pricing

Ms. Carey states that NPBL's charging the same rate to all traffic moving on its system is contrary to standard railroad practice of using differential pricing to set market rates. Over my 32-year career working in the railroad industry, I have assisted numerous short line, switching and terminal railroads set transportation, switching and ancillary rates. This includes the time I spent establishing rates for three (3) common carrier short line railroads for which I worked. Based on my experience, many short line railroads such as the NPBL do not normally set rates in the same

³ *Id.*

way as Class I railroads but instead base their pricing on their own costs, on non-market factors such as ownership agreements or on a desire for operational and clerical simplicity.

Unlike large Class I railroads that have developed sophisticated systems and methodologies to set prices based on their costs and competitive dynamics, many short line railroads customarily do not have sophisticated pricing and costing models to develop their rates. They instead rely on their financial statements and simplified cost assumptions to set rates.

Many small carriers such as the NPBL view all railcars as basically the same (with a few exceptions discussed below). To a short line railroad that is moving a car only a few miles, a boxcar transporting consumer products is indistinguishable from a covered hopper carrying grain. This makes sense from an operational and economic perspective. Operationally, moving 30 covered hoppers from interchange to a station on the line has very little difference in moving 30 boxcars the same distance. Economically, the terminal railroad is not setting the linehaul rate that determines whether a load moves to or from its property or not. It either receives or delivers the railcar to the connecting Class I carrier, which sets the linehaul rate.

The exception to this general rule is when a terminal or switching carrier transports hazardous materials, TIH/PIH commodities, or dimensional loads. In those instances, a short line will sometimes charge a higher rate to account for increased costs for transporting and storing these types of commodities and to account for increased risk.

Ms. Carey includes a summary of differential pricing concepts in her VS and concludes:

Thus, absent NS control of NPBL, it is reasonable to expect differential pricing (similar to NPBL's experience prior to the adoption of the \$210 rate at NS's behest in 2010) just as the two Class 1 railroad owners use on their systems.⁴

⁴ See, Carey VS at page 43.

She then offers three examples of short line railroads with tariffs that impose different fees for switching carloads carrying different commodities.⁵ In all three (3) cases, one of the different rates she cites is applicable to hazardous materials, which have placarding and handling requirements that are different from non-hazmat loads.

While the tariffs Ms. Carey identified do in fact have switching fee schedules that differ based on the commodity being switched, there are also short line railroads that issue tariffs that impose universal switching fees like NBPL. The Galveston Railroad serving the Port of Galveston charges a universal \$315 per car, the Warren & Saline River Railroad charges a universal \$250 per car, and the Stillwater Central Railroad imposes a universal \$326 per car reciprocal switching fee.⁶ There are also several short lines with tariffs that impose a flat fee with exceptions, such as the Brownsville and Rio Grande International Railroad in the Port of Brownsville, which assesses a fee of \$325 for reciprocal switching for all port lead customers, but includes an exception for TIH/PIH commodities and heavy/wide dimensional loads which require special handling.⁷

There simply is no industry standard for short line rate structures. Short line tariff rates generally reflect the scope of the railroads' relative operations and staffing, and the individual management groups' preferences regarding operational and recordkeeping complexity. It is unreasonable to expect a short line with limited resources to enact, maintain, and update a complicated pricing menu in the same way as the Class I railroads do. Complicated pricing schemes also require significant investment in technology/data management systems (and employees) that some short lines cannot afford (or do not prioritize).

⁵ See, Carey VS at pages 44-45.

⁶ See, “Galveston RR_GSVR 7006-17.pdf” at page 3, “Warren and Saline River RR_WSR TS 127006-4.pdf” at page 1, and “Stillwater Central RR_WTS 9012.pdf” at page 1, respectively.

⁷ See, “Brownsville and Rio Grande International RR_8001-05.pdf” at page 7.

2. Ms. Carey's Analysis of NPBL URCS Variable Costs is Flawed

Ms. Carey states international intermodal traffic has lower variable costs than other types of carload traffic on NPBL. She further states that system-average URCS Phase III variable costs for intermodal traffic are {{ [REDACTED] }} lower than other traffic moving on the NPBL.⁸ From this, Ms. Carey asserts that international intermodal traffic moving on the NPBL would absorb an unacceptable amount of NPBL's fixed costs if it were to be charged \$210 per railcar. Ms. Carey's analysis is fatally flawed for several reasons.

First, Eastern Region URCS Phase III variable costs are not necessarily a reflective measure of NPBL's actual variable cost of service. Eastern Region URCS variable costs are based on the composite rail operations of the three (3) primary Class I railroads operating in the eastern portion of the U.S., NS, CSXT and Canadian National Railways (CN).⁹ The STB observed that while it has directed non-Class I railroads to calculate their variable costs using regional URCS variable costs in rate reasonableness proceedings for expediency and simplicity reasons, it also observed that no two carriers' operations are identical and certain costs incurred by the large carriers will tend to be higher or lower than those incurred by smaller carriers.¹⁰ Ms. Casey's use of the Eastern Region URCS variable costs for different commodities transported by NPBL does not necessarily reflect their actual variable costs on NPBL.

Second, even if Eastern Region URCS Phase III variable costs provided an accurate representation of NPBL's variable costs, Ms. Carey incorrectly calculated the variable costs for

⁸ See, Carey VS at pages 26-27. While Ms. Carey uses the term "international" to reflect containers moving through ocean ports, the STB's Carload Waybill Sample Reference Guide indicates ocean movements from Alaska, Hawaii and Puerto Rico are also included as international shipments when received through ocean terminals.

⁹ See, STB Ex Parte No. 589, *Calculation of Variable Costs in Rate Complaint Proceedings Involving Non-Class I Railroads*, served March 28, 2003 (EP 589) at page 3, note 10.

¹⁰ See, *Id.* at page 6.

intermodal traffic included in Figure 5 of her VS. In calculating her URCS variable costs for different types of traffic, Ms. Carey states:

[I] estimate the generic system average variable costs using URCS for the different traffic types. I compare variable costs for carload traffic for the types of carload traffic traversing NPBL (industrial chemicals, other stone products, grains, metallic ores) to double-stacked flat cars for IM traffic (excluding the IM rail lift fee cost paid to the port for the service it provides). On average, the IM traffic movements have a much lower level of variable cost --{ [REDACTED] } as compared to the carload traffic types transported by NPBL.¹¹

However, Ms. Carey made three (3) significant errors in her URCS calculations. First, Ms. Carey misunderstands how URCS uses railcars and intermodal units in its calculation of variable costs and understates the cost per railcar as a result. URCS presents intermodal costs on a cost per TCU (Trailer or Container Unit) basis. When developing the cost for a non-intermodal movement, the URCS Phase III costing program requires the user to input the number of railcars into the costing program. When developing the cost for an intermodal movement, the URCS Phase III program requires the user to input the number of trailers and/or containers into the program. Therefore, when dealing with an intermodal movement, entering one into the number of cars data entry field reflects the movement of one container and not one railcar.¹² Thus, Ms. Carey's estimates for intermodal shipment costs reflect less than a full carload of intermodal traffic.

Ms. Carey used system average values to develop her URCS Phase III variable costs. In developing the system average variable costs for intermodal movements, the URCS Phase III program relies on the average intermodal units loaded per railcar as reported in each Class I

¹¹ See, Carey VS at page 27.

¹² See, STB The Railroad Cost Program (Microsoft Excel Version) manual ("STB URCS Manual") at page 25 "Enter the number of cars for each segment, or the number of TCUs for intermodal shipments. This can be a decimal value." URCS outputs include two separate fields to further this distinction. For non-intermodal movements, the number of freight cars is represented in Line 201 (Number of freight cars), while for intermodal movements, the number of railcars is represented in Line 204 (Number of flat cars).

railroad’s Annual Report Form R-1, Schedule 755, Line 134. The Eastern Region URCS used by Ms. Carey develops its average units loaded based on the weighted average reported for all Eastern Rail Carriers for the year. The number of reported intermodal trailer/container units (“TCU”) per railcar for each eastern rail carrier is shown in Table 1 below

Table 1 <u>Eastern Region URCS Average TCUs Per Flatcar - 2023</u>	
Railroad	Average TCU Per Railcar
(1)	(2)
1. Norfolk Southern Railway	4.73
2. CSX Transportation	4.27
3. Canadian National Railway	<u>5.19</u>
4. Weighted Average Eastern Region URCS	4.58566
Source: STB 2023 URCS Worktable E2 Part 2, Line 202.	

As shown in Table 1 above, the weighted average intermodal units per railcar for all eastern railroads equaled 4.5866 TCU in 2023 and not the one (1) used by Ms. Carey.

To accurately calculate the Eastern Region URCS Phase III variable costs for an intermodal railcar, one must enter the weighted average eastern carriers’ 4.586 TCU into the costing program and not the one (1) TCU used by Ms. Carey.¹³ Understating the system average number of TCU per railcar, as Ms. Carey had done, creates a disconnect between URCS and the costed movement parameters, which in this case significantly understates the calculated Phase III URCS variable costs.

¹³ This error can also be seen by reviewing the outputs of Ms. Carey’s URCS analysis. Ms. Carey’s workpaper “HC-WP URCS Interchange.xlsx,” tab “Output,” cell Y9 shows the outputs from URCS Line 204, which shows the number of railcars used in the costing analysis. A review of Ms. Carey’s workpaper indicates that her intermodal cost calculation is based on {{ [REDACTED] }} flat cars, not one flat car, as claimed by Ms. Carey.

Second, Ms. Carey used an incorrect weight per unit in her calculation. The STB's URCS Phase III program requires the user to enter the weight per car in tons when developing the variable costs for a non-intermodal movement and the weight per intermodal unit when developing intermodal costs.¹⁴ In developing her intermodal variable costs, Ms. Carey stated she used {{ [REDACTED] }} tons per car to reflect the weight of two (2) containers per railcar instead of the weight of a single unit.¹⁵ Overstating the tons per unit, as Ms. Carey has done, leads to another disconnect and corresponding understatement in the URCS Phase III variable costs.¹⁶

Third, Ms. Carey's URCS cost analysis relies on unsupported movement miles. Ms. Carey states that in developing her variable costs that she relied on miles developed using the "Google mapping tool (*sic*)," but provided no workpaper documentation for these miles.¹⁷ I attempted to verify her miles using Google Earth path drawings but was unable to replicate her mileage statistics. I therefore updated her mileage statistics based on my calculation of the actual movement miles.

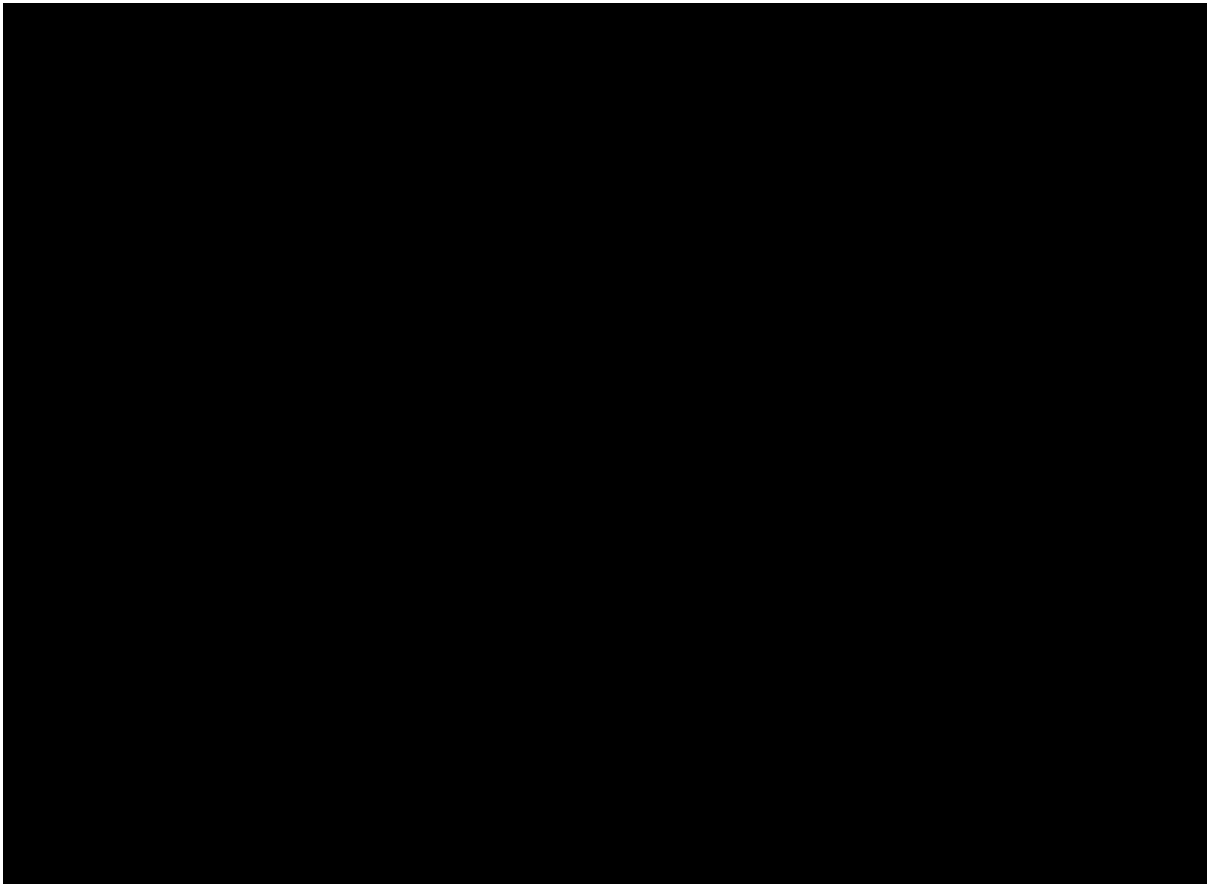
I corrected the errors identified above in Ms. Carey's analysis and calculated the correct variable costs per carload for each movement type shown in Ms. Carey's Figure 5 based on her stated approach to calculating intermodal variable costs. The results of my recalculation are shown in Table 2 below. {{ [REDACTED] }}

¹⁴ See, STB URCS Manual at page 25 "Enter the weight per car (in tons) for each segment, or weight per TCU (in tons) for intermodal shipments. This can be a decimal value."

¹⁵ Ms. Carey's calculation of the figure {{ [REDACTED] }} for the total lading weight of an intermodal car appears to be a mistyped value. Her workpapers show that she calculated an average weight per container of {{ [REDACTED] }} based on her analysis of waybill data. Doubling this value for two (2) containers would produce a total weight of {{ [REDACTED] }} and not {{ [REDACTED] }}. See, Carey VS workpapers "HC-WP URCS Cost.xlsx" and "HC-WP URCS Interchange.xlsx."

¹⁶ I found an additional flaw in Ms. Carey's calculation of the weight of a single intermodal unit. In calculating her {{ [REDACTED] }} per unit from the waybill data, Ms. Carey included multiple records where the tonnage was zero (0). Removing these records increases the average weight per unit to {{ [REDACTED] }}, which is the figure I used in restating Ms. Carey's variable cost for intermodal traffic.

¹⁷ See, Carey workpaper "HC-WP URCS interchange.xlsx" at tab "Detail," Note 3.



}}

As shown in Table 2, Line 3, Column (6) above, the Eastern Region URCS Phase III variable costs for intermodal traffic was \$93 per carload – which is nearly {{ [REDACTED] }} calculated by Ms. Carey as shown in Line 1, Column (6). Moreover, the \$93 URCS Phase III variable cost per carload is {{ [REDACTED] }} URCS Phase III variable cost per carload for the merchandise traffic that moves over the NPLB, as shown in the table above. This indicates the contribution intermodal traffic makes towards fixed costs and profit is similar to the contribution made by other traffic moving on the NPBL. Contrary to Ms. Carey’s assertion, the single \$210 rate charged by NPBL does not result in a disproportionate markup over variable costs for intermodal traffic as compared to other NPBL traffic

3. Ms. Carey's Analysis of CSXT and NS URCS Variable Costs is Flawed

Ms. Carey asserts that there is no significant difference between CSXT and NS' variable costs on the corridor routes to and from NIT/POV when comparing system-wide URCS-average costs for intermodal traffic. and that CSXT actually has a somewhat {{ [REDACTED] }}.¹⁸ Ms. Carey's assertions about her analysis are fundamentally flawed and misrepresent the nature of the movements being analyzed. Contrary to her claim that she is "comparing apples to apples" in her URCS costs analysis, the methodology she employed results in an inherently apples-to-oranges comparison that cannot be reconciled due to the structural differences in the movements of the two carriers.

In her deposition, MS. Carey was asked directly whether she had access to the necessary information to compare costs at NIT. Her response was: {{

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁸ See, Carey VS at page 22.

[REDACTED]
[REDACTED]
[REDACTED]^{19}}}

Ms. Carey's description here fails to account for the operational and cost distinctions between CSXT's and NS's movements from NIT, and her workpapers reveal a significant error in developing her URCS variable costs.

In her workpapers, Ms. Carey states that she developed her URCS variable costs with {{

[REDACTED]

[REDACTED]²⁰ [REDACTED]

[REDACTED]}}²¹ These notes and the underlying costing data demonstrate a fundamental misunderstanding of URCS methodology. NS's movement from NIT is an originate and terminate movement, not{{ [REDACTED] }} In URCS, the rail carrier that initiates a movement, whether from a port terminal or a customer facility, is considered the originating carrier and incurs origination costs.

CSXT's movements from NIT, utilizing the NPBL switch rate, are a combined movement, with NPBL's originate and deliver portion of the movement and CSXT's receive and terminate portion of the movement. Ms. Carey's cost comparison table reflects only the CSXT segment of this combined movement. However, one cannot extract the CSXT portion of a combined movement and compare it to the full NS movement and claim equivalency. This is, by definition, an apples-to-oranges comparison that cannot be corrected without actual carrier cost data for equivalent movement types.

¹⁹ See, Carey Deposition, page 124, lines 1–22 and page 125, lines 1–2.

²⁰ See, Carey workpaper "HC-WP URCS Cost.xlsx" at tab "Midwest IM costs" Notes 3.

²¹ See, Carey workpaper "HC-WP URCS Cost.xlsx" at tab "Midwest IM costs" Notes 13.

**B. SWITCHING RATE
COMPARISONS**

Ms. Carey states that the rate comparison I included in my Opening VS is incorrect because I allegedly included railroads that are not port terminal carriers or have different operations than those of the NPBL. She also claims I failed to include confidential contracted switching rates in my comparison and that my inclusion of length of haul is irrelevant for switching operations.²²

While she disagrees with my comparison of switching rates from other short line, belt and terminal railroads, Ms. Carey develops her own comparison of the NPBL tariff rate against confidential contract rates for movements over the Commonwealth Railway (“CWRV”).²³ There are several issues with Ms. Carey’s critique of my rate comparison and her development of her own comparison. For example, Ms. Carey overstates the differences between the railroads I included in my rate comparison. Ms. Carey also ignores the fact that a CSXT expert witness included the same railroads in his rate comparison of NPBL rates that I included in my analysis. Also, in developing her comparison of NPBL tariff rates to CWRV contract rates, Ms. Carey uses the incorrect number of containers per railcar when developing her NPBL rate per container. Finally, while the CWRV and the NPBL operate in the same geographic area, they have fundamentally different corporate purposes, operations and costs that help explain any difference in relative rate levels.

1. Terminal Railroad Rate Comparisons

Ms. Carey states that many of the railroads that I included in the tariff rate comparison shown in Table 2 of my Opening VS are not comparable to the NPBL and, therefore, infers the

²² See, Carey VS at pages 46-48.

²³ See, Carey VS at pages 47-48.

rate comparison is invalid.²⁴ She also claims that I disregarded the fact that, in many cases, Class I railroads like the CSXT and NS have confidential rate contracts with the switching carriers that have lower switching rates than the published tariff rates. She also stated that I improperly compared NPBL rates to rates for port and terminal railroads that do not either have deepwater ports or routinely transport intermodal traffic.

Ms. Carey's criticisms are overstated and misguided as I explain below.

a. Confidential Contract Rates

Ms. Carey's chief concern with my Opening VS rate comparison is that I did not include confidential switching agreements between the terminal railroads and their connecting Class I railroads. Ms. Carey ignores the fact that when I developed my Opening VS, I did not have access to confidential CSXT rate agreements. "Private agreements," as Ms. Carey uses the term, are by their very nature private and confidential. It was not possible to include confidential rate agreements in my comparison if I did not have access to them, which I did not do.

As to the private agreements between NS and terminal railroads, the only private agreement supplied to me by NS was the agreement between NS and the CWRY for shipments to and from VIG. While I inadvertently excluded this agreement rate from my Opening VS due to a scrivener's error,²⁵ I included NS's confidential switching rate with CWRY in my Supplemental VS.²⁶

b. Tariff Rates From The Port of Birmingham

Ms. Carey states that I improperly included switching rates from the Port of Birmingham, AL because the port does not handle deepwater container vessels.²⁷ While the Port of Birmingham

²⁴ See, Carey VS at page 46.

²⁵ See, page 58 of Fapp Deposition.

²⁶ See, Supplemental VS at page 30.

²⁷ See, Carey VS at page 46, note 242.

is not a deepwater port, it does handle international shipping containers. The Port of Birmingham is located on the Locust Fork of the Black Warrior River and was developed in the 1920's to allow barge traffic to move to and from the Ports of Mobile and New Orleans.²⁸ This allows it to receive international shipping containers by barge from these two Ports.²⁹ The fact that the Port of Birmingham does not handle deepwater vessels does not mean it does not handle international shipping containers, which are relevant to this analysis. The issue is not how the containers arrived at the port, but rather how they were handled by the rail carrier once they had arrived.

c. Tariff Rates From the Galveston Railroad, Rio Grande International Railroad and Port Jersey Rail

Ms. Carey states that it was improper to include the tariff rates from the Galveston Railroad, which serves the Port of Galveston, and the Rio Grande International Railroad, which serves the Port of Brownsville, because the ports at which these railroads operate allegedly transport little container traffic and do not publish container statistics.³⁰ She also indicates that it was a mistake to include Port Jersey Rail because it does not handle intermodal traffic.³¹

Ms. Carey's assertions about the amount of container traffic handled at the ports and whether the ports report these statistics are irrelevant for several reasons. First, the tariff rates included in my Opening VS analysis were not volume-based rates, which changed based on the amount of volume transported. Instead, the rates were based on a per railcar basis meaning the same rate was charged whether one container was shipped or 100,000 containers were shipped.

²⁸ See, <https://www.bhamwiki.com/w/Birminghamport>.

²⁹ See, "2022 Alabama Statewide Freight Plan.pdf," page 16 "High-priority port projects at the Port of Birmingham include truck-related technology investment, dredging improvements at terminals, rail siding expansion, container on-barge service, and warehouse construction" The report is available at https://www.transportation.gov/sites/dot.gov/files/2023-12/AL_2023_Freight_Plan.pdf.

³⁰ See, Carey VS at page 46, note 243.

³¹ See, Carey VS at page 46, note 244.

Second, whether the Ports “publish container statistics” does not eliminate the fact that the Ports can and do ship international shipping containers. For example, the Port of Brownsville indicates that it provides domestic and international container service and has a container handling yard to assist in transporting container traffic.³² Additionally, both the Port of Brownsville and the Port of Galveston include container related charges in their port tariffs.³³ As to the Port Jersey Rail, while the railroad primarily handles bulk and box car traffic, there is no indication that it does not also handle at least a limited amount of container traffic. While these ports do not ship at the same volume as the POV, inclusion of the railroads serving these ports is valid as they all can or do transport international shipping containers

**d. Tariff Rates From Palmetto Railways
and the Alabama State Port Authority**

Ms. Carey states that I was mistaken to include rates from the Palmetto Railway’s Charleston Subdivision and North Charleston Subdivision in my rate comparison because they do not have “non-inland on-dock rail intermodal” facilities.³⁴ She also states that I erred by including a charge from the Alabama State Port Authority because it is a lift charge and not a railroad rate.³⁵ Ms. Carey’s claims are inconsistent with prior analyses presented by CSXT witnesses and misinterprets my rate comparison.

Ms. Carey’s claim that it was improper to include the Palmetto Railway rates in my comparison is wrong for two reasons. First, CSXT included rates for the Palmetto Railway in its

³² See, “Brownsville Navigation District Port Facility and Directory,” Rebuttal workpaper “Port-of-Brownsville-Directory-2016.pdf,” available at <https://www.portofbrownsville.com/wp-content/uploads/2017/02/Port-of-Brownsville-Directory-2016.pdf>.

³³ See, “Port of Brownsville Tariff No. 6,” Rebuttal workpaper “BND-Tariff-No.-6-2025-08-21.pdf,” available at <https://www.portofbrownsville.com/wp-content/uploads/2025/08/BND-Tariff-No.-6-2025-08-21.pdf> and “The Board Of Trustees Of The Galveston Wharves Tariff No. 7,” Rebuttal workpaper “2025-Tariff-8-25.pdf” available at <https://www.portofgalveston.com/wp-content/uploads/2025/08/2025-Tariff-8-25.pdf>.

³⁴ See, Carey VS at page 46, note 245.

³⁵ *Id.*

comparison of port rail switching rates in its Antitrust case against NS.³⁶ Second, Palmetto Railway's switching rate is a per-container rate which indicates Palmetto Railway's management sees a market for container traffic from the terminals. It would be illogical to include a per-container rate if the railroad did not currently or plan in the future to transport containers.

As to the Alabama State Port Authority, Ms. Carey misinterprets my report. As noted in my Opening VS, I included the Alabama State Port Authority in my comparison table, but specifically stated that I did not calculate a switch rate per container mile because it is a lift charge and not a switching charge.³⁷ I listed the Alabama State Port Authority in my Opening VS analysis because the Port of Mobile is a major US port with significant container volume, but I explicitly excluded the rate from my switch rate per mile comparison because it was not applicable to the rail rate comparison analysis. Ms. Carey ignored these facts in her VS.

