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**PUBLIC VERSION**

January 6, 2026

CSXT-40

**VIA E-FILING**

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

Re: **STB Docket No. FD 36836, Norfolk Southern Corporation & Norfolk  
Southern Railway Company—Acquisition of Control—Norfolk &  
Portsmouth Belt Line Railroad Company**

Dear Chief of Case Administration:

Enclosed for e-filing in the above-referenced proceeding is a public version of CSX Transportation, Inc.'s Final Brief, with appropriate redactions that the Board can place in its docket. We are concurrently filing a highly confidential version of the Final Brief, to be filed under seal.

Please contact me with any questions.

Respectfully submitted,

/s/ Peter W. Denton

Peter W. Denton  
*Attorney for CSX Transportation, Inc.*

Enclosures

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 36836

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

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CSX TRANSPORTATION, INC.'S  
FINAL BRIEF

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Dated: January 6, 2026

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## INTRODUCTION & SUMMARY

NS has asked the STB for authority to control the only rail carrier – NPBL – that could allow CSXT to compete with NS for on-dock rail access to one of the most important marine terminals on the East Coast, NIT. NS’s request is a brazen attempt to get an STB rubber stamp to immunize its monopolization of rail access to NIT.<sup>1</sup> NS has unlawfully controlled NPBL for decades with the effect of excluding CSXT from on-dock rail access to NIT. The evidence of anticompetitive conduct is beyond question – because of NS’s unlawful control of NPBL, CSXT has *zero* share of on-dock rail traffic at NIT and must dray tens of thousands of containers by truck annually from NIT through Norfolk. Allowing NS to continue to control NPBL going forward would sanction CSXT’s exclusion from NIT.

The STB’s decision should be an easy one – the STB does not authorize control transactions that eliminate competitive options, and it should not do so here. Indeed, the STB should be especially hostile to NS’s request here, where NS has acted unlawfully for decades and now asks the STB to immunize NS from competitive challenge going forward.

NS’s main argument for control authority is: “Don’t worry, nothing will change.” This is cynical and irresponsible. Indeed, nothing may change with control authorization, but that is only because NS has already used its control over NPBL – exercised unlawfully – to keep CSXT from competing for on-dock rail service at NIT. For NS, “no change” means *zero* CSXT share of on-dock rail at NIT today, and *zero* CSXT share tomorrow. That is precisely why the STB should deny the control application. The STB exists to support and preserve competition. The STB should

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<sup>1</sup> Unless otherwise defined, the acronyms and defined terms used herein are the same as those used in CSX Transportation, Inc.’s Evidence and Argument in Opposition to the NS Control Application, filed on September 18, 2025.

support rail-to-rail competition at NIT by denying NS's control request and requiring divestiture of NS's *existing* control.

NS then argues: "Don't worry, shippers still have other options." But this is a 2-to-1 combination, and the STB does not approve such transactions without imposing a condition to ensure two-carrier competition post-transaction. In any event, NS's evidence does not stand up. International intermodal shippers want dual rail access at NIT. The Governor of Virginia wants dual rail access at NIT. The Virginia Port Authority wants dual rail access at NIT.<sup>2</sup> Consumers of goods shipped in intermodal containers want the benefits of competition: efficient and low-cost rail service. And NPBL was created to provide that competition. Without even the theoretical option of CSXT access to on-dock rail service at NIT, NS will continue to exercise market power at NIT and POV, with the ability to raise prices, making POV even less attractive to shippers. This is wholly inconsistent with the public interest and the policies animating the STB's organic statute.

NS's next argument is particularly surprising: "Don't worry, CSXT can use trucks to dray containers to and from NIT." But how can NS expect the STB to accept an argument that justifies a 2-to-1 reduction in rail competition because of the availability of trucking? The STB prioritizes supporting the use of rail, not finding ways to keep freight moving on trucks. And NS's dismissive attitude ignores the real-world impact on communities long impacted by the truck traffic, particularly as NIT will soon expand its throughput.

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<sup>2</sup> NS sought to speak for VIT/VPA on their operational abilities and supposed limitations, but when VIT/VPA filed a statement correcting NS's misstatements about the number of trains NIT can handle per day, NS filed a motion to strike to prevent the Board from considering the facts from VIT/VPA directly. (VIT/VPA Clarification Comments, Dec. 23, 2025; NS-35.) VIT/VPA are important stakeholders here, and the facts about port capacity and operability for on-dock rail are too important for the Board to brush aside.

NS's final argument is easily dismissed: "Don't worry, we'll play nice if you give us control authority." More than 15 years of experience shows that the Board should not give this claim any weight. Since 2009, when CSXT began to seek ways to work with NS's alter-ego NPBL to support direct rail access to NIT, CSXT has repeatedly faced NPBL denials, refusals, foot-dragging, and pretense, as well as dogged insistence on a switching rate designed to make CSXT's service uneconomical. CSXT owns 43% of NPBL. But the NS-controlled NPBL has met every CSXT commercial proposal with hostility. The STB need not look beyond the recent verified statement in this proceeding by NPBL's President, Cannon Moss, to see what CSXT is up against. NPBL was created to facilitate access by its owners to locations served by NPBL, but the Moss statement is a laundry list of excuses for why NPBL cannot support CSXT's efforts to compete with NS at NIT.<sup>3</sup> With commercial friends like that, who needs enemies?

It has become abundantly clear that NPBL will not seriously consider CSXT's commercial proposals for access to NIT so long as NS controls NPBL.<sup>4</sup> The STB must therefore deny NS's request for control authority so that the competition intended for NIT can occur. And since NS currently exercises unlawful control over NPBL, the STB must also order NS to divest its control over NPBL. CSXT is confident that it can work with a truly independent NPBL to produce an effective and efficient competitive alternative to NS at NIT.

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<sup>3</sup> NPBL's campaign to line up Portsmouth politicians and businesses against CSXT's responsive application for terminal trackage rights also demonstrates that NS-controlled NPBL is working against CSXT rather than with it. (See NPBL-8.)

<sup>4</sup> In the UP-NS merger proceeding, NS declared: "NS's operating plan already anticipates NPBL routings based upon NPBL's current operations" – suggesting that NS does not expect NPBL to carry intermodal traffic for CSXT in the future. (NS-16 at 5, Jan. 2, 2026, *Union Pac. Corp. & Union Pac. R.R. Co.—Control—Norfolk S. Corp. & Norfolk S. Ry. Co. (UP/NS Control Proceeding)*, FD 36873.)

But if, contrary to precedent and the weight of evidence, the STB gives NS authority to control NPBL, the STB would need to mitigate the anticompetitive impact of such control by giving CSXT direct rail access to NIT through terminal trackage rights. Trackage rights, combined with a restoration of the track assets associated with the Connecting Line that links NPBL's lines with NS's lines, would allow CSXT to provide direct, efficient rail access to NIT.<sup>5</sup>

The public strongly supports dual on-dock rail access by NS and CSXT at NIT, as evidenced by the letters submitted in this proceeding by government officials—including Virginia Governor Glenn Youngkin, the Virginia Port Authority, local organizations, an ocean carrier, and other stakeholders. (*See, e.g.*, CSXT Letters submitted on, Aug. 26, 2025, Sept. 26, 2025, Nov. 13, 2025, Nov. 17, 2025, Dec. 3, 2025, Dec. 12, 2025, Dec. 22, 2025, and Dec. 29, 2025 (enclosing a total of 33 letters); Jewett Letter, Dec. 22, 2025; *see also* Youngkin Letter 2, Aug. 27, 2025 (“It is my view that the current lack of dual access by NS and CSXT to on-dock rail at NIT hurts the competitiveness of the Port of Virginia.”).) If the STB allows NS to control NPBL, the STB must grant CSXT terminal trackage rights to preserve the option of dual-rail access to NIT.

