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Surface Transportation Board

395 E Street, SW

Washington DC 20423-0001

Re: Norfolk S. Corp. and Norfolk S. Ry. Co. – Acquisition of Control – Norfolk
& Portsmouth Belt Line R. Co., FD No. 36836

Dear Chief of Case Administration:

Enclosed for filing in the above-captioned docket is Norfolk Southern Corporation's and Norfolk Southern Railway Company's Brief, filed in accordance with the procedural schedule published in Decision No. 12 in this docket. If there are any questions about this matter, please contact me directly, either by telephone at 202-663-7823 or by e-mail at 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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Norfolk Southern Railway Company

Enclosures

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**

**BRIEF SUBMITTED ON BEHALF OF NORFOLK SOUTHERN CORPORATION
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January 6, 2026

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INTRODUCTION

For over four decades, NPBL has operated as a neutral terminal carrier without a single complaint of competitive harm from shippers, ports, or carriers—except CSX, which stayed silent for decades and now seeks to exploit a procedural technicality for its own gain. Norfolk Southern’s majority interest in NPBL has never—and will never—substantially lessen competition. And after nearly a decade of failed litigation, and the thousands of pages filed in this docket, CSX has failed to prove any allegation to the contrary.

CSX’s opposition is not about protecting competition; it is about securing commercial advantages it could not achieve through investment or negotiation. The record is clear: NS’s application preserves the status quo; preserves CSX’s access; and includes commitments that eliminate any hypothetical competitive concern. The statutory standard is equally clear: absent a likely substantial lessening of competition, the Board must approve the application. There is no such likelihood here. This proceeding should not become a vehicle for CSX’s self-interest. It should uphold the law and the facts: pervasive competition exists, and the formal authorization of NS’s control of NPBL does not alter that reality.

LEGAL STANDARD

Under 49 USC 11324(d), the Board looks to whether the application describes a transaction that would “likely” result in “substantial” anticompetitive effects such as a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight service transportation in any region of the United States.¹ As stated recently by CSX in its own control proceeding, “[t]he Board must approve a transaction unless there would be adverse competitive

¹ 49 U.S.C. § 11324(d)(1).

impacts that are both likely and substantial.”² If the Board does not make that finding, then the analysis is done. If, and only if, the Board is able to make a “likely” and “substantial lessening” finding does the Board look to the second criteria. It is only then that the Board may consider whether any anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.³

Competitive harm results from a proposed transaction to the extent that the transactional parties “gain sufficient market power to profit from raising rates or reducing service (or both). In evaluating claims of competitive harm, we distinguish harm caused by a transaction from disadvantages that other railroads, shippers, or communities may have already been experiencing.”⁴ Harms caused by the proposed transaction “must be distinguished from pre-existing disadvantages that other railroads, shippers, or communities may have been experiencing that. . . will neither be caused nor exacerbated by” the proposed transaction.⁵

² CSX Corp. And CSX Trans., Inc., et al. – Control and Merger – Pan Am Systems, Inc., et al., FD 36472, CSXT/PAR-49, , at 4.

³ 49 U.S.C. § 11324(d)(2). See also Consolidated R. Corp. and CSX Trans., Inc. – Acquisition and Operation – Nicholas, Fayette and Greenbrier R.R. Co., FD 32845 (STB served June 20, 1996) (the Board will “consider the public interest factor only if [it] find[s] significant anticompetitive effects”); NS-1, at 39, n.88, and cases cited therein.

⁴ Canadian Nat’l Ry. Co. – Control – Ill. Cent. Corp., Decision No. 37, FD 33556 slip op. at 20 (STB served May 25, 1999) (“CN/IC Decision No. 37”).

⁵ Norfolk S. Ry. Co. – Acquisition and Operation – Certain Rail Lines of the Delaware and Hudson Ry. Co., Inc., Decision No. 6, FD 35873, slip op. at 22-23 (STB served May 15, 2015) (“NS/D&H Decision No. 6”) (citing Canadian Nat’l. – Control – Duluth, Missabe and Iron Range Ry. et al., Decision No. 7, FD 34424, slip op. at 14 (STB served April 9, 2004) (“CN/DMIR”); and Genesee & Wyo. Inc.-Control-RailAmerica, Inc., FD 35654, et al., slip op. at 3 (STB served Dec. 20, 2012)). See CSX Transp., Inc. – Acquisition of Operating Easement – Grand Trunk W. R.R. Co., FD No. 35522, Decision No. 5, slip op. at 5 (STB served Feb. 8, 2013) (“CSXT/Grand Trunk”). See also CSXT/PAR-49 at 5 (CSXT advancing the same in its own proceeding).

Commitments voluntarily made by the applicants, such as those proposed by NS⁶ are generally considered prior to any determination of whether the proposed transaction meets the criteria set forth in Section 11324(d).⁷ The Board should consider those commitments here. CSX incorrectly claims that Section 11324(d) “does not explicitly require the Board to approve NS’s control application if the Board determined that conditions imposed pursuant to Section 11324(c) would alleviate associated anticompetitive effects.”⁸ But Section 11324(d) is unambiguous:

(d) In a proceeding under this section which does not involve the merger or control of at least two Class I railroads, as defined by the Board, the Board ***shall approve*** such an application ***unless it finds that*** –

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; ***and***

⁶ Set forth at NS-32, at 85-86.

⁷ See, e.g., CSX Corp. And CSX Trans., Inc., et al. – Control and Merger – Pan Am Systems, Inc., et al., FD 36472 slip op. at 50 (STB served April 14, 2022) (where the Board found “that the proposed Merger Transaction, subject to all of the commitments, representations, and voluntary agreements that CSX has requested to be imposed as conditions, would not” implicate either 11324(d)(1) or (2), and so the proposed transaction “meets the criteria for approval”).

⁸ CSXT-22 at 117-18 (citing, and mis-characterizing Bessemer & Lake Erie R.R. Co. – Acquisition & Operation – Certain Rail Lines of CSX Transp., Inc. in Onondaga, Oswego, Jefferson, St. Lawrence, & Franklin Cntys., N.Y., FD 36347, slip op. at 25 (STB served Feb. 25, 2021)). CSX’s CSX quotes, and completely misinterprets, the dissent of then-Board member Fuchs. Id. at 15. Then-Board member Fuchs found that the majority’s decision “is best understood not as a remedy to address harm caused by the Transaction but as a mechanism to advance an idealized vision of the rail network,” *id.*, slip op. at 13, which CSX is seeking to advance in this proceeding. Then-Board member Fuchs argued that “both criteria in subsection [11324](d) constrain the Board’s conditioning authority[,]” *id.*, slip op at 15, thus requiring a finding of both: (1) a “likelihood” of “substantial” harm to competition and (2) that the public benefits do not outweigh those competitive harms before conditions could be imposed. Board-member Schultz agreed: “Applying both [11324(d)(1) and 11324(d)(2)] prior to imposing competition-related conditions is the best way to uphold the intent of Congress to ensure that the Board approves non-major transactions not only where the anticompetitive effects are unsubstantial and/or unlikely, but also where the anticompetitive effects do not outweigh the public benefits of a transaction.” *Id.*, slip op. at 35. Thus, under Fuchs and Schultz’s view, the Board should not impose conditions of non-voluntary commitments, such as those suggested by CSX, unless both prongs of 11324(d) are met. NS’s commitments are voluntary. The Board need not apply both prongs before conditioning the transaction on NS’s voluntary commitments.