2. Ms. Carey's Rate Comparison is Inaccurate

Ms. Carey's only rate comparison of the NPBL tariff switching rate is to contract rates paid by NS and CSXT to the CWRV. She states that she only includes CWRV in her rate comparison and excludes other East Coast and Gulf Coast terminal railroads because CWRV is the only port-serving railroad that has similar economic circumstances to the NPBL.³⁸ Ms. Carey compares the NPBL rate per railcar (converted to a per-container rate) to contract rates paid by NS and CSXT to the CWRV.³⁹ She concludes that the tariff rate charged by NPBL is "dramatically overpriced"

³⁶ See, Expert Report of Howard P. Marvel, PhD. at page 28.

³⁷ See, Opening VS at page 6, Table 2, note 2 "The Alabama State Port Authority fee is a lift fee charged by the Port not a switching fee."

³⁸ See, Carey VS at page 47.

³⁹ See, Carey VS at page 48, Figure 7.

and that NPBL could reasonably be expected to offer a much lower switching fee for international IM traffic service to and from NIT absent NS control of NPBL.⁴⁰

Although the CWRV is comparable in some ways to the NPBL, Ms. Carey's statement that CWRV has similar economic circumstances to the NPBL is incorrect. The CWRV is operationally, financially, and economically different than the NPBL, which leads to different pricing strategies and costs as explained below. Regardless, Ms. Carey's rate comparison is facially inaccurate because she incorrectly calculated the NPBL effective rate per container by incorrectly assuming the number of containers transported on each railcar. When this erroneous assumption is corrected, the effective per-container rates charged by the NPBL and CWRV are reasonably comparable when considering the significant differences between the two railroads.

a. CWRV and NPBL Have Many Differences That Explain Their Differences in Rates

Ms. Carey claims that rates charged by CWRV are reasonably comparable to NPBL rates because both railroads serve customers in the same geographic area, both railroads allegedly serve large amounts of international intermodal traffic, both railroads operate over similar distances, and both railroads primarily serve to facilitate interchanging traffic with the CSXT and NS.⁴¹

While Ms. Carey is correct that both CWRV and NPBL interchange with NS and CSXT and both are in the Norfolk and Portsmouth VA region, her assertion that both short line railroads serve high amounts of international intermodal traffic and operate over similar distances is factually incorrect. Moreover, there are a significant number of differences between CWRV and NPBL that lead to differences in operations and costs, which helps to explain why they have

⁴⁰ See, Carey VS at pages 48 and 49.

⁴¹ See, Carey VS at page 47.

different cost structures and different pricing strategies. To claim that one railroad can provide the same or lower rates than another railroad because they operate in the same geographic area ignores the many different aspects of each railroad's operations and operating purpose as explained below.

**i. Different Levels and
Types of Traffic**

Ms. Carey states that CWRV transports a large amount of international intermodal traffic from VIG, which is similar in nature to traffic from NIT.⁴² Ms. Carey improperly equates containers moving from and to VIG and NIT with traffic moving on CWRV and NPBL. While NIT and VIG both move intermodal containers through their respective terminals, NPBL and CWRV have significantly different traffic bases.

Exhibit 8 to my Supplemental VS displays traffic moving to NPBL's top-ten customers for the years 2020 through 2024. My Exhibit 8 shows NPBL's largest shipper is Purdue Farms, which transports food and kindred products. After Purdue Farms, the next largest shipper on the NPBL is Titan-Roanoke Cement, an aggregates shipper, followed by TransMontaigne Ethanol, a chemicals shipper. Overall, NPBL transports a broad mix of commodities for 24 different customers.⁴³ What is not shipped extensively on NPBL is international intermodal shipments, as containers moving from NIT currently move on NS. NPBL ships a small number of containers to other shippers on its network but has not transported containers to or from NIT since 2015.

In contrast, CWRV's primary product transported is containers moving to and from VIG. As I explained in my Supplemental VS, CWRV has only three (3) active locations it serves on the line, i.e., VIG, a specialty chemicals plant located on the Nansemond River in Suffolk, and the

⁴² See, Carey VS at page 47.

⁴³ See, Supplemental VS workpaper "Exhibit_DLF-8.xlsx," tab "Summary."

former US Amines, now AdvanSix, chemical plant located on the Elizabeth River.⁴⁴ Unlike NPBL, which transports a broad range of commodities, CWRV primarily transports containers and chemical traffic.

**ii. Different Networks and
Operations**

Ms. Carey claims that NPBL and CWRV operate with “not too dissimilar service distances” stating CWRV has a 16.5-mile railway system and NPBL operates over 27 miles of trackage rights from NIT to NPBL’s Berkley Yard.⁴⁵ Ms. Carey’s comparison is misleading.

While CWRV operates over 16.5 miles of its own track, NPBL operates over 36 miles of its own track plus 27 miles of NS track via trackage rights, a total of 63 operating miles.⁴⁶ Ms. Carey failed to consider the 36 miles of other track NPBL serves, ignoring the reality that NPBL operates on over 300 percent more track than CWRV.

More importantly, CWRV’s and NPBL’s operations differ. Ms. Carey notes that CWRV interchanges with two (2) railroads, NS and CSXT, but NPBL interchanges with four (4) different common carrier railroads, including NS, CSXT, Chesapeake & Albemarle Railroad and the Buckingham Branch Railroad Company.⁴⁷ CWRV’s primary interchange location is its Churchland, VA marshalling yard, where it receives trains from both CSXT and NS which operate over the CWRV via trackage rights.⁴⁸ NPBL interchanges with its connecting carriers at three (3) different locations on its network.⁴⁹

⁴⁴ See, Supplemental VS at page 26.

⁴⁵ See, Carey VS at page 47, note 253.

⁴⁶ See, <https://www.npbllr.com/about-us.html>.

⁴⁷ *Id.*

⁴⁸ See, Supplemental VS at page 27.

⁴⁹ See, STB Docket No. FD 36836, *Norfolk S. Corp. and Norfolk S. Ry. Co. – Acquisition of Control – Norfolk & Portsmouth Belt Line R. Co.* Minor Application filed on February 14, 2025, at pages 42-43.

As I indicated in my Supplemental VS, CSXT and NS operate trains over CWRV from their own tracks in Suffolk to CWRV's marshalling yard, where CWRV crews transport trains to and from VIG using NS and CSXT locomotives.⁵⁰ NPBL crews, on the other hand, operate over their own network and NS track via trackage rights using their own crews and leased locomotives.⁵¹

NPBL also owns and maintains the Belt Line Bridge on the Southern Branch of the Elizabeth River.⁵² The Belt Line Bridge is a through-truss lift bridge connecting Portsmouth and Chesapeake, Virginia. The structure includes a Warren through-truss lift span and three (3) Warren through-truss approach spans.⁵³ The bridge spans the Elizabeth River, measuring 2,800 feet in length. Its main span is 750 feet long, making it one of the longest bascule bridges in the world.⁵⁴ CWRV has no similar structure on its line, and does not encounter the expense to operate and maintain similar infrastructure.

A significant portion of NPBL's operations move over trackage rights on the NS. NPBL must pay a trackage rights fee for every train it moves over the NS and must coordinate its operations over a busy section of NS's network. CWRV does not operate on any trackage rights but instead has entered into trackage rights agreements with CSXT and NS to operate their trains on its lines. Except for the small amount of traffic moving to the two (2) other non-intermodal terminal locations on CWRV's line, NS and CSXT trains have virtually unencumbered access to CWRV's right of way. This means NS and CSXT are contributing to CWRV's revenues by paying

⁵⁰ See, Supplemental VS at pages 27-28.

⁵¹ According to the 1897 Agreement, only NPBL owned or leased locomotives are allowed to operate on the NPBL.

⁵² See, Supplemental VS at page 12.

⁵³ See, <https://bridgestunnels.com/location/elizabeth-river-lift-bridge-norfolk-portsmouth-belt-line-railroad/>.

⁵⁴ See, <https://www.seamagazine.com/locations/bridge-norfolk-portsmouth-belt-line-bridge-chesapeake-virginia-6214>

for movements to CWRV's marshalling yard and helping to pay for maintenance on CWRV track through their trackage rights fees.

Finally, as discussed in greater detail below, CWRV is a subsidiary of Genesee & Wyoming Inc. (G&W), a short line railroad holding company with over 100 operations across North America. Most general and administrative expenses and other centralized programs, such as rail infrastructure and equipment acquisition, are handled at the corporate level, providing leverage when negotiating with suppliers.⁵⁵ NPBL, while owned by two (2) Class I railroads, operates as an independent operation with minimal support from its parent companies.

iii. Different Corporate Structures and Purposes

Beyond their different traffic bases, different operations and different infrastructures, CWRV and NPBL have completely different corporate organizations and different purposes.

CWRV is a subsidiary of G&W, which is itself owned by Brookfield Infrastructure Partners, L.P. and GIC Private Limited.⁵⁶ Brookfield Infrastructure Partners, L.P. is a global infrastructure company that owns and operates long-life assets in the utilities, transport, midstream and data sectors across the U.S., Asia Pacific, and Europe. The Company's segments include Utilities, Transport, Midstream, and Data.⁵⁷ GIC Private Limited is a Singaporean sovereign wealth fund that manages the country's foreign reserves. Established by the Government of Singapore in 1981 as the Government of Singapore Investment Corporation, from which the acronym "GIC" is derived. Its mission is to preserve and enhance the international purchasing

⁵⁵ See, Genesee & Wyoming Inc. 2018 Annual Report at page 6.

⁵⁶ See, <https://www.gwrr.com/about-us/>.

⁵⁷ See, <https://www.cnbc.com/quotes/BIP>.

power of the reserves, with the aim of achieving good long-term returns above global inflation over the investment time horizon of 20 years.

The purpose of both G&W's owners is to provide acceptable returns on investment for their owners. As a profit maximizing entity, G&W operates to provide sufficient long-term returns to its owners while ensuring safe operations for its employees and surrounding community.⁵⁸

NPBL's purpose is significantly different than that of CWRV. Unlike CWRV, which operates to maximize profits for its owners, NPBL operates to provide terminal switching services for its two (2) owners while covering its operating and capital costs and providing a six (6) percent annual dividend.⁵⁹ NPBL is, by its nature, not a profit maximizing operation and makes operating and pricing decisions accordingly.

b. Ms. Carey Incorrectly Calculated the Effective NPBL Rate Per Container

Ms. Carey claims that the effective NPBL switching rate is {{ [REDACTED] }} per container because CSXT {{ [REDACTED] }} in its normal course of business analysis. Ms. Carey also states CSXT assumed two (2) containers per railcar in its 2018 and 2024 offers to NPBL.⁶⁰

I disagree with Ms. Carey's assumption that intermodal movements from the NIT would transport {{ [REDACTED] }}. First, as I explained in my deposition, the large number of intermodal and shipping companies I worked with in my over 30-year career assume 2.5 containers per railcar when transporting international containers.⁶¹ This is because 2.5

⁵⁸ See, <https://bep.brookfield.com/sites/bep-brookfield-ir/files/Brookfield-BEP-IR-V2/2023/brookfield-health-safety-security-environment-policy.pdf>

⁵⁹ See, 1897 Operating Agreement at pages 1 and 4.

⁶⁰ See, Carey VS at page 48, note 260.

⁶¹ See, Fapp Deposition at pages 93-94.

containers reflects the fact that international containers are either 20 or 40-45 feet in length, and railroads and ports often stack two 20-foot containers beneath a single 40-foot container when loading international intermodal containers onto railcar wells. Therefore, the double stack intermodal cars serving NIT and other ports include a mix of 2-containers (40+40) and 3-containers (20+20+40) configurations.

This is confirmed by CSXT's internal evaluations. Specifically, in evaluating potential intermodal movements to NIT, CSXT's own normal-course-of-business analyses assumed a range of {{ [REDACTED] }} in its evaluations. {{ [REDACTED] }}

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁶³}}

In addition, an analysis prepared by CSXT and produced in discovery in the Antitrust case compared {{ [REDACTED] }}

[REDACTED]

[REDACTED]

[REDACTED]⁶⁴ [REDACTED]

⁶² CSXT provided a presentation produced in discovery in the Antitrust case included a {{ [REDACTED] }} See, CSXT0037049.

⁶³ See, Rebuttal workpaper {{ [REDACTED] }}

⁶⁴ See, "CSXT0064610.xlsx," tab "Summary," cell L78.

[REDACTED]

[REDACTED]⁶⁵ }}

Using an understated number of containers per railcar significantly impacts the per container transportation rate. Exhibit 3 of my Opening VS shows that NPBL rate per container would range from {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

The Board has previously stated its preference for data developed in the normal course of business in lieu of made-for-ligation analyses.⁶⁶ CSXT's normal-course-of-business analyses relied on the assumptions that NPBL would carry {{ [REDACTED] }} when transporting CSXT containers to and from NIT. Whether considering the low or high end of this range, CSXT's normal course of business assumptions clearly contradict Ms. Carey's assumption of {{ [REDACTED] }}

c. Corrected Carey Rate Comparison

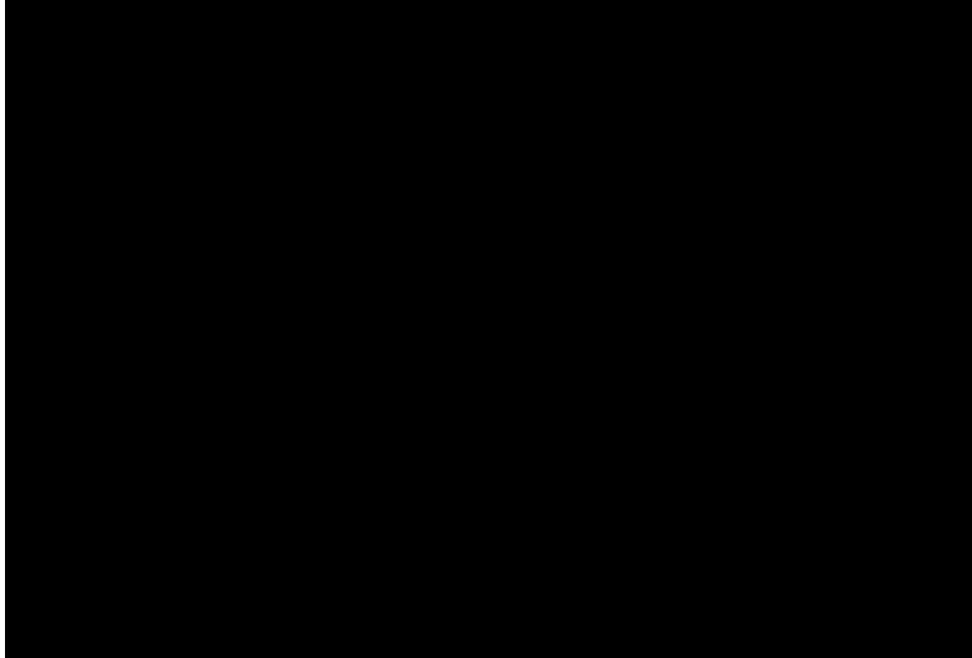
Ms. Carey's rate comparison using an NPBL tariff rate of {{ [REDACTED] }} is contradicted by real world operating practices and CSXT's own internal evaluation of the movements from the NIT over the NPBL. Table 3 below compares the CSXT and NS switching

⁶⁵ See, "CSXT0064610.xlsx," tab "Car Hire," cell B5.

⁶⁶ See, STB Docket No. 42022, *FMC Wyoming Corporation and FMC Corporation vs. Union Pacific Railroad Company*, served May 12, 2000 at page 32 "We believe that UP's own forecasts, made in the normal course of business, provide an acceptable basis for developing growth projections for the ORR... UP's reduction of the LRP volume forecasts by an arbitrary 1% each year has no meaningful support, as it is based solely upon a UP witness opinion rendered specifically for this litigation."

rates from the CWRV to the NPBL tariff rates based on CSXT's own assumptions of {{ [REDACTED] }}.

{{



}}

As shown in Table 3 above, when CSXT's normal-course-of-business assumptions are used, the NPBL tariff rate, which was established under completely different circumstances than the CWRV contract switching rates, ranges from {{ [REDACTED] }}. While these NPBL tariff rates are {{ [REDACTED] }}, the differences can largely be explained by NPBL's more expansive operations, different customer base and different corporate purposes.

C. HISTORIC NPBL RATES

Ms. Carey states that NPBL used differential pricing prior to 2010 in which the railroad charged different rates for different services depending on if NPBL charges were absorbed or not

by the linehaul carrier as well as if they were domestic or international traffic movements.⁶⁷ One of the differential NPBL rates Ms. Carey alludes to in her VS is a 2006 NPBL rate of {{[REDACTED]}} per carload for CSXT intermodal movements to NIT.⁶⁸

Counsel for NS has asked me to calculate what the 2006 NPBL rate of {{[REDACTED]}} per carload for CSXT intermodal movements to NIT would equal at 4Q 2025 wage and price levels. To make this calculation, I applied the quarterly change in the STB's Rail Cost Adjustment Factor -Unadjusted for Productivity ("RCAF-U") from 3Q 2006, the time of the NPBL Rate Committee meeting referenced by Ms. Carey, to 4Q 2025. The RCAF-U is an appropriate index to use to reflect changes in NPBL's costs as it reflects changes in railroad input costs that NPBL would incur but does not take into consideration Class I productivity gains that are not likely to be available to NPBL. Based on the change in the RCAF-U, the 2006 rate of {{[REDACTED]}} per carload is equivalent to {{[REDACTED]}} per carload at today's wage and price levels.⁶⁹

⁶⁷ See, Carey VS at page 43.

⁶⁸ *Id.*, at note 221. Ms. Carey's workpaper cited in her footnote is a summary of an October 2006 NPBL Rate meeting, in which the {{[REDACTED]}} CSXT rate is discussed. It should be noted that the NPBL rate committee found that the rate charged by NPBL to CSXT movements to NIT was non compensatory and that "Anything move to/from Sewell's Point areas loses money."

⁶⁹ See, Rebuttal workpaper "2006 Rate Escalated to 2025.xlsx."

III. DRAY MOVEMENTS

As I explained in my Opening VS, rail and drayage services⁷⁰ compete for intermodal shipments in many locations throughout the U. S. on a daily basis, and that drayage service paired with line-haul rail service provides an effective alternative to on-dock rail movements from the NIT. There are numerous reasons for this competition, including low barriers to enter and exit the trucking market, a large number of potential suppliers, and subsidized dray services from the POV.⁷¹

Ms. Carey claims that drayage is an infeasible alternative to rail at the NIT and not a substitution for on-dock access. She claims that drayage does not have sufficient economic scale to compete with on-dock rail access and that drayage capacity expansion is limited at best. She also claims that the forthcoming expansion at NIT will further limit CSXT's ability to provide an intermodal service product that can compete with NS. She attempts to support her claims by citing various historic articles about congestion at the POV and an abbreviated analysis that implies that NIT would have difficulty dispatching sufficient trucks to meet historic CSXT dray movements.⁷²

Ms. Carey's claims are without merit. As explained below, the POV has spent considerable capital over the last decade to increase the dray and truck capacity at both NIT and VIG. In contrast to Ms. Carey's claim that dray and truck movements at the POV terminals are not scalable, reports and statements made by POV officials (also explained in greater detail below) show that POV facilities and operations are easily capable of expanding their output of truck movements.

⁷⁰ I use the term "drayage" or "dray" to refer to the movement of containers between an ocean terminal and near-dock or off-dock railroad ramp. I discuss later in this Rebuttal VS "truck movements" or "trucking movements" between ocean terminals and customer locations.

⁷¹ See, Opening VS at pages 8-9.

⁷² See, Carey VS at pages 14-15.

A. THE POV CAN SCALE ITS DRAY OPERATIONS

Ms. Carey claims drayage is not a competitive alternative to rail at the NIT due to drayage not having sufficient economic scale to compete with on-dock rail access.⁷³ In actuality, the POV has made considerable investments and changed operating practices in order to scale the dray and truck capacity at NIT. POV has historically presented the ability and willingness to adjust for increased demand through investment in technology and infrastructure. In addition, POV has in the past increased its dray and truck capacity by adjusting its operating periods to accommodate increased demand. I discuss both issues below.

1. POV Investments Have Increased Trucking Capacity

In 2017, POV undertook a \$350 million renovation project at NIT, which increased NIT's overall throughput by 46 percent.⁷⁴ NIT reconfigured the South Yard to use new rail-mounted gantry cranes, which allow NIT “to move cargo more safely, swiftly, and sustainably than ever before.”⁷⁵ This followed the 2017 expansion of NIT’s North Gate Complex, which included a \$42 million investment that added 26 lanes of ingress and egress to NIT to complement the 16 gates on the south side of the terminal. The project also alleviated 740 trucks per day lining up on crowded local streets such as Hampton and Terminal Boulevards and dramatically reduced turn and idling times for truckers and the emissions associated with them.⁷⁶

In addition to the above, and as discussed in my Opening VS and Supplemental VS, POV debuted its PRO-PASS reservation system at NIT in 2018. PRO-PASS is a mandatory online

⁷³ See, Carey VS at page 14.

⁷⁴ See, The Port of Virginia’s “Sustainability Report 2017.” The report is available at <https://wp.portofvirginia.com/landing-pages/fy17-sustainability-report/>

⁷⁵ *Id.*

⁷⁶ *Id.*

platform used by trucking companies to schedule reservations for gate entry, improving efficiency for both truckers and terminal operations. PRO-PASS allows NIT to “optimize gate and yard operations, reduce trucker turn-time, eliminate trouble cases, and reduce congestion within the Port.”⁷⁷

2. POV Can Adjust NIT Operations to Increase Truck Capacity

The POV’s investment discussed above had a great impact on NIT capacity. Prior to the expanded terminal access gates and institution of the PRO-PASS system, NIT operated 13-hours a day Monday through Friday, and five (5) hours on Saturday to meet demand.⁷⁸ After the expansion and implementation of PRO-PASS, NIT was able to reduce its hours and operating days.

POV has shown that it is willing to respond to changes in customer demand and scale operations by extending NIT operating hours. Under current operations, NIT is open Monday through Friday, from 6:00 am Eastern Standard Time (“EST”) to 6:00 pm EST, with trucking companies no longer allowed to enter the terminal after 5:00 pm EST, i.e., trucks are only allowed to enter the terminal 11 hours per day, five (5) days per week (55 hours per week).⁷⁹

However, NIT “continually review[s] commercial performance and forecasts, ensuring that gate hour capacity aligns with customer demand.”⁸⁰ NIT has historically and repeatedly reacted to an increase in customer demand by opening the truck gates on Saturday and Sunday, proving NIT

⁷⁷ See, Supplemental workpaper “PRO_PASS_FAQ.pdf.”

⁷⁸ See, <https://tmtava.org/nit-north-gate-june-26-30-2017/>

⁷⁹ See, Supplemental workpaper “Terminal Gate Hours – Port of Virginia.pdf.”

⁸⁰ See, Port of Virginia Gate Hour Changes at <https://operations.portofvirginia.com/alert/the-port-of-virginia-gate-hour-changes-effective-monday-october-28-2024/>

has the ability to scale operations.⁸¹ To deepen NIT's ability to take on increased demand and to scale operations, NIT could further extend operating hours from the current 55 hours per week. NIT can stay open later than 6:00 pm EST on weekdays, as well as operate on weekends.

Increasing operating hours due to changes in demand is a common activity in the port transportation industry. The Port of Long Beach expands trucking gate hours to three (3) shifts as demand requires.⁸² The Port of Los Angeles uses a similar strategy of adjusting the number of shifts and days per week worked to address changes in volumes.⁸³ As volume increases at the NIT, the POV could seek to implement similar arrangements with its contractors and labor unions to adjust gate hours to meet the increased demand. The issue is not a lack of physical infrastructure, but instead labor and business policies.⁸⁴

3. Local Access Roads Should Not Limit Increased NIT Truck Movements

Ms. Carey also claims “[d]rayage to rail includes a truck portion of the move between NIT and VIG and must traverse a busy Hampton Boulevard that does not allow truck traffic between 4 p.m. and 6 p.m. [sic].”⁸⁵ I discussed Hampton Boulevard truck restrictions in detail in my Supplemental VS.⁸⁶ Drayage companies are able to apply for a City of Norfolk “Hauling Exception” permit that provides access to “Hampton Boulevard, between Terminal Boulevard and

⁸¹ POV continuously releases “Operational Alerts” which extend NIT’s hours of operation to include Saturday and Sunday. See, POV announcements at <https://operations.portofvirginia.com/alert/extended-saturday-sunday-gate-hours/>

⁸² See, <https://polb.com/port-info/gate-hours/>.

⁸³ See, <https://kentico.portoflosangeles.org/getmedia/e4e7962a-b985-41b0-afd2-b1e6712edb20/container-terminal-gate-hours>.

⁸⁴ See, “Lack of 24/7 port operations in US highlighted by FMC Commissioner,” Seatrade-Maritime News, May 10, 2021 available at <https://www.seatrade-maritime.com/terminals/lack-of-24-7-port-operations-in-us-highlighted-by-fmc-commissioner>

⁸⁵ See, Carey VS at page 15.

⁸⁶ See, Supplemental VS at page 17.

Redgate Avenue, between the hours of 4:00 pm and 6:00 am.”⁸⁷ According to the City of Norfolk’s public works permit fees, a one year “Exception (Restricted Road)” hauling permit is \$315 per vehicle.⁸⁸

Drayage companies also have the option of not traversing Hampton Boulevard. Drayage companies can operate between NIT and VIG using Interstates 564, 64 and 264. While this route is longer, it avoids the time restrictions on movements over Hampton Boulevard. It also routes movements away from city streets and on to highways designed to handle large volumes of traffic.