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<sup>5</sup> Effective on-dock rail access through NPBL will also require a restoration of the Connecting Line and certain facilities (the double diamond at NS Junction and connection at Carolina Junction) and trackage rights over those facilities as well as an order to NS not to use its control over tracks leading to NIT to frustrate CSXT's access. CSXT has requested these conditions both in the present proceeding (*see* CSXT-22 at 112 n.44) and in CSXT's affirmative requests (the “Related Proceedings”) that have been held in abeyance during this control proceeding. (*See* STB Docket Nos. NOR 42183, FD 36859, AB 290 (Sub-No. 299X), and AB 1024X.) If the Board were to grant NS's application (which it should not) and grants CSXT's requests for conditions, the corresponding requests in the Related Proceedings would be moot.

## BACKGROUND

NPBL was created in 1896 as a neutral terminal railroad to provide equal access to marine terminals in the Hampton Roads area for all its owners. (CSXT-1, Ex. 1 at CSXT-1-76.) The beginning of the end of that neutrality started in 1982 when NS's predecessors acquired a combined 57% ownership interest in NPBL through its merger of Norfolk & Western and Southern Railway. While NS's predecessors told the ICC at the time that they had no intention of controlling NPBL,<sup>6</sup> NS now admits that it has controlled NPBL for decades<sup>7</sup>—without authorization—and NPBL has likewise acknowledged NS's control.<sup>8</sup>

Without CSXT terminal trackage rights, NPBL offers the only means for CSXT to compete with NS for on-dock rail access at NIT. NS has direct access to NIT and does not need to use NPBL switching. NPBL has direct access to NIT via its own lines and with trackage rights on NS's lines. CSXT does not have direct access to NIT and needs to use NPBL's switching services to access NIT. (*See* CSXT-22, Ex. 1, Map H.) CSXT is a 43% owner of NPBL and, therefore, has the right to use NPBL to access NIT and other facilities served by NPBL.

In the years since NS took unlawful control of NPBL, CSXT has tried, unsuccessfully, to secure workable on-dock rail access to NIT through NPBL. (*See* CSXT-22 § 2.2.) The result is that CSXT has zero share of the on-dock rail traffic at NIT. CSXT spent years pushing for access to NIT through NPBL and proposing, without success, various commercial arrangements that would permit CSXT to

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<sup>6</sup> *Norfolk S. Ry. Co.—Pet. for Declaratory Order*, FD 36522, slip op. at 11 (STB served June 17, 2022) (“[P]etitioners/applicants told the ICC and the public that they had no intention of controlling the non-system companies post-transaction . . .”).

<sup>7</sup> (NS-1 at 7-8, 14 (acknowledging NS control).)

<sup>8</sup> (Opening Statement & Evidence of NPBL 1, 5, Sept. 23, 2021, *Norfolk S. Ry. Co.—Pet. for Declaratory Order*, FD 36522 (same).)

access NIT and enable NPBL to grow its business and revenue. In 2018, CSXT filed suit in the U.S. District Court for the Eastern District of Virginia, alleging that NS and NPBL engaged in anticompetitive conduct to exclude CSXT from NIT. *See CSX Transp., Inc. v. Norfolk S. Ry. Co.*, 648 F. Supp. 3d 679 (E.D. Va. 2023), *aff'd*, 114 F.4th 280 (4th Cir. 2024), *cert. denied*, 145 S. Ct. 1921 (2025). The district court referred to the STB the question of whether NS's control over NPBL was ever authorized, and the Board ruled that it was not. *See Norfolk S. Ry. Co.—Pet. for Declaratory Order*, FD 36522, slip op. at 17 (STB served June 17, 2022). The Board made clear that it “expect[ed] the parties to take appropriate steps to address the unauthorized control issue immediately following resolution of the district court proceeding, including any appeals.” *Id.*, slip op. at 17 n.25.

The district court ultimately dismissed CSXT's antitrust claims on statute of limitations grounds and dismissed CSXT's request for injunctive relief citing a lack of jurisdiction over injunctive claims relating to rail carriers. But, as further explained in Section 2.6, the court expressly stated that CSXT had presented evidence of NS conduct that a reasonable jury could find was exclusionary. *See CSX Transp., Inc.*, 648 F. Supp. at 688 n.2, 723. The court also noted that the Board could address NS's unauthorized control and impose appropriate remedies. *CSX Transp., Inc. v. Norfolk S. Ry. Co.*, No. 2:18-cv-00530, 2023 WL 2552343, at \*10 n.13 (E.D. Va. Jan. 27, 2023) (explaining that CSXT's concerns regarding NS's unauthorized control over NPBL could “be subject to federal oversight and certain injunctive remedies as imposed by the STB”). Furthermore, the court stated that CSXT's claims of anticompetitive conduct could be subject to investigation by the U.S. Department of Justice, Antitrust Division (“DOJ”), *id.* at \*9, which has since opened an antitrust investigation into NS's and NPBL's conduct. DOJ has also submitted comments in this proceeding, emphasizing the benefits of railroad competition and urging the Board to carefully consider the current competitive

dynamics concerning NPBL and NIT, among other topics. (DOJ Comments 2-3, Aug. 27, 2025.)

While the appeals from the district court decision were still pending, NS sought to legitimize its illegal control of NPBL by first filing, on February 14, 2025, a submission styled as an application for a “minor” transaction, seeking Board authority to control NPBL, and following up on June 13, 2025, with a “significant” application for such authority. (NS-1; NS-13.) CSXT opposed the adequacy of both applications (CSXT-1; CSXT-10) and filed its own affirmative cases before the STB to address NS’s unauthorized control of NPBL. (*See* STB Docket Nos. NOR 42183, FD 36859, and AB 290 (Sub-No. 299X), and AB 1024X.) As noted above, the Board is holding these proceedings in abeyance while this control proceeding is ongoing. But if the Board denies NS’s application, there will be no impediment to granting CSXT’s requested relief through the Related Proceedings. *See supra* n.5.

In its September 18, 2025 opposition comments (“Opposition”), CSXT explained why the STB should deny NS’s request for control authority and why a denial of authority will require an order that NS divest control of NPBL. CSXT also explained that if the STB were to authorize NS’s continued control of NPBL, the Board should also grant CSXT terminal trackage rights and order restoration of the Connecting Line as conditions to remedy the harm to competition from any continued control by NS of NPBL. (CSXT-22 at 112 n.44.)