- (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

Under the plain language of the statute, if the Board decides that, as a result of a proposed transaction, there is not likely to be a substantial lessening of competition, creation of a monopoly, or restraint of trade in the freight surface transportation in any region of the United States, then the Board must approve the proposal. The facts here allow the Board to make that finding even without considering NS's voluntary commitments. The inclusion of the commitments made by NS in this proceeding as conditions only serves to further solidify what is already clear: this transaction must be approved.⁹

Finally, if the Board even considers conditions requested by other parties, it must be able to determine whether the condition is "narrowly tailored" to address adverse effects of the proposed transaction.¹⁰ The Board will only impose a condition when it finds that the requested condition is both operationally feasible, and where imposition of the condition would result in greater benefit than harm.¹¹ Not a single condition requested by CSX meets these standards.

SUMMARY OF FACTS AND ARGUMENT

Facts matter. Before the turn of the 20th century, NS's predecessor built a rail line into what today is the Norfolk International Terminal (NIT) and NS's and CSX's predecessors joined

⁹ CSX is the only party that has alleged anticompetitive effects. There are not enough pages permitted by this brief to list – not to mention refute – all of the unfounded claims that CSX asserts. NS addresses the significant claims herein, but notes that any concerns that might be cognizable are fully addressed by the narrowly-tailored commitments that NS has made, and which it asks the Board to impose as voluntary conditions.

¹⁰ 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 Pac. Corp. – Control and Merger – S. Pac. Rail Corp., FD 32760, Decision No. 103, 2008 STB LEXIS 233 slip op. at 6 (STB served May 1, 2008).

¹¹ Canadian Nat'l Ry.—Control—Ill. Cent. Corp Decision No. 7, FD 33556, slip op. at 5 (STB served Sept. 18, 1998). (cited by CSX in its Pan Am acquisition brief, CSXT/PAR-49, at 6).

forces to develop a terminal switching railroad (NPBL) to switch traffic to and from the region that is today the Port of Virginia. NPBL did not originally have access to what would become NIT or to several other customers located on NS's line. In 1917, NS granted trackage rights to NPBL over NS's lines so that NPBL could reach NIT and numerous other shippers.

The fundamental nature of NPBL's operations has not changed for over 125 years, even throughout ownership changes. Since 1917, customers have had access to NS and CSX (or their predecessors) through an NPBL cost-based uniform switch rate and all parties have benefited from NPBL's services. The neutral, non-discriminatory operations and cost-based switching rate did not change when NS took control in 1982 nor will it change in the future with the Proposed Transaction. CSX's claims regarding its inability to compete at NIT (which, as discussed later, is not the proper "relevant market" for analyzing competitive effects) simply do not stand up to scrutiny. CSX's only evidence to support its claim is its lack of a significant share of intermodal traffic at NIT, and only NIT. But CSX's share is not the direct result of a switch rate put in place in 2010, which has been unchallenged by any shippers, customers or shipping lines at the STB. Rather, the reality is that CSX has chosen not to use the NPBL switch rate for intermodal traffic because it has been economically incentivized to dray its traffic from the NIT under a private arrangement with the POV.¹² NS has a larger share of NIT intermodal traffic because: (1) NS's tracks directly serve NIT while CSX can serve NIT through drayage or an NPBL switch. This is a physical reality that has existed for over a hundred years (single-line service will also be more efficient and cost effective than access via switching, drayage or via joint-line service); (2) NS

¹² It is important to note that CSX does not complain about the \$210 switch rate being charged for its access to any other NPBL served customer. CSX is in fact the largest user of NPBL's services and has a higher market share of that traffic than NS. Indeed, under the CSX subsidized drayage program, CSX has significantly increased its market share since the adoption of the 2010 rate.

has invested heavily in its network over the years to make its NIT and VIG intermodal service competitive to trucks and to compete with CSX's inherent advantages at other ports, such as Baltimore and NY/NJ (advantages that will become even more competitive to NS's service offerings due to improvements CSX made at Virginia Avenue in DC and at the Howard Street Tunnel in Baltimore); and (3) VPA/VIT sends more CSX traffic to VIG than it sends to NIT.

The NPBL switch rate has little to no impact on CSX's market share at NIT because neither CSX, NPBL, NS, nor the shipping lines determine whether ships dock at NIT or VIG. And where the ships dock, determines the market shares of CSX and NS traffic at that terminal. VPA/VIT directs vessel calls and container traffic between NIT and VIG.¹³ CSX's rail traffic is largely directed to VIG, where it has on-dock rail access via the Commonwealth Railway (CWRY). CSX's share of NIT intermodal traffic is a result of VPA/VIT's vessel allocation policies and CSX's commercial choice to use subsidized drayage rather than NPBL's switching at NIT,¹⁴ not some anticompetitive action taken by NPBL and NS.

Furthermore, as NS's expert, Dr. Waehrer established, even if one were to ignore all of the above, there are still no anticompetitive effects associated with NS's control of NPBL because the relevant market for analyzing such competitive effects on intermodal traffic is not limited to NIT or even the Port of Virginia. Intermodal container movements occur within a broader competitive landscape that includes multiple East Coast ports—such as New York/New

¹³ CSX's claim that its low share at NIT is due to NS or NPBL actions cannot stand up to the fact that VPA/VIT directed significantly more containers to be carried by CSX between POV and the Midwest to pass through VIG rather than NIT. NS-32, VS Waehrer, at 151.

¹⁴ CSX's preference for subsidized drayage services rather than NPBL switching at NIT is a commercial choice, not foreclosure. VPA has invested heavily to expand drayage capacity and improve operational efficiency, and data show efficient truck movements with manageable turn times. CSX's complaints about truck congestion are misplaced, as the congestion results from CSX's own choice to use drayage and VPA's subsidy, not from NPBL or NS.

Jersey, Baltimore, Philadelphia, and Savannah—as well as trucking and barge services. Ocean carriers routinely contract for bundled services across these ports, treating them as largely interchangeable gateways to inland destinations. Both NS and CSX compete for this traffic by offering network-wide solutions, not terminal-specific service. Moreover, rail competes directly with trucks, which handle the majority of container movements to and from the Port of Virginia. Focusing solely on NIT ignores these realities and misstates the market in which competitive harm could occur. The proper analysis must encompass all East Coast ports and trucking alternatives, where robust competition disciplines pricing and service.

Economic analyses demonstrate that the rate's impact on CSXT's overall costs and profitability is de minimis. Even CSX's expert who purported to calculate the unprofitability of the \$210 rate admitted she did not compare the profit levels that CSX would incur using the \$210 rate to CSXT's profit levels on other intermodal routes,¹⁵ and so there is nothing that shows the \$210 rate was prohibitively high when compared with the rest of CSXT's international intermodal business. In fact, the rate is similar to the unsubsidized drayage rate. CSX could use it and still move traffic at a level that contributes to CSX's competitiveness and costs.¹⁶ Furthermore, adopting a lower switch rate at NPBL, as requested by CSXT, may not result in lower rates to shippers.¹⁷ The Board's role is to protect competition for customers, not competitors. Adopting the CSX proposed rate will also result in increased rates to other shippers on NPBL's line. This is not in the public interest.

¹⁵ Carey Tr. at 167:19-168:3

¹⁶ NS-32, VS Waehrer at 136.

¹⁷ CSX's witness Kenney even admits that *if* NPBL were to adopt CSX's proposed lower intermodal switch rate that CSX would not commit to passing the lower costs associated with that rate to shippers in the form of lower rates. Kenney Deposition Tr. at 135-137.

CSX is not foreclosed from serving the NIT because of a switching rate.¹⁸ CSX can avail itself of the NPBL switch rate to move traffic at a level that contributes to CSX's competitiveness and costs. CSX chooses not to use NPBL services because the POV subsidizes CSX to dray its traffic from NIT, economically disincentivizing the CSXT to use the NPBL. A lower switching rate for only CSX enriches only CSXT and will not result in lower rates to shippers.¹⁹ This is not in the public interest.