It is clear that drayage companies are not bound by limited access on Hampton Boulevard, as companies have the ability to apply for permits that allow them to travel Hampton Boulevard during restricted hours, or simply use a different route.

**B. MS. CAREY’S CLAIM OF YARD
CONGESTION AND WAITTIMES
IS OVERSTATED AND BASED ON
OUTDATED SUPPORT**

Ms. Carey asserts that dray movements consume significantly more time than on-dock rail movements. She bases her assertion on average reported truck turn times at the NIT and an allegation that trucks can face up to eight (8) additional hours of queuing time to enter the NIT gates.⁸⁹ She further asserts that these “delays” are undesirable for time-sensitive intermodal traffic.

There are several issues with Ms. Carey’s assertions concerning the allegedly significant amount of time incurred by dray movements.

First, Ms. Carey’s statement that it takes trucks 43.6 minutes to retrieve a container is

⁸⁷ See, Supplemental workpaper “City of Norfolk PW Hauling Permit Application -6-4-16.pdf.”

⁸⁸ See, Supplemental workpaper “City of Norfolk Public Works Permit Fees-7-01-18.pdf.”

⁸⁹ See, Carey VS at pages 15-16.

misleading.⁹⁰ As I explained in my Supplemental VS, one of the ways the POV measures its operating efficiencies is through the weekly reporting of truck turn-times at NIT and VIG.⁹¹ A key metric reported by the POV is “Expanded Turn Time,” which measures the time a truck waits to enter the terminal plus the time a truck spends in the terminal. In other words, a truck’s total time from arriving at the terminal, waiting to enter the terminal, the time to drop a container or load a container and the time to exit the terminal.

The POV sets a goal of 50 minutes for trucks to wait to enter NIT, retrieve or drop a load and to exit the facility.⁹² Over the three-year period 2021 through 2023, the average expanded turn time at NIT was 43.6 minutes, which is 6.4 minutes less than the POV goal time of 50 minutes per shipment.⁹³ It is misleading for Ms. Carey to claim that dray-related delays are consuming a significant amount of time when turn time is approximately 13 percent better than the POV established goal time.⁹⁴

Second, the amount of time a truck waits to enter the NIT and pick-up or deliver a load pales in comparison to the time a container waits to be loaded onto a railcar. I explained in my Supplemental VS that in addition to measuring a truck’s expanded turn time at NIT, the POV also measures the amount of time a container dwells at the NIT before loading onto a truck or railcar.⁹⁵ While Ms. Carey states that delays to “time-sensitive” intermodal traffic are not desirable, she ignores the fact that containers moving by rail from the NIT dwelled on average 74.9 hours, or 3.1 days, before loading onto railcars for movements.⁹⁶ While she claims the 43.6 minute average time

⁹⁰ See, Carey VS at page 15.

⁹¹ See, Supplemental VS at pages 19-20, and Exhibits 9, 10 and 11.

⁹² See, Supplemental VS at page 19.

⁹³ See, Supplemental Exhibit 9, Line 161, Columns (4) and (7).

⁹⁴ $[(43.6\text{-minute expanded turn time} \div 50\text{-minute goal time}) - 1] \times 100 = -12.8 \text{ percent.}$

⁹⁵ See, Supplemental VS at pages 22-23.

⁹⁶ See, Supplemental VS Exhibit 11, Line 161, Column (7).

a truck spends at the NIT is significant, she completely ignores the three-plus days a container dwells in the NIT yard before leaving the facility.

Third, Ms. Carey's statement that up to eight (8) additional hours of queue time can be added due to trucker delays is a non-sequitur for many reasons. The eight-hour queue time statistics came from a news article more than a decade old about a spike in congestion at VIG.⁹⁷ The article makes no reference to similar long queue times at NIT. Additionally, the article was written prior to the extensive expansion of truck facilities at the NIT and the introduction of the PRO-PASS reservation system. NIT completed a new intermodal gate complex in 2017 that added 22 truck access lanes on the north side of the terminal to supplement the automated gate it installed on the south side of NIT. POV also implemented its PRO-PASS in February 2018, three (3) years after the congestion cited by Ms. Carey. As I explained in my Opening VS, PRO-PASS is a proprietary system that allows truckers to conduct most administrative tasks online prior to arriving at the terminal and to schedule truck arrival appointments. Conducting these tasks prior to arriving at the terminal allows for more efficient and balanced truck arrival patterns throughout the day, reduced queue lengths and time spent waiting to enter the terminal⁹⁸

C. MS. CAREY'S TRUCK DISPATCH ANALYSIS IS FLAWED

Ms. Carey states that NIT would need to dispatch a 40-foot container affixed to a chassis every three (3) minutes to move {{ [REDACTED] }} containers in a day (during the 10-hour window), to reach the {{ [REDACTED] }} maximum dray moves seen in 2021.⁹⁹ She implies that this creates some

⁹⁷ See, Freight Waves, "Congestion flares up again at Port of Virginia," March 13, 2015, available at <https://www.freightwaves.com/news/congestion-flares-up-again-at-port-of-virginia>, "The situation has gotten so bad at VIG that the line of trucks waiting to get into the privately-owned terminal has spilled onto the shoulder of Highway 164. Drivers are often forced to wait seven to eight hours to pick up or deliver a load, George Berry, an independent owner-operator and activist in the trucking community, said in a phone interview.

⁹⁸ See, Opening VS at page 9, note 19.

⁹⁹ See, Carey VS at page 15.

sort of constraint on dray movements from NIT and that this is a reason why dray movements from NIT are unable to compete with NS on-dock rail access. She also states that it would take two (2) days to dray the 300 containers carried on an intermodal train between NIT and VIG.¹⁰⁰

A review of actual gate transactions at NIT shows Ms. Carey’s assertions about dispatching a container every three (3) minutes and needing two (2) days to dray enough containers to fill an intermodal train are greatly exaggerated. Gate transaction statistics published by the POV indicate that the NIT incurred 706,160 gate transactions in 2021, 770,278 transactions in 2022 and 601,528 transactions in 2023.¹⁰¹ Using Ms. Carey’s assumption that the NIT truck gates operate {{ [REDACTED] [REDACTED] }}¹⁰² demonstrates the NIT historically processed {{ [REDACTED] }}.¹⁰³ The POV transaction reports summarize the total transactions, both inbound and outbound. Assuming for every inbound there is an outbound transaction, the NIT dispatched 2.25, 2.45 and 1.95 inbound and outbound transactions per minute for the years 2021, 2022 and 2023, respectively. In addition, as discussed in Section III.D below, trucks frequently move through VIG and NIT gates without containers. Based on data published by POV, I estimate gate transactions overstate actual loaded movements by approximately 19 percent as discussed below. Therefore, even using the 2023 outbound dispatch rate of 1.95 per minute, the lowest of the reported three (3) years and adjusting for empty truck movements, it would take approximately 3.2 hours to dispatch

¹⁰⁰ See, Carey VS at page 22.

¹⁰¹ See, Supplemental VS Exhibit 10, Lines 158 through 160, Column (2).

¹⁰² See, Carey VS at page 15, note 71.

103 {{ [REDACTED] }}

the containers to fill a 300-unit intermodal train, a rate considerably less than Ms. Carey's claim of taking two (2) days.¹⁰⁴

D. MS. CAREY OVERSTATES VIG UTILIZATION

Ms. Carey states that VIG is operating at or near its stated capacity, and as such, growth in international intermodal shipments moving through the POV will necessarily be directed to NIT.¹⁰⁵ According to Ms. Carey, this will increase the importance of moving away from dray movements and having on-dock rail access at NIT.

To support her statements about VIG utilization, Ms. Carey undertook an analysis in which she claims demonstrates that VIG was operating at {{ [REDACTED] }} of its capacity in terms of TEU's moving through the terminal in 2023.¹⁰⁶ Ms. Carey developed her VIG capacity analysis based on VIG's reported 2.2 million TEU operating capacity as reported by POV and on VIG rail and truck gate transaction and dwell time data reported by POV.¹⁰⁷ Using this data, and 2023 total POV throughput on a TEU basis, Ms. Carey estimated VIG utilization of {{ [REDACTED] }} of capacity.

The flaw in Ms. Carey's approach, which leads to her overstatement of VIG utilization, is her misinterpretation of the POV gate transaction and dwell time data that she used in her analysis. Ms. Carey assumes that the number of VIG gate transactions reported by the POV is equal to the number of containers moving through VIG by truck. Stated differently, Ms. Carey assumes that

¹⁰⁴ {{ [REDACTED] }}

¹⁰⁵ See, Carey VS at page 10.

¹⁰⁶ See, Carey workpaper "HC-WP-VIG Utilization.xlsx," tab "Summary," cell E10.

¹⁰⁷ See, Carey workpaper "HC-WP-VIG Utilization.xlsx," tab "Summary," cells C14 and C15. Ms. Carey states the source of VIG truck gate transactions is my Supplemental VS Exhibits 9,10 and 11, which is where I summarized POV NIT and VIG truck data. While she sources the truck data to my Exhibits, I did not develop the statistics and simply summarized data developed and reported by POV.

each truck that enters and exits VIG is transporting a container. This assumption is incorrect. Many trucks enter and exit VIG transporting empty container chassis¹⁰⁸ as shown in pictures obtained from VIG's truck entrance webcam.¹⁰⁹ By assuming that each reported gate transaction reflects a container moving in or out of VIG, Ms. Carey overestimated the number of containers moving by truck.

Similarly, Ms. Carey assumes that the number of rail containers included in the POV weekly container dwell time reports reflects unique weekly rail container counts. However, containers can dwell for more than one (1) week and be reported on more than one (1) weekly dwell time report. Simply counting the number of containers included in the POV container dwell time report can overstate the number of containers moving through the VIG by rail. This is easily shown by comparing the number of containers included in the POV rail container dwell time reports {{ [REDACTED] }} used by Ms. Carey to the number of containers Ms. Carey stated moved through VIG by rail as reported in CSXT and NS waybill data {{ [REDACTED] }}¹¹⁰

Ms. Carey's misapplication of POV truck gate transaction and rail container dwell time data and subsequent overstatement of VIG utilization can easily be shown by comparing the number of estimated TEUs moving through POV using Ms. Carey's utilization methodology and POV reported TEU throughput. The POV produces annual operating statistics, including total container volumes and total TEUs, and publishes these statistics on its website.¹¹¹ POV reported

¹⁰⁸ A container chassis is a wheeled framework designed to transport containers between terminals, shipping facilities and other locations. See, <https://ciemanufacturing.com/what-is-a-container-chassis/>

¹⁰⁹ See, workpaper "VIG Truck Entrance Pictures.zip."

¹¹⁰ See, Carey workpaper "HC-WP Traffic Tapes Analysis 2023_CSXT_NS.xlsx," tab "Stat - share NIT v VIG," cell N16. {{ [REDACTED] }}

¹¹¹ See, "Monthly Statistics" as reported at <https://operations.portofvirginia.com/port-statistics/>. Ms. Carey relied on these same statistics in her VIG utilization analysis. See, Carey workpaper "HC-WP-VIG Utilization.xlsx," tab "TEU Volume Breakdown."

that it handled 3,287,546 TEUs in 2023 at VIG and NIT on a combined basis.¹¹² Using Ms. Carey’s utilization methodology of relying on gate transaction and dwell time data, Ms. Carey’s approach calculates a total of {{ [REDACTED] }} handled by the POV, or {{ 1 [REDACTED] [REDACTED] }}.¹¹³

Ultimately, Ms. Carey’s mixing and matching different POV data leads to an overstatement in VIG utilization. I adjusted Ms. Carey’s VIG utilization analysis by using her number of rail containers moving through VIG and adjusting her truck container count by {{ [REDACTED] [REDACTED] }}. The results of these adjustments shows that in 2023 VIG operated at approximately {{ [REDACTED] }} of its reported capacity and not the {{ [REDACTED] }} calculated by Ms. Carey. At an {{ [REDACTED] }} capacity level, VIG could handle an additional {{ [REDACTED] }} TEU or approximately {{ [REDACTED] }} additional containers using Ms. Carey’s {{ [REDACTED] }} TEU to container conversion factor before reaching its 2.2 million TEU stated capacity.

¹¹² See, Rebuttal workpaper “HC-WP-VIG Utilization - Corrected.xlsx,” tab “TEU Volume Breakdown.”

¹¹³ See, Rebuttal workpaper “HC-WP-VIG Utilization - Corrected.xlsx,” tab “Carey’s POV Volumes.”

IV. TRUCK COMPETITION

In my Opening VS, I explained the extremely competitive environment for transporting international container traffic. Ocean carriers compete for the movement of containers from Europe and Asia to the United States, and vice-versa. Ports compete to move containers to and from the ocean carriers, on the one hand, and railroads, trucks, and inland waterway carriers on the other. Similarly, railroads, trucks and inland water carriers compete to move the containers between these ports and their origins and final destinations.¹¹⁴

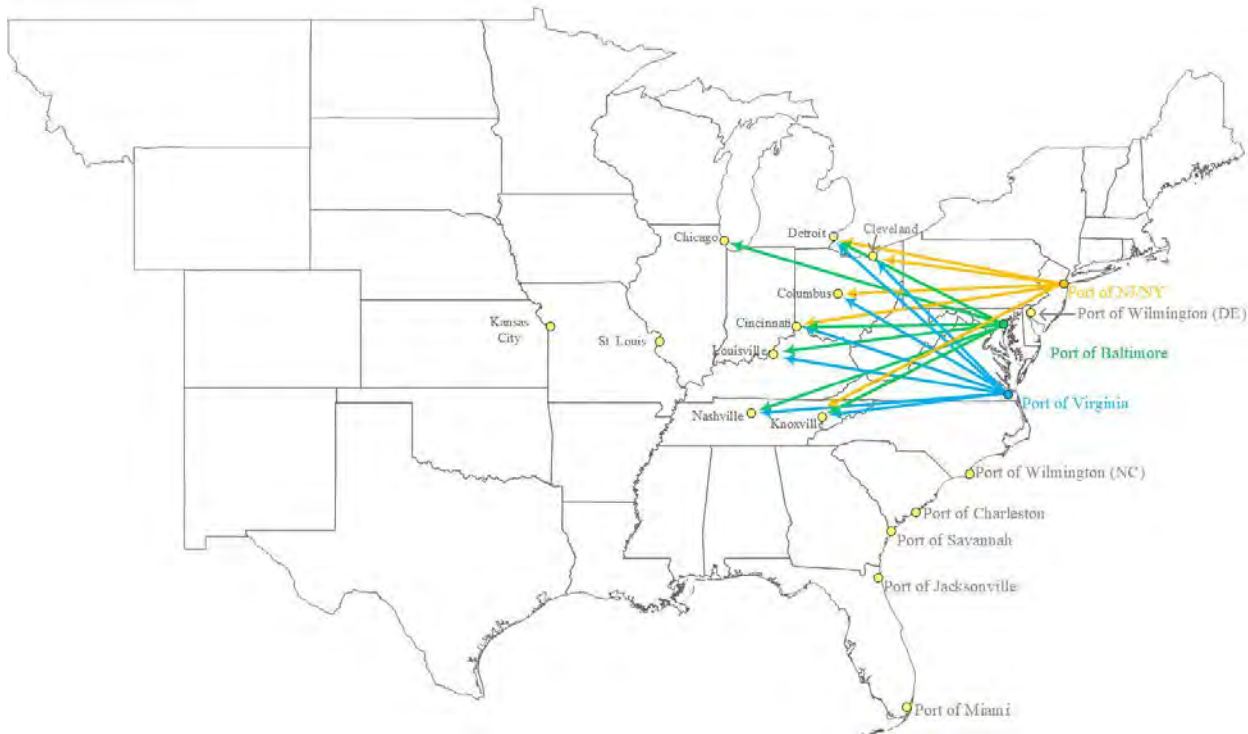
My Opening VS also discussed the intense competition between trucking and railroad companies to move containers from east coast ports to inland markets. While I indicated that the most intense competition occurs on movements of 450 to 700 miles, this does not mean rail and truck do not compete on movements over 700 miles. A 2024 report by Oliver Wyman indicates that in medium-haul domestic intermodal lanes (750-1,500 miles), rail had a 27 percent market share.¹¹⁵ This intense competition between trucks and rail for medium-haul movements is further supported by the rationale for the proposed UP-NS merger, which seeks to take market share from trucks on medium-haul movements in the watershed states.¹¹⁶ As shown in Figure 1, many Midwest destinations fall within the 500 to 700 mile range from multiple East Coast ports.

¹¹⁴ See, Opening VS at page 10.

¹¹⁵ See, “Following The Freight — Where To Find Rail Intermodal Growth,” available at <https://www.oliverwyman.com/our-expertise/insights/2024/jun/where-to-find-rail-intermodal-growth.html>.

¹¹⁶ See, “Watershed Moment: Unpacking the Transcon Rail Opportunity,” *Railway Age*, September 17, 2025 available at <https://www.railwayage.com/news/watershed-moment-unpacking-the-transcon-rail-opportunity/>.

Figure 1
Map of Midwest Trucking Destinations 500 to 700 Miles From Select East Coast Ports



Contrary to the general understanding within the industry, Ms. Carey states that trucking is not an effective competitor to rail intermodal movements on medium-haul movements to the Midwest. She claims that trucks only have a {{ [REDACTED] }} market share of movements to select Midwestern markets from NIT and only {{ [REDACTED] }} market share from a combined NIT and VIG.¹¹⁷ She also claims trucks have average higher rates than rail movements from the POV limiting their ability to compete for traffic to the Midwest and that trucks are less efficient than railroads in moving containers to the Midwest.¹¹⁸

Ms. Carey's claims are without merit as I discuss below.

¹¹⁷ See, Carey VS at page 18.

¹¹⁸ See, Carey VS at page 19.

A. RAIL AND TRUCK COMPETITION

Ms. Carey's suggestion that an analysis is required to demonstrate that trucking acts as a competitive constraint on rail service¹¹⁹ is at odds with US law that was codified 36 years ago. For nearly four decades, intermodal rail traffic has been categorically exempted from economic regulation on the presumption that rail carriers do not have market dominance over the traffic at issue.¹²⁰ Market dominance is defined as "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies."¹²¹ Therefore, Ms. Carey has it exactly backwards. An analysis would be necessary to demonstrate that trucking companies **do not** act as a competitive constraint on rail intermodal traffic. CSX has failed to make the required demonstration.

In fact, Ms. Carey acknowledges "the well documented 500-mile range for which trucks can most effectively compete with rail."¹²² This statement implies that all rail intermodal movements are susceptible to truck diversion to some degree. This is consistent with the STB's handling of rail intermodal traffic from economic perspective because intermodal modal traffic lacks market dominance.

Ms. Carey conducted an analysis to support her thesis that trucking and rail do not compete in which she compares per-mile rail rates to adjusted per-mile truck rates between POV and select Midwestern destination regions defined by BEA. Ms. Carey's analyses allegedly show that trucking is more expensive on a per mile basis than rail, and thus non-competitive. Ms. Carey's analysis is fraught with unreasonable assumptions and formulas designed to obfuscate the facts. In

¹¹⁹ See, Carey VS at page 17. Ms. Carey further alleges that, "trucks are not an economically feasible competitor on the NIT/POV corridors with far away Midwestern locations." *Id.*

¹²⁰ See, [49USC10701(d)(1)].

¹²¹ See, [49USC10707(a)].

¹²² See, Carey VS at page 18.

addition, her use of per-mile rates in this construct is at odds with her critique of my comparative analysis of terminal switching rates in my Opening VS in which I placed the rates on a comparable per container-mile basis. The problems with Ms. Carey's analyses are discussed further below.

1. Ms. Carey Ignores Costs for First Mile/Last Mile Movements

First, the rail rates included in Ms. Carey's rate comparison reflect only the line-haul rail portion of the movement and ignore the fact that rail intermodal shipments originate or terminate at rail terminal facilities, not the ultimate shipment origins and destinations. More specifically, after the rail movement to a midwestern intermodal terminal from the POV or before a rail movement to the POV from a midwestern intermodal terminal, the containers must be moved to or from the customer, usually by truck. STB waybill data shows that 99.98 percent of movements to and from POV terminals moved from "Ramp-to-Ramp" indicating a trucking movement before or after the POV movement.¹²³ Ms. Carey's analytical framework ignores the "first mile/last-mile" intermodal services that are provided by trucks on rail intermodal moves to Midwestern markets.

This first mile/last mile component is a key to intermodal movements. Intermodal drayage plays a significant role in long-distance transportation, where multiple modes are required to reach a final destination.¹²⁴ CSX has previously noted that international intermodal movements require short dray movements to deliver containers to and from the intermodal rail provider:

After CSX moves the container to the inland rail intermodal terminal chosen by the steamship line, the unit is lifted off the railcar and positioned for pickup, either on a chassis or in a stack easily accessible by lift equipment. Finally, CSX notifies the receiver identified on the waybill that the

¹²³ See, Rebuttal workpaper, "Intermodal MoveTypes 2023.xlsx," tab "Data," cell F15. A "Ramp-to-Ramp" movement indicates a movement of lading from the intermodal ramp closest to the customer to the closest intermodal ramp to the receiver. See, <https://www.up.com/customers/premium/intgloss/index.htm> and <https://ntslogistics.com/glossary/meaning-of-ramp-to-ramp/#:~:text=Ramp%20to%20ramp%20refers%20to,machines%20while%20executing%20their%20duties>

¹²⁴ See, <https://www.dat.com/resources/drayage-basics-guide>.

container is available and a drayage truck, arranged by the receiver or steamship line, removes the container from the rail terminal and delivers it to the receiver's facility.¹²⁵

The drayage to or from the railroad ramp is not included in the railroad's rate and must be absorbed by the steamship company or the customer.

2. Short Trucking Movements

Ms. Carey dismisses the ability of trucking to compete with rail based on an observation that, "a significant volume [the majority] of trucks leaving the POV are destined for locations between Richmond, VA and Southeast, VA which are less than 100 miles from the POV."¹²⁶

There are three (3) problems with Ms. Carey's position. First, Ms. Carey's focus on the "majority" of reported POV truck volumes does not eliminate the presence of shipments that move more than 100 miles (sometimes significantly more).

Second, Ms. Carey does not indicate whether the sub-100-mile truck hauls to Virginia locations include dray movements to rail intermodal terminals. Her workpapers show no indication that she made any effort to identify and segregate any such movements. As a result, it must be assumed that some of the short truck shipments Ms. Carey claims are destined for Virginia locations and are therefore not competitive with rail shipments, are in fact moved to Virginia intermodal terminals for furtherance to the Midwest and other locations via the CSX rail network. She is correct that these moves are not competitive with rail service – they are complementary to rail service.

Third, the rail movements to which Ms. Carey compares truck movements for select lanes include both rail-only moves and moves that include both a rail segment and a truck dray segment.

¹²⁵ See, August 2, 2021 letter from CSX Corporation Inc. President James M. Foote to STB Chairman Martin Oberman available on the STB's website.

¹²⁶ See, Carey VS at page 18, footnote omitted.

In her effort to demonstrate that truck-only moves cannot effectively compete with rail moves, she treated rail-only and truck-rail shipments as one and the same.

It is telling that Ms. Carey did not include a more granular analysis of the “rail traffic” she studied. Many of the movements that do not have a dray component at NIT have a dray movement at the other end of the rail segment¹²⁷, whether they are destined for a midwestern market or are interchanged to a western railroad for delivery to a western market. Moreover, while some of the intermodal shipments that move in interline rail service to western regions of the US use steel wheel interchanges at gateway terminals, others use rubber wheel interchanges (intermediate drays). Ms. Carey’s analysis does not consider any of the rail and truck operations that are part of intermodal shipments – her analyses do not even account for the dray at POV.

At a minimum, there are five (5) operational categories for the movement of containers from ports to inland intermodal terminals: (1) truck only, (2) rail only, (3) dray-to-rail, (4) rail-to-dray, (5) dray-to-rail-to-dray. Ms. Carey’s treatment of categories 2 through 5 as a single pool of “rail” shipments validates my position that rail-only and dray-to-rail movements are similar, competitive, and fungible.

3. Ms. Carey’s Truck and Rail Rate Comparison Contains Numerous Flaws

Beyond the theoretical problems, Ms. Carey’s truck and rail rate analysis contains inconsistencies and misrepresentations. As a result, Ms. Carey’s analysis is both misleading and erroneous.

¹²⁷ See, Rebuttal workpaper “Intermodal MoveTypes 2023.xlsx.”

First, Ms. Carey's comparisons inexplicably discard the mileage data included in the data tables that she uses to quantify volumes and rates in favor of substitute mileage data from PC*Miler.¹²⁸ The substitutions create systematic understatement of both trucking miles and CSXT rail miles, and overstatement of NS rail miles. As a result, they provide a distorted view of the relevant markets.

Take, for example, the POV-Cincinnati Lane. Ms. Carey's analysis assumes {{ [REDACTED] [REDACTED] }}. The implication is that trucks have a {{ [REDACTED] [REDACTED] }}. However, the data underlying her volume and rate analyses show an implicit {{ [REDACTED] [REDACTED] }} for this lane. Ms. Carey offered no explanation as to why the mileage data included in the workpapers she used to develop volumes and rates needed to be replaced with conflicting mileage data from another source. The data she ignored shows that while trucking has {{ [REDACTED] [REDACTED] [REDACTED] [REDACTED] }}. To the extent that CSXT is unable to effectively compete with NS for traffic in this lane, NS's distance advantage is clearly a contributing factor. Yet, Ms. Carey identifies only a single factor in her market analysis – the presence or absence of on-dock rail.