## **ARGUMENT**

### **1. NS’s “Nothing Will Change” theory of the case is fatally deficient and justifies summary dismissal of the application.**

NS’s application for control authority and its response to CSXT’s Opposition ignore the central issue in this case that makes it unique – NS has already controlled NPBL *unlawfully* for years and now seeks to immunize that unlawful control going forward. In its application, NS claimed that its past conduct was

somehow irrelevant and the STB should only consider whether an authorization of control would change anything. NS stated that the Board should not consider “past competitive conduct and market changes stemming from the 1982 transaction,” (NS-13 at 31), and that “[t]his proceeding is solely about whether *NS’s future control of NPBL* will result in a substantial lessening of competition.” (*Id.* at 17 (emphasis in original).) In its Response to CSXT’s Opposition, NS doubled down on this flawed theory, stating again that “[t]he statutory focus is on whether the future control results in a substantial lessening of competition.” (NS-32 at 17.) According to NS’s circular argument, if nothing changes, then competition cannot be lessened.

NS’s approach to this proceeding is fundamentally flawed and justifies summary dismissal of NS’s application. The STB must make a choice here – approve NS’s application or deny it. To do so, the STB must analyze and compare from a competition perspective: (1) approval of NS’s application and NS’s continued control of NPBL, and (2) denial of NS’s application and NS’s divestiture of control of NPBL. (CSXT-22, V.S. Miller ¶ 10, § III.A.) But NS’s application and supporting materials are silent on the no-control scenario. Under NS’s logic, denial of its application is simply not a possibility. NS gives the STB nothing to indicate what competitive conditions would likely occur if the Board denies the application and allows NPBL to act as an independent provider of service, free from NS’s desires to prevent competition from CSXT.

NS bears the burden of presenting a *prima facie* case that gives the STB adequate information to make the necessary competitive analysis, and NS failed to do so here. That could, and should, be the end of it. CSXT, on the other hand, has provided abundant evidence in its Opposition to show the anticompetitive effects of a “with control” world – the present world which reflects the anticompetitive effects of NS’s longtime control of NPBL – versus a “without control” world. (*See, e.g.*, CSXT-22 at 90-91, V.S. Miller 28, 67 (concluding that an independent NPBL would

likely charge lower rates for intermodal traffic, leading to increased intermodal traffic, leading to little to no remaining demand for drayage at NIT); *id.* at V.S. Carey 23-36, 50-56 (describing how an independent NPBL would likely move a higher volume of intermodal freight, spreading fixed costs across more traffic and leading to lower rates on NPBL).)

There is a stark difference between the actual world – where NS can thwart CSXT’s efforts to compete for rail access at NIT through control of NPBL – and the but-for world – where NPBL can act independently of NS and its anticompetitive interests. Without NS exercising control of NPBL, CSXT would have an independent terminal railroad partner that would seek ways to provide CSXT with the rail access to which it is entitled. NS would no longer be able to use its exclusive rail access to NIT, coupled with its unlawful control of NPBL, to eliminate rail competition for international intermodal traffic and harm the public interest.

## **2. The Board should deny NS’s application on the merits.**

### **2.1. NS’s control of NPBL harms competition by denying CSXT on-dock rail access at NIT that shippers want.**

NS claims that CSXT’s concerns are focused only on harm to CSXT “and not on any harms to customers on NPBL or intermodal competition, in general.” (NS-32 at 11.) To the contrary, the harm to competition from CSXT’s exclusion from on-dock rail access to NIT is direct, obvious, and substantial.

When railroads compete to provide transportation services, a shipper can choose its preferred price-service bundle among those offered. (CSXT-22, V.S. Miller ¶ 58.) This is why ocean carriers want a choice of on-dock rail providers at NIT. The inability of CSXT to use NPBL to provide competing on-dock rail service at NIT – consistent with CSXT’s right under the 1897 NPBL charter – harms shippers by eliminating a service option and harms VPA by forcing it to subsidize drayage service from NIT to CSXT rail.

The evidence is clear that shippers want on-dock rail service at NIT and that drayage is generally viewed as less preferred than on-dock rail. In comments to the STB in this proceeding, VPA stated that CSXT's drayage program at NIT is "inefficient, and unnecessarily congests local roads." (VPA Letter 4, Mar. 5, 2025.) Intermodal shippers share that dim view of drayage and prefer on-dock rail. (*See, e.g.*, CSXT-22, V.S. Miller ¶¶ 100-104 (discussing concerns of {{ [REDACTED] }}); *id.* at V.S. Carey 16-17 and 38-39 (discussing customer preference for on-dock rail service and opposition to drayage).) Contrary to NS's claim that no shipper has complained to the Board (NS-32 at 12), CMA CGM submitted comments to the Board stating that it desires "rail competition at the terminals that [CMA CGM] serves" and that it is concerned that NS control of NPBL "may have the effect of preventing [CSXT] from becoming an effective rail competitor at [NIT]." (CSXT-3 (enclosing a letter from CMA CGM); *see also* CSXT-22, V.S. Miller ¶ 104.) Eliminating a competitive option that shippers want obviously harms competition.

Indeed, NS itself has noted the pricing impact of dual-rail access at a port facility, and the lack of such access. Professor Miller discusses an NS document stating that NS was making {{ [REDACTED] }}  
[REDACTED]  
[REDACTED]  
[REDACTED] }}. (CSXT-22, V.S. Miller ¶ 114.) Availability of dual access had an obvious impact on price.

VPA is also harmed by CSXT's exclusion from direct rail access at NIT, as NS also concedes. NS refers repeatedly to the subsidy that VPA pays to CSXT to support drayage from NIT. But the subsidy to CSXT, a direct cost to VPA, would be unnecessary if CSXT had effective direct rail access. Similarly, NS's economist, Dr. Waehrer, describes VPA's otherwise unnecessary efforts to "sort" vessel traffic between VIG and NIT in order to minimize the amount of CSXT traffic that is

handled at NIT, where CSXT does not have direct rail access. (NS-32, V.S. Waehrer ¶¶ 42-53, 57.) This sorting also represents an added cost to VPA.

The fallback argument of NS and Dr. Waehrer is that any harm to competition is minimal because international intermodal shippers have many options. Therefore, the elimination of only one option – CSXT’s on-dock rail access at NIT – does not substantially harm competition. In support, NS states that “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.” (NS-32 at 34.)

Dr. Waehrer takes this argument about “numerous” port options a step further and claims that focusing only on access to a single port facility, like NIT, is like “defining a market for left-shoes and ignoring the fact that left-shoes and right-shoes are sold as a bundle.” (*Id.* at V.S. Waehrer ¶ 90.) But Dr. Waehrer’s example actually shows the substantial competitive harm that flows from CSXT’s exclusion from NIT. Dr. Waehrer is correct that no one wants to buy a left-shoe from one supplier and then find a different right-shoe supplier. Left- and right-shoes are sold as a bundle. But if a supplier cannot offer the desired bundle, it is at a severe competitive disadvantage and consumers suffer from the lack of choice. CSXT is at a severe competitive disadvantage by not offering a bundle of on-dock rail services that includes direct rail access at NIT. And the bottom line is that ocean shippers suffer from the lack of choice of on-dock rail carriers at NIT.