In any event, even if through some stretch of the imagination one wanted to assume that NS "control" of the NPBL would "likely" result in "substantial" anticompetitive effects, those anticompetitive effects do not outweigh the many public benefits that have been achieved and implemented to improve service by NPBL. If the Board were to review the transaction retroactively and treat NS's acquisition in a hypothetical 1980 environment, as often suggested by CSX, the Board would also be required to balance any anticompetitive impacts against any public benefits.

The Board cannot ignore that NS's control has resulted in significant public benefits to shippers and NPBL. As noted in Mr. W. Hugh Moomaw book, cited in the response, NPBL faced significant operational and safety challenges in the 1980s but experienced a remarkable

¹⁸ NPBL's uniform switching rate of \$210 per railcar is reasonable and cost based. Adopted in 2010 and based on NPBL's actual operating costs, which switching rate is consistent with NPBL's governing agreements. The NPBL switch rate was set "to recover NPBL's variable operating expenses and to contribute to fixed costs, capital improvements, and profits." The rate falls just short of covering today's cost. The rate has remained unchanged for over a decade and compares reasonably with rates charged by other terminal railroads. CSX's claims that the rate is exclusionary or too high are contradicted by the evidence. NS-1, VS Fapp, at 84. See also, NS-32, VS Waehrer, at 111; NS-32, VS Waehrer, at 111.

¹⁹ CSX's own witness Kenney admitted that CSX would not commit to lowering its rate offered to POV shippers if NPBL adopted the lower switching rate proposed by CSX. This indicates that CSX's real motive is to lower its costs to improve its profits not to lower rates to shippers. Kenney Tr. at pp. 135-140.

turnaround starting in 1989 under a new administration that included NS’s financial majority ownership. This leadership “transformed [NPBL] into a thoroughly modern railroad, becoming very productive, technologically oriented, and responsive to shippers....”²⁰ Moomaw credits the NPBL board and management, *under NS’s majority ownership*, with resolving a crisis that threatened the railroad’s viability, leading to a renaissance that emphasized safety, efficiency, and accountability to shippers.

If notwithstanding all of the above, the Board determined that conditions were warranted, CSX’s proposed remedies—including divestiture of NS’s NPBL ownership, terminal trackage rights, and operational vetoes—should be rejected. Such remedies would fundamentally alter NPBL’s neutral governance and harm captive shippers who rely on NPBL’s service. These proposals lack evidentiary support, are not narrowly tailored, and would destabilize a system that has functioned effectively for over a century.

ARGUMENT

I. THE PROPOSED TRANSACTION WILL NOT RESULT IN COMPETITIVE HARM THAT IS BOTH LIKELY AND SUBSTANTIAL

A. NS Has Not, And Will Not, Exercise “Control” Over NPBL To Foreclose CSX From Accessing NIT Via NPBL Switch

NPBL has trackage rights over NS in order to reach NIT. NPBL pays compensation for those rights. That trackage rights compensation is a cost element that is used to determine the switching fee that NPBL sets for movement of traffic, including for the movements of intermodal traffic to and from NIT. In the over 40 years that it has held a majority financial interest in NPBL, NS has never “directed” NPBL to accept a trackage rights compensation fee that, when integrated into the switching fee, would result in such a high NPBL switching rate so

²⁰ Moomaw at xiii (quoted in NS-32, VS Brennan, at 256.

as to foreclose CSXT's ability to use an NPBL switch to serve NIT, nor will it in the future under STB authorized control of NPBL.²¹ NS also has not acted to otherwise increase any of NPBL's other costs. The NPBL switch has been developed in a cost-based manner in line with its governing documents.²² NS has not exercised "control" over NPBL to foreclose CSX from accessing NIT via NPBL switch. The fact that NS commits to the STB setting that rate in line with established STB precedent is prima facie evidence that NS does not intend to do so in the future.

B. NS And NPBL Are Not "Conspiring" To Foreclose CSXT From Accessing NIT Via NPBL Switch

CSX's claim that NS and NPBL are working together to foreclose CSX from access to NIT²³ by adopting a cost-based rate in contrary to the multitude of evidence to the opposite.²⁴

²¹ CSXT and DOJ express concern that NS and NPBL will somehow conspire to set a high trackage rights fee so as to increase NPBL's costs in a manner that would preclude CSXT from using the NPBL switch. NS's commitment to have that rate set at an SSW rate through the Board's independent process precludes this from happening. Indeed, the SSW rate is designed to ensure that neither the tenant nor the landlord are provided an unfair competitive advantage. Norfolk S. Ry.—Pet. to Set Trackage Rts. Comp.—Norfolk & Portsmouth Belt Line R.R., FD 36223 slip op. at 6 (STB served Sept. 25, 2025) (noting that "it is not clear how NSR could use this proceeding to establish trackage rights compensation at a level that harms competition since SSW Compensation is designed to set compensation for the trackage rights to "put the tenant in the same competitive position as the owning carrier." (internal citations omitted)).

²² Although CSX claims otherwise, Mr. Fapp shows that the rate was, and remains, cost-based and further demonstrates that the rate falls short of covering today's costs. NS-1, VS Fapp, at 84-86. In fact, Mr. Fapp calculated what the pre-2010 NPBL switch rate (which CSX had no objection to) would be if the 2010 rate was not imposed and instead the then-applicable 2006 rate was escalated to today, applying the STB's RCAF-U, and the result does not support CSX's claim of foreclosure whatsoever. The result was that the escalated rate would be higher than the existing 2010 NPBL switch rate. NS-32, VS Fapp, at 210.

²³ CSXT's claim of competitive harm focuses solely on rail-to-rail competition at NIT as a "relevant market" in and of itself, which as Dr. Waehrer in this proceeding and Dr. Wright in the antitrust proceeding established is not the proper relevant market in this matter.

²⁴ If NS and NPBL were "conspiring" to foreclose CSX from access to NIT, then they are remarkably ineffective in doing so. CSX, via drayage, has been able to increase its share of rail intermodal traffic and provide a competitive alternative to NS. NS-13, Supplemental VS Fapp, at

These claims have been heard by, and rejected, by the Federal courts all the way to the Supreme Court.²⁵ CSX is simply using this proceeding to relitigate that proceeding, asserting that the Board “must consider the same issue examined in the District Court Proceeding.”²⁶ Res judicata and collateral estoppel preclude CSX from reasserting claims it had a full and fair opportunity to litigate,²⁷ or that could have been raised earlier.²⁸ Allegations of anticompetitive conduct, even if true, fall under antitrust law and are for the courts—not the STB. The Board lacks authority to adjudicate such claims and does not sit as an antitrust court.²⁹ CSX’s effort to graft antitrust theories into this proceeding should be rejected

As to the merits of CSX’s claim, even if there was a “conspiracy,” which there was not, it was not a successful one. The simple fact that “there is no ability to foreclose a rival if the rival is able to substitute away from using the input that is being foreclosed.”³⁰ The facts are plain: (1) CSX’s claims are based on intermodal rates and services, which by definition of the Board’s

77. See also id., at 96 (DLF-4, Rail Container Movements Through Port of Virginia – 2007 through 2023). NS and NPBL are either incapable of foreclosing competition (in which case there is no competitive concern) or are not conspiring to foreclose competition as CSX claims. NS-32, at 26-27. “CSX’s ability to grow its share of container movements between POV and the Midwest is not consistent with the claims of significant foreclosure.” Id., VS Waehrer, at 111.

²⁵ See NS-1, at 36-37 (discussing the Federal district and appellate court proceedings). See also, NPBL District Court Decision and NPBL 4th Circuit Decision, upheld by NPBL S.Ct. Decision.

²⁶ CSXT-11, at 11.