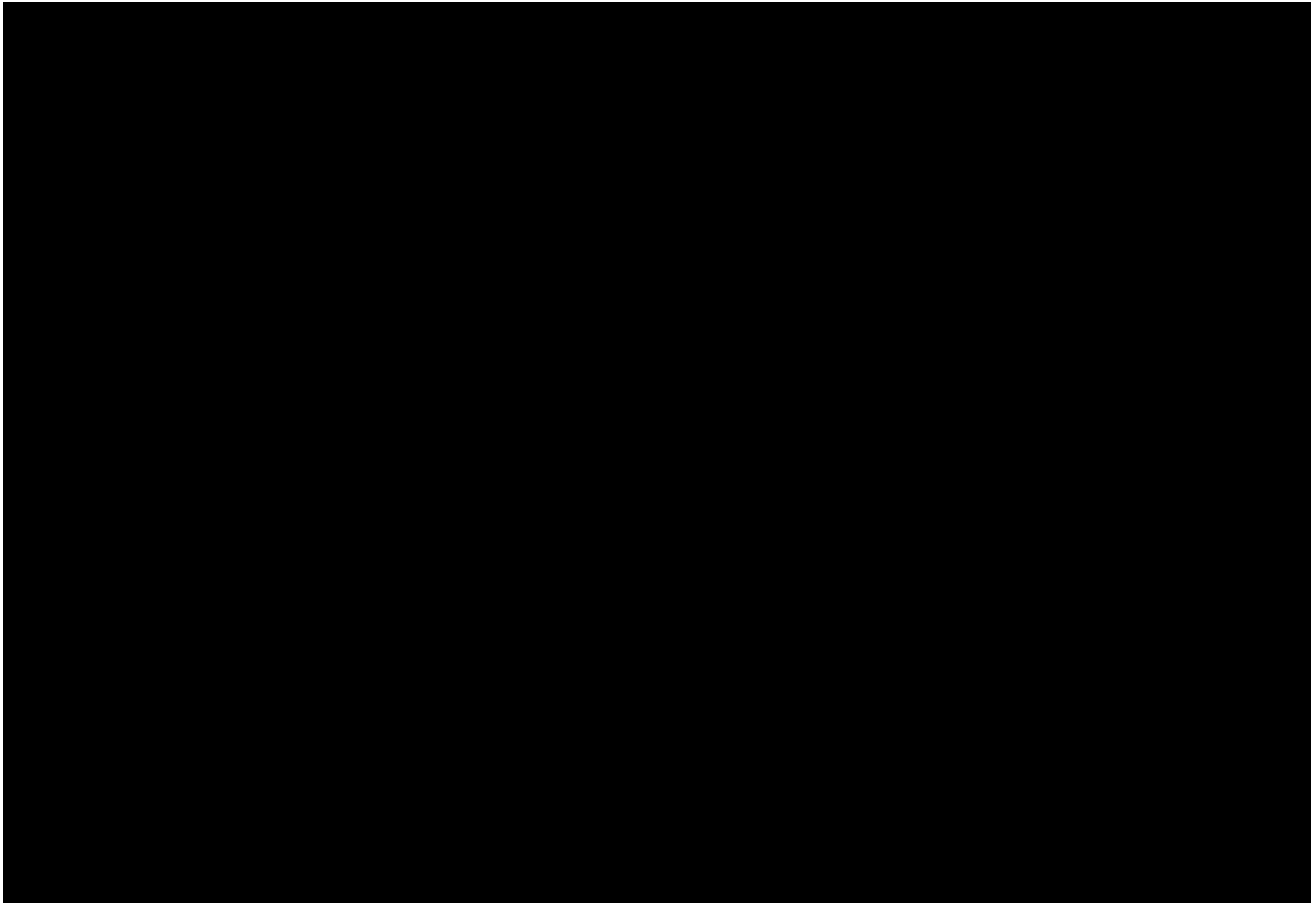
Similarly, for the POV-Cleveland lane, Ms. Carey's analysis assumes {{ [REDACTED] [REDACTED] }}. The implication is that trucks have {{ [REDACTED] [REDACTED] }}. However, the data underlying her volume and rate analyses show {{ [REDACTED] [REDACTED] }}. While trucking has {{ [REDACTED] [REDACTED] }}

¹²⁸ See, Carey workpaper "HC-WP Truck vs Rail Rate per Container Mile.xlsx."

[REDACTED]

[REDACTED] } }.

Figure 2 below shows the mileages assumed by Ms. Carey compared to the mileages implicit in the data tables she used to develop volumes and rates. { {



[REDACTED] } }

As shown in Figure 2 above, Ms. Carey's use of surrogate miles serves to give the false impressions that: (1) truck miles are vastly shorter than rail miles, and (2) CSXT and NS rail miles are comparable in every corridor. When the miles are sourced from the same tables Ms. Carey used in her analysis to develop rates and volumes, a different story emerges. Whereas trucking has

a generally small distance advantage over NS, NS has an often-significant distance advantage over CSXT (in all but one lane).

Rather than Ms. Carey's conclusion that trucking cannot compete with rail, these statistics support a more nuanced takeaway. Trucking's ability to compete with rail is influenced by many factors, including the alternate route miles for individual lanes.

Another obvious factor is the rail rates themselves, which Ms. Carey ignores completely. Figure 3 below shows a comparison of rail miles and rail rates for the intermodal rail shipments included in Ms. Carey's analysis. {{



As shown in Figure 3 above, NS has a distance advantage over CSX in all but one lane, and {{ [REDACTED] }}. Ms. Carey fails to acknowledge {{ [REDACTED] }}.

4. Ms. Carey's Market Share For Truck Traffic is Understated

Ms. Carey's quantification of trucking's share of traffic moving in the midwestern corridors {{ [REDACTED] }}¹²⁹ is understated because she failed to account for data records that were missing origin and/or destination data in her calculations. For example, the 2022 Freight Analysis Framework ("FAF") data that she relied upon to analyze shipments originating at Norfolk identifies a destination for {{ [REDACTED] }} of traffic. The data also shows that {{ [REDACTED] }} that moved in 2022 {{ [REDACTED] }} did not have a destination identified in the data {{ [REDACTED] }} originated at Norfolk). When determining the portion of Norfolk truck moves destined for Chicago, Ms. Carey included {{ [REDACTED] }} with no destination in her denominator.¹³⁰ She therefore assumed without evidence that none of {{ [REDACTED] }}. Ms. Carey should have based her apportionment calculation on {{ [REDACTED] }} for which the destination was known and included in her data source tables. This correction would increase her calculation of "apportioned truck containers" moving in each lane.

The error is even larger in the other direction. Specifically, the 2022 FAF data she relied upon to analyze shipments terminating at Norfolk identifies an origin for {{ [REDACTED] }} of

¹²⁹ See, Carey VS at page 18.

¹³⁰ See, Carey WP "HC-WP Truck vs Rail Container Volume.xlsx" at tab "Detailed Summary Apportionment" Columns I to K include reference to rows 2 through 71 of tabs "NFLK Orig FAF22 Truck Weight," "NFLK Term FAF22 Truck Weight," "PTSMTH Orig FAF22 Truck Weight," and "PTSMTH Term FAF22 Truck Weight." These references should be to rows 2 through 70 and exclude the summary records missing origin and destination data. PTSMTH

traffic. The data also shows that {{ [REDACTED] }} did not have an origin identified in the data (a total of {{ [REDACTED] }}). Ms. Carey's formula artificially suppresses the apportionment of truck containers to the studied lanes.

In total, Ms. Carey's framework understates truck volumes by a combined {{ [REDACTED] }} across all lanes included in her study.¹³¹

5. Ms. Carey's Truck Rate Analysis Conflates Rates From Two Different Markets

As discussed above, the Spot Truck Average rates included in Ms. Carey's Figure 3 are unreliable because they are calibrated based on Ms. Carey's surrogate mileage figures that contradict the mileage data implicit in the source data tables she used to quantify volumes and rates. In addition, the rail rates included in the Rail Average column in her Figure 3 reflect an average of rates for shipments that included a dray move at POV and shipments that did not. Despite her insistence that dray-to-rail movements cannot effectively compete with rail-only movements, Ms. Carey considers the rail rates for both service types interchangeable for purposes of comparing them to truck-only rates.

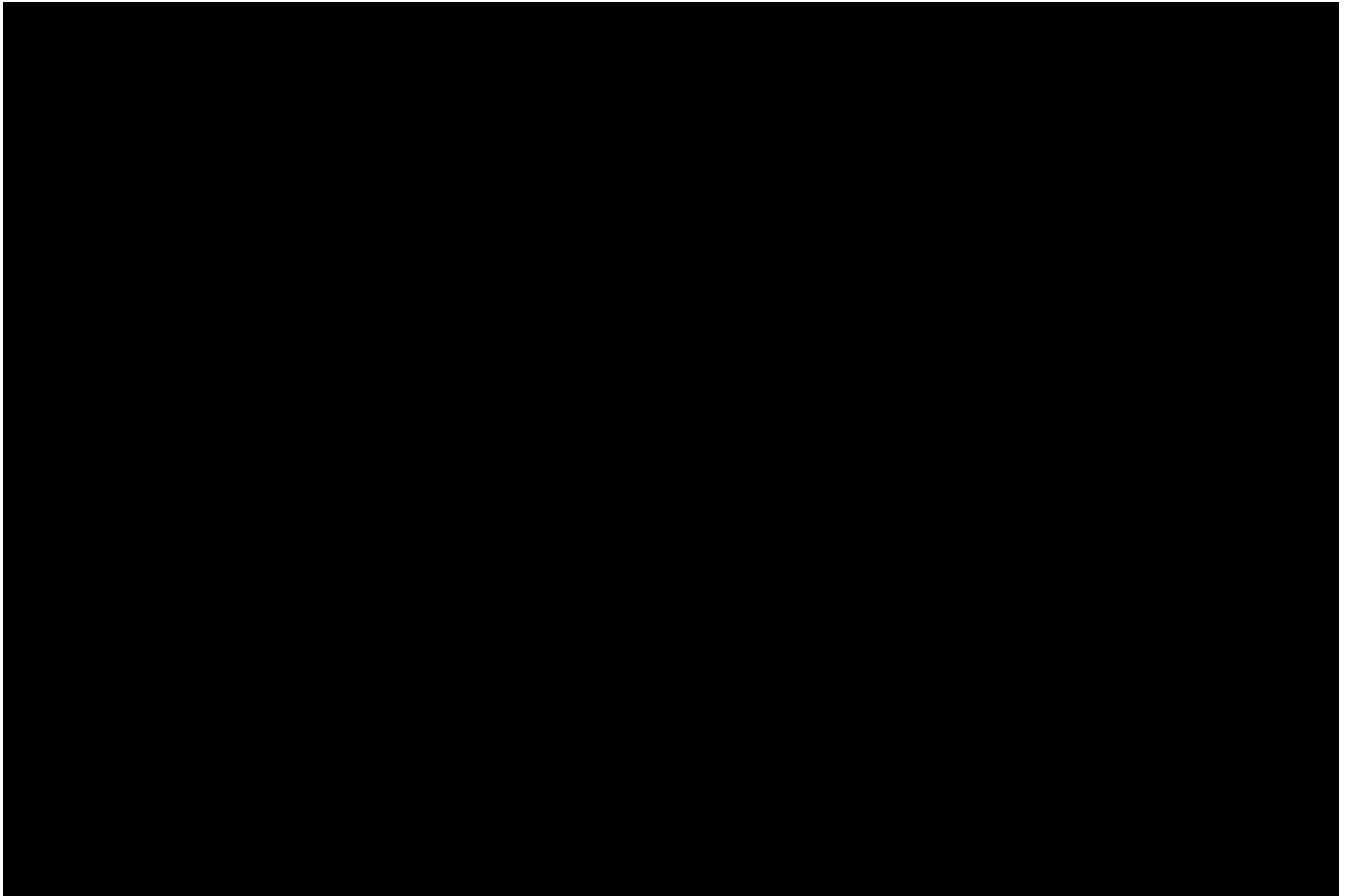
In addition, further scrutiny shows that she conflated two distinct segments of the over-the-road trucking market. Five (5) of the seven (7) lanes for which she included rates in her comparison fall within the 500-to-700-mile range, where trucks can theoretically offer same-day (or next morning) service.¹³² The other two lanes are longer and would require more time to complete. The

¹³¹ See, Rebuttal worksheet "HC-WP Truck vs Rail Container Volume – REVIEW.xlsx."

¹³² Single driver shift: 10.5 hours x 65 miles per hour = 682.5-mile range. Truck drivers are required to take one 30-minute break during an 11-hour shift. See, <https://www.fmcsa.dot.gov/regulations/hours-service/summary-hours-service-regulations>

rates for the 500–700-mile moves are clustered together and higher than the longer haul moves, reflecting two different trucking market segments, as shown in Figure 4 below.

{{



_____}}

As shown in Figure 4 above, the trucking rates per mile for relatively shorter movements shown in the red circle are higher than the trucking rates per mile which must compete with rail intermodal movements.

Ms. Carey's Figure 4 analysis is also incomplete. She compares rail rates for a given corridor to truck rates for the same corridor, defined by the rail origin and destination. However, for intermodal traffic, the rail origin and destination often do not match the movement origin and destination. For example, she does not consider shipments that may be drayed east from the

midwestern intermodal terminals included in her analysis. For example, a box that moves from NIT to Chicago via rail may be drayed east from Chicago to its destination in central Indiana. The appropriate comparison for this shipment would be between (1) rail to Chicago plus truck to Indianapolis vs (2) truck to Indianapolis – not rail to Chicago vs truck to Chicago, as Ms. Carey has done.

Ms. Carey's entire argument is undone by her concluding statement.

In addition, to the extent that some long-haul truck moves may compete with rail under NS control of NPBL, a more competitive NIT with two railroads instead of NS on-dock rail exclusivity could result in greater competition and more rail moves (i.e. take trucks off the road.)¹³³

If, as Ms. Carey claims, increased rail access would result in reduced truck volumes, then the obvious conclusion is that rail and trucking are substitutes that effectively compete for the same intermodal traffic.

¹³³ See, Carey VS at page 20.

V. FINANCIAL IMPACT ON NPBL

NPBL charges a uniform rate of \$210 per railcar to all shippers on the line pursuant to the terms of an 1897 Agreement between the predecessor railroads to the NS and CSXT.¹³⁴ I demonstrated in my Opening VS that this switching rate is greater than NPBL's average variable cost of service and provides a contribution to NPBL's fixed costs and profits. I explained in my Supplemental VS that if NPBL were to charge a rate less than its variable cost of service for transporting CSXT's containers to and from NIT, other NPBL shippers would have to incur higher rates to make up for the loss contribution on CSXT traffic.¹³⁵

Ms. Carey disagrees with my demonstration that charging CSXT a lower rate would cause NPBL to charge shippers higher rates. She instead asserts that NPBL could charge CSXT lower rates than those charged to other NPBL customers and provide NPBL with higher operating margins. She also indicates that rail rates charged by other short line railroads support lower variable costs for the NPBL and prove that NPBL could lower her rates. Finally, Ms. Carey believes I failed to conduct an NPBL-specific variable cost analysis when I demonstrated that NPBL could not charge a lower rate to CSXT and that my variable cost approach produces unreasonably high variable costs.

Ms. Carey's claims are without merit as discussed below.

A. NPBL VARIABLE COSTS OF SERVICE

I explained my calculations of NPBL's variable costs of service in my Opening VS.¹³⁶ Specifically, I first developed NPBL's total operating expenses from NPBL's annual financial

¹³⁴ See, Supplemental VS at pages 31-32.

¹³⁵ See, Supplemental VS at page 33.

¹³⁶ See, Opening VS at pages 3-5.

reports. I then developed a composite variability expense from the STB's Eastern Region URCS variability percentages as developed from URCS Table D8 Part 4. Multiplying the composite variability factor to the NPBL reported operating expenses produced an estimate of NPBL's variable operating expenses. Overall, my approach produced a weighted average variability percentage of {{ [REDACTED] }}.¹³⁷

Ms. Carey disagrees with my approach for calculating the NPBL variable costs, stating that my approach does not reflect NPBL specific variable costs nor the traffic types used by NPBL customers and produces an unreliable variable cost estimate. She also states that she analyzed NPBL company records and developed a more detailed breakdown of the variable costs as a percentage of total costs.¹³⁸ Specifically, Ms. Carey states that she used information from NPBL's 2023 annual report and 2023 Board of Directors minutes and assigned variability percentages to each NPBL operating cost category based upon the STB's URCS variabilities for each operating expense category. Ms. Carey's 2023 analysis results in an NPBL variable cost percentage of approximately {{ [REDACTED] }}.¹³⁹

I have reviewed Ms. Carey's approach and her calculation of NPBL variable costs and find that her approach is riddled with errors and mistakes, as discussed below.

1. NPBL Specific Variable Costs

Ms. Carey states that I did not develop an NPBL-specific variable cost analysis for traffic moving over the NPBL line segments.¹⁴⁰ Ms. Carey is wrong. I began my analysis of NPBL variable costs using cost data from multiple NPBL's annual reports. I then calculated the STB's

¹³⁷ See, Exhibit 2, Line 14c.

¹³⁸ See, Carey VS at pages 51-52.

¹³⁹ See, Carey workpaper "HC-WP - NPBL Fixed Cost.xlsx," tab "NPBL FC," cell H12.

¹⁴⁰ See, Carey VS at page 51.

Eastern Region URCS Total Operating Expenses Less Depreciation, Total Variable Operating Expenses Less Depreciation, Total Depreciation Expenses and Total Variable Depreciation Expenses, and calculated an Operating Expense Less Depreciation variability factor, a Depreciation Expense variability factor and a composite total cost variability factor.¹⁴¹ I then applied the composite variability factor to the NPBL specific total costs to develop NPBL's variable costs.

The basis of my NPBL variable costs was NPBL total costs as reported by NPBL management. It is an extreme stretch to claim that I did not develop an NPBL specific variable costs when the underlying data for my analysis was an expanded version of the NPBL reported costs that Ms. Carey relied upon for her variable costs analysis. Additionally, we both relied upon STB URCS Eastern Region variability factors to develop our variable costs analyses.

The primary difference between my analyses and Ms. Carey's analysis is how I applied the URCS variability percentages. I chose to apply the percentages on a composite basis, while Ms. Carey applied them on an individual cost basis. The fact that we applied the percentages in a different manner does not negate the fact that we both used NPBL reported costs and STB URCS variability factors. To claim that I did not calculate NPBL specific variable costs and that she did using the same data is incorrect.

2. Ms. Carey's Variable Cost Analysis Incorrectly Mixes Data From Different Operating Years and Different Sources

Ms. Carey states that she relied upon data from NPBL's 2023 Annual Reports and Board of Directors minutes to develop her variable costs.¹⁴² While Ms. Carey states in her narrative that

¹⁴¹ See, Opening workpaper "Exhibit__(DLF-2) (Final).xlsx," tab "East Region_Variability."

¹⁴² See, Carey VS at page 52, note 283.

her figures are from 2023, her workpapers show her calculations are drawn from disparate sources that are each from different years of data. For example, Ms. Carey calculates that NPBL's total costs for Maintenance of Way Salary and Benefits was {{ [REDACTED] }}.¹⁴³ While she represents that this was NPBL's actual costs for 2023, she utilized three (3) different sources from three (3) different years to estimate the costs. Ms. Carey relied upon reported 2023 maintenance personnel headcount from NPBL's 2023 annual report. However, instead of relying on NPBL's actual labor rates, she relied on reported salary data from a 2022 Bureau of Labor Statistics National Occupational Employment and Wage Estimate. Also, instead of relying on actual NPBL labor benefits rates, she used the Benefits Factor adopted from a 2019 US Small Business Administration blog post estimate. Ms. Carey's calculation is far from being specific to NPBL.

3. Ms. Carey's Variable Cost Analysis Uses Incorrect URCS Variability Factors

Ms. Carey states that she assigned variabilities to NPBL cost elements based on the variabilities reported in the 2023 URCS analyses for these operating expense categories in order to develop her estimates of NPBL variable costs.¹⁴⁴ In actuality, when applying the Eastern Region URCS variability percentages, Ms. Carey did not utilize URCS variabilities for all cost categories, but instead relied on her own variability assumptions that are inconsistent with the STB's URCS model.

First, in calculating the salary and benefits for NPBL supervisors and for NPBL maintenance of way personnel, Ms. Carey assumed {{ [REDACTED] }}.¹⁴⁵ These assumptions are completely inconsistent with STB's URCS variable cost calculations. URCS

¹⁴³ See, Carey workpaper "HC-WP - NPBL Fixed Cost.xlsx," tab "Table 1," cell D9.

¹⁴⁴ See, Carey VS at page 52, note 283.

¹⁴⁵ See, Carey workpaper "HC-WP - NPBL Fixed Cost.xlsx," tab "Table 1," cells E8 and E9.

assigns a 78 percent variability percentage to the employee category “General Officers.”¹⁴⁶ Similarly, URCS assigns salaries and benefits for maintenance of way employees a variability percentage of 49 percent.¹⁴⁷

Second, Ms. Carey also assumes NPBL Equipment Rents (freight car rent, locomotive rent) are {{ [REDACTED] }}.¹⁴⁸ Ms. Carey’s assumption is the complete opposite of how the Board’s URCS equipment rents which applies a 100 percent variability factor to equipment rents.¹⁴⁹

Third, Ms. Carey assumes NPBL depreciation expense is {{ [REDACTED] }}.¹⁵⁰ This too is completely inconsistent with the STB’s URCS, which assigns 50 percent variability to all depreciation expense accounts.¹⁵¹

4. Corrected Variable Costs Using Ms. Carey’s Approach

Ms. Carey states that under her variable cost approach the NPBL has an average variability percentage of approximately {{ [REDACTED] }} based on the erroneous data and assumptions described above.¹⁵² Correcting Ms. Carey’s use of inconsistent years in her analysis and correcting her unsupported variability percentages to reflect URCS variability percentages significantly increases her NPBL variable cost estimate.

Ms. Carey’s flawed analysis resulted in a fixed-to-variable cost split of {{ [REDACTED] }}.¹⁵³ Correcting Ms. Carey’s flawed approach produces a fixed-to-

¹⁴⁶ See, URCS East 2023 Worktables, D8 Part 2, Line 306, Column C4. URCS assigns the regression number 14 variability percentage.

¹⁴⁷ See, URCS East 2023 Worktables, D8 Part 1, Line 114, Column 4. URCS regression number 2.

¹⁴⁸ See, Carey workpaper “HC-WP - NPBL Fixed Cost.xlsx,” tab “Table 2,” cell E9.

¹⁴⁹ See, URCS East 2023 Worktables, D6 Part 18, Lines 1801-1819, Column C4

¹⁵⁰ See, Carey workpaper “HC-WP - NPBL Fixed Cost.xlsx,” tab “NPBL FC,” cell G10.

¹⁵¹ See, URCS East 2023 Worktables, D1 Part 2, Column 4.

¹⁵² See, Carey VS at page 52.

¹⁵³ See, Carey workpaper “HC-WP - NPBL Fixed Cost.xlsx,” tab “NPBL FC,” cells G12 and H12.

variable cost split of {{ [REDACTED] }}.¹⁵⁴ These corrected percentages are in line with the weighted average {{ [REDACTED] }} fixed-to-variable percentage split I calculated in my Opening VS.¹⁵⁵ Correcting Ms. Carey's variable cost calculations produces an average NPBL variable cost of {{ [REDACTED] }} as compared to my calculation of {{ [REDACTED] }} from my Opening VS.¹⁵⁶ This equates to {{ [REDACTED] }} as compared to the {{ [REDACTED] }} that I used in my Opening VS variable cost analysis.

B. NPBL'S COSTS ARE DIFFERENT THAN CWRV'S RATES

Ms. Carey claims that lower rates assessed by the CWRV are proof that my calculations of NPBL variable costs are overstated. As support for her claim, she includes as her Figure 8 an alleged comparison of my variable costs per container to per container rates charged by the CWRV. From this alleged comparison, she draws the conclusion that because the CWRV can generate sufficient operating margins at lower rates, the NPBL can likewise cover its variable costs and earn a contribution towards fixed costs and profits offering lower rates to intermodal traffic.¹⁵⁷

There are several problems with Ms. Carey's claims. First, Ms. Carey's assumption that NPBL's 2023 variable cost is equal to {{ [REDACTED] }} is based on the incorrect assumption that NPBL would transport only {{ [REDACTED] }}. As discussed above, CSXT's internal analysis indicated that NPBL would transport between {{ [REDACTED] }}

¹⁵⁴ See, Rebuttal workpaper "HC-WP - NPBL Fixed Cost_Corrected.xlsx, tab "NPBL FC," cells G12 and H12.

¹⁵⁵ My Opening VS workpapers show NPBL variability percentages ranged from {{ [REDACTED] }} percent over the 2010 through 2023 period and fixed cost percentages ranged from {{ [REDACTED] }}.

¹⁵⁶ See, Rebuttal workpaper "HC-WP - NPBL Fixed Cost_Corrected.xlsx, tab "NPBL FC," cell H14.

¹⁵⁷ See, Carey VS at pages 52-53.

██████████ }}. This would place NPBL's average variable costs {{ ██████████
██ }} assumed by Ms. Carey.

Second, as discussed in detail above, the NPBL and the CWRV are different railroads with different operations, traffic mixes and cost structures. CWRV's traffic consists mostly of intermodal movements, which moves over 16 miles of track to and from VIG using NS and CSXT provided locomotives. As shown in Exhibit No. 8 to my Supplemental VS, NPBL transports a diverse set of hazardous and nonhazardous commodities, including ethanol, oils and chemicals, grain and aggregates. In addition, NPBL operates over 36 miles of its own track and 26 miles over other lines via trackage rights using a reported six (6) leased locomotives. Simply claiming that NPBL can charge a lower rate because a completely different railroad charges a different rate is a false analogy.