**2.2. CSXT’s zero share of on-dock rail traffic at NIT is conclusive evidence of competitive harm.**

The evidence that NS’s control of NPBL has distorted and harmed competition is overwhelming. While NIT is one of the most important intermodal port facilities on the East Coast, CSXT has had *zero* on-dock rail shipments at NIT except for a small volume of shipments in 2015, discussed further below. (CSXT-22,

V.S. Kenney 5; *see also* VPA Letter 4; CSXT-22, Ex. 16, Moss Dep. Tr. 41:23-42:3.) CSXT's inability to provide on-dock rail service at NIT has resulted in dramatically imbalanced traffic shares on certain key corridors. As a result of CSXT's lack of on-dock rail access at NIT, NS carried {{ [REDACTED] }} of the intermodal containers moved in 2023 by rail at NIT to/from Midwestern markets and CSXT carried only {{ [REDACTED] }}. (V.S. Carey 6-7, fig. 1.) NS does not challenge these figures. Even when traffic at VIG is included, CSXT's share of all POV rail movements to/from Midwestern markets in 2023 was only {{ [REDACTED] }}, compared to NS's {{ [REDACTED] }} share. (*Id.* at app. A, fig. 3.) And looking at the three most significant rail corridors from POV to/from the Midwest in 2024, NS had a {{ [REDACTED] }} share. (*Id.* at app. A, fig. 4.)

These distorted share figures cannot be explained in terms of NS costs, service quality, or other economic factors. (*Id.* at 2-5, 11; CSXT-22 § 3.2.3.) They are the result of NS's unlawful control of NPBL. The artificially inflated switch rate charged by NS-controlled NPBL has contributed to the problem. But the switch rate is not the only cause of CSXT's exclusion. In 2015, after a West Coast port strike left CSXT with too many containers to dray from NIT, CSXT tried to use NPBL to meet shippers' demand for service from NIT despite the costly \$210/car rate. (*See* CSXT-22, V.S. Kenney 5.) NS interference resulted in numerous operational obstacles and delays. NPBL ultimately moved only a small number of CSXT international intermodal trains at NIT for {{ [REDACTED] }} over a period of several months in 2015. (CSXT-22 at 35-36, 36 n.18.) CSXT lost business from customers who could not be reliably serviced without on-dock access at NIT. (*Id.* at 37.)

NS's claim that CSXT has zero on-dock market share at NIT because it has chosen to dray is implausible on its face. CSXT does not use NPBL because NS has effectively shut down that option by wielding its control of NPBL like a shield against competition. NS-controlled NPBL has artificially raised its switching rate and has rejected alternative rate and service proposals that cover NPBL's costs,

including free fuel and use of CSXT locomotives (and certain labor costs), that would have permitted CSXT to have on-dock rail access at NIT via NPBL. NS also removed physical infrastructure necessary for CSXT to efficiently switch traffic with NPBL and caused NPBL to discontinue its trackage rights on NS's Connecting Line that would permit efficient NPBL service to NIT.

The claim by NS's witness Mr. Fapp that CSXT uses dray because it is cheaper than the NPBL switch rate is based on sloppy and erroneous calculations.<sup>9</sup> Mr. Fapp used the wrong drayage rate,<sup>10</sup> the wrong NIT lift charge,<sup>11</sup> and ignored the CWRV switch fee.<sup>12</sup> But the calculation is ultimately irrelevant. CSXT uses dray because NS has forced it to do so. NS's control has precluded CSXT from using the option its customers actually want: NPBL. (*See* CSXT-22, V.S. Kenney 7 (“[O]cean carriers express a strong preference for on-dock rail and view drayage as an inferior option.”) and V.S. Carey 16-17 (discussing shipper preference for on-dock rail.)

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<sup>9</sup> Correcting Mr. Fapp's analysis, while maintaining his 2.5 container per rail car assumption (versus CSXT's economists' assumption of 2 containers per car), results in an average dray cost per rail car of {{ [REDACTED] }} and an NPBL switch cost per car of {{ [REDACTED] }}, which implies dray is approximately {{ [REDACTED] }} more expensive than NPBL – not cheaper. \$210 switch per car / 2.5 = \$84. {{ [REDACTED] }}

{{ [REDACTED] }} *See infra* nn. 10-12 (showing record source for cited costs.)

<sup>10</sup> Mr. Fapp states the subsidized rate for CSXT to dray is \$65. (*See* NS-13, V.S. Fapp 25.) The current CSXT subsidized dray cost is {{ [REDACTED] }}. (CSXT-22, V.S. Miller ¶ 48 n.76 (citing {{ [REDACTED] }}).)

<sup>11</sup> The CSXT lift charge at NIT is approximately {{ [REDACTED] }}. (CSXT-22, V.S. Carey 46 n.248.) Mr. Fapp relies on an erroneous \$95.16 lift cost reported on a public tariff instead of CSXT's actual private contract charge.

<sup>12</sup> CSXT must additionally pay CWRV a {{ [REDACTED] }} switch fee for containers switched at VIG. (CSXT-22, V.S. Carey 48 n.255 (citing {{ [REDACTED] }} 48 n.257, 53).)

The purported explanation of CSXT's zero market share by NS's economist Dr. Waehrer also falls short and actually shows the competitive harm resulting from NS's unlawful control of NPBL. Dr. Waehrer argues that CSXT lacks market share at NIT due to VPA's "efficient" sorting of CSXT vessels to VIG rather than to NIT and its sorting of NS-dominated vessels to NIT. (NS-32 at 25; *id.* at V.S. Waehrer ¶¶ 42-47.) But VPA should not have to sort at all. Ideally VPA could dispatch ships to either terminal and provide ocean shippers with a choice of CSXT or NS on-dock rail service at both NIT and VIG. But VPA must change its dispatch practices, and ocean carriers contracting with CSXT must deal with the consequences when some of their containers inevitably end up at NIT because NS has made it expensive and impractical to move CSXT traffic to/from NIT on NPBL. NS's argument proves CSXT's point – VPA tries to send CSXT ships to VIG because CSXT does not have viable or cost-effective on-dock rail access at NIT.

### **2.3. NS seeks approval of an impermissible 2-to-1 consolidation.**

As CSXT explained in its Opposition, the NS application violates the STB's rule against 2-to-1 consolidations. (CSXT-22 at 109-112; *id.* at V.S. Miller § III.B; *id.* at V.S. Carey § IV.A.) *Without* NS control of NPBL, ocean carriers seeking on-dock rail access at NIT would have two options: (1) NS and (2) CSXT through NPBL switching. *With* NS control of NPBL, ocean carriers seeking on-dock rail access at NIT must deal with two commonly controlled railroads, NS and NPBL. The Board has "consistently sought to assure that agency-approved transactions would not result in the creation of '2-to-1' points where shippers lose existing intramodal rail competition." *Canadian Nat'l Ry.—Adverse Discontinuance—Lines of Bangor & Aroostook R.R. Co. & Van Buren Bridge Co. in Aroostook Cnty., Me.*, AB 279 (Sub-No. 3) et al., slip op. at 5 (STB served May 3, 2004) (citing *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp.*, 1 S.T.B. 233, 252, 390-93 (1996)).

NS disingenuously argues that it does not propose a 2-to-1 transaction because the Board's approval of its application would not change any competitive options. (NS-32 at 68-73.) NS points to its commitment to maintain so-called "cost-based pricing" – the same "one-size-fits-all" rate that has contributed to CSXT's exclusion – as a reason to conclude that nothing will change. NS goes so far as to argue that creating two-carrier competition at NIT would be a "windfall" for CSXT (*id.* at 73), presumably because CSXT does not have effective competitive access today, so it should not get that access in the future.