²⁷ See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 332-33 (1979). See also Montana v. United States, 440 U.S. 147, 153 (1979); 212 Marin Boulevard, LLC, et. al. – Petition for Declaratory Order, FD 35825 (STB served August 11, 2014)

²⁸ See Norfolk and Western Ry. Co. and New York, Chicago and St. Louis Railroad Company – Merger, etc., FD 21510 (Sub-No. 6), slip. op. at 5 (STB served Dec. 3, 1996) (“N&W/SLR”)

²⁹ McLean Trucking Co. v. United States, 321 U.S. 67, 88, 64 S. Ct. 370 (1944); In re Wheat Rail Freight Rate Antitrust Litig., 579 F. Supp. 517 (N.D. IL Feb. 6, 1984); B&LE/CSXT at*36, n. 12 (STB served Feb. 25, 2021) (“In the context of transactions subject to subsection (d), the purpose of which is to expedite and encourage nonmajor transactions, it is doubtless true that the agency does not function as an antitrust court.”).

³⁰ NS-32, VS Waehrer, at 143.

TOFC/COFC exemption are subject to market forces (both rail and truck) disciplining rail pricing and the Board has no authority to regulate; (2) NIT is only one of two existing (and potentially more in the future³¹) intermodal terminals at the Port of Virginia being operated in a coordinated manner by an independent third party;³² and (3) ocean carriers have access, and take advantage of access, to CSX for movements to and from the same US Midwest locations served by NS via ports in Baltimore and New York/New Jersey, which ports compete against POV.³³ But most importantly than any of those factors is that *most of the traffic to and from the POV currently moves by truck*. Rail has a minority share of the market.³⁴ These facts, applied to the law, indicate that substitution is available and means that there is no foreclosure possible to NS for CSX intermodal movements to and from NIT.

Further, CSX's share of direct rail traffic through NIT (not even considering truck and barge traffic) is the direct result of (1) CSX's choice to move that traffic via subsidized drayage; and (2) VPA/VIT direction of virtually all of CSXT's POV traffic to VIG rather than NIT.³⁵ The numbers demonstrate that CSX has a significant share of intermodal traffic moving through NIT via rail (not even considering truck movements and assuming rail-to-rail competition at NIT is

³¹ See, e.g., the discussion of the future Craney Island container terminal project now underway at the Port of Virginia which will dwarf NIT and VIG, while also accessible to both NS and CSX via CWRV. NS-32, VS Waehrer, at 120-21 (including the CSX discussion of the same).

³² CSX's repeated complaints about having "zero share" of the on-dock rail service at NIT simply do not matter. The combined throughput for NS and CSXT at POV are set forth in Mr. Fapp's DLF-4 exhibit referenced in footnote 11 above. See also NS-32, VS Waehrer, at 126 (noting that "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" and that those "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").

³³ Evidence submitted by CSX's experts demonstrate "a significant ability to substitute between East Coast ports." NS-32, VS Waehrer, at 112.

³⁴ NS-13, at 18 (citing NS-1, VS Fapp, at 97).

³⁵ NS-32, at 24-25.

the relevant market) and a significant share of the total intermodal traffic moving through the Port of Virginia in recent years.³⁶

C. The Relevant Market Is Broader Than Rail Movements Of Intermodal Containers To And From NIT

Critical to the evaluation of competitive harm is the definition of the relevant market in which the competitive harm is being alleged. CSXT wants this Board to treat rail-to-rail competition at NIT as the only relevant market for analyzing competitive effects of this transaction. Any such market definition is far too narrow.³⁷ It is not. The relevant market is the movement of containers to/from the East Coast Ports to/from the Midwest.

Intermodal containers are moved by ocean carriers, on the one hand, and rail, truck, and barge,³⁸ on the other hand, to and from the Port of Virginia. Intermodal containers are moved by NS and CSX, with the help of terminal railroads, drayage companies, and barge lines, as well as by trucking companies, between various East Coast ports and the Midwest.³⁹ The relevant market must include trucks, barges, and other East Coast ports, not simply rail-to-rail

³⁶ NS-32, at 26-27 (citing CSXT-22, at 96, and NS-13, Supplemental VS Fapp, at 77) (noting that CSXT's evolving share of total POV rail container movements through POV "is not tied to NS's control of NPBL, but instead results from a myriad of other factors, including CSXT's rate and service 'bundle' offering."). NS-32, at 26-27.

³⁷ Even if rail-to-rail competition at NIT were the relevant market, the evidence shows that CSXT can, and does, effectively serve NIT via drayage, actually increasing its market share vis-a-vis NS. The record also reflects that CSXT could use the NPBL switch rate and still be competitive. CSXT chooses not to because it makes more contribution, *i.e.*, profit, by using drayage. NS-32, VS Waehrer at 142-45,

³⁸ CSX attempts to dismiss barge traffic as "not a factor," but that opinion is not shared by VPA, which has set up an inland port to which it shuttles containers in order to play "the crucial role," touted by the Greater Richmond Partnership, "in pushing cargo inland – closer to its destination." NS-32, at 46. Nor is it an opinion held by other stakeholders, including the PONYNJ, and the Hampton Roads Transportation Planning Agency, which views it as a valuable tool to address environmental concerns, and the Commonwealth of Virginia. *See id.*, at 46-47.

³⁹ NS-32, at 32.

competition at NIT. In fact, ocean carriers enter into agreements with railroads that reflect a bundle of services from not one but many of those ports for movements to and from the Midwest. Both NS and CSX agree:

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.⁴⁰

In fact, “[o]cean carriers seem to substitute between POV and PONYNJ depending upon which railroad [will carry] the container to the Midwest.”⁴¹ The relationship between CSX rates for container shipments through POV via NIT and VIG is more than telling.⁴² The sum of these facts makes it quite clear the relevant market is not direct rail movements to and from NIT, rather, the relevant market must encompass the broader commercial realities of intermodal shipping along the East Coast of the United States.⁴³

⁴⁰ NS-32, at 34 (quoting VS Waehrer, at 118). *id.* (quoting CSXT-22, VS Miller, at 508-09 (CSXT expert Mr. Miller explaining the same)).

⁴¹ NS-32, VS Waehrer, at 147, 148 (Figure 13) (noting that evidence presented by CSXT’s witness Professor Miller “supports this conclusion”).

⁴² See, NS-32, VS Waehrer, at 151-52 showing that the NIT switch rate has little to no competitive effect on CSX’s ability to serve ocean lines to/from the East Coast ports. The evidence also shows that when CSXT quotes rates, they do so for the POV as a whole and do not make a distinction between rates to NIT versus VIG.

⁴³ US DOJ would not limit the market so narrowly, identifying POV as one of the “key domestic and international ports,” and noting that, within that market, there exists rail competition. DOJ Comments, at 2. Mr. McClellan notes that “POV is but one of several large intermodal container transfer port facilities along the East Coast of the United States [that] . . . are in direct competition with each other.” NS-1, VS McClellan at 61. Mr. Fapp explains that there are numerous studies that back up that proposition, noting that there is a high elasticity of demand in the import/export container market competition among ports. NS-1, VS Fapp, at 93-95.

CSX's argument for a narrow reading of the relevant market is belied by its own intermodal marketing witness who identifies the relevant market as "all major ports in a region."⁴⁴ CSX's claims of the relevant market is at odds with its own words⁴⁵ and actions.⁴⁶

The bottom line is simple: "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."⁴⁷ NS has demonstrated that its intermodal rates at NIT and POV are constrained by competition from not only from CSX and trucks at POV but also at other ports along the East Coast of the US.⁴⁸ The relevant market definition must match that reality.