**C. MS. CAREY INCREMENTAL COST
ANALYSIS IS UNSUPPORTED AND
INCOMPLETE**

Ms. Carey states she evaluated NPBL's profit margin for the international intermodal traffic moves to NIT using incremental costs assuming that the NPBL would move an additional {{ ██████████ }}. For her analysis, Ms. Carey claims that she included NPBL specific incremental crew, locomotive, fuel, maintenance of way and trackage rights expenses, and after adding an average fixed cost per container, concluded that NPBL's current rate of \$210 per railcar is unreasonable and that NPBL could cover its incremental and fixed cost per container at a lower rate.¹⁵⁸

¹⁵⁸ See, Carey VS at pages 54-56. Ms. Carey's statement that "This analysis demonstrates the unreasonableness of the NPBL single rate of \$210 per car for international IM traffic movements to and from NIT" does not appear to mean she believes NPBL's tariff switching rate is unreasonable under the STB's Rate Reasonableness standards for regulated commodities. Rather, Ms. Carey appears to be expressing her opinions regarding the level of NPBL's public tariff rates relative to private contract rates, based on her evaluation of rates and costs allegedly incurred by other short line railroads, such as CWRV, for the movement of intermodal containers.

Ms. Carey's analysis is fundamentally flawed. Her incremental cost estimates are understated, and she has underestimated the amount of additional equipment and infrastructure required to operate such a large increase in traffic as explained below.

1. Locomotive Requirements

NPBL currently operates with six (6) leased locomotives which transport and switch approximately 27,000 railcars per year. Ms. Carey assumes that the NPBL would see an approximately {{ [REDACTED] }} increase in carload traffic over its current operations but would only require {{ [REDACTED] }} additional locomotives to meet this demand.¹⁵⁹ Ms. Carey provided no support for this assumption beyond a statement from a CSXT employee that this is an appropriate number.¹⁶⁰

When evaluating locomotive requirements, the Board customarily requires parties to account for annual fluctuations in volumes and for the provision of spare locomotives.¹⁶¹ Volumes change throughout a year, which impacts a railroad's locomotive requirements. In addition, the STB has long recognized that individual locomotives are not available 100 percent of the time and that spare locomotives are required to supplement a railroad's active fleet.¹⁶² Ms. Carey has not proven that NPBL's current fleet has sufficient excess capacity to absorb the {{ [REDACTED] }} increase in traffic, even with the addition of {{ [REDACTED] }} new leased locomotives.

¹⁵⁹ See, Carey worksheet "HC-WP NPBL Variable Cost.xlsx," tab "2024 VC Input," cell G23.

¹⁶⁰ See, Carey VS at page 55, note 303.

¹⁶¹ See, for example, STB Docket No. 42071, *Otter Tail Power v. BNSF Railway Company*, served January 27, 2006, at pages C-2, STB Docket No. 42057, *Public Service Company of Colorado D/B/A Xcel Energy vs. The Burlington Northern and Santa Fe Railway Company*, served June 8, 2004, at page 59, and STB Docket No. NOR 42142, *Consumers Energy v. CSX Transportation, Inc.*, updated March 14, 2018, at page 60.

¹⁶² *Id.*

2. Incremental Fuel Expenses

In evaluating the alleged incremental fuel costs for the additional {{ [REDACTED] }} railcars of intermodal traffic per year moving to NIT, Ms. Carey relied upon her calculation of NPBL system-average fuel expense per carload.¹⁶³ Implicit in Ms. Carey's calculation is that CSXT intermodal traffic moving to NIT over the NPBL has the same average mileage as all other traffic moving on the NPBL.

This is not the case, however. The vast majority of NPBL traffic moves to its customers in Portsmouth and Chesapeake, VA as shown in Ms. Carey's own workpapers.¹⁶⁴ The NPBL's largest shipper, Purdue Agribusiness, accounts for approximately [70] percent of NPBL's carloads and only lies 2.5 miles from the interchange with CSXT and 5 miles from the interchange with NS. In contrast, NIT is 15 miles from the interchange with the CSXT.¹⁶⁵

Aggregate fuel consumption is a function of many different factors, including, but not limited to, distance traveled, trailing tons and train speed. Ms. Carey adjusted her fuel expense calculation to account for differences in trailing tons between NPBL's current traffic base and CSXT intermodal traffic.¹⁶⁶ Speed is generally restricted on the NPBL due to its location within an urban area which means intermodal trains moving to NIT would likely move at similar speeds to other NPBL trains. Therefore, the distance a train travels should have the largest impact on NPBL fuel consumption, holding all else constant.¹⁶⁷ Given that trains moving to NIT will travel

¹⁶³ See, Carey workpaper "HC-WP NPBL Variable Cost.xlsx," tab "2024 VC Input," cell G32.

¹⁶⁴ See, Carey workpaper "HC-WP Maps.docx" at page 4.

¹⁶⁵ See, Rebuttal workpaper "Interchange Miles.doc," and CSXT Antitrust document "CSXT0064610.xlsx," tab "Fuel and Loco."

¹⁶⁶ See, Carey VS at page 55, note 305 and Carey workpaper "HC-WP NPBL Variable Cost.xlsx," tab "2024 VC Input," cells G29-G31.

¹⁶⁷ The number of locomotives used on a train also impacts aggregate fuel consumption. Ms. Carey's analysis assumes the average number of railcars on a CSXT intermodal train is the same as on average NPBL train serving other customers. I have accepted this assumption for this Rebuttal VS but reserve my right to amend this assumption as more data becomes available.

significantly longer distances than the average NPBL train, these trains can be expected to incur additional fuel costs. This indicates Ms. Carey's analysis understates the incremental fuel costs for intermodal movements.

3. Incremental Maintenance of Way Expenses

In developing her incremental maintenance of way expenses for the additional {{ [REDACTED] }} railcars, Ms. Carey relies upon a 2010 analysis prepared by CSXT that estimated the incremental maintenance of way of transporting {{ [REDACTED] }} using Ms. Carey's {{ [REDACTED] }} assumption.¹⁶⁸ Many studies have shown, however, that maintenance of way expenses are a function of multiple factors and are not necessarily linear with traffic volumes.¹⁶⁹ Ms. Carey's analysis assumes incremental maintenance costs for {{ [REDACTED] }} per year is the same as incremental maintenance costs for {{ [REDACTED] }} carloads per year without any support.

Ms. Carey also erred in indexing her 2010 incremental maintenance of way costs to 2024 wage and price levels. Ms. Carey's workpapers show she used the RCAF-5 to index her maintenance of way costs.¹⁷⁰ Ms. Carey erred, however, by not accounting for RCAF rebasing. The AAR rebases its RCAF calculations on a periodic basis.¹⁷¹ An index can be rebased by dividing each index number by the index value for the period which will be established as the new base. The AAR rebases its RCAF-U every five (5) years, which also impacts its calculations of

¹⁶⁸ See, Carey workpaper "HC-WP NPBL Variable Cost.xlsx," tab "2024 VC Input," cell G37.

¹⁶⁹ See, "Determining the Cost of Track Maintenance," *Railway Track and Structures*, 1993 included in Rebuttal workpaper "Determining the Cost of Track Maintenance.pdf," and "Technical Monograph: Estimating Maintenance Costs for Mixed High Speed Passenger and Freight Rail Corridors," Federal Railroad Administration, Final Report, August 2004, and included in Rebuttal workpaper "Estimating Maintenance Costs for Mixed High-Speed Passenger and Freight Rail Corridors.pdf."

¹⁷⁰ See, Carey workpaper "HC-WP NPBL Variable Cost.xlsx," tab "RCAF," Column T.

¹⁷¹ See, "Association of American Railroads Rail Cost Indexes," September 2025 at pages 25 through 29 for the rebased RCAF values and page 39 for an explanation of base periods and periodic rebasing of indexes.

the RCAF-A and the RCAF-5. Ms. Carey simply took the average of the quarterly reported RCAF for each year and developed an annual percentage change without rebasing her RCAF factors. This leads to a vast understatement in Ms. Carey's incremental maintenance of way expense per container.

4. Missing Incremental Costs

Ms. Carey's analysis assumes that except for crew wages, locomotive lease expenses, fuel expenses, traffic rights expenses and maintenance of way expenses, all other NPBL operating expenses are fixed. Additionally, Ms. Carey's analysis also assumes that NPBL has sufficient capacity to add nearly {{ [REDACTED] }} more traffic on its line yet not add any additional infrastructure. Both assumptions are contrary to railroad economics and STB precedent.

As discussed above, Ms. Carey's assumption that NPBL supervisory expenses is fixed is contrary to long-standing STB precedent and practices. The STB's URCS applies a {{ [REDACTED] }} variability factor to supervisory salaries and benefits expenses indicating that these expenses change with traffic volumes. Ms. Carey has provided no evidence that NPBL could increase its traffic nearly {{ [REDACTED] }} and not increase its supervisory staff.

Ms. Carey's incremental cost analysis also assumes that the NBPL has sufficient infrastructure to accommodate a {{ [REDACTED] }} in traffic. The Board has found that significant increases in traffic can lead to increases in required track infrastructure to handle the large increases in traffic.¹⁷² Moreover, the Commonwealth of Virginia's Office of Intermodal Planning and Development reiterated this point in developing its Master Rail Plan for Port of Virginia finding:

¹⁷² See, STB Docket No. 42057, *Public Service Company of Colorado D/B/A Xcel Energy vs. The Burlington Northern and Sante Fe Railway Company*, served June 8, 2004, at pages 30-31.

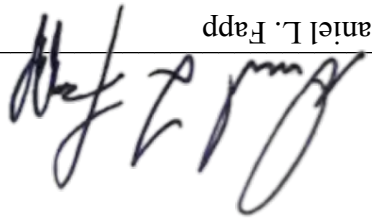
Regularly scheduled [CSXT intermodal train] operations would need to be further integrated into the existing train schedules and ***may introduce service issues that would necessitate additional trackage for staging and train movements.***¹⁷³

Ms. Carey's analysis simply assumes that no additional track infrastructure would be required, without showing that the NPBL could handle such an increase in traffic.

¹⁷³ See, "Master Rail Plan for The Port of Virginia (SJR 69, 2014)," Report of the Office of Intermodal Planning and Investment, 2015 ("Master Rail Plan") at page 21 (emphasis added).

VERIFICATION

I, Daniel L. Fapp, verify under penalty of perjury that I have read this Rebuttal Verified Statement on behalf of the Norfolk Southern Railway Company, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.



Daniel L. Fapp

Executed on November 14, 2025

**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**

**RESPONSE TO COMMENTS, PROTESTS,
REQUESTS FOR CONDITIONS, AND OTHER OPPOSITION**

EXHIBIT C

VERIFIED STATEMENT OF WILLIAM BRENNAN, PHD

**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**

VERIFIED STATEMENT OF WILLIAM BRENNAN, PhD

Introduction

My name is William Brennan. I am an independent economist, with a PhD in Economics from George Mason University. I have a deep background in economic and regulatory issues, particularly as they relate to the transportation sector. I spent 20 years as an economist at the U.S. Surface Transportation Board in positions of increasing responsibility. I retired in 2023 after serving for six years as the Director of the Board's Office of Economics and its Chief Economist. Because I participated – albeit not substantially – in earlier iterations of this matter, I sought the advice of Chris Oehrle, an Ethics Official at the Board, before making an appearance. His email (attached as an exhibit to this statement) supports my recollection that my participation in this matter was *de minimis* and I am now free to offer my support to Norfolk Southern Railway Company (NSC) in this matter involving the Norfolk and Portsmouth Belt Line Railroad (NPBL).

Although this is styled as a “control” application, as I understand it, NSC does not now nor does it seek in the future to control the NPBL Board of Directors. Rather, it simply seeks – by virtue of its larger ownership stake – to appoint three directors to NPBL's Board. CSXT would appoint two directors, one fewer which reflects CSXT's lesser financial interest in NPBL. Together, these five would select a final director who will also serve as the NPBL's president. To be clear, CSXT agreed to this Board composition via contract with NSC in 1989.

NSC does not seek to control the day-to-day operations and decisions made by the president of the NPBL. In addition, each of the NPBL's directors will have a fiduciary duty to act with the best interests of the NPBL. NSC is not seeking to merge with or absorb NPBL. NSC wants NPBL to continue operating under its 1897 operating agreement, remaining a neutral carrier and serving the commercial interests of both carriers and shippers in Hampton Roads. NSC seeks only to secure the approval of the Surface Transportation Board to correct a legal oversight from a transaction that took place decades ago.

Purpose

I have been asked by NSC to address some of the economic and policy issues raised by CSXT. I will respond to points raised by CSXT's expert witnesses Miller, Carey, and Huneke. I will also discuss the economic foundations of good regulatory decision making and show how the

Board's previous decisions have not comported with best practices; how Norfolk Southern's influence over NPBL for more than 40 years has not given rise to any improper exercise of market power; nor will the Board's approval of this application give rise to future opportunities to engage in anticompetitive behavior.

Background

Before we begin, it is important for the Board to recognize that this is an unusual case, something even CSXT's expert witnesses concede. Dr. Miller admits this is an "atypical" case.¹ Dr. Huneke says it is "unique."² And yet, CSXT would have you believe this is an ordinary control application that threatens to reduce shipper options and should be rejected because NSC has "lawlessly" controlled NPBL for 40 years in some conspiracy against the Board and the public interest. For his part, Dr. Huneke asks, "Why would NS go to the trouble and expense of this proceeding for control of NPBL, a railroad that does not need access to NIT, unless it is planning to use that control to continue to block CSX from NIT?"³ So, let us answer Dr. Huneke's question!

NSC has gone to the trouble and expense of this proceeding because it is—and long has been—the majority shareholder of NPBL. When the ICC approved the merger of Norfolk and Western (N&W) and Southern Railway (SR) in 1982, the newly created NSC ended up owning 57% of NPBL's stock. Since that time, NSC has openly listed its "control" of NPBL in its Annual R-1 reports – not in an attempt to deceive the public or its regulators, but because NSC thought the 1982 merger between N&W and SR vested it with the certain ownership rights and responsibilities. Never did NSC seek to hide its ownership stake in NPBL, nor has it ever exercised its influence in ways that were anything but consistent with the foundational

¹ Miller, VS, p. 2.

² Huneke, VS, p. 3.

³ Huneke, VS, p. 3.

purposes of NPBL. NSC has been a faithful steward of NPBL and has not used its superior ownership position to disadvantage CSXT.⁴

I think it worth pondering the twin sense of the word “control” as it applies in this proceeding. This is a control application in the legal sense—NSC, as the majority shareholder of NPBL, seeks to exercise oversight over NPBL consistent with its long-standing majority-ownership position. By contrast, CSXT seeks to persuade the Board (through a parade of horrors) that NSC intends to “control” in a pejorative sense—to dominate NPBL and use it as a vehicle to discriminate unlawfully against CSXT. Nothing could be further from the truth. NSC seeks only to bring its majority ownership interest into legal compliance, not change the fundamental structure and neutrality of NPBL.

Ever since the Board has called into question NSC’s interest in NPBL, NSC has sought diligently to rectify the regulatory gap that the Board’s decision created. NSC first filed a petition for declaratory order which the Board denied. And so now, NSC has—at the Board’s directive—come filing a control application in an effort to regularize what has been the reality since 1982 – that NSC should be allowed to own a majority position in NPBL and continue to exercise that position consistent with the purposes for which NPBL was founded in 1897.⁵ This is a reality that was accepted by all parties, including CSXT, for decades – and, no doubt, would still be recognized by CSXT but for the commercial dispute that has arisen between NSC and CSXT.

So, no, this is not a typical control application – not by any stretch. But it is the only path available to NSC to vindicate its ownership interest in NPBL. As such, the Board should approach this from first principles rather than mechanically assuming, as Dr. Huneke does, that this is case where one firm seeks to merge with another, reducing competitive options. This is a case where NCS is dutifully attempting to remedy what was, **at worst**, an oversight in an application to a long-settled merger—one that was not opposed by CSXT and where all the relevant facts were

⁴ Indeed, if NSC truly wanted to block CSXT over the years, there were many more effective ways to do it other than (1) adhering to a cost-based, neutral switching rate charged to both NS and CSXT; (2) giving CSXT an additional Board seat, as it did in 1989; and (3) not dictating the trackage rights fee that NBPL would need to pay to use NSC tracks.

⁵ NS Petition for Declaratory Order, FD 36522.

well known not just to CSXT but to the Board's predecessor, the Interstate Commerce Commission (ICC).

What was that oversight? In this matter, the Board apparently believes that N&W and SRC erred by failing to include a simple, declarative statement in their 1980 merger application. A statement like: "Should this application be approved, in order to comply with the general accounting regulations under the Interstate Commerce Act, we ask for permission to control NPBL and we will list NPBL as a controlled-affiliate in our Annual R-1 report (reflecting the new firm's 57 percent ownership stake in NPBL)."

The Board well knows that mergers are complicated transactions with lots of moving parts and subject to strict deadlines. Mistakes can be made. Even now, there are disputes as to what rights lots of moving parts and subject to strict deadlines. Surely, 1980-82 was extraordinarily chaotic. The Staggers Act passed as the merger application was pending, leaving a much-reduced ICC to evaluate the restructuring of the Eastern US rail network, while simultaneously rewriting a raft of rules needed to implement the partial de-regulation.

And yet, though N&W and SR clearly disclosed their ownership interests in NPBL to the ICC, for want of a declarative statement alerting the ICC that approval of the merger would also grant control of NPBL to the newly merged firm, the Board has cast into doubt NSC's property rights in NPBL. But NPBL's share ownership was known to all parties *including CSXT*. CSXT had a keen interest in the outcome of the merger, had every opportunity to comment on these facts and request conditions to the merger. CSXT chose not to do so. CSXT was silent. The Board should not now, more than 40 years after the fact, permit CSXT to effectively re-open the N&W-SRW merger and seek conditions it did not seek at that time.

Nor is this just a matter of CSXT's silence 40 years ago. For more than 30 years after the merger was approved, CSXT worked cooperatively with NSC to ensure NPBL's financial and operational success. CSXT agreed to restructure NPBL's Board of Directors along the same lines that are in existence today. Nothing was hidden. There was no conspiracy. The management of NPBL was transparent, stable, and operationally effective.

So, what is really going on here? Why now, after all those long years, has CSXT begun a relentless campaign in the Federal Court and here at the STB? ***Because CSXT wants to use this corporate dispute to prompt a regulatory order to improve its access to an intermodal terminal that they have never had access to in the past.*** At bottom, this is a simple dispute between the majority shareholder and the minority shareholder of a firm. Such disagreements are not uncommon, and the proper venue for such disputes is state court under corporate law. The STB is not the referee of shareholder disagreements over how best to monetize shared property. The STB's role is to protect the public interest—not to mediate internal boardroom politics dressed up as a competition complaint. Here, CSXT seeks to use the regulatory process to improve its commercial and marketing access, not to dedicate capital resources to achieve the same (as NSC's predecessors did). There is a word for this: rent-seeking. The Board should not permit it to succeed.

The Peculiar Nature of Belt Line Railroads

In its application to the Board, NSC merely asks that, as the long-standing majority owner of NPBL, it should be allowed to continue to retain its majority ownership position and to continue the governance of NPBL as has been the case for the past 40 plus years. CSXT asserts, on some vague theory of harm, that the Board should order NSC to divest itself of its majority stake in NPBL and that CSXT should be granted key trackage rights over NPBL.

Before the Board can address that question, it should understand that for 42 years NSC has been a faithful steward of the NPBL. The record shows that NSC and the directors it has appointed to NPBL's Board have scrupulously upheld the principles that have animated NPBL since its founding in 1897. Dr. Huneke claims – correctly – that a “terminal railroad pricing neutrally and providing service neutrally facilitates competition rather than being an instrument of monopoly.”⁶ In fact, for 128 years, NPBL has existed for just this purpose: to offer all participating carriers a non-discriminatory rate of access, while ensuring that NPBL's owners recover their operating and capital costs—with any surplus distributed as dividends in

⁶ Huneke, VS, p. 5.

proportion to its ownership. NSC has not altered that basic bargain in the 42 years it has held a majority ownership position in NPBL, nor does it propose to do so now. A belt railroad's commitment to neutrality is not an arbitrary tradition, it is a governance solution designed for co-owned infrastructure in a competitive industry. NPBL's posted pricing regime is simple, prevents gamesmanship, and has allowed NPBL to function effectively for over a century.

Dr. Huneke argues "NPBL was meant to be independent of control by any single railroad."⁷ And if, by that, Dr. Huneke means NPBL should adhere to the principles of pricing and service neutrality that have long guided it, I agree.

But Dr. Huneke goes beyond this. He implies that a conveyance of "control" to NSC will undermine the progress that NPBL has made in recent decades to improve service and safety, but it is NSC's majority ownership and attention that made this possible in the first place. Dr. Huneke quotes at length from a marvelous, if understandably obscure, book on the NPBL's history: *Virginia's Belt Line Railroad: the Norfolk & Portsmouth, 1898-1997* by W. Hugh Moomaw.⁸ And, certainly, as Moomaw noted and Dr. Huneke cites, safety and productivity problems plagued NPBL throughout the 1980s as "the [NPBL] was clearly staggering under the hostile environment created by the changing national economy and government transportation policy."⁹

But Moomaw himself considers the operations of NPBL after 1989 as a model to be emulated, not dismantled:

Since 1989, the current, forward looking administration concentrated resourceful and decisive leadership on the crisis, which reached an acute stage in 1991.

The traditional company was thoroughly reconstituted through modern attitudes and procedures, innovative technology, computerization, and a 65 percent employment reduction from 1987 to 1995. This crisis was brilliantly and beneficially solved.

⁷ Huneke, VS, p. 5.

⁸ W. Hugh Moomaw, *Virginia's Belt Line Railroad: The Norfolk & Portsmouth, 1898-1997*, Hallmark Publishing Company (1998)

⁹ Moomaw (1998), p. xiii.

The Belt Line was dramatically transformed into a thoroughly modern railroad, becoming very productive, technologically oriented, and responsive to shippers, for whom individually expedited services are now offered...

What lies ahead? If the policies of the present administration (emphasis added) continue, then greater safety, more sophisticated technology, and closer accountability of railroaders to shippers will be emphasized.¹⁰

And what is important about 1989? That was the year that NSC and CSXT came together, and worked out a Supplemental Agreement, which secured NPBL's revitalization. Even Dr. Huneke acknowledges the NPBL's transformation: "The restructured modern Belt line in 1996, therefore, almost doubled 1988 productivity even as traffic decreased by one-quarter, a really significant achievement."'¹¹

And yet, Dr. Huneke takes exactly the wrong meaning when he cites Moomaw as expressing NPBL's concern with respect to "***the maintenance of its independent, corporate status*** [Italics added]."'¹² Dr. Huneke has added bold and italics to this quote as if to suggest that the present application will somehow undermine that independence. But, as the very next page of Moomaw's book makes clear, what was at stake in the 1980s was the NPBL's survival as an independent company. Many of NPBL employees "feared for their paychecks. They feared the company would be absorbed into NS's Norfolk Terminal with loss of jobs, or suffering a large downsizing, or, in the worst scenario, be sold to a non-union short line operator."¹³ This is "the maintenance of [NPBL's] independent, corporate status" that Moomaw meant. Dr. Huneke has misread the meaning of these words and applied them out-of-context and incorrectly.

Indeed, Moomaw makes clear that it was only after 1989 that NPBL made significant improvements in safety, operations, and productivity. And, so, contrary to Dr. Huneke's insinuations, the present arrangements (which the STB has called into question and that CSXT now decries) have been in the public interest all along and will continue to be so.

¹⁰ Moomaw (1998), p. xiii.

¹¹ Huneke, VS, p. 11 (citing Moomaw (1998), p. 142).

¹² Huneke, VS, p. 11 (citing Moomaw (1998), p. 142).

¹³ Moomaw (1998), p 143.

Under its current, independent management, NPBL has not only emphasized service and safety, but it has kept faith with the foundational 1897 agreement to offer fair and neutral rates to all shippers. It is CSXT that seeks to decisively break with this principle by introducing price discrimination in favor of one carrier, for one service. That a majority of NPBL's directors (the three NSC-appointed directors and the independent NPBL president) might balk at such a shift is perfectly reasonable—and consistent both with the railroad's founding ethos and economic logic. A decision to preserve neutrality is not a breach of duty. It is a reaffirmation of institutional purpose.

NPBL is not some ordinary joint venture between complementary firms. It is a firm co-owned by competitors. That is why neutrality matters. Once NPBL begins deviating from posted, neutral rates for specific services, it enters into the realm of custom access agreements, setting a new precedent – not just for one intermodal lane, but for every service, every switch, and every facility on the line. That is not simplification; it is fragmentation.

Joint ownership of infrastructure by competitors is inherently fragile. It works only when governance is neutral and respected by all parties. But it is CSXT who no longer respects the principles of neutrality and seeks to overturn the long-standing status quo. The real reason we are here is because NPBL's Board of Directors tabled a series of rate proposals brought by CSXT over the years, proposals that would have fundamentally changed the nature of NPBL's interactions with its customers. By tabling these proposals, no rate was changed nor was any law or regulation violated. There is no record of abuse here. There has been no deviation from neutrality. There is no harm that would justify mitigation, conditioning, or retroactive sanction. This is not a case that cries out for remedy.

Claims that CSXT Lacks On-Dock Access Are a Misdirection

CSXT makes much of the fact that it has zero, direct on-dock access. But it was ever thus. CSXT's lines do not now and have never connected directly to NIT. This is not anti-competitive behavior on the part of NSC, it is the nature of property rights. And so, yet again, CSXT desperately seeks to spin straw into gold by confusing the Board.

The simple reality is that NSC's predecessors built a rail line that connects directly to what is now the NIT. CSXT's predecessors did not. Later, all the rail firms in the region came together to build a second line in the area, which would become the NPBL. In 1917, NSC freely granted NPBL trackage rights into the port facilities on which NIT now sits. CSXT has **never** had direct, on-dock access to NIT. CSXT has **always** had access to NIT via an interchange with the NPBL.