Yet again, NS's argument is circular. NS has used its unlawful control of NPBL until now to prevent CSXT from having any effective on-dock rail access at NIT. But the fact that NS has used its controlled subsidiary to maintain an effective on-dock rail monopoly at NIT cannot possibly be a valid reason for concluding that this is not a 2-to-1 transaction. The Board must determine whether an NPBL controlled by NS harms competition relative to an NPBL not controlled by NS. It is twisted logic for NS to argue that granting control authority does not change shipper options given that NS, through unlawful control of NPBL, has already effectively eliminated shipper options to use CSXT via NPBL at NIT.

NS's proposal to take control of a terminal railroad like NPBL is particularly inappropriate. As Dr. Huneke explains, "NPBL was established as a neutral mechanism to serve all users." (CSXT-22, V.S. Huneke 2.) "Granting control of such a railroad to only one of the owners makes no sense." (*Id.*) The competitive risk is especially heightened in this case, as Dr. Huneke explains, "because NS owns the tracks that lead to NIT and has no need for NPBL's switching services at all for NIT traffic." (*Id.* at 5.) Under such circumstances, NS has the incentive to use control over NPBL to make it difficult for CSXT to access NIT via NPBL without any risk that its own access to NIT will be impeded. (*See id.* at 5-6.)

**2.4. The other options discussed by NS are inadequate substitutes for on-dock rail access at NIT.**

NS argues that the Board should not worry about NS control of NPBL because ocean shippers have other options to reach Midwestern destinations besides CSXT on-dock rail service via NPBL at NIT. However, these other options – drayage to rail, VIG, other East Coast ports, or trucking – are not adequate substitutes for the loss of competition for on-dock rail at NIT.

**2.4.1. Drayage to rail is not an adequate substitute for on-dock rail service at NIT.**

CSXT presented substantial evidence showing that shippers prefer on-dock rail over drayage. (*See, e.g.*, CSXT-22 § 3.2; *id.* at V.S. Kenney 7.) CSXT showed that CSXT's lack of on-dock rail at NIT was an important consideration in shipper decisions to contract with NS over CSXT for international intermodal shipments into and out of the United States. (CSXT-22 § 3.2.4; *id.* at V.S. Carey 38-40.)

NS and NPBL claim that CSXT has simply chosen to dray its containers to/from NIT, rather than utilize NPBL's switching services, because POV subsidizes drayage. (*See* NPBL-6 at 10; NS-31 at 27.) CSXT previously addressed the flaws in NS's analysis of drayage costs. But the economic calculations are ultimately not relevant because shippers want on-dock rail service and CSXT cannot provide it because of NS's control over NPBL. There is absolutely no evidence that CSXT has chosen to dray because it is cheaper. Drayage is an inferior option to on-dock rail access. (CSXT-22, V.S. Carey §§ II.E.1 and IV.B.) Drayage is inefficient, expensive, lacks scalability, and imposes additional regulations on the movement of intermodal containers. (CSXT-22 § 3.1.1; *id.* at V.S. Miller § V.A; *id.* at V.S. Kenney 7-8.) CSXT must use trucks because NS and NPBL have excluded CSXT from effective on-dock rail service.

NS's claim that "VPA has been actively working to increase the capacity" for drayage is also beside the point. (NS-32 at 29.) VPA does not want to promote the drayage option. As VPA stated in its comments, "[n]ot only are these 'cross-town' drays for the [CSXT] cargo costly due to the additional re-handling, but the drayage service is inefficient and unnecessarily congests local roads." (VPA Letter 4.) Moreover, "POV and its customers are impacted by the operational and cost consequences of the costly work-around in the form of the NIT cross-town drayage program." (*Id.* at 5.) Similarly, Virginia Governor Glenn Youngkin noted CSXT's drayage workaround "results in more than 20,000 tractor trailers annually using local roads to transfer freight between the terminals," and ultimately "leads to congestion and delays which decreases safety." (Youngkin Letter 2.) Drayage is only necessary due to the anticompetitive effects of NS's and NPBL's conduct. NS is the only party that benefits from CSXT's need to use drayage over effective and reasonably priced on-dock access to NIT.

**2.4.2. VIG is not an adequate substitute for NIT.**

NS also claims that competition is not harmed by CSXT's exclusion from on-dock rail access to NIT because shippers can simply use VIG instead of NIT. (NS-32 at 24-26.) But VIG is not an adequate substitute for NIT for the reasons explained in CSXT's Opposition, and NS's rebuttal does nothing to undercut CSXT's showing.

First, VIG is smaller than NIT and is close to or at capacity. (CSXT-22, V.S. Kenney 10.) On rebuttal, Mr. Fapp takes issue with Ms. Carey's VIG capacity utilization analysis, but his rebuttal is little more than nit-picking (and like his analysis of drayage costs, is flawed), and it does not contest the basic fact that capacity at VIG is highly constrained. VPA is expanding NIT capacity because existing capacity at VIG cannot handle expected traffic growth. (*See* CSXT-22, V.S. Kenney 15.)

Second, NS concedes that ocean carriers do not control which terminal at POV their ships use. (NS-32 at 18.) On rebuttal, Dr. Waehrer argues that VPA's ability to direct NS vessels to NIT will yield adequate space at VIG to handle CSXT traffic.<sup>13</sup> (V.S. Waehrer 4, 20-24, 36-37.) But Dr. Waehrer ignores that the much larger NIT will always have more free or available berths than VIG, which is the most important factor in determining where a vessel docks. (CSXT-22, V.S. Carey 10.)

The NS application also disregards the substantial, multimillion-dollar expansion underway at NIT. CSXT's experts, Ms. Carey and Dr. Miller, explained that, with the expansion, NIT could handle over 50% more containers and will have approximately 65% more berth space for vessels to unload containers than VIG. (CSXT-22, V.S. Carey 9-10.) In other words, NIT will become an even more dominant terminal in the region. With NS in control of NPBL, the evidence points to NS further entrenching its outsized market share at an enlarged NIT.<sup>14</sup> (*Id.* at 8-9.) Consequently, more and more ocean carriers will likely select NS if it has exclusive on-dock rail access to NIT with its expanded capacity. (*Id.* at 9-10.)

**2.4.3. Other East Coast ports are not substitutes for on-dock rail at NIT.**

Multiple East Coast ports may allow ocean carriers to economically reach common inland locations, but the evidence shows that ocean carriers do not fully substitute one port for another for international intermodal traffic. (CSXT-22 § 3.1.3; *id.* at V.S. Miller ¶ 77.) Rather, ocean carriers select ports based on a variety of factors, including the port's ability to access and connect efficiently to inland

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<sup>13</sup> This claim misses the point that customers at NIT should have access to two on-dock railroads at NIT.

<sup>14</sup> NS also claims that Craney Island could be a substitute for NIT, but this is grasping for straws. If the Craney Island project materializes, it is not expected to be operational until 2040. (NS-32 at 21.)

locations. (*Id.* at V.S. Miller 37-38, 46.) While ocean carriers can reach Midwestern destinations from POV and the Port of New York/New Jersey (“PONYNJ”), they often use both ports to serve those inland destinations due to various factors beyond rail rates or routes of rail service. (*See id.* at ¶ 85; V.S. Carey 10-11 and app. A, fig. 10.)

NS’s experts, Dr. Waehrer and Mr. Fapp, argue that the PONYNJ could be used instead of NIT.<sup>15</sup> But PONYNJ lacks sufficient spare capacity and cannot take full NIT volumes.<sup>16</sup> (CSXT-22, V.S. Carey 10-11.) Similarly, the Port of Baltimore is not a substitute for on-dock access at NIT. NS presents no evidence that ocean carriers seek to use Baltimore to replace NIT. Nor is there evidence it could substantially replace NIT.