II. THE BOARD HAS NO LEGAL AUTHORITY TO DENY A CONTROL APPLICATION ON THE BASIS OF COMPETITIVE IMPACTS ARISING FROM RATES AND SERVICES APPLICABLE TO INTERMODAL TRAFFIC

CSX bases its argument for the denial of the Proposed Transaction on the flawed argument that the uniform switching rate that NPBL adopted in 2010 is too high because it prevents CSX from using NIT efficiently and profitably to move intermodal containers. All of CSX's complaints emanate from this falsehood. CSX argues that because the NPBL board did not adopt a CSX-proposed lower, intermodal only switching rate ((applicable to only CSXT intermodal traffic), NS and NPBL have acted anticompetitively. So much so that NS's actions

⁴⁴ Ms. Kenny, formerly CSX Vice President of Intermodal and Automotive, and current Vice President of Merchandise – Sales and Marketing, stated that CSX's competitive advantage or disadvantage arises from "transportation service from all major ports in a region." CSXT-22, VS Kenney, at 411. See also, CSX_STB_0097122, at 11 (cited in NS-32, at 23).

⁴⁵ See, e.g., NS-32, at 37-39 (citing CSX marketing materials, presentations to its Board, and the verified statements of CSX witnesses).

⁴⁶ See, e.g., NS-32, at 39-41 (detailing the hundreds of millions of dollars CSX invests in various routes between East Coast ports and the Midwest, as well as the enunciated purpose for that expenditure, including the shifting of traffic from the Port of Virginia to the Port of Baltimore where CSX has the only intermodal on-dock rail service).

⁴⁷ NS-32, VS Waehrer, at 135.

⁴⁸ See NS-1, at 28-35.

and continued control of NPBL have anticompetitive effects that are both “likely” and “substantial.” Despite the factual fallacies asserted by CSX, there is a significant issue with CSX’s argument: the STB has no legal authority to regulate intermodal rates and services. Any finding of anticompetitive impacts based upon rates and services related to intermodal traffic would not withstand appellate scrutiny.⁴⁹

A. Intermodal Traffic is Free From Regulation

As an initial matter, the Board has exempted rates and services applicable to intermodal traffic from regulation. As such, the Board has no legal authority to find that the failure to lower a switching rate applicable to intermodal traffic constitutes an anticompetitive act.⁵⁰ Congress directed the STB to exempt certain rail services and transactions from regulation. 49 USC 10502 (directing the STB to exempt services when regulation is not necessary to carry out the RTP or to protect shippers from market power abuse). Congress did not leave it at that – it specifically authorized the Board to “exercise its authority under this section to exempt transportation that is provided by a rail carrier as part of a *continuous intermodal movement*.” 49 USC 10502(f). The

⁴⁹ CSX’s real allegation continues to be that NPBL and NS, as two independent carriers, acted in a collusive manner to set a rate to foreclose CSX from providing intermodal service to NIT. This is not an allegation subject to the jurisdiction of the STB, but rather subject to the antitrust laws, particularly the Sherman Act. The STB has no statutory jurisdiction to review allegations of collusion among two independent railroads under the Sherman Act. See n. 54. Nor can the STB hold that such past conduct between NS and NPBL, even if it did occur (which it did not) involving intermodal rates, is an anticompetitive act because intermodal rates, practices, and services are exempt and there is no STB remedy associated with two carriers “conspiring” to set a rate for which the STB can grant relief unless that rate is unreasonable. This would be a matter for the antitrust courts under the Sherman Act, not the STB.

⁵⁰ It is important to note that CSX does not decry the NPBL rate as it is applied to *any* other commodity or the movement of traffic to *any* shipper or location at the Port of Virginia – only to intermodal traffic. The alleged harm comes from the failure to lower the rate for intermodal traffic, and only intermodal traffic. Being focused solely on intermodal traffic and the intermodal rate, the Board has no authority (absent revocation of the intermodal exemption) to find anticompetitive harm based upon that intermodal rate.

STB has acted on that mandate and, by regulation, exempted intermodal (TOFC/COFC) rates and movements from Subtitle IV requirements. 49 CFR 1090. Because the Board has exempted intermodal movements and pricing pursuant to Section 10502, it has effectively determined that intermodal movements and pricing cannot be the source of competitive harm protected by the Rail Transportation Policy or otherwise cognizable in Section 11324 proceedings. For the Board to give weight to CSX's primary concern, therefore, would be to rely upon actions and rates that have been removed from regulation decades ago as the basis for finding anticompetitive effect.⁵¹

Indeed, because of this exemption, the Board has no authority to review the rates, practices, and service obligations related to intermodal movements. Shippers cannot challenge intermodal rates as unreasonable before the STB; nor can railroads challenge intermodal switching rates as being too high to allow them to efficiently compete. The STB has no authority to prescribe or cap intermodal rates. The exemption of intermodal pricing was established precisely because the Board found intermodal traffic faces robust intramodal (truck) competition (as is the case here), rendering rail rate regulation unnecessary and counterproductive. The intermodal market is fully market-driven, intended to allow railroads flexibility to compete aggressively with trucking, and without regulation. Yet, somehow, CSX wants the Board to ignore that and find that the failure of NS to support NPBL lowering its switch rate for intermodal traffic is anticompetitive.

B. The NPBL Rate is Not Subject to a Reasonableness Challenge

The Board would only have the authority to regulate the NPBL switching rate as applicable to intermodal traffic if (1) it first revoked the intermodal exemption as applicable to

⁵¹ In any event, NS has provided detailed discussion as to the fact that the switching rate that was adopted by the NPBL board more than a decade ago was appropriate at the time. NS-1, at 24-26. It remains appropriate today and competitive.

the POV; and (2) found that the switch rate, as applicable to intermodal traffic at POV was unreasonable. CSX has made no such arguments and has presented no such evidence to support revocation of the exemption. Nor has the NPBL switching rate been challenged as unreasonable. No customer, shipper, shipping line, or other party has alleged that the rate is unreasonable. Even CSX has not brought an unreasonable rate complaint case, nor could they, as the rate is reasonable. What is unreasonable, according to CSX, is that the NPBL Board of Directors has not supported a proposal to lower the NPBL switch rate to a level that CSX advocates for and desires. It is this failure of NPBL to lower the rate that is the action that is allegedly unreasonable—and, according to CSX, anticompetitive. The problem with this argument is that there is no legal basis for the Board, absent revocation and a finding of unreasonableness, to remedy such actions, even if true.

Even if the rate CSX desires to be changed was not an exempt intermodal rate, the Board has no authority to regulate – either directly or indirectly – a rate that has not been found unreasonable.⁵² CSX has not cited to one case supporting the notion that the Board has authority to regulate a switching rate that is reasonable.⁵³ The Board has no legal authority to order lowering of a rate not found to be unreasonable or to find anticompetitive conduct because an

⁵² Burlington Northern & Santa Fe Ry v. STB, 453 F.3d 473, 476 (D.C. Cir. 2005) (“The Board is precluded ... from finding market dominance and in turn regulating the rate if the revenue generated thereby does not exceed 180% of the carrier’s variable cost of service” and thus unreasonable).

⁵³ Nor can CSX cite to one case or statute supporting the notion that if an incumbent carrier voluntarily opens its facility to reciprocal switching (as NS did with NPBL in 1917) but then refuses to adopt a switching rate that allows its competitor to more efficiently use that switching rate, the incumbent carrier has undertaken an anticompetitive action for which Board regulation is required. CSXT cannot cite to a single case supporting that position because there is none.

incumbent carrier refuses to lower a reciprocal switching rate, especially when that rate is an exempt intermodal rate.⁵⁴

C. CSX's Proposed Remedies Amount to Impermissible Rate Regulation

CSX goes so far as to ask the Board to “order NS to effectively remove itself from any NPBL decisions related to CSX’s access to NIT, and to require NS to work with CSX to refer any such decisions to an independent decision-maker,” including, specifically, any decisions “relating to NPBL’s trackage rights fee for moving traffic over NS’s track to NIT.”⁵⁵ Ordering NS to remove itself from decisions related to NPBL’s rate for intermodal moves and to require NPBL to adopt a rate set by an “independent decision-maker” and in a manner that is inconsistent with its terminal railroad governance mandate is the epitome of regulation.