This is an important point. It is well understood that rail carriers are required to facilitate interchange traffic – this is a foundational part of the common carrier obligation. Here, there is a route and rate available to CSXT into NIT via NPBL, a rate Mr. Fapp shows is reasonable.

CSXT can reach NIT via NPBL. It is simply that CSXT would prefer to reach NIT directly and avoid any drayage or switch charge. But this state of affairs, where CSXT has not had direct, on-dock access to NIT, has been the case for CSXT and its predecessors for more than 120 years. And, again, there is a simple reason for it: while NSC and its predecessors made the investments needed to serve NIT directly, CSXT and its predecessors did not. Even so, CSXT can use NPBL's strictly neutral and cost-based terms to access the port facilities. CSXT can use NPBL's switching service anytime it wants. It simply chooses not to.¹⁴ It prefers instead to rely on competitive trucking services – at prices subsidized by the Port of Virginia – to dray containers from NIT directly to its lines rather than rely on NPBL to switch them. There is nothing untoward about that – draying containers at ports or between interchange locations in Chicago-Land is a common practice, not proof of a failure to serve or discriminatory practices.

What CSXT fundamentally objects to are the terms that NPBL has set for all carriers (including CSXT) to access NIT over its lines even though these terms were developed using a cost-based approach and are also consistent with the prices other belt line railroads charge for similar services.¹⁵

¹⁴ CSXT has made no showing that using an NPBL switch would preclude them from using NIT. Mr. Fapp shows that a CSXT/NPBL rate and the CSXT/drayage rate are roughly equivalent, CSXT simply chooses not to use it, perhaps because half of CSXT's drayage costs is reimbursed by the Port of Virginia.

¹⁵ Fapp, VS, p.5-8.

Instead, CSXT, and its expert witness Dr. Carey, would have the Board believe that there is another set of prices and access terms which if, hypothetically applied, might (possibly) result in such a boom of traffic that they would effectively pay for themselves. And yet, Carey admitted in her deposition that she has not done any actual analysis of what CSXT's volumes would be absent NSC control,¹⁶ or indeed any analysis exploring the extent to which NIT volumes can grow¹⁷ and whether NPBL has the operational capability of handling CSXT double stack intermodal trains.¹⁸

Yet, despite this lack of examination, Carey in effect argues that there are hundred-dollar bills lying around waiting to be collected, "money for nothing," which allows CSXT to claim that NPBL's directors are violating their fiduciary duty by not simply conceding to CSXT's demands, immediately. All of this, of course, without any serious exploration by CSXT of how the remainder of NPBL's customers would be affected by the introduction of large volumes of intermodal movements, or the impacts on rates and costs on these other customers. To handle CSXT double stack trains, an entirely new operating plan and schedule would need to be developed and worked out for NPBL and all its local customers. But did CSXT develop one? Did it stress-test its plan by modeling it with the Rail Traffic Controller Model or similar software packages? It did not. Given its painful experience in Lake Charles, the Board knows well that developing such a plan is no easy thing. CSXT cannot simply ask the Board to take its word that everything will be fine. It seems much more likely that granting CSXT terminal trackage rights will lower the quality of NPBL's service – and may force NPBL to raise rates on local customers in order to cover its costs.

Carey further argues that NPBL's switch rate is "inconsistent with railroad industry practices that are anchored in differential pricing."¹⁹ Carey points to the example of the Commonwealth Railway (CWRY) as an example that NPBL should emulate. But the CWRY is

¹⁶ Carey, Deposition, p. 14-19.

¹⁷ Carey, Deposition, p. 33-34.

¹⁸ Carey, Deposition, p. 192-93.

¹⁹ Carey VS, p. 4.

different from NPBL. The CWRV is a short-line railroad owned by Genesee & Wyoming, the nation's largest short-line holding company. Naturally, it may be in CWRV's interest to price differentially, to enter in numerous different contracts with different customers and to discriminate among and between the connecting carriers and customers. After all, CWRV's motive is to maximize its profits.²⁰

But Carey makes a mistake in economic logic when she applies that logic to NPBL. Though CWRV and NPBL may serve the same port complex, they are not strictly comparable in terms of what services they render or whose profit they seek to maximize.²¹ NPBL does not seek to maximize its own profitability, but to neutrally serve its two Class I railroad owners, CSXT and NSC. From the standpoint of economic efficiency, there is strong justification for a co-owned switching or terminal railroad like NPBL to employ a uniform per-car charge rather than to engage in its own differential pricing. A flat switching fee functions as a cost-recovery mechanism: it is transparent, predictable, and avoids duplicating the value-based pricing already performed by the Class I carriers. Were a switching carrier such as NPBL to impose its own discriminatory markups in addition to those set by its Class I owners, the result would be what economists describe as *double marginalization*.²²

Double marginalization occurs when two firms within the same supply chain each impose a markup over cost. The outcome is unambiguously harmful: shippers face higher rates

²⁰ The fact that CWRV exists as an independent railroad is itself proof that NS is not trying to block CSXT. NSC owned the line that became CWRV. Before it spun off CWRV, NSC was the only railroad serving the property that now is the Virginia International Gateway. NSC could easily have structured its sale to include steel or paper barriers frustrating the ability of CSXT to interchange with CWRV. NSC did not do so—hardly the actions of a monopolist with long-running intentions to foreclose CSXT from operating at the Port of Virginia, but certainly consistent with the idea of that NSC finds it in its self-interest to support and promote the Port of Virginia, even if that also benefits its arch-rival in the process.

²¹ Nor can it be argued that NPBL's rate is too high because the CWRV rate is lower. CWRV merely moves containers from the Virginia International Gateway (VIG) under contract to the adjacent marshalling yard. NSC and CSXT pay a trackage rights fee to operate over CWRV's lines to that marshalling yard. By contrast, NPBL's cost-based, neutral tariff rate covers the movement of containers across the Elizabeth River from the Norfolk International Terminal to connections with its interchange partners.

²² Double-marginalization is described in most Industrial Organization text books. See, for example, *Industrial Organization: Markets and Strategies* by Paul Belleflamme and Martin Peitz, 2nd Edition, Cambridge University Press, 2015. George Mason University Professor Alex Tabarrok has an excellent short video describing double-marginalization that can be viewed at <https://www.youtube.com/watch?v=-uN--rvaGA4>.

and reduced access, traffic volumes are inefficiently suppressed, and overall social welfare declines. Importantly, the inefficiency does not even redound to the benefit of the carriers themselves; the extra markup depresses total output, leaving the combined profit of the carriers lower than if they had coordinated their pricing or acted as a single integrated firm. In short, when both the switching carrier and the long-haul carrier attempt to capture additional rents, the consequence is a deadweight loss that leaves both customers and carriers worse off. And that is why, consistent with economic logic, NPBL employs a simple, standard mark-up based on costs.

The 1897 agreements called for a single, nondiscriminatory charge on carloads. In the years following the Supplemental Agreement, NPBL experimented with various pricing schemes—as is its right—by sometimes charging different rates per car depending on the particular service that NPBL offered. In 2010, NPBL simplified its rate structure by eliminating the distinction between “international” traffic and “domestic” traffic. In unifying these rates, NPBL simplified its rate structure in a manner that was entirely consistent with the 1897 agreement, not engaging in price discrimination on the basis of commodity or customer.²³ In this case, engaging in demand-based differential pricing would (contrary to Carey’s assertions) undermine, and not promote, the social welfare.

The simple truth is that once NPBL begins deviating from posted, neutral rates in favor of individualized access arrangements, not only does it forfeit its simplicity and neutrality, but it also lowers the welfare of its customers and its owners. It opens the door not to greater fairness, but to greater conflict, and calls into question its viability as a shared infrastructure asset.

²³ After 1980, the Port of Virginia has emerged as a major entry port for container traffic. Containers differ significantly from carloads, and so NPBL initially offered separate rates for domestic container traffic and international containers. But not only did this arrangement create accounting and marketing problems, but it also seemed inconsistent with the spirit of neutrality embodied by the 1897 agreement. And so, in 2010, NPBL voted to go back to a simple, single, set rate regardless of customer, commodity, or car-type. Although CSXT now complains about this rate, it should be noted that had the separate international container rate remained in place and subject to a standard cost escalation factor, that rate would be higher today than the \$210 switch rate NPBL currently offers.

That is why, when NPBL's Directors tabled CSXT's proposal requesting individualized access and rate treatment for movements to NIT, they knew what was at stake. The majority of NPBL's Board understood that abandoning a principle of neutrality that has served this railroad—and its owners—for over 128 years is not a minor adjustment; it is a fundamental shift, one that requires careful consideration.

In short, CSXT seeks to undermine the independence and neutrality of NPBL for the sake of obtaining leverage on a highly competitive service already exempted by the Board's regulations, and a service that barely registered in the minds of the ICC when it approved the NSC merger all those years ago. The facts are clear: CSXT has access to NIT, it just wants a lower rate and direct on-dock access to NIT. It seeks to persuade this Board to grant it by regulatory fiat that which it has been unable to secure (and unwilling to build) in the commercial marketplace; and for the Board to do this without CSXT having to make a genuine showing that NSC has engaged in competitive abuse.

CSXT's Allegations of Harm are Either Post Hoc Rationalizations or Wildly Overstated

The Board should recognize that nearly all of CSXT's arguments are post-hoc rationalizations. The NPBL Board of Directors—including those directors appointed by CSXT—unanimously approved almost all of the actions that CSXT now cites as evidence of a conspiracy, including discontinuing service over the connecting track and removing the diamond.

The out-of-service discontinuance was entirely proper – no local traffic had moved over the line in question for two years and overhead traffic had an alternative route. NPBL's Board of Directors unanimously took the cost-minimizing, profit-maximizing step of seeking and obtaining the Board's exemption approval. CSXT now claims it was unaware of NSC "conspiratorial intentions" and would never have agreed to this action had it known. But that is a post hoc rationalization. The line in question was not being used for local traffic, so there is no reason to second-guess the NPBL's decision to pursue an out-of-service discontinuance exemption.

The argument regarding the diamond similarly fails. Having secured approval to discontinue the line, it was only natural that NPBL remove the diamond interchange. Not to do

so would have been irresponsible. Not only does the presence of a diamond raise the cost of maintaining the lines remaining in service, but the diamond is a valuable piece of property – to have left it in the ground would have been nothing short of managerial inefficiency. If the Board decides to order NPBL to restore this line and diamond (and it should not), then surely CSXT should bear the full cost of this restoration – not NPBL.

These two examples raised by CSXT serve to prove the point that rail assets in a port complex are valuable properties – not only because they enable firms to engage in on-going commercial activity, but also because they provide substantial option value. Firms often hold on to underperforming assets because there is a possibility (and a hope) that markets will evolve in the future in ways that make the asset more valuable. So, sometimes a firm may choose to abandon and salvage rail assets, while other times a firm may choose to hold on hoping that market conditions may change. This is normal firm behavior – but note that CSXT wants to have its cake and eat it too. When NSC abandons an underutilized asset and salvages a diamond, CSXT complains (after the fact). When NSC decides to hold on to underutilized assets, hoping conditions will improve, CSXT complains. Simply put, CSXT complains – and will continue to complain until all its demands are met.

Here, CSXT is claiming that NSC behaved improperly when the directors NSC appointed to NPBL rejected CSXT's offer to purchase NPBL's "underutilized" Port of Norfolk Yard. And yet the same NSC whose appointed directors chose not to sell NPBL's yard, willingly spun-off the CRWY through which both CSXT and NSC now have on-dock access at VIG. Reading CSXT's arguments, it is hard to tell if NSC is incredibly sophisticated – or incredibly stupid. The truth is NSC is neither of those things, it is just a firm doing the best it can under the information constraints it faces. But given hindsight (and self-interest) CSXT spins plausible, colorable business decisions into "evidence" of improper behavior.

As an example of such "spin," CSXT makes much of the fact that after it requested service over NPBL in 2015, NSC moved to cancel the 1917 trackage rights agreement. But I invite the Board to remember that this was a 99-year agreement whose terms were about to expire. Rather than concluding that NSC's business decisions had anything to do with CSXT's efforts to

access NPBL, perhaps a better explanation is that after 98 long years, NSC no longer considered this 99-year-old agreement in its best business interests moving forward. Therefore, NSC provided the required one-year-in-advance notice that it intended to cancel the agreement and initiated negotiations with NPBL to change that agreement. This is not some conspiracy—just another ordinary business decision.

Indeed, if NSC actually controlled NPBL, if it were acting as a foreclosing monopolist, it could simply have crammed its desired trackage rights rate down NPBL's throat notwithstanding any objections from either NPBL or CSXT. The fact that NSC is willing to have the Board set at an SSW rate for NPBL's use of NS's tracks shows once again that NSC is acting in a manner that maintains NPBL's neutrality and not in a manner that disadvantages CSXT.

NSC is Not a Monopolist at NIT

In his verified statement, Dr. Huneke asks an important question: "In evaluating this transaction the STB should therefore consider whether Norfolk Southern's control of the [NPBL] would stymie or limit CSXT's ability to enter new lanes and compete for Hampton Roads traffic."²⁴ Though I again dispute the notion that NSC will "control" NPBL (beyond a narrow, legal sense), Dr. Huneke poses an excellent question – and my answer is unequivocally, "No."

CSXT has sought to define the market definition as movements originating at NIT bound for Midwest rail markets, an absurdly narrow definition of the market (as Dr. Waehrer demonstrates in his verified statement).²⁵ Supply chains for international containers are highly integrated – more of a supply web than a supply chain – and there is ample evidence of port-to-port competition.

In fact, Dr. Huneke makes this very point when he claims what is at stake is CSXT's ability to compete for "Hampton Roads traffic." But NIT is not the only container facility in Hampton Roads; just across the river sits its sister facility, the Virginia International Gateway (VIG). The

²⁴ Huneke, VS, p. 1.

²⁵ What is even more interesting is that Dr. Carey admitted in her deposition that she has not even attempted to define what the relevant market is or should be but simply focused on the share of traffic that NS and CSXT had at NIT. Carey Deposition: 15:3-12.

VIG has more than 50 semi-automated stacking cranes and the capability to support three ULCVs simultaneously, and a 2.2M TEU annual capacity. VIG has on-dock connections to both Norfolk Southern and CSX through CWRV—and given, its unique position adjacent I-64, offers first class fluidity and efficiency for motor carriers.

The NIT and the VIG are both operated by the Port of Virginia and it makes little sense (unless one wanted to confuse the Board) to consider them separate from one another for the purposes of developing a market definition. The evidence here shows that the Port of Virginia directs in-coming vessels to either the NIT or the VIG in order to maximize the fluidity of the port complex. Certainly, carrier preference plays a role: CSXT-allied shipping lines prefer to land at VIG; NSC-allied shipping lines prefer to land at NIT. But given the fact that the two facilities are substitutable – and, in fact, are substituted by the Port of Virginia – to consider them as distinct for the purposes of market definition is manifestly absurd. The Port of Virginia competes against other East Coast ports, just as railroads compete against each other and against trucks. To say that the Board should only examine “direct rail shares” at NIT is myopic and ignores the realities of the marketplace.

So, without question, CSXT has the ability to enter new lanes and compete for Hampton Roads traffic. In fact, with respect to movements to the Midwest, VIG (being on the east side of the Elizabeth River and with direct access to I-64) starts off closer to the Midwest. Surely, given that the Port of Virginia directs traffic to both terminals, Dr. Miller’s contention that NSC has an 88% of the market share must be modified to include the containers originating at VIG. No doubt, NSC would still have a significant majority of the containers landed in Hampton Roads, but nothing like the 88% figure with which CSXT seeks to scare the Board. So, given the presence of competition within the Hampton Roads region (at VIG) – as well as the competitive pressures brought to bear by trucks and by other East Coast ports (particularly PNYNJ) – NSC is not a monopolist at NIT. NIT is simply one link in a supply chain that spans the globe and it cannot be analyzed in isolation.

And, even if NSC has a significant lead in volumes at the Port of Virginia, it is because NSC marketed itself and invested in its lines to make that a reality. Much has changed since

1982. At that time, intermodal shipping—especially the double-stack container traffic that now dominates international freight—barely existed. In the decades since, it has become a defining feature of North American supply chains, reshaping how freight moves and how railroads invest to serve that demand.

Norfolk Southern did not merely adapt to that change—it helped drive it. It made long-term, transformative investments in infrastructure, terminals, and inland connectivity. These decisions were premised on the stability of governance frameworks that all parties—including the Board—had treated as settled for decades.

Foremost among those investments is the Heartland Corridor, a \$150 million public-private partnership that between 2007 and 2010 raised tunnel clearances and eliminated bottlenecks to allow double-stack intermodal trains to move efficiently between the Port of Virginia and major inland markets like Columbus, Cincinnati, and Chicago. This was a strategic investment in system throughput and competitive connectivity—one made with full reliance on a regulatory structure that, for nearly forty years, no party, including CSXT had questioned NSC's ownership interests in NPBL.²⁶

Now CSX asks the Board to unwind that reliance. In various legal proceedings it seeks to compel a selective rate change that would privilege its commercial interests at NIT, even if doing so undermines the economic premise on which Norfolk Southern's investment was made. No firm is entitled to insulation from market risk—but when a company makes irreversible, public-serving infrastructure investments under a governance model long accepted by regulators and competitors alike, changing the rules midstream is not just unwise. It is destabilizing. To allow CSXT, a minority shareholder, to use this forum to gain advantage by altering NPBL's ownership or its foundational rate structure—a structure that has served the company and its customers well for over a century—is to elevate tactical grievance over strategic continuity. That may serve

²⁶ CSXT did not make a similar investment until 2015-18 when it raised the Virginia Avenue Tunnel in Washington, DC. This permitted double-stack service from the Port of Virginia to the Midwest via the old Baltimore and Ohio line that runs from Washington, DC through Cumberland, MD and onto Pittsburgh, PA. So, for 8 years (2010-2018), NSC has a clear competitive advantage moving container traffic from Norfolk because it had invested heavily in its own network.

one party's immediate aims, but it does damage to the principles that make shared infrastructure viable in the first place.

NSC's Competes With and is Constrained by Other East Coast Ports

As Dr. Waehrer persuasively demonstrates, the key player in international container traffic are the owner/operators of container ships. The business is highly competitive – and very dynamic.

Dr. Waehrer shows that because railroads bundle their rates to the various shipping alliances, it is the entire bundle that matters – prices for individual parts are not strictly comparable – it is the attractiveness of the bundle itself that matters to the shipping alliances.²⁷ There is a reason that container traffic is exempt from regulation: it is a highly competitive. The flexibility of the international supply chains – ships can easily be rerouted – suggests that if a railroad even attempted to exercise monopoly power, it would find ships and supply chains would easily evade its efforts.

Indeed, there is every reason to believe that ocean carriers, not railroads, have the leverage in their bilateral relationship. Cargo vessels are inherently more flexible than railroads – they can easily be redeployed to new lanes – even to different oceans. This flexibility gives the ocean shippers real bargaining power over the railroads. Securing a bundled contract is one thing, but rail carriers must constantly deliver on their pricing and service quality in order to remain credible when the next round of bargaining begins.

All of this suggests it is a mistake to view NIT or the POV in isolation for the purpose of market definition. If anything, the Port of Virginia (POV) has historically been at something of a disadvantage to the Port of New York and New Jersey (PNYNJ). Not only does the PNYNJ serve a huge local market, but it also has easy truck access to Pennsylvania and to New England as well. As a result, it is quite frequently the case that large container ships will want to make PNYNJ their first port of call on the East Coast.²⁸ There, the ships can unload not only containers for the immense local markets but can readily access on-dock rail to inland destinations, including

²⁷ Waehrer, VS, p.34-36.

²⁸ Luebbbers, VS, p.5.

Midwestern distribution centers. Because PNYNJ is typically the first port of call, it is faster to market, a critical advantage in an era of just-in-time inventory management.

After unloading containers at PNYNJ (and taking on containers loaded with export goods and empty containers), it is common for container ships to make one or more additional ports of call at other East Coast ports. There the shipping lines will again drop off additional loads and pick up containers loaded with export goods as well as empty containers (an inevitability given the US trade imbalance). For operational reasons, shipping lines would prefer to unload as many containers as possible at the first port of call and load as many containers as possible at the final port of call. This desire on the part of the shipping lines however creates difficulties for the railroads. Railroads naturally like a balanced flow of trade – they want their power and the cars to cycle back and forth. But here, there is an imbalance between loads coming out of PNYNJ and the empties returning to POV. This leads to equipment being out of position, leading to non-revenue moves as equipment needs to be repositioned (or “dead-headed”).

The testimony here shows NSC employs a variety of strategies to deal with this imbalance. In his verified statement, Mr. Luebber states that {{[REDACTED]}}. NSC also seek to market the port aggressively as a first-port of call option.²⁹ The revealed behavior of NSC is powerful evidence that the supply chains centered on the POV and PNYNJ cannot be readily separated in a proper market definition.

If anything, because POV is more often than not the second port of call (after PNYNJ), the POV can be viewed as a “follower” in a sequential, Stackelberg game where the PNYNJ is the “leader.” In a Stackelberg game the follower (POV) observes the decisions made by the leader (PNYNJ) and then chooses its own strategy in response even as the leader anticipates the follower’s reaction. The equilibrium reflects the rational expectations of both players. In such games, the leader typically gains a “first-mover advantage,” capturing the most profitable segment of the market (here, time-sensitive cargo), while the follower accommodates the

²⁹Luebbbers, VS p. 8-9.

leader's decision, typically serving residual demand (evidenced by discounted pricing). Far from being a monopolist at NIT, NSC finds itself competitive with and constrained by the PNYNJ.

The Port of Baltimore, too, is a ready competitor to the Port of Virginia, particularly now that the Howard Street Tunnel project has been completed. 15 years after NSC managed to expand its tunnels to handle double-stack traffic, CSX has finally managed to do the same. Baltimore will be a fierce competitor to the Port of Virginia moving forward. Not only is the population of the combined statistical area for Washington-Baltimore more than five times greater than that of Virginia Beach-Norfolk-Newport News, but the Port of Baltimore is also closer to both Mid-Atlantic and Midwestern markets.

Indeed, CSXT's internal documents show not only that it {{ [REDACTED] }}^{30}}} The documents also show that that as part of the package it was willing to put forward to induce outside investment to rebuild the Howard Street Tunnel, {{ [REDACTED] }}

{{ [REDACTED] }}^{31}}} Clearly, CSXT believed that by pricing competitively, it could promote the Port of Baltimore's attractiveness as a first-stop destination, just as NSC has promoted POV in the past. The fact that CSXT carefully considers its {{ [REDACTED] }}

{{ [REDACTED] }}^{32}}} This evidence clearly shows that we must adopt a wider view of market definition than merely movements from either NIT or even the POV as a whole—and also that the statements from {{ [REDACTED] }} should be viewed with an appropriate degree of skepticism, they are not wholly disinterested.

NPBL Price is Not Too High

³⁰ See Slide 3 from CSX_STB_0091924.pdf.

³¹ CSX_STB_0089999, CSX_STB_0090000, CSXT_STB_0090001, CSX_STB_0090002.

³² CSX_STB_0090002.

Mr. Fapp demonstrates that there is no single industry standard for short line rate structures, but that the rates at question here are quite comparable to rates for similar services charged by other Belt Line railroads. And I would note that the rate itself has not changed in 10 years, meaning that inflation has already reduced this rate by 19.0 percent over the last 10 years.³³ So, the idea that somehow NPBL and NSC are engaged in some unlawful attempt to use prices to foreclose CSXT's access to NIT is untenable.

NPBL's rates are cost-based and fair. The current rate structure has not harmed any carriers or shippers but has instead ensured fair access to all market participants. There is no evidence that shippers are suffering as a result of NPBL's rate structure, so CSXT's claims of harm to shippers have not been substantiated.

The Problem of Cross-Subsidization

At the heart of the Board's rates processes is a determination that the Board's regulatory practices not induce a cross-subsidy – either from shippers to carriers, or from one carrier to another. This is sound regulatory practice. In fact, two of the four pillars of Coal Rate Guidelines directly forbid the practice of cross-subsidization: Shippers should not be required to pay more than is necessary for the railroad to earn adequate revenues (known as the Revenue Adequacy Constraint) and a captive shipper should not bear the costs of any facilities or services from which it derives no benefit (the Stand-alone Cost constraint).

The Board's desire to avoid improper cross-subsidization was further advanced by two key decisions, PPL Montana LLC v. BNSF (FD 42054) and Otter Tail Power Company v. BNSF (FD 42071). The PPL Test effectively asserts that a rate complainant may not rely on an improper cross-subsidy (i.e., a shipper bringing a rate case cannot be a parasite on the traffic group it proposes). The Board extended that logic in the Otter Tail Test which further requires that the Board's final rate prescription must not induce a cross-subsidy.

³³ This number was calculated by comparing the Linked Index found in Table B of the Board's RCAF decisions (EP 290 Sub 5). The published value for the 2Q2015 (actual) was 264.4. For 2Q2025 the same value was 326.6. $((264.4/326.6)-1)*100 = -19.0$ percent.

But, here, CSXT's request for conditioning the control application is motivated by a single thought: it wants a lower charge for containers landed at NIT. Initially, CSXT offered to offset these costs on NPBL with in-kind services—locomotives, crews, fuel—hoping this would solve the problem. But the reality, of course, is that this proposal was functionally a grant of haulage rights that itself would have distorted the very neutrality that makes shared infrastructure viable in the first place. Now, CSXT asks its regulators for what amounts to the same remedy – this time in the form of terminal trackage rights. But this does not change the fundamental problem -- NPBL's rates are designed to recover its costs, so a lower container rate inevitably implies a higher rate on carload traffic. Similarly, enhanced access for CSXT's container traffic inevitably lowers the quality of service that NPBL's other shippers will experience. In short, CSXT seeks to offload expenses either onto NPBL's other shippers or onto NSC, NPBL's other owner and CSXT's competitor for the traffic. Either way, this will induce the very sort of cross-subsidy that the Board would be highly skeptical of in a rate case.