**2.4.4. Trucks do not compete with rail for international intermodal freight beyond short distances, and barges are not a factor.**

NS argues, without specific analysis of volumes and prices, that because “ocean customers have the choice to use trucks to/from the POV to Midwest markets,” trucking competitors on long-haul Midwestern corridors act as a competitive constraint on NS with or without its control of NPBL. (NS-32 at 41-42; *see also id.* at V.S. Waehrer 45-46 (opinion based on trade press stating that East Coast ports benefit from trucking).) But the theoretical possibility of trucking does make it an attractive alternative.

As CSXT’s expert Ms. Carey showed, trucking competitors’ share of traffic moving to and from the Midwestern corridors is {{ [REDACTED] }} – a *de minimis* share. (CSXT-22, V.S. Carey 18.) Mr. Fapp’s efforts to undermine Ms. Carey’s analysis are unavailing. He wrongly claims that Ms. Carey

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<sup>15</sup> (NS-32, V.S. Waehrer ¶ 18; NS-13, V.S. Fapp 5-6.)

<sup>16</sup> Both witnesses disregard Dr. Miller’s evidence that PONYNJ is an inadequate substitute for NIT. (CSXT-22, V.S. Miller ¶ 85.)

understated trucking volumes to Midwestern locations by {{ [REDACTED] }} by asserting that certain truck moves with no specific Bureau of Economic Analysis Economic Area (“BEA”) location should be apportioned as truck moves on the Midwestern corridors. (NS-32, V.S. Fapp 49-50.) But these truck moves substantially involve other locations (i.e., VA, NC, KY, WV), not the Midwest.<sup>17</sup>

Ms. Carey’s analysis also showed that, on average, truck rates are at least {{ [REDACTED] }} than equivalent corridor railroad rates for the specific NIT/POV long haul corridors with Midwestern locations. (CSXT-22, V.S. Carey § II.E.2.) Ms. Carey presented this analysis on a rate per mile basis, thereby neutralizing any effect due to differing distances of the moves. The significantly higher trucking cost means that trucking cannot act as a competitive constraint on rail moves in the NIT/POV to Midwestern location corridors for the vast majority of rail moves.<sup>18</sup>

Nothing in Dr. Waehrer’s or Mr. Fapp’s rebuttal verified statements demonstrates anything to the contrary.<sup>19</sup>

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<sup>17</sup> (Carey Workpaper, “HC-WP FAF Truck Weight Analysis by County\_VA Expanded.R.”)

<sup>18</sup> Mr. Fapp’s critique of this analysis is also without merit. He claims Ms. Carey missed the costs associated with “last mile” transportation (pre or post railroad). (NS-32, V.S. Fapp 43-44.) This is true but does not change her conclusions because her analysis was on a per mile basis so the “last mile” distance is not significant on moves between POV and the Midwest. (CSXT-22, V.S. Carey § II.E.2, fig. 3 (stating rate per mile).)

<sup>19</sup> NS’s rebuttal also repeats the incorrect suggestion that barge service through Richmond, Virginia is a competitive alternative to on-dock rail at NIT. (NS-32 at 46-47.) As explained in CSXT’s Opposition, barges are not a practical alternative for CSXT or shippers. (*See* CSXT-22 at 78; *id.* at V.S. Kenney 9-10 (explaining that “barges move only a negligible amount of traffic from POV (approximately 5%),” the trip takes approximately 12 hours from POV to Richmond, and, like drayage, barging requires an extra move (from ship to barge to rail)); *see also id.* at V.S. Miller 19 n.52; *id.* at V.S. Carey 14 n.66.)

**2.5. NPBL's switching rate was designed to exclude CSXT from access to NIT.**

NPBL's rate structure became a one-size-fits-all \$210 switching rate in January 2010 as part of an effort by NS and the NS-controlled NPBL to prevent CSXT from using NPBL to access NIT. (CSXT-22 § 2.2.3.)<sup>20</sup> In the antitrust litigation that preceded this case, the district court found:

CSX has presented sufficient evidence on which a factfinder could conclude that the [\$210] rate was viewed by NSR as a 'high' rate that acted as an obstacle to CSX's ability to provide on-dock rail at NIT. CSX has also provided facially damaging evidence indicating that NSR acted to leverage its majority stake in NPBL to prevent CSX from securing a lower rate to access NIT in 2009 and shortly thereafter.

*CSX Transp., Inc.*, 648 F. Supp. at 688 n.2.

Since 2010, NS-controlled NPBL has continued to insist on a single rate of \$210 to apply to all traffic, rejecting alternative rate proposals that would have given CSXT an opportunity to compete with NS and would have fully covered NPBL's costs. (CSXT-22 at 81-82.) CSXT showed that the \$210 rate is high compared to other comparable rates (*id.* at 85-87), is inconsistent with the cost structure of providing intermodal service, (*id.* at 84-85, 87-89), and imposes costs on CSXT that would make intermodal service using NPBL's switch rate uneconomic (*id.* at 81; *id.* at V.S. Carey 29.)

CSXT rebutted the claim of NS's witness Mr. Fapp that NPBL would be "financially devastated" if NPBL adopted a lower switch rate for intermodal service. Specifically, CSXT's economist Ms. Carey showed that NPBL could fully cover its costs for moving traffic from CSXT with an intermodal-specific rate of {{ [REDACTED] }} (versus the current \$210). (CSXT-22, V.S. Carey 54-56.) While he criticizes

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<sup>20</sup> Prior to adopting a one-size-fits-all rate, NPBL maintained different rates for different types of cargo. (CSXT-22 § 3.1.4.) To the extent that a "uniform" rate is required, it means that each owner is to be charged the same commodity-specific rate without discrimination. (*Id.*)

Ms. Carey's analysis, Mr. Fapp does not demonstrate that NPBL could not cover its costs by serving international intermodal customers at NIT if NPBL adopted the CSXT proposals. (See NS-32, V.S. Fapp 54.) Indeed, CSXT's proposals to NPBL of a switch rate of {{ [REDACTED] }} where CSXT would absorb locomotive, fuel and certain labor costs, would substantially eliminate NPBL's variable costs, meaning that a rate even lower than {{ [REDACTED] }} would cover NPBL's costs. (CSXT-22, V.S. Carey 29-30, 54-56.) Mr. Fapp disregards CSXT's offers.

In light of the substantial evidence that the NPBL switch rate has had an anticompetitive impact, NS argues that CSXT's opposition to NS's control of NPBL is simply an attempt to "weaponize[ ] a routine rate dispute." (NS-32 at 7.) In fact, the NPBL rate is unreasonable and was adopted as part of a broader attempt to prevent CSXT from competing with NS at NIT. But CSXT's concern goes far beyond the level of the NPBL switching rate. NPBL's insistence on the \$210 rate is just one more piece of evidence showing that it is now, and will continue to be, effectively impossible for CSXT to work with NPBL to come up with an effective on-dock rail service so long as NPBL is controlled by NS.

An independent NPBL would consider alternatives to the existing switch rate that would make economic sense to a truly independent terminal railroad. And more important, an independent NPBL would consider alternative service proposals that would give CSXT an opportunity to compete for on-dock rail at NIT. CSXT is not just seeking a change to the NPBL switch rate. CSXT is asking the STB to ensure that it is given a chance to work with an independent NPBL to explore commercial alternatives, including an appropriate switch rate and other operational details, that will allow competition for rail access at NIT.