Similarly, CSX asks the Board to “order NS to provide operational assent to NPBL switching movements to NIT” (only with respect to intermodal movements) without providing any guidance as to what this means.⁵⁶ The requested condition is too ambiguous to be evaluated and as such cannot be considered narrowly tailored.⁵⁷ But at its heart, this too, is fundamentally a condition seeking Board regulation of the through-movement of intermodal traffic.

⁵⁴ If that is the standard, the Board, and CSX, will have opened the flood gates to hundreds of cases challenging switching rates at every location currently served via reciprocal switch (or via terminal switching railroad) where the competing carrier can show that it can better compete if the switching rate were lowered. Such a standard advocated by CSX is particularly ironic in that CSX voraciously opposed, in Reciprocal Switching For Inadequate Service, 2023 STB LEXIS 188, Ex Parte No. 711 (Sub-No. 2), any form of switching or competitive relief for shippers, even when a shipper was suffering a service inadequacy.

⁵⁵ CSXT-22, at 129. The proper underlying trackage rights compensation amount is currently pending in a proceeding whereby NPBL and NS are asking an independent decision-maker – the STB – to set the rate.

⁵⁶ CSXT-22, at 129 and VS Kenney, at 413.

⁵⁷ As framed, the condition would fly in the face of the RTP, specifically Section 10101(2) and (15), opening up the Board to a constant barrage of review of day-to-day operational decisions as to whether any particular action constituted “operational accent.” See NS-32, at 93-95.

It would be arbitrary, capricious, and beyond the STB’s statutory authority to find that NS’s control of NPBL will result in a substantial lessening of competition based upon an argument that the NPBL intermodal switching rate is too high and should be lowered so that NS’s competitor could allegedly better compete for intermodal movements in and out of the POV. Such a finding would effectively regulate—indirectly through denial of NS’s control application or through onerous conditions—rates that Congress and the STB have explicitly deregulated. If intermodal rates (including switching components) are exempt, the STB simply lacks jurisdiction to determine their “reasonableness” or to remedy alleged practices related to those rates and services. Relying on CSX’s argument that the switching rate is too high as applied to intermodal movements as evidence of lost competition contradicts the exemption’s premise: that market forces (especially truck competition) sufficiently discipline rail pricing. In the end, to base a denial of NS’s control application on the premise that NPBL’s intermodal switching rate is too high for CSXT to effectively serve NIT would undermine the deregulatory framework of the Staggers Act and ICCTA; exceed the STB’s limited jurisdiction post-exemption; and invite judicial reversal as inconsistent agency action without reasoned explanation.

III. CSX’S PROPOSED REMEDIES ARE NOT NARROWLY TAILORED AND WOULD CAUSE COMPETITIVE HARM

A. CSX’s Remedies Are Not Narrowly Tailored And Would Cause Competitive Harm

As noted by both Chairman Fuchs and now Vice-Chairman Schultz in the *B&LE/CSXT* Decision No. 7, “both criteria in subsection [11324(d)] constrain the Board’s conditioning authority,”⁵⁸ thus requiring a finding of both: (1) a “likelihood” of “substantial” harm to

⁵⁸ Id., slip op at 15

competition and (2) that the public benefits do not outweigh those competitive harms. As Board-member Schultz made clear, the Board has no conditioning authority until it has applied the criteria of both 11324(d)(1) and 11324(d)(2) prior to imposing competition-related conditions.⁵⁹ Then, when it comes to imposing a condition, the Board can only impose conditions that: (1) are operationally feasible; (2) produce net public benefits; (3) are narrowly tailored to remedy any anticompetitive; and (4) that the Board will closely scrutinize to determine whether they would alter the competitive balance otherwise to be realized from the transaction, including whether those conditions could have unpredictable effects.⁶⁰ Accordingly, for the Board to impose a condition, it would have to first conclude that it has the power to determine anticompetitive effects based upon effects on intermodal traffic, and second, conclude that both conditions of 49 U.S.C. 11324(d) have been met and then apply the criteria noted above. Not a single condition requested by CSX meets the standards.

CSX submits a whole host of different so-called “remedies” for the asserted concerns it raises. However, not a single one is narrowly tailored to address any cognizable competitive harm. In fact, all would result in nothing but competitive harm. Some venture into areas that are

⁵⁹ Because the commitments made in this proceeding by NS with respect to its future control of NPBL are voluntary commitments that NS is willing to accept as conditions to the transactions, the Board is not directly imposing conditions on the movement of intermodal traffic but rather simply imposing NS’s commitments as conditions just like the Board has done in numerous proceedings, including the CSX/Pan Am proceeding.

⁶⁰ CP/KCS, FD 36500, Decision No. 13, 2022 STB LEXIS 39, *6 (STB served Feb. 18,.2022). See also UP/MP, 366 I.C.C. 459, 564 (finding the agency “should not use our conditioning powers to make consolidation proceedings vehicles for rail system restructuring”); CN/IC, slip op. at 4 (cited by CSX in its Pan Am acquisition brief, CSXT/PAR-49, at 6).

not cognizable by the Board.⁶¹ Others amount to a demand to reopen the underlying 1982 transaction without considering the public benefits from that transaction in its analysis.

CSX wants the Board to reopen the *2008 Discontinuance* decision involving the so-called “Connecting Track” in order to reverse that discontinuance, order NS to reinstall the Double Diamonds and a switch, and to rehabilitate the line.⁶² The Board has no authority in this proceeding without meeting the reopening standards, to require such actions, especially if the basis for the Board to do so is based upon alleged competitive harms for the movement of intermodal traffic.⁶³ In fact doing so creates more harm as set forth in NS’s and NPBL’s comments with respect to CXT’s terminal trackage rights application. Doing so would come at the expense of NPBL’s captive merchandise customers who would have to bear a portion of the costs associated with restoration of this infrastructure and who would see significant service reductions from NPBL and NS due to CSX’s operations over the restored infrastructure.⁶⁴ Competitive harm would be inflicted on the NPBL shippers and receivers, none of whom have entered an appearance or claimed harm in this proceeding.

⁶¹ CSX seeks to have the Board order NS to recuse itself from any NPBL decisions involving the movement of intermodal traffic to and from NIT, and to grant NPBL “operational assent” to NPBL’s movement of intermodal traffic on behalf of CSX. Both are addressed *supra* at Part II.

⁶² CSXT-22, at 21, 124, and 128-29.

⁶³ The CSX responsive application should be denied for all the reasons set forth in this proceeding and in NS’s reply and opposition to CSX’s responsive application.

⁶⁴ CSX has not attempted to estimate the cost of making that segment operable again, nor the costs associated with continued maintenance and rehabilitation. But all of that work would be performed solely for NPBL’s operations, with costs allocated accordingly, and thereafter passed along to NPBL’s customers as a cost element to its switching fee. *See*, NS-32, at 96-7.

CSX demands divestiture of NS stock interests in NPBL, but to whom and to what end CSX does not detail.⁶⁵ First, that “remedy” is not one that is tied to the current Proposed Transaction, it is one that is tied directly to re-opening the 1982 transaction, proposed without consideration of either the public benefits that were anticipated (and have resulted) from that transaction,⁶⁶ or the fact that CSX, for decades following that transaction not only consented to but acted in furtherance of,⁶⁷ and benefitted from, the NPBL aspects of that transactions.⁶⁸ But

⁶⁵ CSXT-22 at 120 (suggesting that the Board order NS to “work jointly with CSX to establish new and independent NPBL management”). CSX should have presented the divestiture proposal as a responsive application, or with enough information and analysis to permit the Board to evaluate the potential consequences. See NS-32, at 92-93. But CSX did not in the apparent hope that the requested condition would be imposed with any details to be determined in the future. The Board does not and should not operate on a such a “TBD” basis.