CSXT Can Absorb NPBL's Rate – But Would Prefer Not To

CSXT can access and absorb NPBL's cost-based rate, it chooses not to. Why? In no small part because the Port of Virginia subsidizes the cost of drayage. Naturally, the governor and local officials would be keen on reducing the bill, freeing up resources for other purposes, and so Virginia officials are neither neutral nor disinterested in the outcome of this proceeding.

Even worse, while several letters included in the record complain about the truck traffic in Hampton Roads (and blame that on the lack of on-dock rail service by CSXT at NIT), the real reason that truck traffic exists is because the POV itself subsidizes drayage so that CSXT finds it more profitable to use drayage than the cost-based NPBL switch. The truck traffic is the direct effect of the choices of Virginia's officials—and CSXT's responses to those choices—not to any action by NS or NPBL. See Exhibit C, letter from NSC to the Virginia Secretary of Transportation.

CSXT pays the NPBL's rate for non-intermodal traffic and indeed has the largest market share of NPBL switch traffic, but argues that, as applied to container traffic, NPBL's rates are unreasonable. However, CSXT's analysis here contains two significant errors that cast doubt on its position. First, as Mr. Fapp demonstrates, Dr. Carey makes fundamental mistakes in her

application of the Board's general purpose costing model, URCS. She improperly equates containers as carloads, even though URCS treats them quite differently, as it should.³⁴ Second, Dr. Carey has imposed an arbitrary and uneconomic constraint on the analysis – by suggesting that movements with a less than 5% profit margin are uneconomic and evidence that NPBL's rate must be dropped. But this is illogical.

Intermodal movements are highly competitive, which is precisely why they are exempt from the Board's rate jurisdiction. Indeed, using the Board's general purpose costing system, URCS, a substantial volume of movements take place at R/VC ratios well below 100%. That is, there are many movements that do not quite cover the "variable" costs assigned to them by the Board's costing program but certainly cover marginal costs and thus make a positive contribution to the fixed costs of a carrier.

And yet, Carey's analysis spurns such contributions – even though economic logic clearly recognizes there are cases where rates can – and ought – to be set above incremental costs but below long-run marginal costs (which, by the way, is almost certainly higher than URCS costs because all the optimized infrastructure costs would be included, not the 50 percent of the existing asset base that URCS assumes).

Such low margin movements are clearly profitable and accepting them is not only consistent with the behavior of many short line railroads, but also with economic theory itself. As Ioannis Kessides and Robert Willig noted:

The role of a cost floor as a measure of efficiency is to determine whether the railroad would be better off without the traffic in question. There are two basic reasons why it will often be appropriate for a price to lie below the corresponding long-run marginal cost. First, investment decisions which were entirely rational and appropriate at the time they were made will in many cases subsequently be affected by unexpected developments. Such eventualities may cast a shadow over the future of the service which utilizes the investment. A railroad is always better off carrying any and all traffic that can cover its short-run avoidable costs and make some contribution to its fixed and common costs--the supplier earns more by providing the service than by abandoning it. (Emphasis added).³⁵

³⁴ Fapp, VS. p. 8-14

³⁵Ioannis N. Kessides and Robert D. Willig, "Restructuring Regulation of the Rail Industry for the Public Interest," Policy Research Working Paper 1506, The World Bank, Private Sector Development Department, September 1995, p. 10.

It is a mistake to suggest rates below an arbitrary cost floor are unremunerative (why would CSXT bother to offer them in the first place?) and doubly so to suggest these rates are therefore proof or evidence that NPBL's rates are too high. The Board cannot use this analysis as evidence of inappropriate price discrimination on the part of NPBL. CSXT well knows that occasionally vessels intended for VIG (and connection to CSXT) will be directed by the Port of Virginia to unload at NIT. Despite this inconvenience, CSXT aggressively competes for traffic from the Port of Virginia—CSXT's revealed behavior shows that it can absorb the expenses associated with moving containers between terminals and remain profitable. In no way is NPBL's rate foreclosing CSXT, and there is no evidence demonstrating that NPBL's cost-based rate is inappropriate – only a desire on the part of CSXT that it should be lower.³⁶

But if nothing here has shown that NPBL's rates render CSXT's movements unremunerative, or that NPBL's tariff rate is anticompetitive, then why should it be incumbent on NPBL to reduce its rate – or grant CSXT terminal trackage rights? Why shouldn't it be CSXT who lowers its division – perhaps they are foreclosing NPBL, not the other way around? Indeed, Dr. Waehrer and Mr. Fapp both show that CSXT can lower its division requirement while still covering its short-run avoidable cost. This is just a division fight that CSXT hopes to win through salacious allegations of anticompetitive behavior, hoping that the STB buys it. The STB should not take the bait. The point is that the Board cannot use Ms. Carey's evidence as proof that NPBL is engaged in inappropriate price discrimination against CSXT.

CSXT chooses not to use NPBL because the Port of Virginia subsidizes its dray rate. Even so, while NPBL may not (at present) handle CSXT's containers, it stands ready to handle any

³⁶ If the NPBL rate had a competitive impact (and absent the 125-year purpose of NPBL to be a neutral railroad serving its owners by charging a non-discriminatory cost-based rate to all customers regardless of car type and commodity), Dr. Willig's economic principles would apply to CSXT's rate proposal. But that is precisely the point. If the NPBL rate truly had a competitive impact, which it does not, this appears to be a typical divisions fight between two railroads. But NPBL cannot, given its corporate structure and purpose, adopt a rate applicable only to intermodal traffic. In contrast, CSXT can lower its division and still obtain remunerative rates. Furthermore, even if NPBL were to lower its rates, CSXT would not pass those "savings" to the customers because it charges the same rate whether the traffic originates/terminates at VIG or NIT. Thus, any lowering of NPBL's rate would simply contribute to CSXT's bottom line, not to the customer in the form of lower rates. Regardless, as Dr. Waehrer establishes, the NPBL rate is so de minimis in the overall rate structure that it has little to no competitive impact.

container that is off-loaded at NIT, and—consequently-- all containers benefit from NPBL's presence.

NPBL's Rates Have *De Minimis* Impact on CSXT

The true test is the impact of the cost of movement between NIT and VIG is on the totality of CSXT's cost structure in the Hampton Roads region, not the costs borne by that small fraction of CSXT's movements that originate at NIT (which cannot be viewed in isolation from the vast majority that land at VIG). It seems that CSXT is arguing that NSC should buy them an expensive umbrella because it rains whenever they use NIT. And yet, it only rains three times a month – the other 27 days CSXT's containers are landed under sunny skies at VIG. By focusing only on NIT—and ignoring VIG—CSXT effectively overstates the NPBL's influence by a factor of five or more.

The simple reality is that CSXT does not know in advance which particular shipment will end up at NIT. Given this uncertainty, CSXT will set its rates from Virginia with the expectation that some fraction of its shipments will be barged, drayed, or railed from NIT to VIG. These rates will apply to all containers – not just the ones landing at NIT, because (again) CSXT does not know in advance which containers those will be. In effect, the cost of transportation between the two terminals is a kind of insurance problem: a small fee is implicitly charged to all traffic to cover the higher expenses incurred by an unlucky few that will be off-loaded at NIT.

As Dr. Waehrer convincingly demonstrates, the additional expenses associated with NPBL's rates amount *to less than 1 percent of the revenue associated with CSXT's movements from the Port of Virginia*, making it “implausible that such an increase in cost could materially affect CSXT's ability to compete.”³⁷ CSXT's entire case for foreclosure and anti-competitive behavior collapses when this point is appreciated.

To repeat: the small share of containers that end up at the disfavored NIT must be brought to VIG to be included on CSXT's out-bound trains. This action is necessary for CSXT to serve its customer and a charge for this service is warranted. And yet, the total cost of moving

³⁷ Waehrer, VS, p. 27.

out-of-position containers from NIT to VIG amounts to less than one percent of CSXT's revenues on its movements from the Port of Virginia. I would hardly call this foreclosure, but CSXT balks at paying even this *de minimis* expense, preferring instead to lobby the Board to grant it via regulatory action property rights it has never possessed—direct, on-dock access at NIT.

The Need for Sound Regulatory Practice

In my years as Chief Economist at the STB, most regulatory questions come down to three core tensions: balancing precision with practicality, fairness with finality, and competition with cooperation. These are not theoretical ideals—they are the real-world guideposts that help regulators steer a course that promotes competition, confidence, clarity, and neutrality. In my experience, four principles stand out as essential to maintaining that confidence:

1. Predictability

Agencies must strive to be predictable—especially in industries, like the railroad industry, where infrastructure investments are long-lived. A regulatory decision that surprises firms after 40 years, reinterpreting silence as disapproval, is destabilizing. No reasonable economic actor plans for retroactive reinterpretation.

For decades, the NSC reported its “control” over NPBL without any objection from CSXT. While the merger parties did not use the exact words, “Approval will confer certain rights over NPBL to NSC,” the math was plain: $28.57\% + 28.57\% = 57.14\%$. Certainly, CSXT, the co-owner of NPBL, understood how the ownership shares in NPBL would change if the merger were approved. And even though the ICC had granted a waiver from the requirement that applicants provide information related to NPBL and other short-line subsidiaries they owned in part or in whole, the applicants disclosed their ownership stakes in NPBL in their exhibits. And so, it should not have mattered that NCS did not explicitly ask for control of NPBL, because it was clear that approval of the merger would result in NCS with a majority stake in NPBL.

2. Transparency

For decades after 1982, NSC clearly and openly reported its control of NPBL in its Annual R-1 reports. Nor was there any reason to think this a mistake. Even CSXT acceded to this reality

and worked to restructure the NPBL's Board of Director to reflect their ownership stakes of the two owners more closely. There was never any reason for the ICC or the Board to question NSC's "control" until the growth of intermodal traffic in Norfolk suddenly made CSXT envious that it lacked direct, on-dock access to NIT. It was that business dispute (one rooted in long-standing property rights) that led CSXT to launch the legal campaign that has brought us here.

But even if the Board was correct that NSC had never asked for and been granted control rights over NPBL, it can remedy that lack of control authority now and can do so confident that its decision to legally authorize NSC's more than 42 years of management and control over NPBL will not result in a substantial lessening of competition, the creation of a monopoly, or restrain trade in the freight surface transportation of any region of the United States.

3. Proportionality

Not all technical oversights justify sweeping remedies. Ownership interest in NPBL had been treated as settled for four decades. No abuse had been found, no concealment alleged. With the cooperation of both of its owners, NPBL's operations, safety record, and financial well-being have improved dramatically. Rather than reopening the 1982 merger, the Board should close it shut – and close down CSXT's relentless campaign of litigation.

The Board has confronted more complex issues in other cases. As noted earlier, the Lake Charles matter is a useful reminder that even high-stakes mergers can involve loose threads. The answer is to deal with matters with an appropriate degree of perspective and proportionality and the Board can do so here by granting the control application.

4. Regulatory Reliance and Institutional Memory

Because of its majority ownership stake, NSC reported NPBL as an affiliate in its Annual R-1 (though this may have been a mistake on NSC's part). The ICC and the Board never objected to this, CSX never protested. In any event NPBL's ownership was public, stable, and effective.

For more than a century, NPBL's governance has rested on a neutral framework that ensures both surviving owners can compete for port traffic on equal terms. NSC has maintained that framework. In a capital-intensive, network-based industry, governance assumptions shape

investment. If joint facilities can be reopened decades later, parties can have no certainty in regulations and precedents.

Taken together, these four principles are not novel or abstract economic theories. They are the scaffolding on which responsible regulation is built. I raise them here not to litigate the past, but to affirm what this Board has long known: that principled, transparent, forward-looking regulation is what allows our freight network to function and adapt successfully.

CSX now asks the Board to unwind that reliance and tilt the competitive environment to its own advantage, undermining the economic premise of the investments NSR and NPBL have made; the very investments that Mr. Moomaw's book claims saved NPBL. Moomaw credits "this administration"—i.e., the NPBL Board of Directors under the majority-ownership of NSC—as the reason for NPBL's revival. By contrast, CSXT's requests are not designed to remedy any problem but rather to extract rents from government action.

Even if the Board approves this application—as it should—CSXT has claimed that its efforts will not stop and that it plans to continue litigating its claims. This litigation could last for years, as the prior antitrust litigation and STB actions have, and will cost both firms millions of dollars. This may be good for lawyers and economists, but it is not good public policy.

And yet, simply by asserting NSC has exercised improper control over NPBL, CSXT has called into question the nature of NSC's property rights in NPBL, even though no party (least of all CSXT) had questioned those rights for decades. The Board's decision has exposed NSC to severe litigation risk; CSXT now threatens to seek hundreds of millions in "damages" from NSC due to its "unlawful" control over NPBL even though CSXT can cite to no genuinely improper action by NSC or harm to any shipper. What CSXT wants is "something" for its own sake: the ability to rewrite NPBL's rules to favor its own network, without CSXT having to make a demonstration of harm to customers. CSXT wants to exercise the benefits of majority ownership of NPBL even though it is NSC that owns 57.14 percent of the NPBL's stock.

The Board Has Effectively Re-Opened the 1982 Merger Decision.

By calling into question NSC's ownership interest in NPBL, the Board has effectively reopened N&W/SR merger and enabled CSXT to ask for new conditions that it did not seek at the time. And it is particularly ironic, that the 1982 merger has been effectively reopened for a specific commodity, intermodal movements of international containers, that all agree are hyper-competitive movements (so much so that the Board has exempted their transport of containers from regulatory oversight), and which barely registered on the minds of the ICC in 1982, if it registered at all.

Just because a new customer, even a lucrative customer, comes to the terminal area, this is not a reason to restructure the terminal area and access to it. In game-theoretic terms, sometimes "nature moves." That is, in games where strategies and payoffs unfold over time, external conditions can shift in ways not chosen or anticipated by any of the players, and these shifts alter the distribution of gains and losses. That is what has happened here. The growth of NSC's competitive advantages relative to CSXT in the Norfolk region reflects just such a move by nature—an exogenous development arising from long-term investments, evolving traffic flows, and market dynamics beyond NPBL's control. NSC saw those changes and invested heavily to improve its competitive posture for service to and from POV. CSXT did not follow suit for many years – preferring to serve Midwestern markets from the Port of New York and New Jersey. CSXT waited until NSC's pioneering investment proved profitable and Norfolk became an important port of call before expanding the Virginia Avenue Tunnel and the Howard Street Tunnel—and, even now, as noted above, documents produced in discovery indicate that CSXT views Baltimore as more important to its long-term strategy. It was NSC's efforts and NSC's investments that enabled Norfolk to become a key intermodal port of call – and NSC's attentiveness that has given it a leg up in those markets relative to CSXT at NIT.

Economics teaches us that efficient pricing should reflect underlying costs and operational realities, not be retrofitted to counterbalance the fortunes of one shareholder when market conditions tilt in favor of another. To demand that NPBL adjust its rates or grant terminal trackage rights to CSXT in order to shelter its minority owner from those natural shifts would be to distort incentives, punish efficiency, and undermine the neutrality that NPBL's 1897 charter has always sought to preserve. The terminal trackage rights being sought here were not asked

for in 1982 and the Board should not impose them now. Some may argue that legacy practices should give way to more “dynamic” arrangements, particularly in a fast-evolving intermodal market. But regulatory innovation, if it is to endure, must follow clear principles—not the strategic importunings of well-positioned competitors.

This Board is now being asked to force market participants to deviate from a time-tested, neutral process—one that has served NPBL, its customers, and its owners well. Yes, the Board has a role in promoting competition, but it does so by staying true to the principles of good economic decision making, not by departing from them. Calls to abandon that neutrality in the name of flexibility or “market responsiveness” may sound compelling but need to be viewed skeptically if they are imposed by government diktat and have not emerged from the marketplace. The Board should not attempt to promote competition by decree.

The Department of Justice’s Comment

The United States Department of Justice, too, seems to treat this as a “new” control application that will reduce competitive options. Indeed, the DOJ seems merely to parrot certain arguments taken from CSXT, arguments that NSC’s filing today refutes. NSC has not foreclosed CSXT – CSXT and NSC are keen competitors not just at the Port of Virginia but at all the East Coast Ports. NIT cannot be viewed in isolation from the POV as a whole (a mistake that DOJ makes). Moreover, Dr. Waehrer shows that NPBL’s potential charges rates represent less than one percent of CSXT’s revenues from the Port of Virginia. The Department of Justice has little to worry about here. The greater injustice would be not to approve this application.

Conclusion

The question before this Board is not whether NPBL has served its purpose well, but whether NSC’s influence over NPBL has somehow violated that purpose. It has not. It was only when CSXT sought to change a fundamental aspect of NPBL’s governance—its historic commitment to neutrality—that conflict began. And it is only after NPBL did not immediately adopt CSXT’s proposal for a lower, volume-based intermodal rate targeting a single facility, that litigation followed. From this, CSXT has attempted to spin a narrative of anticompetitive behavior and procedural illegitimacy. But the reality is simpler—and less dramatic.

Since its founding in 1897, NPBL has existed to offer all participating carriers a non-discriminatory rate of access, while ensuring that its owners recover their operating and capital costs. NSC has upheld that bargain faithfully for 42 years. In fact, the rates NPBL charges today have remained unchanged for more than a decade. NPBL's rates were cost-based at the time of their adoption and are certainly unremunerative now. The rates charged by NPBL compare favorably with those offered by similar belt line railroads. Shippers and carriers alike have been treated evenhandedly – no carrier has been excluded; no shipper has been harmed.

CSXT's requests in this application would dismantle the neutrality principles that have made NPBL successful for 128 years. CSXT seeks a lower rate for intermodal traffic moving through Norfolk International Terminal—a facility whose rail infrastructure is wholly owned by NSC—on the basis that “every penny counts” in this competitive market. That much is true: intermodal competition is intense, both modally and geographically; so competitive, in fact, the Board has exempted it from its regulatory review. But to label NPBL's decision to preserve a neutral, cost-based rate as “anticompetitive” simply because it does not confer a tactical advantage to CSXT is to invert the meaning of the term. Indeed, it would seem CSXT is quick to label any practice or rate offering that is not to its satisfaction as “anticompetitive” or “abusive.”³⁸

This is not a case of market failure. It is a case of institutional stability resisting pressure to privilege one owner's commercial strategy over another's. The Board should recognize it as such. What CSXT is asking for here is for the STB itself should blow up the principles that have animated the NPBL since its foundation and which NSC has scrupulously adhered to. What CSXT claims as innovation, or adaptation, or remedy, is in fact the request of a minority shareholder asking the Board to compel changes that serve its own commercial strategy at the expense of stable governance and systemic predictability.

³⁸ Consider a shipper location served by CSXT but open to a reciprocal switch to NSC. Should the Board adopt a policy that if CSXT has an 88% market share to a specific geographic region imply the switch rate is “too high?” Or, that any refusal by CSXT to lower the reciprocal switch rate upon request is presumptively “anti-competitive?” Of course not! But that is precisely the nature of CSXT's request here. Should the Board begin down this path, there would seem no logical end point or means of cabining these sorts of requests in the future.

In short, CSXT is seeking to undo decades of NSC's conscientious stewardship of NPBL for the sake of a highly competitive service already exempted by the Board's regulations, and a service that barely registered in the minds of the ICC when it approved the NSC merger all those years ago.

The facts are clear: CSXT has access to NIT, it just wants a lower rate and direct on-dock access to NIT. CSXT seeks to persuade this Board to grant it by regulatory fiat that which it has been unable to secure (and unwilling to build) in the commercial marketplace; and for the Board to do this without CSXT having to make a showing that NSC has engaged in competitive abuse, without a single suggestion of harm to a single shipper.

There is no basis to change NPBL's rates or governing structure practices that have worked well for 128 years. The Board should approve NSC's application, without conditions, other than those offered by NSC, thus preserving the NPBL that has served its two owners in a neutral manner since 1982 and before.

The Board should approve this application and not impose the terminal trackage rights conditions requested by CSXT. Those conditions go beyond mitigating the effects of this control application and are not appropriate in a significant transaction. CSXT is engaged in a rent-seeking effort to obtain by regulation rights it has never possessed. Forty years ago, when N&W and SR applied to merge (in competitive response to the merger that had already created CSXT), CSXT sought no conditions. The Board should not let an oversight from a long-decided merger to allow CSXT a second bite at the apple, especially when the relevant fact (that NSC would become the majority owner of NPBL) was well known to CSXT. The Board should resist incurring further damage by giving into the temptation to promote artificial competition.

If the Board feels it necessary to condition this application, then the only conditions it should impose on NSC are the conditions set forth by NSC itself. These conditions will fully resolve the concerns expressed by the US Department of Justice and ensure that NSC does not use its future control and corresponding antitrust immunity in a manner that would undermine the fundamental neutrality of NPBL's rate and governance structure.

VERIFICATION

I, Willaim Brennan, verify under penalty of perjury that I have read this Verified Statement on behalf of the Norfolk Southern Railway Company, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

/s/ William Brennan

William Brennan

Executed on November 18, 2025

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

VERIFIED STATEMENT OF WILLIAM BRENNAN, PhD

EXHIBIT A

From: **Oehrle, Christopher** <Christopher.Oehrle@stb.gov>
Date: Fri, May 30, 2025 at 8:20 PM
Subject: Post-employment restriction related to FD 36836
To: William Brennan <wbrennan628@gmail.com>
Cc: Cooper, Anika <Anika.Cooper@stb.gov>

Hi Bill,

You have requested our advice on whether you may communicate with the Board on behalf of a party in Docket No. FD 36836 without violating your post-employment restrictions under 18 U.S.C. § 207. Specifically, you would like to be able to file expert testimony in the matter.

As a former federal employee, you have a life-time ban from communicating with the Board on any particular matter involving specific parties on behalf of another and with the intent to influence the Board, if you personally and substantially worked on the same or closely-related matter while you were a Board employee. § 207(a)(1). Based on your statements and our review of your involvement, it does not appear that you substantially worked on any prior related matter (i.e., FD 36522, FD 36223) as you do not appear to have, for example, provided comments on draft decisions or provided substantive input at meetings. Therefore, you may communicate with the Board in FD 36836.

As a caveat, please be aware that you may still have a two-year post-employment ban because of your supervision of staff in prior related matters. § 207(a)(2). But we are not deciding this separate restriction. However, I strongly recommend that you not communicate with the Board in FD 36836 before you pass the two-year mark without a separate determination. The statute allows you to work behind the scenes on this matter, and you may do so.

Please let me know if you have any questions. As you know, it is important to resolve any questions before you communicate with the Board because a violation of the post-employment restriction is a federal crime.

Sincerely,

Chris Oehrle

Chris Oehrle
Ethics Official
Office of the Chief Counsel
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001
Phone: 202-934-0375

**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**

**RESPONSE TO COMMENTS, PROTESTS,
REQUESTS FOR CONDITIONS, AND OTHER OPPOSITION**

EXHIBIT D

VERIFIED STATEMENT OF CHRISTOPHER LUEBBERS

VERIFIED STATEMENT OF CHRIS LUEBBERS

My name is Christopher (Chris) Luebbbers. I am currently Senior Manager Ports Strategy and Project Development for Norfolk Southern (“NS”). I have over 26 years of railroad experience. I began my career as a general manager for “K” Line America, Inc. I was hired on at Norfolk Southern in May 1999 as a Manager International Marketing. After more than 17 years in international marketing, I became Group Manager Domestic Yield. After 4 years in that position, I was elevated to Assistant Vice President Planning and Yield. In my current position I am responsible for furthering our partnerships with the various East Coast and Gulf Coast container and automotive ports as well as managing special projects in conjunction with the ports or elsewhere on the NS network. This includes regular interactions with the various ports and to champion their needs within NS. It also includes reviews of our international intermodal service offerings, and managing the processes related to developing new intermodal or automotive terminals.

In this Verified Statement I provide details with regard to the options available to the international ocean carrier, especially as those options play out at the Port of Virginia (“POV”) and more particularly with regard to service to and from Norfolk International Terminal (“NIT”). My prior experience, and particularly my 17 years as a Group Manager International Marketing, provide me with the knowledge and experience to provide this particular verified statement.

I. The Port of Virginia

Much of my verified statement involves the Port of Virginia (“POV”), so I begin with a brief description of that port. POV is a port facility located in Hampton Roads, Virginia. It is owned and operated by the Virginia Ports Authority (“VPA”), both directly and through its wholly-owned subsidiary, Virginia International Terminals (“VIT”). When I say “operated” I

mean that VPA/VIT manages the entire port facility, to the point where they manage the truck gate reservation system (PRO-PASS), determine what terminals will be used for what types of traffic (such as containers, roll-on/roll-off, break bulk, or otherwise), and even operate the terminal rail system at one of the terminals, Norfolk International Terminal (“NIT”).

Currently, two of the POV terminals, NIT and the Virginia International Gateway (“VIG”) are devoted largely (but not exclusively) to the movement of containers in the import/export and domestic market. VPA/VIT direct any individual ocean vessel to berth at NIT or VIG. That is not a decision made by the maritime company owning that vessel, it is a decision made by the Port of Virginia.

II. Routing Decisions

When offering ocean / inland shipping, it is the ocean carrier that determines the routings, the service, and the rates it will offer the ultimate shipper. They design the vessel schedules, negotiate with the various ports for unloading / unloading services, negotiate rail contracts, and negotiate over-the-road and local dray truck rates in various markets. Based on all of these factors, the ocean carrier may offer several rate and service packages that can vary depending on transit time, costs, etc.