**2.6. Abundant evidence of NS's anticompetitive conduct supports denial of NS's control application.**

The Board must determine (1) whether authorizing NS's continued control of NPBL is likely to substantially lessen competition, create a monopoly, or restrain trade, and (2) whether such anticompetitive effects outweigh any associated public benefits. *See* 49 U.S.C. § 11324(d). In most control proceedings, the Board must draw inferences from economic incentives and market structure to predict likely future behavior and effects. Here, the record is based on actual history. For many years, as shown by the abundant evidence of record, NS has unlawfully exercised control over NPBL, has engaged in anticompetitive conduct to keep CSXT from using NPBL to access NIT, and has distorted the market for on-dock rail movements of intermodal traffic at one of the most important East Coast intermodal facilities.

The record contains ample evidence of the anticompetitive conduct resulting from NS's control of NPBL. (*See, e.g.*, CSXT-22 § 2.2.) In 2008, when CSXT was developing a strategy for accessing international intermodal traffic at NIT, NS and NPBL discontinued trackage rights over a segment of rail necessary to provide efficient intermodal service and NS later removed (without necessary STB authority) diamond facilities that would permit the efficient movement of intermodal trains to CSXT lines. (*Id.* at § 2.2.2.) Afterwards, NS repeatedly prevented NPBL from fairly assessing CSXT's commercially reasonable proposals for intermodal-specific rates and service plans – in 2009, 2010, and 2018 – despite evidence that these proposals would have generated substantial revenue for NPBL and covered its full costs. (*Id.* at §§ 2.2.3, 2.2.5, 2.2.8.) NS impeded NPBL's movement of CSXT intermodal traffic when NPBL briefly moved CSXT traffic to NIT during the 2015 congestion crisis. (*Id.* at § 2.2.6.) Then in response to CSXT's 2015 attempt to use NPBL switching services, NS promptly terminated the 1917

trackage rights agreement with NPBL and initiated a process to replace it with a new agreement charging higher trackage rights fees and imposing other costs and limitations on NPBL access to NIT. (*Id.* at § 2.2.7.) As shown in CSXT’s Opposition, NS has consistently manipulated NPBL governance and pricing to stymie competition and maintain its monopoly on NIT on-dock rail service. (*Id.* at § 2.2.)

The Board should give no weight to NS’s hollow commitments that it would not engage in anticompetitive conduct if granted future control authority.<sup>21</sup> NS repeatedly claims that there’s nothing to worry about because it will make sure NPBL adheres to the principles of its 1897 operating agreement. (*See, e.g.*, NS-13 at 13.) But under NS’s control, NPBL has steadfastly refused to take actions that would support dual-carrier access to NIT. The continued adherence to those operating principles, as interpreted and implemented by NS, would simply preserve the status quo: no effective access for CSXT. (*See* CSXT-22 § 3.2.1; *id.* at V.S. Huneke 3-5; *id.* at V.S. Carey 25.)

In response to the voluminous evidence of NS’s historical anticompetitive conduct, NS argues that CSXT is simply trying to relitigate the same claims at issue in the district court. (NS-13 at 17.) NS repeatedly mischaracterizes the district court proceeding to suggest that the court ruled against CSXT on the substance of NS’s alleged anticompetitive behavior. That is incorrect. Although the district court ultimately dismissed CSXT’s request for antitrust damages on statute of limitations

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<sup>21</sup> NS also tries to sweep aside DOJ’s comments by claiming – without any support – that its commitments “fully address” DOJ’s concerns. (NS-32 at 76.) Nothing in NS’s behavioral commitments dispels the underlying concerns DOJ raised regarding how the grant of control could lead to potential foreclosure and harm to competition in and around the POV. Indeed, DOJ noted the myriad and subtle ways in which a firm with control could engage in foreclosing behavior. (DOJ Comments 3-4.) A vague list of “commitments” does not come close to preventing such harm and nothing indicates DOJ believes otherwise.

grounds, the Court made several findings regarding CSXT's claims of anticompetitive activity.

For example, in addition to its findings discussed above regarding CSXT's evidence that the \$210 rate was designed to be exclusionary, *see supra* § 2.5, the court stated that "the record evidence . . . could reasonably support finding that NSR acted to obstruct [CSXT's] train movements in 2015." *CSX Transp., Inc.*, 648 F. Supp. at 730. The court also noted that "evidence highlighted by [CSXT] . . . present[s] a triable issue as to whether [NS] will use its ability to control the NPBL Board to harm [CSXT] in the future in the same way it allegedly did so in the past." *Id.* at 723. This point cuts to the heart of the issue: the likelihood that approving NS's control of NPBL will substantially lessen competition, create a monopoly, or restrain trade in freight surface transportation. 49 U.S.C. § 11324(d)(1); (*see also* CSXT-22, V.S. Miller ¶ 59) ("When all railroads serving a shipper location come under common control, those railroads no longer have the incentive to compete against each other. To the extent the competition between railroads serving a shipper location limits the exercise of market power, common control of the railroads removes that limitation [and shippers suffer].").)

The incentive for NS to continue to use its control to thwart CSXT on-dock rail access will only grow as NIT expands. *See supra* § 2.4.2; (*see also* CSXT-22, V.S. Miller ¶ 122.) Virginia has invested heavily in NIT to improve its infrastructure and increase capacity. *See supra* § 2.4.2. As the volumes and economic activity at NIT continue to increase, "NS's incentive to preclude NPBL-CSXT access and maintain its {{ [REDACTED] }} share of on-dock rail service at NIT gets stronger." (CSXT-22, V.S. Miller ¶ 122.) This expansion should produce competition-driven benefits. But if the Board grants NS's control application without conditions, NS alone will capture the benefits from expanding capacity to the detriment of shipping customers,

competition, the surrounding communities living with unnecessary trucking, and VPA.

**2.7. There is no evidence of public benefits that outweigh the anticompetitive effects of NS's continued control of NPBL.**

NS has failed to demonstrate any cognizable public benefits that would outweigh the substantial competitive harm caused by its control of NPBL as required under 49 U.S.C. § 11324(d). As explained in Section 4.2.3 of CSXT's Opposition, the supposed public benefits identified in NS's application are illusory and NS made no attempt to quantify them. In its rebuttal, NS does not even mention the supposed public benefits identified in its application or attempt to refute CSXT's showing that they are illusory.

Rather, in rebuttal, NS presents a new argument – that any anticompetitive effects from the transaction 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.” (NS-32 at 10; *see also id.* at 77-79.) Specifically, NS argues that CSXT should have analyzed how other identified NPBL customers would be impacted by the introduction of intermodal movements over NPBL to NIT. (*Id.* at 77-78.) It is completely improper for NS to present a new substantive argument and purportedly supporting evidence on rebuttal.<sup>22</sup> More importantly, NS's new argument has no merit. NS and NPBL have similarly argued in their respective oppositions to CSXT's responsive application that CSXT's proposed intermodal trains to NIT would severely disrupt service to

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<sup>22</sup> *See, e.g., Can. Pac. Ry. Ltd.—Control—Kans. City S.*, FD 36500, slip op. at 3 (STB served Sept. 13, 2022) (explaining that “[r]esponses, by their nature, are ‘limited to responding to issues and arguments raised’ in the comments to which they are addressed” and “should not refer to those comments as mere pretext for submitting new evidence or arguments”); *see also* 49 C.F.R. § 1112.6 (“Rebuttal statements shall be confined to issues raised in the reply statements to which they are directed.”).

existing NPBL customers. But as CSXT explained in its rebuttal supporting its responsive application, no significant service disruptions to existing NPBL customers would result from CSXT's proposal.