⁶⁶ This request should be considered a petition to reopen the 1982 ICC decision. See City of Creede, CO – Petition for Declaratory Order, FD 34376 (STB served November 3, 2003) (treating a petition for declaratory order requesting the Board to void an authorization in an abandonment proceeding permitting the sale of the affected line as a petition to reopen the abandonment proceeding). A petition to reopen an administratively final action requires a showing that the action sought to be reopened would be affected materially because of new evidence or changed circumstances, or because it involved material error. 49 CFR 1115.3(b). Such a proceeding would implicate the entirety of the proceeding, including the public benefits anticipated therefrom. See Oakland Global Rail Enterprise – Petition for Declaratory Order, FD 36168, slip op. at 4 (STB served June 20, 2019) (“no matter which type of reconsideration claim is presented (new evidence, changed circumstances, or material error), the alleged grounds must be sufficient to convince the Board that its prior decision in the case would be materially affected in order for reconsideration to be granted”) (emphasis added) (citing Montezuma Grain Co. v. STB, 339 F.3d 535 (7th Cir. 2003) and Canadian Nat’l Ry. – Control – EJ&E West Co., FD 35087 (Sub-No. 8) (STB served December 21, 2018).

⁶⁷ CSX argues that it did not oppose the common control of NPBL because at the time (1980) NS disclaimed any intention of exercising any control over those companies, but that now has changed. CSXT-22, at 30, 38. The facts show otherwise. CSX agreed to modify the original 1897 NPBL operating agreement to redistribute board seats so that – collectively – NS could appoint three board members and CSX could appoint two board members. NS-1, VS McClellan, at 74. CSX not only knew about the de facto economic control but acted in a manner to reflect that de facto economic control in the NPBL governance.

⁶⁸ See CSXT-22, VS Huneke, at 662 (“In 1988 NPBL began a restructuring program that aimed to streamline capital and operations and focus on safety improvements. By 1996 NPB recorded success[.]”).

regardless of whether that divestiture is to VPA⁶⁹ (suggested by CSX) or to an independent owner, the action would result in a fundamental change in the very nature of NPBL, from a terminal railroad acting on behalf of its owners and connecting carriers to an independent, profit-seeking railroad able to charge CSX one rate while charging a higher rate to other NPBL customers, thereby leveraging the shippers that would, as a result, become captive to NPBL's services.⁷⁰ This is not narrowly tailored and is decidedly anticompetitive. "The function of the NPBL is not solely to serve local industries, but to act as a terminal coordinator and neutral broker for the entire [Norfolk railroad terminal area]. This includes facilitating seamless and timely interchanges with connecting carriers, primarily CSXT and NSR."⁷¹

Likewise, CSX's request for terminal trackage rights failed to provide much of the information that would allow the STB to even consider the proposal, justifying the Board to summarily dismiss the application altogether.⁷² Further, the rights sought are unjustified, certainly not narrowly-tailored to remedy any competitive harm, and failed to demonstrate that the grant could be effected without substantially interfering with NS's and NPBL's existing

⁶⁹ Placing a VPA representative on the NPBL board of directors would enable VPA to effectively convert NPBL into an asset of VPA for the economic benefit of the Port of Virginia, at the expense of the shippers captive to the NPBL. See NS-32, at 90-92. Furthermore, VPA is not an independent actor. VPA has an existing business relationship with CSX and has even made proposals to manage and takeover other aspects of CSX's drayage operations at the POV. Putting a VPA representative on the Board would simply shift control of NPBL from NS to CSX and without any commitments toward continued abeyance to the 1897 principles.

⁷⁰ See NS-32, at 88-92. NPBL is not a for-profit short line like CWRV, able to play connecting carriers off of one another in order to extract the maximum profit from each and every move. Developed and designed to be a terminal carrier, it acts in a neutral, uniform, cost-based manner. NS's predecessor railroad likely would not have given NPBL the trackage rights that it did if it thought that someday NPBL would have its charter and purpose changed.

⁷¹ NPBL-6, VS Cannon Moss, at 17.

⁷² NS-29 (describing how CSX's responsive application failed to present a prima facie case with no operational, financial, marketing or environmental analysis of the proposed transaction).

operations.⁷³ CSX's remedy would require it to use a short section of double track on the Swells Point Branch to park one of its two-mile long trains while NS or NPBL attempt to route around it, without mentioning that this would stop all road traffic in the region as it does so.⁷⁴

NPBL's response to CSX's request for terminal trackage rights put a capstone on the arguments, clearly demonstrating that the underlying reasons for CSX to propose the rights is "significantly flawed."⁷⁵ The proposed operations are not only unsupported by an operating plan, but if attempted would not be feasible.⁷⁶ If implemented, NPBL states that those CSXT operations would result in "massive operational interference" with other operations at the Port, creating "daily blockages to public access and emergency services" that would "impose[] a significant, unmitigated burden on the City of Portsmouth."⁷⁷ CSX argues that the VPA/VIT-subsidized drayage services that it currently uses imposes traffic issues on Hampton Boulevard but evidences no concern about imposing the same sort of community impact as long as it commercially benefits from it. Moreover, CSX terminal trackage rights request "impermissibly seeks to improve [CSX's] pre-transaction competitive position," which would violate the fundamental principle that "the Board's conditioning power is limited to preserving competitive

⁷³ CSX states that its preferred terminal trackage rights route would only cross the NS Lambert's Point line and implies that NS is solely concerned with coal service. CSXT-36, at 21. CSX fails to point out that its "preferred route" would impose a burden on Amtrak and NS's operations.

⁷⁴ CSXT-36, at 21. CSX has evoked a significant amount of public outcry against road congestion that may accompany the drayage that it chooses to use, which drayage is incentivized by public subsidy. In addition, CSXT's terminal trackage rights operations inevitably would result in *road blockage* through its use of while steering clear of enunciating clearly the road blockage the double track section as an operational bypass. See, e.g., CSXT-36, at 12.

⁷⁵ NPBL-6, at 1.

⁷⁶ Id.

⁷⁷ Id. at 5.

options that may be foreclosed by a transaction, not increasing the competitive options for a specific carrier.”⁷⁸

In sum, the STB may impose competition-related conditions only after finding both a likely and substantial competitive harm and that public benefits do not outweigh that harm, and even then, only if a condition is feasible, narrowly tailored, beneficial on balance, and will not distort the competitive landscape. CSX’s proposed “remedies” fail every part of this legal and practical test: they are not tied to any cognizable competitive harm, would themselves create competitive injury, and in many cases improperly attempt to reopen decades-old transactions without accounting for their public benefits. CSX’s terminal trackage rights are unworkable, unjustified, and harmful to NPBL shippers, port operations, and the surrounding community. Moreover, NPBL’s own analysis shows that CSX’s trackage-rights plan is operationally infeasible and would cause severe congestion and public-safety impacts, while also violating the principle that STB conditions in a minor or significant transaction must preserve—but not expand—a carrier’s competitive options.

IV. THE SUBMISSIONS BY VPA/VIT, NPBL AND US DOJ DO NOT DICTATE ANYTHING BUT APPROVAL

Other than NS and CSX, the only parties in this proceeding are VPA/VIT, NPBL, and US DOJ. No shippers, other NPBL customers, shipping lines, trucking companies, terminals, or other ports have appeared or otherwise expressed concerns about the Proposed Transaction.⁷⁹

⁷⁸ NS/D&H Decision No. 10, slip op. at 8.