An international ocean carrier makes the decisions with regard to the routing of cargo it is carrying as it moves between a domestic U.S. location (regardless of whether it is an origin or destination) and its overseas counterpart. It has a number of options for routing their cargo for this portion of the shipment movement. It has the same sort of options on the other side of the marine transport.

A container’s movement to or from a port can occur in one of three ways.

1. The movement of a container between the origin factory and the port, and/or between the port and the destination, can be via truck. If that is the case, then the number of handlings for that container are substantially fewer than if a rail move is included on one side or the other of the maritime portion of the move. The movement outbound is generally straight from the factory to the truck, which then delivers the traffic to the port to be loaded on the ocean vessel. The movement inbound is basically the same – a truck will pick up the container at the port and deliver to the final destination.
2. The container can be loaded to or removed from an intermodal train directly “on-dock” at the port.
3. The container may need to be drayed between the port and a nearby “off-dock” intermodal terminal where it can access intermodal train services.

The decision as to which option is employed often depends on the infrastructure that is available and what services a rail carrier offers. In Charleston for example, there is no on-dock rail infrastructure, so all rail units move via an off-dock terminal. At the Port of New York / New Jersey, {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

The legs of the container’s journey that are the most flexible are the origin and destination drays (also known as the “Final Mile” drays) between the inland intermodal terminal and the customers facility. In the US (possibly overseas as well), the shipper (or receiver depending on the shipping terms) has the option to use Merchant Haulage, in which the shipper arranges and pays for the final-mile dray between the inland intermodal terminal (or directly

from the port) and their receiving facility. Alternatively, the shipper can use Carrier Haulage, in which the ocean carrier arranges and pays for that dray. The ocean carrier would likely offer different rate levels depending on the service that its shipper seeks, and which components the ocean carrier must arrange for. Shippers choose Merchant Haulage for several reasons, such as having an established relationship with a trucking company or securing a lower drayage rate than what the ocean carrier offers.

Ocean carriers do not just call at one port along its maritime journey. It will direct its vessels to stop at a number of different ports in a row, receiving or delivery containers all along the line of the vessel's rotation or "string" along the coast that it finds itself before it once again embarks for the ocean voyage overseas to another coast. Ocean carrier services are based on a specific vessel string, and generally the ocean carrier will have a full set of ships that follow the same port rotation week after week. Not all ocean carrier vessels will follow the same rotation. Ocean carrier rotations will vary to allow multiple options for shippers to route freight from locations overseas to locations in North America, and vice versa. For example, an ocean carrier could offer to move a shipment from Shanghai to Chicago via a vessel that sails directly across the Pacific Ocean, discharging containers in Southern California, and arrange for a rail service for moving those containers east to an inland U.S. destination, perhaps Chicago. In the alternative, the ocean carrier could offer to move that same shipment through either the Panama Canal or the Suez Canal, discharging containers on the East Coast of the U.S., and a rail service westbound to Chicago. The total package, including timing, costs, and reliability, will entice an ocean carrier's customers (the shippers) to choose one alternative over any of the other alternatives provided.

One important aspect of a shipper's choice when moving inland is the "first port of call" in North America, which is the first port a vessel calls on in its rotation. In most, but not all cases, shipments destined to the US Midwest via the East Coast can either utilize the Port of New York/New Jersey or the Port of Virginia and rail inland. Movements destined to the US South or South Central (for example, Atlanta) will go through other ports located along the Southern US coast such as Savannah.

Given New York's massive local market vis a vis Norfolk, for most vessel rotations with traffic destined for the US Midwest, New York will be the first port of call. Norfolk will be the second. Often times, the ships will then head back overseas. An ocean carrier may prefer to route their inland volumes via Norfolk, but the shipper may insist on utilizing the first port of call intermodal option so they can get their goods to market faster and/or minimize their inventory carrying costs. Most likely there are trade-offs between the faster service and the rates the ocean carrier offers over the two port options. Especially with the introduction of full double stack service, the Port of Baltimore, served primarily by CSXT, will be getting more attention due to the fact that it is a port located closer, from a rail distance standpoint, than either the Port of New York/New Jersey or Norfolk.

Exporters from the US Midwest are likely to choose the later US port of call, in order to take advantage of a later cut-off date for delivery to the port and less time spent by the customer's container traveling along the U.S. coast before heading overseas towards its final destination.

III. Ocean Carrier Negotiations Generally

Railroads and ocean carriers enter into multi-year agreements to cover the intermodal rail services. These agreements generally last from {{ [REDACTED] }} and cover linehaul

rates, fuel surcharge provisions, any special accessorial charges or terms that vary from the railroad's rules circular, and other provisions such as {{ [REDACTED] [REDACTED] }}. While there are rate negotiations at a lane level, the overall value of the deal will determine the winner.

Historically, ocean carriers have preferred to consolidate as much of their traffic with one railroad as possible. There are a few drivers for this:

A. Density and Volume.

Given their size, ocean carriers are hesitant to give up the leverage of density and volume with any particular railroad if the ocean carrier was to split its book. However, over the past 15 or so years, consolidation in the container shipping industry has led to larger books of business. For example, OOCL and its parent company COSCO requested bids for their combined volumes. ONE was created as a business entity from the three Japanese container lines – “K” Line, Mitsui OSK, and NYK Lines – and they negotiated their last agreements as a single offering.

As these ocean carriers grow larger, they may be more willing to split their business in order to move volumes back and forth between the two eastern U.S. rail carriers, NS and CSXT, giving them leverage over the rail carriers as they compete for the ocean carrier's business.

Currently, {{ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }}

B. Operational Efficiency.

As discussed above, when using a rail service between the inland origin or destination, there is a need for drayage service between that origin/destination and the rail intermodal terminal. Having all of their shipper's containers land at one railroad's intermodal terminal in a given inland market makes it easier for the ocean carrier to manage that drayage operation and any of their equipment related to that operation. Trying to balance day-to-day chassis availability between the origin/destination and two railroad intermodal terminals in a single market always has been difficult at best. Ensuring that chassis availability would meet the inbound demand, and avoid the creation of chaos and delays for both the ocean carrier and the intermodal terminals, was always demanding and costly. Consequently, the ocean carrier would tend to award all of their business into / out of a market – regardless of the origin. For example, they would award traffic moving between Port of NY/NJ, the Port of Virginia, and West Coast Transcon, on the one hand, all destined to and from Columbus, OH, all to a single railroad. This was particularly true prior to the ocean carriers' trend towards discontinuing the ownership of chassis in favor of utilizing chassis pools. However, since the industry has moved to the pooled chassis operation, this should be less of a concern.

C. Special Markets.

An ocean carrier(s) may place special significance on a market that only one railroad serves. For example, the ocean carrier group {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

IV. Railroad Linehaul Rate Negotiations

One of the most important items involved in a railroad / ocean carrier negotiation is the linehaul rates that the ocean carrier will pay to the railroad. When working with current ocean carrier customers, the usual starting point for the negotiating rates will be the current rates. Often, the goal of the railroad is to try to have the future rates at least at their current levels and perhaps even get a small increase. Through the negotiations, several factors often come into play:

A. The Ocean Carrier's Customer Feedback.

The ocean carrier provides feedback on the various offers it has received and/or provides target rate levels for a specified lane or group of multiple lanes.

B. Influences on the Railroad's Side.

Very often the railroad will not want to reduce a rate in a given lane. The rail carrier generally will be facing increasing costs year-over-year. Further, no rail carrier wants to undercut its other customers in the lane. But the railroad, on the other hand, always faces the threat of losing the traffic to the highway or other rail options and so is constrained in that way as well. As a result, the railroad often will work with other alternative approaches such as {{

[REDACTED]

[REDACTED]

[REDACTED] }}

As noted above, these rail – ocean carrier agreements have more components that impact the financial value of the agreement than just linehaul rates. The financial package can be influenced by:

- {{ [REDACTED] }}
- {{ [REDACTED] }}
- {{ [REDACTED] }}

Other incentives can {{ [REDACTED] }}

Historically, NS, often in conjunction with the Virginia Port Authority, has provided for {{

[REDACTED] }}

More recently, NS has even developed incentives {{

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

V. The NPBL versus CWRV

I know that CSXT has compared access to the Virginia International Gateway (“VIG”) terminal to the NPBL access to NIT. I am not aware of CSXT’s costs and their full operations, but I can address access to VIG from NS’s perspective. NS accesses VIG via the Commonwealth Railway (“CWRV”) can be divided into two components: (1) the movement between its lines and CWRV’s “marshalling yard” and then (2) between that marshalling yard and VIG itself. There are separate cost components for each of these two components.

NS has trackage rights over CWRV between our main line and CWRV’s marshalling yard and as such we pay them {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

Between the marshalling yard and VIG, {{ [REDACTED]

[REDACTED]

[REDACTED] }}¹

The rates I discuss above are based on the private contract between NS and Genessee & Wyoming (“G&W”), which owns CWRV. Early on, {{ [REDACTED]

[REDACTED] }}

¹ This is {{ [REDACTED] }} the NPBL tariff, which assesses charges for each loaded well, regardless of the number of containers in that well. NPBL also charges for a loaded well, regardless of the direction. So if a particular car well carries a container inbound to NIT, that well would be assessed a charge, and if the same car well carried a different container outbound in a rotation, that outbound car well would be assessed a separate charge. If the same the same car well, however, came out empty, that outbound car well would not be assessed a separate charge.

VI. Comparing rail rates for PONYNJ vs. other ports.

There is always competition between the East Coast ports, and particularly between the Port of Virginia and the Port of NY/NJ. So it is important to understand that the cost components intermodal movements between the Port of NY/NJ and the Midwest are different than the cost components for intermodal movements for the same movements between the Port of Virginia and the Midwest. The key is the fact that the Port of Virginia operates not only as an owner, but an operator, of its terminals. In New York, it is different.

Millenium Marine Rail (“MMR”) operates the Elizabeth Marine Terminal which loads / unloads containers for the railroads. MMR assesses a charge for each container lift on or off a rail car. That charge is outlined on page 2 of their tariff, which I attach as Attachment A to my verified statement. There are other charges assessed as well. For example, if for some reason there is a delivery of non-double-stacked rail cars, there is an assessment made, presumably to account for MMR’s lost opportunity cost in being able to assess a lift fee.

Port Liberty operates Port Liberty Bayonne (which we refer to as GCT Bayonne) and Port Liberty New York (which we refer to as NYCT). These two terminals operate under the more general tariff covering various PONYNJ facilities (“NYTC”), attached as Attachment B to my verified statement. The lift charge is outlined in rule 24 on page 14 of the New York Terminal Conference Revised Tariff.

Both the MMR charge and the NYTC charge include not only a base lift charge, but also a fuel surcharge component. These charges get assessed on the railroads, which is similar to charges assessed by Port of Virginia and Georgia Port Authority for their on-dock rail lifts. However, these charges are passed off to the ocean carrier differently than similar charges at other ports.

The NYNJ terminals are not willing to enter into a binding contract with specific rate increase mechanisms, and therefore those entities can change the rate at any time. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

For the Port of Virginia, {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

To better understand that impact, it is useful to compare rates from different ports and different terminals. I offer below a sampling of rates comparisons for one account {{ [REDACTED]

[REDACTED]

[REDACTED]

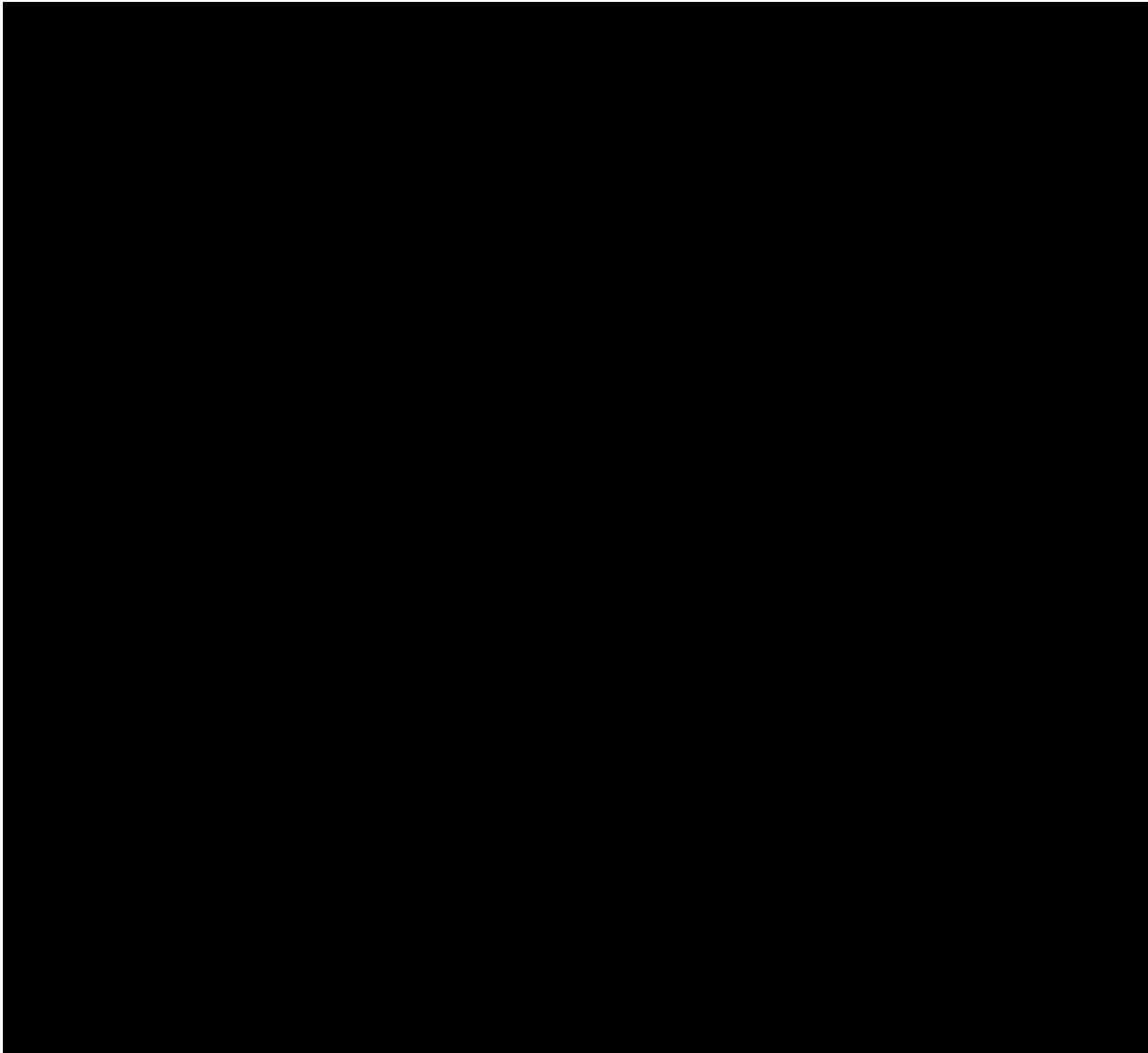
[REDACTED] | [REDACTED]

[REDACTED]

[REDACTED] }}

² {{ NS negotiated an agreement with a different marine carrier, Cosco/OOCL, that is the exception to the rule. That Cosco/OOCL agreement includes, as specifically requested by the marine carrier, a differential between traffic that moves through NIT as opposed to VIG. NS is not aware of the reason for the request, but was willing to provide differential pricing as requested.}}

{{

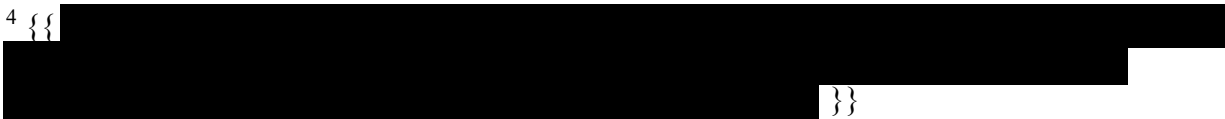


}}

³ {{



⁴ {{



ATTACHMENT A

MILLENNIUM MARINE RAIL, LLC –
EXPRESSRAIL ELIZABETH TERMINAL SCHEDULE

MILLENNIUM MARINE RAIL, LLC	Page 1 of 7
	Revised Date September 9, 2025

Millennium Marine Rail, LLC - ExpressRail Elizabeth Terminal Schedule

SETTING FORTH RULES, REGULATIONS, AND RATES ON CONTAINERIZED
CARGO MOVING VIA THE PORT AUTHORITY OF NEW YORK AND NEW
JERSEY'S EXPRESSRAIL ELIZABETH FACILITY AS OPERATED
BY MILLENNIUM MARINE RAIL, LLC

This schedule is issued by Millennium Marine Rail, LLC. This schedule shall be applicable at the Port Authority of New York and New Jersey's ExpressRail Elizabeth Terminal in Port Elizabeth, NJ as operated by Millennium Marine Rail, LLC.

PUBLISHED BY:

Millennium Marine Rail, LLC
1210 Corbin Street
Elizabeth, NJ 07201

PHONE: 908-527-8200

FAX: 908-436-4812

WEB PAGE ADDRESS:

WWW.MILLENNIUMMARINERAIL.COM

MILLENNIUM MARINE RAIL, LLC	Page 2 of 7
	Revised Date September 9, 2025

Millennium Marine Rail, LLC - ExpressRail Elizabeth Terminal Schedule

SETTING FORTH RULES, REGULATIONS, AND RATES ON CONTAINERIZED
CARGO MOVING VIA THE PORT AUTHORITY OF NEW YORK AND NEW
JERSEY'S EXPRESSRAIL ELIZABETH FACILITY AS OPERATED
BY MILLENNIUM MARINE RAIL, LLC

PURPOSE

The Port Authority of New York and New Jersey's Elizabeth facility is operated by Millennium Marine Rail, LLC as an on-dock double stack rail facility for the limited and express purpose of handling waterborne containerized cargo moving between the railroads serving the ExpressRail Elizabeth facility and vessels loading or discharging containerized cargo in the Port of New York and New Jersey.

INTERMODAL CONTAINER HANDLING FEE:

Effective – July 13, 2025

Millennium Marine Rail, LLC will receive or deliver
and load or unload containers to or from railcars at
the ExpressRail Elizabeth facility. **\$94.97 per container**

Effective –October 9, 2025

Fuel surcharge - Rate will be adjusted quarterly
based on data supplied by the U.S. Dept of Energy. **\$ 2.14 per container**

Baseline diesel gallon price = \$3.00

Gallons per container = \$2.92

CONTAINER FREE TIME AND DEMURRAGE

Millennium Marine Rail, LLC will establish rules and regulations concerning free time and demurrage on both import and export cargo.

MILLENNIUM MARINE RAIL, LLC	Page 3 of 7
	Revised Date September 9, 2025

Millennium Marine Rail, LLC - ExpressRail Elizabeth Terminal Schedule

SETTING FORTH RULES, REGULATIONS, AND RATES ON CONTAINERIZED
CARGO MOVING VIA THE PORT AUTHORITY OF NEW YORK AND NEW
JERSEY'S EXPRESSRAIL ELIZABETH FACILITY AS OPERATED
BY MILLENNIUM MARINE RAIL, LLC

USE OF NON DOUBLE STACK RAILCARS

Millennium Marine Rail, LLC reserves the right to establish rules and regulations concerning the use of non double stack rail cars.

A handling charge of \$100 per container will be assessed against containers discharged from non double stack rail cars. This charge will be applied only when the percentage of non double stack railcars on arriving train as reported on the railroads inbound train consist exceeds 10% of the arriving train's railcar make-up. In the event this 10% allowance is exceeded, all containers discharged from non double stack railcars on the arriving train will be subject to this charge. In the event the total number of non double stack railcars is 10% or less of the arriving train's make-up, charge will not be applied.

SCHEDULE OF EXTRA LABOR RATES

For services to be performed by MMR on request, for which there is no rate in the MMR Schedule, MMR shall charge as follows:

Straight time labor hour	\$138.18 per hour
Overtime labor hour	\$194.82 per hour

SCHEDULE OF HOURLY EQUIPMENT RATES

Straddle Carrier	\$413.32 per hour
Reach Stacker	\$277.91 per hour
Rubber Tired Gantry (RTG) crane	\$816.45 per hour

MILLENNIUM MARINE RAIL, LLC	Page 4 of 7
	Revised Date September 9, 2025

Millennium Marine Rail, LLC - ExpressRail Elizabeth Terminal Schedule

SETTING FORTH RULES, REGULATIONS, AND RATES ON CONTAINERIZED
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MISCELLANEOUS RATES

Redelivery	\$347.90 per unit
Grounding & Mounting	\$101.72 each way
Placarding	\$241.42 per unit
Over dimensional (load/unload railcars)	\$221.22 per unit
Segregation of unit for inspection	\$275.38 per unit

REPAIR FEES

Millennium Marine Rail, LLC reserves the right to establish rules and regulations concerning the imposition of a fee for specified types of damage (such as the damage of switches). Nothing contained herein shall limit Millennium Marine Rail, LLC's ability to seek damages from any person or party which is responsible for the damage or destruction of any portion or part of the ExpressRail Elizabeth facility including, but not limited to tracks and switches.

PAYMENT TERMS

The railroads that use the ExpressRail Elizabeth facility, including their agents (the "Users") shall pay all charges published in this tariff upon presentation of invoices and such charges shall be paid within 30 calendar days of the invoice date. Failure to pay any invoice in full within 30 calendar days may result in the suspension of services pending payment in full.

MILLENNIUM MARINE RAIL, LLC	Page 5 of 7
	Revised Date September 9, 2025

Millennium Marine Rail, LLC - ExpressRail Elizabeth Terminal Schedule

SETTING FORTH RULES, REGULATIONS, AND RATES ON CONTAINERIZED
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LIMITATION OF LIABILITY

Liability for loss or damage to any cargo resulting from the failure to exercise due and proper care by Millennium Marine Rail, LLC at the ExpressRail Elizabeth facility, incurred during the handling, loading, unloading, receipt, delivery, or storage of such cargo on the terminal at any time, including applicable free time, shall not exceed \$500.00 (US) per package or customary freight unit (as defined in the United States Carriage of Goods by Sea Act) unless the value of the cargo has been declared to Millennium Marine Rail, LLC by the User and Millennium Marine Rail, LLC has agreed, in writing, to accept a different amount of liability prior to its taking custody of, or assuming responsibility for the cargo.

PERFORMANCE OF ANCILLARY RAIL SERVICES

Millennium Marine Rail, LLC reserves the right to perform ancillary rail services including, but not limited to, railcar inspection, railcar maintenance and airing of railcars.

SERVICES NOT SPECIFICALLY PROVIDED FOR

In the event services are requested that are not specifically provided for herein, such requests should be submitted to Millennium Marine Rail, LLC for consideration and establishing of rules, regulations and rates if appropriate. Millennium Marine Rail, LLC reserves the right to subcontract these requested services as well as the services specifically provided herein.

NON WATERBORNE CONTAINERS

Movement of containers through the ExpressRail Elizabeth facility other than waterborne containers moving between the railroads serving the ExpressRail Elizabeth facility and vessels working in the Port of New York and New Jersey is prohibited and Millennium Marine Rail, LLC reserves the right to refuse to load or discharge any nonwaterborne container.

MILLENNIUM MARINE RAIL, LLC	Page 6 of 7
	Revised Date September 9, 2025

Millennium Marine Rail, LLC - ExpressRail Elizabeth Terminal Schedule

SETTING FORTH RULES, REGULATIONS, AND RATES ON CONTAINERIZED
CARGO MOVING VIA THE PORT AUTHORITY OF NEW YORK AND NEW
JERSEY'S EXPRESSRAIL ELIZABETH FACILITY AS OPERATED
BY MILLENNIUM MARINE RAIL, LLC

PORT AUTHORITY IMPOSED FEES

Millennium Marine Rail, LLC shall act on behalf of the Port Authority of New York and New Jersey in the invoicing and collection of fees due the Port Authority for use of the ExpressRail Elizabeth facility as provided in the Port Authority's tariff. All charges of the Port Authority provided for in its tariff shall be due and payable upon presentation of invoices and shall be paid within 30 calendar days of the invoice date. Failure to pay any such invoice in full within 30 calendar days may result in the suspension of services pending payment in full. All charges of the Port Authority collected by Millennium Marine Rail, LLC are in addition to those payable to Millennium Marine Rail, LLC pursuant to this schedule.

INDEMNIFICATION

Users agree to hold harmless and indemnify Millennium Marine Rail, LLC for any loss, liability, claim, suit, expense, cost or charge in connection with the acts or omissions of Users, their agents, employees, contractors or customers ("User Parties") in connection with (i) physical damage or personal injury to whatsoever and whoever caused by the negligence or willful misconduct of such User Party, (ii) failure to properly mark or placard containers or cargo as required by applicable law, (iii) claims by the Port Authority of New York and New Jersey against Millennium Marine Rail, LLC resulting from the User Parties failure to pay amounts when due or otherwise breaching the terms of this tariff.

MILLENNIUM MARINE RAIL, LLC	Page 7 of 7
	Revised Date September 9, 2025

**Millennium Marine Rail, LLC - ExpressRail Elizabeth
Terminal Schedule**

SETTING FORTH RULES, REGULATIONS, AND RATES ON CONTAINERIZED
CARGO MOVING VIA THE PORT AUTHORITY OF NEW YORK AND NEW
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DISPUTE RESOLUTION

This tariff and all services provided by Millennium Marine Rail, LLC shall be governed by the laws of the State of New Jersey. Users and Millennium Marine Rail, LLC shall attempt to resolve any disputes regarding the terms of this tariff in an amicable manner. Failing such resolution, the Users and Millennium Marine Rail, LLC agree to the jurisdiction of the state courts of Union County, New Jersey or (if same shall have jurisdiction with respect thereto) the United States District Court for the District of New Jersey.

VERIFICATION

I, Chris Luebbbers, 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 [14], 2025.

DocuSigned by:
/s/ 
2E2A0655A63546B
Christopher Luebbbers