NS and NPBL have repeatedly said in this proceeding that CSXT currently may transport intermodal traffic to NIT via NPBL. Now, CSXT only seeks to move one additional intermodal train per day, with no local service, to that terminal.<sup>23</sup> Furthermore, NPBL currently has little traffic on the rail line that runs to NIT (CSXT Rebuttal 20, Dec. 19, 2025, *CSX Transp. Inc.—Terminal Trackage Rts.—Norfolk S. Ry. Co. & Norfolk & Portsmouth Belt Line R.R. Co.*, FD 36836 (Sub-No.1)), and no new operational challenges would arise if CSXT runs one intermodal train per day to NIT (*id.* at 21-23).

Granting NS's control application without conditions will perpetuate a monopoly that has effectively eliminated intermodal competition at one of the nation's most critical marine terminals and will not benefit the public. By contrast, the harms caused by NS control are clear: reduced service options, dominance of access to an important port facility, and continued reliance on inefficient drayage. With no evidence of offsetting benefits, the statutory balancing test compels denial of NS's application.

### **3. Ordering divestiture is necessary to implement a ruling denying NS's Control Application.**

Denial of most control applications would simply result in a transaction not moving forward. But because NS has unlawfully controlled NPBL for the past four decades, the Board must order NS to divest control of NPBL when the Board

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<sup>23</sup> VIT/VPA have confirmed that there are no capacity concerns at NIT. (See VIT/VPA Clarification Comments 2-3, Dec. 23, 2025 (clarifying that NIT currently has capacity to handle three 10,000-foot trains or four 6,000 trains per day, and "since September of 2025 NIT has only handled two NS trains per day, *"leaving room for at least one more train."*) (emphasis added).)

dismisses or denies the NS control application here. (See CSXT-22 at 119-20 (describing CSXT’s specific divestiture request).) Such an order would ensure that NPBL is independent from NS’s control, will operate independently, and will provide meaningful and effective access to its owners, consistent with NPBL’s founding purpose as a terminal railroad.<sup>24</sup>

NS attempts to argue that CSXT’s divestiture proposal “(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.” (NS-32 at 86.) NS either misunderstands or deliberately misinterprets CSXT’s argument. NS’s divestiture of NPBL is not a “remedy” – it is the only natural outgrowth of the Board’s denial of the NS control application. The divestiture path set forth in CSXT’s Opposition will ensure that NS no longer controls NPBL once the Board denies NS’s application.

**4. If the Board decides to approve the NS application, the Board should impose certain conditions to alleviate anticompetitive effects and allow CSXT to access NIT, either directly or via NPBL switching.**

Given the significant harms to competition resulting from NS’s control of NPBL and the lack of any public benefits resulting from that control relationship, the Board should deny NS’s application and then grant the relief that CSXT has requested in the Related Proceedings. However, if the Board decides to approve NS’s application, the Board should use its conditioning authority to begin to

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<sup>24</sup> CSXT’s position regarding the necessary divestiture steps is specified in Section 4.3 of its Opposition. (CSXT-22 § 4.3.) In the UP-NS merger proceeding, NS has suggested that, if the Board denies its NPBL control application, “NS will be required to divest at least a 7% interest in NPBL shares” – essentially reducing NS ownership in NPBL to 50%. (NS Reply Comments 3, Jan. 2, 2026, *UP/NS Control Proceeding*, FD 36873.) But if NS retains a 50% interest in NPBL, NS could continue to control NPBL’s decisions by using NS’s one-half interest to effectively veto any proposals from NPBL’s other owner(s). The Board should instead order the divestiture approach proposed by CSXT in Section 4.3 of its Opposition.

alleviate the anticompetitive effects by imposing certain conditions on its approval that should allow CSXT to access NIT via rail. The specific conditions requested by CSXT are set forth in detail in Section 5 of the CSXT Opposition and CSXT does not repeat that full discussion here.<sup>25</sup>

At a high level, two conditions are necessary under any scenario where the Board approves NS's application. First, the Board must order NS to restore the physical assets of the Connecting Line. The restoration of the Connecting Line is critical to ensuring that either NPBL or CSXT can efficiently move traffic to NIT. Second, the Board must order NS to discontinue wielding its control of NPBL to exclusionary and anticompetitive effect, consistent with NPBL's founding purpose as a terminal railroad.

In addition to these two conditions, if the Board approves NS's application, the Board should also approve CSXT's responsive application for terminal trackage rights that would allow CSXT to serve NIT directly. (*See* CSXT-22 at 126-27; CSXT-36 at 1-2.) NS has proven over the last half-century that it can wield its control over NPBL to exclude CSXT from accessing NIT via NPBL's switching services. NS has every incentive to block CSXT from using NPBL switching services to access NIT, and NS has indicated that approval of its control application will result in continuation of the status quo. Therefore, only direct trackage rights for CSXT would ensure that NS could no longer manipulate NPBL in this anticompetitive manner if the Board allows NS to continue to control NPBL.<sup>26</sup>

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<sup>25</sup> Additionally, the Board should conduct rigorous oversight of any approval decision for at least a seven-year rather than a five-year period, consistent with recent precedent. The Board should also then grant any remaining relief that CSXT has requested through the Related Proceedings to fully remedy the anticompetitive harm.

<sup>26</sup> Coupled with approval of CSXT's responsive application for terminal trackage rights, the Board should also order NS to provide operational assent to CSXT direct movements to NIT. This condition is critical to ensure that CSXT can

Finally, if the Board approves NS's control application and denies CSXT's responsive application for terminal trackage rights, the Board should impose certain conditions that would enable NPBL to provide CSXT with effective switching services to NIT. (*See CSXT-22 at 128-30.*)

### **CONCLUSION**

For the reasons set forth above, the Board should deny the NS application. The Board should order NS to divest control of NPBL and then address CSXT's requested relief in the Related Proceedings. If the Board decides to approve NS's application, the Board should impose certain conditions to alleviate anticompetitive effects and allow CSXT to access NIT, either directly or via NPBL switching, conduct rigorous oversight of any such approval for at least a seven-year period, and address any outstanding issues in the Related Proceedings.

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efficiently move traffic to NIT, especially given CSXT's experience in 2015 when NS interfered with CSXT's direct movements to NIT. (*See CSXT-22 at 127.*) Notwithstanding the parade of horrors that NS presents in response to CSXT's request for operational assent, NS's past conduct shows how important this condition would be if the Board were to approve NS's application for control of NPBL.

**CERTIFICATE OF SERVICE**

I hereby certify that I have caused this CSX Transportation, Inc.'s Final Brief in Finance Docket No. 36836 to be served electronically or by first class mail, postage pre-paid, on the Secretary of Transportation, the Attorney General of the United States, Administrative Law Judge Jenifer Soulikias, Applicants' representative, William Mullins, and all parties of record in this proceeding.

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