⁷⁹ CSX submitted a letter from CMA CGM, an ocean carrier pursuing its own interests in the international intermodal container movement marketplace. The letter expressed a desire for CSX to have direct operating access to NIT and alleged it did not choose CSXT for some undisclosed movements to/from POV because CSXT did not have direct access to NIT. The letter did not allege that it was forced to use NS at NIT at a higher rate or was otherwise prevented from using CSX at other competing East Coast Ports and terminals. In fact, CMA CGM uses CSXT

VPA filed on March 5, 2025, arguing that it (VPA) would benefit from direct CSX access to NIT.⁸⁰ While decrying the operational and subsidy cost consequences of drayage, nothing in its comments evidenced a competitive harm that would result from the grant of the proposed application. VPA/VIT are not shippers or customers, but rather commercial actors with their own financial interests—specifically, they subsidize CSX’s drayage operations and compete against other ports on the East Coast of the U.S. – and therefore are not neutral. VPA does not claim the transaction will substantially lessen competition; instead, VPA merely expresses a desire for “more efficient rail access” at NIT. This is not the legal standard for imposing conditions. VPA’s comments reflect dissatisfaction with the cost structure of CSX’s access, having to subsidize CSX’s NIT drayage, but that dissatisfaction should be directed at CSX for misleading VPA into believing a subsidy was necessary. The evidence shows that CSX could use the existing NPBL switch rate and still remain competitive. There is no need for a VPA subsidy.⁸¹ Regardless, the VPA comments do not establish any competitive foreclosure caused by NS. VPA/VIT’s position is essentially an attempt to shift costs or improve CSX’s commercial position, for VPA/VIT’s benefit, and not evidence of harm to competition or customers, and therefore provides no basis

extensively for movements from other terminals to/from the same Midwest locations served by NS.

⁸⁰ VIT, a wholly-owned operational subsidiary of VPA, submitted comments on August 12, 2025, and responded to matters related to discovery, but disclaimed an intention to becoming a party to the proceeding. See VIT Comments, at 2; VPA/VIT Response, at 1. Similarly, VPA has attempted to avoid being characterized as a party.

⁸¹ If VPA wants to continue to subsidize CSX under some mistaken belief that it needs to do so for CSX to serve NIT, why doesn’t VPA subsidize CSX’s use of the NPBL switch rate? What is particularly ironic is that CSX has submitted numerous letters decrying the traffic congestion caused by its own drayage operations, but that traffic congestion is the direct result of CSX’s own decision to use drayage and VPA’s decision to pay a subsidy to encourage drayage. Such traffic congestion is also a result of the POV’s direct investments to increase the number of gates available for drayage and to undertake a series of other transactions to increase the efficiency and use of drayage. NS-32, VS Fapp at 212-15. If VPA would stop the subsidy and/or subsidize the switch rate, CSX would no longer be incentivized to use drayage.

for denying or conditioning the transaction.

NPBL took no position on NS's application, but strongly opposed CSX's responsive application seeking terminal trackage rights over NPBL's trackage.⁸² NPBL noted that the unsubsidized drayage rate would be more than the NPBL cost-based switch rate that is one of CSX's enunciated concerns.⁸³ NPBL decries the fact that CSX provided no evidence of the feasibility of its terminal trackage rights operations and fails to even address "the massive operational interference issues that would need to be confronted and addressed before the Board could possibly begin to consider whether CSX has satisfied the statutory criteria for imposing terminal trackage rights."⁸⁴ CSX's terminal trackage rights not only would interfere with NPBL's ability to serve the customers who are captive to NPBL, but evidenced that "CSXT appears to have no understanding or appreciation of NPBL train operations...."⁸⁵ The grant of CSX's requested terminal trackage rights, in NPBL's opinion, would "immediately translate[] into a systemic breakdown that directly impairs the regional freight transportation network."⁸⁶

DOJ submitted comments expressing concerns about the competitive impacts of the Proposed Transaction. NS shares DOJ's commitment to safeguarding competition, but the record and NS's commitments fully address DOJ's concerns and do not support denial or additional conditions beyond those offered by NS. Indeed, since obtaining de facto financial control of

⁸² NPBL-1, at 1; NPBL-6, at 1.

⁸³ NPBL-6, at 7-8.

⁸⁴ Id., at 2.

⁸⁵ Id., at 5 and VS Moss, at 8, 16. (CSXT's proposed operations would have a "destructive impact ... on NPBL's ability to serve its customers").

⁸⁶ Id., VS Moss, at 17. Although NPBL did not take a position with regard to CSX's petition to reject the NS minor application, NPBL did take issue with being referred to as NS's "puppet arguing with its ventriloquist," NPBL-1, at 2, an insult that CSX continues to wield without hesitation. See CSXT-36, at 5, 23.

NPBL in 1982, NS has adhered strictly to NPBL's century-old principles of neutrality, cost-based uniform switching rates, and fiduciary duties to all shareholders, including CSX. NS has not exercised its de facto financial control in any way to eliminate CSX's ability to fully utilize NPBL in accordance with the fundamental purpose of NPBL.

To the extent DOJ expressed concern over NS's larger share of traffic moving through NIT, Dr. Waehrer demonstrated that the lopsided market shares of NS and CSX at NIT versus VIG results in part from the efficient vessel traffic sorting by VPA/VIT, not foreclosure. Mr. McClellan and Dr. Brennan describe NS's investment into its routes to/from POV and the physical advantage that NS has for movements from POV to the Midwest. NS also has single-line service from NIT and has extensively invested in its network to improve its routing to/from NIT to the Midwest. All of this provides NS with a competitive advantage at the POV just as CSX has a competitive advantage at the Ports of NY/NJ and Baltimore. This is called competition. And both CSX and NS compete against trucks, who have the largest market share of intermodal traffic from the East Coast Ports to the Midwest. This robust competitive market should provide DOJ with comfort that the Proposed Transaction will not result in any anticompetitive effects.

DOJ also expresses concern that NS's control of NPBL could enable foreclosure of rivals' access to critical infrastructure and notes that Board approval would grant NS antitrust immunity for its exercise of control over NPBL. This concern is primarily directed at the pending trackage rights compensation proceeding between NPBL and NS and whether NS will use its control of NPBL and its antitrust immunity to deny CSX switching access and/or require NPBL to agree to a trackage rights fee that effectively forecloses CSX's ability to use an NPBL switch. None of that will happen. NS has committed to allow the Board to set a fair trackage rights fee using established cost-based SSW principles, alleviating DOJ's concern that NS might

unilaterally set unreasonable fees. NS has committed to adhere to NPBL's neutral governance and cost-based rate principles and to submit to Board oversight for five years; alleviating DOJ's concerns regarding CSX's continued switching access. As to other potential anticompetitive actions between NS and NPBL, DOJ acknowledges, any future antitrust immunity is limited to activities necessary to carry out the approved transaction and does not extend to unrelated conduct that may otherwise violate the antitrust laws. In the end, DOJ's comments do not support denial of NS's control application or imposition of additional conditions beyond those NS has offered.

CONCLUSION

The record leaves no doubt: Norfolk Southern's longstanding majority interest in NPBL has neither harmed competition nor created any risk of future foreclosure. For over forty years, NPBL has operated as a neutral terminal carrier, notwithstanding NS's economic majority interest, without a single complaint from shippers, ports, or carriers—except CSX, which now seeks to leverage this proceeding for its own commercial advantage. The statutory standard is clear: absent a likely and substantial lessening of competition, the Board must approve the proposed transaction. There is no likely or substantial lessening of competition here. NS's commitments further eliminate any hypothetical concern. Moreover, CSX's proposed "remedies" are legally unsupportable, operationally infeasible, and themselves anticompetitive. The law, the facts, and the public interest all point in one direction: approval of NS's application without conditions beyond those NS has offered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on January 6, 2026, in accordance with 49 CFR 1114.21(f), I have caused to be served a copy of the foregoing Brief of Norfolk Southern Corporation and Norfolk Southern Railway Company upon the Secretary of the Department of Transportation, the Attorney General of the United States, Administrative Law Judge Jenifer Soulikias, and upon each Party of Record in these proceedings.

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